SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

\- - - - - - - - - - - - - - - - - -

PAUL ERLINGER,)

Petitioner,)

v.) No. 23-370

UNITED STATES,)

Respondent.)

\- - - - - - - - - - - - - - - - - -

Pages: 1 through 104

Place: Washington, D.C.

Date: March 27, 2024

HERITAGE REPORTING CORPORATION

Official Reporters

1220 L Street, N.W., Suite 206

Washington, D.C. 20005

(202) 628-4888

www.hrccourtreporters.com

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - - - - - - - - - - - - - -

3 PAUL ERLINGER,)

4 Petitioner,)

5 v.) No. 23-370

6 UNITED STATES,)

7 Respondent.)

8 - - - - - - - - - - - - - - - - - -

9

10 Washington, D.C.

11 Wednesday, March 27, 2024

12

13 The above-entitled matter came on for

14 oral argument before the Supreme Court of the

15 United States at 10:06 a.m.

16

17 APPEARANCES:

18 JEFFREY L. FISHER, ESQUIRE, Menlo Park, California; on

19 behalf of the Petitioner.

20 ERIC J. FEIGIN, Deputy Solicitor General, Department

21 of Justice, Washington, D.C.; on behalf of the

22 Respondent, supporting the Petitioner.

23 D. NICK HARPER, ESQUIRE, Washington, D.C.;

24 Court-appointed amicus curiae in support of the

25 judgment below.

1 C O N T E N T S

2 ORAL ARGUMENT OF: PAGE:
3 JEFFREY L. FISHER, ESQ.
4 On behalf of the Petitioner 3
5 ORAL ARGUMENT OF:
6 ERIC J. FEIGIN, ESQ.
7 On behalf of the Respondent,
8 supporting the Petitioner 39
9 ORAL ARGUMENT OF:
10 D. NICK HARPER, ESQ.
11 Court-appointed amicus curiae
12 in support of the judgment below 70
13 REBUTTAL ARGUMENT OF:
14 JEFFREY L. FISHER, ESQ.
15 On behalf of the Petitioner 101
16
17
18
19
20
21
22
23
24
25

1 P R O C E E D I N G S
2 (10:06 a.m.)
3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 23-370,
5 Erlinger versus United States.
6 Mr. Fisher.
7 ORAL ARGUMENT OF JEFFREY L. FISHER
8 ON BEHALF OF THE PETITIONER
9 MR. FISHER: Mr. Chief Justice, and
10 may it please the Court:
11 Robust and clear precedent dictates
12 the outcome here. In case after case, this
13 Court has held that judges applying ACCA may
14 find only what crime with what -- what crime
15 with what elements a defendant was previously
16 convicted of, nothing more.
17 And the Court has grounded that rule
18 directly in the Sixth Amendment. A -- a judge
19 may not increase a defendant's sentencing range
20 based on offense-related conduct that the prior
21 jury did not need to find.
22 ACCA's occasions clause, as this Court
23 construed it in Wooden, requires exactly that
24 kind of factual inquiry. The whole point of the
25 clause, in fact, is to require something more

1 than just three convictions before an ACCA
2 sentence is imposed. As such, the Apprendi rule
3 directly applies to it.
4 That leaves amicus's objection that
5 the Court should eschew that straightforward
6 analysis because applying the Sixth Amendment
7 here would somehow harm defendants. But, as the
8 briefs filed by criminal defense organizations
9 show in this case, that concern is unfounded.
10 Guilty pleas, waivers, and
11 stipulations, in all candor, make the occasions
12 clause not really an issue that's litigated in
13 most cases. But, in the rare cases, in fact, in
14 the handful of cases a year where you're going
15 to have a defendant who disputes the -- the
16 occasions issue, as well as the underlying
17 Section 922(g) charge, bifurcation is a
18 time-honored solution that courts have already
19 shown that they can apply to resolve that
20 situation and avoid any prejudice to the
21 defendant.
22 The Court should endorse that practice
23 and reverse the court of appeals.
24 I'm happy to take the Court's
25 questions.

1 JUSTICE THOMAS: Mr. Fisher, wouldn't
2 it be more straightforward to overrule
3 Almendarez-Torres?
4 MR. FISHER: Obviously, that's one
5 thing the Court could do if and when necessary,
6 but I --
7 JUSTICE THOMAS: Well, do you think we
8 should?
9 MR. FISHER: I think the Court should
10 someday, but I don't know the Court needs to do
11 it in this case. I think that -- our position
12 in this case is what the Court has already said
13 in Mathis and Descamps makes perfectly clear
14 that the occasions clause falls outside of
15 Almendarez-Torres, and I think, you know, the
16 reason we didn't brief the case that way is
17 because the Court's ordinary practice is not to
18 consider overruling a case unless you had to.
19 JUSTICE THOMAS: But don't you have --
20 it -- it seems that you and the government can
21 agree where you draw the line, right?
22 MR. FISHER: I think, Justice Thomas,
23 we agree on a whole lot. So we agree that the
24 test is whether or not it -- the fact at issue
25 is part of the prior conviction. And the

1 government uses the word "integral" to the prior
2 conviction. We think "inherent" in the prior
3 conviction.
4 So we agree with the test. We do have
5 some quibbles perhaps on the margins of how that
6 test would apply, but, again, this case wouldn't
7 present any of those issues.
8 JUSTICE ALITO: Well,
9 Almendarez-Torres is a -- an established
10 principle of -- an -- an established precedent
11 of the Court that's been relied upon and
12 reaffirmed in subsequent cases, so if we were to
13 reexamine that, would it then be appropriate to
14 reexamine the entire question that was opened up
15 in Apprendi? Or you -- would you just like us
16 to open up the part that might yield a decision
17 that's favorable to you?
18 MR. FISHER: Well, I'm not even asking
19 you to do that today, Justice Alito.
20 JUSTICE ALITO: Well, you --
21 MR. FISHER: But, if you -- but, if
22 you did, I suppose fair is fair.
23 JUSTICE ALITO: -- you -- you sort of
24 took -- you sort of took Justice Thomas's bait.
25 MR. FISHER: I --

1 (Laughter.)
2 MR. FISHER: -- I -- I -- I suppose
3 fair would be fair and the Court could go back
4 to first principles, and I think those first
5 principles, as the Court -- as the Court's
6 opinions in Apprendi showed, you know, would
7 dictate the right to jury trial applies in -- to
8 all facts necessary to include in --
9 JUSTICE ALITO: Well, that remains to
10 be seen, but anyway, when you --
11 CHIEF JUSTICE ROBERTS: Well, but --
12 I'm sorry.
13 JUSTICE ALITO: I'm sorry.
14 CHIEF JUSTICE ROBERTS: Go ahead.
15 JUSTICE ALITO: When -- when -- when
16 you say that we should say something favorable
17 about bifurcation, do you mean we should just
18 say that it's a discretionary determination for
19 trial judges, or you want us to hint more than
20 that?
21 MR. FISHER: Well, I think, as I
22 understand the argument on the other side, it's
23 that you should not apply the Sixth Amendment
24 here because it would prejudice defendants. And
25 so there's a ready answer to that question,

1 which is bifurcation. It's the time-honored
2 solution Justice Thomas identified in his
3 Apprendi concurrence and we show in the papers
4 has been endorsed by the Court in the past.
5 I think the Spencer versus Texas case
6 from nine -- from the '60s was one in which the
7 Court, I think, gently endorsed bifurcation, and
8 that was a state case. This is a federal case.
9 And so I think the Court, if it wanted to,
10 could -- could express a little more support for
11 that.
12 I'd -- frankly, I don't know what the
13 argument would be against bifurcation, Justice
14 Alito. As I said, there are only a handful of
15 cases a year where this is even going to arise.
16 There are fewer -- right now, there are fewer
17 than 200 ACCA cases a year, and, of course, most
18 of those are plea bargains.
19 So there's only a handful of cases a
20 year. And bifurcation occurs in things like
21 criminal forfeiture, it occurs in all kinds of
22 civil cases, and so just to move the fact
23 finding from the judge over to the jury, I don't
24 think it's very much to ask.
25 JUSTICE KAVANAUGH: The -- the broader

1 argument on the other side by the amicus is that
2 the historical practice is much more mixed and
3 that there were a variety of practices in the
4 1800s and earlier --
5 MR. FISHER: Yeah.
6 JUSTICE KAVANAUGH: -- 1900s on this
7 question and that recidivism, the question of
8 whether a defendant committed prior offenses,
9 was not routinely put before juries, in part
10 because it was related to punishment and in part
11 because it was perceived as different, because
12 it's harmful to defendants in most cases to have
13 it paraded before the jury.
14 So that historical practice, I'm -- I
15 think, because it's mixed, actually supports
16 Almendarez-Torres and supports, arguably, the
17 amicus says -- I want to get your response --
18 the -- what -- the approach that they're
19 suggesting here, that Descamps and Mathis were
20 statutory cases, not constitutional cases.
21 Your response?
22 MR. FISHER: Right. So I think the
23 history question is an important one, and then
24 I'll turn to Descamps and Mathis. And starting
25 with the -- the way you should answer -- the

1 look at the history question, we think, after
2 Gaudin and Apprendi, the question would be
3 whether amicus can show a uniform or
4 near-uniform --
5 JUSTICE KAVANAUGH: Why --
6 MR. FISHER: -- historical tradition.
7 JUSTICE KAVANAUGH: -- why is that?
8 So I'm sorry to interrupt.
9 MR. FISHER: Yeah.
10 JUSTICE KAVANAUGH: But that's a key
11 point.
12 MR. FISHER: I -- I --
13 JUSTICE KAVANAUGH: I think it's the
14 -- the burden usually to establish a
15 constitutional right because it's not in the
16 text. The text, we have to -- and, therefore,
17 we have to look at what the understanding of
18 that text was, and we look at historical --
19 MR. FISHER: Yeah.
20 JUSTICE KAVANAUGH: -- practice, and
21 it would seem to me, to get something
22 established in the Constitution, you would need
23 to show more of a uniform historical practice,
24 which I think some of the prior writings and
25 commentary has assumed. But, when you get --

1 when you get into it, it's a more mixed picture,
2 I think.
3 MR. FISHER: So, Justice Kavanaugh --
4 JUSTICE KAVANAUGH: So those are two
5 different questions.
6 MR. FISHER: No, I think there's a lot
7 there and we want to work through it. And --
8 and I will say, to cut to the chase, I think
9 whatever test you apply on the history and
10 tradition, we're going to win, but I think what
11 the test is is -- is perhaps an important
12 question for the future.
13 And if you look at Gaudin, that's a
14 Sixth Amendment jury trial case, and what the
15 Court says is, to carve out an exception from
16 the general rule that the jury has to find all
17 the elements, the government in that case or the
18 other side has to show an overwhelming history
19 and tradition.
20 And I think, once Apprendi extended
21 the Gaudin all elements rule to any fact that
22 increases a sentence and creates what the
23 Apprendi Court itself called the general rule,
24 subject only to the exception of
25 Almendarez-Torres, then --

1 JUSTICE KAVANAUGH: Well --
2 MR. FISHER: -- to fall in that
3 exception, I think you have to make the
4 Gaudin text point, but let me --
5 JUSTICE KAVANAUGH: -- as you well
6 know, whether you call it the rule or the
7 exception kind of loads the dice, but the
8 established principle in some states from --
9 from early on in our history was that these --
10 these issues were not put -- put before the
11 jury. You can call that the exception or the
12 rule. But recidivism was not put before the
13 jury precisely because it's so harmful and is --
14 MR. FISHER: Well, Justice Kavanaugh,
15 let's just cut right to that then.
16 JUSTICE KAVANAUGH: Yeah.
17 MR. FISHER: I think the amicus has
18 identified only four states where recidivism was
19 put to the judge instead of the jury when it
20 increases a defendant's sentence --
21 JUSTICE KAVANAUGH: Right. And there
22 --
23 MR. FISHER: -- up until the mid -- up
24 until the 20th Century.
25 JUSTICE KAVANAUGH: Right. And there

1 weren't --
2 MR. FISHER: And I think that's a --
3 JUSTICE KAVANAUGH: -- 50 then, so
4 four out of, you know, whatever it was.
5 MR. FISHER: Four out of -- by the
6 time -- all the way into the 1920s --
7 JUSTICE KAVANAUGH: Yeah.
8 MR. FISHER: -- four states. And then
9 I don't think that's enough to show any kind of
10 meaningful history. And, again, that's just on
11 the Almendarez-Torres question, Justice
12 Kavanaugh.
13 JUSTICE KAVANAUGH: Yeah.
14 MR. FISHER: As to the different
15 occasions type question that you have in front
16 of you in this case, there is a sum and total of
17 zero states up until 1929 that required any sort
18 of finding like this that was allowed to be made
19 by the -- by a judge instead of a jury.
20 So what amicus has done is cobbled
21 together four states that would just, you know,
22 cut against overruling Almendarez-Torres and
23 then a handful of other states with a few other
24 kinds of findings here and there that are not
25 offense-related conduct findings, which is what

1 you have here.
2 The, you know, amicus, I think the
3 only other category of findings that amicus is
4 really able to put much together on is the date
5 of a prior conviction for -- for -- for --
6 for understanding that it's a prior conviction
7 or a second conviction or that sort of thing.
8 But, again, that has to do with the inherent
9 nature of the conviction. It's not anything to
10 do with the offense-related conduct.
11 And so that's what makes this an easy
12 case. Whether you do it under Descamps and
13 Mathis -- and I'll come to that in a minute
14 because you asked me whether those are just
15 statutory -- but the rule in those cases or just
16 first principles, history and tradition, you
17 land in the same spot.
18 So let me turn to Descamps and Mathis
19 -- Mathis then because you asked that as well.
20 We think the Court, to use the Court's own words
21 in Mathis, said what it meant in those cases,
22 and the Court was very clear that one of the
23 three reasons why the categorical approach was
24 construed the way and -- and applied the way it
25 was was because of the "serious Sixth Amendment

1 concerns that would arise," and the Court, I
2 think, even went a step further in Mathis and
3 expressed an unambiguous rule in Sixth Amendment
4 terms that any facts beyond the elements of the
5 prior offense that are related to the conduct of
6 that prior offense have to be made by the jury
7 and cannot be made by the judge. And that's
8 stated unequivocally in Sixth Amendment terms in
9 the Mathis opinion.
10 JUSTICE JACKSON: Can I ask --
11 JUSTICE BARRETT: Mr. Fisher, can you
12 maybe address what history and tradition are on
13 your side? Because Justice Kavanaugh's question
14 said, oh, it will be loading -- loading the dice
15 if you say that it's amicus's burden to show the
16 history and tradition. So can you talk about
17 the history and tradition of fact finding by the
18 jury in cases of recidivism that supports your
19 side?
20 MR. FISHER: Yeah. So that's laid out
21 quite thoroughly in our blue brief, that even
22 when it came to a prior conviction itself, the
23 overwhelming practice was for the jury to make
24 those findings, and that's laid out quite
25 thoroughly in our brief. I don't think there's

1 a dispute that that was the common law rule.
2 And -- and any other fact that amicus
3 identifies, the answer is the same.
4 And, Justice Barrett, I think
5 something else that's important to understand is
6 that the occasions inquiry in this case, you
7 know, arose from some 1960s reform movements
8 about recidivism statutes, so there is no direct
9 analogue from history because this is a
10 innovation of the '60s and beyond. And so --
11 and so it's really amicus that would depart from
12 history by letting this fact be found by the --
13 the judge instead of the jury.
14 JUSTICE BARRETT: One other question.
15 Do you agree with the government amicus that the
16 harmless error analysis would apply?
17 MR. FISHER: Yes. I think Neder --
18 JUSTICE BARRETT: I thought that.
19 MR. FISHER: -- dictates that harmless
20 error would apply in these cases, and so I think
21 there's -- this case would be one of some
22 pipeline cases that would be decided by lower
23 courts on a harmless error.
24 Obviously, once you establish this
25 rule, I don't think that's going to be much of

1 an issue even going forward.
2 JUSTICE JACKSON: Can I ask --
3 JUSTICE GORSUCH: No, please go ahead.
4 JUSTICE JACKSON: Yes. I just wanted
5 to know, if there is a history and tradition of
6 fact finding by the jury with respect to
7 recidivism, which I understood your answer to
8 Justice Barrett to be that that's the case, how
9 -- what is the basis then for the
10 Almendarez-Torres carveout? Like, why do we
11 have that?
12 MR. FISHER: I think for two reasons
13 as I understand the Court's jurisprudence. One
14 is, in Almendarez-Torres, the Court did talk
15 about a tradition of judicial fact finding when
16 it came to prior convictions. The problem, I
17 think, is that it's a more recent tradition.
18 It's not the kind of tradition the Court
19 typically looks to nowadays, but there was a
20 recent tradition of judicial fact finding.
21 And, secondly, the Court explained in
22 Apprendi that at least when it comes to the fact
23 of a prior conviction, which is to say the
24 elements in -- and nothing more, you have prior
25 procedural protections in the form of a jury

1 right in that prior adjudication that are --
2 that -- that are different from any other fact
3 like the one here.
4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.
6 Justice Thomas?
7 Justice Alito?
8 JUSTICE ALITO: I have a few questions
9 about how trials would be conducted if you
10 prevail here. So what -- how would the
11 government be able to go about proving that an
12 offense -- that if -- that a series of offenses
13 occurred on the same conviction? I -- I assume
14 they can introduce the judgment of conviction in
15 all of those offenses, right?
16 MR. FISHER: Yes.
17 JUSTICE ALITO: Can they introduce the
18 charging documents, which would typically say,
19 on or about March 27, 2024, so-and-so broke into
20 a house and burglarized it?
21 MR. FISHER: I think the charging
22 documents are harder, Justice Alito, because
23 they would -- might be hearsay or the like. I
24 mean, they might -- so, for the truth of the
25 matter asserted in those charging documents, I

1 think the government might have a problem, but
2 --
3 JUSTICE ALITO: Well, what if they're
4 --
5 MR. FISHER: -- most of these cases --
6 sorry.
7 JUSTICE ALITO: What if they're not
8 introduced for the truth of the matter asserted,
9 they are introduced for the truth of the fact
10 that this is what the person was charged with?
11 MR. FISHER: I -- I think perhaps.
12 That's something I've tried to research and just
13 haven't found much law on. Something else I
14 would add, though, is plea colloquies is going
15 to be a -- is -- is going to be --
16 JUSTICE ALITO: Plea colloquy --
17 MR. FISHER: -- obviously, most of
18 these cases are pleas --
19 JUSTICE ALITO: Plea colloquies would
20 --
21 MR. FISHER: -- and the defendant's
22 own admissions in plea colloquies.
23 JUSTICE ALITO: -- they would be
24 admissible?
25 MR. FISHER: Yes.

1 JUSTICE ALITO: And jury instructions
2 would be admissible, so if the jury is
3 instructed on Count I you must find that on or
4 about March 27, blah, blah, blah --
5 MR. FISHER: I think jury --
6 JUSTICE ALITO: -- that would be
7 admissible?
8 MR. FISHER: I think the jury
9 instructions might be admissible.
10 JUSTICE ALITO: It's a court document?
11 MR. FISHER: I -- I -- I think -- I
12 think -- and, basically, what I would tell the
13 Court is, you know, the Federal Rules of
14 Evidence have many provisions about official
15 records and court records and prior testimony
16 and the like, and so, you know, those rules and
17 precedent are readily -- readily available to
18 administer this rule.
19 JUSTICE ALITO: Okay. What about the
20 question of how the jury would be instructed on
21 the question of whether prior offenses occurred
22 on the same occasion? That was a -- a vexing
23 issue in Wooden and I think the Court's opinion
24 was well-crafted and nuanced, but it -- I would
25 be hard-pressed to reduce it to an instruction

1 that would be easily intelligible to a jury.
2 It's a multi-factor question.
3 MR. FISHER: I think the jury
4 instruction --
5 JUSTICE ALITO: Have you given any --
6 could you give us a model jury instruction on
7 this or do you have some idea how -- how a jury
8 could grapple with this question?
9 MR. FISHER: I think those exist,
10 Justice Alito, and they just mostly track the
11 language in the Court's opinion. So the
12 question for the jury overall, of course, is
13 whether these prior offenses were committed on
14 different occasions, which, as the Court put it
15 in that case, turns on whether it was a single
16 criminal episode or not, and then there are the
17 factors, temporal proximity, geographic
18 proximity, and the nature and relationship to
19 the offense.
20 I think it's similar to other kinds of
21 qualitative elements that juries sometimes find.
22 Mens rea can sometimes be highly qualitative.
23 Materiality in a fraud case can be -- can be
24 multi-factored in certain ways. So --
25 JUSTICE ALITO: But those are not

1 multi--- that's not a multi-factor
2 determination. Mens rea, you're -- you're
3 asking the jury to determine what is in the
4 defendant's mind. People make judgments about
5 what is in the mind of other people all the
6 time. That's a -- that's a common experience.
7 MR. FISHER: I -- I think what you had
8 --
9 JUSTICE ALITO: Materiality -- I can't
10 think of something offhand -- maybe you can --
11 that's -- that's quite as multi-dimensional and
12 nuanced as this.
13 MR. FISHER: Well, I think maybe one
14 way to think about it, Justice Alito, is you
15 have -- you have a top-line finding that needs
16 to be made, which is different occasions or a
17 single criminal episode, and then you have
18 subsidiary facts that feed into that ultimate
19 finding.
20 And that's just -- you know, that's
21 like most of the things, I think, we were just
22 talking about, which is a top-line finding and
23 then subsidiary facts. And just so you have an
24 opinion in Wooden itself that makes -- you know,
25 kind of lays out those various facts, and so the

1 jury could be instructed to consider those
2 things.
3 JUSTICE ALITO: So the judge says the
4 temporal factor, I don't want to dwell too much
5 on this, but it -- it would -- it will turn out
6 to be important if you prevail. Temporal
7 proximity is important. And so then the jury
8 says: Well, what does that mean? They were --
9 they had to occur on different days, different
10 weeks? And what's the judge supposed to say?
11 MR. FISHER: I don't think --
12 JUSTICE ALITO: Well, that's up to
13 you?
14 MR. FISHER: I think that's right.
15 And I think the judge would say --
16 JUSTICE ALITO: It's up to you?
17 MR. FISHER: -- in that situation
18 something like, the ultimate question you're
19 asking is whether this is a single criminal
20 episode or not when you come -- when you
21 consider these three prior offenses.
22 JUSTICE ALITO: Yeah -- so then they
23 say, well, what is assumed -- what is a -- a
24 criminal episode? How do you define a criminal
25 episode? DIG that?

1 MR. FISHER: I think we're doing the
2 Wooden argument again.
3 JUSTICE ALITO: I know. That's the
4 problem.
5 (Laughter.)
6 MR. FISHER: Well, I think an -- I
7 think an episode involves sort of a -- a -- a --
8 a single coherent, you know, plan or experience
9 or event. We -- we --
10 JUSTICE ALITO: Like a whole RICO
11 enterprise. That's a single criminal episode?
12 MR. FISHER: I don't think so. I
13 think there's, you know, temporal -- I think
14 there are limits temporally, but I don't think
15 -- as the Court itself went back and forth at
16 the oral argument in Wooden, I don't think it's
17 necessarily a single day or a single -- single
18 place. I think the qualitative nature of a
19 single episode allows for a little bit more than
20 that.
21 JUSTICE ALITO: Thank you.
22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?
24 JUSTICE SOTOMAYOR: Mr. Fisher, do you
25 have -- the SG is suggesting, as you are, that

1 we remand for the lower court to do the harmless
2 error analysis. And that's what we generally
3 do.
4 MR. FISHER: Right.
5 JUSTICE SOTOMAYOR: But amici wants us
6 to address it. Do you have a viable argument
7 below?
8 MR. FISHER: Oh, yes, we do. We -- we
9 have -- what's at issue in this case are three
10 convictions over eight days allegedly in the
11 same place, allegedly over eight days in the
12 same place, all for -- for --
13 JUSTICE SOTOMAYOR: Same city, not the
14 same place. It wasn't the same. One was a
15 pizzeria. Another --
16 MR. FISHER: Yes. Forgive me. That's
17 what I meant to say. Yes, that's what's
18 alleged. And so, just as I was describing to
19 Justice Alito, I think you could have a
20 situation where imagine somebody, you know, had
21 to pay a debt and so, to -- to -- to get money
22 to pay that gambling debt, they conducted a
23 string of burglaries over a few days of various
24 commercial establishments.
25 I think a jury could -- a rational

1 jury could find that's a single criminal
2 episode, especially against the backdrop of what
3 ACCA is trying to accomplish with the different
4 occasions clause.
5 What -- remember, what you're trying
6 to accomplish is identifying career offenders,
7 people who have a long practice of offending.
8 And so somebody who goes on a single bender or
9 executes a single plan is not the kind of person
10 that ACCA seems to be trying to identify.
11 JUSTICE SOTOMAYOR: Thank you.
12 CHIEF JUSTICE ROBERTS: Justice Kagan?
13 JUSTICE KAGAN: There's been some talk
14 in the briefs about the exact scope of the
15 Almendarez-Torres exception. Do those questions
16 get litigated, or are they entirely academic,
17 and does it matter, the exact scope for this
18 case?
19 MR. FISHER: It doesn't matter, the
20 exact scope for this case, because all the Court
21 has to do is apply the rule that's announced in
22 Descamps and Mathis, which is any
23 offense-related conduct that goes beyond the
24 elements is covered by Apprendi, not
25 Almendarez-Torres. That's enough to decide this

1 case.

2 So, Justice Kagan, there are a few

3 other facts. Candidly, there are not very many

4 cases about them because there aren't very many

5 recidivist statutes that deal with something

6 like the date of the offense or other kinds of

7 facts that are about -- I'm not going to say

8 never, but there is very little case law on it.

9 And something like, you know, these

10 other kind of facts are -- are, again, rarely

11 going to be litigated because the defendant may

12 not have any legitimate argument when it comes

13 to, you know, these other kind of facts.

14 CHIEF JUSTICE ROBERTS: Justice

15 Gorsuch?

16 JUSTICE GORSUCH: I just want to

17 explore a little bit about what happens on

18 remand, not that we need to address it but just

19 to pick your brain for a minute.

20 MR. FISHER: Yeah.

21 JUSTICE GORSUCH: Our line between

22 what is susceptible to harmless error review and

23 what is structural error, I confess, sometimes

24 defies me. On the one hand, it's structural

25 error if -- if you don't have a reasonable doubt

1 instruction or if you've been denied your choice
2 of counsel. On the other hand, it's susceptible
3 to harmless error review if you didn't instruct
4 the jury with respect to an element of the crime
5 or if there's a variance.
6 MR. FISHER: Right.
7 JUSTICE GORSUCH: Here, we have the
8 plea bargaining context, so we don't even have a
9 trial record to analyze for harmless error
10 review. So I'm -- I'm a bit uncertain how one
11 would do harmless error review, other than look
12 at the very records that you want to be able to
13 challenge before a jury, right?
14 You -- you -- you may be taking
15 judicial notice that he did it on such and such
16 a date and he did this in -- in a certain place.
17 MR. FISHER: Right.
18 JUSTICE GORSUCH: How does that work?
19 How do you do harmless error review when you
20 don't have a trial record? And -- let me add
21 one more thing in there, a lot, I know -- here,
22 your client pleaded to an information that
23 listed as the ACCA predicate offense different
24 crimes, so he didn't even have notice that the
25 government was going to reach back to when he

1 was 18 or thereabouts for this string of
2 burglaries to enhance his sentence by 15 years.
3 And he's now in his mid 40s so that he'll never
4 -- he won't get out of prison until he's in his
5 -- maybe 60 or so.
6 And how -- how do we analyze, oh, it
7 was harmless that he didn't even know what he
8 was pleading guilty to?
9 MR. FISHER: I think you're right
10 there are challenges even with conducting a
11 Neder-type harmless error analysis after a jury
12 verdict. Justice Scalia pointed out in dissent
13 in that case that becomes a very difficult
14 speculative enterprise. Of course, the majority
15 of the Court disagreed. And the Court has also
16 disagreed when it comes to indictments.
17 So I don't want to butt myself up too
18 hard against the Court's precedent, but I do
19 think you make a good point that when it comes
20 to cases where you have plea bargains, the
21 question whether a jury might have found
22 something or not requires, a -- you know, a very
23 unusual showing on the government's part that
24 it's absolutely so clear based on the kind of
25 documents that we all agree a court can look at

1 under the Almendarez-Torres exception itself.
2 So you're going to have some cases
3 where the dates of conviction are so far apart
4 or other things like that that I think, you
5 know, are going to be harmless, but I -- I think
6 that just bolsters my answer to Justice
7 Sotomayor as to why we have a serious harmless
8 error -- or not harmless error argument on
9 remand.
10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?
12 JUSTICE KAVANAUGH: On both Justice
13 Alito's questions about instructions and Justice
14 Gorsuch's question there, Wooden said courts
15 "have nearly always treated offenses as
16 occurring on separate occasions if a person
17 committed them a day or more apart or a
18 significant distance." That's still good law,
19 correct?
20 MR. FISHER: Of course. Yeah.
21 JUSTICE KAVANAUGH: And --
22 MR. FISHER: "Nearly always," I think,
23 is the -- is the phrase there.
24 JUSTICE KAVANAUGH: Okay. Then,
25 second question, Descamps and Mathis, obviously,

1 didn't affect the states' criminal justice
2 systems. Our holding here will cause states to
3 have to revamp their recidivism practices, so
4 that strikes me as something we didn't even
5 contemplate in Mathis and Descamps.
6 You're saying, I think, they're fueled
7 by constitutional concerns. But they didn't
8 actually -- amicus makes this point -- address
9 the constitutional question, correct?
10 MR. FISHER: Well, I -- I think they
11 did address the constitutional question. I
12 grant you they also, you know, grounded the case
13 in statutory analysis. But, as to the effect on
14 the states, there are a handful of states only
15 that have anything like a different occasions
16 kind of finding. Obviously, if you overruled
17 Almendarez-Torres, that would have a bigger
18 effect on the states.
19 But you have only a hand -- a small
20 handful of states that have a finding anything
21 like this, Justice Kavanaugh, and that's, I -- I
22 would just submit, quite small potatoes compared
23 to what the Court has done in other Apprendi
24 cases, you know, and required the states to do
25 in reaction. And I think it's probably telling

1 that you don't even have a state's amicus brief
2 in this case, and it's because it would be so
3 easy for states to just engraft the jury
4 procedure onto the existing structures you
5 already have.
6 JUSTICE KAVANAUGH: And last question.
7 What about the concern raised by Judge Bibas in
8 his article that amicus cites that because of
9 the prevalence of plea bargaining that goes on,
10 that having this as an element of the offense
11 will actually be problematic for criminal
12 defendants?
13 I know you have the amicus briefs on
14 the other side, but I just want you, since it's
15 --
16 MR. FISHER: Yeah.
17 JUSTICE KAVANAUGH: -- raised by
18 amicus here, to respond to that.
19 MR. FISHER: Right. I think the NAFD
20 brief actually deals with the plea bargaining
21 dynamics that follow from a holding in our favor
22 here, and they're actually good, because the
23 problem with felon-in-possession cases where
24 ACCA is a -- is a -- is a -- is a kicker on the
25 back end is that there's nothing to plead to

1 because the -- before Wooden and hopefully this
2 case, you know, the -- the probation officer
3 could just tell the judge you have to increase
4 the sentence, the defendant had no fair notice
5 and -- and -- and no way to defend, no -- no way
6 -- nothing to bargain with, is -- is what I mean
7 to say.
8 And so, if you look at actually
9 statistics, 14 percent of felon-in-possession
10 cases go to trial. That's a very high number
11 for the federal system. Here, if you were to
12 say that the different occasions clause is an
13 element, that then puts prosecutorial discretion
14 in the government's hands and gives the
15 defendant something to bargain with the
16 government with. So you can have in the future
17 defendants who plead guilty to the underlying
18 922(g) charge who would not have done so in the
19 past in exchange for taking the ACCA enhancement
20 off the table.
21 And one last thing about that.
22 Remember, at the time this case was litigated,
23 the -- the maximum punishment for 922(g) was 10
24 years. Now it's 15 years. So those -- that
25 actual change in law and the dynamics that would

1 follow from a decision in our favor actually,
2 you know, -- enforce, you know, bolster the plea
3 bargaining process.
4 JUSTICE KAVANAUGH: Thank you.
5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?
7 JUSTICE BARRETT: No.
8 CHIEF JUSTICE ROBERTS: Justice
9 Jackson?
10 JUSTICE JACKSON: So is there any
11 distinction between your position and the SG's
12 position, and, if so, can you just zero in on
13 it?
14 MR. FISHER: There's no difference in
15 this case.
16 JUSTICE JACKSON: Okay.
17 MR. FISHER: There's no difference as
18 to what the rule that you should apply in this
19 case is, which is any offense-related conduct
20 beyond the elements of the crime are subject to
21 Apprendi and not Almendarez-Torres.
22 The only differences that I can
23 discern in the briefing between our position and
24 the SG are a few borderline in-between question
25 -- questions about how you apply that test to

1 particular facts.
2 So there's offense -- the -- the date
3 of the offense, I think, is something the
4 Solicitor General suggests might be within the
5 prior conviction exception. We don't think it
6 is because the date of the offense is not an
7 element of the crime. It's not something a
8 prior jury would have had to find.
9 JUSTICE JACKSON: Does that suggest
10 that the -- the sort of future work of this
11 Court and other courts is going to be to have to
12 identify which facts go to the judge and go to
13 the jury? I mean, are -- are we at that level?
14 It seems at least the other side has a sort of
15 simpler conception of this, which is recidivism,
16 put it in the bucket of Almendarez-Torres.
17 MR. FISHER: Well, it might be simpler
18 to say any fact about a prior conviction, using
19 a gun, vulnerable victim, whatever you could
20 imagine, would be called within recidivism. I
21 just think that's so at odds with the Court's
22 Apprendi jurisprudence that that option is just
23 not on the table as a matter of stare decisis.
24 JUSTICE JACKSON: Well, let me ask you
25 another question about that option --

1 MR. FISHER: Yeah.
2 JUSTICE JACKSON: -- which is it seems
3 very complex. This is going back to Justice
4 Alito's line of questions. I -- I totally
5 understand your point, I understand the
6 precedents, but we do have this
7 Almendarez-Torres carveout, and part of this
8 case is -- is understanding its scope and
9 whether or not this kind of thing should fit --
10 does fit in it as a matter of precedent or
11 should fit in it given all of the various ways
12 in which this could go.
13 And one concern I have is that I
14 think, when we're talking about two different
15 sets of facts with respect to the jury, there
16 is, like, added complexity. What I mean by that
17 is we have the facts that relate to the charged
18 crime, today's charged crime in this case, it's
19 the 924(g), but we also have facts that relate
20 to past crimes that this defendant was convict
21 -- convicted of committing, and I guess I'm just
22 trying to understand how today's jury
23 adjudicates past crime facts.
24 So are they limited to the record that
25 was presented to the original jury on those

1 facts? Can new evidence come in related to
2 crimes that happened 20 years ago as we try to
3 figure out whether they happened on a -- a
4 single occasion, or how does this work?
5 MR. FISHER: So, remember, if you
6 bifurcate, the jury's not doing the two things
7 at the same time. They're doing the -- they're
8 doing the 922(g).
9 JUSTICE JACKSON: Yes.
10 MR. FISHER: And then -- and then
11 they're having a separate proceeding.
12 JUSTICE JACKSON: Right.
13 MR. FISHER: In that separate
14 proceeding, I do think other evidence could come
15 in beyond the -- beyond the record that was
16 established in the initial conviction because
17 the way I think Congress drafted this, was
18 committed on separate occasions, is an
19 open-ended fact finding.
20 JUSTICE JACKSON: So we're -- how do
21 we keep this from being just like many retrials
22 of the whole -- are you saying we have to have
23 the evidence with respect --
24 MR. FISHER: Well, remember, Justice
25 Jackson --

1 JUSTICE JACKSON: Yeah.
2 MR. FISHER: -- you're having that
3 inquiry regardless. It's just whether or not
4 the judge or the jury is going to make the
5 finding.
6 JUSTICE JACKSON: Hmm.
7 MR. FISHER: Now, if the jury's making
8 the finding, the Rule of Evidence applies in
9 ways it doesn't to the judge. But the -- all
10 the litigation is going to happen regardless.
11 It's just who's making the fact finding.
12 And I think you -- I want to come back
13 to your other question quickly.
14 JUSTICE JACKSON: Yes.
15 MR. FISHER: You asked about are we
16 going to have these borderline Almendarez-Torres
17 cases coming back to you. I don't think that's
18 necessarily the case. I won't say it's
19 impossible, but this is my answer to Justice
20 Kagan. There are very few states that have or
21 -- or in the federal code that have facts beyond
22 the prior conviction itself that trigger
23 enhancements that are -- that are currently in
24 the law found by judges. So I think it's very
25 uncommon.

1 And, of course, there will be further
2 guidance presumably in this opinion for -- for
3 -- for federal and state judges, so I think it's
4 very unlikely you're going to see additional
5 cases just because those laws are so uncommon.
6 JUSTICE JACKSON: Thank you.
7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.
9 Mr. Feigin.
10 ORAL ARGUMENT OF ERIC J. FEIGIN ON
11 BEHALF OF THE RESPONDENT,
12 SUPPORTING THE PETITIONER
13 MR. FEIGIN: Thank you, Mr. Chief
14 Justice, and may it please the Court:
15 As I think the colloquy so far this
16 morning has demonstrated, as -- as we see it,
17 this case boils down to an unavoidable
18 syllogism, which is that under Wooden, the
19 different occasions finding under the ACCA
20 requires a multi-factored inquiry involving the
21 timing, the proximity of location, and the
22 character and relationship of prior offenses,
23 whereas the Sixth Amendment prohibits, to use
24 the words in Mathis, exploring the manner in
25 which a prior conviction's offense occurred.

1 And we therefore think that because a
2 district judge is disempowered from doing it,
3 the only option left is that the jury has to do
4 it, and so we have acknowledged that a -- a jury
5 would need to do that.
6 I'm happy to take the Court's
7 questions, but I don't think the Court needs to
8 or, frankly, should say much more than that to
9 resolve this case.
10 JUSTICE THOMAS: Well, wouldn't it be
11 cleaner, though, to just simply overrule
12 Almendarez-Torres?
13 MR. FEIGIN: I had a suspicion you
14 might ask me that question, Justice Thomas.
15 (Laughter.)
16 MR. FEIGIN: And as you might
17 anticipate, your suspicion might have been my
18 answer is no, and the reason why is that we
19 don't -- we -- we think Almendarez-Torres is
20 correct, but it's also a precedent this Court
21 has adhered to for 25 years post-Apprendi,
22 always acknowledging this.
23 Nobody's asked the Court to overrule
24 it in this case. There's no need for the Court
25 to overrule it in this case. And we therefore

1 just leave it the way it is.
2 To address some of the questioning
3 from Justice Jackson and I think maybe Justice
4 Kagan, we don't think very many
5 Almendarez-Torres questions are really going to
6 come up in practice. We do think that it means
7 a bit more than I think my friend thinks it
8 means, but our principal interest here is
9 actually in the type of cases that are currently
10 before the Court in the Brown and Jackson cases,
11 which involve the comparison of state predicates
12 to federal predicates and some timing questions
13 that come up with those.
14 And that situation's already covered
15 by McNeill. It's clear that a court can find
16 what version of the statute was applied to the
17 defendant at the time of the prior conviction,
18 so --
19 JUSTICE KAVANAUGH: Do you want to say
20 why you think Almendarez-Torres is correct?
21 MR. FEIGIN: Well, Your Honor, I -- I
22 don't really want to turn this into relitigation
23 of Almendarez-Torres, which, again, even
24 Petitioner has not asked for, but we think the
25 Court was correct. There are more states that I

1 think support that than my friend was -- would
2 acknowledge.
3 There are -- there's some clear
4 precedent from Alabama, Louisiana, South
5 Carolina, and Kansas. There are the superseding
6 indictment statutes out of Virginia, West
7 Virginia, Maine, and Massachusetts.
8 And although some of those statutes
9 allowed for jury trials on the back end, the --
10 that was all historical evidence that was in
11 front of the Court in Almendarez-Torres, and the
12 Court found that -- and this goes to some of
13 your earlier questioning, Justice Kavanaugh --
14 that there was at least enough non-uniformity on
15 the issue to allow legislatures some wiggle room
16 on this topic, which, again, Almendarez --
17 JUSTICE KAVANAUGH: Who do you think
18 has the burden on the historical practice?
19 MR. FEIGIN: Well, Your Honor, it's --
20 it's a little bit of do you want to see two
21 faces or a vase. I think, as we view it --
22 JUSTICE KAVANAUGH: I -- I'm going to
23 need more than that.
24 (Laughter.)
25 MR. FEIGIN: Yeah. I -- I -- I

1 thought you might. I think, as we view it, the
2 Court made a move in Apprendi that I think your
3 colloquy with Mr. Fisher illustrated, the Court
4 made a move in Apprendi to extend the Sixth
5 Amendment's treatment of things as an element to
6 various features of criminal statutes that the
7 legislature intended as sentencing factors.
8 And I think we would take the view
9 that that -- viewing that as somewhat of an
10 extension of what the Sixth Amendment literally
11 demands, that there wouldn't be any burden on us
12 to show unanimous or near unanimous practice.
13 So long as, as we think the history indicates,
14 this was left to the legislature to describe, we
15 think the legislature would retain that room
16 today.
17 But, again, the Court doesn't need to
18 get into any of this today. It is clear from
19 the historical practice that there's really
20 nothing like this. At most, the amicus marshals
21 some decisions that show beyond simply
22 reaffirming the correctness of
23 Almendarez-Torres, that show that district
24 courts or trial courts could conduct some sort
25 of sequencing determination, which we think a

1 court can do because it can find the time of the
2 prior offense, but, at the very least, can find
3 the time of the prior conviction.
4 And even those cases are relatively
5 modern. There is -- only South Carolina so far
6 as we can tell under a 1955 statute and a 1972
7 decision has allowed for litigation in front of
8 a judge of the type of thing that the different
9 occasions inquiry of ACCA might encompass.
10 And we're talking about, you know,
11 precise timing questions. So a court, we think,
12 on its own could determine that on or -- the
13 jury necessarily found that an event occurred on
14 or about April 7th, for example. But the kind
15 of timing questions that are involved under the
16 ACCA's different occasions inquiry are going to
17 be more fine-grained than that.
18 You could have acts occurring across a
19 single day that are separate occasions. Sells
20 drugs in the morning. In the afternoon, robs a
21 store. In the evening, comes home and beats his
22 spouse. Like, those would be three separate
23 occasions. There's clearly a chance to have a
24 break in between those.
25 JUSTICE BARRETT: What about this one

1 across --
2 MR. FEIGIN: This one, we think, is
3 crystal-clear. We -- we think it should clearly
4 be found harmless on remand. You have --
5 JUSTICE BARRETT: Not -- not we
6 shouldn't do it?
7 MR. FEIGIN: Oh, Your Honor, we're
8 fine with you simply affirming on harmlessness
9 grounds if that's what the Court chooses to do.
10 The Court's usual practice is to remand these
11 things. We -- we think we've got a
12 crystal-clear case on remand, and -- and we will
13 in most of these cases. It'll be a vanishingly
14 small number where -- where we don't. But,
15 here, you have separate robberies that occurred
16 on April 4th, April 8th, and April 11th --
17 JUSTICE BARRETT: And would there be
18 some value -- I mean, I guess, a value if you
19 think -- I'm not saying I agree with you -- but,
20 if -- if we agreed with you that this was a
21 crystal-clear case, would there be some value to
22 lower courts in saying, like, this is the kind
23 of thing that, you know, under Wooden would
24 still be different occasions?
25 MR. FEIGIN: Sure. I mean, we think

1 that's already clear to some degree from Wooden,
2 which I take to generally say that if you've got
3 offenses spaced as far apart as these are, that
4 it's almost invariably going to be the case that
5 they are on separate occasions.
6 But, if the Court wishes to explain
7 that, that -- that would be great for us. In --
8 in particular -- or great by us. For us as
9 well.
10 (Laughter.)
11 MR. FEIGIN: In particular, to -- just
12 to address the harmless error argument that Mr.
13 Fisher posited a few minutes ago, we don't think
14 simply "I was in debt" is enough to make things
15 the same occasion. The -- the kinds of
16 circumstances where possibly a jury could -- you
17 know, we -- we think, you know, it would be fair
18 to find -- obviously, this always goes to the
19 jury, but we think would really be realistically
20 found to be the same occasion if they occur
21 across the course of several days might be what
22 the Court posited in Wooden itself, like they're
23 part of a common criminal scheme.
24 So, for example, you burglarize a
25 store to steal what you need to commit a

1 kidnapping. You commit an assault during the
2 course of the kidnapping, and later you murder
3 the victim. It's possible that, you know, a
4 jury could find that those were all the same
5 occasion --
6 JUSTICE GORSUCH: Mr. --
7 MR. FEIGIN: -- even if it occurred
8 over the course of a few days.
9 JUSTICE GORSUCH: So, Mr. Feigin, on
10 -- on that, first of all, I commend the
11 government for acknowledging the error below in
12 this case. That's an admirable step of candor.
13 But, on the -- on the -- on this
14 harmless error question, let me ask you first,
15 how is a court supposed to conduct that when
16 there hasn't been a trial and in a world in
17 which almost everybody pleads guilty these days?
18 A -- a really novel development during the
19 course of our lifetimes.
20 So, here, the defendant was told that
21 the three predicate ACCA crimes were different
22 than these three crimes that you're now asking
23 us to -- to -- to -- for a court to say are
24 clearly separate occasions and -- and,
25 therefore, harmless error.

1 How is it harmless when he didn't know
2 what the charges would be against him when he
3 pled guilty?
4 MR. FEIGIN: Well, Your Honor, I think
5 he --
6 JUSTICE GORSUCH: Wouldn't that have
7 informed his bargain? Perhaps he would have
8 chosen not to plead guilty and -- if you were
9 going to drag back up convictions from when he
10 was 18 that have nothing to do with his
11 possession of a firearm today as a
12 40-something-year-old man.
13 MR. FEIGIN: Well, Your Honor, first
14 of all, I don't think he was under any
15 assurances that he would not receive an ACCA
16 sentence. In fact, he was --
17 JUSTICE GORSUCH: No, but in the
18 information, the government specifically listed
19 three other predicate offenses, not these.
20 MR. FEIGIN: Well, Your Honor, I'd --
21 to the extent you're suggesting that the
22 availability of an ACCA sentence might have
23 informed his decision to plead, he was perfectly
24 on notice that he could receive an ACCA
25 sentence.

1 It turns out that it's for three -- or
2 I think only two of the crimes are different
3 than the original ones because of intervening
4 decisional law that made some of the original
5 charged predicates no longer valid.
6 To -- to be clear, we don't think that
7 in the indictment we actually need to charge
8 what the specific predicates are.
9 JUSTICE GORSUCH: No, but you -- you
10 did in this information.
11 MR. FEIGIN: We -- we did in this
12 information, but I don't think that --
13 JUSTICE GORSUCH: And wouldn't the --
14 MR. FEIGIN: -- given that he had --
15 he has a fairly long rap sheet --
16 JUSTICE GORSUCH: No, I understand
17 that.
18 MR. FEIGIN: -- I don't --
19 JUSTICE GORSUCH: But do you think a
20 defendant might make a reasonably different
21 choice if he knows what -- what the -- I may be
22 able to have a good occasions clause argument
23 with respect to these crimes but not those
24 crimes. And -- and the ones you chose are
25 different than the ones you're now seeking to

1 pursue.
2 MR. FEIGIN: Well, to be clear, Your
3 Honor, we charged them, as -- as I read the
4 information, as -- I mean, it put him on notice
5 of the ACCA because it cited --
6 JUSTICE GORSUCH: You did.
7 MR. FEIGIN: It -- it put him on
8 notice of the ACCA, but it was also in support
9 of the basic underlying 922(g) offense. In --
10 in addition, I think he is fairly charged with
11 knowing --
12 JUSTICE GORSUCH: Okay.
13 MR. FEIGIN: -- his own prior
14 conviction history.
15 JUSTICE GORSUCH: And then, on that,
16 you -- in response to Justice Barrett, you --
17 you -- you admitted, I think, that there are
18 some situations in which a jury could reasonably
19 find that a -- a series of crimes happened on
20 the same occasion even though they happened over
21 the span of some days.
22 At least in a jury trial, you've got
23 all the facts before you. Here, we have just
24 the pleading documents from those prior cases.
25 How is a judge -- how are we supposed to have a

1 hundred percent confidence that it's harmless
2 that these were, in fact, on separate occasions
3 when there's been no trial and all we have
4 before us are these pleading documents?
5 MR. FEIGIN: Well, first of all, Your
6 Honor, I -- I -- I don't think we look at it
7 quite as that there has been no trial. It's
8 that the --
9 JUSTICE GORSUCH: Well, there's been
10 no trial.
11 MR. FEIGIN: -- the entire record here
12 would encompass the sentencing proceedings.
13 This is the same error the Court considered in
14 Neder, where an element was erroneously
15 presented to a judge but not a jury.
16 And, here, you have the record. We
17 have the documents.
18 JUSTICE GORSUCH: But we don't know
19 what the defendant would say. He might say it
20 was all part -- I -- I did this crime to commit
21 that crime, to commit the third crime, just as
22 you posited in response to Justice Barrett. We
23 don't know what he would say in -- with respect
24 to whether these three crimes that you wound up
25 using are part of a single occasion or different

1 ones.
2 MR. FEIGIN: Well, Your Honor, now
3 that we've expanded the different occasions
4 inquiry into a fundamentally factual one --
5 that's the holding of -- of Wooden -- I think
6 looking at what the defendant precisely did, it
7 doesn't remotely support an argument of that
8 sort.
9 And also, the idea that I -- I -- I --
10 I would resist the idea that it's part of a
11 common scheme or plan simply just to undertake a
12 string of robberies within a week. Like,
13 clearly, he had the means to do the first one,
14 to do the second one, and to do the third one.
15 He had several days in between to cool off. He
16 -- he did not -- and on the last day, he robbed
17 two stores, Druthers and Schnitzelbank. The --
18 if you want to look at the sentencing
19 memorandum, the government's sentencing
20 memorandum, at page 6, those are fairly far
21 apart from one another.
22 I don't really think he has any viable
23 argument, and I don't take debt, simply a debt,
24 to be an argument. Otherwise, a -- a gambling
25 addict could constantly be on the same occasion.

1 JUSTICE GORSUCH: It seems to me
2 probably right, but we have to decide whether
3 it's harmless beyond a reasonable doubt, and we
4 don't have anything from the defendant here with
5 respect to his views about why this might be a
6 single occasion, and I'm just wondering how
7 we're supposed to do that, but --
8 MR. FEIGIN: Well, Your -- Your Honor,
9 I think we do because this issue was litigated
10 before the judge, notwithstanding his objection.
11 And I -- I really don't think he has anything
12 there. If he did --
13 JUSTICE GORSUCH: Okay.
14 MR. FEIGIN: -- I think you would have
15 heard it earlier this morning.
16 JUSTICE GORSUCH: Thank you, Mr.
17 Feigin.
18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.
20 Justice Thomas?
21 Justice Alito?
22 JUSTICE ALITO: Well, I wanted to ask
23 you some of the same questions I asked Mr.
24 Fisher about how these cases will be tried if
25 your view of the law prevails.

1 So I asked him about the admissibility
2 of the judgment of conviction, the charging
3 document, the jury instructions, plea colloquy.
4 You think all of that is admissible?
5 MR. FEIGIN: Yes, Your Honor. I mean,
6 there are -- for example, in -- in addition to
7 the hearsay exceptions that might cover those, I
8 think, to the extent you're submitting documents
9 that were just shown to the jury that are being
10 used for the purpose of showing what the jury
11 was instructed as opposed to for the truth of
12 the matter asserted, there isn't a hearsay
13 problem with those.
14 JUSTICE ALITO: Now suppose the rule
15 is -- I mean, the -- what -- what was said in
16 Wooden was that judges have usually regarded
17 things that are separated by more than a day as
18 having occurred on separate occasions. I don't
19 know whether you can instruct a jury about what
20 judges previously did, but put that aside.
21 Suppose there's a rule that says that,
22 in general, offenses that are separated by a day
23 or more are -- occur on different occasions.
24 And suppose the documents that I mention don't
25 nail down the exact day on which the offense

1 occurred. So you have, let's say, the charging
2 document for one says on or about March 27th.
3 The other one says on or about March the 30th.
4 Is that sufficient to prove beyond a
5 reasonable doubt that they occurred within a
6 day? If it's not, then what are you going to
7 do? You're going to have to call the witnesses
8 from those prior trials, if they can be found,
9 and nail down the exact day on which this
10 occurred?
11 MR. FEIGIN: Well, to answer your
12 first question, Your Honor, I do think the jury
13 could -- that would be enough to support a
14 jury's inference beyond a reasonable doubt that
15 they are on different occasions, particularly if
16 there are other aspects of the crimes that are
17 different.
18 But, number two, if we can't otherwise
19 establish that -- and, again, this is an inquiry
20 that judges used to undertake from the Shepard
21 documents as to which they didn't really differ
22 and were reaching by and large common-sense
23 conclusions. So it will be even easier for a
24 jury to do that if --
25 JUSTICE ALITO: Well, were they doing

1 it beyond a reasonable doubt, based on the
2 beyond-a-reasonable-doubt standard?
3 MR. FEIGIN: Yes, Your Honor. I -- I
4 think this is the kind of thing where the jury
5 could infer that, for example, a robbery on or
6 about March 28th and an assault on or about
7 March 30th would be different occasions,
8 particularly if there is really no contrary
9 argument that connects them.
10 And, you know, if necessary -- and one
11 -- one reason we don't really think that
12 Almendarez-Torres should be overruled as a
13 practical matter is we don't really want to have
14 to get the victims back into court to testify
15 about what happened or the exact day on which it
16 happened.
17 But I -- I -- I don't take this to be
18 a particularly complicated inquiry. It's a
19 common-sense one. Wooden expressly explained it
20 as such. And we've had, due to the uniformity
21 of the circuits against the position we're
22 conceding now, very few actual jury trials, but
23 we've had four of them, and it hasn't proven to
24 really be a -- a problem for us.
25 JUSTICE ALITO: Now what about the

1 question about differences in the nature of the
2 offenses? So, if the offenses are sufficiently
3 different, that may support the conclusion that
4 they were not part of -- they were not committed
5 on the same occasion, they're not part of the
6 same scheme. What's the judge supposed to tell
7 the jury about that?
8 Suppose you have a case where the
9 defendant committed a -- a robbery in the
10 morning on one day by grabbing a woman's purse
11 and running away with it. Then, in the evening,
12 the defendant committed another mugging using a
13 knife and then the following morning went into
14 some retail establishment and just grabbed $500
15 worth of merchandise and ran away.
16 Are -- are they sufficiently
17 different?
18 MR. FEIGIN: Yes, I -- I think they
19 are.
20 JUSTICE ALITO: And -- and on what
21 theory? What would you tell the -- what would
22 the judge tell the jury?
23 MR. FEIGIN: Well, Your Honor, I -- I
24 take separate occasions essentially where --
25 to -- to take this a couple -- in a couple of

1 pieces.
2 It's clear, and the Court was
3 explaining this in Wooden, that what Congress
4 was trying to do was to address the situation in
5 the Petty case out of the Eighth Circuit where
6 the government and the solicitor general had
7 confessed error where essentially he got all of
8 the occasions out of one act.
9 Where you have the three kinds of acts
10 even over a -- a short span of time such as
11 you've described, Justice Alito, I think that's
12 presumptively going to be separate occasions,
13 not that you'd instruct the jury with such a
14 presumption, but that it would be presumption in
15 the sense that the jury would -- I would expect
16 the jury to find those to be separate occasions,
17 unless the defendant produced some substantial
18 evidence to convince the jury otherwise.
19 JUSTICE ALITO: All right. Thank --
20 thank you.
21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?
23 Justice Kagan?
24 JUSTICE KAGAN: Did I hear you say to
25 Justice Alito that you've had four of these

1 types of trials?

2 MR. FEIGIN: You did.

3 JUSTICE KAGAN: What -- what did those

4 look like? What were they about? How did they

5 go?

6 MR. FEIGIN: They were --

7 JUSTICE KAGAN: Did you -- did you

8 bifurcate?

9 MR. FEIGIN: -- they were bifurcated

10 trials, Your Honor, and --

11 JUSTICE KAGAN: Well, do you always

12 expect to bifurcate?

13 MR. FEIGIN: I think in the -- unless

14 there's some reason that we, frankly, haven't

15 been able to anticipate as to why you wouldn't

16 bifurcate, we generally agree to bifurcation,

17 although I think, as -- as Mr. Fisher said, in a

18 lot of cases, the defendant's going to choose to

19 plead to this or -- or else just will enter into

20 a stipulation and can handle it that way.

21 JUSTICE KAGAN: And what do those --

22 those trials look like?

23 MR. FEIGIN: I mean, I think they look

24 like normal bifurcated proceedings, where you

25 would prove -- we prove the 922(g) offense and

1 then there was, after that, separate jury
2 consideration of the enhancement, where we
3 introduced evidence about the prior crimes, had
4 argument about the prior crimes, and the jury --
5 the -- those questions were submitted to the
6 jury.
7 JUSTICE KAGAN: I -- I guess what I'm
8 asking is there's been some talk about how
9 difficult this is going to be for everybody.
10 Was it?
11 MR. FEIGIN: Well, let me say two
12 things about that, Your Honor. I mean, one is
13 this obviously was not our first-choice
14 position. We have been arguing to the contrary
15 for a long time. Our position in Wooden was
16 largely informed by the fact that if it was a
17 judge inquiry, that it needed to be a much
18 simpler inquiry. And this is not -- this is
19 imposing some burden on us.
20 But number two is that it -- it's
21 manageable, and we believe it will be
22 manageable. Obviously, because of the
23 uniformity of the circuits, it's a little bit
24 hard to predict that. But this is -- ACCA cases
25 are less than 1 percent of the federal criminal

1 docket, and in those cases, with the
2 availability of pleas, stipulations, and
3 bifurcations, we are reasonably confident that
4 we can manage this.
5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch?
7 Justice Kavanaugh?
8 JUSTICE KAVANAUGH: I have a few
9 questions. Sorry.
10 On the facts here, this defendant had
11 nine prior felonies over a 13-year period. Is
12 that accurate?
13 MR. FEIGIN: Your Honor, I couldn't --
14 standing here, I -- I don't remember the precise
15 number, but he -- he has more than the three
16 that --
17 JUSTICE KAVANAUGH: Right.
18 MR. FEIGIN: -- comprise the -- that,
19 sorry, made up the ACCA determination.
20 JUSTICE KAVANAUGH: Right. You're on
21 notice after even one not to possess firearms,
22 and he had 16 long guns and four other guns in
23 his garage, correct?
24 MR. FEIGIN: That's right, Your Honor.
25 JUSTICE KAVANAUGH: Okay. On the

1 confession of error, I guess I thought of it a
2 little differently than Justice Gorsuch did,
3 because not one way or the other, but all the
4 courts of appeals have rejected the confession
5 of error, right, and ruled still for the
6 government's original position?
7 MR. FEIGIN: That's true, Your Honor,
8 but we don't think that those holdings are
9 viable. I mean, some -- in some cases, they've
10 just been waiting for this Court to itself
11 announce that the syllogism I mentioned at the
12 beginning is correct, because the Court
13 expressly reserved the question in Wooden.
14 In some cases, we think they're just
15 reading the Almendarez-Torres exception too far,
16 and in other cases, they're talking about
17 prejudice to the defendant, which, first of all,
18 we don't -- we think is itself a manageable
19 problem, but also, as Mr. Fisher said, if -- if
20 you don't believe me, you -- you can believe the
21 defense bar, which is coming in on the
22 Petitioner's side here.
23 JUSTICE KAVANAUGH: All right. Thank
24 you.
25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: Mr. Feigin, just a

3 quick clarifying question. When you were going

4 back and forth with Justice Alito about how this

5 would actually be done as a practical matter, he

6 was asking you about burden of proof, and I

7 don't think you ever went back to it.

8 I mean, in the old system, when judges

9 were doing this, it was by a preponderance, I

10 assume?

11 MR. FEIGIN: Correct.

12 JUSTICE BARRETT: The sentencing? So

13 do you anticipate, which I took to be the thrust

14 of some of Justice Alito's questions, that when

15 juries are doing this beyond a reasonable doubt,

16 do you think that the problems of proof would

17 make it much more difficult to prove the

18 predicates?

19 MR. FEIGIN: I think that it will do

20 two things. It may well do two things. And,

21 again, for reasons I've stated, this is kind of

22 predictive.

23 I -- I do think it may incentivize

24 defendants to submit this to a jury whereas they

25 might not have before, and I don't know that

1 that's necessarily a -- a particularly
2 beneficial thing as a practical matter because I
3 think very rarely would it actually be the case
4 that these were not -- that the defendant's
5 three prior offenses were not committed on
6 separate occasions.
7 And, second, going before the jury, we
8 might need to introduce different types of proof
9 or it may be harder to acquire everything that
10 we might need. We'd prefer, as I said, not to
11 have to bring the victim back in to say --
12 JUSTICE BARRETT: Sure.
13 MR. FEIGIN: -- yes, I -- I can
14 remember, the -- the date is stamped in my
15 brain, you know, October 26th, that's a day I'll
16 never forget because that's the day that that
17 man robbed me, particularly if it's 10 years in
18 the past and memories may have faded.
19 In fact, this kind of inquiry or --
20 and much more overruling Almendarez-Torres would
21 be a windfall for defendants who have a long rap
22 sheet, as Mr. Erlinger does here, but who
23 several of their crimes have been knocked out by
24 various of this Court's or the court of appeals'
25 decisions, and so we have to rely on some of the

1 older crimes as to which it may be harder to
2 produce this evidence or even to find every
3 single state record that we might need, where
4 there would otherwise be no dispute about it
5 because the defendant knows quite well that he
6 actually committed those offenses and what they
7 were about.
8 JUSTICE BARRETT: One other question.
9 So Justice Kagan asked you about the four trials
10 the government has already conducted that were
11 bifurcated. Same jury or did you -- was it a
12 different jury?
13 MR. FEIGIN: I believe it was the same
14 jury, Your Honor. I -- I -- I -- I'm not -- I'm
15 not certain, but I don't see any reason why
16 you'd need to swear in an entirely new jury and
17 say, hello, here's the defendant, you know,
18 here's what we've already determined.
19 JUSTICE BARRETT: Sure. Thanks.
20 CHIEF JUSTICE ROBERTS: Justice
21 Jackson?
22 JUSTICE JACKSON: So I just want to
23 clarify one thing because I've seen cases in
24 which the indictment has many counts talking
25 about different acts of the defendant and uses

1 the kind of language that Judge Alito points to,
2 "on or about" X date. In some of them, those
3 counts even have overlapping dates and, you
4 know, time frames. And so I -- I guess I would
5 expect that it would be those kinds of cases in
6 which the defendant would have a colorable
7 argument that these things happened on the same
8 occasion, and those would be the ones that would
9 be more likely to go to trial, right?
10 I mean, it -- it's -- I guess I'm --
11 I'm suggesting that the trial scenario seems to
12 me to be precisely the one where you would have
13 to bring in all the evidence related to the past
14 crime because, if it was just as easy as, you
15 know, these things are on separate dates, the
16 person probably wouldn't go to trial, right?
17 MR. FEIGIN: Well, Your Honor, I -- I
18 do think that -- again, we don't have a ton of
19 experience with this.
20 JUSTICE JACKSON: Yes.
21 MR. FEIGIN: But I do think that to
22 the extent that the indictments for the prior
23 crimes or the information for the prior crimes,
24 the charging documents, show that they occurred
25 on different days or at least allow a jury to

1 infer as much, I'm not sure that the defendant,
2 in the absence of some plausible argument --
3 and, again, I think that's going to be the rare
4 case, and I take Wooden to say it's the rare
5 case -- in the absence of a plausible argument
6 that they're part of a common scheme, not just a
7 common motivation like I'm an inveterate gambler
8 and I need to rob stores to make my money but an
9 actual part of a common scheme, that the
10 defendant's actually going to want to go to
11 trial on that, because, you know, among other
12 things like lots of cases plead, the defendant
13 may not, for -- for -- may not wish to kind of
14 try the district court's patience with holding
15 separate proceedings on something --
16 JUSTICE JACKSON: Yeah.
17 MR. FEIGIN: -- that's not going to
18 benefit him.
19 JUSTICE JACKSON: All right. Let me
20 ask you another question that comes from a
21 colloquy that you had with Justice Barrett about
22 harmless error.
23 So any ruling that this Court made,
24 let's say we decided to address harmlessness in
25 this context, you would anticipate that that

1 rule would then be incorporated into jury
2 instructions if these cases should happen in the
3 future?
4 MR. FEIGIN: It would depend what the
5 Court said, Your Honor. Our -- our current
6 proposed model jury instruction, which, again,
7 we haven't really had to use very often because
8 the courts of appeals --
9 JUSTICE JACKSON: Yeah.
10 MR. FEIGIN: -- haven't gone in our
11 favor, largely tracks what Mr. Fisher said
12 earlier this morning.
13 JUSTICE JACKSON: No, I know. But any
14 future thing that courts say about harmlessness
15 in a situation, right, if we look at the facts
16 here and we say this is harmless because, fill
17 in the blank, that would then become a rule that
18 I would assume would have to be incorporated
19 into future jury instructions in order to make
20 sure we have some sort of uniformity coming out
21 of this, right?
22 MR. FEIGIN: It would depend what --
23 it would depend what the Court said. I -- I
24 don't know that we would invariably, even under
25 the current Wooden decision as we have it,

1 insist that the jury be instructed that, for
2 example, different days almost always means
3 separate occasions. I think we're comfortable
4 enough with kind of a description of the general
5 inquiry --
6 JUSTICE JACKSON: But it doesn't
7 bother the government that you could have a jury
8 that is -- that you could have different
9 defendants who basically got the same rap sheets
10 coming out differently, unless we have a rule
11 about when it's going to be treated as a
12 different occasion?
13 MR. FEIGIN: That does bother us, Your
14 Honor. We always want like offendants to be
15 treated alike. That's a basic -- a basic
16 animating principle of the Sentencing Reform Act
17 and sentencing in general. And to the extent we
18 can, we would want jury instructions that would
19 tend to reach that conclusion.
20 However, as this Court has noted, you
21 know, for example, in United States against
22 Williams, like, different juries even instructed
23 the exact same way --
24 JUSTICE JACKSON: Yeah.
25 MR. FEIGIN: -- can come out different

1 ways on similar facts. That's just --

2 JUSTICE JACKSON: Thank you.

3 MR. FEIGIN: -- the nature of the

4 system.

5 CHIEF JUSTICE ROBERTS: Thank you,

6 counsel.

7 MR. FEIGIN: Thank you.

8 CHIEF JUSTICE ROBERTS: Mr. Harper.

9 ORAL ARGUMENT OF D. NICK HARPER,

10 COURT-APPOINTED AMICUS CURIAE IN SUPPORT OF

11 THE JUDGMENT BELOW

12 MR. HARPER: Thank you, Mr. Chief

13 Justice, and may it please the Court:

14 ACCA's occasions clause requires

15 judges to make a classic recidivism

16 determination, a finding about the separateness

17 of prior offenses. Under this Court's

18 precedents, that legislative choice is

19 consistent with the Constitution. This Court

20 held in Almendarez-Torres, based on

21 centuries-old sentencing practices, that judges

22 can impose sentencing enhancements based on

23 recidivism.

24 For decades, the federal courts of

25 appeals have unanimously applied

1 Almendarez-Torres to uphold judicial fact
2 finding under the occasions clause, and states
3 also have relied on Almendarez-Torres to enact
4 and enforce similar state recidivism schemes.
5 Petitioner and the government seek to
6 upend this practice, but they don't offer a
7 principled basis for doing so. Their front-line
8 position is that judges can find only the
9 elements of prior offenses. But they concede
10 that Almendarez-Torres authorizes judges to find
11 various non-elemental facts as well. So they're
12 forced to make exception after exception to
13 their elements-only principle, and they
14 ultimately land on standards that are
15 inconsistent with one another and divorced from
16 any constitutional principle or precedent of
17 this Court.
18 I think what this Court's precedents
19 show is that judges can find facts about prior
20 offenses under Almendarez-Torres, whereas juries
21 must find facts about present offenses under
22 Apprendi.
23 But, even if the other side's
24 approaches were correct, the Court should still
25 affirm because at least the government agrees

1 that judges applying ACCA's predicate felony
2 clause can find facts about the dates and
3 locations of prior offenses, and those very same
4 facts are going to resolve most occasions
5 questions, as this case illustrates. It would
6 make no sense to allow judges to find those
7 facts under one clause of ACCA but not the
8 other.
9 This Court should not set aside
10 decades of consensus and impose on all federal
11 and state courts an untested recidivism regime
12 that would gravely prejudice defendants.
13 I welcome the Court's questions.
14 JUSTICE THOMAS: Counsel, the --
15 what's your best historical evidence that judges
16 have performed inquiries like the occasions --
17 the different occasions inquiry here?
18 MR. HARPER: Sure, Justice Thomas. I
19 -- I want to flag up front that I don't think
20 the -- the right question is to ask whether
21 there are sort of direct historical analogues.
22 But, to answer your question directly first, I
23 do think that the statutes that Mr. Feigin
24 mentioned about sequencing that go back to the
25 early 1800s, finding that an offense occurred

1 after a prior conviction, that an offense
2 occurred after a defendant escaped or was
3 released from prison, I think those are quite
4 analogous to the occasions clause.
5 I think, at bottom, in most cases, the
6 occasions clause is essentially asking judges to
7 make a question about -- to make a decision
8 about sequencing, about how prior offenses
9 occurred, whether they occurred one after
10 another. And I do think these statutes that,
11 again, go back to the early 1800s are quite
12 similar in that regard.
13 I -- I do want to say, though, I don't
14 think that that's the right historical question.
15 I think the way the Court should think about the
16 historical inquiry here is to ask, at the time
17 of the Founding, was there a settled practice
18 that legislatures had to treat recidivism as an
19 element of the offense? And I think the answer
20 to that question is no, as Almendarez-Torres
21 recognized.
22 CHIEF JUSTICE ROBERTS: Why -- why
23 doesn't bifurcation take care of all the
24 problems from your perspective?
25 MR. HARPER: So I think for a couple

1 things, Your Honor. I think, first, bifurcation
2 is -- is extremely rare in criminal cases. I
3 think the other side has cited only two contexts
4 in which it occurs regularly. One is the death
5 penalty context, where it's required by statute.
6 The other is the criminal forfeiture context,
7 where it's required by rule.
8 And I think, here, it's going to be
9 discretionary. And I don't think they've cited
10 you a -- a case in -- or a context in which
11 discretionary bifurcation happens as a matter of
12 course. And I do think that the -- because it's
13 discretionary, the government is, I think, going
14 to have good arguments against bifurcation in at
15 least some cases. I would think if I were the
16 government I would argue that the government has
17 a right to present all of its evidence on all of
18 the elements of the crime to a single jury so
19 that that jury can make a moral judgment about
20 whether this defendant has committed the crime
21 as defined by Congress, and the defendant
22 doesn't have the right to sort of hide an
23 element from the jury on the first go-round and
24 then show it to it -- the jury in a bifurcated
25 proceeding.

1 And I think there already is some
2 evidence of this. So we cite the Harrell case
3 at page 46 of our brief. That's a case in which
4 the government -- the prosecutor opposed
5 bifurcation post-Wooden. The judge denied
6 bifurcation. And then the -- the defendant was
7 forced to stipulate to the occasions question.
8 And the jury was told, this is a
9 three-time convicted felon, and then the
10 prosecutor at closing told the jury this is a
11 drug-slinging, gun-toting, three-time convicted
12 felon. So I think that shows that when
13 prosecutors decide they don't want to bifurcate,
14 judges may well agree with that and that when
15 they don't bifurcate, it's going to be seriously
16 prejudicial to defendants.
17 CHIEF JUSTICE ROBERTS: Well, of
18 course, part of their answer is that this will
19 be an incentive for the defendants to plead.
20 MR. HARPER: So I think that's right,
21 but I think that goes to my point, which is that
22 this is -- this is prejudicial whether it's --
23 it's -- it forces defendants to plead to worse
24 deals or it forces them to go through
25 non-bifurcated proceedings in which these prior

1 convictions are paraded before the jury.
2 JUSTICE ALITO: There are a lot of
3 occasions in which a -- a defendant might love
4 to have a bifurcated proceeding because jurors
5 don't usually think like lawyers, who are open
6 to arguments in the alternative, so if the --
7 you know, if the defense is going to be, I
8 didn't do it, but if I did it, I didn't have the
9 intent that is necessary under the statute, it
10 might be really beneficial to have a trial first
11 on the actus reus and then have a separate trial
12 later on the mens rea.
13 MR. HARPER: So I think there's no
14 doubt that defendants are going to want to have
15 bifurcated trials. I think the question is
16 whether the government is going to want to. And
17 Mr. Feigin said that at least the federal
18 government is going to be willing to do that in
19 most cases, apparently not all cases, but most
20 cases.
21 But I don't think there's any
22 guarantee that's -- this is going to apply to
23 the states. Whatever this Court says in this
24 case is going to apply to the states too, and I
25 don't think there's any guarantee that state

1 prosecutors are going to feel the same way.
2 In fact, I would think -- I mean, I
3 would think that this is going to be a pretty
4 significant piece of leverage that prosecutors
5 can use against defendants to say either plead
6 to a worse deal or we're going to try to get
7 this in front of a jury, and that's -- and it's
8 seriously prejudicial.
9 JUSTICE ALITO: Do you think it's the
10 right historical question to ask whether there
11 was an established precedent on the narrow
12 question, whether recidivism questions, whether
13 the question whether the defendant had committed
14 other offenses in the past, was recognized as an
15 exception at the time of the adoption of the
16 Sixth Amendment, or would the broader question
17 be more appropriate, which was whether it was
18 well understood at the time of the adoption of
19 the Sixth Amendment that judges could make
20 discretionary sentencing decisions, which would
21 take into account prior criminal convictions?
22 And if it's the broader question, the
23 historical evidence is extremely strong, as --
24 as distinguished scholars have pointed out. At
25 the time of the adoption of the Sixth Amendment,

1 the -- the first Congress, which sent the Sixth
2 Amendment to the states, also adopted the first
3 criminal -- federal criminal proceedings.
4 And contrary to the suggestion in
5 Apprendi, they didn't say, if you commit -- if
6 you commit burglary, you get five years'
7 imprisonment. No, they said, if you commit such
8 and such an offense, you shall be sentenced to
9 no more than a certain sentence, which gave the
10 trial judge discretion.
11 MR. HARPER: So, to be candid, Your
12 Honor, I think there are two lines of history
13 here. One is the history you just referenced,
14 which is that judges have enormous -- an
15 enormous amount of discretion to, you know,
16 change sentences within a sentencing range.
17 The other is the Apprendi line of
18 history, which is that generally speaking,
19 sentence enhancing facts about present crimes
20 were treated as elements that had to go to a
21 jury. And so I think the relevant historical
22 question is, was there a uniform understanding
23 about sort of which box these recidivism-related
24 facts fell into?
25 And I think the answer is no. I think

1 the answer is that there were at least eight
2 states that we've identified going back to the
3 early 1800s that -- where legislatures had
4 discretion to treat recidivism as an element of
5 the offense or not, and that's because
6 recidivism was different than facts about
7 present crimes. It went to punishment only, not
8 guilt. And -- and putting that recidivism --
9 those recidivism facts before a jury would
10 seriously prejudice the defendant.
11 So I think that --
12 JUSTICE SOTOMAYOR: Counsel --
13 JUSTICE KAVANAUGH: Mr. --
14 JUSTICE SOTOMAYOR: -- when we start
15 talking about history, I -- I get very annoyed
16 because, in every history, there are exceptions.
17 The question then becomes how many of an
18 exception defeats the general rule. I'm not
19 going to argue whether it was eight or four. I
20 think it was four. And so I don't think that
21 that defeats the general rule. That's the
22 point.
23 As to your earlier question on what
24 prejudices a defendant or not, it's really only
25 a defendant that has a viable single occasion

1 argument who's ever going to think about raising
2 it because both with perjury enhancements to
3 sentencing that judges possess, as well as
4 annoying a judge enough so that a lighter
5 sentence is unlikely because, when the sentence
6 comes about, you're going to add the 15 years to
7 a base that the judge can have from a low to a
8 high, so it really is a question at the end, in
9 my mind, of a -- a viable argument on a single
10 -- about a single occasion or not, will it hurt
11 the defendant.
12 And as others here have said, I don't
13 know why we take your judgment as opposed to the
14 judgment of the bar.
15 MR. HARPER: So --
16 JUSTICE SOTOMAYOR: And every criminal
17 defense bar.
18 MR. HARPER: -- it is certainly a fair
19 point, Your Honor, that the criminal defenders
20 are on the other side. I think they've clearly
21 made a judgment that this rule that Petitioner
22 and the government are urging is a net benefit
23 for criminal defendants, and I -- I don't think
24 you should take my word over theirs on that.
25 What I think -- my submission, though,

1 is that I think it's indisputable that in some
2 cases, like Your Honor said, the cases where
3 this is a close question and the government
4 refuses to bifurcate, I think it's going to
5 prejudice defendants. I think that's what the
6 Harrell case that we cite at page 46 shows.
7 In some cases, this is going to
8 prejudice defendants, and I think that --
9 JUSTICE KAGAN: Well, isn't that true
10 of Apprendi generally? I mean, Apprendi was not
11 justified on the basis of this is always going
12 to help defendants. There are any number of
13 elements that a particular defendant might prove
14 and might decide in a particular set of
15 circumstances he would rather argue to a judge.
16 I -- I mean, you know, it just doesn't
17 seem to me that that's a reason for denying the
18 force of Apprendi in this situation.
19 MR. HARPER: So I agree that the same
20 could be said of the prejudice point on -- in
21 Apprendi. But I think this is not just
22 something that I'm making up. This is what
23 courts have said going back hundreds of years,
24 there's a reason to treat recidivism
25 differently.

1 And so I think Apprendi recognized a
2 tradition as to present crimes, and Apprendi
3 made that very clear at pages 488 and 496 of the
4 opinion in distinguishing Almendarez-Torres.
5 What the Court said there was that
6 Almendarez-Torres was about prior crimes. It
7 was about -- it was about issues that didn't go
8 to the defendant's guilt. They went to
9 punishment only.
10 This tradition that we're recognizing
11 here is about present crimes. And I think
12 courts recognized that it was both the prejudice
13 point and the fact that this was sort of a
14 collateral issue, it was more like a sentencing
15 issue, was why there was a different tradition
16 as to recidivism.
17 JUSTICE KAVANAUGH: So your point is
18 it wasn't a historical accident necessarily, it
19 was justified by a principle of not prejudicing
20 -- prejudicing defendants?
21 MR. HARPER: That's right. And I
22 think a good place to look for this is the
23 Bishop treatise, one -- the -- one of the
24 leading criminal law treatise writers of the
25 19th Century said just that. He said that

1 recidivism is treated differently because it --
2 putting it before a jury is seriously
3 prejudicial to defendants and because this is an
4 issue that's more like a sentencing issue,
5 which, as Justice Alito noted, has a tradition
6 for hundreds of years as being not subject to
7 Sixth Amendment constraints.
8 JUSTICE KAVANAUGH: On Justice -- on
9 Justice Sotomayor's question, because I think
10 the methodological question if we get deep into
11 this is pretty important here, to how to think
12 about all this, so start with the text. The
13 text itself of the Constitution does not tell us
14 the answer, just the bare words, correct?
15 MR. HARPER: Correct.
16 JUSTICE KAVANAUGH: Okay. So then we
17 usually look to history. We might not like it,
18 but I don't --
19 MR. HARPER: Agreed.
20 JUSTICE KAVANAUGH: -- unless we're
21 just making it up, I don't -- I don't know where
22 else we're going to look. And the question Mr.
23 Fisher raised was who has the burden on that,
24 and I think I'd like you to speak to who has the
25 burden.

1 Do you have the burden to show a
2 consistent, uniform practice or does he have the
3 burden to show a consistent, uniform practice
4 going the other way in which recidivism always
5 went to the jury?
6 MR. HARPER: So I think that is the
7 critical question because, if the government has
8 the burden, then I see no way in which
9 Almendarez-Torres is correctly decided.
10 But I think that the government in
11 these cases does not have the burden because I
12 think, as a default principle, when somebody is
13 coming into this Court or a court saying the
14 Constitution violates or invalidates my sentence
15 or invalidates a statute, typically, it is upon
16 that person to show that there is some
17 well-established understanding that that's what
18 the Constitution means.
19 And sometimes, when the text is clear,
20 like in the Gaudin case that Mr. Fisher cited,
21 then the burden flips to the government to show
22 some -- some historical practice that
23 contradicts the text.
24 But, as Your Honor noted, the text
25 here doesn't answer the question, and so we're

1 looking to history. And I would say we're not
2 only just looking -- we're not looking to
3 history directly interpreting the text of the
4 Sixth Amendment. We're looking to history --
5 we're looking to state common law principles.
6 And I think, when the Court is that
7 far removed from something actually interpreting
8 the Sixth Amendment, the Court should demand a
9 level of uniformity in those state common law
10 principles before making the leap that the
11 Constitution necessarily incorporated those
12 common law principles.
13 JUSTICE KAVANAUGH: Is the right year
14 to look at 1791 or 1868? Obviously, this is a
15 federal case, but --
16 MR. HARPER: So I think there's
17 certainly academic debate about that. I think,
18 for purposes of this case, the right -- the time
19 of the Founding is obviously the most relevant
20 time.
21 And -- and I guess what I would say is
22 I think, if anything, what the history shows
23 here is that there was a almost uniform practice
24 that legislatures had discretion in this area.
25 So it wasn't only the four states where judges

1 were allowed to make findings about recidivism.
2 It was also four -- four states -- we have
3 Virginia, Massachusetts, and Maine, significant
4 states, between 1818 and 1824 enacting
5 supplemental information statutes that allowed
6 the government to withhold recidivism
7 allegations from an indictment, despite that --
8 generally requiring all elements of an offense
9 to be in an indictment. So we have at least
10 eight -- and then West Virginia added on a
11 similar statute in 1868. So we have eight
12 states.
13 And then I think the government -- on
14 the other side, the government and Petitioner
15 haven't cited a single case in any relevant time
16 period where a court struck down a statute on
17 the ground that it assigned recidivism findings
18 to -- to judges or allowed the government to
19 withhold these allegations from -- from the
20 indictment.
21 And so I think, as far as I can see,
22 there's an unrebutted tradition here of
23 legislatures having discretion when it comes to
24 recidivism, and I think there were good reasons
25 for that, as we discussed.

1 JUSTICE BARRETT: Did all of those
2 states -- I mean, you know, the Sixth Amendment
3 didn't apply to the states back then. So in --
4 when you're saying, well, you can't point to a
5 single one in which a court struck it down, were
6 there state analogues to the Sixth Amendment
7 that would be relevant?
8 MR. HARPER: So I think the states did
9 have comparable jury trial rights, and also
10 states in which the supplemental information
11 statutes were enacted, they had grand jury
12 requirements that required all elements to be in
13 an indictment.
14 And so -- and these were challenged on
15 constitutional grounds, and courts uniformly
16 upheld them. This goes all the way back to 1824
17 and the Massachusetts Ross case that we cite in
18 our brief, all the way through to this Court's
19 decision in Graham. There's no decision that
20 I'm aware of to the contrary.
21 So I do think there is a -- even if it
22 was -- even if it were our burden to show a
23 uniform tradition here, I think the uniform
24 tradition was one of legislative discretion when
25 it comes to recidivism.

1 JUSTICE BARRETT: What about Mathis
2 and Descamps? You know, it's true they're
3 statutory cases, but, you know, there is some
4 avoidance language in them, which you recognize
5 in your brief. Do you want to talk about that a
6 little about it?
7 MR. HARPER: Sure. So the language in
8 Mathis and Descamps, admittedly, not great for
9 my position here. I -- I think -- I do think
10 that the Court --
11 JUSTICE BARRETT: We appreciate your
12 candor.
13 (Laughter.)
14 MR. HARPER: I do think that the Court
15 just didn't resolve the constitutional question
16 in those cases. I said -- they -- they were --
17 as you said, they were avoidance cases. I think
18 most of what the Court held in those cases was
19 that there is a serious constitutional question
20 about the scope of Almendarez-Torres. And I
21 think that's what this case is about.
22 But I don't think that those cases
23 resolved that question, and I don't think any
24 other decision of this Court has either.
25 JUSTICE JACKSON: Can you turn to the

1 theory for a second? You said in your opening
2 that you find the other side's position to be
3 unprincipled. So why is that?
4 MR. HARPER: So for a few reasons. I
5 think, first of all, they -- their principle in
6 this case, which I think Mr. Fisher reiterated
7 in his opening, was that -- this elements-only
8 principle, this principle that judges can only
9 find facts that juries previously found beyond a
10 reasonable doubt.
11 And I just don't think that their
12 theory, their -- their test that they end up
13 articulating line up with that principle because
14 they recognize that if the Court were to
15 double-down on that elements-only principle, it
16 would blow up the categorical -- categorical
17 approach because judges, in doing predicate
18 felony determinations, often find facts that are
19 not elements of prior offenses, like identity,
20 like the date of the offense, like the
21 sequencing issue in Almendarez-Torres itself.
22 So they articulate -- they have to
23 fall back from their elements-only principle,
24 and they end up articulating standards like the
25 government's standard, for example, facts

1 encapsulated in judicial records that are
2 components of prior convictions. I think that's
3 what the government says. That test is in no
4 decision of this Court. I don't think it's in a
5 decision of any court as far as I can tell.
6 And so I think, because they are
7 departing from their principle, they are
8 articulating novel tests that really don't have
9 any grounding in this Court.
10 And then I -- the last thing I would
11 say is that I think their test, at -- at least
12 the government's test, is not descriptively
13 accurate, even to -- because the -- the -- the
14 test, facts encapsulated in judicial records,
15 that -- identity is not encapsulated in judicial
16 records. The date of the offense is not a
17 component of the prior conviction.
18 So I think the government's test and I
19 think Petitioner's test too, although I'm a
20 little less clear on what Petitioner's test
21 actually is, I think none of them have a
22 principle that actually explains where they end
23 up landing.
24 JUSTICE KAGAN: I mean, as I
25 understand that argument, it's really just to

1 say that Almendarez-Torres and Apprendi are in a
2 little bit of tension with each other. And who
3 would deny that really? I mean, even Apprendi
4 understood that.
5 But there's nothing about that bit of
6 tension that has made the system fail to work.
7 And, you know, why would we allow that bit of
8 tension, which has existed for decades now, to
9 suggest an answer to this question that does not
10 seem the one that all our past precedents point
11 to?
12 MR. HARPER: So I -- I guess I would
13 say I don't think there needs to be tension
14 between Apprendi and Almendarez-Torres. I
15 think, certainly, under the government and
16 Petitioner's view, there is tension. But I
17 think under -- my reading of Apprendi and
18 Almendarez-Torres is that they're -- they drew a
19 pretty clear line between facts about prior
20 crimes, facts about present crimes. I think,
21 again, Apprendi said that multiple times.
22 And so I think, if you interpret it
23 that way, it's -- the -- the tension sort of
24 resolves itself. And I think the fact that the
25 Court has -- or -- or courts have found

1 non-elemental facts in doing the predicate
2 felony inquiry suggests that that's really what
3 the line is, is I think my fundamental point.
4 JUSTICE KAVANAUGH: Your -- on the
5 tension, I think your point is that the history
6 has two different rules.
7 MR. HARPER: That's right. And I
8 think --
9 JUSTICE KAVANAUGH: And -- and --
10 MR. HARPER: -- Almendarez-Torres
11 recognized that.
12 JUSTICE KAVANAUGH: -- and it's rooted
13 in concern about prejudicing defendants.
14 MR. HARPER: That's right. And I
15 think, in Apprendi itself, the Court demanded a
16 uniform standard as to sentence-enhancing facts
17 about present crimes. And so I think it would
18 be somewhat anomalous not to require an
19 extension of that uniformity down to the
20 different tradition of recidivism facts. And I
21 think that's exactly what Almendarez-Torres
22 recognized, admittedly, before Apprendi, but
23 that there was no such uniform tradition in this
24 different context. And so, in this context,
25 facts about present crimes, those don't need the

1 -- there's no constitutional prescription there.
2 JUSTICE KAVANAUGH: Can I ask -- go
3 ahead.
4 JUSTICE GORSUCH: No -- no, please.
5 JUSTICE KAVANAUGH: Go ahead.
6 JUSTICE GORSUCH: No, finish up.
7 JUSTICE KAVANAUGH: No.
8 JUSTICE GORSUCH: Just looking to
9 history, I -- I know South Carolina you have in
10 your corner. Do you have any other Antebellum
11 cases from the states?
12 MR. HARPER: So we have the Louisiana
13 Hudson decision, which I think even Petitioner
14 agrees is in our camp. And I think Petitioner
15 agrees all of these are in our camp. We have
16 the --
17 JUSTICE GORSUCH: Well, I know you
18 have some later decisions.
19 MR. HARPER: Well, that's it. I think
20 Hudson is -- I think it's in the 1850s. I could
21 be wrong about that.
22 JUSTICE GORSUCH: Okay.
23 MR. HARPER: We have an -- we have an
24 Alabama decision that's -- I think decisions
25 from the early 1900s, but what they were lacking

1 is --

2 JUSTICE GORSUCH: Yeah. No, no, I'm

3 -- I'm -- if we're interpreting the original

4 meaning of the Sixth Amendment, I would have

5 thought closer-in-time contemporaneous evidence

6 would be better. Would you agree with that?

7 MR. HARPER: I think that's right, but

8 I think what the Alabama cases --

9 JUSTICE GORSUCH: And so South

10 Carolina is your best one, I think.

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

12 JUSTICE GORSUCH: And -- and they've

13 admitted that they're an outlier. What do we do

14 about that?

15 MR. HARPER: So I guess a couple of

16 points. First, I think it is true that the four

17 states that I think were on the other side of

18 this judge -- whether judges or juries had to

19 make these recidivism findings, they were an --

20 they were an outlier as to the default common

21 law rule in this context.

22 I concede that the majority of states

23 had a default common law rule that these

24 recidivism findings or these recidivism facts

25 had to be in an indictment and proved to a jury

1 beyond a reasonable doubt. I think -- so I
2 think South Carolina, Alabama, Louisiana,
3 Kansas, they were outliers with respect to that
4 tradition.
5 But what I don't think they were --
6 JUSTICE GORSUCH: And some of them
7 weren't even members of -- of the original
8 states that -- that formed the -- compact that
9 led to the Sixth Amendment.
10 MR. HARPER: That's true, Your Honor,
11 but I think the -- and as -- as to your second
12 point, the later cases, Alabama, Kansas, they --
13 although they come later, they recognize that
14 there had been a settled tradition in those
15 states. And I think Petitioner and the
16 government have shown nothing to -- to
17 contradict that. So I think that is a fair
18 assumption.
19 And I do think that -- that the -- so
20 the -- the fact that there is this different
21 common law tradition in the majority of states,
22 it doesn't -- I don't think that's enough to
23 establish that this was a fundamental principle
24 that was incorporated into the Constitution
25 because -- in -- because we have these -- these

1 states within that majority, Virginia,
2 Massachusetts, Maine, these are significant
3 states that were a part of the initial compact
4 and that allowed legislatures to deviate from
5 the common law rule. And then, when those
6 supplemental information statutes were
7 challenged in court on constitutional grounds,
8 courts rejected those challenges all the way
9 through to this Court's decision in 1910
10 endorsing the Massachusetts Ross decision from
11 1824.
12 So I think there's just a uniform
13 string of precedents saying this majority common
14 law rule that recidivism has to be in the
15 indictment and proved to a jury is something the
16 legislature can alter.
17 JUSTICE KAVANAUGH: Can I ask you
18 about bifurcation? Do you think bifurcation is
19 completely in the discretion of the trial judge?
20 MR. HARPER: I -- I think it's in the
21 discretion of the trial judge --
22 JUSTICE KAVANAUGH: If you lose here
23 and have --
24 MR. HARPER: That's right. I think,
25 in -- in the federal system, it is -- under Rule

1 14, I think it's subject to the discretion of
2 the trial judge, subject to abuse of discretion
3 review.
4 JUSTICE KAVANAUGH: Would there be any
5 constitutional overlay on that? In other words,
6 it was impermissible to deny bifurcation under
7 these circumstances?
8 MR. HARPER: I don't think so. I
9 think the Court has refused to require
10 bifurcation as a constitutional matter, and I
11 don't think the Court should do so in this case.
12 And I also don't think the Court
13 should sort of place a thumb on the scale even
14 if the Court sides with Petitioner and the
15 government here to say that bifurcation should
16 ordinarily be required in these cases because I
17 do think there is something to -- to the -- to
18 the idea that the government really does have a,
19 I think, a right to present to a single jury all
20 of the -- all of its evidence on all of the
21 elements of the crime.
22 And if you rule for Petitioner and the
23 government here, I think what you are saying is
24 that this occasions fact is sort of an element
25 of the crime.

1 And then -- and then, on
2 bifurcation -- I think bifurcation, the other
3 problem which I mentioned earlier is that states
4 have varying procedures on bifurcation, and so
5 some of them make it discretionary, and I -- I
6 think -- so it's going to have -- it's hard to
7 say exactly how this is going to play out in the
8 states.
9 JUSTICE BARRETT: That's true with
10 respect to Old Chief too?
11 MR. HARPER: Correct. I think Old
12 Chief -- I think Old Chief doesn't really solve
13 the prejudice problem because, as you see from
14 the Harrell case we cite, that case involved an
15 Old Chief stipulation, so the bifurcation was
16 denied. The defendant was then forced to
17 stipulate or he chose to stipulate, I guess,
18 under Old Chief.
19 And that stipulation has to be read to
20 the jury, and that jury has to be told this is a
21 three-time convicted felon. That's a big
22 difference from being told this is a, you know,
23 a one-time convicted felon.
24 JUSTICE BARRETT: Justice Alito asked
25 questions of your friends on the other side

1 about -- and Justice Jackson too -- about what
2 kind of proof would be used to prove this up to
3 a jury. Do you have anything to say about that?
4 MR. HARPER: So I think, if it's going
5 before a jury, subject to the rules of evidence,
6 which, admittedly, I'm not an expert on, I think
7 anything that's admissible and relevant I would
8 think would be able to be used to prove this
9 question to a jury.
10 JUSTICE BARRETT: But it would make it
11 harder since they don't apply to a judge and a
12 judge has to find these things by a
13 preponderance if you're right?
14 MR. HARPER: I think that it
15 probably -- I'm sure the standard would make it
16 harder for them to prove these issues.
17 Again, I don't think it -- I agree
18 with the government that I don't think this is
19 going to matter in all that many cases because I
20 think most of these cases are going to be pretty
21 clear that the crimes were on separate
22 occasions. This case, for example, I think it's
23 clear beyond a doubt, as the government said,
24 that this is -- these crimes occurred multiple
25 days apart. They were on separate occasions.

1 And I think most juries -- I guess the
2 one point I would make is there is a potential
3 nullification risk, I think, in some of these
4 cases because of the severe mandatory minimums
5 at issue. And I think the Petitioner cited one
6 case in his cert petition where a Georgia jury
7 refused to find different occasions despite
8 the -- the -- the -- the convictions being or
9 the offenses being months and years apart.
10 So I do think that might happen in
11 some cases, but for the most part, I think these
12 are going to be pretty straightforward.
13 JUSTICE BARRETT: Thank you.
14 CHIEF JUSTICE ROBERTS: Thank -- thank
15 you, counsel.
16 Justice Thomas, any -- anything
17 further?
18 JUSTICE SOTOMAYOR: There is a lot of
19 debate on whether historically jury
20 nullification was an okay thing.
21 MR. HARPER: That -- that's right,
22 Your Honor. I don't want to wade into that
23 debate.
24 JUSTICE SOTOMAYOR: No, I'm -- I'm not
25 suggesting we do. But it is an open question.

1 CHIEF JUSTICE ROBERTS: Anything
2 further? No?
3 Thank you, counsel.
4 Rebuttal, Mr. Fisher.
5 REBUTTAL ARGUMENT OF JEFFREY L. FISHER
6 ON BEHALF OF THE PETITIONER
7 MR. FISHER: Thank you. I'd like to
8 cover two topics. First, a couple more words
9 about bifurcation.
10 There was some talk about state
11 practices. Even in 1967, when the Court looked
12 at this issue in Spencer, it noted that the
13 majority of the states require bifurcation by
14 statute. It's not even a prosecutorial
15 discretion, discretionary decision.
16 And I think that trend has continued
17 for all the common-sense reasons laid out in
18 the -- in the briefs you have. So, Justice
19 Kavanaugh, it's not even a constitutional
20 question necessarily. It's just already been
21 decided by the states.
22 If you had -- you know, this is a
23 federal case where you have your own supervisory
24 powers and you can, I think, you know, make
25 whatever suggestions you like in the opinion,

1 and we think it would be appropriate for the
2 Court to say that bifurcation is the accepted
3 solution here that seems to be the right one.
4 I'd also like to say a couple words
5 about the harmless error conversation that's
6 taken place today.
7 We haven't briefed that issue
8 precisely because the Court's common practice
9 and -- and overwhelming practice is to leave
10 decisions -- leave questions like that that were
11 not addressed by the lower courts for the lower
12 courts to decide in the first instance.
13 And that's what we'd ask for the Court
14 to do here. And -- and forgive me, I may have
15 even misunderstood the way the amicus
16 appointment works in this case. You know,
17 of course, we are -- we are not in line with the
18 government on harmless error in this case, but
19 the government's top-side brief said the case
20 should be remanded for harmless error.
21 And so, on the issue on which we are
22 adverse to the government, you know, I don't
23 know that amicus can come in and tell this Court
24 to go ahead and address it.
25 But leaving -- you know, leaving that

1 perhaps thorny issue of the Court's practice
2 aside, in all events, we think the safest thing
3 is to leave that for remand.
4 But -- but I'll just add a couple of
5 things about the factual conversation that took
6 place today. Remember, when the -- when you ask
7 whether these crimes that are alleged to be
8 committed on eight days, you know, on an
9 eight-day stretch, three different crimes on an
10 eight-day stretch could possibly be the same
11 occasion, you are yourselves relying on these
12 kinds of documents that you have noted in Mathis
13 and Descamps are highly unreliable. And, in
14 fact, these documents themselves, the plea
15 documents themselves here say that Mr. Erlinger
16 agrees to cooperate against all of his
17 co-defendants.
18 There were no co-defendants in these
19 cases. And so, Justice Jackson, you noted that
20 an indictment might say on or about certain
21 days. And when you get into an eight-day
22 stretch, on or about matters quite a lot.
23 So what we would say on remand in part
24 -- and this goes to Justice Gorsuch's questions
25 about how harmless error would work here -- is

1 that the government may not have been able to
2 prove beyond a reasonable doubt to a jury that
3 these crimes were committed on separate
4 occasions, and that's enough to allow -- you
5 know, to allow a retrial or just at least
6 renegotiations on that point.
7 If the Court has no further questions,
8 I'll submit.
9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.
11 Mr. Harper, this Court appointed you
12 to brief and argue this case as an amicus curiae
13 in support of the judgment below. You have ably
14 discharged that responsibility, for which we are
15 grateful.
16 The case is submitted.
17 (Whereupon, at 11:40 a.m., the case
18 was submitted.)
19
20
21
22
23
24
25

$
$500 [1] 57:14
1
1 [1] 60:25
10 [2] 33:23 64:17
10:06 [2] 1:15 3:2
101 [1] 2:15
11:40 [1] 104:17
11th [1] 45:16
13-year [1] 61:11
14 [2] 33:9 97:1
15 [3] 29:2 33:24 80:6
16 [1] 61:22
1791 [1] 85:14
18 [2] 29:1 48:10
1800s [4] 9:4 72:25 73:11 79:3
1818 [1] 86:4
1824 [3] 86:4 87:16 96:11
1850s [1] 93:20
1868 [2] 85:14 86:11
1900s [2] 9:6 93:25
1910 [1] 96:9
1920s [1] 13:6
1929 [1] 13:17
1955 [1] 44:6
1960s [1] 16:7
1967 [1] 101:11
1972 [1] 44:6
19th [1] 82:25
2
20 [1] 37:2
200 [1] 8:17
2024 [2] 1:11 18:19
20th [1] 12:24
23-370 [1] 3:4
25 [1] 40:21
26th [1] 64:15
27 [3] 1:11 18:19 20:4
27th [1] 55:2
28th [1] 56:6
3
3 [1] 2:4
30th [2] 55:3 56:7
39 [1] 2:8
4
40-something-year-old [1] 48:12
40s [1] 29:3
46 [2] 75:3 81:6
488 [1] 82:3
496 [1] 82:3
4th [1] 45:16
5
50 [1] 13:3
6
6 [1] 52:20
60 [1] 29:5
60s [2] 8:6 16:10
7
70 [1] 2:12
7th [1] 44:14
8
8th [1] 45:16
9
922(g [6] 4:17 33:18,23 37:8 50:9 59:25
924(g [1] 36:19
A
a.m [3] 1:15 3:2 104:17
able [7] 14:4 18:11 28:12 49:22 59:15 99:8 104:1
ably [1] 104:13
above-entitled [1] 1:13
absence [2] 67:2,5
absolutely [1] 29:24
abuse [1] 97:2
academic [2] 26:16 85:17
ACCA [19] 3:13 4:1 8:17 26:3,10 28:23 32:24 33:19 39:19 44:9 47:21 48:15,22,24 50:5,8 60:24 61:19 72:7
ACCA's [4] 3:22 44:16 70:14 72:1
accepted [1] 102:2
accident [1] 82:18
accomplish [2] 26:3,6
account [1] 77:21
accurate [2] 61:12 90:13
acknowledge [1] 42:2
acknowledged [1] 40:4
acknowledging [2] 40:22 47:11
acquire [1] 64:9
across [3] 44:18 45:1 46:21
act [2] 58:8 69:16
acts [3] 44:18 58:9 65:25
actual [3] 33:25 56:22 67:9
actually [16] 9:15 31:8 32:11,20,22 33:8 34:1 41:9 49:7 63:5 64:3 65:6 67:10 85:7 90:21,22
actus [1] 76:11
add [4] 19:14 28:20 80:6 103:4
added [2] 36:16 86:10
addict [1] 52:25
addition [2] 50:10 54:6
additional [1] 39:4
address [10] 15:12 25:6 27:18 31:8,11 41:2 46:12 58:4 67:24 102:24
addressed [1] 102:11
adhered [1] 40:21
adjudicates [1] 36:23
adjudication [1] 18:1
administer [1] 20:18
admirable [1] 47:12
admissibility [1] 54:1
admissible [6] 19:24 20:2,7,9 54:4 99:7
admissions [1] 19:22
admitted [2] 50:17 94:13
admittedly [3] 88:8 92:22 99:6
adopted [1] 78:2
adoption [3] 77:15,18,25
adverse [1] 102:22
affect [1] 31:1
affirm [1] 71:25
affirming [1] 45:8
afternoon [1] 44:20
ago [2] 37:2 46:13
agree [12] 5:21,23,23 6:4 16:15 29:25 45:19 59:16 75:14 81:19 94:6 99:17
agreed [2] 45:20 83:19
agrees [4] 71:25 93:14,15 103:16
ahead [5] 7:14 17:3 93:3,5 102:24
Alabama [5] 42:4 93:24 94:8 95:2,12
alike [1] 69:15
ALITO [49] 6:8,19,20,23 7:9,13,15 8:14 18:7,8,17,22 19:3,7,16,19,23 20:1,6,10,19 21:5,10,25 22:9,14 23:3,12,16,22 24:3,10,21 25:19 53:21,22 54:14 55:25 56:25 57:20 58:11,19,25 63:4 66:1 76:2 77:9 83:5 98:24
Alito's [3] 30:13 36:4 63:14
allegations [2] 86:7,19
alleged [2] 25:18 103:7
allegedly [2] 25:10,11
allow [6] 42:15 66:25 72:6 91:7 104:4,5
allowed [7] 13:18 42:9 44:7 86:1,5,18 96:4
allows [1] 24:19
Almendarez [1] 42:16
Almendarez-Torres [43] 5:3,15 6:9 9:16 11:25 13:11,22 17:10,14 26:15,25 30:1 31:17 34:21 35:16 36:7 38:16 40:12,19 41:5,20,23 42:11 43:23 56:12 62:15 64:20 70:20 71:1,3,10,20 73:20 82:4,6 84:9 88:20 89:21 91:1,14,18 92:10,21
almost [4] 46:4 47:17 69:2 85:23
already [9] 4:18 5:12 32:5 41:14 46:1 65:10,18 75:1 101:20
alter [1] 96:16
alternative [1] 76:6
although [4] 42:8 59:17 90:19 95:13
Amendment [20] 3:18 4:6 7:23 11:14 14:25 15:3,8 39:23 43:10 77:16,19,25 78:2 83:7 85:4,8 87:2,6 94:4 95:9
Amendment's [1] 43:5
amici [1] 25:5
amicus [22] 1:24 2:11 9:1,17 10:3 12:17 13:20 14:2,3 16:2,11,15 31:8 32:1,8,13,18 43:20 70:10 102:15,23 104:12
amicus's [2] 4:4 15:15
among [1] 67:11
amount [1] 78:15
analogous [1] 73:4
analogue [1] 16:9
analogues [2] 72:21 87:6
analysis [5] 4:6 16:16 25:2 29:11 31:13
analyze [2] 28:9 29:6
animating [1] 69:16
announce [1] 62:11
announced [1] 26:21
annoyed [1] 79:15
annoying [1] 80:4
anomalous [1] 92:18
Another [7] 25:15 35:25 52:21 57:12 67:20 71:15 73:10
answer [16] 7:25 9:25 16:3 17:7 30:6 38:19 40:18 55:11 72:22 73:19 75:18 78:25 79:1 83:14 84:25 91:9
Antebellum [1] 93:10
anticipate [4] 40:17 59:15 63:13 67:25
anyway [1] 7:10
apart [6] 30:3,17 46:3 52:21 99:25 100:9
apparently [1] 76:19
appeals [4] 4:23 62:4 68:8 70:25
appeals' [1] 64:24
APPEARANCES [1] 1:17
applied [3] 14:24 41:16 70:25
applies [3] 4:3 7:7 38:8
apply [13] 4:19 6:6 7:23 11:9 16:16,20 26:21 34:18,25 76:22,24 87:3 99:11
applying [3] 3:13 4:6 72:1
appointed [1] 104:11
appointment [1] 102:16
appreciate [1] 88:11
Apprendi [30] 4:2 6:15 7:6 8:3 10:2 11:20,23 17:22 26:24 31:23 34:21 35:22 43:2,4 71:22 78:5,17 81:10,10,18,21 82:1,2 91:1,3,14,17,21 92:15,22
approach [3] 9:18 14:23 89:17
approaches [1] 71:24
appropriate [3] 6:13 77:17 102:1
April [4] 44:14 45:16,16,16
area [1] 85:24
aren't [1] 27:4
arguably [1] 9:16
argue [4] 74:16 79:19 81:15 104:12
arguing [1] 60:14
argument [31] 1:14 2:2,5,9,13 3:4,7 7:22 8:13 9:1 24:2,16 25:6 27:12 30:8 39:10 46:12 49:22 52:7,23,24 56:9 60:4 66:7 67:2,5 70:9 80:1,9 90:25 101:5
arguments [2] 74:14 76:6
arise [2] 8:15 15:1
arose [1] 16:7
article [1] 32:8
articulate [1] 89:22
articulating [3] 89:13,24 90:8
aside [3] 54:20 72:9 103:2
aspects [1] 55:16
assault [2] 47:1 56:6
asserted [3] 18:25 19:8 54:12
assigned [1] 86:17
assume [3] 18:13 63:10 68:18
assumed [2] 10:25 23:23
assumption [1] 95:18
assurances [1] 48:15
authorizes [1] 71:10
availability [2] 48:22 61:2
available [1] 20:17
avoid [1] 4:20
avoidance [2] 88:4,17
aware [1] 87:20
away [2] 57:11,15
B
back [20] 7:3 24:15 28:25 32:25 36:3 38:12,17 42:9 48:9 56:14 63:4,7 64:11 72:24 73:11 79:2 81:23 87:3,16 89:23
backdrop [1] 26:2
bait [1] 6:24
bar [3] 62:21 80:14,17
bare [1] 83:14
bargain [3] 33:6,15 48:7
bargaining [4] 28:8 32:9,20 34:3
bargains [2] 8:18 29:20
BARRETT [26] 15:11 16:4,14,18 17:8 34:6,7 44:25 45:5,17 50:16 51:22 63:1,2,12 64:12 65:8,19 67:21 87:1 88:1,11 98:9,24 99:10 100:13
base [1] 80:7
based [5] 3:20 29:24 56:1 70:20,22
basic [3] 50:9 69:15,15
basically [2] 20:12 69:9

basis [3] **17**:9 **71**:7 **81**:11
beats [1] **44**:21
become [1] **68**:17
becomes [2] **29**:13 **79**:17
beginning [1] **62**:12
behalf [8] **1**:19,21 **2**:4,7,15 **3**:8 **39**:11 **101**:6
believe [4] **60**:21 **62**:20,20 **65**:13
below [6] **1**:25 **2**:12 **25**:7 **47**:11 **70**:11 **104**:13
bender [1] **26**:8
beneficial [2] **64**:2 **76**:10
benefit [2] **67**:18 **80**:22
best [2] **72**:15 **94**:10
better [1] **94**:6
between [8] **27**:21 **34**:11, 23 **44**:24 **52**:15 **86**:4 **91**:14, 19
beyond [17] **15**:4 **16**:10 **26**: 23 **34**:20 **37**:15,15 **38**:21 **43**:21 **53**:3 **55**:4,14 **56**:1 **63**:15 **89**:9 **95**:1 **99**:23 **104**: 2
beyond-a-reasonable-doubt [1] **56**:2
Bibas [1] **32**:7
bifurcate [7] **37**:6 **59**:8,12, 16 **75**:13,15 **81**:4
bifurcated [6] **59**:9,24 **65**: 11 **74**:24 **76**:4,15
bifurcation [25] **4**:17 **7**:17 **8**:1,7,13,20 **59**:16 **73**:23 **74**:1,11,14 **75**:5,6 **96**:18,18 **97**:6,10,15 **98**:2,2,4,15 **101**: 9,13 **102**:2
bifurcations [1] **61**:3
big [1] **98**:21
bigger [1] **31**:17
Bishop [1] **82**:23
bit [9] **24**:19 **27**:17 **28**:10 **41**: 7 **42**:20 **60**:23 **91**:2,5,7
blah [3] **20**:4,4,4
blank [1] **68**:17
blow [1] **89**:16
blue [1] **15**:21
boils [1] **39**:17
bolster [1] **34**:2
bolsters [1] **30**:6
borderline [2] **34**:24 **38**:16
both [3] **30**:12 **80**:2 **82**:12
bother [2] **69**:7,13
bottom [1] **73**:5
box [1] **78**:23
brain [2] **27**:19 **64**:15
break [1] **44**:24
brief [10] **5**:16 **15**:21,25 **32**: 1,20 **75**:3 **87**:18 **88**:5 **102**: 19 **104**:12
briefed [1] **102**:7
briefing [1] **34**:23
briefs [4] **4**:8 **26**:14 **32**:13 **101**:18
bring [2] **64**:11 **66**:13
broader [3] **8**:25 **77**:16,22
broke [1] **18**:19
Brown [1] **41**:10
bucket [1] **35**:16
burden [14] **10**:14 **15**:15 **42**: 18 **43**:11 **60**:19 **63**:6 **83**:23, 25 **84**:1,3,8,11,21 **87**:22
burglaries [2] **25**:23 **29**:2
burglarize [1] **46**:24
burglarized [1] **18**:20
burglary [1] **78**:6
butt [1] **29**:17

C

California [1] **1**:18
call [3] **12**:6,11 **55**:7
called [2] **11**:23 **35**:20
came [3] **1**:13 **15**:22 **17**:16
camp [2] **93**:14,15
candid [1] **78**:11
Candidly [1] **27**:3
candor [3] **4**:11 **47**:12 **88**: 12
cannot [1] **15**:7
care [1] **73**:23
career [1] **26**:6
Carolina [5] **42**:5 **44**:5 **93**:9 **94**:10 **95**:2
carve [1] **11**:15
carveout [2] **17**:10 **36**:7
Case [74] **3**:4,12,12 **4**:9 **5**: 11,12,16,18 **6**:6 **8**:5,8,8 **11**: 14,17 **13**:16 **14**:12 **16**:6,21 **17**:8 **21**:15,23 **25**:9 **26**:18, 20 **27**:1,8 **29**:13 **31**:12 **32**: 2 **33**:2,22 **34**:15,19 **36**:8,18 **38**:18 **39**:17 **40**:9,24,25 **45**: 12,21 **46**:4 **47**:12 **57**:8 **58**: 5 **64**:3 **67**:4,5 **72**:5 **74**:10 **75**:2,3 **76**:24 **81**:6 **84**:20 **85**:15,18 **86**:15 **87**:17 **88**: 21 **89**:6 **97**:11 **98**:14,14 **99**: 22 **100**:6 **101**:23 **102**:16,18, 19 **104**:12,16,17
cases [66] **4**:13,13,14 **6**:12 **8**:15,17,19,22 **9**:12,20,20 **14**:15,21 **15**:18 **16**:20,22 **19**:5,18 **27**:4 **29**:20 **30**:2 **31**:24 **32**:23 **33**:10 **38**:17 **39**:5 **41**:9,10 **44**:4 **45**:13 **50**:24 **53**:24 **59**:18 **60**:24 **61**:1 **62**:9,14,16 **65**:23 **66**: 5 **67**:12 **68**:2 **73**:5 **74**:2,15 **76**:19,19,20 **81**:2,2,7 **84**:11 **88**:3,16,17,18,22 **93**:11 **94**: 8 **95**:12 **97**:16 **99**:19,20 **100**:4,11 **103**:19
categorical [3] **14**:23 **89**: 16,16
category [1] **14**:3
cause [1] **31**:2
centuries-old [1] **70**:21
Century [2] **12**:24 **82**:25
cert [1] **100**:6
certain [5] **21**:24 **28**:16 **65**: 15 **78**:9 **103**:20
certainly [3] **80**:18 **85**:17 **91**:15
challenge [1] **28**:13
challenged [2] **87**:14 **96**:7
challenges [2] **29**:10 **96**:8
chance [1] **44**:23
change [2] **33**:25 **78**:16
character [1] **39**:22
charge [3] **4**:17 **33**:18 **49**:7
charged [6] **19**:10 **36**:17, 18 **49**:5 **50**:3,10
charges [1] **48**:2
charging [6] **18**:18,21,25 **54**:2 **55**:1 **66**:24
chase [1] **11**:8
CHIEF [31] **3**:3,9 **7**:11,14 **18**:4 **24**:22 **26**:12 **27**:14 **30**: 10 **34**:5,8 **39**:7,13 **53**:18 **58**:21 **61**:5 **62**:25 **65**:20 **70**: 5,8,12 **73**:22 **75**:17 **98**:10, 12,12,15,18 **100**:14 **101**:1 **104**:9
choice [3] **28**:1 **49**:21 **70**: 18
choose [1] **59**:18
chooses [1] **45**:9
chose [2] **49**:24 **98**:17
chosen [1] **48**:8
Circuit [1] **58**:5
circuits [2] **56**:21 **60**:23
circumstances [3] **46**:16 **81**:15 **97**:7
cite [4] **75**:2 **81**:6 **87**:17 **98**: 14
cited [6] **50**:5 **74**:3,9 **84**:20 **86**:15 **100**:5
cites [1] **32**:8
city [1] **25**:13
civil [1] **8**:22
clarify [1] **65**:23
clarifying [1] **63**:3
classic [1] **70**:15
clause [13] **3**:22,25 **4**:12 **5**: 14 **26**:4 **33**:12 **49**:22 **70**:14 **71**:2 **72**:2,7 **73**:4,6
cleaner [1] **40**:11
clear [17] **3**:11 **5**:13 **14**:22 **29**:24 **41**:15 **42**:3 **43**:18 **46**: 1 **49**:6 **50**:2 **58**:2 **82**:3 **84**: 19 **90**:20 **91**:19 **99**:21,23
clearly [5] **44**:23 **45**:3 **47**: 24 **52**:13 **80**:20
client [1] **28**:22
close [1] **81**:3
closer-in-time [1] **94**:5
closing [1] **75**:10
co-defendants [2] **103**:17, 18
cobbled [1] **13**:20
code [1] **38**:21
coherent [1] **24**:8
collateral [1] **82**:14
colloquies [3] **19**:14,19,22
colloquy [5] **19**:16 **39**:15 **43**:3 **54**:3 **67**:21
colorable [1] **66**:6
come [10] **14**:13 **23**:20 **37**:1, 14 **38**:12 **41**:6,13 **69**:25 **95**: 13 **102**:23
comes [9] **17**:22 **27**:12 **29**: 16,19 **44**:21 **67**:20 **80**:6 **86**: 23 **87**:25
comfortable [1] **69**:3
coming [5] **38**:17 **62**:21 **68**: 20 **69**:10 **84**:13
commend [1] **47**:10
commentary [1] **10**:25
commercial [1] **25**:24
commit [7] **46**:25 **47**:1 **51**: 20,21 **78**:5,6,7
committed [13] **9**:8 **21**:13 **30**:17 **37**:18 **57**:4,9,12 **64**: 5 **65**:6 **74**:20 **77**:13 **103**:8 **104**:3
committing [1] **36**:21
common [16] **16**:1 **22**:6 **46**: 23 **52**:11 **67**:6,7,9 **85**:5,9, 12 **94**:20,23 **95**:21 **96**:5,13 **102**:8
common-sense [3] **55**:22 **56**:19 **101**:17
compact [2] **95**:8 **96**:3
comparable [1] **87**:9
compared [1] **31**:22
comparison [1] **41**:11
completely [1] **96**:19
complex [1] **36**:3
complexity [1] **36**:16
complicated [1] **56**:18
component [1] **90**:17
components [1] **90**:2
comprise [1] **61**:18
concede [2] **71**:9 **94**:22
conceding [1] **56**:22
conception [1] **35**:15
concern [4] **4**:9 **32**:7 **36**:13 **92**:13
concerns [2] **15**:1 **31**:7
conclusion [2] **57**:3 **69**:19
conclusions [1] **55**:23
concurrence [1] **8**:3
conduct [8] **3**:20 **13**:25 **14**: 10 **15**:5 **26**:23 **34**:19 **43**:24 **47**:15
conducted [3] **18**:9 **25**:22 **65**:10
conducting [1] **29**:10
confess [1] **27**:23
confessed [1] **58**:7
confession [2] **62**:1,4
confidence [1] **51**:1
confident [1] **61**:3
Congress [4] **37**:17 **58**:3 **74**:21 **78**:1
connects [1] **56**:9
consensus [1] **72**:10
consider [3] **5**:18 **23**:1,21
consideration [1] **60**:2
considered [1] **51**:13
consistent [3] **70**:19 **84**:2, 3
constantly [1] **52**:25
Constitution [7] **10**:22 **70**: 19 **83**:13 **84**:14,18 **85**:11 **95**:24
constitutional [14] **9**:20 **10**:15 **31**:7,9,11 **71**:16 **87**: 15 **88**:15,19 **93**:1 **96**:7 **97**: 5,10 **101**:19
constraints [1] **83**:7
construed [2] **3**:23 **14**:24
contemplate [1] **31**:5
contemporaneous [1] **94**: 5
context [8] **28**:8 **67**:25 **74**:5, 6,10 **92**:24,24 **94**:21
contexts [1] **74**:3
continued [1] **101**:16
contradict [1] **95**:17
contradicts [1] **84**:23
contrary [4] **56**:8 **60**:14 **78**: 4 **87**:20
conversation [2] **102**:5 **103**:5
convict [1] **36**:20
convicted [6] **3**:16 **36**:21 **75**:9,11 **98**:21,23
conviction [22] **5**:25 **6**:2,3 **14**:5,6,7,9 **15**:22 **17**:23 **18**: 13,14 **30**:3 **35**:5,18 **37**:16 **38**:22 **41**:17 **44**:3 **50**:14 **54**: 2 **73**:1 **90**:17
conviction's [1] **39**:25
convictions [8] **4**:1 **17**:16 **25**:10 **48**:9 **76**:1 **77**:21 **90**: 2 **100**:8
convince [1] **58**:18
cool [1] **52**:15
cooperate [1] **103**:16
corner [1] **93**:10
correct [12] **30**:19 **31**:9 **40**: 20 **41**:20,25 **61**:23 **62**:12 **63**:11 **71**:24 **83**:14,15 **98**: 11
correctly [1] **84**:9
correctness [1] **43**:22
couldn't [1] **61**:13
counsel [10] **18**:5 **28**:2 **39**: 8 **53**:19 **70**:6 **72**:14 **79**:12 **100**:15 **101**:3 **104**:10
Count [1] **20**:3
counts [2] **65**:24 **66**:3
couple [7] **57**:25,25 **73**:25 **94**:15 **101**:8 **102**:4 **103**:4
course [12] **8**:17 **21**:12 **29**: 14 **30**:20 **39**:1 **46**:21 **47**:2, 8,19 **74**:12 **75**:18 **102**:17
COURT [104] **1**:1,14 **3**:10, 13,17,22 **4**:5,22,23 **5**:5,9, 10,12 **6**:11 **7**:3,5 **8**:4,7,9

11:15,23 14:20,22 15:1 17:14,18,21 20:10,13,15 21:14 24:15 25:1 26:20 29:15,15,25 31:23 35:11 39:14 40:7,20,23,24 41:10,15,25 42:11,12 43:2,3,17 44:1,11 45:9 46:6,22 47:15,23 51:13 56:14 58:2 62:10,12 64:24 67:23 68:5,23 69:20 70:13,19 71:17,24 72:9 73:15 76:23 82:5 84:13,13 85:6,8 86:16 87:5 88:10,14,18,24 89:14 90:4,5,9 91:25 92:15 96:7 97:9,11,12,14 101:11 102:2,13,23 104:7,11
Court's [20] 4:24 5:17 7:5 14:20 17:13 20:23 21:11 29:18 35:21 40:6 45:10 64:24 67:14 70:17 71:18 72:13 87:18 96:9 102:8 103:1
Court-appointed [3] 1:24 2:11 70:10
courts [19] 4:18 16:23 30:14 35:11 43:24,24 45:22 62:4 68:8,14 70:24 72:11 81:23 82:12 87:15 91:25 96:8 102:11,12
cover [2] 54:7 101:8
covered [2] 26:24 41:14
creates [1] 11:22
crime [16] 3:14,14 28:4 34:20 35:7 36:18,18,23 51:20,21,21 66:14 74:18,20 97:21,25
crimes [31] 28:24 36:20 37:2 47:21,22 49:2,23,24 50:19 51:24 55:16 60:3,4 64:23 65:1 66:23,23 78:19 79:7 82:2,6,11 91:20,20 92:17,25 99:21,24 103:7,9 104:3
criminal [23] 4:8 8:21 21:16 22:17 23:19,24,24 24:11 26:1 31:1 32:11 43:6 46:23 60:25 74:2,6 77:21 78:3,3 80:16,19,23 82:24
critical [1] 84:7
crystal-clear [3] 45:3,12,21
curiae [4] 1:24 2:11 70:10 104:12
current [2] 68:5,25
currently [2] 38:23 41:9
cut [3] 11:8 12:15 13:22

D

D.C [3] 1:10,21,23
date [9] 14:4 27:6 28:16 35:2,6 64:14 66:2 89:20 90:16
dates [4] 30:3 66:3,15 72:2
day [13] 24:17 30:17 44:19 52:16 54:17,22,25 55:6,9 56:15 57:10 64:15,16
days [14] 23:9 25:10,11,23 46:21 47:8,17 50:21 52:15 66:25 69:2 99:25 103:8,21
deal [2] 27:5 77:6
deals [2] 32:20 75:24
death [1] 74:4
debate [3] 85:17 100:19,23
debt [5] 25:21,22 46:14 52:23,23
decades [3] 70:24 72:10 91:8
decide [5] 26:25 53:2 75:13 81:14 102:12
decided [4] 16:22 67:24 84:9 101:21
decision [16] 6:16 34:1 44:7 48:23 68:25 73:7 87:19,19 88:24 90:4,5 93:13,24 96:9,10 101:15
decisional [1] 49:4
decisions [6] 43:21 64:25 77:20 93:18,24 102:10
decisis [1] 35:23
deep [1] 83:10
default [3] 84:12 94:20,23
defeats [2] 79:18,21
defend [1] 33:5
defendant [37] 3:15 4:15,21 9:8 27:11 33:4,15 36:20 41:17 47:20 49:20 51:19 52:6 53:4 57:9,12 58:17 61:10 62:17 65:5,17,25 66:6 67:1,12 73:2 74:20,21 75:6 76:3 77:13 79:10,24,25 80:11 81:13 98:16
defendant's [8] 3:19 12:20 19:21 22:4 59:18 64:4 67:10 82:8
defendants [21] 4:7 7:24 9:12 32:12 33:17 63:24 64:21 69:9 72:12 75:16,19,23 76:14 77:5 80:23 81:5,8,12 82:20 83:3 92:13
defenders [1] 80:19
defense [4] 4:8 62:21 76:7 80:17
defies [1] 27:24
define [1] 23:24
defined [1] 74:21
degree [1] 46:1
demand [1] 85:8
demanded [1] 92:15
demands [1] 43:11
demonstrated [1] 39:16
denied [3] 28:1 75:5 98:16
deny [2] 91:3 97:6
denying [1] 81:17
depart [1] 16:11
departing [1] 90:7
Department [1] 1:20
depend [3] 68:4,22,23
Deputy [1] 1:20
Descamps [11] 5:13 9:19,24 14:12,18 26:22 30:25 31:5 88:2,8 103:13
describe [1] 43:14
described [1] 58:11
describing [1] 25:18
description [1] 69:4
descriptively [1] 90:12
despite [2] 86:7 100:7
determination [5] 7:18 22:2 43:25 61:19 70:16
determinations [1] 89:18
determine [2] 22:3 44:12
determined [1] 65:18
development [1] 47:18
deviate [1] 96:4
dice [2] 12:7 15:14
dictate [1] 7:7
dictates [2] 3:11 16:19
differ [1] 55:21
difference [3] 34:14,17 98:22
differences [2] 34:22 57:1
different [47] 9:11 11:5 13:14 18:2 21:14 22:16 23:9,9 26:3 28:23 31:15 33:12 36:14 39:19 44:8,16 45:24 47:21 49:2,20,25 51:25 52:3 54:23 55:15,17 56:7 57:3,17 64:8 65:12,25 66:25 69:2,8,12,22,25 72:17 79:6 82:15 92:6,20,24 95:20 100:7 103:9
differently [4] 62:2 69:10 81:25 83:1
difficult [3] 29:13 60:9 63:17
DIG [1] 23:25
direct [2] 16:8 72:21
directly [4] 3:18 4:3 72:22 85:3
disagreed [2] 29:15,16
discern [1] 34:23
discharged [1] 104:14
discretion [12] 33:13 78:10,15 79:4 85:24 86:23 87:24 96:19,21 97:1,2 101:15
discretionary [7] 7:18 74:9,11,13 77:20 98:5 101:15
discussed [1] 86:25
disempowered [1] 40:2
dispute [2] 16:1 65:4
disputes [1] 4:15
dissent [1] 29:12
distance [1] 30:18
distinction [1] 34:11
distinguished [1] 77:24
distinguishing [1] 82:4
district [3] 40:2 43:23 67:14
divorced [1] 71:15
docket [1] 61:1
document [3] 20:10 54:3 55:2
documents [14] 18:18,22,25 29:25 50:24 51:4,17 54:8,24 55:21 66:24 103:12,14,15
doing [11] 24:1 37:6,7,8 40:2 55:25 63:9,15 71:7 89:17 92:1
done [4] 13:20 31:23 33:18 63:5
double-down [1] 89:15
doubt [11] 27:25 53:3 55:5,14 56:1 63:15 76:14 89:10 95:1 99:23 104:2
down [6] 39:17 54:25 55:9 86:16 87:5 92:19
drafted [1] 37:17
drag [1] 48:9
draw [1] 5:21
drew [1] 91:18
drug-slinging [1] 75:11
drugs [1] 44:20
Druthers [1] 52:17
due [1] 56:20
during [2] 47:1,18
dwell [1] 23:4
dynamics [2] 32:21 33:25

E

each [1] 91:2
earlier [6] 9:4 42:13 53:15 68:12 79:23 98:3
early [5] 12:9 72:25 73:11 79:3 93:25
easier [1] 55:23
easily [1] 21:1
easy [3] 14:11 32:3 66:14
effect [2] 31:13,18
eight [7] 25:10,11 79:1,19 86:10,11 103:8
eight-day [3] 103:9,10,21
Eighth [1] 58:5
either [2] 77:5 88:24
element [10] 28:4 32:10 33:13 35:7 43:5 51:14 73:19 74:23 79:4 97:24
elements [16] 3:15 11:17,21 15:4 17:24 21:21 26:24 34:20 71:9 74:18 78:20 81:13 86:8 87:12 89:19 97:21
elements-only [4] 71:13 89:7,15,23
enact [1] 71:3
enacted [1] 87:11
enacting [1] 86:4
encapsulated [3] 90:1,14,15
encompass [2] 44:9 51:12
end [6] 32:25 42:9 80:8 89:12,24 90:22
endorse [1] 4:22
endorsed [2] 8:4,7
endorsing [1] 96:10
enforce [2] 34:2 71:4
engraft [1] 32:3
enhance [1] 29:2
enhancement [2] 33:19 60:2
enhancements [3] 38:23 70:22 80:2
enhancing [1] 78:19
enormous [2] 78:14,15
enough [9] 13:9 26:25 42:14 46:14 55:13 69:4 80:4 95:22 104:4
enter [1] 59:19
enterprise [2] 24:11 29:14
entire [2] 6:14 51:11
entirely [2] 26:16 65:16
episode [9] 21:16 22:17 23:20,24,25 24:7,11,19 26:2
ERIC [3] 1:20 2:6 39:10
ERLINGER [4] 1:3 3:5 64:22 103:15
erroneously [1] 51:14
error [27] 16:16,20,23 25:2 27:22,23,25 28:3,9,11,19 29:11 30:8,8 46:12 47:11,14,25 51:13 58:7 62:1,5 67:22 102:5,18,20 103:25
escaped [1] 73:2
eschew [1] 4:5
especially [1] 26:2
ESQ [4] 2:3,6,10,14
ESQUIRE [2] 1:18,23
essentially [3] 57:24 58:7 73:6
establish [4] 10:14 16:24 55:19 95:23
established [6] 6:9,10 10:22 12:8 37:16 77:11
establishment [1] 57:14
establishments [1] 25:24
even [34] 6:18 8:15 15:2,21 17:1 28:8,24 29:7,10 31:4 32:1 41:23 44:4 47:7 50:20 55:23 58:10 61:21 65:2 66:3 68:24 69:22 71:23 87:21,22 90:13 91:3 93:13 95:7 97:13 101:11,14,19 102:15
evening [2] 44:21 57:11
event [2] 24:9 44:13
events [1] 103:2
everybody [2] 47:17 60:9
everything [1] 64:9
Evidence [17] 20:14 37:1,14,23 38:8 42:10 58:18 60:3 65:2 66:13 72:15 74:17 75:2 77:23 94:5 97:20 99:5
exact [7] 26:14,17,20 54:25 55:9 56:15 69:23
exactly [3] 3:23 92:21 98:7
example [8] 44:14 46:24 54:6 56:5 69:2,21 89:25 99:22
exception [13] 11:15,24 12:3,7,11 26:15 30:1 35:5 62:15 71:12,12 77:15 79:18
exceptions [2] 54:7 79:16

exchange [1] **33:**19
executes [1] **26:**9
exist [1] **21:**9
existed [1] **91:**8
existing [1] **32:**4
expanded [1] **52:**3
expect [3] **58:**15 **59:**12 **66:** 5
experience [3] **22:**6 **24:**8 **66:**19
expert [1] **99:**6
explain [1] **46:**6
explained [2] **17:**21 **56:**19
explaining [1] **58:**3
explains [1] **90:**22
explore [1] **27:**17
exploring [1] **39:**24
express [1] **8:**10
expressed [1] **15:**3
expressly [2] **56:**19 **62:**13
extend [1] **43:**4
extended [1] **11:**20
extension [2] **43:**10 **92:**19
extent [4] **48:**21 **54:**8 **66:**22 **69:**17
extremely [2] **74:**2 **77:**23

F

faces [1] **42:**21
fact [28] **3:**25 **4:**13 **5:**24 **8:** 22 **11:**21 **15:**17 **16:**2,12 **17:** 6,15,20,22 **18:**2 **19:**9 **35:**18 **37:**19 **38:**11 **48:**16 **51:**2 **60:** 16 **64:**19 **71:**1 **77:**2 **82:**13 **91:**24 **95:**20 **97:**24 **103:**14
factor [1] **23:**4
factors [2] **21:**17 **43:**7
facts [42] **7:**8 **15:**4 **22:**18,23, 25 **27:**3,7,10,13 **35:**1,12 **36:** 15,17,19,23 **37:**1 **38:**21 **50:** 23 **61:**10 **68:**15 **70:**1 **71:**11, 19,21 **72:**2,4,7 **78:**19,24 **79:** 6,9 **89:**9,18,25 **90:**14 **91:**19, 20 **92:**1,16,20,25 **94:**24
factual [3] **3:**24 **52:**4 **103:**5
faded [1] **64:**18
fail [1] **91:**6
fair [8] **6:**22,22 **7:**3,3 **33:**4 **46:**17 **80:**18 **95:**17
fairly [3] **49:**15 **50:**10 **52:**20
fall [2] **12:**2 **89:**23
falls [1] **5:**14
far [9] **30:**3 **39:**15 **44:**5 **46:**3 **52:**20 **62:**15 **85:**7 **86:**21 **90:** 5
favor [3] **32:**21 **34:**1 **68:**11
favorable [2] **6:**17 **7:**16
features [1] **43:**6
federal [14] **8:**8 **20:**13 **33:** 11 **38:**21 **39:**3 **41:**12 **60:**25 **70:**24 **72:**10 **76:**17 **78:**3 **85:** 15 **96:**25 **101:**23
feed [1] **22:**18
feel [1] **77:**1
FEIGIN [63] **1:**20 **2:**6 **39:**9, 10,13 **40:**13,16 **41:**21 **42:** 19,25 **45:**2,7,25 **46:**11 **47:**7, 9 **48:**4,13,20 **49:**11,14,18 **50:**2,7,13 **51:**5,11 **52:**2 **53:** 8,14,17 **54:**5 **55:**11 **56:**3 **57:**18,23 **59:**2,6,9,13,23 **60:** 11 **61:**13,18,24 **62:**7 **63:**2, 11,19 **64:**13 **65:**13 **66:**17, 21 **67:**17 **68:**4,10,22 **69:**13, 25 **70:**3,7 **72:**23 **76:**17
fell [1] **78:**24
felon [4] **75:**9,12 **98:**21,23
felon-in-possession [2] **32:**23 **33:**9
felonies [1] **61:**11
felony [3] **72:**1 **89:**18 **92:**2
few [11] **13:**23 **18:**8 **25:**23 **27:**2 **34:**24 **38:**20 **46:**13 **47:** 8 **56:**22 **61:**8 **89:**4
fewer [2] **8:**16,16
figure [1] **37:**3
filed [1] **4:**8
fill [1] **68:**16
find [26] **3:**14,21 **11:**16 **20:**3 **21:**21 **26:**1 **35:**8 **41:**15 **44:** 1,2 **46:**18 **47:**4 **50:**19 **58:** 16 **65:**2 **71:**8,10,19,21 **72:**2, 6 **89:**2,9,18 **99:**12 **100:**7
finding [19] **8:**23 **13:**18 **15:** 17 **17:**6,15,20 **22:**15,19,22 **31:**16,20 **37:**19 **38:**5,8,11 **39:**19 **70:**16 **71:**2 **72:**25
findings [8] **13:**24,25 **14:**3 **15:**24 **86:**1,17 **94:**19,24
fine [1] **45:**8
fine-grained [1] **44:**17
finish [1] **93:**6
firearm [1] **48:**11
firearms [1] **61:**21
first [21] **3:**4 **7:**4,4 **14:**16 **47:** 10,14 **48:**13 **51:**5 **52:**13 **55:** 12 **62:**17 **72:**22 **74:**1,23 **76:** 10 **78:**1,2 **89:**5 **94:**16 **101:** 8 **102:**12
first-choice [1] **60:**13
FISHER [93] **1:**18 **2:**3,14 **3:** 6,7,9 **5:**1,4,9,22 **6:**18,21,25 **7:**2,21 **9:**5,22 **10:**6,9,12,19 **11:**3,6 **12:**2,14,17,23 **13:**2, 5,8,14 **15:**11,20 **16:**17,19 **17:**12 **18:**16,21 **19:**5,11,17, 21,25 **20:**5,8,11 **21:**3,9 **22:** 7,13 **23:**11,14,17 **24:**1,6,12, 24 **25:**4,8,16 **26:**19 **27:**20 **28:**6,17 **29:**9 **30:**20,22 **31:** 10 **32:**16,19 **34:**14,17 **35:** 17 **36:**1 **37:**5,10,13,24 **38:**2, 7,15 **43:**3 **46:**13 **53:**24 **59:** 17 **62:**19 **68:**11 **83:**23 **84:** 20 **89:**6 **101:**4,5,7
fit [3] **36:**9,10,11
five [1] **78:**6
flag [1] **72:**19
flips [1] **84:**21
follow [2] **32:**21 **34:**1
following [1] **57:**13
force [1] **81:**18
forced [3] **71:**12 **75:**7 **98:**16
forces [2] **75:**23,24
forfeiture [2] **8:**21 **74:**6
forget [1] **64:**16
Forgive [2] **25:**16 **102:**14
form [1] **17:**25
formed [1] **95:**8
forth [2] **24:**15 **63:**4
forward [1] **17:**1
found [11] **16:**12 **19:**13 **29:** 21 **38:**24 **42:**12 **44:**13 **45:**4 **46:**20 **55:**8 **89:**9 **91:**25
Founding [2] **73:**17 **85:**19
four [15] **12:**18 **13:**4,5,8,21 **56:**23 **58:**25 **61:**22 **65:**9 **79:** 19,20 **85:**25 **86:**2,2 **94:**16
frames [1] **66:**4
frankly [3] **8:**12 **40:**8 **59:**14
fraud [1] **21:**23
friend [2] **41:**7 **42:**1
friends [1] **98:**25
front [5] **13:**15 **42:**11 **44:**7 **72:**19 **77:**7
front-line [1] **71:**7
fueled [1] **31:**6
fundamental [2] **92:**3 **95:** 23
fundamentally [1] **52:**4
further [5] **15:**2 **39:**1 **100:** 17 **101:**2 **104:**7
future [6] **11:**12 **33:**16 **35:** 10 **68:**3,14,19

G

gambler [1] **67:**7
gambling [2] **25:**22 **52:**24
garage [1] **61:**23
Gaudin [5] **10:**2 **11:**13,21 **12:**4 **84:**20
gave [1] **78:**9
General [10] **1:**20 **11:**16,23 **35:**4 **54:**22 **58:**6 **69:**4,17 **79:**18,21
generally [6] **25:**2 **46:**2 **59:** 16 **78:**18 **81:**10 **86:**8
gently [1] **8:**7
geographic [1] **21:**17
Georgia [1] **100:**6
give [1] **21:**6
given [3] **21:**5 **36:**11 **49:**14
gives [1] **33:**14
go-round [1] **74:**23
GORSUCH [33] **17:**3 **27:**15, 16,21 **28:**7,18 **47:**6,9 **48:**6, 17 **49:**9,13,16,19 **50:**6,12, 15 **51:**9,18 **53:**1,13,16 **61:**6 **62:**2 **93:**4,6,8,17,22 **94:**2,9, 12 **95:**6
Gorsuch's [2] **30:**14 **103:** 24
got [5] **45:**11 **46:**2 **50:**22 **58:** 7 **69:**9
government [41] **5:**20 **6:**1 **11:**17 **16:**15 **18:**11 **19:**1 **28:** 25 **33:**16 **47:**11 **48:**18 **58:**6 **65:**10 **69:**7 **71:**5,25 **74:**13, 16,16 **75:**4 **76:**16,18 **80:**22 **81:**3 **84:**7,10,21 **86:**6,13,14, 18 **90:**3 **91:**15 **95:**16 **97:**15, 18,23 **99:**18,23 **102:**18,22 **104:**1
government's [8] **29:**23 **33:**14 **52:**19 **62:**6 **89:**25 **90:** 12,18 **102:**19
grabbed [1] **57:**14
grabbing [1] **57:**10
Graham [1] **87:**19
grand [1] **87:**11
grant [1] **31:**12
grapple [1] **21:**8
grateful [1] **104:**15
gravely [1] **72:**12
great [3] **46:**7,8 **88:**8
ground [1] **86:**17
grounded [2] **3:**17 **31:**12
grounding [1] **90:**9
grounds [3] **45:**9 **87:**15 **96:** 7
guarantee [2] **76:**22,25
guess [11] **36:**21 **45:**18 **60:** 7 **62:**1 **66:**4,10 **85:**21 **91:** 12 **94:**15 **98:**17 **100:**1
guidance [1] **39:**2
guilt [2] **79:**8 **82:**8
Guilty [6] **4:**10 **29:**8 **33:**17 **47:**17 **48:**3,8
gun [1] **35:**19
gun-toting [1] **75:**11
guns [2] **61:**22,22

H

hand [3] **27:**24 **28:**2 **31:**19
handful [6] **4:**14 **8:**14,19 **13:**23 **31:**14,20
handle [1] **59:**20
hands [1] **33:**14
happen [3] **38:**10 **68:**2 **100:** 10
happened [7] **37:**2,3 **50:**19, 20 **56:**15,16 **66:**7
happens [2] **27:**17 **74:**11
happy [2] **4:**24 **40:**6
hard [3] **29:**18 **60:**24 **98:**6
hard-pressed [1] **20:**25
harder [5] **18:**22 **64:**9 **65:**1 **99:**11,16
harm [1] **4:**7
harmful [2] **9:**12 **12:**13
harmless [27] **16:**16,19,23 **25:**1 **27:**22 **28:**3,9,11,19 **29:**7,11 **30:**5,7,8 **45:**4 **46:** 12 **47:**14,25 **48:**1 **51:**1 **53:** 3 **67:**22 **68:**16 **102:**5,18,20 **103:**25
harmlessness [3] **45:**8 **67:** 24 **68:**14
HARPER [41] **1:**23 **2:**10 **70:** 8,9,12 **72:**18 **73:**25 **75:**20 **76:**13 **78:**11 **80:**15,18 **81:** 19 **82:**21 **83:**15,19 **84:**6 **85:** 16 **87:**8 **88:**7,14 **89:**4 **91:** 12 **92:**7,10,14 **93:**12,19,23 **94:**7,11,15 **95:**10 **96:**20,24 **97:**8 **98:**11 **99:**4,14 **100:**21 **104:**11
Harrell [3] **75:**2 **81:**6 **98:**14
he'll [1] **29:**3
hear [2] **3:**3 **58:**24
heard [1] **53:**15
hearsay [3] **18:**23 **54:**7,12
held [3] **3:**13 **70:**20 **88:**18
hello [1] **65:**17
help [1] **81:**12
hide [1] **74:**22
high [2] **33:**10 **80:**8
highly [2] **21:**22 **103:**13
hint [1] **7:**19
historical [17] **9:**2,14 **10:**6, 18,23 **42:**10,18 **43:**19 **72:** 15,21 **73:**14,16 **77:**10,23 **78:**21 **82:**18 **84:**22
historically [1] **100:**19
history [27] **9:**23 **10:**1 **11:**9, 18 **12:**9 **13:**10 **14:**16 **15:**12, 16,17 **16:**9,12 **17:**5 **43:**13 **50:**14 **78:**12,13,18 **79:**15, 16 **83:**17 **85:**1,3,4,22 **92:**5 **93:**9
Hmm [1] **38:**6
holding [4] **31:**2 **32:**21 **52:** 5 **67:**14
holdings [1] **62:**8
home [1] **44:**21
Honor [30] **41:**21 **42:**19 **45:** 7 **48:**4,13,20 **50:**3 **51:**6 **52:** 2 **53:**8 **54:**5 **55:**12 **56:**3 **57:** 23 **59:**10 **60:**12 **61:**13,24 **62:**7 **65:**14 **66:**17 **68:**5 **69:** 14 **74:**1 **78:**12 **80:**19 **81:**2 **84:**24 **95:**10 **100:**22
hopefully [1] **33:**1
house [1] **18:**20
However [1] **69:**20
Hudson [2] **93:**13,20
hundred [1] **51:**1
hundreds [2] **81:**23 **83:**6
hurt [1] **80:**10

I

idea [4] **21:**7 **52:**9,10 **97:**18
identified [3] **8:**2 **12:**18 **79:** 2
identifies [1] **16:**3
identify [2] **26:**10 **35:**12
identifying [1] **26:**6
identity [2] **89:**19 **90:**15
illustrated [1] **43:**3
illustrates [1] **72:**5

imagine [2] 25:20 35:20
impermissible [1] 97:6
important [6] 9:23 11:11 16:5 23:6,7 83:11
impose [2] 70:22 72:10
imposed [1] 4:2
imposing [1] 60:19
impossible [1] 38:19
imprisonment [1] 78:7
in-between [1] 34:24
incentive [1] 75:19
incentivize [1] 63:23
include [1] 7:8
inconsistent [1] 71:15
incorporated [4] 68:1,18 85:11 95:24
increase [2] 3:19 33:3
increases [2] 11:22 12:20
indicates [1] 43:13
indictment [10] 42:6 49:7 65:24 86:7,9,20 87:13 94:25 96:15 103:20
indictments [2] 29:16 66:22
indisputable [1] 81:1
infer [2] 56:5 67:1
inference [1] 55:14
information [9] 28:22 48:18 49:10,12 50:4 66:23 86:5 87:10 96:6
informed [3] 48:7,23 60:16
inherent [2] 6:2 14:8
initial [2] 37:16 96:3
innovation [1] 16:10
inquiries [1] 72:16
inquiry [16] 3:24 16:6 38:3 39:20 44:9,16 52:4 55:19 56:18 60:17,18 64:19 69:5 72:17 73:16 92:2
insist [1] 69:1
instance [1] 102:12
instead [3] 12:19 13:19 16:13
instruct [3] 28:3 54:19 58:13
instructed [6] 20:3,20 23:1 54:11 69:1,22
instruction [5] 20:25 21:4,6 28:1 68:6
instructions [7] 20:1,9 30:13 54:3 68:2,19 69:18
integral [1] 6:1
intelligible [1] 21:1
intended [1] 43:7
intent [1] 76:9
interest [1] 41:8
interpret [1] 91:22
interpreting [3] 85:3,7 94:3
interrupt [1] 10:8
intervening [1] 49:3
introduce [3] 18:14,17 64:8
introduced [3] 19:8,9 60:3
invalidates [2] 84:14,15
invariably [2] 46:4 68:24
inveterate [1] 67:7
involve [1] 41:11
involved [2] 44:15 98:14
involves [1] 24:7
involving [1] 39:20
isn't [2] 54:12 81:9
issue [18] 4:12,16 5:24 17:1 20:23 25:9 42:15 53:9 82:14,15 83:4,4 89:21 100:5 101:12 102:7,21 103:1
issues [4] 6:7 12:10 82:7 99:16
It'll [1] 45:13
itself [13] 11:23 15:22 22:24 24:15 30:1 38:22 46:22 62:10,18 83:13 89:21 91:24 92:15

J

JACKSON [32] 15:10 17:2,4 34:9,10,16 35:9,24 36:2 37:9,12,20,25 38:1,6,14 39:6 41:3,10 65:21,22 66:20 67:16,19 68:9,13 69:6,24 70:2 88:25 99:1 103:19
JEFFREY [5] 1:18 2:3,14 3:7 101:5
judge [34] 3:18 8:23 12:19 13:19 15:7 16:13 23:3,10,15 32:7 33:3 35:12 38:4,9 40:2 44:8 50:25 51:15 53:10 57:6,22 60:17 66:1 75:5 78:10 80:4,7 81:15 94:18 96:19,21 97:2 99:11,12
judges [26] 3:13 7:19 38:24 39:3 54:16,20 55:20 63:8 70:15,21 71:8,10,19 72:1,6,15 73:6 75:14 77:19 78:14 80:3 85:25 86:18 89:8,17 94:18
judgment [10] 1:25 2:12 18:14 54:2 70:11 74:19 80:13,14,21 104:13
judgments [1] 22:4
judicial [7] 17:15,20 28:15 71:1 90:1,14,15
juries [8] 9:9 21:21 63:15 69:22 71:20 89:9 94:18 100:1
jurisprudence [2] 17:13 35:22
jurors [1] 76:4
jury [107] 3:21 7:7 8:23 9:13 11:14,16 12:11,13,19 13:19 15:6,18,23 16:13 17:6,25 20:1,2,5,8,20 21:1,3,6,7,12 22:3 23:1,7 25:25 26:1 28:4,13 29:11,21 32:3 35:8,13 36:15,22,25 38:4 40:3,4 42:9 44:13 46:16,19 47:4 50:18,22 51:15 54:3,9,10,19 55:12,24 56:4,22 57:7,22 58:13,15,16,18 60:1,4,6 63:24 64:7 65:11,12,14,16 66:25 68:1,6,19 69:1,7,18 74:18,19,23,24 75:8,10 76:1 77:7 78:21 79:9 83:2 84:5 87:9,11 94:25 96:15 97:19 98:20,20 99:3,5,9 100:6,19 104:2
jury's [3] 37:6 38:7 55:14
Justice [268] 1:21 3:3,9 5:1,7,19,22 6:8,19,20,23,24 7:9,11,13,14,15 8:2,13,25 9:6 10:5,7,10,13,20 11:3,4 12:1,5,14,16,21,25 13:3,7,11,13 15:10,11,13 16:4,14,18 17:2,3,4,8 18:4,6,7,8,17,22 19:3,7,16,19,23 20:1,6,10,19 21:5,10,25 22:9,14 23:3,12,16,22 24:3,10,21,22,22,24 25:5,13,19 26:11,12,12,13 27:2,14,14,16,21 28:7,18 29:12 30:6,10,10,12,12,13,21,24 31:1,21 32:6,17 34:4,5,5,7,8,8,10,16 35:9,24 36:2,3 37:9,12,20,24 38:1,6,14,19 39:6,7,14 40:10,14 41:3,3,19 42:13,17,22 44:25 45:5,17 47:6,9 48:6,17 49:9,13,16,19 50:6,12,15,16 51:9,18,22 53:1,13,16,18,20,21,22 54:14 55:25 56:25 57:20 58:11,19,21,21,23,24,25 59:3,7,11,21 60:7 61:5,5,7,8,17,20,25 62:2,23,25,25 63:2,4,12,14 64:12 65:8,9,19,20,20,22 66:20 67:16,19,21 68:9,13 69:6,24 70:2,5,8,13 72:14,18 73:22 75:17 76:2 77:9 79:12,13,14 80:16 81:9 82:17 83:5,8,8,9,16,20 85:13 87:1 88:1,11,25 90:24 92:4,9,12 93:2,4,5,6,7,8,17,22 94:2,9,12 95:6 96:17,22 97:4 98:9,24,24 99:1,10 100:13,14,16,18,24 101:1,18 103:19,24 104:9
justified [2] 81:11 82:19

K

Kagan [15] 26:12,13 27:2 38:20 41:4 58:23,24 59:3,7,11,21 60:7 65:9 81:9 90:24
Kansas [3] 42:5 95:3,12
KAVANAUGH [53] 8:25 9:6 10:5,7,10,13,20 11:3,4 12:1,5,14,16,21,25 13:3,7,12,13 30:11,12,21,24 31:21 32:6,17 34:4 41:19 42:13,17,22 61:7,8,17,20,25 62:23 79:13 82:17 83:8,16,20 85:13 92:4,9,12 93:2,5,7 96:17,22 97:4 101:19
Kavanaugh's [1] 15:13
keep [1] 37:21
key [1] 10:10
kicker [1] 32:24
kidnapping [2] 47:1,2
kind [20] 3:24 12:7 13:9 17:18 22:25 26:9 27:10,13 29:24 31:16 36:9 44:14 45:22 56:4 63:21 64:19 66:1 67:13 69:4 99:2
kinds [8] 8:21 13:24 21:20 27:6 46:15 58:9 66:5 103:12
knife [1] 57:13
knocked [1] 64:23
knowing [1] 50:11
knows [2] 49:21 65:5

L

lacking [1] 93:25
laid [3] 15:20,24 101:17
land [2] 14:17 71:14
landing [1] 90:23
language [4] 21:11 66:1 88:4,7
large [1] 55:22
largely [2] 60:16 68:11
last [4] 32:6 33:21 52:16 90:10
later [5] 47:2 76:12 93:18 95:12,13
Laughter [6] 7:1 24:5 40:15 42:24 46:10 88:13
law [17] 16:1 19:13 27:8 30:18 33:25 38:24 49:4 53:25 82:24 85:5,9,12 94:21,23 95:21 96:5,14
laws [1] 39:5
lawyers [1] 76:5
lays [1] 22:25
leading [1] 82:24
leap [1] 85:10
least [13] 17:22 35:14 42:14 44:2 50:22 66:25 71:25 74:15 76:17 79:1 86:9 90:11 104:5
leave [4] 41:1 102:9,10 103:3
leaves [1] 4:4
leaving [2] 102:25,25
led [1] 95:9
left [2] 40:3 43:14
legislative [2] 70:18 87:24
legislature [4] 43:7,14,15 96:16
legislatures [6] 42:15 73:18 79:3 85:24 86:23 96:4
legitimate [1] 27:12
less [2] 60:25 90:20
letting [1] 16:12
level [2] 35:13 85:9
leverage [1] 77:4
lifetimes [1] 47:19
lighter [1] 80:4
likely [1] 66:9
limited [1] 36:24
limits [1] 24:14
line [8] 5:21 27:21 36:4 78:17 89:13 91:19 92:3 102:17
lines [1] 78:12
listed [2] 28:23 48:18
literally [1] 43:10
litigated [5] 4:12 26:16 27:11 33:22 53:9
litigation [2] 38:10 44:7
little [10] 8:10 24:19 27:8,17 42:20 60:23 62:2 88:6 90:20 91:2
loading [2] 15:14,14
loads [1] 12:7
location [1] 39:21
locations [1] 72:3
long [6] 26:7 43:13 49:15 60:15 61:22 64:21
longer [1] 49:5
look [17] 10:1,17,18 11:13 28:11 29:25 33:8 51:6 52:18 59:4,22,23 68:15 82:22 83:17,22 85:14
looked [1] 101:11
looking [7] 52:6 85:1,2,2,4,5 93:8
looks [1] 17:19
lose [1] 96:22
lot [7] 5:23 11:6 28:21 59:18 76:2 100:18 103:22
lots [1] 67:12
Louisiana [3] 42:4 93:12 95:2
love [1] 76:3
low [1] 80:7
lower [5] 16:22 25:1 45:22 102:11,11

M

made [12] 13:18 15:6,7 22:16 43:2,4 49:4 61:19 67:23 80:21 82:3 91:6
Maine [3] 42:7 86:3 96:2
majority [6] 29:14 94:22 95:21 96:1,13 101:13
man [2] 48:12 64:17
manage [1] 61:4
manageable [3] 60:21,22 62:18
mandatory [1] 100:4
manner [1] 39:24
many [8] 20:14 27:3,4 37:21 41:4 65:24 79:17 99:19
March [7] 1:11 18:19 20:4 55:2,3 56:6,7
margins [1] 6:5
marshals [1] 43:20
Massachusetts [5] 42:7 86:3 87:17 96:2,10
Materiality [2] 21:23 22:9

Mathis [16] **5**:13 **9**:19,24 **14**:13,18,19,21 **15**:2,9 **26**:22 **30**:25 **31**:5 **39**:24 **88**:1,8 **103**:12
matter [14] **1**:13 **18**:25 **19**:8 **26**:17,19 **35**:23 **36**:10 **54**:12 **56**:13 **63**:5 **64**:2 **74**:11 **97**:10 **99**:19
matters [1] **103**:22
maximum [1] **33**:23
McNeill [1] **41**:15
mean [22] **7**:17 **18**:24 **23**:8 **33**:6 **35**:13 **36**:16 **45**:18,25 **50**:4 **54**:5,15 **59**:23 **60**:12 **62**:9 **63**:8 **66**:10 **77**:2 **81**:10,16 **87**:2 **90**:24 **91**:3
meaning [1] **94**:4
meaningful [1] **13**:10
means [5] **41**:6,8 **52**:13 **69**:2 **84**:18
meant [2] **14**:21 **25**:17
members [1] **95**:7
memorandum [2] **52**:19,20
memories [1] **64**:18
Menlo [1] **1**:18
Mens [3] **21**:22 **22**:2 **76**:12
mention [1] **54**:24
mentioned [3] **62**:11 **72**:24 **98**:3
merchandise [1] **57**:15
methodological [1] **83**:10
mid [2] **12**:23 **29**:3
might [30] **6**:16 **18**:23,24 **19**:1 **20**:9 **29**:21 **35**:4,17 **40**:14,16,17 **43**:1 **44**:9 **46**:21 **48**:22 **49**:20 **51**:19 **53**:5 **54**:7 **63**:25 **64**:8,10 **65**:3 **76**:3,10 **81**:13,14 **83**:17 **100**:10 **103**:20
mind [3] **22**:4,5 **80**:9
minimums [1] **100**:4
minute [2] **14**:13 **27**:19
minutes [1] **46**:13
misunderstood [1] **102**:15
mixed [3] **9**:2,15 **11**:1
model [2] **21**:6 **68**:6
modern [1] **44**:5
money [2] **25**:21 **67**:8
months [1] **100**:9
moral [1] **74**:19
morning [7] **3**:4 **39**:16 **44**:20 **53**:15 **57**:10,13 **68**:12
most [17] **4**:13 **8**:17 **9**:12 **19**:5,17 **22**:21 **43**:20 **45**:13 **72**:4 **73**:5 **76**:19,19 **85**:19 **88**:18 **99**:20 **100**:1,11
mostly [1] **21**:10
motivation [1] **67**:7
move [3] **8**:22 **43**:2,4
movements [1] **16**:7
much [11] **8**:24 **9**:2 **14**:4 **16**:25 **19**:13 **23**:4 **40**:8 **60**:17 **63**:17 **64**:20 **67**:1
mugging [1] **57**:12
multi [1] **22**:1
multi-dimensional [1] **22**:11
multi-factor [2] **21**:2 **22**:1
multi-factored [2] **21**:24 **39**:20
multiple [2] **91**:21 **99**:24
murder [1] **47**:2
must [2] **20**:3 **71**:21
myself [1] **29**:17

N

NAFD [1] **32**:19
nail [2] **54**:25 **55**:9
narrow [1] **77**:11
nature [5] **14**:9 **21**:18 **24**:18 **57**:1 **70**:3
near [1] **43**:12
near-uniform [1] **10**:4
nearly [2] **30**:15,22
necessarily [7] **24**:17 **38**:18 **44**:13 **64**:1 **82**:18 **85**:11 **101**:20
necessary [4] **5**:5 **7**:8 **56**:10 **76**:9
Neder [2] **16**:17 **51**:14
Neder-type [1] **29**:11
need [15] **3**:21 **10**:22 **27**:18 **40**:5,24 **42**:23 **43**:17 **46**:25 **49**:7 **64**:8,10 **65**:3,16 **67**:8 **92**:25
needed [1] **60**:17
needs [4] **5**:10 **22**:15 **40**:7 **91**:13
net [1] **80**:22
never [3] **27**:8 **29**:3 **64**:16
new [2] **37**:1 **65**:16
NICK [3] **1**:23 **2**:10 **70**:9
nine [2] **8**:6 **61**:11
Nobody's [1] **40**:23
non-bifurcated [1] **75**:25
non-elemental [2] **71**:11 **92**:1
non-uniformity [1] **42**:14
none [1] **90**:21
normal [1] **59**:24
noted [6] **69**:20 **83**:5 **84**:24 **101**:12 **103**:12,19
nothing [8] **3**:16 **17**:24 **32**:25 **33**:6 **43**:20 **48**:10 **91**:5 **95**:16
notice [7] **28**:15,24 **33**:4 **48**:24 **50**:4,8 **61**:21
notwithstanding [1] **53**:10
novel [2] **47**:18 **90**:8
nowadays [1] **17**:19
nuanced [2] **20**:24 **22**:12
nullification [2] **100**:3,20
number [6] **33**:10 **45**:14 **55**:18 **60**:20 **61**:15 **81**:12

O

objection [2] **4**:4 **53**:10
Obviously [10] **5**:4 **16**:24 **19**:17 **30**:25 **31**:16 **46**:18 **60**:13,22 **85**:14,19
occasion [15] **20**:22 **37**:4 **46**:15,20 **47**:5 **50**:20 **51**:25 **52**:25 **53**:6 **57**:5 **66**:8 **69**:12 **79**:25 **80**:10 **103**:11
occasions [48] **3**:22 **4**:11,16 **5**:14 **13**:15 **16**:6 **21**:14 **22**:16 **26**:4 **30**:16 **31**:15 **33**:12 **37**:18 **39**:19 **44**:9,16,19,23 **45**:24 **46**:5 **47**:24 **49**:22 **51**:2 **52**:3 **54**:18,23 **55**:15 **56**:7 **57**:24 **58**:8,12,16 **64**:6 **69**:3 **70**:14 **71**:2 **72**:4,16,17 **73**:4,6 **75**:7 **76**:3 **97**:24 **99**:22,25 **100**:7 **104**:4
occur [3] **23**:9 **46**:20 **54**:23
occurred [16] **18**:13 **20**:21 **39**:25 **44**:13 **45**:15 **47**:7 **54**:18 **55**:1,5,10 **66**:24 **72**:25 **73**:2,9,9 **99**:24
occurring [2] **30**:16 **44**:18
occurs [3] **8**:20,21 **74**:4
October [1] **64**:15
odds [1] **35**:21
offendants [1] **69**:14
offenders [1] **26**:6
offending [1] **26**:7
offense [23] **15**:5,6 **18**:12 **21**:19 **27**:6 **28**:23 **32**:10 **35**:2,3,6 **39**:25 **44**:2 **50**:9 **54**:25 **59**:25 **72**:25 **73**:1,19 **78**:8 **79**:5 **86**:8 **89**:20 **90**:16
offense-related [5] **3**:20 **13**:25 **14**:10 **26**:23 **34**:19
offenses [24] **9**:8 **18**:12,15 **20**:21 **21**:13 **23**:21 **30**:15 **39**:22 **46**:3 **48**:19 **54**:22 **57**:2,2 **64**:5 **65**:6 **70**:17 **71**:9,20,21 **72**:3 **73**:8 **77**:14 **89**:19 **100**:9
offer [1] **71**:6
offhand [1] **22**:10
officer [1] **33**:2
official [1] **20**:14
often [2] **68**:7 **89**:18
Okay [9] **20**:19 **30**:24 **34**:16 **50**:12 **53**:13 **61**:25 **83**:16 **93**:22 **100**:20
old [6] **63**:8 **98**:10,11,12,15,18
older [1] **65**:1
once [2] **11**:20 **16**:24
one [49] **5**:4 **8**:6 **9**:23 **14**:22 **16**:14,21 **17**:13 **18**:3 **22**:13 **25**:14 **27**:24 **28**:10,21 **33**:21 **36**:13 **44**:25 **45**:2 **52**:4,13,14,14,21 **55**:2,3 **56**:10,11,19 **57**:10 **58**:8 **60**:12 **61**:21 **62**:3 **65**:8,23 **66**:12 **71**:15 **72**:7 **73**:9 **74**:4 **78**:13 **82**:23,23 **87**:5,24 **91**:10 **94**:10 **100**:2,5 **102**:3
one-time [1] **98**:23
ones [5] **49**:3,24,25 **52**:1 **66**:8
only [20] **3**:14 **8**:14,19 **11**:24 **12**:18 **14**:3 **31**:14,19 **34**:22 **40**:3 **44**:5 **49**:2 **71**:8 **74**:3 **79**:7,24 **82**:9 **85**:2,25 **89**:8
open [3] **6**:16 **76**:5 **100**:25
open-ended [1] **37**:19
opened [1] **6**:14
opening [2] **89**:1,7
opinion [7] **15**:9 **20**:23 **21**:11 **22**:24 **39**:2 **82**:4 **101**:25
opinions [1] **7**:6
opposed [3] **54**:11 **75**:4 **80**:13
option [3] **35**:22,25 **40**:3
oral [8] **1**:14 **2**:2,5,9 **3**:7 **24**:16 **39**:10 **70**:9
order [1] **68**:19
ordinarily [1] **97**:16
ordinary [1] **5**:17
organizations [1] **4**:8
original [6] **36**:25 **49**:3,4 **62**:6 **94**:3 **95**:7
other [49] **7**:22 **9**:1 **11**:18 **13**:23,23 **14**:3 **16**:2,14 **18**:2 **21**:20 **22**:5 **27**:3,6,10,13 **28**:2,11 **30**:4 **31**:23 **32**:14 **35**:11,14 **37**:14 **38**:13 **48**:19 **55**:3,16 **61**:22 **62**:3,16 **65**:8 **67**:11 **71**:23 **72**:8 **74**:3,6 **77**:14 **78**:17 **80**:20 **84**:4 **86**:14 **88**:24 **89**:2 **91**:2 **93**:10 **94**:17 **97**:5 **98**:2,25
others [1] **80**:12
Otherwise [4] **52**:24 **55**:18 **58**:18 **65**:4
out [21] **11**:15 **13**:4,5 **15**:20,24 **22**:25 **23**:5 **29**:4,12 **37**:3 **42**:6 **49**:1 **58**:5,8 **64**:23 **68**:20 **69**:10,25 **77**:24 **98**:7 **101**:17
outcome [1] **3**:12
outlier [2] **94**:13,20
outliers [1] **95**:3
outside [1] **5**:14
over [9] **8**:23 **25**:10,11,23 **47**:8 **50**:20 **58**:10 **61**:11 **80**:24
overall [1] **21**:12
overlapping [1] **66**:3
overlay [1] **97**:5
overrule [4] **5**:2 **40**:11,23,25
overruled [2] **31**:16 **56**:12
overruling [3] **5**:18 **13**:22 **64**:20
overwhelming [3] **11**:18 **15**:23 **102**:9
own [5] **14**:20 **19**:22 **44**:12 **50**:13 **101**:23

P

PAGE [4] **2**:2 **52**:20 **75**:3 **81**:6
pages [1] **82**:3
papers [1] **8**:3
paraded [2] **9**:13 **76**:1
Park [1] **1**:18
part [18] **5**:25 **6**:16 **9**:9,10 **29**:23 **36**:7 **46**:23 **51**:20,25 **52**:10 **57**:4,5 **67**:6,9 **75**:18 **96**:3 **100**:11 **103**:23
particular [5] **35**:1 **46**:8,11 **81**:13,14
particularly [5] **55**:15 **56**:8,18 **64**:1,17
past [8] **8**:4 **33**:19 **36**:20,23 **64**:18 **66**:13 **77**:14 **91**:10
patience [1] **67**:14
PAUL [1] **1**:3
pay [2] **25**:21,22
penalty [1] **74**:5
People [3] **22**:4,5 **26**:7
perceived [1] **9**:11
percent [3] **33**:9 **51**:1 **60**:25
perfectly [2] **5**:13 **48**:23
performed [1] **72**:16
perhaps [5] **6**:5 **11**:11 **19**:11 **48**:7 **103**:1
period [2] **61**:11 **86**:16
perjury [1] **80**:2
person [5] **19**:10 **26**:9 **30**:16 **66**:16 **84**:16
perspective [1] **73**:24
petition [1] **100**:6
Petitioner [19] **1**:4,19,22 **2**:4,8,15 **3**:8 **39**:12 **41**:24 **71**:5 **80**:21 **86**:14 **93**:13,14 **95**:15 **97**:14,22 **100**:5 **101**:6
Petitioner's [4] **62**:22 **90**:19,20 **91**:16
Petty [1] **58**:5
phrase [1] **30**:23
pick [1] **27**:19
picture [1] **11**:1
piece [1] **77**:4
pieces [1] **58**:1
pipeline [1] **16**:22
pizzeria [1] **25**:15
place [9] **24**:18 **25**:11,12,14 **28**:16 **82**:22 **97**:13 **102**:6 **103**:6
plan [3] **24**:8 **26**:9 **52**:11
plausible [2] **67**:2,5
play [1] **98**:7
plea [12] **8**:18 **19**:14,16,19,22 **28**:8 **29**:20 **32**:9,20 **34**:2 **54**:3 **103**:14
plead [9] **32**:25 **33**:17 **48**:8,23 **59**:19 **67**:12 **75**:19,23 **77**:5

pleaded [1] 28:22
pleading [3] 29:8 50:24 51:4
pleads [1] 47:17
pleas [3] 4:10 19:18 61:2
please [5] 3:10 17:3 39:14 70:13 93:4
pled [1] 48:3
point [19] 3:24 10:11 12:4 29:19 31:8 36:5 75:21 79:22 80:19 81:20 82:13,17 87:4 91:10 92:3,5 95:12 100:2 104:6
pointed [2] 29:12 77:24
points [2] 66:1 94:16
posited [3] 46:13,22 51:22
position [11] 5:11 34:11,12,23 56:21 60:14,15 62:6 71:8 88:9 89:2
possess [2] 61:21 80:3
possession [1] 48:11
possible [1] 47:3
possibly [2] 46:16 103:10
post-Apprendi [1] 40:21
post-Wooden [1] 75:5
potatoes [1] 31:22
potential [1] 100:2
powers [1] 101:24
practical [3] 56:13 63:5 64:2
practice [22] 4:22 5:17 9:2,14 10:20,23 15:23 26:7 41:6 42:18 43:12,19 45:10 71:6 73:17 84:2,3,22 85:23 102:8,9 103:1
practices [4] 9:3 31:3 70:21 101:11
precedent [9] 3:11 6:10 20:17 29:18 36:10 40:20 42:4 71:16 77:11
precedents [5] 36:6 70:18 71:18 91:10 96:13
precise [2] 44:11 61:14
precisely [4] 12:13 52:6 66:12 102:8
predicate [6] 28:23 47:21 48:19 72:1 89:17 92:1
predicates [5] 41:11,12 49:5,8 63:18
predict [1] 60:24
predictive [1] 63:22
prefer [1] 64:10
prejudice [10] 4:20 7:24 62:17 72:12 79:10 81:5,8,20 82:12 98:13
prejudices [1] 79:24
prejudicial [4] 75:16,22 77:8 83:3
prejudicing [3] 82:19,20 92:13
preponderance [2] 63:9 99:13
prescription [1] 93:1
present [11] 6:7 71:21 74:17 78:19 79:7 82:2,11 91:20 92:17,25 97:19
presented [2] 36:25 51:15
presumably [1] 39:2
presumption [2] 58:14,14
presumptively [1] 58:12
pretty [5] 77:3 83:11 91:19 99:20 100:12
prevail [2] 18:10 23:6
prevails [1] 53:25
prevalence [1] 32:9
previously [3] 3:15 54:20 89:9
principal [1] 41:8
principle [16] 6:10 12:8 69:16 71:13,16 82:19 84:12 89:5,8,8,13,15,23 90:7,22 95:23
principled [1] 71:7
principles [6] 7:4,5 14:16 85:5,10,12
prior [50] 3:20 5:25 6:1,2 9:8 10:24 14:5,6 15:5,6,22 17:16,23,24 18:1 20:15,21 21:13 23:21 35:5,8,18 38:22 39:22,25 41:17 44:2,3 50:13,24 55:8 60:3,4 61:11 64:5 66:22,23 70:17 71:9,19 72:3 73:1,8 75:25 77:21 82:6 89:19 90:2,17 91:19
prison [2] 29:4 73:3
probably [4] 31:25 53:2 66:16 99:15
probation [1] 33:2
problem [9] 17:16 19:1 24:4 32:23 54:13 56:24 62:19 98:3,13
problematic [1] 32:11
problems [2] 63:16 73:24
procedural [1] 17:25
procedure [1] 32:4
procedures [1] 98:4
proceeding [4] 37:11,14 74:25 76:4
proceedings [5] 51:12 59:24 67:15 75:25 78:3
process [1] 34:3
produce [1] 65:2
produced [1] 58:17
prohibits [1] 39:23
proof [4] 63:6,16 64:8 99:2
proposed [1] 68:6
prosecutor [2] 75:4,10
prosecutorial [2] 33:13 101:14
prosecutors [3] 75:13 77:1,4
protections [1] 17:25
prove [9] 55:4 59:25,25 63:17 81:13 99:2,8,16 104:2
proved [2] 94:25 96:15
proven [1] 56:23
proving [1] 18:11
provisions [1] 20:14
proximity [4] 21:17,18 23:7 39:21
punishment [4] 9:10 33:23 79:7 82:9
purpose [1] 54:10
purposes [1] 85:18
purse [1] 57:10
pursue [1] 50:1
put [11] 9:9 12:10,10,12,19 14:4 21:14 35:16 50:4,7 54:20
puts [1] 33:13
putting [2] 79:8 83:2

Q

qualitative [3] 21:21,22 24:18
question [64] 6:14 7:25 9:7,7,23 10:1,2 11:12 13:11,15 15:13 16:14 20:20,21 21:2,8,12 23:18 29:21 30:14,25 31:9,11 32:6 34:24 35:25 38:13 40:14 47:14 55:12 57:1 62:13 63:3 65:8 67:20 72:20,22 73:7,14,20 75:7 76:15 77:10,12,13,16,22 78:22 79:17,23 80:8 81:3 83:9,10,22 84:7,25 88:15,19,23 91:9 99:9 100:25 101:20
questioning [2] 41:2 42:13
questions [23] 4:25 11:5 18:8 26:15 30:13 34:25 36:4 40:7 41:5,12 44:11,15 53:23 60:5 61:9 63:14 72:5,13 77:12 98:25 102:10 103:24 104:7
quibbles [1] 6:5
quick [1] 63:3
quickly [1] 38:13
quite [9] 15:21,24 22:11 31:22 51:7 65:5 73:3,11 103:22

R

raised [3] 32:7,17 83:23
raising [1] 80:1
ran [1] 57:15
range [2] 3:19 78:16
rap [3] 49:15 64:21 69:9
rare [4] 4:13 67:3,4 74:2
rarely [2] 27:10 64:3
rather [1] 81:15
rational [1] 25:25
rea [3] 21:22 22:2 76:12
reach [2] 28:25 69:19
reaching [1] 55:22
reaction [1] 31:25
read [2] 50:3 98:19
readily [2] 20:17,17
reading [2] 62:15 91:17
ready [1] 7:25
reaffirmed [1] 6:12
reaffirming [1] 43:22
realistically [1] 46:19
really [25] 4:12 14:4 16:11 41:5,22 43:19 46:19 47:18 52:22 53:11 55:21 56:8,11,13,24 68:7 76:10 79:24 80:8 90:8,25 91:3 92:2 97:18 98:12
reason [7] 5:16 40:18 56:11 59:14 65:15 81:17,24
reasonable [9] 27:25 53:3 55:5,14 56:1 63:15 89:10 95:1 104:2
reasonably [3] 49:20 50:18 61:3
reasons [6] 14:23 17:12 63:21 86:24 89:4 101:17
REBUTTAL [3] 2:13 101:4,5
receive [2] 48:15,24
recent [2] 17:17,20
recidivism [33] 9:7 12:12,18 15:18 16:8 17:7 31:3 35:15,20 70:15,23 71:4 72:11 73:18 77:12 79:4,6,8,9 81:24 82:16 83:1 84:4 86:1,6,17,24 87:25 92:20 94:19,24,24 96:14
recidivism-related [1] 78:23
recidivist [1] 27:5
recognize [3] 88:4 89:14 95:13
recognized [6] 73:21 77:14 82:1,12 92:11,22
recognizing [1] 82:10
record [7] 28:9,20 36:24 37:15 51:11,16 65:3
records [6] 20:15,15 28:12 90:1,14,16
reduce [1] 20:25
reexamine [2] 6:13,14
referenced [1] 78:13
reform [2] 16:7 69:16
refused [2] 97:9 100:7
refuses [1] 81:4
regard [1] 73:12
regarded [1] 54:16
regardless [2] 38:3,10
regime [1] 72:11
regularly [1] 74:4
reiterated [1] 89:6
rejected [2] 62:4 96:8
relate [2] 36:17,19
related [4] 9:10 15:5 37:1 66:13
relationship [2] 21:18 39:22
relatively [1] 44:4
released [1] 73:3
relevant [5] 78:21 85:19 86:15 87:7 99:7
relied [2] 6:11 71:3
relitigation [1] 41:22
rely [1] 64:25
relying [1] 103:11
remains [1] 7:9
remand [8] 25:1 27:18 30:9 45:4,10,12 103:3,23
remanded [1] 102:20
remember [7] 26:5 33:22 37:5,24 61:14 64:14 103:6
remotely [1] 52:7
removed [1] 85:7
renegotiations [1] 104:6
require [4] 3:25 92:18 97:9 101:13
required [6] 13:17 31:24 74:5,7 87:12 97:16
requirements [1] 87:12
requires [4] 3:23 29:22 39:20 70:14
requiring [1] 86:8
research [1] 19:12
reserved [1] 62:13
resist [1] 52:10
resolve [4] 4:19 40:9 72:4 88:15
resolved [1] 88:23
resolves [1] 91:24
respect [9] 17:6 28:4 36:15 37:23 49:23 51:23 53:5 95:3 98:10
respond [1] 32:18
Respondent [4] 1:7,22 2:7 39:11
response [4] 9:17,21 50:16 51:22
responsibility [1] 104:14
retail [1] 57:14
retain [1] 43:15
retrial [1] 104:5
retrials [1] 37:21
reus [1] 76:11
revamp [1] 31:3
reverse [1] 4:23
review [6] 27:22 28:3,10,11,19 97:3
RICO [1] 24:10
rights [1] 87:9
risk [1] 100:3
rob [1] 67:8
robbed [2] 52:16 64:17
robberies [2] 45:15 52:12
robbery [2] 56:5 57:9
ROBERTS [23] 3:3 7:11,14 18:4 24:22 26:12 27:14 30:10 34:5,8 39:7 53:18 58:21 61:5 62:25 65:20 70:5,8 73:22 75:17 100:14 101:1 104:9
robs [1] 44:20
Robust [1] 3:11
room [2] 42:15 43:15
rooted [1] 92:12
Ross [2] 87:17 96:10
routinely [1] 9:9

rule [30] **3**:17 **4**:2 **11**:16,21, 23 **12**:6,12 **14**:15 **15**:3 **16**: 1,25 **20**:18 **26**:21 **34**:18 **38**: 8 **54**:14,21 **68**:1,17 **69**:10 **74**:7 **79**:18,21 **80**:21 **94**:21, 23 **96**:5,14,25 **97**:22
ruled [1] **62**:5
Rules [4] **20**:13,16 **92**:6 **99**: 5
ruling [1] **67**:23
running [1] **57**:11

S

safest [1] **103**:2
same [28] **14**:17 **16**:3 **18**:13 **20**:22 **25**:11,12,13,14,14 **37**:7 **46**:15,20 **47**:4 **50**:20 **51**:13 **52**:25 **53**:23 **57**:5,6 **65**:11,13 **66**:7 **69**:9,23 **72**: 3 **77**:1 **81**:19 **103**:10
saying [8] **31**:6 **37**:22 **45**: 19,22 **84**:13 **87**:4 **96**:13 **97**: 23
says [9] **9**:17 **11**:15 **23**:3,8 **54**:21 **55**:2,3 **76**:23 **90**:3
scale [1] **97**:13
Scalia [1] **29**:12
scenario [1] **66**:11
scheme [5] **46**:23 **52**:11 **57**: 6 **67**:6,9
schemes [1] **71**:4
Schnitzelbank [1] **52**:17
scholars [1] **77**:24
scope [5] **26**:14,17,20 **36**:8 **88**:20
second [6] **14**:7 **30**:25 **52**: 14 **64**:7 **89**:1 **95**:11
secondly [1] **17**:21
Section [1] **4**:17
see [7] **39**:4,16 **42**:20 **65**:15 **84**:8 **86**:21 **98**:13
seek [1] **71**:5
seeking [1] **49**:25
seem [3] **10**:21 **81**:17 **91**:10
seems [7] **5**:20 **26**:10 **35**: 14 **36**:2 **53**:1 **66**:11 **102**:3
seen [2] **7**:10 **65**:23
Sells [1] **44**:19
sense [2] **58**:15 **72**:6
sent [1] **78**:1
sentence [13] **4**:2 **11**:22 **12**: 20 **29**:2 **33**:4 **48**:16,22,25 **78**:9,19 **80**:5,5 **84**:14
sentence-enhancing [1] **92**:16
sentenced [1] **78**:8
sentences [1] **78**:16
sentencing [15] **3**:19 **43**:7 **51**:12 **52**:18,19 **63**:12 **69**: 16,17 **70**:21,22 **77**:20 **78**: 16 **80**:3 **82**:14 **83**:4
separate [23] **30**:16 **37**:11, 13,18 **44**:19,22 **45**:15 **46**:5 **47**:24 **51**:2 **54**:18 **57**:24 **58**: 12,16 **60**:1 **64**:6 **66**:15 **67**: 15 **69**:3 **76**:11 **99**:21,25 **104**:3
separated [2] **54**:17,22
separateness [1] **70**:16
sequencing [4] **43**:25 **72**: 24 **73**:8 **89**:21
series [2] **18**:12 **50**:19
serious [3] **14**:25 **30**:7 **88**: 19
seriously [4] **75**:15 **77**:8 **79**:10 **83**:2
set [2] **72**:9 **81**:14
sets [1] **36**:15
settled [2] **73**:17 **95**:14
several [3] **46**:21 **52**:15 **64**: 23
severe [1] **100**:4
SG [2] **24**:25 **34**:24
SG's [1] **34**:11
shall [1] **78**:8
sheet [2] **49**:15 **64**:22
sheets [1] **69**:9
Shepard [1] **55**:20
short [1] **58**:10
shouldn't [1] **45**:6
show [18] **4**:9 **8**:3 **10**:3,23 **11**:18 **13**:9 **15**:15 **43**:12,21, 23 **66**:24 **71**:19 **74**:24 **84**:1, 3,16,21 **87**:22
showed [1] **7**:6
showing [2] **29**:23 **54**:10
shown [3] **4**:19 **54**:9 **95**:16
shows [3] **75**:12 **81**:6 **85**: 22
side [13] **7**:22 **9**:1 **11**:18 **15**: 13,19 **32**:14 **35**:14 **62**:22 **74**:3 **80**:20 **86**:14 **94**:17 **98**: 25
side's [2] **71**:23 **89**:2
sides [1] **97**:14
significant [4] **30**:18 **77**:4 **86**:3 **96**:2
similar [5] **21**:20 **70**:1 **71**:4 **73**:12 **86**:11
simpler [3] **35**:15,17 **60**:18
simply [6] **40**:11 **43**:21 **45**: 8 **46**:14 **52**:11,23
since [2] **32**:14 **99**:11
single [24] **21**:15 **22**:17 **23**: 19 **24**:8,11,17,17,17,19 **26**: 1,8,9 **37**:4 **44**:19 **51**:25 **53**: 6 **65**:3 **74**:18 **79**:25 **80**:9, 10 **86**:15 **87**:5 **97**:19
situation [6] **4**:20 **23**:17 **25**: 20 **58**:4 **68**:15 **81**:18
situation's [1] **41**:14
situations [1] **50**:18
Sixth [21] **3**:18 **4**:6 **7**:23 **11**: 14 **14**:25 **15**:3,8 **39**:23 **43**: 4,10 **77**:16,19,25 **78**:1 **83**:7 **85**:4,8 **87**:2,6 **94**:4 **95**:9
small [3] **31**:19,22 **45**:14
so-and-so [1] **18**:19
Solicitor [3] **1**:20 **35**:4 **58**:6
solution [3] **4**:18 **8**:2 **102**:3
solve [1] **98**:12
somebody [3] **25**:20 **26**:8 **84**:12
someday [1] **5**:10
somehow [1] **4**:7
sometimes [4] **21**:21,22 **27**:23 **84**:19
somewhat [2] **43**:9 **92**:18
sorry [6] **7**:12,13 **10**:8 **19**:6 **61**:9,19
sort [17] **6**:23,24 **13**:17 **14**:7 **24**:7 **35**:10,14 **43**:24 **52**:8 **68**:20 **72**:21 **74**:22 **78**:23 **82**:13 **91**:23 **97**:13,24
Sotomayor [12] **24**:23,24 **25**:5,13 **26**:11 **30**:7 **58**:22 **79**:12,14 **80**:16 **100**:18,24
Sotomayor's [1] **83**:9
South [5] **42**:4 **44**:5 **93**:9 **94**:9 **95**:2
spaced [1] **46**:3
span [2] **50**:21 **58**:10
speaking [1] **78**:18
specific [1] **49**:8
specifically [1] **48**:18
speculative [1] **29**:14
Spencer [2] **8**:5 **101**:12
spot [1] **14**:17
spouse [1] **44**:22
stamped [1] **64**:14
standard [4] **56**:2 **89**:25 **92**: 16 **99**:15
standards [2] **71**:14 **89**:24
standing [1] **61**:14
stare [1] **35**:23
start [2] **79**:14 **83**:12
starting [1] **9**:24
state [11] **8**:8 **39**:3 **41**:11 **65**: 3 **71**:4 **72**:11 **76**:25 **85**:5,9 **87**:6 **101**:10
state's [1] **32**:1
stated [2] **15**:8 **63**:21
STATES [45] **1**:1,6,15 **3**:5 **12**:8,18 **13**:8,17,21,23 **31**:2, 14,14,18,20,24 **32**:3 **38**:20 **41**:25 **69**:21 **71**:2 **76**:23,24 **78**:2 **79**:2 **85**:25 **86**:2,4,12 **87**:2,3,8,10 **93**:11 **94**:17,22 **95**:8,15,21 **96**:1,3 **98**:3,8 **101**:13,21
states' [1] **31**:1
statistics [1] **33**:9
statute [8] **41**:16 **44**:6 **74**:5 **76**:9 **84**:15 **86**:11,16 **101**: 14
statutes [10] **16**:8 **27**:5 **42**: 6,8 **43**:6 **72**:23 **73**:10 **86**:5 **87**:11 **96**:6
statutory [4] **9**:20 **14**:15 **31**: 13 **88**:3
steal [1] **46**:25
step [2] **15**:2 **47**:12
still [4] **30**:18 **45**:24 **62**:5 **71**: 24
stipulate [3] **75**:7 **98**:17,17
stipulation [3] **59**:20 **98**:15, 19
stipulations [2] **4**:11 **61**:2
store [2] **44**:21 **46**:25
stores [2] **52**:17 **67**:8
straightforward [3] **4**:5 **5**: 2 **100**:12
stretch [3] **103**:9,10,22
strikes [1] **31**:4
string [4] **25**:23 **29**:1 **52**:12 **96**:13
strong [1] **77**:23
struck [2] **86**:16 **87**:5
structural [2] **27**:23,24
structures [1] **32**:4
subject [6] **11**:24 **34**:20 **83**: 6 **97**:1,2 **99**:5
submission [1] **80**:25
submit [3] **31**:22 **63**:24 **104**: 8
submitted [3] **60**:5 **104**:16, 18
submitting [1] **54**:8
subsequent [1] **6**:12
subsidiary [2] **22**:18,23
substantial [1] **58**:17
sufficient [1] **55**:4
sufficiently [2] **57**:2,16
suggest [2] **35**:9 **91**:9
suggesting [5] **9**:19 **24**:25 **48**:21 **66**:11 **100**:25
suggestion [1] **78**:4
suggestions [1] **101**:25
suggests [2] **35**:4 **92**:2
sum [1] **13**:16
superseding [1] **42**:5
supervisory [1] **101**:23
supplemental [3] **86**:5 **87**: 10 **96**:6
support [10] **1**:24 **2**:12 **8**: 10 **42**:1 **50**:8 **52**:7 **55**:13 **57**:3 **70**:10 **104**:13
supporting [3] **1**:22 **2**:8 **39**: 12
supports [3] **9**:15,16 **15**:18
suppose [6] **6**:22 **7**:2 **54**: 14,21,24 **57**:8
supposed [5] **23**:10 **47**:15 **50**:25 **53**:7 **57**:6
SUPREME [2] **1**:1,14
susceptible [2] **27**:22 **28**:2
suspicion [2] **40**:13,17
swear [1] **65**:16
syllogism [2] **39**:18 **62**:11
system [5] **33**:11 **63**:8 **70**:4 **91**:6 **96**:25
systems [1] **31**:2

T

table [2] **33**:20 **35**:23
temporal [4] **21**:17 **23**:4,6 **24**:13
temporally [1] **24**:14
tend [1] **69**:19
tension [7] **91**:2,6,8,13,16, 23 **92**:5
terms [2] **15**:4,8
test [14] **5**:24 **6**:4,6 **11**:9,11 **34**:25 **89**:12 **90**:3,11,12,14, 18,19,20
testify [1] **56**:14
testimony [1] **20**:15
tests [1] **90**:8
Texas [1] **8**:5
text [10] **10**:16,16,18 **12**:4 **83**:12,13 **84**:19,23,24 **85**:3
Thanks [1] **65**:19
theirs [1] **80**:24
themselves [2] **103**:14,15
theory [3] **57**:21 **89**:1,12
there's [31] **7**:25 **8**:19 **11**:6 **15**:25 **16**:21 **24**:13 **26**:13 **28**:5 **32**:25 **34**:14,17 **35**:2 **40**:24 **42**:3 **43**:19 **44**:23 **51**: 3,9 **54**:21 **59**:14 **60**:8 **76**: 13,21,25 **81**:24 **85**:16 **86**: 22 **87**:19 **91**:5 **93**:1 **96**:12
thereabouts [1] **29**:1
therefore [4] **10**:16 **40**:1,25 **47**:25
they've [4] **62**:9 **74**:9 **80**:20 **94**:12
thinks [1] **41**:7
third [2] **51**:21 **52**:14
THOMAS [12] **5**:1,7,19,22 **8**:2 **18**:6 **40**:10,14 **53**:20 **72**:14,18 **100**:16
Thomas's [1] **6**:24
thorny [1] **103**:1
thoroughly [2] **15**:21,25
though [5] **19**:14 **40**:11 **50**: 20 **73**:13 **80**:25
three [14] **4**:1 **14**:23 **23**:21 **25**:9 **44**:22 **47**:21,22 **48**:19 **49**:1 **51**:24 **58**:9 **61**:15 **64**: 5 **103**:9
three-time [3] **75**:9,11 **98**: 21
thrust [1] **63**:13
thumb [1] **97**:13
time-honored [2] **4**:18 **8**:1
timing [4] **39**:21 **41**:12 **44**: 11,15
today [6] **6**:19 **43**:16,18 **48**: 11 **102**:6 **103**:6
today's [2] **36**:18,22
together [2] **13**:21 **14**:4
ton [1] **66**:18
took [4] **6**:24,24 **63**:13 **103**: 5
top-line [2] **22**:15,22
top-side [1] **102**:19
topic [1] **42**:16
topics [1] **101**:8
total [1] **13**:16

totally [1] **36:**4
track [1] **21:**10
tracks [1] **68:**11
tradition [24] **10:**6 **11:**10, 19 **14:**16 **15:**12,16,17 **17:**5, 15,17,18,20 **82:**2,10,15 **83:** 5 **86:**22 **87:**23,24 **92:**20,23 **95:**4,14,21
treat [3] **73:**18 **79:**4 **81:**24
treated [5] **30:**15 **69:**11,15 **78:**20 **83:**1
treatise [2] **82:**23,24
treatment [1] **43:**5
trend [1] **101:**16
trial [23] **7:**7,19 **11:**14 **28:**9, 20 **33:**10 **43:**24 **47:**16 **50:** 22 **51:**3,7,10 **66:**9,11,16 **67:** 11 **76:**10,11 **78:**10 **87:**9 **96:** 19,21 **97:**2
trials [9] **18:**9 **42:**9 **55:**8 **56:** 22 **59:**1,10,22 **65:**9 **76:**15
tried [2] **19:**12 **53:**24
trigger [1] **38:**22
true [6] **62:**7 **81:**9 **88:**2 **94:** 16 **95:**10 **98:**9
truth [4] **18:**24 **19:**8,9 **54:**11
try [3] **37:**2 **67:**14 **77:**6
trying [5] **26:**3,5,10 **36:**22 **58:**4
turn [5] **9:**24 **14:**18 **23:**5 **41:** 22 **88:**25
turns [2] **21:**15 **49:**1
two [16] **11:**4 **17:**12 **36:**14 **37:**6 **42:**20 **49:**2 **52:**17 **55:** 18 **60:**11,20 **63:**20,20 **74:**3 **78:**12 **92:**6 **101:**8
type [3] **13:**15 **41:**9 **44:**8
types [2] **59:**1 **64:**8
typically [3] **17:**19 **18:**18 **84:**15

U

ultimate [2] **22:**18 **23:**18
ultimately [1] **71:**14
unambiguous [1] **15:**3
unanimous [2] **43:**12,12
unanimously [1] **70:**25
unavoidable [1] **39:**17
uncertain [1] **28:**10
uncommon [2] **38:**25 **39:**5
under [20] **14:**12 **30:**1 **39:** 18,19 **44:**6,15 **45:**23 **48:**14 **68:**24 **70:**17 **71:**2,20,21 **72:** 7 **76:**9 **91:**15,17 **96:**25 **97:** 6 **98:**18
underlying [3] **4:**16 **33:**17 **50:**9
understand [8] **7:**22 **16:**5 **17:**13 **36:**5,5,22 **49:**16 **90:** 25
understanding [5] **10:**17 **14:**6 **36:**8 **78:**22 **84:**17
understood [3] **17:**7 **77:**18 **91:**4
undertake [2] **52:**11 **55:**20
unequivocally [1] **15:**8
unfounded [1] **4:**9
uniform [11] **10:**3,23 **78:**22 **84:**2,3 **85:**23 **87:**23,23 **92:** 16,23 **96:**12
uniformity [5] **56:**20 **60:**23 **68:**20 **85:**9 **92:**19
uniformly [1] **87:**15
UNITED [5] **1:**1,6,15 **3:**5 **69:** 21
unless [5] **5:**18 **58:**17 **59:** 13 **69:**10 **83:**20
unlikely [2] **39:**4 **80:**5
unprincipled [1] **89:**3
unrebutted [1] **86:**22
unreliable [1] **103:**13
untested [1] **72:**11
until [4] **12:**23,24 **13:**17 **29:** 4
unusual [1] **29:**23
up [23] **6:**14,16 **12:**23,23 **13:** 17 **23:**12,16 **29:**17 **41:**6,13 **48:**9 **51:**24 **61:**19 **72:**19 **81:** 22 **83:**21 **89:**12,13,16,24 **90:**23 **93:**6 **99:**2
upend [1] **71:**6
upheld [1] **87:**16
uphold [1] **71:**1
urging [1] **80:**22
uses [2] **6:**1 **65:**25
using [3] **35:**18 **51:**25 **57:** 12
usual [1] **45:**10

V

valid [1] **49:**5
value [3] **45:**18,18,21
vanishingly [1] **45:**13
variance [1] **28:**5
variety [1] **9:**3
various [6] **22:**25 **25:**23 **36:** 11 **43:**6 **64:**24 **71:**11
varying [1] **98:**4
vase [1] **42:**21
verdict [1] **29:**12
version [1] **41:**16
versus [2] **3:**5 **8:**5
vexing [1] **20:**22
viable [5] **25:**6 **52:**22 **62:**9 **79:**25 **80:**9
victim [3] **35:**19 **47:**3 **64:**11
victims [1] **56:**14
view [5] **42:**21 **43:**1,8 **53:**25 **91:**16
viewing [1] **43:**9
views [1] **53:**5
violates [1] **84:**14
Virginia [5] **42:**6,7 **86:**3,10 **96:**1
vulnerable [1] **35:**19

W

wade [1] **100:**22
waiting [1] **62:**10
waivers [1] **4:**10
wanted [3] **8:**9 **17:**4 **53:**22
wants [1] **25:**5
Washington [3] **1:**10,21, 23
way [22] **5:**16 **9:**25 **13:**6 **14:** 24,24 **22:**14 **33:**5,5 **37:**17 **41:**1 **59:**20 **62:**3 **69:**23 **73:** 15 **77:**1 **84:**4,8 **87:**16,18 **91:**23 **96:**8 **102:**15
ways [4] **21:**24 **36:**11 **38:**9 **70:**1
Wednesday [1] **1:**11
week [1] **52:**12
weeks [1] **23:**10
welcome [1] **72:**13
well-crafted [1] **20:**24
well-established [1] **84:** 17
West [2] **42:**6 **86:**10
whatever [5] **11:**9 **13:**4 **35:** 19 **76:**23 **101:**25
whereas [3] **39:**23 **63:**24 **71:**20
Whereupon [1] **104:**17
whether [31] **5:**24 **9:**8 **10:**3 **12:**6 **14:**12,14 **20:**21 **21:**13, 15 **23:**19 **29:**21 **36:**9 **37:**3 **38:**3 **51:**24 **53:**2 **54:**19 **72:** 20 **73:**9 **74:**20 **75:**22 **76:**16 **77:**10,12,12,13,17 **79:**19 **94:**18 **100:**19 **103:**7
who's [2] **38:**11 **80:**1
whole [4] **3:**24 **5:**23 **24:**10 **37:**22
wiggle [1] **42:**15
will [15] **3:**3 **11:**8 **15:**14 **23:**5 **31:**2 **32:**11 **39:**1 **45:**12 **53:** 24 **55:**23 **59:**19 **60:**21 **63:** 19 **75:**18 **80:**10
Williams [1] **69:**22
willing [1] **76:**18
win [1] **11:**10
windfall [1] **64:**21
wish [1] **67:**13
wishes [1] **46:**6
withhold [2] **86:**6,19
within [6] **35:**4,20 **52:**12 **55:** 5 **78:**16 **96:**1
witnesses [1] **55:**7
woman's [1] **57:**10
wondering [1] **53:**6
Wooden [19] **3:**23 **20:**23 **22:**24 **24:**2,16 **30:**14 **33:**1 **39:**18 **45:**23 **46:**1,22 **52:**5 **54:**16 **56:**19 **58:**3 **60:**15 **62:** 13 **67:**4 **68:**25
word [2] **6:**1 **80:**24
words [6] **14:**20 **39:**24 **83:** 14 **97:**5 **101:**8 **102:**4
work [6] **11:**7 **28:**18 **35:**10 **37:**4 **91:**6 **103:**25
works [1] **102:**16
world [1] **47:**16
worse [2] **75:**23 **77:**6
worth [1] **57:**15
wound [1] **51:**24
writers [1] **82:**24
writings [1] **10:**24

Y

year [5] **4:**14 **8:**15,17,20 **85:** 13
years [10] **29:**2 **33:**24,24 **37:** 2 **40:**21 **64:**17 **80:**6 **81:**23 **83:**6 **100:**9
years' [1] **78:**6
yield [1] **6:**16
yourselves [1] **103:**11

Z

zero [2] **13:**17 **34:**12