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MARVIN PEUGH :

Petitioner : No. 12-62

v. :

UNITED STATES :

Washington, D.C.

Tuesday, February 26, 2013

APPEARANCES:

STEPHEN B. KINNAIRD, ESQ., Washington, D.C.; on behalf
of Petitioner.

ERIC J. FEIGIN, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.;
on behalf of Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	STEPHEN B. KINNAIRD, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	ERIC J. FEIGIN, ESQ.	
7	On behalf of the Respondent	28
8	REBUTTAL ARGUMENT OF	
9	STEPHEN B. KINNAIRD, ESQ.	
10	On behalf of the Petitioner	57
11		
12		
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 (10:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 12-62, Peugh v. United
5 States.

6 Mr. Kinnaird?

7 ORAL ARGUMENT OF STEPHEN B. KINNAIRD

8 ON BEHALF OF THE PETITIONER

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

11 In sentencing Petitioner Marvin Peugh, the
12 district court applied the 2009 guidelines sentencing
13 range of 70 to 87 months, rather than the 1998 range of
14 37 to 46 months applicable at the time of his offense.
15 Retroactive application of harsher guidelines passed
16 after the offense violates the Ex Post Facto Clause if
17 it -- if it creates a significant risk of increased
18 punishment.

19 Now, the government here objects that a
20 guidelines amendment does not change the law, but that
21 is incorrect. The guidelines are legislative rules that
22 define a term of a mandatory statute, namely subsection
23 (a)(4) of Section 18 USC --

24 JUSTICE SCALIA: Excuse me. A mandatory
25 schedule?

1 MR. KINNAIRD: Excuse me?

2 JUSTICE SCALIA: A mandatory schedule, you
3 say?

4 MR. KINNAIRD: No, it's a term of a -- of a
5 mandatory statute, subsection --

6 JUSTICE SCALIA: Oh, okay.

7 MR. KINNAIRD: -- (a)(4) of -- of 18 USC
8 3553. That provision requires the district court to
9 consider the guidelines sentencing range, and I'll
10 quote, "established for the applicable category of
11 offense committed by the applicable category of
12 offender."

13 So, in 1998, the guide -- that statute, the
14 law mandated that the district court shall consider, as
15 applied to Peugh's offense and offender category, a
16 sentencing range of 37 to 46 months.

17 JUSTICE ALITO: Well, let's say you prevail,
18 and the case is remanded for resentencing. Is there
19 anything that would prevent the district court from
20 saying -- you know, before the promulgation of the new
21 guidelines, I thought the range in the old guidelines
22 was about right for this offense.

23 But, now that I've seen the new guidelines,
24 I think that those really fit best under the factors
25 that I have to consider under the statute in determining

1 the correct sentence, so I'm going to reimpose exactly
2 the same sentence, not because it's required by the
3 guidelines, in fact, I'm going to go outside the
4 guidelines. I just think, with the enlightenment that
5 the new guidelines have provided me, that that's the
6 best sentence.

7 Now, would that be -- would there be an ex
8 post facto problem there?

9 MR. KINNAIRD: No, it would not, Your Honor.
10 You would, under the statute, have to follow all the
11 steps in the Rita/Gall framework, but the district court
12 is always able to consider any new developments that it
13 wants. What we're talking about is the change of law.
14 And that was the point I was just getting to.

15 JUSTICE SCALIA: It's not a change of the
16 law if -- if the law does not require the guidelines to
17 be imposed. Your -- your case rests upon the
18 proposition you stated at the outset, which is that the
19 Ex Post Facto Law applies -- prohibition applies -- if
20 there is a substantial possibility of -- of a higher
21 sentence -- was that the language you used?

22 MR. KINNAIRD: Substantial -- significant
23 risk --

24 JUSTICE SCALIA: Significant risk.
25 Suppose -- suppose the district judge for the Federal

1 district in which somebody's crime was committed was a
2 bleeding heart judge. He always gave the lowest
3 sentence possible, and everybody knew that.

4 And he is replaced. He retires after the
5 arrest, after the crime, and he is replaced by Maximum
6 John, who everybody knows gives the highest sentence,
7 every time. Ex post -- ex post facto violation?

8 MR. KINNAIRD: No, because the Ex Post Facto
9 Clause only applies to laws where here are delegated
10 lawmaking. And here's where the change in the law was,
11 Your Honor: As I mentioned, in 1998, the law required
12 the district court to consider a sentencing range of 37
13 to 46 months.

14 With the guidelines amendment, the law
15 changed. The law now required the district court for
16 that category of offender and offense to consider as
17 the --

18 JUSTICE SOTOMAYOR: Is that what your
19 definition of legal consequence is?

20 MR. KINNAIRD: Well, legal consequence
21 refers to punishment. That's something -- that's
22 something different. So the fact --

23 JUSTICE SOTOMAYOR: Well, so you're
24 taking -- you're disagreeing with the proposition of our
25 older cases that to -- for there to be an ex post facto

1 violation, you have to have a legal consequence.

2 MR. KINNAIRD: No, not at all, Your Honor.

3 The legal consequence is the -- is the ultimate sentence
4 imposed. And in Morales and Lynce, the Court said --

5 JUSTICE SOTOMAYOR: Well, there's a --
6 there's a disconnect for me. Yes, I do accept that the
7 district courts have to consider the guidelines. But
8 how do you tie that to the requirement that the
9 punishment has to be tied to the guidelines?

10 MR. KINNAIRD: Well, the Court said, in
11 Morales and in Lynce, that -- and then when it was
12 reconciling two different formulations of the
13 standard -- and, in Lynce, the Court said it's the same
14 test whether you increase the penalty or whether you
15 determine if there's a sufficient risk of increasing the
16 penalty because that --

17 JUSTICE GINSBURG: The real formula is --
18 significantly increased the risk of perform -- of
19 prolonging the defendant's incarceration. That's the
20 standard you would like us --

21 MR. KINNAIRD: That's the standard of Garner
22 and Morales, yes, Your Honor.

23 JUSTICE GINSBURG: And is -- is the heart of
24 your argument that there really isn't much difference at
25 all in what district judges are doing, now that the

1 guidelines are discretionary, than what they did when
2 they were mandatory; that is, most of them will start
3 with and stop with the guidelines.

4 I think that's --

5 MR. KINNAIRD: Yes. That -- that is
6 certainly one element of it, but the -- the fact -- it's
7 not exactly the same, but the fact is that, even under
8 the advisory guidelines, the change in law creates a
9 significant risk.

10 And when you're evaluating significant risk,
11 I think you have to start from the premise that the
12 ex post facto violation prohibits an increase in
13 punishment of any quantum, even of 1 day.

14 JUSTICE KENNEDY: Your -- your brief spent
15 some time on statistics, how often this happens. But I
16 take it you're not saying that our inquiry is a
17 statistical one. You're simply saying that the
18 statistics bear out that, as an objective legal matter,
19 the framework that you are explaining to us is and must
20 be followed?

21 MR. KINNAIRD: Yes, Your Honor. The -- and
22 that's -- the inquiry in Garner -- in Garner, the Court
23 said, you can demonstrate significant risk either by
24 showing that the risk is inherent in the rule or as
25 applied to your sentence and marshalling the evidence of

1 the practical operation of the rule.

2 So statistical evidence is -- is evidence of
3 the fact of significant risk by the operation of that
4 framework.

5 JUSTICE SCALIA: What about the statutes
6 allowing relatives and friends of the victim to testify?
7 Let's assume a crime committed before -- a horrible
8 crime committed before that statute is enacted. Does it
9 violate the ex post facto law to give effect to that
10 statute?

11 MR. KINNAIRD: No, Your Honor. I think
12 there's a series of cases saying those kind of changes
13 in trial procedure would not be within the Ex Post Facto
14 Clause. It --

15 JUSTICE SCALIA: Why? Don't -- don't you
16 think it creates a significant risk --

17 MR. KINNAIRD: Well, you have to --

18 JUSTICE SCALIA: -- that the defendant will
19 get a higher sentence? Don't you think that's the whole
20 object of the law, in fact?

21 MR. KINNAIRD: Well, but -- what you have to
22 show -- I think you have -- this is a core sentencing
23 law. It changes the law of punishment, which is
24 different from procedure. And, in Miller, the Court
25 said that, when there's a change in the -- in the actual

1 sentencing standard, the number of years, that's
2 substantive, not procedural.

3 CHIEF JUSTICE ROBERTS: What if you have a
4 law that sentencing judges must consider these factors,
5 and one of the factors is whether the defendant has
6 strong family ties that will be -- you know, jeopardized
7 or whatever, if he's incarcerated. You don't want to
8 take him away from his family because that will penalize
9 other people. And then Congress thinks that's not a
10 good idea and they take that away.

11 Is that an ex post facto violation? It
12 increases the factors of -- or the risk that the
13 defendant will get a higher sentence. Before, he could
14 take advantage of the fact that he had -- you know, a
15 particular family situation; later, he could not.
16 That's a change in what the sentencing court must
17 consider and is to his prejudice.

18 MR. KINNAIRD: I think, if it is simply a
19 change in the mix of factors, even the mandatory
20 factors, it wouldn't necessarily create a significant
21 risk. But the guidelines --

22 CHIEF JUSTICE ROBERTS: Well, under -- under
23 our modification of the guidelines approach, isn't that
24 just a list of factors that the Court should consider --
25 or must consider?

1 MR. KINNAIRD: Well, Your Honor, I think the
2 guidelines are distinctive because they are the actual
3 benchmark, and they must -- and the starting point for
4 any sentencing. It is critical at what range you
5 start your sentencing analysis, it's going to affect the
6 analysis, whether you're starting at a range of 20 to
7 30 months or 120 --

8 JUSTICE SCALIA: Is that -- is that what --
9 who says that they're the benchmark that you start with?
10 Where -- where is that writ?

11 MR. KINNAIRD: That's in Gall, so that's
12 in -- a construction -- what's implied in the sentencing
13 format.

14 JUSTICE SCALIA: A court -- a court must
15 begin with that?

16 MR. KINNAIRD: Yes. Yeah, that's the -- and
17 the court not only must begin with it, it must be
18 cognizant of it throughout the process. And any --
19 any --

20 CHIEF JUSTICE ROBERTS: So what if the --
21 what if the law said the court must begin with a
22 comparison of what the average sentence is across the
23 country, okay? And the data collection, over time,
24 becomes more sophisticated, and they can give you a more
25 accurate number for what the average sentence is. And

1 it turns out it's higher than what their informal survey
2 was before.

3 Is that an ex post facto violation?

4 MR. KINNAIRD: I don't think necessarily so,
5 but this is a -- a requirement to actually consider a
6 range. So if --

7 CHIEF JUSTICE ROBERTS: No, no. It'd be the
8 same -- it'd be the same thing. One of the things that
9 the Sentencing Commission considers is, of course, what
10 the average sentences were around the country. And
11 let's say that the law says that's something you have to
12 consider, and the technology or the range of -- of
13 judges that they can survey becomes more sophisticated,
14 the number goes up.

15 MR. KINNAIRD: I think it may be, if you had
16 the exact same Rita and Gall framework --

17 CHIEF JUSTICE ROBERTS: Yes.

18 MR. KINNAIRD: -- and that -- that framework
19 is that that range actually is the benchmark and the --
20 and the starting point. The district court must justify
21 any deviation from that range -- and this is language
22 from Gall -- with "sufficiently compelling
23 justifications to support the degree of the variance."

24 CHIEF JUSTICE ROBERTS: And so the answer --

25 MR. KINNAIRD: And it is then reviewed on

1 appeal --

2 CHIEF JUSTICE ROBERTS: And so the answer to
3 my question is?

4 MR. KINNAIRD: It would be -- I think it
5 would be likely if it were -- if it were within the same
6 framework, if it's the mandatory benchmark with
7 appellate review for substantive reasonableness and a
8 presumption --

9 CHIEF JUSTICE ROBERTS: Just -- I'm sorry.
10 Go ahead.

11 MR. KINNAIRD: And a presumption of -- of
12 reasonableness on appeal would attach to that standard.

13 CHIEF JUSTICE ROBERTS: So just getting more
14 accurate information violates the Ex Post Facto Clause,
15 in the framework that you've set forth?

16 MR. KINNAIRD: I think if it's -- if you
17 could -- if it's an actual -- well, I don't -- the
18 distinction I was trying to draw is that, if you
19 actually -- if the -- if the statute has effectively
20 delegated the specification of a specific range, as
21 opposed to just a data factor that might change over
22 time, and that's the key change in law here.

23 As I mentioned, 1998, had to consider 36 to
24 47 months. With the guidelines amendment, the law
25 changed. He now must consider, for that offense and

1 offender category, a range of 70 to 87 months, and --
2 and -- as the mandatory benchmark. That's a change in
3 the law. And then you go to the test of significant
4 risk.

5 JUSTICE ALITO: What if the -- what if the
6 statistics showed that nationwide only -- let's say,
7 25 percent of defendants were being sentenced within the
8 guideline range; would that change your argument?

9 MR. KINNAIRD: I think it makes the -- well,
10 we have an argument that's specific to our sentencing.
11 But if the -- if in a particular case, a defendant were
12 making an empirical analysis, that may diminish the
13 chance of significant risk, but with a caveat because
14 it's not just sentences within the guidelines range,
15 it's the fact that the district court, even if it
16 sentences out of the guidelines range, the ultimate
17 amount that it sentences to is going to be partially
18 determined by that mandatory benchmark. And that --
19 that's an important point.

20 And, as I said, the significant risk is a
21 risk of any increase in the quantum of punishment. So
22 it's really is there a significant risk that, had he
23 been -- had the old guidelines been in place as the
24 benchmark, that he would have gotten a sentence of less
25 than 60 -- 70 months. And --

1 JUSTICE ALITO: Well, I think there's a fair
2 chance that, as time goes by --

3 MR. KINNAIRD: -- I think it's clear --

4 JUSTICE ALITO: -- we're going to see fewer
5 and fewer sentences within the guidelines. As judges
6 who began their careers during the guidelines, the
7 mandatory guidelines era, leave the bench, new judges
8 come in who never had to deal with the mandatory
9 guidelines, I think we're going to see fewer and fewer
10 guidelines sentences.

11 And -- and the percentages in some districts
12 are -- are really quite striking. I'm told that, in the
13 Southern District -- or the Eastern District of New
14 York, now, only 30 percent of the defendants receive
15 within-guidelines sentences.

16 So --

17 JUSTICE SOTOMAYOR: You're assuming that's
18 changed over time.

19 (Laughter.)

20 JUSTICE ALITO: Well, when I was on the
21 court of appeals we thought it was our responsibility to
22 ensure that the district courts were complying with the
23 Sentencing Reform Act. That might not have been true
24 across the river, but --

25 (Laughter.)

1 JUSTICE SOTOMAYOR: It wasn't.

2 (Laughter.)

3 JUSTICE ALITO: Let's say this case comes
4 back in 20 years and the statistics show that --
5 only a distinct minority of defendants are being
6 sentenced within the guidelines; would the case come out
7 differently?

8 MR. KINNAIRD: Perhaps, but, again, this is
9 an as-applied challenge, so we look to current data.
10 There has been a very slight, gradual decline, but
11 there's still 80 percent of the sentences are either
12 within the guidelines or they're below the guidelines
13 range, pursuant to a guidelines sanction departure
14 motion from the government.

15 So it's an -- even the Sentencing Commission
16 attributes that relationship to the fact that it's the
17 initial starting point in the 2012 Booker report. So I
18 think it has a profound effect.

19 Now, if the Court wanted to rule more
20 narrowly in this case on significant risk, it could.
21 And it could adopt a rule that, when the new and the old
22 guidelines ranges do not overlap at all, so that any
23 sentence that would be in the new guidelines range would
24 have required an upward variance, and, here, a
25 50 percent upward variance, those are as rare as hen's

1 teeth in the -- in the district courts -- that at least
2 shows, at a minimum, a significant risk, absent any
3 indication that the judge, as the question was posed,
4 wasn't going to apply them at all.

5 Here, the judge specifically and expressly
6 deferred to the 2009 guidelines. So it's clear that the
7 significant risk was increased by this change in the
8 law.

9 JUSTICE SCALIA: Your -- your case depends,
10 it seems to me, upon the proposition that significant
11 risk is only applicable at the sentencing stage. And
12 I'm not sure that that's true. I mean, what -- why --
13 why would that be so?

14 What if -- what if you have a new law that
15 permits evidence to come in, in a criminal trial, that
16 previously was not allowed to come in? Let's say the
17 testimony of a wife or -- or whatever. I think the law
18 is pretty well established that that change in procedure
19 does not violate the ex post facto law.

20 And -- and your response to that is, well,
21 that's not sentencing; it's trial. So what? I mean,
22 if -- certainly making a conviction more likely is -- is
23 even worse than making a higher sentence more likely.

24 MR. KINNAIRD: I think my response would be,
25 Your Honor, that's not -- that particular change would

1 not be in the third category of Calder, the increase in
2 punishment. That would be in the fourth category, in
3 the change of the evidence, where you don't even look to
4 significant risk.

5 But I think the -- the change in punishment,
6 at a minimum, it's the sentencing law of this kind --

7 JUSTICE KENNEDY: And would it be ex post
8 facto in -- in the hypothetical Justice Scalia gave?

9 MR. KINNAIRD: No, I don't think
10 so because I think -- well, it may, depending on the
11 circumstances, be within the fourth category, but not
12 under the third. I think in the third --

13 JUSTICE SOTOMAYOR: Can you just tell me the
14 narrow rule that you would propose --

15 MR. KINNAIRD: Yes.

16 JUSTICE SOTOMAYOR: -- getting back to
17 Justice Scalia --

18 MR. KINNAIRD: The narrow rule --

19 JUSTICE SOTOMAYOR: -- which is
20 procedures-change risks. Having a victim testify at
21 sentences -- at a sentence is likely, if you examined it
22 statistically, to increase -- increase the sentence.

23 So assume that's the set of hypotheticals.
24 You change it; now, victims can. Why is that not -- or
25 is it an ex post facto change?

1 MR. KINNAIRD: I don't think so because the
2 Court has generally excluded procedural changes, even if
3 you could show --

4 JUSTICE SOTOMAYOR: So why is this not
5 procedural?

6 MR. KINNAIRD: Because the --

7 JUSTICE SOTOMAYOR: Give me the rule where I
8 can draw a line between those changes that are
9 permissible and those that are not, not the general
10 statement you're making because both increase the risk
11 of a higher sentence.

12 MR. KINNAIRD: Right.

13 JUSTICE SOTOMAYOR: So it can't be that.

14 MR. KINNAIRD: No. What Miller -- what
15 Miller said -- in Miller v. Florida, the argument was
16 made that a change in the sentencing range, the
17 presumptive range, was a change in procedure, and the
18 Court said, no, that's substantive. This is the
19 substantive benchmark. That is applied. It's a
20 substance standard.

21 JUSTICE GINSBURG: But that was in the --
22 that Florida case was the mandatory -- almost mandatory
23 guideline, and I think our starting point is -- your
24 starting point, too -- is that, when the guidelines were
25 mandatory, it was ex post facto because our decision in

1 the Florida case said it was.

2 Is this sufficiently different now that the
3 guidelines are advisory rather than mandatory?

4 MR. KINNAIRD: No, Your Honor. I think it
5 would still be a substantive standard, regardless of
6 whether it's binding or -- or whether it's advisory.
7 It's still a substantive standard. So, if it's a change
8 in the substantive sentencing law, you go to significant
9 risk analysis.

10 And there you either look to the inherent
11 risk -- and I think there is an inherent risk in this
12 framework, that there's going to be some increase of
13 some quantum of punishment beyond what they would have
14 done if they'd applied the older guidelines as the
15 mandatory benchmark.

16 JUSTICE SCALIA: But saying that the
17 sentencer has to consider testimony from the victim or
18 from relatives of the deceased, that -- that change in
19 sentencing law is okay?

20 MR. KINNAIRD: Under the fact that it's
21 considered a procedural law, not substantive.

22 JUSTICE SCALIA: It pertains to sentencing.
23 It -- it says what the sentencing authority, the judge
24 or the jury, must consider.

25 MR. KINNAIRD: Well --

1 JUSTICE SCALIA: This is evidence brought
2 before the sentencer.

3 MR. KINNAIRD: Well -- yes.

4 JUSTICE SCALIA: I don't see any difference
5 between that and saying that the -- the guidelines have
6 to be considered by the sentencer.

7 MR. KINNAIRD: Well, I may have misheard
8 your -- your hypothetical. In that case, it may very
9 well be a sentencing -- a sentencing law, it may pass
10 that threshold, and then you go to significant risk. I
11 would say significant risk is more difficult to
12 determine than in this particular case, where you have
13 the actual starting point, an actual number, which has a
14 --

15 JUSTICE SOTOMAYOR: You're answering me
16 differently now?

17 MR. KINNAIRD: I'm sorry?

18 JUSTICE SOTOMAYOR: You're answering me
19 differently? I posed exactly the question that
20 Justice Scalia --

21 MR. KINNAIRD: I -- I may have misheard,
22 Your Honor. If --

23 JUSTICE SOTOMAYOR: I said the sentencing --
24 the assumptions I made were the sentencing law changes,
25 victims must testify, judges must consider what they

1 say, and, after 5 years, it's proven that, when victims
2 speak, the sentences are higher. Is that a substantive
3 or a procedural law?

4 MR. KINNAIRD: Well, I think Miller did draw
5 a distinction. There are procedures that are involved
6 in sentencing, and I'm not sure if the Court's
7 procedure-substance cases have drawn that distinction.
8 If it --

9 JUSTICE SOTOMAYOR: But I'm asking you to
10 draw it. So tell me, what's the rule? Do you want
11 something as broad that says even that kind of change
12 can be an ex post facto? And, if you don't, articulate
13 how I draw the line.

14 MR. KINNAIRD: I think -- I think the Court
15 could draw the line simply on substantive standards that
16 are applied. But, if the Court were to go the other
17 direction, significant risk --

18 JUSTICE SOTOMAYOR: What does that mean to
19 you? The number of years in jail?

20 MR. KINNAIRD: Yes.

21 JUSTICE SOTOMAYOR: Is that as limited as
22 you want it to be?

23 MR. KINNAIRD: Well, it could be. I mean --
24 or at least -- you know, if it's a mandatory sentencing
25 factor, something like that, as opposed to --

1 JUSTICE SOTOMAYOR: Well, we know that's
2 Miller.

3 MR. KINNAIRD: Right.

4 JUSTICE SOTOMAYOR: This is not Miller.

5 MR. KINNAIRD: Well, but even the -- there
6 are -- there are sentencing factors that are mandatory
7 other than the guidelines range.

8 JUSTICE BREYER: I would have thought you
9 would have gone back to Calder and Bull. And Calder and
10 Bull, which this Court refers to all the time, in these
11 kinds of cases, has four categories, and the only one
12 that fits this case is a law that changes the
13 punishment --

14 MR. KINNAIRD: Right.

15 JUSTICE BREYER: -- and inflicts a greater
16 punishment than the law annexed to the crime when
17 committed. So whatever these other hypotheticals are,
18 they do not involve -- they are not laws that change the
19 punishment, but yours is a law that changes the
20 punishment.

21 MR. KINNAIRD: It is a law that changes --

22 JUSTICE SCALIA: Does it "affix a higher
23 punishment," in the words of Calder v. Bull?

24 MR. KINNAIRD: I think it --

25 JUSTICE SCALIA: I don't think that's a

1 question at all. The answer to that is quite easy. It
2 does not affix a higher punishment, does it?

3 MR. KINNAIRD: But -- but the Court in
4 Garner, in Lynce, have equated that with increased risk
5 of significant punishment. And that -- the importance
6 of Garner is that it recognizes that the Ex Post Facto
7 Clause --

8 JUSTICE SCALIA: Okay. Then rely on Garner,
9 but not on Calder v. Bull.

10 MR. KINNAIRD: Yes. I think -- I think --
11 but Garner is applying that --

12 JUSTICE BREYER: I wouldn't concede that.

13 JUSTICE SCALIA: That doesn't help --

14 (Laughter.)

15 MR. KINNAIRD: Okay. So what Garner -- what
16 Garner does say is that you look to the significant
17 risk. And it's important for ex post facto -- ex post
18 facto jurisprudence because the exercise of discretion
19 can't displace ex post facto protections. You have to
20 look to the effect on the actual punishment.

21 JUSTICE KENNEDY: Could you remind me --
22 it's in the briefs -- if a sentence is appealed, what is
23 the review authority of the appellate court? It must
24 begin with the guidelines as the framework?

25 MR. KINNAIRD: The review authority is to

1 review for both procedural and substantive
2 reasonableness. So procedural, I think, has been
3 interpreted to look at whether there was a correct
4 calculation, whether they -- they did not treat it as
5 mandatory, that they considered it as the benchmark and
6 the --

7 JUSTICE KAGAN: But isn't the important
8 point, Mr. Kinnaird, that there's a presumption of
9 correctness that attaches to guidelines sentences on
10 appeal --

11 MR. KINNAIRD: Yes.

12 JUSTICE KAGAN: -- that does not attach to
13 non-guidelines sentences?

14 MR. KINNAIRD: Yes. I was getting to that,
15 Your Honor.

16 JUSTICE KAGAN: I mean, this has, one would
17 think, great legal consequence.

18 MR. KINNAIRD: It is. And the second step
19 is substantive reasonableness review, and the Court has
20 held that an appellate presumption of reasonableness may
21 attach, so that -- it attaches only to this guideline
22 range. And that makes the risk of reversal higher if
23 you -- if you go outside the guidelines --

24 JUSTICE ALITO: Do you -- do you know what
25 the statistics are as to the number of below-guidelines

1 sentences each year that are reversed by the courts of
2 appeals on the ground that they are not reasonable?

3 MR. KINNAIRD: Well, I think that they are
4 fairly low -- I don't know the precise statistics -- I
5 believe they're low for defendant appeals. But when --
6 partly, you're worried about here is -- is the
7 government going to appeal. They don't appeal very
8 often, but they have a high rate of --

9 JUSTICE ALITO: Yes. I mean, I'm told that
10 it's in the single digits.

11 MR. KINNAIRD: I believe the -- yes, it may
12 be -- I don't know if that -- it's not a great number,
13 but they prevail when they do. And it -- and it does
14 have some effect, but I think the Court --

15 CHIEF JUSTICE ROBERTS: I'm sorry, who
16 prevails? The government or the --

17 MR. KINNAIRD: The government tends to
18 prevail when it brings, it's -- but -- you know, that's
19 a potential deterrent effect. But, even the fact of
20 substantive reasonableness review, you have to have
21 reasons, you have to be able to -- to justify your
22 deviations --

23 JUSTICE SOTOMAYOR: Have you had -- are you
24 aware of any circuit court case, in recent time, where a
25 circuit has reversed the lower range than the guideline,

1 basically because the deviation from the guideline was
2 unreasonable?

3 MR. KINNAIRD: I'm not sure. I haven't
4 reviewed all those cases, Your Honor. I'm not sure.

5 So the -- returning to the -- the question
6 of this particular sentencing, I think if the Court were
7 to rule on a narrower ground, based on non-overlapping
8 ranges, which is not going to be particularly common,
9 here, is unquestionably a significant risk. You
10 have a defendant who, prior to this course of conduct,
11 had lived an exemplary life.

12 His threshold -- his -- the loss in his case
13 barely crawled into the 2.5 to 5 million. It
14 was about 40,000 over 2.5 million. And the district
15 court sentenced at the bottom of the guidelines range,
16 agreeing with the policy of increasing sentences with
17 the amount of loss. That same policy was present, but
18 not the same level of increase, in the 1998 guidelines.

19 So I think there's clearly, as applied to
20 his sentence, the significant risk he would not have
21 gotten 70 months, which would have been an upward
22 variance of 50 -- of -- of 50 percent from the old
23 guidelines range.

24 And -- but I think, if the Court does wish
25 to consider the broader ruling, I think it's also true

1 that it is inherent in this system, in the Rita and Gall
2 framework, which provide for a mandatory benchmark,
3 which provide for the substantive reasonableness review,
4 that you're going to have some significant risk of some
5 increased quantum of punishment as a -- as a result of
6 this change in law.

7 I'd like to reserve the rest of my time for
8 rebuttal.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Mr. Feigin?

11 ORAL ARGUMENT OF ERIC J. FEIGIN

12 ON BEHALF OF THE RESPONDENT

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

15 This Court made clear, in Miller v. Florida,
16 that an Ex Post Facto Law has to change "the legal
17 consequences of a prior act." A guidelines amendment
18 doesn't do that. A district court has the same
19 authority and the same --

20 JUSTICE SOTOMAYOR: Why are you fighting
21 this proposition? If the starting point doesn't matter,
22 why didn't you stick to your old position, that judges
23 should start from the old one and simply consider the
24 new one? Why this whole Supreme Court case?

25 MR. FEIGIN: Well -- well, Your Honor, we --

1 we opposed certiorari largely on that ground. We don't
2 think the guidelines impose a constraint on a district
3 court's exercise of sentencing discretion; that is, if a
4 judge decides that a guidelines range that the
5 Commission has suggested at some other time suggests a
6 more appropriate sentence or if the judge believes that
7 some sentence that's unrelated to any guidelines range
8 is the most appropriate sentence, the judge has
9 discretion to impose that sentence.

10 JUSTICE SOTOMAYOR: Practically speaking, do
11 you believe it makes no difference?

12 MR. FEIGIN: Your Honor, I freely believe
13 that the guidelines are very influential to many
14 district judges and district judges often agree with the
15 guidelines. They often impose sentences within the
16 guidelines range or close to the guidelines range. But
17 there --

18 JUSTICE GINSBURG: This is a change -- your
19 position is -- is a change, at least in the position
20 that the government took in -- in the Seventh Circuit
21 case that started all this. The government confessed
22 error.

23 The government said the district judge
24 should have used the guidelines that were in effect at
25 the time the offense was committed, and the government

1 came to the Seventh Circuit and confessed error.

2 So there was not even an argument until the
3 Seventh Circuit and Judge Posner wrote the opinion that
4 included all the hypotheticals that -- that were aired
5 earlier about the victim impact statement and all of
6 those are in that opinion. So it was only after --
7 after the Seventh Circuit opinion that the government
8 changed its position.

9 MR. FEIGIN: Your Honor, the government
10 changed its position in response to this Court's
11 decisions in Gall, Kimbrough, and Irizarry because,
12 before those decisions came out, there was an argument
13 that the guidelines still imposed some substantive legal
14 constraint on a district court's sentencing discretion.
15 After Gall, Kimbrough, and Irizarry, after Nelson and
16 Spears, that argument no longer exists.

17 Rita makes clear that district courts cannot
18 presume a guidelines range to be reasonable. Irizarry
19 makes clear that a defendant is constitutionally on
20 notice that he can get sentenced anywhere within the
21 statutory range.

22 And Gall makes clear that courts of appeals
23 should apply the same deferential standard of review to
24 every sentence, regardless whether it falls within the
25 guidelines range, just outside the guidelines range, or

1 far outside the guidelines range.

2 JUSTICE GINSBURG: The guidelines range gets
3 a presumption of reasonableness at the appellate level.

4 MR. FEIGIN: That's right, Your Honor, and I
5 think Rita actually supports our position, not
6 Petitioner's. The Court made clear in Rita that the
7 presumption of reasonableness on appeal that this --
8 that courts of appeals can choose to apply, but need
9 not, has no legal effect.

10 Rather, it reflects the commonsense
11 proposition that when the Commission recommends a
12 particular sentencing range as to a particular class of
13 defendants and the district court, in its discretion,
14 actually imposes the sentence within that range, that
15 the sentence is likely to be reasonable.

16 The entire premise behind the presumption of
17 reasonableness that was adopted in Rita is that district
18 courts are, in fact, exercising their discretion when
19 they impose sentences, and that's the same premise on
20 which we'd ask you to decide this case.

21 JUSTICE SOTOMAYOR: What is the reason that
22 miscalculating a guideline is considered a procedural
23 error?

24 MR. FEIGIN: Your Honor, it's very
25 clear, from 3553(a)(4), that Congress wants district

1 courts to start with the right mix of information, which
2 includes the most up-to-date recommendation of the
3 Sentencing Commission.

4 JUSTICE SOTOMAYOR: That begs the question.
5 Obviously, if we hold it's a procedural error to
6 miscalculate the guidelines, using the guidelines has
7 some significant importance in the process.

8 MR. FEIGIN: It has importance, Your Honor,
9 and as I've said before, they can be very influential to
10 judges, but the reason why it's an error if -- to
11 miscalculate the guidelines is not because the
12 guidelines impose any substantive constraint on the
13 district court's discretion.

14 After reversal for miscalculating the
15 guidelines, the judge is free to impose the same
16 sentence anyway, and there's no constraint on the
17 judge's discretion that arises from the guidelines
18 frame.

19 JUSTICE KAGAN: But what that suggests is
20 that the guidelines are -- serve as an anchor and are
21 supposed to serve as an anchor and that the reason why
22 the miscalculation is error is because you've picked the
23 wrong anchor and that's going to affect or -- or has a
24 significant likelihood of affecting your ultimate
25 decision.

1 And isn't that, really, what we've
2 suggested? Is the way the guidelines ought to work and
3 the way you think the guidelines ought to work, that it
4 serves as an anchor for sentencing decisions; yes, you
5 can vary, you can deviate, but it's your anchor.

6 MR. KINNAIRD: Your Honor, there are two
7 things you could mean when you use the word "anchor."
8 One, you could mean that there's some sort of legal
9 anchor, and we think that the Court's decisions that
10 I've just described, in particular, the Court's repeated
11 insistence that district courts cannot presume a
12 guidelines range to be reasonable, means the district
13 courts cannot treat them as a legal anchor.

14 Second, you might be suggesting that they
15 serve as some sort of psychological anchor. That's not
16 a concern of the Ex Post Facto Clause. The Ex Post
17 Facto Clause doesn't guarantee defendants a right to a
18 judge who has a particular sentencing philosophy --

19 JUSTICE KAGAN: I think I'm saying more than
20 it's all in your head. I think I'm saying you start in
21 a particular place, you have to get the particular place
22 right. The appellate court looks at the particular
23 place that you've started and, if you -- if you've ended
24 up there, has to grant a presumption of reasonableness.

25 But the rules are all geared towards saying,

1 yes, you can deviate, but you have to understand that
2 there's -- that deviation requires some kind of thought
3 process and some kind of reason. Otherwise, this is
4 where you should be.

5 MR. FEIGIN: Well, Your Honor, the Court
6 made clear in Pepper, two terms ago, that the district
7 court's overarching legal duty is to impose a sentence
8 sufficient, but not greater than necessary, to meet the
9 statutory purposes of sentencing in Section 3553(a)(2).

10 The guidelines are one of several factors
11 that inform the district court's exercise of discretion.
12 If a district court treats the guidelines as some sort
13 of legal constraint this Court's decisions say it
14 can't be treated as, that would be statutory error --

15 JUSTICE BREYER: Well, it isn't, but that, I
16 think, is an undecided question at best. If you won the
17 case on that ground, I would say that what the
18 guidelines and the Sentencing Commission are best at,
19 gathering information from across the country, and
20 saying a typical person who commits this crime in a
21 typical way should be sentenced to the typical range
22 that applies -- let's say 18 to 24 months.

23 That would be down the drain. And I think
24 that Rita, in fact, and the other cases have, at the
25 very most, left open and maybe decided against you the

1 question of when a court of appeals gets the sentence
2 from a judge who does not apply the guideline because he
3 doesn't like the policy judgment.

4 That's a different matter from when he
5 applies it then when he thinks he shouldn't apply it
6 because the person in front of him doesn't meet the --
7 the policy conditions. Those are different. The
8 Commission has the expertise in the first, the judge in
9 the second. And so there is at least a question as to
10 whether the court of appeals should give more leeway to
11 the guidelines in the first and more leeway to the judge
12 in the second.

13 Now, I think Rita is consistent with that,
14 and I think every opinion we have written is consistent
15 with that. And I'd hate to see that suddenly decided
16 and changed in a way I think is inappropriate in this
17 case. So have you all thought that through?

18 And is the position of the government, now,
19 that we think the guidelines, even if it's a policy
20 matter that they have gathered evidence on, are entitled
21 to nothing, if they run across a district judge who
22 happens to think, though he was an outlier, that the
23 outliers were right as a matter of policy, which, of
24 course, will always be true. Every judge who is an
25 outlier thinks the outliers are right. Otherwise, why

1 would he do it? You see?

2 Now, I didn't know that issue was in this
3 case and that changes the case dramatically for me. And
4 I thought we could decide this just on the ground that
5 this is a law that changes punishment. It's a law.
6 It's a regulation.

7 And Justice Scalia, I thought, was
8 completely right. The question is whether it inflicts
9 greater punishment. And there is a test on that, and
10 the controlling inquiry is whether retroactive
11 application of a change in a law that affects punishment
12 created a sufficient risk of increasing the measure of
13 punishment attached. All right? And that's -- that's
14 what I thought the -- the framework of law was in this
15 case.

16 Now, this is sort of tough for you on oral
17 argument because I'm just, perhaps, bringing it all up
18 to get it all out there and see what you think.

19 MR. FEIGIN: Let me start at the end there,
20 Justice Breyer --

21 JUSTICE SCALIA: I disagree with all that,
22 by the way.

23 (Laughter.)

24 MR. FEIGIN: Well, Your Honor,
25 Justice Breyer, beginning with what you said at the end

1 there, I think it's -- it would be inappropriate to
2 untether the significant risk test from the requirement
3 that there be an ex post facto law; that is, there has
4 to be a significant legal risk, a risk that is traceable
5 to some sort of change in the decision maker's authority
6 with respect to sentencing, and we don't have that here.

7 A district court has the same authority and
8 the same obligation to impose an appropriate sentence
9 the day after the guidelines are amended as the judge
10 had the day before the guidelines are amended. And any
11 judge who forgets that is going to be committing
12 statutory error, and the sentence could be reversed on
13 appeal for violating the Booker remedy.

14 And that's --

15 JUSTICE KENNEDY: But when -- when it comes
16 to the court of appeals, that's different. The court of
17 appeals begins with a framework of whether or not it's
18 within the guidelines. That's how it begins to measure
19 the exercise of discretion.

20 MR. FEIGIN: Well, Your Honor, as I -- as
21 I've explained, the reason why courts -- the only way in
22 which courts of appeals can apply a different standard
23 of review to a sentence, depending on where it falls in
24 the guidelines range, is the presumption of
25 reasonableness the Court recognized in Rita.

1 And I think Rita makes quite clear that that
2 is a practical presumption. That is, it simply
3 acknowledges the common-sense proposition that when a
4 district court, exercising its discretion, reaches a
5 judgment that accords with the Commission's expertise,
6 it's likely that sentence is reasonable.

7 I don't think --

8 JUSTICE SOTOMAYOR: You know, there is a lot
9 of dispute, now, about the child pornography sentences.
10 Let's assume -- and this goes back to Justice Breyer's
11 question -- a judge comes in and says, I know child
12 pornography is criminal, but I don't think what the
13 guidelines are imposing are fair, to any defendant, so
14 10 days in jail.

15 Why would that be substantively
16 unreasonable?

17 MR. FEIGIN: Your Honor, it would depend on
18 the individual circumstances of the particular case --

19 JUSTICE SOTOMAYOR: No, I'm giving you
20 exactly what the judge says. You don't think that the
21 appellate court would say that's substantively
22 unreasonable because it's not giving due deference to
23 the Commission's assessment of the seriousness of this
24 crime?

25 MR. FEIGIN: I think the court of appeals

1 might say that it's substantively unreasonable because
2 it's a very, very low sentence, even in comparison to
3 the --

4 JUSTICE SCALIA: I assume that the statute
5 is one that permits 10 days, right?

6 MR. FEIGIN: Your Honor --

7 JUSTICE SCALIA: It's sort of an unusual
8 statute, but, if the hypothetical is in the real world,
9 the statute provides -- you know, 10 days to life, okay?
10 And the judge thinks 10 days is okay. I think that's
11 the hypothetical.

12 MR. FEIGIN: And, Your Honor, in that case,
13 it is possible a court of appeals would decide that that
14 is substantively unreasonable. It's possible a court of
15 appeals might reference the guidelines. But the reason
16 why the court of appeals would find it substantively
17 unreasonable is because, as a whole, it is substantively
18 unreasonable and not because it varies too far from the
19 guidelines.

20 I also want to emphasize --

21 JUSTICE GINSBURG: Do you disagree with --
22 getting back to what this case is about, the D.C.
23 Circuit, in opposition to the Seventh Circuit said, it
24 is enough that using the new guideline created a
25 substantial risk that the defendant's sentence was more

1 severe than it would have been if the guidelines in
2 effect at the time of the crime were used.

3 And is it -- there is no doubt that this
4 case fits that description. There was quite a
5 substantial risk that the elevated guidelines would
6 result in a more severe sentence.

7 MR. FEIGIN: Well, Your Honor, there are two
8 complaints that Petitioner could be making about his
9 particular sentencing. One could be that he thinks the
10 judge treated the guidelines too deferentially as a
11 legal matter. And, if that's what he believes, his
12 remedy is a claim of statutory error under Booker. He's
13 never made that claim.

14 The other claim --

15 JUSTICE GINSBURG: He's saying that -- the
16 question is which guidelines in this case? And he's
17 saying it's the guidelines in effect at the time he
18 committed the crime. We are not dealing with other -- I
19 mean, it's quite a simple choice.

20 Is it -- does the court start with the
21 guidelines in effect at the time the crime was
22 committed? Or does it start with the guidelines in
23 effect at the time of sentencing?

24 MR. FEIGIN: And whichever set of guidelines
25 the district court started with, it had discretion and,

1 in fact, the obligation to impose the appropriate
2 sentence under 3553(a). Now --

3 JUSTICE GINSBURG: We know that this
4 district judge, he didn't want to get into any
5 philosophical things about what was better or what was
6 worse. He said, I want to follow the guidelines. So
7 the question for him was only which guideline.

8 He got his answer from the Seventh Circuit.
9 They said the guidelines at the time of sentencing. A
10 judge in the D.C. District Court will get the other
11 answer, the guidelines in effect at the time the crime
12 was committed.

13 MR. FEIGIN: Your Honor, Petitioner argued
14 in this case that the former guidelines range suggested
15 a more appropriate sentence than the 2009 guidelines
16 range. The district court considered that argument, and
17 it rejected it. And defendants are always free to raise
18 that argument.

19 If I could go back to Justice Sotomayor's
20 child pornography hypothetical --

21 JUSTICE GINSBURG: But it's not -- it's not
22 a question of whether the judge thought that the one
23 guideline was better than the other. He specifically
24 said he wasn't interested in that question. The
25 question was which guideline does he follow? Which --

1 what does he start with? And you recognize that you do
2 start with the guidelines.

3 JUSTICE KENNEDY: Yes, I agree with Justice
4 Ginsburg's follow-up question. It seems to me you
5 avoided the question. You said, oh, well, the judge
6 looked at all this and selected the sentence he did.
7 But he did so because he referred to the later
8 guidelines, and I think that you have to recognize that.

9 Unless -- unless I'm --

10 JUSTICE SCALIA: I think you are saying
11 it doesn't matter if they are advisory --

12 JUSTICE KENNEDY: Well, I'd like to finish.

13 Unless I am wrong under the record.

14 MR. FEIGIN: Well, Your Honor, on the
15 record, I think, if you look at the full sentencing
16 transcript, which is in the Joint Appendix, you will see
17 that one of the questions the judge had to answer was
18 which set of guidelines were provided -- were the set of
19 guidelines that he had to calculate under
20 3553(A)(4)(a)(2).

21 And then there was a separate section in
22 which he considered the argument that the 2009
23 guidelines were too harsh. If you look at the
24 sentencing memorandum that Petitioner filed in this
25 case, it argued that the increase of loss amounts in the

1 fraud guidelines was too harsh, that judges often
2 imposed sentences that are under the guidelines, and the
3 district court should do so here.

4 The district court considered that
5 argument and rejected that.

6 JUSTICE GINSBURG: But the district court
7 was following orders. He was following the Seventh
8 Circuit. The Seventh Circuit had said, you start with
9 the higher guidelines.

10 MR. FEIGIN: Justice Ginsburg, it's --
11 the Court considers these as two separate questions, one
12 is which is the set of guidelines I'm required to
13 calculate under Section 3553(a), and, second, having
14 calculated those guidelines, what sentence should I
15 impose, with the guidelines as one of the factors that
16 the Court considers.

17 JUSTICE KAGAN: Mr. Feigin, you're sounding
18 awfully like according deference to the guidelines
19 counts as reversible error.

20 MR. FEIGIN: No, Your Honor, that's not what
21 I'm trying to say. I'm saying treating the guidelines
22 as some sort of legal constraint on the district court's
23 sentencing discretion is reversible error. Now, if the
24 district court chooses, in its own discretion, to give
25 weight to the guidelines, that's within the realm of

1 choice that 3553(a) provides.

2 There are many circumstances --

3 JUSTICE SCALIA: It is reversible error, is
4 it not, simply to blindly apply the guidelines without
5 considering the factors in 3553? That's reversible,
6 isn't it?

7 MR. FEIGIN: That's correct, Your Honor.

8 And, Justice Kagan --

9 JUSTICE KAGAN: But, surely, you do not want
10 judges living in a world where they think that they
11 cannot give deference to the guidelines, isn't that
12 right? You want them to give appropriate deference to
13 the guidelines, isn't that correct?

14 MR. FEIGIN: Your Honor, we want them to
15 find the guidelines persuasive and influential. We
16 recognize that, under this Court's decisions, they
17 cannot treat the guidelines as a legal constraint on
18 their sentencing discretion. If a judge follows the
19 guidelines, that's because the judge is exercising its
20 discretion to decide that a guideline's range sentence
21 is appropriate in that particular case.

22 Now, there are many instances in which
23 judges choose not to do that. So if I -- for example,
24 Justice Sotomayor brought up child pornography. In
25 fiscal year 2012, a defendant for a non-production child

1 pornography offense, that is, receipt or possession of
2 child pornography, was substantially more likely to get
3 a nongovernment-sponsored below-range sentence than to
4 get a within-range sentence; 48.4 percent
5 nongovernment-sponsored below-range, 32.7 percent within
6 range.

7 If we want to talk about fraud for a minute,
8 which is what the Petitioner in this case was charged
9 with, if you look at page 67 of the Commission's
10 post-Booker report -- and I'd encourage the Court to
11 read that report in full -- because it makes very clear
12 the variations in sentencing practices among --
13 depending on the crime, depending on the particular
14 circuit, depending on the particular district, and even
15 depending on the particular judge.

16 I believe --

17 JUSTICE GINSBURG: Was Judge Randolph wrong
18 when he said -- quoting the Sentencing Commission --
19 that within-guidelines range, even after Booker, is the
20 standard? Indeed, the actual impact of Booker on
21 sentencing has been minor, and, for that minor, he cites
22 the Sentencing Commission.

23 MR. FEIGIN: So, Your Honor, I think the
24 post-Booker report refutes that in the respect I just
25 suggested. It says that there are actually very

1 different sentencing practices, depending on the
2 particular crime, depending on the particular judge.

3 JUSTICE GINSBURG: But this statement comes
4 from Final Report on the Impact of the United
5 States v. Booker on Federal Sentencing.

6 MR. FEIGIN: Your Honor, the Commission says
7 many things in its report. One of the things it says is
8 that, in the aggregate, guidelines do -- actual
9 sentences do tend to track the guidelines.

10 But, if you look beyond that one aggregate
11 statistic and you start to look at the variations in
12 sentencing practices in courts across the nation that
13 vary, not only by judge, but by guideline, you see that
14 the system is actually operating the way you'd
15 expect to --

16 JUSTICE BREYER: I see -- I see, now, where
17 you're going. What I think you're saying is, whatever
18 the sentence is, I am the judge, I read the guidelines.
19 Now, I may think that I am more likely to get reversed
20 if I -- I substitute a different view than the
21 Commission had on a matter of policy. That's all true.

22 But, still, I don't have to do it. No
23 matter what it is, I can not use the guidelines. And,
24 if I get reversed on other grounds, or the sentence is
25 not reasonable, da, da, da, da, da. But there's no

1 legal binding nature there. That's your point, I think.

2 MR. FEIGIN: That's exactly my point, Your
3 Honor.

4 JUSTICE BREYER: All right. If that's
5 exactly your point --

6 MR. FEIGIN: I'd like to add two -- two
7 observations to that, first of which is, as an empirical
8 matter, it is extremely unlikely for a sentence to get
9 reversed on substantive reasonableness grounds.

10 The Commission's post-Booker report -- and
11 I'm talking about the one that they just issued a few
12 weeks ago that's cited in the reply brief -- states that
13 substantive unreasonableness reversals are very rare.
14 Petitioner, on page 30 of his brief, cites a database
15 that contains 38 such reversals post-Gall.

16 JUSTICE BREYER: All right. But, now, I can
17 narrow what the question I think is.

18 MR. FEIGIN: And the second point I'd like
19 to make, Your Honor, with respect to that, is that I
20 don't think this Court should assume that district
21 courts are actually going to change what sentences they
22 impose and not impose the sentence they believe is
23 sufficient, but no greater than necessary, to meet the
24 purposes of sentencing, just because they --

25 JUSTICE KENNEDY: Well, but that -- that

1 gets back to -- to your argument. You're -- I sense
2 that you want me to leave the bench saying the
3 guidelines just don't make any difference. Suppose
4 the -- suppose the district judge said, you know, if it
5 were just up to me, I would give this lower sentence,
6 but the guidelines are an important institutional part
7 of our system.

8 Uniformity in sentencing is desirable. For
9 us to take into account the experience of other -- of
10 other courts and what the Sentencing Commission does is
11 very important. Therefore, my discretion is guided by
12 these guidelines.

13 MR. FEIGIN: Your Honor, I absolutely --

14 JUSTICE KENNEDY: You don't want me -- you
15 don't want me to say that.

16 MR. FEIGIN: I absolutely do not want you to
17 leave the bench with the impression that the guidelines
18 are unimportant. I want you to leave the bench with the
19 impression that the guidelines don't impose any legal
20 constraint on a judge's exercise of discretion.
21 Different judges -- not only does it vary by guideline,
22 but --

23 JUSTICE KAGAN: Mr. Feigin, take -- take
24 this example: Let's suppose that there's a crime and
25 the punishment for crime is 5 years to life, all right?

1 Now, Congress passes a statute, and it says,
2 no, we think this crime, now, is much more important
3 than we used to; now, it's 25 years to life, right? A
4 person commits the offense prior to that change.
5 Absolutely obvious case, right, that you have to apply
6 the -- the 5 years to life, right?

7 Obvious, correct?

8 MR. FEIGIN: Yes.

9 JUSTICE KAGAN: Okay. Now, the Sentencing
10 Commission does what the Sentencing Commission always
11 does when there is a legislative change like this. It
12 says, well, we have this guidelines that assumes 5 years
13 to life. We have to change our guidelines because, now,
14 it's 25 years to life. And it passes a guideline
15 amendment which completely conforms to the legislative
16 amendment.

17 But you're saying, no, the 25-year-to-life
18 guideline is the appropriate one to implement, even
19 though the 5-year statute is the appropriate one to
20 implement -- is the appropriate one to give effect to.

21 Is that -- can that possibly be right?

22 MR. FEIGIN: Your Honor, I think I'm saying
23 something slightly different. I think, under 3553(a),
24 the Court would calculate the current guidelines. Now,
25 the defendant would have a very good argument in that

1 case, that the current guidelines range would simply not
2 be appropriate for him, and I think a district court
3 would do well to listen to that argument in that
4 particular case, if it thought that the sentences that
5 the new guidelines range was suggesting were out of
6 whack with the statute at the time the offense was
7 committed.

8 JUSTICE SCALIA: Mr. Feigin, I'm under the
9 impression -- more than the impression I know -- that
10 the Sentencing Commission can make a revision of the
11 guidelines retroactive.

12 Can it only do that for revisions that --
13 that lower the -- the suggested penalty? Or can it do
14 that for revisions that increase it as well?

15 MR. FEIGIN: I believe it's only for
16 revisions that lower --

17 JUSTICE SCALIA: Only for lower, okay.

18 MR. FEIGIN: Yes, Your Honor.

19 JUSTICE SCALIA: Because, if it could
20 increase it, then it would be violating, according to
21 your -- your friend, the Ex Post Facto Clause.

22 MR. FEIGIN: And, Your Honor, getting back
23 to how the -- the advisory guidelines are working in
24 practice for a minute -- which, again, is I don't think
25 what this -- what the focus should be. The focus should

1 be on whether there's actually been a change in the law
2 that either increases or decreases a sentencer's
3 discretion.

4 If you imagine two States, for example, each
5 of which had exactly the same advisory guidelines system
6 that the Federal government has and, in one of them,
7 judges are -- you know, tend to find the guidelines very
8 persuasive, they sentence within the guidelines 70
9 percent of the time. In the other one, judges
10 exercising their discretion don't find the guidelines
11 very persuasive, and they sentence within the guidelines
12 10 percent of the time.

13 I don't think it makes sense that, under the
14 exact same legal regime, an amendment to the guidelines
15 in one State would be an Ex Post Facto Law and an
16 amendment to the guidelines in the other State wouldn't
17 be an Ex Post Facto Law.

18 JUSTICE KENNEDY: But your -- your statement
19 to me was -- and to us earlier -- was that the -- there
20 is no legal constraint on the exercise of discretion. I
21 agree, the judge -- everybody knows the judge can go
22 lower, but that overlooks the fact that discretion is
23 defined by legal standards. That's how we begin to
24 think about discretion.

25 That's how appellate courts weigh

1 discretion. And, again, you want to give the guidelines
2 no effect in determining how that discretion is shaped,
3 guided and exercised.

4 MR. FEIGIN: Your Honor, they are a factor.
5 They're a factor under 3553(a). They're a factor that
6 the district court has to consider. But they don't
7 themselves in any way, shape, or form constrain the
8 district court's exercise of discretion. A district
9 court can decide that -- not to impose a guidelines
10 sentence.

11 JUSTICE KENNEDY: Would you accept the fact
12 that they define the discretion, even though they don't
13 constrain it?

14 MR. FEIGIN: Your Honor, I wouldn't say they
15 define the discretion either. I think they are a
16 recommendation and information that informs the exercise
17 of discretion --

18 CHIEF JUSTICE ROBERTS: What if -- I'm
19 sorry.

20 Are you finished?

21 MR. FEIGIN: I'm happy to be, Your Honor.

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: A good -- good
24 advocate.

25 Let's say you had a statute -- not a

1 guideline, a statute -- that said a sentence for a
2 particular offense will be 5 years, but the judge can
3 lower it to 4 years, if he thinks it would be a manifest
4 injustice to sentence to 5 years. That provision is
5 later repealed.

6 Now, it just says that the sentence should
7 be 5 years. Does that violate the Ex Post Facto Clause?

8 MR. FEIGIN: I think it might well violate
9 the Ex Post Facto Clause, Your Honor, because, in that
10 case, you have something we don't have here, which is
11 that the decision maker has less discretion than the --

12 CHIEF JUSTICE ROBERTS: No matter how
13 narrow -- no matter how narrow the original grant of
14 discretion is? In other words, only in the case of
15 manifest injustice or however dramatic you want to limit
16 the available discretion.

17 MR. FEIGIN: The reason I -- the reason I
18 said "might well" is I think, at that point, the Court
19 would have to look at the significance of the increase
20 or decrease in the sentencer's authority and decide
21 whether that was a significant enough increase or
22 decrease to trigger the --

23 CHIEF JUSTICE ROBERTS: How would -- how
24 would a court --

25 MR. FEIGIN: -- the Ex Post Facto Clause.

1 CHIEF JUSTICE ROBERTS: Right. How would a
2 court go about answering that question?

3 MR. FEIGIN: I think that's where the
4 significant risk test comes in. And, under the
5 significant risk test, you can either see whether it
6 facially has that effect -- we know that's not true of
7 the Federal Sentencing Guidelines because the Court's
8 made clear they don't impose any legal constraints. Or
9 you could see whether it has that effect as applied
10 under Garner.

11 But We know that --

12 CHIEF JUSTICE ROBERTS: So it's a
13 statistical evaluation of the kind we were talking
14 about. You look, and you say, well, it's only once in a
15 blue moon that a judge invokes the manifest injustice
16 provision, so it's not increasing the risk.

17 On the other hand, well, every four out of
18 five judges do, and, therefore, it is an increase. Is
19 that how you --

20 MR. FEIGIN: I think it's fundamental -- the
21 decision in Garner doesn't precisely describe exactly
22 how the significant risk inquiry works. I think it is,
23 fundamentally, a legal inquiry because the bottom-line
24 question the Court's always trying to answer is whether
25 there has been an ex post facto law.

1 And I think, to the extent it's okay to look
2 at empirical data -- and I don't think the Court in
3 Garner expressly says that that's the kind of data it
4 was contemplating -- it would be to inform how the legal
5 framework actually operates in practice.

6 And, if the Court found it necessary to look
7 at that here, in the -- the post-Booker report makes
8 clear that sentencing practices vary over the districts,
9 over the circuits, and with respect to particular
10 guidelines.

11 So Justice Alito brought up the example of
12 the Eastern District of New York. We don't have to look
13 any further than the Northern District of Illinois,
14 where Petitioner was sentenced here, where the latest
15 2012 statistics that came out on Friday show that the
16 defendant actually has a slightly higher probability --
17 very slightly higher probability -- of getting a
18 non-government-sponsored below-range sentence than of
19 getting a sentence within the guidelines range.

20 I think all these variances show two things.
21 One, they show that the system is working exactly as
22 you'd expect an advisory system to work; and, two, I
23 think they show that some sort of narrow focus on
24 empirical data, which is what you are left with, once
25 you divorce the ex post facto inquiry from a change in

1 law, is inherently unworkable.

2 You have to --

3 JUSTICE KAGAN: But, Mr. Feigin, I think
4 more goes into it than empirics. But there's this
5 unbelievable chart, really, in one of the green briefs
6 about -- you know, where there's one line, which is what
7 happens to the guidelines, and there's this other line,
8 which is what happens to the sentence, and they follow
9 each other identically, exactly.

10 You can't get a chart that looks better
11 from this than -- from Mr. Kinnaird's point of view.

12 MR. FEIGIN: So let me say two things in
13 response to that, Your Honor. If you look in the
14 post-Booker report, they have charts like that, that are
15 broken down by offense --

16 CHIEF JUSTICE ROBERTS: You can finish your
17 sentence.

18 MR. FEIGIN: If you look at fraud and you
19 look at child pornography, they deviate when they go --
20 when the guidelines' suggestion goes up, the sentences
21 don't go up in accordance with that, at the same level
22 of the chart you are looking at.

23 Thank you, Mr. Chief Justice.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Kinnaird, you have 3 minutes left.

1 REBUTTAL ARGUMENT OF STEPHEN B. KINNAIRD
2 ON BEHALF OF THE PETITIONER

3 MR. KINNAIRD: Thank you, Mr. Chief Justice.

4 Five quick points. First, the government
5 says this must be an overt legal restraint to be within
6 the Ex Post Facto Clause. This Court has repeatedly, in
7 Weaver and other cases, said it's the effect of the
8 change of law, not its form, that matters for ex post
9 facto purposes, the effect on punishment.

10 And what this revision and amendment of the
11 mandatory benchmark did was to alter the legal framework
12 in a way that channeled and redefined the exercise of
13 discretion in the direction of greater punishment.

14 Secondly, what range is the -- is the
15 mandatory benchmark under the statute matters greatly,
16 as Justice Kennedy alluded to, to appellate review for
17 substantive reasonableness. You have -- it's the key
18 factor in determining whether a sentence is reasonable,
19 and it's the standard to which a presumption of
20 reasonableness may attach.

21 Third, as far as the record, there's --
22 there's no analysis in the record of the 1998
23 guidelines, other than to -- to set them aside. And --
24 and what you have to have, under the Constitution, is he
25 has to actually apply those as the statute required at

1 the time of the offense, as the mandatory benchmark.

2 Instead, he's quite clear, he's applying the
3 '98 guidelines. He's deferring to the -- to the policy
4 judgments there and to the loss calculations. So it had
5 a clear substantive effect on his risk of greater
6 punishment.

7 The post-Booker report does have those --
8 those charts that show that, for all offenses and for
9 fraud offenses, when the guidelines' minimum goes up,
10 the average sentences go up, and that's a very
11 compelling point of evidence.

12 And, finally, I would point out here that
13 one of the amendments here was actually a response of
14 the Commission to a congressional directive in the wake
15 of the Enron scandal and the Sarbanes-Oxley Act, where
16 there was great public and legislative outrage over
17 light fraud sentences, to reconsider the fraud -- fraud
18 guidelines.

19 And that puts this in the core of the Ex
20 Post Facto Clause, that it violates fundamental notions
21 of retroactivity for a legislature to be able to alter
22 the law of punishment after the offense.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 The case is submitted.

1 (Whereupon, at 11:09 a.m., the case in the
2 above-entitled matter was submitted.)
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A			B	
able 5:12 26:21 58:21 above-entitled 1:11 59:2 absent 17:2 absolutely 48:13,16 49:5 accept 7:6 52:11 accords 38:5 account 48:9 accurate 11:25 13:14 acknowledges 38:3 act 15:23 28:17 58:15 actual 9:25 11:2 13:17 21:13,13 24:20 45:20 46:8 add 47:6 adopt 16:21 adopted 31:17 advantage 10:14 advisory 8:8 20:3,6 42:11 50:23 51:5 55:22 advocate 52:24 affect 11:5 32:23 affix 23:22 24:2 aggregate 46:8,10 ago 34:6 47:12 agree 29:14 42:3 51:21 agreeing 27:16 ahead 13:10 aired 30:4 Alito 4:17 14:5 15:1 15:4,20 16:3 25:24 26:9 55:11 allowed 17:16 allowing 9:6 alluded 57:16 alter 57:11 58:21 amended 37:9,10	amendment 3:20 6:14 13:24 28:17 49:15,16 51:14,16 57:10 amendments 58:13 amount 14:17 27:17 amounts 42:25 analysis 11:5,6 14:12 20:9 57:22 anchor 32:20,21,23 33:4,5,7,9,13,15 annexed 23:16 answer 12:24 13:2 24:1 41:8,11 42:17 54:24 answering 21:15,18 54:2 anyway 32:16 appeal 13:1,12 25:10 26:7,7 31:7 37:13 appealed 24:22 appeals 15:21 26:2 26:5 30:22 31:8 35:1,10 37:16,17 37:22 38:25 39:13 39:15,16 APPEARANCES 1:14 appellate 13:7 24:23 25:20 31:3 33:22 38:21 51:25 57:16 Appendix 42:16 applicable 3:14 4:10 4:11 17:11 application 3:15 36:11 applied 3:12 4:15 8:25 19:19 20:14 22:16 27:19 54:9 applies 5:19,19 6:9 34:22 35:5 apply 17:4 30:23 31:8 35:2,5 37:22	44:4 49:5 57:25 applying 24:11 58:2 approach 10:23 appropriate 29:6,8 37:8 41:1,15 44:12 44:21 49:18,19,20 50:2 argued 41:13 42:25 argument 1:12 2:2,5 2:8 3:3,7 7:24 14:8 14:10 19:15 28:11 30:2,12,16 36:17 41:16,18 42:22 43:5 48:1 49:25 50:3 57:1 arises 32:17 arrest 6:5 articulate 22:12 aside 57:23 asking 22:9 assessment 38:23 Assistant 1:17 assume 9:7 18:23 38:10 39:4 47:20 assumes 49:12 assuming 15:17 assumptions 21:24 as-applied 16:9 attach 13:12 25:12 25:21 57:20 attached 36:13 attaches 25:9,21 attributes 16:16 authority 20:23 24:23,25 28:19 37:5,7 53:20 available 53:16 average 11:22,25 12:10 58:10 avoided 42:5 aware 26:24 awfully 43:18 a.m 1:13 3:2 59:1	B 1:15 2:3,9 3:7 57:1 back 16:4 18:16 23:9 38:10 39:22 41:19 48:1 50:22 barely 27:13 based 27:7 basically 27:1 bear 8:18 began 15:6 beginning 36:25 begins 37:17,18 begs 32:4 behalf 1:15,19 2:4,7 2:10 3:8 28:12 57:2 believe 26:5,11 29:11,12 45:16 47:22 50:15 believes 29:6 40:11 below-guidelines 25:25 below-range 45:3,5 55:18 bench 15:7 48:2,17 48:18 benchmark 11:3,9 12:19 13:6 14:2,18 14:24 19:19 20:15 25:5 28:2 57:11,15 58:1 best 4:24 5:6 34:16 34:18 better 41:5,23 56:10 beyond 20:13 46:10 binding 20:6 47:1 bleeding 6:2 blindly 44:4 blue 54:15 Booker 16:17 37:13 40:12 45:19,20 46:5 bottom 27:15 bottom-line 54:23	Breyer 23:8,15 24:12 34:15 36:20 36:25 46:16 47:4 47:16 Breyer's 38:10 brief 8:14 47:12,14 briefs 24:22 56:5 bringing 36:17 brings 26:18 broad 22:11 broader 27:25 broken 56:15 brought 21:1 44:24 55:11 Bull 23:9,10,23 24:9
				C
				C 2:1 3:1 calculate 42:19 43:13 49:24 calculated 43:14 calculation 25:4 calculations 58:4 Calder 18:1 23:9,9 23:23 24:9 careers 15:6 case 3:4 4:18 5:17 14:11 16:3,6,20 17:9 19:22 20:1 21:8,12 23:12 26:24 27:12 28:24 29:21 31:20 34:17 35:17 36:3,3,15 38:18 39:12,22 40:4,16 41:14 42:25 44:21 45:8 49:5 50:1,4 53:10 53:14 58:25 59:1 cases 6:25 9:12 22:7 23:11 27:4 34:24 57:7 categories 23:11 category 4:10,11,15 6:16 14:1 18:1,2

<p>18:11 caveat 14:13 certainly 8:6 17:22 certiorari 29:1 challenge 16:9 chance 14:13 15:2 change 3:20 5:13,15 6:10 8:8 9:25 10:16,19 13:21,22 14:2,8 17:7,18,25 18:3,5,24,25 19:16 19:17 20:7,18 22:11 23:18 28:6 28:16 29:18,19 36:11 37:5 47:21 49:4,11,13 51:1 55:25 57:8 changed 6:15 13:25 15:18 30:8,10 35:16 changes 9:12,23 19:2,8 21:24 23:12 23:19,21 36:3,5 channeled 57:12 charged 45:8 chart 56:5,10,22 charts 56:14 58:8 Chief 3:3,9 10:3,22 11:20 12:7,17,24 13:2,9,13 26:15 28:9,13 52:18,23 53:12,23 54:1,12 56:16,23,24 57:3 58:24 child 38:9,11 41:20 44:24,25 45:2 56:19 choice 40:19 44:1 choose 31:8 44:23 chooses 43:24 circuit 26:24,25 29:20 30:1,3,7 39:23,23 41:8 43:8 43:8 45:14</p>	<p>circuits 55:9 circumstances 18:11 38:18 44:2 cited 47:12 cites 45:21 47:14 claim 40:12,13,14 class 31:12 Clause 3:16 6:9 9:14 13:14 24:7 33:16 33:17 50:21 53:7,9 53:25 57:6 58:20 clear 15:3 17:6 28:15 30:17,19,22 31:6,25 34:6 38:1 45:11 54:8 55:8 58:2,5 clearly 27:19 close 29:16 cognizant 11:18 collection 11:23 come 15:8 16:6 17:15,16 comes 16:3 37:15 38:11 46:3 54:4 Commission 12:9 16:15 29:5 31:11 32:3 34:18 35:8 45:18,22 46:6,21 48:10 49:10,10 50:10 58:14 Commission's 38:5 38:23 45:9 47:10 commits 34:20 49:4 committed 4:11 6:1 9:7,8 23:17 29:25 40:18,22 41:12 50:7 committing 37:11 common 27:8 commonsense 31:10 common-sense 38:3 comparison 11:22 39:2</p>	<p>compelling 12:22 58:11 complaints 40:8 completely 36:8 49:15 complying 15:22 concede 24:12 concern 33:16 conditions 35:7 conduct 27:10 confessed 29:21 30:1 conforms 49:15 Congress 10:9 31:25 49:1 congressional 58:14 consequence 6:19 6:20 7:1,3 25:17 consequences 28:17 consider 4:9,14,25 5:12 6:12,16 7:7 10:4,17,24,25 12:5 12:12 13:23,25 20:17,24 21:25 27:25 28:23 52:6 considered 20:21 21:6 25:5 31:22 41:16 42:22 43:4 considering 44:5 considers 12:9 43:11,16 consistent 35:13,14 Constitution 57:24 constitutionally 30:19 constrain 52:7,13 constraint 29:2 30:14 32:12,16 34:13 43:22 44:17 48:20 51:20 constraints 54:8 construction 11:12 contains 47:15 contemplating 55:4</p>	<p>controlling 36:10 conviction 17:22 core 9:22 58:19 correct 5:1 25:3 44:7,13 49:7 correctness 25:9 counsel 28:9 56:24 58:24 country 11:23 12:10 34:19 counts 43:19 course 12:9 27:10 35:24 court 1:1,12 3:10,12 4:8,14,19 5:11 6:12,15 7:4,10,13 8:22 9:24 10:16,24 11:14,14,17,21 12:20 14:15 15:21 16:19 19:2,18 22:14,16 23:10 24:3,23 25:19 26:14,24 27:6,15 27:24 28:14,15,18 28:24 31:6,13 33:22 34:5,12 35:1 35:10 37:7,16,16 37:25 38:4,21,25 39:13,14,16 40:20 40:25 41:10,16 43:3,4,6,11,16,24 45:10 47:20 49:24 50:2 52:6,9 53:18 53:24 54:2 55:2,6 57:6 courts 7:7 15:22 17:1 26:1 30:17,22 31:8,18 32:1 33:11 33:13 37:21,22 46:12 47:21 48:10 51:25 court's 22:6 29:3 30:10,14 32:13 33:9,10 34:7,11,13</p>	<p>43:22 44:16 52:8 54:7,24 crawled 27:13 create 10:20 created 36:12 39:24 creates 3:17 8:8 9:16 crime 6:1,5 9:7,8 23:16 34:20 38:24 40:2,18,21 41:11 45:13 46:2 48:24 48:25 49:2 criminal 17:15 38:12 critical 11:4 current 16:9 49:24 50:1</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 da 46:25,25,25,25 46:25 data 11:23 13:21 16:9 55:2,3,24 database 47:14 day 8:13 37:9,10 days 38:14 39:5,9 39:10 deal 15:8 dealing 40:18 deceased 20:18 decide 31:20 36:4 39:13 44:20 52:9 53:20 decided 34:25 35:15 decides 29:4 decision 19:25 32:25 37:5 53:11 54:21 decisions 30:11,12 33:4,9 34:13 44:16 decline 16:10 decrease 53:20,22 decreases 51:2 defendant 9:18 10:5</p>
---	--	--	--	--

<p>10:13 14:11 26:5 27:10 30:19 38:13 44:25 49:25 55:16 defendants 14:7 15:14 16:5 31:13 33:17 41:17 defendant's 7:19 39:25 deference 38:22 43:18 44:11,12 deferential 30:23 deferentially 40:10 deferred 17:6 deferring 58:3 define 3:22 52:12,15 defined 51:23 definition 6:19 degree 12:23 delegated 6:9 13:20 demonstrate 8:23 Department 1:18 departure 16:13 depend 38:17 depending 18:10 37:23 45:13,13,14 45:15 46:1,2 depends 17:9 describe 54:21 described 33:10 description 40:4 desirable 48:8 determine 7:15 21:12 determined 14:18 determining 4:25 52:2 57:18 deterrent 26:19 developments 5:12 deviate 33:5 34:1 56:19 deviation 12:21 27:1 34:2 deviations 26:22 difference 7:24 21:4</p>	<p>29:11 48:3 different 6:22 7:12 9:24 20:2 35:4,7 37:16,22 46:1,20 48:21 49:23 differently 16:7 21:16,19 difficult 21:11 digits 26:10 diminish 14:12 direction 22:17 57:13 directive 58:14 disagree 36:21 39:21 disagreeing 6:24 disconnect 7:6 discretion 24:18 29:3,9 30:14 31:13 31:18 32:13,17 34:11 37:19 38:4 40:25 43:23,24 44:18,20 48:11,20 51:3,10,20,22,24 52:1,2,8,12,15,17 53:11,14,16 57:13 discretionary 8:1 displace 24:19 dispute 38:9 distinct 16:5 distinction 13:18 22:5,7 distinctive 11:2 district 3:12 4:8,14 4:19 5:11,25 6:1 6:12,15 7:7,25 12:20 14:15 15:13 15:13,22 17:1 27:14 28:18 29:2 29:14,14,23 30:14 30:17 31:13,17,25 32:13 33:11,12 34:6,11,12 35:21 37:7 38:4 40:25</p>	<p>41:4,10,16 43:3,4 43:6,22,24 45:14 47:20 48:4 50:2 52:6,8,8 55:12,13 districts 15:11 55:8 divorce 55:25 doing 7:25 doubt 40:3 drain 34:23 dramatic 53:15 dramatically 36:3 draw 13:18 19:8 22:4,10,13,15 drawn 22:7 due 38:22 duty 34:7 D.C 1:8,15,18 39:22 41:10</p> <hr/> <p>E</p> <hr/> <p>E 2:1 3:1,1 earlier 30:5 51:19 Eastern 15:13 55:12 easy 24:1 effect 9:9 16:18 24:20 26:14,19 29:24 31:9 40:2,17 40:21,23 41:11 49:20 52:2 54:6,9 57:7,9 58:5 effectively 13:19 either 8:23 16:11 20:10 51:2 52:15 54:5 element 8:6 elevated 40:5 emphasize 39:20 empirical 14:12 47:7 55:2,24 empirics 56:4 enacted 9:8 encourage 45:10 ended 33:23 enlightenment 5:4</p>	<p>Enron 58:15 ensure 15:22 entire 31:16 entitled 35:20 equated 24:4 era 15:7 ERIC 1:17 2:6 28:11 error 29:22 30:1 31:23 32:5,10,22 34:14 37:12 40:12 43:19,23 44:3 ESQ 1:15,17 2:3,6,9 established 4:10 17:18 evaluating 8:10 evaluation 54:13 everybody 6:3,6 51:21 evidence 8:25 9:2,2 17:15 18:3 21:1 35:20 58:11 ex 3:16 5:7,19 6:7,7 6:8,25 8:12 9:9,13 10:11 12:3 13:14 17:19 18:7,25 19:25 22:12 24:6 24:17,17,19 28:16 33:16,16 37:3 50:21 51:15,17 53:7,9,25 54:25 55:25 57:6,8 58:19 exact 12:16 51:14 exactly 5:1 8:7 21:19 38:20 47:2,5 51:5 54:21 55:21 56:9 examined 18:21 example 44:23 48:24 51:4 55:11 excluded 19:2 Excuse 3:24 4:1 exemplary 27:11 exercise 24:18 29:3</p>	<p>34:11 37:19 48:20 51:20 52:8,16 57:12 exercised 52:3 exercising 31:18 38:4 44:19 51:10 exists 30:16 expect 46:15 55:22 experience 48:9 expertise 35:8 38:5 explained 37:21 explaining 8:19 expressly 17:5 55:3 extent 55:1 extremely 47:8</p> <hr/> <p>F</p> <hr/> <p>facially 54:6 fact 5:3 6:22 8:6,7 9:3,20 10:14 14:15 16:16 20:20 26:19 31:18 34:24 41:1 51:22 52:11 facto 3:16 5:8,19 6:7 6:8,25 8:12 9:9,13 10:11 12:3 13:14 17:19 18:8,25 19:25 22:12 24:6 24:17,18,19 28:16 33:16,17 37:3 50:21 51:15,17 53:7,9,25 54:25 55:25 57:6,9 58:20 factor 13:21 22:25 52:4,5,5 57:18 factors 4:24 10:4,5 10:12,19,20,24 23:6 34:10 43:15 44:5 fair 15:1 38:13 fairly 26:4 falls 30:24 37:23 family 10:6,8,15 far 31:1 39:18 57:21</p>
---	--	---	---	--

February 1:9 Federal 5:25 46:5 51:6 54:7 Feigin 1:17 2:6 28:10,11,13,25 29:12 30:9 31:4,24 32:8 34:5 36:19,24 37:20 38:17,25 39:6,12 40:7,24 41:13 42:14 43:10 43:17,20 44:7,14 45:23 46:6 47:2,6 47:18 48:13,16,23 49:8,22 50:8,15,18 50:22 52:4,14,21 53:8,17,25 54:3,20 56:3,12,18 fewer 15:4,5,9,9 fighting 28:20 filed 42:24 Final 46:4 finally 58:12 find 39:16 44:15 51:7,10 finish 42:12 56:16 finished 52:20 first 3:4 35:8,11 47:7 57:4 fiscal 44:25 fit 4:24 fits 23:12 40:4 five 54:18 57:4 Florida 19:15,22 20:1 28:15 focus 50:25,25 55:23 follow 5:10 41:6,25 56:8 followed 8:20 following 43:7,7 follows 44:18 follow-up 42:4 forgets 37:11 form 52:7 57:8	format 11:13 former 41:14 formula 7:17 formulations 7:12 forth 13:15 found 55:6 four 23:11 54:17 fourth 18:2,11 frame 32:18 framework 5:11 8:19 9:4 12:16,18 13:6,15 20:12 24:24 28:2 36:14 37:17 55:5 57:11 fraud 43:1 45:7 56:18 58:9,17,17 58:17 free 32:15 41:17 freely 29:12 Friday 55:15 friend 50:21 friends 9:6 front 35:6 full 42:15 45:11 fundamental 54:20 58:20 fundamentally 54:23 further 55:13	50:22 55:17,19 Ginsburg 7:17,23 19:21 29:18 31:2 39:21 40:15 41:3 41:21 43:6,10 45:17 46:3 Ginsburg's 42:4 give 9:9 11:24 19:7 35:10 43:24 44:11 44:12 48:5 49:20 52:1 gives 6:6 giving 38:19,22 go 5:3 13:10 14:3 20:8 21:10 22:16 25:23 41:19 51:21 54:2 56:19,21 58:10 goes 12:14 15:2 38:10 56:4,20 58:9 going 5:1,3 11:5 14:17 15:4,9 17:4 20:12 26:7 27:8 28:4 32:23 37:11 46:17 47:21 good 10:10 49:25 52:23,23 gotten 14:24 27:21 government 3:19 16:14 26:7,16,17 29:20,21,23,25 30:7,9 35:18 51:6 57:4 gradual 16:10 grant 33:24 53:13 great 25:17 26:12 58:16 greater 23:15 34:8 36:9 47:23 57:13 58:5 greatly 57:15 green 56:5 ground 26:2 27:7 29:1 34:17 36:4	grounds 46:24 47:9 guarantee 33:17 guide 4:13 guided 48:11 52:3 guideline 14:8 19:23 25:21 26:25 27:1 31:22 35:2 39:24 41:7,23,25 46:13 48:21 49:14,18 53:1 guideline's 44:20	47:3,19 48:13 49:22 50:18,22 52:4,14,21 53:9 56:13 horrible 9:7 hypothetical 18:8 21:8 39:8,11 41:20 hypotheticals 18:23 23:17 30:4
I				
	idea 10:10 identically 56:9 Illinois 55:13 imagine 51:4 impact 30:5 45:20 46:4 implement 49:18,20 implied 11:12 importance 24:5 32:7,8 important 14:19 24:17 25:7 48:6,11 49:2 impose 29:2,9,15 31:19 32:12,15 34:7 37:8 41:1 43:15 47:22,22 48:19 52:9 54:8 imposed 5:17 7:4 30:13 43:2 imposes 31:14 imposing 38:13 impression 48:17,19 50:9,9 inappropriate 35:16 37:1 incarcerated 10:7 incarceration 7:19 included 30:4 includes 32:2 incorrect 3:21 increase 7:14 8:12 14:21 18:1,22,22			

19:10 20:12 27:18 42:25 50:14,20 53:19,21 54:18 increased 3:17 7:18 17:7 24:4 28:5 increases 10:12 51:2 increasing 7:15 27:16 36:12 54:16 indication 17:3 individual 38:18 inflicts 23:15 36:8 influential 29:13 32:9 44:15 inform 34:11 55:4 informal 12:1 information 13:14 32:1 34:19 52:16 informs 52:16 inherent 8:24 20:10 20:11 28:1 inherently 56:1 initial 16:17 injustice 53:4,15 54:15 inquiry 8:16,22 36:10 54:22,23 55:25 insistence 33:11 instances 44:22 institutional 48:6 interested 41:24 interpreted 25:3 invokes 54:15 involve 23:18 involved 22:5 Irizarry 30:11,15,18 issue 36:2 issued 47:11 it'd 12:7,8	jeopardized 10:6 John 6:6 Joint 42:16 judge 5:25 6:2 17:3 17:5 20:23 29:4,6 29:8,23 30:3 32:15 33:18 35:2,8,11,21 35:24 37:9,11 38:11,20 39:10 40:10 41:4,10,22 42:5,17 44:18,19 45:15,17 46:2,13 46:18 48:4 51:21 51:21 53:2 54:15 judges 7:25 10:4 12:13 15:5,7 21:25 28:22 29:14,14 32:10 43:1 44:10 44:23 48:21 51:7,9 54:18 judge's 32:17 48:20 judgment 35:3 38:5 judgments 58:4 jurisprudence 24:18 jury 20:24 justifications 12:23 justify 12:20 26:21	3:6,7,9 4:1,4,7 5:9 5:22 6:8,20 7:2,10 7:21 8:5,21 9:11 9:17,21 10:18 11:1 11:11,16 12:4,15 12:18,25 13:4,11 13:16 14:9 15:3 16:8 17:24 18:9,15 18:18 19:1,6,12,14 20:4,20,25 21:3,7 21:17,21 22:4,14 22:20,23 23:3,5,14 23:21,24 24:3,10 24:15,25 25:8,11 25:14,18 26:3,11 26:17 27:3 33:6 56:25 57:1,3 Kinnaird's 56:11 knew 6:3 know 4:20 10:6,14 22:24 23:1 25:24 26:4,12,18 36:2 38:8,11 39:9 41:3 48:4 50:9 51:7 54:6,11 56:6 knows 6:6 51:21	37:3 51:1,15,17 54:25 56:1 57:8 58:22 lawmaking 6:10 laws 6:9 23:18 leave 15:7 48:2,17 48:18 leeway 35:10,11 left 34:25 55:24 56:25 legal 6:19,20 7:1,3 8:18 25:17 28:16 30:13 31:9 33:8,13 34:7,13 37:4 40:11 43:22 44:17 47:1 48:19 51:14,20,23 54:8,23 55:4 57:5 57:11 legislative 3:21 49:11,15 58:16 legislature 58:21 let's 4:17 9:7 12:11 14:6 16:3 17:16 34:22 38:10 48:24 52:25 level 27:18 31:3 56:21 life 27:11 39:9 48:25 49:3,6,13,14 light 58:17 likelihood 32:24 limit 53:15 limited 22:21 line 19:8 22:13,15 56:6,7 list 10:24 listen 50:3 lived 27:11 living 44:10 longer 30:16 look 16:9 18:3 20:10 24:16,20 25:3 42:15,23 45:9 46:10,11 53:19	54:14 55:1,6,12 56:13,18,19 looked 42:6 looking 56:22 looks 33:22 56:10 loss 27:12,17 42:25 58:4 lot 38:8 low 26:4,5 39:2 lower 26:25 48:5 50:13,16,17 51:22 53:3 lowest 6:2 Lynce 7:4,11,13 24:4
M				
				maker 53:11 maker's 37:5 making 14:12 17:22 17:23 19:10 40:8 mandated 4:14 mandatory 3:22,24 4:2,5 8:2 10:19 13:6 14:2,18 15:7 15:8 19:22,22,25 20:3,15 22:24 23:6 25:5 28:2 57:11,15 58:1 manifest 53:3,15 54:15 marshalling 8:25 Marvin 1:3 3:11 matter 1:11 8:18 28:21 35:4,20,23 40:11 42:11 46:21 46:23 47:8 53:12 53:13 59:2 matters 57:8,15 Maximum 6:5 mean 17:12,21 22:18,23 25:16 26:9 33:7,8 40:19 means 33:12

measure 36:12 37:18 meet 34:8 35:6 47:23 memorandum 42:24 mentioned 6:11 13:23 Miller 9:24 19:14 19:15,15 22:4 23:2 23:4 28:15 million 27:13,14 minimum 17:2 18:6 58:9 minor 45:21,21 minority 16:5 minute 45:7 50:24 minutes 56:25 miscalculate 32:6 32:11 miscalculating 31:22 32:14 miscalculation 32:22 misheard 21:7,21 mix 10:19 32:1 modification 10:23 months 3:13,14 4:16 6:13 11:7 13:24 14:1,25 27:21 34:22 moon 54:15 Morales 7:4,11,22 morning 3:4 motion 16:14	nature 47:1 necessarily 10:20 12:4 necessary 34:8 47:23 55:6 need 31:8 Nelson 30:15 never 15:8 40:13 new 4:20,23 5:5,12 15:7,13 16:21,23 17:14 28:24 39:24 50:5 55:12 nongovernment-s... 45:3,5 non-government-... 55:18 non-guidelines 25:13 non-overlapping 27:7 non-production 44:25 Northern 55:13 notice 30:20 notions 58:20 number 10:1 11:25 12:14 21:13 22:19 25:25 26:12	58:1,22 offenses 58:8,9 oh 4:6 42:5 okay 4:6 11:23 20:19 24:8,15 39:9 39:10 49:9 50:17 55:1 old 4:21 14:23 16:21 27:22 28:22,23 older 6:25 20:14 once 54:14 55:24 open 34:25 operates 55:5 operating 46:14 operation 9:1,3 opinion 30:3,6,7 35:14 opposed 13:21 22:25 29:1 opposition 39:23 oral 1:11 2:2,5 3:7 28:11 36:16 orders 43:7 original 53:13 ought 33:2,3 outlier 35:22,25 outliers 35:23,25 outrage 58:16 outset 5:18 outside 5:3 25:23 30:25 31:1 overarching 34:7 overlap 16:22 overlooks 51:22 overt 57:5	33:10,18,21,21,22 38:18 40:9 44:21 45:13,14,15 46:2,2 50:4 53:2 55:9 particularly 27:8 partly 26:6 pass 21:9 passed 3:15 passes 49:1,14 penalize 10:8 penalty 7:14,16 50:13 people 10:9 Pepper 34:6 percent 14:7 15:14 16:11,25 27:22 45:4,5 51:9,12 percentages 15:11 perform 7:18 permissible 19:9 permits 17:15 39:5 person 34:20 35:6 49:4 persuasive 44:15 51:8,11 pertains 20:22 Petitioner 1:4,16 2:4 2:10 3:8,11 40:8 41:13 42:24 45:8 47:14 55:14 57:2 Petitioner's 31:6 Peugh 1:3 3:4,11 Peugh's 4:15 philosophical 41:5 philosophy 33:18 picked 32:22 place 14:23 33:21 33:21,23 please 3:10 28:14 point 5:14 11:3 12:20 14:19 16:17 19:23,24 21:13 25:8 28:21 47:1,2 47:5,18 53:18	56:11 58:11,12 points 57:4 policy 27:16,17 35:3 35:7,19,23 46:21 58:3 pornography 38:9 38:12 41:20 44:24 45:1,2 56:19 posed 17:3 21:19 position 28:22 29:19 29:19 30:8,10 31:5 35:18 Posner 30:3 possession 45:1 possibility 5:20 possible 6:3 39:13 39:14 possibly 49:21 post 3:16 5:8,19 6:7 6:7,8,25 8:12 9:9 9:13 10:11 12:3 13:14 17:19 18:7 18:25 19:25 22:12 24:6,17,17,19 28:16 33:16,16 37:3 50:21 51:15 51:17 53:7,9,25 54:25 55:25 57:6,8 58:20 post-Booker 45:10 45:24 47:10 55:7 56:14 58:7 post-Gall 47:15 potential 26:19 practical 9:1 38:2 Practically 29:10 practice 50:24 55:5 practices 45:12 46:1 46:12 55:8 precise 26:4 precisely 54:21 prejudice 10:17 premise 8:11 31:16 31:19
<hr/> N <hr/> N 2:1,1 3:1 narrow 18:14,18 47:17 53:13,13 55:23 narrower 27:7 narrowly 16:20 nation 46:12 nationwide 14:6	<hr/> O <hr/> O 2:1 3:1 object 9:20 objective 8:18 objects 3:19 obligation 37:8 41:1 observations 47:7 obvious 49:5,7 Obviously 32:5 offender 4:12,15 6:16 14:1 offense 3:14,16 4:11 4:15,22 6:16 13:25 29:25 45:1 49:4 50:6 53:2 56:15	<hr/> P <hr/> P 3:1 page 2:2 45:9 47:14 part 48:6 partially 14:17 particular 10:15 14:11 17:25 21:12 27:6 31:12,12	<hr/> P <hr/> P 3:1 page 2:2 45:9 47:14 part 48:6 partially 14:17 particular 10:15 14:11 17:25 21:12 27:6 31:12,12	<hr/> P <hr/> P 3:1 page 2:2 45:9 47:14 part 48:6 partially 14:17 particular 10:15 14:11 17:25 21:12 27:6 31:12,12

<p>present 27:17</p> <p>presume 30:18 33:11</p> <p>presumption 13:8 13:11 25:8,20 31:3 31:7,16 33:24 37:24 38:2 57:19</p> <p>presumptive 19:17</p> <p>pretty 17:18</p> <p>prevail 4:17 26:13 26:18</p> <p>prevails 26:16</p> <p>prevent 4:19</p> <p>previously 17:16</p> <p>prior 27:10 28:17 49:4</p> <p>probability 55:16,17</p> <p>problem 5:8</p> <p>procedural 10:2 19:2,5 20:21 22:3 25:1,2 31:22 32:5</p> <p>procedure 9:13,24 17:18 19:17</p> <p>procedures 22:5</p> <p>procedures-change 18:20</p> <p>procedure-substa... 22:7</p> <p>process 11:18 32:7 34:3</p> <p>profound 16:18</p> <p>prohibition 5:19</p> <p>prohibits 8:12</p> <p>prolonging 7:19</p> <p>promulgation 4:20</p> <p>propose 18:14</p> <p>proposition 5:18 6:24 17:10 28:21 31:11 38:3</p> <p>protections 24:19</p> <p>proven 22:1</p> <p>provide 28:2,3</p> <p>provided 5:5 42:18</p> <p>provides 39:9 44:1</p>	<p>provision 4:8 53:4 54:16</p> <p>psychological 33:15</p> <p>public 58:16</p> <p>punishment 3:18 6:21 7:9 8:13 9:23 14:21 18:2,5 20:13 23:13,16,19,20,23 24:2,5,20 28:5 36:5,9,11,13 48:25 57:9,13 58:6,22</p> <p>purposes 34:9 47:24 57:9</p> <p>pursuant 16:13</p> <p>puts 58:19</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>quantum 8:13 14:21 20:13 28:5</p> <p>question 13:3 17:3 21:19 24:1 27:5 32:4 34:16 35:1,9 36:8 38:11 40:16 41:7,22,24,25 42:4 42:5 47:17 54:2,24</p> <p>questions 42:17 43:11</p> <p>quick 57:4</p> <p>quite 15:12 24:1 38:1 40:4,19 58:2</p> <p>quote 4:10</p> <p>quoting 45:18</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1</p> <p>raise 41:17</p> <p>Randolph 45:17</p> <p>range 3:13,13 4:9 4:16,21 6:12 11:4 11:6 12:6,12,19,21 13:20 14:1,8,14,16 16:13,23 19:16,17 23:7 25:22 26:25 27:15,23 29:4,7,16</p>	<p>29:16 30:18,21,25 30:25 31:1,2,12,14 33:12 34:21 37:24 41:14,16 44:20 45:6,19 50:1,5 55:19 57:14</p> <p>ranges 16:22 27:8</p> <p>rare 16:25 47:13</p> <p>rate 26:8</p> <p>reaches 38:4</p> <p>read 45:11 46:18</p> <p>real 7:17 39:8</p> <p>really 4:24 7:24 14:22 15:12 33:1 56:5</p> <p>realm 43:25</p> <p>reason 31:21 32:10 32:21 34:3 37:21 39:15 53:17,17</p> <p>reasonable 26:2 30:18 31:15 33:12 38:6 46:25 57:18</p> <p>reasonableness 13:7,12 25:2,19,20 26:20 28:3 31:3,7 31:17 33:24 37:25 47:9 57:17,20</p> <p>reasons 26:21</p> <p>rebuttal 2:8 28:8 57:1</p> <p>receipt 45:1</p> <p>receive 15:14</p> <p>recognize 42:1,8 44:16</p> <p>recognized 37:25</p> <p>recognizes 24:6</p> <p>recommendation 32:2 52:16</p> <p>recommends 31:11</p> <p>reconciling 7:12</p> <p>reconsider 58:17</p> <p>record 42:13,15 57:21,22</p> <p>redefined 57:12</p>	<p>reference 39:15</p> <p>referred 42:7</p> <p>refers 6:21 23:10</p> <p>reflects 31:10</p> <p>Reform 15:23</p> <p>refutes 45:24</p> <p>regardless 20:5 30:24</p> <p>regime 51:14</p> <p>regulation 36:6</p> <p>reimpose 5:1</p> <p>rejected 41:17 43:5</p> <p>relationship 16:16</p> <p>relatives 9:6 20:18</p> <p>rely 24:8</p> <p>remanded 4:18</p> <p>remedy 37:13 40:12</p> <p>remind 24:21</p> <p>repealed 53:5</p> <p>repeated 33:10</p> <p>repeatedly 57:6</p> <p>replaced 6:4,5</p> <p>reply 47:12</p> <p>report 16:17 45:10 45:11,24 46:4,7 47:10 55:7 56:14 58:7</p> <p>require 5:16</p> <p>required 5:2 6:11,15 16:24 43:12 57:25</p> <p>requirement 7:8 12:5 37:2</p> <p>requires 4:8 34:2</p> <p>resentencing 4:18</p> <p>reserve 28:7</p> <p>respect 37:6 45:24 47:19 55:9</p> <p>Respondent 1:19 2:7 28:12</p> <p>response 17:20,24 30:10 56:13 58:13</p> <p>responsibility 15:21</p> <p>rest 28:7</p> <p>restraint 57:5</p>	<p>rests 5:17</p> <p>result 28:5 40:6</p> <p>retires 6:4</p> <p>retroactive 3:15 36:10 50:11</p> <p>retroactivity 58:21</p> <p>returning 27:5</p> <p>reversal 25:22 32:14</p> <p>reversals 47:13,15</p> <p>reversed 26:1,25 37:12 46:19,24 47:9</p> <p>reversible 43:19,23 44:3,5</p> <p>review 13:7 24:23 24:25 25:1,19 26:20 28:3 30:23 37:23 57:16</p> <p>reviewed 12:25 27:4</p> <p>revision 50:10 57:10</p> <p>revisions 50:12,14 50:16</p> <p>right 4:22 19:12 23:3,14 31:4 32:1 33:17,22 35:23,25 36:8,13 39:5 44:12 47:4,16 48:25 49:3 49:5,6,21 54:1</p> <p>risk 3:17 5:23,24 7:15,18 8:9,10,23 8:24 9:3,16 10:12 10:21 14:4,13,20 14:21,22 16:20 17:2,7,11 18:4 19:10 20:9,11,11 21:10,11 22:17 24:4,17 25:22 27:9 27:20 28:4 36:12 37:2,4,4 39:25 40:5 54:4,5,16,22 58:5</p> <p>risks 18:20</p> <p>Rita 12:16 28:1</p>
---	--	--	--	---

30:17 31:5,6,17 34:24 35:13 37:25 38:1 Rita/Gall 5:11 river 15:24 ROBERTS 3:3 10:3 10:22 11:20 12:7 12:17,24 13:2,9,13 26:15 28:9 52:18 52:23 53:12,23 54:1,12 56:16,24 58:24 rule 8:24 9:1 16:19 16:21 18:14,18 19:7 22:10 27:7 rules 3:21 33:25 ruling 27:25 run 35:21	schedule 3:25 4:2 second 25:18 33:14 35:9,12 43:13 47:18 Secondly 57:14 section 3:23 34:9 42:21 43:13 see 15:4,9 21:4 35:15 36:1,18 42:16 46:13,16,16 54:5,9 seen 4:23 selected 42:6 sense 48:1 51:13 sentence 5:1,2,6,21 6:3,6 7:3 8:25 9:19 10:13 11:22,25 14:24 16:23 17:23 18:21,22 19:11 24:22 27:20 29:6,7 29:8,9 30:24 31:14 31:15 32:16 34:7 35:1 37:8,12,23 38:6 39:2,25 40:6 41:2,15 42:6 43:14 44:20 45:3,4 46:18 46:24 47:8,22 48:5 51:8,11 52:10 53:1 53:4,6 55:18,19 56:8,17 57:18 sentenced 14:7 16:6 27:15 30:20 34:21 55:14 sentencer 20:17 21:2,6 sentencer's 51:2 53:20 sentences 12:10 14:14,16,17 15:5 15:10,15 16:11 18:21 22:2 25:9,13 26:1 27:16 29:15 31:19 38:9 43:2 46:9 47:21 50:4	56:20 58:10,17 sentencing 3:11,12 4:9,16 6:12 9:22 10:1,4,16 11:4,5 11:12 12:9 14:10 15:23 16:15 17:11 17:21 18:6 19:16 20:8,19,22,23 21:9 21:9,23,24 22:6,24 23:6 27:6 29:3 30:14 31:12 32:3 33:4,18 34:9,18 37:6 40:9,23 41:9 42:15,24 43:23 44:18 45:12,18,21 45:22 46:1,5,12 47:24 48:8,10 49:9 49:10 50:10 54:7 55:8 separate 42:21 43:11 series 9:12 seriousness 38:23 serve 32:20,21 33:15 serves 33:4 set 13:15 18:23 40:24 42:18,18 43:12 57:23 Seventh 29:20 30:1 30:3,7 39:23 41:8 43:7,8 severe 40:1,6 shape 52:7 shaped 52:2 show 9:22 16:4 19:3 55:15,20,21,23 58:8 showed 14:6 showing 8:24 shows 17:2 significance 53:19 significant 3:17 5:22 5:24 8:9,10,23 9:3	9:16 10:20 14:3,13 14:20,22 16:20 17:2,7,10 18:4 20:8 21:10,11 22:17 24:5,16 27:9 27:20 28:4 32:7,24 37:2,4 53:21 54:4 54:5,22 significantly 7:18 simple 40:19 simply 8:17 10:18 22:15 28:23 38:2 44:4 50:1 single 26:10 situation 10:15 slight 16:10 slightly 49:23 55:16 55:17 Solicitor 1:17 somebody's 6:1 sophisticated 11:24 12:13 sorry 13:9 21:17 26:15 52:19 sort 33:8,15 34:12 36:16 37:5 39:7 43:22 55:23 Sotomayor 6:18,23 7:5 15:17 16:1 18:13,16,19 19:4,7 19:13 21:15,18,23 22:9,18,21 23:1,4 26:23 28:20 29:10 31:21 32:4 38:8,19 44:24 Sotomayor's 41:19 sounding 43:17 Southern 15:13 speak 22:2 speaking 29:10 Spears 30:16 specific 13:20 14:10 specifically 17:5 41:23	specification 13:20 spent 8:14 stage 17:11 standard 7:13,20,21 10:1 13:12 19:20 20:5,7 30:23 37:22 45:20 57:19 standards 22:15 51:23 start 8:2,11 11:5,9 28:23 32:1 33:20 36:19 40:20,22 42:1,2 43:8 46:11 started 29:21 33:23 40:25 starting 11:3,6 12:20 16:17 19:23 19:24 21:13 28:21 State 51:15,16 stated 5:18 statement 19:10 30:5 46:3 51:18 states 1:1,6,12 3:5 46:5 47:12 51:4 statistic 46:11 statistical 8:17 9:2 54:13 statistically 18:22 statistics 8:15,18 14:6 16:4 25:25 26:4 55:15 statute 3:22 4:5,13 4:25 5:10 9:8,10 13:19 39:4,8,9 49:1,19 50:6 52:25 53:1 57:15,25 statutes 9:5 statutory 30:21 34:9 34:14 37:12 40:12 step 25:18 STEPHEN 1:15 2:3 2:9 3:7 57:1 steps 5:11 stick 28:22
--	--	---	---	---

<p>stop 8:3</p> <p>striking 15:12</p> <p>strong 10:6</p> <p>submitted 58:25</p> <p>59:2</p> <p>subsection 3:22 4:5</p> <p>substance 19:20</p> <p>substantial 5:20,22</p> <p>39:25 40:5</p> <p>substantially 45:2</p> <p>substantive 10:2</p> <p>13:7 19:18,19 20:5</p> <p>20:7,8,21 22:2,15</p> <p>25:1,19 26:20 28:3</p> <p>30:13 32:12 47:9</p> <p>47:13 57:17 58:5</p> <p>substantively 38:15</p> <p>38:21 39:1,14,16</p> <p>39:17</p> <p>substitute 46:20</p> <p>suddenly 35:15</p> <p>sufficient 7:15 34:8</p> <p>36:12 47:23</p> <p>sufficiently 12:22</p> <p>20:2</p> <p>suggested 29:5 33:2</p> <p>41:14 45:25 50:13</p> <p>suggesting 33:14</p> <p>50:5</p> <p>suggestion 56:20</p> <p>suggests 29:5 32:19</p> <p>support 12:23</p> <p>supports 31:5</p> <p>suppose 5:25,25</p> <p>48:3,4,24</p> <p>supposed 32:21</p> <p>Supreme 1:1,12</p> <p>28:24</p> <p>sure 17:12 22:6 27:3</p> <p>27:4</p> <p>surely 44:9</p> <p>survey 12:1,13</p> <p>system 28:1 46:14</p> <p>48:7 51:5 55:21,22</p>	<p>T</p> <p>T 2:1,1</p> <p>take 8:16 10:8,10</p> <p>10:14 48:9,23,23</p> <p>talk 45:7</p> <p>talking 5:13 47:11</p> <p>54:13</p> <p>technology 12:12</p> <p>teeth 17:1</p> <p>tell 18:13 22:10</p> <p>tend 46:9 51:7</p> <p>tends 26:17</p> <p>term 3:22 4:4</p> <p>terms 34:6</p> <p>test 7:14 14:3 36:9</p> <p>37:2 54:4,5</p> <p>testify 9:6 18:20</p> <p>21:25</p> <p>testimony 17:17</p> <p>20:17</p> <p>Thank 28:9,13</p> <p>56:23,24 57:3</p> <p>58:23,24</p> <p>they'd 20:14</p> <p>thing 12:8</p> <p>things 12:8 33:7</p> <p>41:5 46:7,7 55:20</p> <p>56:12</p> <p>think 4:24 5:4 8:4,11</p> <p>9:11,16,19,22</p> <p>10:18 11:1 12:4,15</p> <p>13:4,16 14:9 15:1</p> <p>15:3,9 16:18 17:17</p> <p>17:24 18:5,9,10,12</p> <p>19:1,23 20:4,11</p> <p>22:4,14,14 23:24</p> <p>23:25 24:10,10</p> <p>25:2,17 26:3,14</p> <p>27:6,19,24,25 29:2</p> <p>31:5 33:3,9,19,20</p> <p>34:16,23 35:13,14</p> <p>35:16,19,22 36:18</p> <p>37:1 38:1,7,12,20</p> <p>38:25 39:10 42:8</p>	<p>42:10,15 44:10</p> <p>45:23 46:17,19</p> <p>47:1,17,20 49:2,22</p> <p>49:23 50:2,24</p> <p>51:13,24 52:15</p> <p>53:8,18 54:3,20,22</p> <p>55:1,2,20,23 56:3</p> <p>thinks 10:9 35:5,25</p> <p>39:10 40:9 53:3</p> <p>third 18:1,12,12</p> <p>57:21</p> <p>thought 4:21 15:21</p> <p>23:8 34:2 35:17</p> <p>36:4,7,14 41:22</p> <p>50:4</p> <p>threshold 21:10</p> <p>27:12</p> <p>tie 7:8</p> <p>tied 7:9</p> <p>ties 10:6</p> <p>time 3:14 6:7 8:15</p> <p>11:23 13:22 15:2</p> <p>15:18 23:10 26:24</p> <p>28:7 29:5,25 40:2</p> <p>40:17,21,23 41:9</p> <p>41:11 50:6 51:9,12</p> <p>58:1</p> <p>told 15:12 26:9</p> <p>tough 36:16</p> <p>traceable 37:4</p> <p>track 46:9</p> <p>transcript 42:16</p> <p>treat 25:4 33:13</p> <p>44:17</p> <p>treated 34:14 40:10</p> <p>treating 43:21</p> <p>treats 34:12</p> <p>trial 9:13 17:15,21</p> <p>trigger 53:22</p> <p>true 15:23 17:12</p> <p>27:25 35:24 46:21</p> <p>54:6</p> <p>trying 13:18 43:21</p> <p>54:24</p>	<p>Tuesday 1:9</p> <p>turns 12:1</p> <p>two 7:12 33:6 34:6</p> <p>40:7 43:11 47:6,6</p> <p>51:4 55:20,22</p> <p>56:12</p> <p>typical 34:20,21,21</p> <p>U</p> <p>ultimate 7:3 14:16</p> <p>32:24</p> <p>unbelievable 56:5</p> <p>undecided 34:16</p> <p>understand 34:1</p> <p>Uniformity 48:8</p> <p>unimportant 48:18</p> <p>United 1:1,6,12 3:4</p> <p>46:4</p> <p>unquestionably 27:9</p> <p>unreasonable 27:2</p> <p>38:16,22 39:1,14</p> <p>39:17,18</p> <p>unreasonableness</p> <p>47:13</p> <p>unrelated 29:7</p> <p>untether 37:2</p> <p>unusual 39:7</p> <p>unworkable 56:1</p> <p>upward 16:24,25</p> <p>27:21</p> <p>up-to-date 32:2</p> <p>USC 3:23 4:7</p> <p>use 33:7 46:23</p> <p>V</p> <p>v 1:5 3:4 19:15</p> <p>23:23 24:9 28:15</p> <p>46:5</p> <p>variance 12:23</p> <p>16:24,25 27:22</p> <p>variances 55:20</p> <p>variations 45:12</p> <p>46:11</p> <p>varies 39:18</p>	<p>vary 33:5 46:13</p> <p>48:21 55:8</p> <p>victim 9:6 18:20</p> <p>20:17 30:5</p> <p>victims 18:24 21:25</p> <p>22:1</p> <p>view 46:20 56:11</p> <p>violate 9:9 17:19</p> <p>53:7,8</p> <p>violates 3:16 13:14</p> <p>58:20</p> <p>violating 37:13</p> <p>50:20</p> <p>violation 6:7 7:1</p> <p>8:12 10:11 12:3</p> <p>W</p> <p>wake 58:14</p> <p>want 10:7 22:10,22</p> <p>39:20 41:4,6 44:9</p> <p>44:12,14 45:7 48:2</p> <p>48:14,15,16,18</p> <p>52:1 53:15</p> <p>wanted 16:19</p> <p>wants 5:13 31:25</p> <p>Washington 1:8,15</p> <p>1:18</p> <p>wasn't 16:1 17:4</p> <p>41:24</p> <p>way 33:2,3 34:21</p> <p>35:16 36:22 37:21</p> <p>46:14 52:7 57:12</p> <p>Weaver 57:7</p> <p>weeks 47:12</p> <p>weigh 51:25</p> <p>weight 43:25</p> <p>We'll 3:3</p> <p>we're 5:13 15:4,9</p> <p>we've 33:1</p> <p>whack 50:6</p> <p>whichever 40:24</p> <p>wife 17:17</p> <p>wish 27:24</p> <p>within-guidelines</p>
---	---	---	---	--

15:15 45:19	20 11:6 16:4	7		
within-range 45:4	2009 3:12 17:6	70 3:13 14:1,25		
won 34:16	41:15 42:22	27:21 51:8		
word 33:7	2012 16:17 44:25	8		
words 23:23 53:14	55:15	80 16:11		
work 33:2,3 55:22	2013 1:9	87 3:13 14:1		
working 50:23 55:21	24 34:22	9		
works 54:22	25 14:7 49:3,14	98 58:3		
world 39:8 44:10	25-year-to-life			
worried 26:6	49:17			
worse 17:23 41:6	26 1:9			
wouldn't 10:20	28 2:7			
24:12 51:16 52:14	3			
writ 11:10	3 2:4 56:25			
written 35:14	30 11:7 15:14 47:14			
wrong 32:23 42:13	32.7 45:5			
45:17	3553 4:8 44:5			
wrote 30:3	3553(a) 41:2 43:13			
X	44:1 49:23 52:5			
x 1:2,7	3553(a)(2) 34:9			
Y	3553(a)(4) 31:25			
Yeah 11:16	3553(A)(4)(a)(2)			
year 26:1 44:25	42:20			
years 10:1 16:4 22:1	36 13:23			
22:19 48:25 49:3,6	37 3:14 4:16 6:12			
49:12,14 53:2,3,4	38 47:15			
53:7	4			
York 15:14 55:12	4 3:23 4:7 53:3			
1	40,000 27:14			
1 8:13	46 3:14 4:16 6:13			
10 38:14 39:5,9,10	47 13:24			
51:12	48.4 45:4			
10:09 1:13 3:2	5			
11:09 59:1	5 22:1 27:13 48:25			
12-62 1:4 3:4	49:6,12 53:2,4,7			
120 11:7	5-year 49:19			
18 3:23 4:7 34:22	50 16:25 27:22,22			
1998 3:13 4:13 6:11	57 2:10			
13:23 27:18 57:22	6			
2	60 14:25			
2.5 27:13,14	67 45:9			