1   IN THE SUPREME COURT OF THE UNITED STATES

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3   ALEJANDRA TAPIA,   :

4   Petitioner   :

5   v.   :   No. 10-5400

6   UNITED STATES   :

7   - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Monday, April 18, 2011

10

11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 10:04 a.m.

14   APPEARANCES:

15   REUBEN C. CAHN, ESQ., San Diego, California; on behalf

16   of Petitioner.

17   MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor

18   General, Department of Justice, Washington, D.C.; on

19   behalf of Respondent in support of vacatur.

20   STEPHANOS BIBAS, ESQ., Philadelphia, Pennsylvania; for

21   amicus curiae, appointed by this Court.

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1   C O N T E N T S

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

2   (10:04 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument first this morning in Case 10-5400, Tapia v.

5   United States.

6   Mr. Cahn.

7   ORAL ARGUMENT OF REUBEN C. CAHN

8   ON BEHALF OF THE PETITIONER

9   MR. CAHN: Mr. Chief Justice, and may it

10   please the Court:

11   When it instructed courts to recognize that

12   imprisonment is not an appropriate means of promoting

13   correction and rehabilitation, Congress intended to end

14   the practice of sending defendants to prison so that

15   they might get treatment. The commands of 3582 are

16   clear on this point: Do not imprison and do not

17   lengthen prison sentences for the purposes of

18   rehabilitation. This plain meaning is confirmed by the

19   structure of the statute.

20   Under the statute, judges have the power to

21   sentence defendants to prison but not to prison

22   programs. Judges once had that power under the Youth

23   Corrections Act and under the Narcotic Addicts

24   Rehabilitation Act. With the Sentencing Reform Act

25   Congress took that power away. That structure makes

1   sense only because Congress intended that defendants

2   should no longer be sent to prison for purposes of

3   rehabilitation.

4   JUSTICE KENNEDY: You have, in effect, a

5   one-way ratchet. If the judge really thinks

6   rehabilitation is a -- a -- a primary or an important

7   component of the sentence, then it reduces the prison

8   term. It could never increase it. So you have a

9   one-way ratchet.

10   MR. CAHN: Yes, Your Honor. I believe that

11   that's correct, that the -- that the way in which the

12   statute is set up, the logic of 3582 is that a need for

13   rehabilitation can push the judge, the sentencing judge,

14   into moving the individual either out of an

15   incarceration sentence into probation or lower the

16   sentence to get that individual into supervisory release

17   where rehabilitation current -- concerns are properly

18   addressed under the statute.

19   JUSTICE ALITO: Do you think that's -- do

20   you think that's consistent with what Congress thought

21   about rehabilitation when it adopted the Sentencing

22   Reform Act? And you discuss their thinking, and I think

23   accurately, in your brief, but was their thinking simply

24   that rehabilitation is very feasible and it's reasonably

25   predictable whether somebody can be rehabilitated or has

1 been rehabilitated so long as it's done outside of

2 prison, but it just doesn't work in prison? Was that

3 their thinking?

4   MR. CAHN: Well, there's relatively little

5 evidence of what Congress thought about the possibility

6 of rehabilitating individuals outside of prison. What's

7 clear is that they doubted that rehabilitation could be

8 reliably induced in the prison setting. There is at

9 least one comment that indicates that they doubt that we

10 know enough about human behavior to rehabilitate

11 individuals on a regular basis in any case, but they

12 certainly --

13   JUSTICE GINSBURG: But it is strange, isn't

14 it, that they can take rehabilitation into account for

15 the supervised release. I mean, that -- that's a

16 provision, isn't it? As far as supervised release is

17 concerned, the judge can take account of rehabilitation

18 in setting the length of the term, but can't do that for

19 the prison time.

20   MR. CAHN: Well, certainly with regard to

21 supervised release, we think, as far as setting the term

22 of supervised release, the judge is required to take

23 rehabilitation concerns into account, and that's because

24 supervised release is intended to smooth the transition

25 from prison to true liberty and is specifically a

1   rehabilitative vehicle.

2   Now, with regard to revocation, to the

3   extent that that's -- that's at issue, we concur with

4   the Solicitor General that 3582, by its terms, simply

5   doesn't govern a revocation of supervised release

6   because it's not the imposition of a term of

7   imprisonment but, rather, requiring the individual to

8   serve a portion of the supervised release term in

9   prison. So, by its plain terms, it simply isn't

10   applicable.

11   JUSTICE SOTOMAYOR: Counsel, aren't -- isn't

12   punishment and rehabilitation often flip sides of each

13   other? If you read what the judge said here, his

14   comment was this man -- or this woman, I'm sorry, has

15   been involved in a series -- escalating series of

16   serious offenses. Logically, she has to be put away for

17   a long time unless she gets rehabilitation because

18   there's going to be no deterrence otherwise.

19   And so, what the judge was basically saying,

20   in my judgment -- and I don't know why it's not just the

21   flip, which is without -- without drug treatment, we

22   can't deter her. And so, this crime, given her

23   background, deserves this kind of sentence. One of its

24   by-products is a drug treatment program.

25   How different is that, or do you really

1 think that a judge who knows that someone is going to

2 get a rehab program if they serve 50 months and the

3 sentencing range is between 45 and 55, do you think that

4 they're going to take 50 -- they're not going to choose

5 50 if they understand that there's no chance for this

6 person to be deterred without drug treatment?

7   MR. CAHN: The problem is the judge has no

8 ability to ensure that the individual gets that

9 treatment if they're sent to prison.

10   JUSTICE SCALIA: Your client --

11   JUSTICE SOTOMAYOR: That's a --

12   JUSTICE SCALIA: -- didn't get, did she?

13   MR. CAHN: She did not get that treatment,

14 in fact. And then, she's past the --

15   JUSTICE SCALIA: So, if he gave her extra

16 years in order to get that treatment, he just gave her

17 extra years without the treatment, as it turned out?

18   MR. CAHN: Yes, and I don't think that was

19 that --

20   JUSTICE SOTOMAYOR: Well, wait a minute.

21 That's the whole point, because what the judge said was

22 if she doesn't get treatment, she needs to be in jail a

23 long time because her crime was serious, because she's

24 just going to continue committing crimes. There's a

25 chance if she gets it that she won't, but without it,

7

1 for sure, she's not, and this is the just punishment she

2 deserves, this amount of years. That's how I read the

3 transcript.

4   MR. CAHN: Well, Judge -- I mean, Justice, I

5 would disagree with that characterization of Judge

6 Moskowitz's comments, and I'd point specifically to the

7 Joint Appendix, really, at pages 25 through 38, and

8 particularly to pages 27 through 29, where he very

9 specifically says not that he's imposing this time for

10 punishment purposes, but really to get her into the drug

11 program. He says: I'm going to impose a 51-month

12 sentence, 46 months plus 5 months for the bail jump, and

13 one of the factors that affects this is the need to

14 provide treatment. In other words, so she is in long

15 enough to get the 500-hour drug program.

16   And then, again, when he actually imposes

17 sentence, he says -- the judge says: I think a

18 sentence -- I'm sorry. Well, he says: The court

19 recommends, strongly recommends, that she participate in

20 the 500-hour drug program.

21   JUSTICE SOTOMAYOR: But you're ignoring his

22 lengthy discussion talking about she was really going

23 down the wrong road here. I understand her troubled

24 past. She gets involved in alien smuggling, which is

25 very serious. He is talking at length about the

8

1   seriousness of the crime.

2   So what I'm asking you is, if what we see is

3   a judge who's talking about a flip situation, i.e., you

4   need to punish strongly because the crimes are serious,

5   and an added benefit is rehabilitation, why does that

6   violate 3582? What about 3582, in using the word

7   "recognizing," stops a judge from saying without

8   something there's going to be no deterrence?

9   MR. CAHN: There's nothing that stops a

10   sentencing judge from saying I think that

11   incapacitation, retribution, deterrence justify a

12   sentence of X, and in addition you'll receive

13   rehabilitative resources while you're inside; make --

14   you know, make best use of them. There's nothing that

15   stops a judge from urging a defendant to, in fact, make

16   better of herself while she's in prison or outside.

17   JUSTICE SOTOMAYOR: So you're talking only

18   about when rehabilitation is the primary purpose? So

19   the issue here is what was the judge's primary purpose?

20   MR. CAHN: No. No. Whenever the judge

21   lengthens a sentence or imposes a sentence of

22   imprisonment that that judge otherwise would not have

23   imposed, that is a violation of 3582. You could --

24   JUSTICE SOTOMAYOR: So now we want some

25   talismanic words where the judge says what I said? This

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1   crime is so serious that the sentence should be X

2   amount, and now talismanically I'll say rehab is just a

3   side effect, really the sentence is motivated by --

4   completely by punishment?

5   MR. CAHN: I think a fair reading of Judge

6   Moskowitz's statements at the sentencing was that, in

7   fact, he was lengthening the sentence for purposes of

8   rehabilitation --

9   JUSTICE GINSBURG: Well, how do we --

10   MR. CAHN: -- to make sure that she got into

11   the --

12   JUSTICE GINSBURG: -- can we know that when

13   the government -- didn't the government ask for 63

14   months?

15   MR. CAHN: The government did ask for 63

16   months. We requested 36 months. There's -- we don't

17   know with certainty --

18   JUSTICE GINSBURG: And the judge came up

19   with something in between those two?

20   MR. CAHN: He did, indeed. I believe that

21   -- that these particular issues are appropriately -- I'm

22   sorry -- addressed on plain error review in the circuit

23   court first. I don't think they're essential to the

24   legal question that's before this Court.

25   JUSTICE SCALIA: The judge did say, didn't

 1 he -- this is on page 27 of the Joint Appendix -- "the

 2 sentence has to be sufficient to provide needed

 3 correctional treatment, and here I think the needed

 4 correctional treatment is the 500-hour drug program."

 5 It couldn't be clearer that he's computing the length of

 6 the sentence on the basis of what correctional treatment

 7 will be received. It "has to be sufficient to provide

 8 needed correctional treatment."

 9   MR. CAHN: Indeed, he did, and I believe

10 that he was taking into account his own knowledge of the

11 prison system and what it would require to allow Ms.

12 Tapia to participate in the 500-hour program.

13   CHIEF JUSTICE ROBERTS: What if -- putting

14 aside the particular statement here, what if a judge

15 says: I appreciate that one purpose of punishment is

16 deterrence; that's what -- and that's what's going to

17 guide me, and I think you will not be deterred if I only

18 sentence you for 2 years, but I think if you have to go

19 away for 3 years, you will appreciate that what you've

20 done is wrong and you won't do it again.

21   Is that for rehabilitation, that extra year,

22 or is it for punishment?

23   MR. CAHN: I believe that's for punishment

24 and deterrence, and I don't believe that's an improper

25 purpose.

11

1   CHIEF JUSTICE ROBERTS: Well, maybe -- what

2   is the difference between deterrence and rehabilitation?

3   The person doesn't commit any crimes anymore but wishes

4   -- wishes she could? Or -- and, well, if she's

5   rehabilitated, she doesn't want to? It seems to me it's

6   a very artificial distinction.

7   MR. CAHN: Well, I don't think it is,

8   because I think we can look at the purposes Congress had

9   in mind when it enacted the statute and, in particular,

10   the system it had in mind, the system it intended to

11   overturn when it enacted the statute. As I mentioned

12   before, one of the statements, a prominent statement, in

13   the Senate report that comes up again and again is

14   Congress doubted that rehabilitation could be reliably

15   induced in the prison setting. The system that was

16   being overturned was one of coercive rehabilitation in

17   which individuals were sent to prison and prison

18   sentences were tied to their completion of these

19   programs.

20   And so for that reason, I think when you

21   look at a sentence that's employed specifically to get

22   somebody into treatment, it is exactly within the

23   proscription Congress intended.

24   If there are no questions at this time, I'd

25   ask to reserve the rest of my time, Your Honor.

1   CHIEF JUSTICE ROBERTS: Thank you, Mr. Cahn.

2   Mr. Roberts.

3   ORAL ARGUMENT OF MATTHEW D. ROBERTS

4   ON BEHALF OF THE RESPONDENT IN SUPPORT OF VACATUR

5   MR. ROBERTS: Mr. Chief Justice, and may it

6   please the Court:

7   Section 3582(a) prohibits courts from

8   imposing or lengthening a term of imprisonment to

9   promote a defendant's rehabilitation, including by

10   facilitating her access to a prison drug treatment

11   program.

12   JUSTICE KAGAN: Mr. Roberts, could I take

13   you back to Justice Kennedy's question at the start

14   about the one-way ratchet? What's the government's

15   theory about what Congress might have been thinking when

16   it said you can't think about rehabilitation to sentence

17   or to lengthen a sentence, but you can think about

18   rehabilitation to make a decision not to sentence or to

19   shorten a sentence? What would -- what would have been

20   in Congress's mind?

21   MR. ROBERTS: Well, Congress was intending

22   to reject the prevailing rehabilitation model of

23   sentencing, and under that model, defendants were kept

24   in prison until they were declared rehabilitated based

25   on their participation in treatment programs. And what

1   Congress determined was that -- that coercing

2   participation in prison programs that way wasn't -- had

3   failed and that rehabilitation couldn't be accomplished

4   reliably in a prison setting. So --

5   JUSTICE ALITO: That's only one-half of what

6   the thinking was at the time about rehabilitation. The

7   thinking was that -- that some people were being

8   sentenced to coercive rehabilitation, but also that

9   other people were being paroled before they should be on

10   the theory that they had been rehabilitated. It was a

11   general skepticism about rehabilitation, and that is

12   inconsistent with the idea that you can take

13   rehabilitation into account in going down, but you can't

14   take rehabilitation into account in going up.

15   MR. ROBERTS: Well, Congress expressly

16   determined to retain -- there were people that said

17   rehabilitation never works; it can't be a legitimate

18   purpose of sentencing. And Congress decided not to go

19   that far. It expressly retained rehabilitation as a

20   purpose of sentencing. That's reflected in section

21   3553(a)(2)(D).

22   But what Congress determined was that it --

23   that because you couldn't reliably induce it in prison,

24   it wasn't appropriate to deprive defendants of their

25   liberty, expend the resources on keeping them in prison

1   for that purpose, but that -- that rehabilitation

2   remained a possibility, that other forms of sentencing

3   were appropriate ways to attempt to achieve

4   rehabilitation, and that's why Congress expressly

5   provided that, in imposing a sentence of probation, the

6   court can require a defendant to participate in

7   particular treatment programs --

8   JUSTICE ALITO: Yes, but that's different

9   from saying that a lower sentence can be imposed on the

10   theory that with rehabilitation outside of prison, a

11   lengthier sentence isn't needed.

12   Would you agree that when the guidelines

13   were mandatory a judge could not sentence to -- to

14   additional time, certainly not additional time outside

15   the guideline range for the purpose of rehabilitation,

16   but the judge also generally could not depart below the

17   guideline range on the theory that this defendant had

18   led a life of crime because the defendant lacked

19   vocational skills or the defendant was dependent on

20   drugs or alcohol, and with treatment outside of

21   incarceration, those problems which had led to the

22   criminality could be alleviated?

23   MR. ROBERTS: I think it would depend

24   whether that was an aggravating or, you know, mitigating

25   circumstance that the guidelines hadn't adequately taken

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1   into account, but I don't think that Congress was trying

2   to prevent a court from selecting another sentencing

3   option, such as probation, in lieu of imprisonment

4   because the court determined that the primary purpose of

5   the sentence should be rehabilitation, or to shorten the

6   sentence to speed the defendant from imprisonment to

7   supervised release, where the court could guarantee the

8   defendant would participate in programs.

9   On the other hand, if the -- it was very

10   important, if there were important purposes of

11   protecting the public, deterring the defendant from

12   committing other crimes, deterring generally, then the

13   court was supposed to sentence the defendant to prison

14   in accordance with that, even if the defendant also

15   needed rehabilitation.

16   JUSTICE KENNEDY: Suppose -- suppose the

17   case in which the judge is going to sentence to 2 years

18   no matter, but there is a 2-year rehabilitation program,

19   and the defendant is -- the prisoner is receiving that.

20   Would you say that, at that point, the prisoner is

21   receiving an imprisonment term and rehabilitation?

22   MR. ROBERTS: Well, the prisoner is

23   receiving an imprisonment term --

24   JUSTICE KENNEDY: Hypothetical. The term

25   isn't affected by the program, but the judge recommends

16

1   the program, and the prisoner is receiving it.

2   MR. ROBERTS: I --

3   JUSTICE KENNEDY: Would you agree the

4   prisoner is then receiving both an imprisonment term and

5   rehabilitation?

6   MR. ROBERTS: I think the prisoner is

7   receiving rehabilitative services, yes, in prison -- in

8   prison, yes.

9   JUSTICE KENNEDY: I -- so then, we can use

10   those two goals of sentencing in -- in the

11   conjunctive --

12   MR. ROBERTS: Well --

13   JUSTICE KENNEDY: -- and you can have

14   imprisonment and rehabilitation at the same time?

15   MR. ROBERTS: Congress intended that, even

16   if a defendant needed rehabilitation, if the other goals

17   of sentencing such as deterrence and protecting the

18   public justified a term of imprisonment, that the court

19   should impose a term of imprisonment. So Congress --

20   JUSTICE KENNEDY: I'm just talking about a

21   matter of diction. You would agree there are instances,

22   in a hypothetical --

23   MR. ROBERTS: Yes.

24   JUSTICE KENNEDY: -- case, where you can

25   receive imprisonment and rehabilitation at same time?

1   MR. ROBERTS: Yes, yes, but what Congress

2   wanted courts to -- required courts to recognize was

3   that imprisonment is not an appropriate means of

4   promoting rehabilitation.

5   JUSTICE KENNEDY: We're -- we're talking

6   about what the statute says, and the question indicates,

7   the hypothetical indicates, that those are not mutually

8   exclusive. You can have imprisonment and rehabilitation

9   at same time. Now, this case is a little different

10   because she didn't get it, but let's just talk about the

11   hypothetical.

12   MR. ROBERTS: I agree that you can -- there

13   can be rehabilitative programs in prison. But what

14   Congress was trying to preclude was imposing

15   imprisonment for the purpose of providing those programs

16   or lengthening the imprisonment term for that purpose.

17   JUSTICE KAGAN: Counsel, assume --

18   JUSTICE GINSBURG: Prisons have multiple

19   treatment programs.

20   MR. ROBERTS: Yes.

21   JUSTICE GINSBURG: And they have vocational

22   treatment. Do you -- are you relying at all on the fact

23   that in the supervised release term, the judge can say

24   this man or this woman needs rehabilitation, and I want

25   this program for her, but in the prison setting, the

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1   judge, this judge -- as the colloquy with Justice Scalia

2   showed, this judge wanted her to be in the program, but

3   she never got into it because the judge has no control?

4   MR. ROBERTS: Exactly, Your Honor. The --

5   under the SRA, judges have no authority to place

6   prisoners in -- place defendants in prison treatment

7   programs or to require their participation in those

8   programs. And Petitioner, in fact, did not participate

9   in the drug treatment program on which the sentencing

10   court relied in setting her prison term.

11   CHIEF JUSTICE ROBERTS: What if -- what if

12   the judge sentences people who commit robbery with

13   assault typically to 1 year; he can do it 1 to 2 years,

14   he gives them 1 year; except whenever the presentencing

15   report says the person has a drug problem and there's a

16   one-and-a-half-year drug program in the prison, he

17   sentences those people to one and a half years?

18   Regularly. But each time he says I recognize

19   rehabilitation is not a permitted factor; I can send

20   sentence this person to one to two, I'm going to pick

21   one and a half.

22   MR. ROBERTS: Right.

23   CHIEF JUSTICE ROBERTS: Is that a problem,

24   or does it always just depend on what the judge says?

25   MR. ROBERTS: I think generally you take the

1   district court at the court's word for what the purposes

2   of the sentence are, and the sentence has to be

3   justified by the reasons that the district court gives

4   in sentencing the defendant.

5   JUSTICE SCALIA: I think you'd say it was

6   wrong for the district court to do that.

7   MR. ROBERTS: If the -- if the judge --

8   JUSTICE SCALIA: But whether it can be

9   established on appeal that it was wrong is another

10   matter.

11   MR. ROBERTS: Yes. I mean, I don't know if

12   we -- I mean if we -- if the question is we know --

13   CHIEF JUSTICE ROBERTS: It's wrong -- wrong

14   to do what?

15   MR. ROBERTS: -- we're inside the district

16   court's head, and the district court is actually not

17   recognizing that rehabilitation is an appropriate means

18   of promoting -- that imprisonment is an appropriate

19   means of promoting rehabilitation but is in fact doing

20   that, but not -- but being disingenuous about the

21   court's reason, then the court is violating the statute,

22   but we're not going to know that.

23   CHIEF JUSTICE ROBERTS: Does the defendant

24   have the right to raise arguments and inquire into that

25   in -- in every case? Say that, well, he did say this

1   was just to -- just to punish me, but here is a list of

2   10 cases where I think it's like my case and those

3   people got less.

4   MR. ROBERTS: I think that -- that it's

5   going to be hard for the defendant to obtain reversal of

6   a conviction under those circumstances.

7   CHIEF JUSTICE ROBERTS: Well, I think it's

8   going to be hard for the government to defend a sentence

9   under those circumstances.

10   MR. ROBERTS: Well, I think, as I said, that

11   the words that you -- that the court is required to give

12   its reasons for imposing sentence. We presume that

13   district courts honestly give their reasons for imposing

14   the sentence and that if the court is indeed lengthening

15   the term of imprisonment because the court wants the

16   defendant to be in a program, that the court will say

17   that's what they're doing, just as Judge Moskowitz did

18   here. And once this Court makes clear that imprisonment

19   is not an appropriate means of promoting rehabilitation,

20   therefore, courts cannot impose or lengthen a term of

21   imprisonment to serve that purpose, sentencing courts

22   will follow that --

23   JUSTICE SOTOMAYOR: Counsel --

24   MR. ROBERTS: -- map.

25   JUSTICE KENNEDY: Suppose the judge said:

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1   I'm going to sentence you to 12 months. Now, there is a

2   particular facility where there is a drug treatment

3   program that you can really benefit from, and you'd be a

4   safer citizen, but I'm not going to mix up imprisonment

5   and rehabilitation. I'm not even going to make that --

6   I'm not going to consider it. All I'm interested in is

7   imprisonment.

8   Is that an abuse of discretion? The failure

9   to consider the factors that Congress set forth,

10   including rehabilitation?

11   MR. ROBERTS: No. I think that the -- that

12   the -- what the court has to do is consider all of the

13   factors, including rehabilitative purposes.

14   JUSTICE KENNEDY: No, he said I -- no, he

15   said I'm not going to consider that.

16   MR. ROBERTS: He's not going to consider

17   rehabilitation at all in imposing sentence?

18   JUSTICE KENNEDY: Right.

19   MR. ROBERTS: Then, yes, that would -- that

20   would be a procedural error --

21   JUSTICE KENNEDY: All right.

22   MR. ROBERTS: -- to fail to consider it at

23   all.

24   JUSTICE KENNEDY: So -- so then he must

25   consider rehabilitation in the context of imprisonment?

1   MR. ROBERTS: Yes. We don't think that it

2   precludes -- the statute precludes considering

3   rehabilitation in the context of imprisonment. What it

4   precludes is imposing or lengthening the term.

5   JUSTICE SCALIA: I don't understand what

6   you're saying. It -- it seems to me what the statute

7   requires is that he consider rehabilitation in imposing

8   the sentence. Right?

9   MR. ROBERTS: Yes.

10   JUSTICE SCALIA: Not in imposing

11   imprisonment.

12   MR. ROBERTS: It does require --

13   JUSTICE SCALIA: So he can consider

14   rehabilitation in deciding what this person will be

15   required to do in -- in a probated term, but not in how

16   long he's going to stay in prison before he gets

17   probation.

18   MR. ROBERTS: Yes, but the court can also

19   consider rehabilitation to choose a sentence of

20   probation rather than a sentence of imprisonment.

21   JUSTICE ALITO: Suppose the judge thinks

22   that a -- a defendant would benefit from a type of a

23   vocational or educational training that may be available

24   in prison but that is not available in -- on the outside

25   in the particular community where this defendant

23

1   resides? What would the judge do then?

2   MR. ROBERTS: I think the court can still

3   require the availability -- require that as a condition

4   of supervised release if the judge thinks that that's --

5   or as probation; if the judge thinks that that's a

6   really critical provision to have, and the judge can

7   require the defendant --

8   JUSTICE ALITO: No, what if that's not --

9   MR. ROBERTS: -- to reside in the

10   appropriate place.

11   JUSTICE ALITO: What if it's not available

12   in the community on the outside?

13   MR. ROBERTS: Well, then the judge would

14   have to decide whether moving from -- whether having the

15   defendant in a different location than the defendant

16   ordinarily would be is worth providing that program. I

17   don't know that -- that there are such specialized

18   programs that those things can't be accommodated as a

19   general matter in -- in most communities --

20   JUSTICE SCALIA: Well, that wouldn't affect

21   the length of the sentence. Are you talking about, say,

22   can the judge prescribe that he be incarcerated in a

23   particular facility?

24   MR. ROBERTS: The judge cannot prescribe

25   that he be incarcerated in a particular facility. The

1   judge can make a recommendation for a particular

2   facility, but the judge can require participation in a

3   particular program on supervised release and residing in

4   a particular area on supervised release or on probation.

5   So a judge can, if the judge thinks it's important

6   enough, address that situation if it would arise. I'm

7   not --

8   JUSTICE SOTOMAYOR: Counsel, can a judge who

9   believes a defendant is dangerous to the public and

10   thinks that that danger can't be abated without a drug

11   treatment program, could the judge nevertheless under

12   3553(a)(2)(C) say, because of the danger to the public,

13   I'm going to lengthen the sentence?

14   MR. ROBERTS: Yes.

15   JUSTICE SOTOMAYOR: And in the hopes that a

16   drug rehabilitation program will be available? I don't

17   care if it is or it's not; this person's dangerous to

18   the community otherwise?

19   MR. ROBERTS: I think the judge can say that

20   -- that this person needs to be in prison for this

21   amount of time to protect the public.

22   JUSTICE SOTOMAYOR: So what's different than

23   what the judge did here, where he talked about,

24   explicitly, on page 26, "it has to deter" -- the

25   sentence has to deter criminal conduct by others, and it

1   has to protect the public from further crimes of the

2   defendant, and the sentence -- that's a big factor here,

3   given her failure to appear and what she did out on

4   bail.

5   So, if the sentence has a dual motive, is

6   that okay?

7   MR. ROBERTS: That is --

8   JUSTICE SOTOMAYOR: Now, I know that you're

9   -- there's -- there's an issue about whether this

10   transcript can be read as a dual motive or not.

11   MR. ROBERTS: Right.

12   JUSTICE SOTOMAYOR: But my question is, is a

13   dual-motive sentence permissible?

14   MR. ROBERTS: No, a dual-motive sentence --

15   if one reason that the judge is selecting the term is to

16   impose a sentence of imprisonment, that violates the

17   prohibition. However, if the sentence would have been

18   the same otherwise, then that would be harmless error.

19   JUSTICE SOTOMAYOR: Isn't that what "dual

20   motive" means? Unless --

21   MR. ROBERTS: I think -- yes. We --

22   JUSTICE SOTOMAYOR: You want talismatic

23   words. I would have picked the sentence anyway.

24   MR. ROBERTS: We -- we think that -- that in

25   this case the Petitioner won't be able to show plain

1   error, won't be able to show an effect on her

2   substantial rights on remand.

3   CHIEF JUSTICE ROBERTS: Thank you, counsel.

4   Mr. Bibas.

5   ORAL ARGUMENT OF STEPHANOS BIBAS

6   ON BEHALF OF THE AMICUS CURIAE

7   MR. BIBAS: Thank you. Mr. Chief Justice,

8   and may it please the Court:

9   Sentencing judges may consider needed

10 correctional treatments in deciding both whether to

11 imprison and for how long. The Sentencing Reform Act

12 rejected the rehabilitation model's unstructured

13 sentencing procedures designed to confine every inmate

14 indefinitely until a parole board found he had reformed

15 himself.

16   It did not, however, forbid treatment

17 programs targeting specific defendants' pathologies,

18 such as the drug treatment at issue here. The Act

19 rejected one means of promoting rehabilitation that was

20 bound up with indeterminate sentencing, not

21 rehabilitation itself.

22   JUSTICE GINSBURG: I could follow your

23 argument much better if the judge could say that this

24 specialized program -- as I am making that a term of

25 your incarceration. The disturbing factor about your

27

1   argument is the judge can only recommend; the judge has

2   no way of making sure that this person will be in prison

3   longer and get the treatment the -- the judge wants,

4   because the judge can't control where the person will

5   serve her sentence and what treatment will be available

6   for her.

7   MR. BIBAS: Your Honor, I don't believe

8   that's a large concern for several reasons. The first

9   is this Residential Drug Abuse Program, RDAP, is given

10   to 93 percent of eligible defendants. The only reason

11   Petitioner did not get it is because she affirmatively

12   refused, said she was not interested.

13   The second point I would make is that if we

14   look at the legislative history, the Petitioner and the

15   government's reply brief say, well, this Act stripped

16   judges of the power to do this. The Senate report makes

17   clear this was a simple administrative simplification

18   designed to make it clear that the Bureau of Prisons

19   ultimately controlled all of these things but that at

20   the same time it was supposed to listen seriously to

21   judges' recommendations. It was not --

22   JUSTICE GINSBURG: Wasn't there something --

23   you responded that she didn't -- she said I'd rather

24   not. But wasn't there something about placing her

25   with -- in the same facility as another inmate? Wasn't

28

1 that involved?

2   MR. BIBAS: There were two distinct issues

3 here. One was putting her in the particular prison that

4 was named was not possible because she needed to be

5 separated from another inmate. The other is whether she

6 could be put in a facility that had one of these

7 programs. About half of prisons -- Federal prisons do,

8 and the reason she didn't get that was because she

9 refused, she said she wasn't interested.

10   JUSTICE SCALIA: I don't know why you

11 consider that that solves your case, that that makes

12 everything okay. She refused it. She would not have

13 been able to refuse it had it been made a condition of

14 her supervised release. You either take the program or

15 you go back to jail. I mean, that's -- why is that an

16 insignificant difference?

17   The fact is the judge has no control over

18 whether this person gets the rehabilitation that was

19 supposedly the purpose of the -- of the extended prison

20 term.

21   MR. BIBAS: A couple of --

22   JUSTICE SCALIA: It makes no sense.

23   MR. BIBAS: I just note, Your Honor, first

24 of all, the statute requires judges to make predictions

25 about deterrence. That is a forward-looking matter.

1   The fact that a judge must predict the future calls for

2   appropriate skepticism and a statement of reasons in

3   appellate review. It does not mean that a judge may not

4   consider deterrence because it's a speculative

5   possibility.

6   JUSTICE SCALIA: You're -- you're not

7   responding to my point. You're -- you're -- you're

8   making a different point. I'm saying that it's -- it --

9   it -- it does not help your case that the reason she did

10   not get the rehabilitative treatment that this judge

11   wanted her to get was that she simply refused it. Why

12   does that help your case? She couldn't have refused it

13   if, as the other side says, had to be the case, he had

14   imposed this rehabilitative measure as a portion of

15   supervised release. Then she would have had to take it.

16   MR. BIBAS: Your Honor is correct that there

17   is a contingency involved here, but the contingency

18   involved is no greater than the contingency involved in

19   other sentencing decisions judges must make and that is

20   a reason for skepticism. It doesn't imply that the Act

21   meant to disable judges from doing this.

22   JUSTICE KAGAN: Mr. Bibas, I -- I -- I have

23   to say I don't really understand the whole premise of

24   your argument. You're basically saying the judge cannot

25   consider rehabilitation, but the judge can consider

1   educational programs, vocational programs, treatment

2   programs, and so forth.

3   I think most people would think that all of

4   those things are rehabilitation, that there's nothing

5   left over when you say that the judge can consider all

6   of those things.

7   MR. BIBAS: Your Honor, I don't believe you

8   phrased correctly. Our point is not that judges can't

9   consider rehabilitation. It is that judges may not use

10   imprisonment as the means of promoting rehabilitation.

11   JUSTICE KAGAN: Yes. Well, I'll ask the

12   same question.

13   MR. BIBAS: Yes.

14   JUSTICE KAGAN: You're saying they can

15   consider rehabilitation in imposing a sentence, they

16   cannot consider rehabilitation in imposing a sentence,

17   but they can consider all these programs in imposing a

18   sentence. And I'm saying what's the difference between

19   all these programs and rehabilitation? Once you say

20   they -- they can consider all these programs, what's

21   left over that they can't consider?

22   MR. BIBAS: Your Honor, I think the answer

23   is clear if we look at the statutory text. It's in

24   Petitioner's brief, the blue brief at Appendix 2 and

25   Appendix 3. The contrast becomes clear if we look at

1   3553(a)(2)(D). There were four simple purposes of

2   punishment the judge must consider. And (D) is not

3   everything that was ever considered rehabilitation. It

4   is a specifically limited subset of rehabilitation.

5   It must be needed, must be educational or

6   vocational training, medical care or other correctional

7   treatment, and it must be in the most effective manner.

8   So, judges may no longer rest on what Judge

9   Frankel and the -- the Senate decried as the eerie

10   nonsense that everyone can be rehabilitated simply by

11   throwing them in prison or simply by having everybody

12   going to social workers or classes, but because

13   criminality is not a pathology that needs treatment.

14   But he and the Senate report contrasted that with drug

15   treatment, which is very different, because there's a

16   diagnosed pathology, there is a criterion for success

17   that's measurable, and there's a fixed limited time.

18   And that third point is crucial here,

19   because both Petitioner and the government in their

20   argument said that you can't keep someone in jail tied

21   to completion of programs or keep them in until he has

22   been rehabilitated through treatment. The indeterminant

23   aspect here was a crucial part of what Congress was

24   targeting that's very different from --

25   JUSTICE SCALIA: You haven't read the -- the

32

1   crucial provision of the statute. Yes, you read the --

2   the section entitled imposition of a sentence, but there

3   is another provision in the statute which says

4   imposition of a sentence of imprisonment. You can

5   indeed consider those factors in imposing the sentence,

6   which includes probation, supervised release and any

7   other matters. But what -- what 3582(a) says is that

8   the court in determining whether to impose a -- whether

9   to impose a term of imprisonment as opposed to just

10 parole or -- or supervised release, and if a term of

11 imprisonment is to be imposed and determining the length

12 of term shall consider the factors set forth in, that

13 you mentioned in 3553(a) to the extent they are

14 recognizing that imprisonment is not an appropriate

15 means of promoting correction and rehabilitation.

16   You have to reconcile the two sections. And

17 the way to reconcile them is to say that the former

18 applies to sentencing in general but when you're dealing

19 with the length of a sentence of imprisonment or whether

20 there should be any imprisonment at all, you cannot

21 consider rehabilitation.

22   MR. BIBAS: No, Your Honor.

23   JUSTICE SCALIA: I don't know any other way

24 to read it.

25   MR. BIBAS: No, Your Honor. The main clause

1   of 3582(a) says shall consider the factors set forth in

2   3553(a). It does not say (a)(2) -- (a), (a)(2)(B) and

3   (a)(2)(C). As the very next section of the sentencing

4   format goes, 3583 says consider only these purposes, but

5   3582 says consider all of these factors to the extent

6   they apply in a particular case.

7   Now, the way Your Honor reads the

8   recognizing clause is as if it said, except the court

9   shall not consider in imposing or lengthening a sentence

10   (a)(2)(D) or if it tracked the language of (a)(2)(D).

11   JUSTICE SCALIA: I -- I don't know what else

12   recognizing that factor would consist of, except you

13   won't use that factor in deciding imprisonment or length

14   of term of imprisonment.

15   MR. BIBAS: Your Honor, we've looked through

16   the entire United States Code. We have not found a

17   single instance in which a recognizing clause is used to

18   mean an exception --

19   JUSTICE SCALIA: Well, you tell me what it

20   means here, then. What, he -- he should say, you know,

21   I recognize that rehabilitation is not a -- an

22   appropriate factor to take into account in determining

23   the length of your sentence or the -- or whether you

24   should go to jail at all. That said, I'm going to send

25   you to jail in order to rehabilitate you.

1   (Laughter.)

2   JUSTICE SCALIA: Is that all it means?

3   MR. BIBAS: Your Honor, a recognize -- we

4   found dozens of instances in the U.S. Code where

5   recognizing introduces a statement of principle or

6   policy or rationale. Petitioner or the government cite

7   no instances in which it's used to impose a flat ban.

8   What we point out is -- Justice Kennedy made

9   the point that logically there is a distinction between

10   the imprisonment and the treatment that occurs during

11   the imprisonment. And if it's recognizing that the

12   imprisonment is not an appropriate means of promoting

13   correction rehabilitation, that itself bans a

14   penological policy that was known in our history and had

15   been known into the 1970s.

16   JUSTICE SCALIA: But the judge only has the

17   power to impose imprisonment. He does not have the

18   empower to impose anything else during the imprisonment.

19   I mean, what you're saying might make sense if indeed he

20   could prescribe some treatment during imprisonment, but

21   he can't. There are prisons -- and why can't he, by the

22   way? Why has he been prevented from doing that,

23   although he's allowed to do it during supervised

24   release? Does that make any sense, if indeed, as you

25   say, he can take that into account in imprisonment?

1   MR. BIBAS: Your Honor, judges in supervised

2   release, it -- it -- it's hard to understand why in

3   3583(e)(3) judges may consider rehabilitation in

4   deciding whether to impose a term of imprisonment on

5   resentencing, and we've been offered no logical

6   explanation as to why that same logic Congress would

7   have meant a flat ban here that it didn't spell out in

8   an initial sentencing.

9   JUSTICE KENNEDY: It -- it does seem to me

10   that the principal trouble I have with your argument is

11   that, as Justice Scalia mentioned, the judge can't be

12   certain that the treatment will -- will be provided.

13   And in an answer to an earlier question you said, well,

14   90 percent of the time the judge's recommendation is

15   followed, the program is -- is offered.

16   Suppose we're only 10 percent of the time?

17   Suppose only 10 percent of the time could or did the

18   Bureau of Prisons follow the judge's recommendation,

19   wouldn't your interpretation of the statute then be very

20   difficult to sustain?

21   MR. BIBAS: Justice Kennedy, while I agree

22   that the reliability of the prediction is an important

23   factor, I think this is dealt with through the ordinary

24   appellate review that this Court has fleshed out in

25   Rita, Gall, and Kimbrough. If there's 93 percent

1   likelihood, predictability, here, then the judge can

2   give it a fair amount of weight as the judge can give a

3   fair amount of weight to deterrence calculations. If

4   it's highly unpredictable, then the judge shouldn't be

5   putting very much weight on that at all.

6   And I would point out particularly that if

7   we look at those appellate review cases, it's very

8   relevant that the judge here imposed a sentence within

9   the range. As Justice Sotomayor pointed out, there are

10   multiple explanations going on here; the judge arrives

11   at a sentence within the range. It's hard to tell here

12   that it's even a but-for cause versus just a hope.

13   The -- the thicket of issues that

14   Petitioner's and the government's reading forces

15   appellate courts into in disentangling sentences that

16   are otherwise reasonable, that are within the range that

17   could have been justified any number of ways, counsels

18   against requiring us to say one factor is categorically

19   forbidden in the sentencing format.

20   JUSTICE KAGAN: Mr. Bibas, just practically

21   speaking what does this clause instruct a court not to

22   do in your view?

23   MR. BIBAS: It instructs a court to bear in

24   mind that simply locking someone in a cell away from his

25   criminal associates, away from his pattern of life, is

 1   not itself going to reform him. We've been down that

 2   road.

 3   JUSTICE KAGAN: Well, really who thought

 4   that? This was 1984. When people talked about

 5   rehabilitation, they were talking about drug programs,

 6   they were talking about education programs, they were

 7   talking about vocation programs. They were not talking

 8   about some idea that had passed away long since, that

 9   just locking you in a cell was going to rehabilitate

10   you.

11   MR. BIBAS: A couple of responses that I

12   think show that to be incorrect. The first of these is

13   most of the references in the Senate report are to just

14   generic open-ended education, vocation, and counseling.

15   We see maybe one reference to alcohol and drug treatment

16   in there.

17   The second of these is that idea of

18   isolation, though it had diminished, was still alive in

19   the 1970s. There was a widely cited manual for judges,

20   the "Guides for Sentencing" in 1974, that said that

21   confinement, quote, "may be necessary to break criminal

22   associations and in time to modify antisocial attitudes

23   and tendencies."

24   My third point is this is not just about the

25   substantive idea of rehabilitating. The government and

1   Petitioner point out that there was a rehabilitation

2   model, a procedural approach here that was bound up with

3   that history of the penitentiary, and the approach was

4   that, in the Senate report, the rehabilitation model

5   ties prison release dates to successful completion of

6   programs.

7   We don't have open-ended, unpredictable

8   sentences any more. The Sentencing Reform Act in

9   multiple ways gets rid of that unpredictability --

10   JUSTICE GINSBURG: But wouldn't your

11   proposal lead to unevenness in sentencing? If you -- if

12   you're right, then this choice of extending a term to

13   accommodate a drug program, that could be -- the judge

14   would have the option. I think nearly half of the

15   people who are incarcerated have a drug addiction. So

16   one judge might say: I'm not going to let that person

17   out until they -- they should at least have a chance to

18   get into this program. And another will say: I can't

19   control that; I'm not going to subject -- you would be

20   introducing that, just what the framers of the Reform

21   Act were trying to get away from, that this swings from

22   one judge to another, and you're dealing with almost

23   half the prison population.

24   MR. BIBAS: A couple of points. One is,

25   statistically I think the number is lower than you say.

 1   The RDAP program here requires 12 months before

 2   admission having a provable addiction or abuse, so it's

 3   about 30, 35 percent of inmates.

 4   But granted that issue, that's why the

 5   Sentencing Reform Act requires statements of reasons,

 6   subject to appellate review. If judges are varying

 7   widely, this Court's case law in Rita, Gall, and

 8   Kimbrough allows appellate courts to harmonize what

 9   they're doing. If this judge had added 5 years to her

10   sentence, this would be a different case. Judge

11   Franklin and others were concerned about sentences

12   exceeding 5 years, open-ended, airy hopes that everyone

13   will be cured of criminality.

14   We're talking about a sentence within the

15   range, sentence that, if a few lines of the transcript

16   had been whited out we wouldn't be here. A judge could

17   have reached the same sentence on a lot of different

18   grounds. And are we going to tell judges you can

19   consider other things, but if you muse about this ground

20   you can't offer a thoughtful, reasoned justification --

21   per se automatic reversal.

22   There are only a couple of places in the

23   Sentencing Reform Act that have categorical bans and

24   they don't read the way this one does. The very next

25   section in the Act, 3583(c) says: "In considering a

40

1   supervised release sentence, a judge shall consider the

2   factors in 3553(a)(1), (a)(2)(B), (a)(2)(C), and

3   (a)(2)(D).

4   It skips over retribution explicitly where

5   Congress meant to omit it.

6   The other place in the Act where Congress

7   explicitly banned the factor was in 28 U.S.C. 994(d).

8   The commission, the sentencing commission, not a judge,

9   shall ensure that the guidelines are entirely neutral

10   with respect to race, sex, creed, national original, and

11   socioeconomic status. When Congress meant to ban

12   something, even within the range, it spoke much more

13   clearly. What it did usually was it gave some guidance

14   to the sentencing commission. And section 994 has a

15   number of places where the commission shall do this, the

16   commission shall ensure that this is generally an

17   appropriate or inappropriate.

18   But it left a range, and it simultaneously

19   said judges should individualize sentences within that

20   range. 991(b)(1)(B) says there are factors not

21   adequately taken into account in the guidelines that can

22   lead to aggravating or mitigating, and judges can also

23   adjust sentences to individualize them within the range.

24   JUSTICE SOTOMAYOR: Can you articulate an

25   interpretation of this provision that would guide

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1   appellate review? If rehabilitation can always be a

2   factor, then when and how does a court of appeals

3   determine whether a judge has abused his or her

4   discretion? You said 5 years, if the guideline range

5   presumably is 24 months and the judge adds 5 years. But

6   how do you define that?

7   The simple answer is if the judge is

8   imposing the sentence because of rehabilitation, they

9   can't do that. Is that what you're arguing or are you

10   arguing they can do it except within a range? I'm not

11   quite sure I understand how far you're going.

12   MR. BIBAS: I understand, Justice Sotomayor.

13   Our primary argument is that 3582's recognizing clause

14   isn't about this at all. This is dealt with by

15   3553(a)(3)(D), what is it that's needed correctional

16   treatment, and if it fits within (a)(2)(D), ordinary

17   appellate review.

18   If the Court is not comfortable with that

19   and thinks that there ought to be more discouragement,

20   we do have a fallback argument that says that the Senate

21   report talks about discouraging using this as the sole

22   basis, right, but that if it's one of several factors,

23   if it appears to be given a proper balanced weight, then

24   there's no need to be so suspicious of it. And indeed,

25   when we look at the case law in the circuits -- and

42

1   we've surveyed the most recent 150 or so cases on

2   rehabilitation in the courts -- we see very rarely --

3   first of all, we haven't found any cases where judges

4   are putting someone into prison versus out based solely

5   on this.

6   We find only a couple of cases where judges

7   appear to be lengthening a sentence solely because of a

8   desire to put someone into drug treatment. Usually,

9   what's happening is something like what happened here.

10   The judge is balancing three or four factors; it's in

11   the mix; the judge might well have gotten the same

12   result anyway.

13   Are we going to forbid courts to have that

14   kind of reasoned, open review, subject to appellate

15   review, in order to ban something that isn't banned in

16   the way that 994 bans race and sex or 3583 bans

17   retribution? It's simply not the way the statute words

18   things elsewhere and it's not the wording Congress chose

19   here, especially since this -- it's a subordinate

20   clause, it's hidden, it's not at all clear in

21   undercutting the main clause of 3582 in saying shall

22   consider all the factors of punishment here to the

23   extent they apply in an individual case.

24   JUSTICE KENNEDY: But I still find it hard,

25   if I were going to write the opinion, to rule for your

43

1   position to ignore the 90 percent-10 percent

2   hypothetical problem I have, to say, well now, 90

3   percent of the time the judge's rules are going to be

4   followed or the judge's recommendations are going to be

5   followed. That's an odd way to support the

6   interpretation of the statute that we have to -- that we

7   have to adopt in order to rule in your favor because, as

8   I say, suppose his position, his recommendation, were

9   followed only 10 percent of the time?

10   MR. BIBAS: Justice Kennedy, first of all,

11   there are programs out there for which the judge's

12   recommendation is a prerequisite and 100 percent of the

13   people who get into the program are ones whom the judge

14   recommended. There are some drug education programs, I

15   believe a mental health or sex offender program, where

16   there's a link between those two. It's just this

17   particular program that we're talking about.

18   The second point is, as I said, one of the

19   explicit purposes of sentencing is deterrence. A judge

20   can never guarantee that he's going to deter a

21   particular offender from committing a crime in the

22   future. The judge has to make an educated prediction

23   with the help of the probation or pretrial services

24   officer's report, and that's subject to appellate

25   review. But the fact of the prediction, the fact of

1 uncertainty about whether someone will be deterred or

2 not doesn't disable the judge from weighing that

3 prediction.

4   JUSTICE SCALIA: If -- if it is as you say,

5 why -- why did Congress leave it up to the Bureau of

6 Prisons to decide whether this person can enter into a

7 rehabilitation program, and not allow the judge to

8 prescribe that the person will enter into it?

9   Why? What -- what possible sense could that

10 make?

11   MR. BIBAS: Your Honor, if you will bear

12 with me for your colleagues who like legislative

13 history, and I quote from the Senate report, that this

14 change is designed only to simplify the administration

15 of the prison system, at page 141 of the Senate report.

16 It was not designed to introduce any substantive change

17 in the role of judges or the Attorney General.

18   JUSTICE SCALIA: Judges can prescribe it?

19   MR. BIBAS: No, the change was made --

20   JUSTICE SCALIA: Well, that's a substantive

21 change, they can't prescribe, right?

22   MR. BIBAS: But it was not intended to

23 affect the authority of the Bureau of Prisons or the

24 judge in their -- in their roles and input. It's just

25 that the --

1   JUSTICE SCALIA: I don't understand what

2   you're saying. Was it not a change that the judge could

3   not prescribe a certain program for the prisoner?

4   MR. BIBAS: It -- it was --

5   JUSTICE SCALIA: It was a change?

6   MR. BIBAS: Yes, it was, actually.

7   JUSTICE SCALIA: Why? Why would they have

8   that change if the statute reads the way you say? What

9   sense does it make to still allow the judge to take this

10   into account, but affirmatively deprive him of the power

11   to do what he wanted to do?

12   MR. BIBAS: Your Honor, I believe that there

13   were some legal issues that were coming up in litigation

14   over prison conditions and sentencing in the years

15   leading up to this Act, where there was unclarity as to

16   whether the Attorney General or the judge or the Bureau

17   of Prisons -- whose decision ultimately was being

18   challenged in this litigation. And the Act made that

19   change, but it was designed only to simplify the

20   administration. It was not meant to say that judges

21   therefore are cut out of the process, and unfortunately

22   that's all that we know about that provision.

23   JUSTICE BREYER: Well, the Senate report

24   says that the provisions we've been talking about make

25   clear a defendant should not be sent to prison only

46

1   because the prison has a program that might be good for

2   him. Drug dependence in the committee's view generally

3   should not play a role in the decision whether or not to

4   incarcerate the offender. Is there something that

5   conflicts with that?

6   Because that was pretty clear indication of

7   the committee's view.

8   MR. BIBAS: Your Honor, the committee in

9   dealing with drug dependence said the commission shall

10   decide whether drug dependence, etcetera, is relevant,

11   shall take it into account only to the extent that it is

12   relevant; and the commission decided as with most of

13   these other factors that drug dependence shall not be

14   used ordinarily in sentencing outside the range, but

15   left it to the judge to decide within the range.

16   As to your -- so judges have some

17   flexibility in using drug dependence for

18   within-guideline sentencing.

19   And then on your point about a person should

20   not be sent to prison only because the prison has a --

21   JUSTICE BREYER: You put a great deal of

22   weight on the word only. I guess if it's a dual motive

23   we don't really know what would have happened in the

24   absence of one of the motives. So should we send the

25   whole thing back for resentencing?

47

1   MR. BIBAS: No, I think this goes to Justice

2   Sotomayor's question. That very often these things are

3   bound up and judge ought to be able to consider it in

4   the mix, especially when it's not just a program that

5   quote, "might" be good for him this -- this airy hope

6   that everybody who has criminality can be cured -- but

7   specifically there's a specific targeted program.

8   Particularly where, as here, Congress made a

9   point of approving of in-prison drug treatment as

10   effective to reduce recidivism where we have a fixed

11   term and a specific diagnosis that Congress has funded

12   and encouraged with a 12-month sentence reduction.

13   If this Court has no further questions, the

14   statute allows judges to consider needed correctional

15   treatment programs in prison sentencing. The judgment

16   of the court of appeals should therefore be affirmed.

17   CHIEF JUSTICE ROBERTS: Thank you.

18   Mr. Cahn, you have 3 minutes remaining.

19   REBUTTAL ARGUMENT OF REUBEN C. CAHN

20   ON BEHALF OF THE PETITIONER

21   MR. CAHN: Thank you, Your Honor.

22   Let me begin with a couple points about the

23   plain language of this statute. When a defendant is

24   sent to prison so that he can gain access to

25   rehabilitative programs, imprisonment is used as a means

48

1   to promote rehabilitation. Counsel stresses only the

2   imprisonment portion of that sentence, but it is

3   strictly speaking within the very prohibition that

4   Congress has articulated.

5   Beyond that I would point to 3553(a)(2)(D),

6   and counsel has left off the last few words in

7   discussing that purpose of sentencing that's set out

8   there. Congress required that these rehabilitative

9   resources be provided in the most effective manner. As

10   is discussed in the brief, Congress had determined with

11   regard to in-prison rehabilitation programs that they

12   simply were not the most effective manner.

13   JUSTICE SOTOMAYOR: Counsel, this makes a

14   lot of sense when we're talking about huge disparities

15   in a guideline sentence, versus one where the judge goes

16   outside the guidelines or imposes a greater sentence

17   than otherwise the guidelines would determine for

18   rehabilitation purposes.

19   But not infrequently guideline ranges are

20   within very narrow scopes, and in fact there are some

21   prison advantages that you get from being sentenced to a

22   year and a day that you don't get if you're sentenced to

23   12 months; and district courts routinely will choose

24   between a year and a day or 12 months based on knowledge

25   about what might be available if you're there for over a

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1   year. Why is that wrong?

2   What would be the difference? You see, I'm

3   having a hard time in this case, because if a judge

4   comes in and says guideline range is 50 to 60, I think

5   in the middle is perfectly fine, I just don't know

6   whether I should give him 54 or 55 months, but I know

7   that at 55 months there's this kind of program

8   available. I'm going to do -- I'm going to -- you know,

9   it is -- judging is not so precise that you know exactly

10 where to go within the small ranges, and so there are

11 many factors that influence that decision. Why should

12 we announce a rule that says to a judge in those

13 situations, don't give him that extra month?

14   MR. CAHN: Because Congress has prescribed

15 it. Because Congress made the choice that it shouldn't

16 be allowed; and it may seem unreasonable to all of us,

17 but Congress made a determination that it wasn't

18 appropriate to lengthen these sentences or impose them

19 for purposes of rehabilitation.

20   JUSTICE ALITO: Are you arguing for

21 something like a plain statement rule, if the judge says

22 plainly, I'm increasing your sentence so you can get

23 rehabilitation, then there's a problem? Or would there

24 possibly be situations in which one could infer that the

25 desire to provide for rehabilitation in prison had

1   influenced the sentence? For example, choosing a

2   sentence that is just long enough to allow somebody to

3   take advantage of a particular rehabilitation program in

4   a -- in a prison, or where the judge goes on and on and

5   on about the need for rehabilitation for this --

6   vocational training for this prisoner?

7   MR. CAHN: It's possible, but I think that

8   this Court entrusts sentencing judges to follow its

9   mandate, and if this Court says you're not to increase

10   sentences for the purposes of getting people into

11   rehabilitative programs, then you should state why

12   you're putting people in prison, that we can count on

13   those reasons to be honestly and truthfully given.

14   CHIEF JUSTICE ROBERTS: Thank you, counsel.

15   Mr. Bibas, you were appointed by this Court

16   to brief and argue this case. You have ably carried out

17   that responsibility, for which the Court is grateful.

18   The case is submitted.

19   (Whereupon, at 11:02 a.m., the case in the

20   above-entitled matter was submitted.)

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A

abated 25:10
ability 7:8
able 26:25 27:1
  29:13 48:3
ably 51:16
above-entitled
  1:11 51:20
absence 47:24
abuse 22:8 28:9
  40:2
abused 42:3
access 13:10
  48:24
accommodate
  39:13
accommodated
  24:18
accomplished
  14:3
account 5:14,17
  5:23 11:10
  14:13,14 16:1
  34:22 35:25
  41:21 46:10
  47:11
accurately 4:23
achieve 15:3
Act 3:23,24,24
  4:22 27:11,18
  28:15 30:20
  39:8,21 40:5,23
  40:25 41:6
  46:15,18
added 9:5 40:9
addiction 39:15
  40:2
Addicts 3:23
addition 9:12
additional 15:14
  15:14
address 25:6
addressed 4:18
  10:22

adds 42:5
adequately
  15:25 41:21
adjust 41:23
administration
  45:14 46:20
administrative
  28:17
admission 40:2
adopt 44:7
adopted 4:21
advantage 51:3
advantages
  49:21
affect 24:20
  45:23
affirmatively
  28:11 46:10
affirmed 48:16
aggravating
  15:24 41:22
agree 15:12 17:3
  17:21 18:12
  36:21
airy 40:12 48:5
alcohol 15:20
  38:15
ALEJANDRA
  1:3
alien 8:24
ALITO 4:19 14:5
  15:8 23:21 24:8
  24:11 50:20
alive 38:18
alleviated 15:22
allow 11:11 45:7
  46:9 51:2
allowed 35:23
  50:16
allows 40:8 48:14
amicus 1:21 2:11
  27:6
amount 8:2 10:2
  25:21 37:2,3

announce 50:12
answer 31:22
  36:13 42:7
antisocial 38:22
anymore 12:3
anyway 26:23
  43:12
appeal 20:9
appeals 42:2
  48:16
appear 26:3 43:7
APPEARANC...
  1:14
appears 42:23
appellate 30:3
  36:24 37:7,15
  40:6,8 42:1,17
  43:14 44:24
Appendix 8:7
  11:1 31:24,25
applicable 6:10
applies 33:18
apply 34:6 43:23
appointed 1:21
  2:11 51:15
appreciate 11:15
  11:19
approach 39:2,3
appropriate 3:12
  14:24 15:3 18:3
  20:17,18 21:19
  24:10 30:2
  33:14 34:22
  35:12 41:17
  50:18
appropriately
  10:21
approving 48:9
April 1:9
area 25:4
argue 51:16
arguing 42:9,10
  50:20
argument 1:12

2:2,5,9,12 3:4,7
  13:3 27:5,23
  28:1 30:24
  32:20 36:10
  42:13,20 48:19
arguments 20:24
arrives 37:10
articulate 41:24
articulated 49:4
artificial 12:6
aside 11:14
asking 9:2
aspect 32:23
assault 19:13
Assistant 1:17
associates 37:25
associations
  38:22
assume 18:17
attempt 15:3
attitudes 38:22
Attorney 45:17
  46:16
authority 19:5
  45:23
automatic 40:21
availability 24:3
available 23:23
  23:24 24:11
  25:16 28:5
  49:25 50:8
a.m 1:13 3:2
  51:19

B

B 34:2 41:2
back 13:13 29:15
  47:25
background 6:23
bail 8:12 26:4
balanced 42:23
balancing 43:10
ban 35:7 36:7
  41:11 43:15
banned 41:7

43:15
bans 35:13 40:23
  43:16,16
based 13:24 43:4
  49:24
basically 6:19
  30:24
basis 5:11 11:6
  42:22
bear 37:23 45:11
behalf 1:15,19
  2:4,7,14 3:8
  13:4 27:6 48:20
behavior 5:10
believe 4:10
  10:20 11:9,23
  11:24 28:7 31:7
  44:15 46:12
believes 25:9
benefit 9:5 22:3
  23:22
best 9:14
better 9:16 27:23
Beyond 49:5
Bibas 1:20 2:10
  27:4,5,7 28:7
  29:2,21,23
  30:16,22 31:7
  31:13,22 33:22
  33:25 34:15
  35:3 36:1,21
  37:20,23 38:11
  39:24 42:12
  44:10 45:11,19
  45:22 46:4,6,12
  47:8 48:1 51:15
big 26:2
blue 31:24
board 27:14
bound 27:20 39:2
  48:3
break 38:21
BREYER 46:23
  47:21

brief 4:23 28:15
   31:24,24 49:10
   51:16
Bureau 28:18
   36:18 45:5,23
   46:16
but-for 37:12
by-products 6:24

C

C 1:15 2:1,3,13
   3:1,7 34:3 41:2
   48:19
Cahn 1:15 2:3,13
   3:6,7,9 4:10 5:4
   5:20 7:7,13,18
   8:4 9:9,20 10:5
   10:10,15,20
   11:9,23 12:7
   13:1 48:18,19
   48:21 50:14
   51:7
calculations 37:3
California 1:15
calls 30:1
care 25:17 32:6
carried 51:16
case 3:4 5:11
   16:17 17:24
   18:9 20:25 21:2
   26:25 29:11
   30:9,12,13 34:6
   40:7,10 42:25
   43:23 50:3
   51:16,18,19
cases 21:2 37:7
   43:1,3,6
categorical
   40:23
categorically
   37:18
cause 37:12
cell 37:24 38:9
certain 36:12
   46:3

certainly 5:12,20
   15:14
certainty 10:17
challenged 46:18
chance 7:5,25
   39:17
change 45:14,16
   45:19,21 46:2,5
   46:8,19
characterization
   8:5
Chief 3:3,9 11:13
   12:1 13:1,5
   19:11,23 20:13
   20:23 21:7 27:3
   27:7 48:17
   51:14
choice 39:12
   50:15
choose 7:4 23:19
   49:23
choosing 51:1
chose 43:18
circuit 10:22
circuits 42:25
circumstance
   15:25
circumstances
   21:6,9
cite 35:6
cited 38:19
citizen 22:4
classes 32:12
clause 33:25
   34:8,17 37:21
   42:13 43:20,21
clear 3:16 5:7
   21:18 28:17,18
   31:23,25 43:20
   46:25 47:6
clearer 11:5
clearly 41:13
client 7:10
Code 34:16 35:4

coercing 14:1
coercive 12:16
   14:8
colleagues 45:12
colloquy 19:1
comes 12:13
   50:4
comfortable
   42:18
coming 46:13
commands 3:15
comment 5:9
   6:14
comments 8:6
commission 41:8
   41:8,14,15,16
   47:9,12
commit 12:3
   19:12
committee 47:8
committee's 47:2
   47:7
committing 7:24
   16:12 44:21
communities
   24:19
community 23:25
   24:12 25:18
completely 10:4
completion 12:18
   32:21 39:5
component 4:7
computing 11:5
concern 28:8
concerned 5:17
   40:11
concerns 4:17
   5:23
concur 6:3
condition 24:3
   29:13
conditions 46:14
conduct 25:25
confine 27:13

confinement
   38:21
confirmed 3:18
conflicts 47:5
Congress 3:13
   3:25 4:1,20 5:5
   12:8,14,23
   13:15,21 14:1
   14:15,18,22
   15:4 16:1 17:15
   17:19 18:1,14
   22:9 32:23 36:6
   41:5,6,11 43:18
   45:5 48:8,11
   49:4,8,10 50:14
   50:15,17
Congress's
   13:20
conjunctive
   17:11
consider 22:6,9
   22:12,15,16,22
   22:25 23:7,13
   23:19 27:9
   29:11 30:4,25
   30:25 31:5,9,15
   31:16,17,20,21
   32:2 33:5,12,21
   34:1,4,5,9 36:3
   40:19 41:1
   43:22 48:3,14
considered 32:3
considering 23:2
   40:25
consist 34:12
consistent 4:20
context 22:25
   23:3
contingency
   30:17,17,18
continue 7:24
contrast 31:25
contrasted 32:14
control 19:3 28:4

   29:17 39:19
controlled 28:19
conviction 21:6
correct 4:11
   30:16
correction 3:13
   33:15 35:13
correctional 11:3
   11:4,6,8 27:10
   32:6 42:15
   48:14
Corrections 3:23
correctly 31:8
counsel 6:11
   18:17 21:23
   25:8 27:3 49:1
   49:6,13 51:14
counseling 38:14
counsels 37:17
count 51:12
couple 29:21
   38:11 39:24
   40:22 43:6
   48:22
court 1:1,12,21
   2:11 3:10 8:18
   10:23,24 13:6
   15:6 16:2,4,7
   16:13 17:18
   19:10 20:1,3,6
   20:16,21 21:11
   21:14,15,16,18
   22:12 23:18
   24:2 27:8 33:8
   34:8 36:24
   37:21,23 42:2
   42:18 48:13,16
   51:8,9,15,17
courts 3:11 13:7
   18:2,2 21:13,20
   21:21 37:15
   40:8 43:2,13
   49:23
court's 20:1,16

20:21 40:7
creed 41:10
crime 6:22 7:23
9:1 10:1 15:18
44:21
crimes 7:24 9:4
12:3 16:12 26:1
criminal 25:25
37:25 38:21
criminality 15:22
32:13 40:13
48:6
criterion 32:16
critical 24:6
crucial 32:18,23
33:1
cured 40:13 48:6
curiae 1:21 2:11
27:6
current 4:17
cut 46:21

___

D

D 1:17 2:6 3:1
13:3 32:2 34:10
34:10 41:3
42:16
danger 25:10,12
dangerous 25:9
25:17
dates 39:5
day 49:22,24
deal 47:21
dealing 33:18
39:22 47:9
dealt 36:23 42:14
decide 24:14
45:6 47:10,15
decided 14:18
47:12
deciding 23:14
27:10 34:13
36:4
decision 13:18
46:17 47:3

50:11
decisions 30:19
declared 13:24
decried 32:9
defend 21:8
defendant 9:15
15:6,17,18,19
16:6,8,11,13
16:14,19 17:16
20:4,23 21:5,16
23:22,25 24:7
24:15,15 25:9
26:2 46:25
48:23
defendants 3:14
3:21 4:1 13:23
14:24 19:6
27:17 28:10
defendant's 13:9
define 42:6
depart 15:16
Department 1:18
depend 15:23
19:24
dependence 47:2
47:9,10,13,17
dependent 15:19
deprive 14:24
46:10
deserves 6:23
8:2
designed 27:13
28:18 45:14,16
46:19
desire 43:8 50:25
deter 6:22 25:24
25:25 44:20
determination
50:17
determine 42:3
49:17
determined 14:1
14:16,22 16:4
49:10

determining 33:8
33:11 34:22
deterred 7:6
11:17 45:1
deterrence 6:18
9:8,11 11:16,24
12:2 17:17
29:25 30:4 37:3
44:19
deterring 16:11
16:12
diagnosed 32:16
diagnosis 48:11
diction 17:21
Diego 1:15
difference 12:2
29:16 31:18
50:2
different 6:25
15:8 18:9 24:15
25:22 30:8
32:15,24 40:10
40:17
difficult 36:20
diminished 38:18
disable 30:21
45:2
disagree 8:5
discouragement
42:19
discouraging
42:21
discretion 22:8
42:4
discuss 4:22
discussed 49:10
discussing 49:7
discussion 8:22
disentangling
37:15
disingenuous
20:20
disparities 49:14
distinct 29:2

distinction 12:6
35:9
district 20:1,3,6
20:15,16 21:13
49:23
disturbing 27:25
doing 20:19
21:17 30:21
35:22 40:9
doubt 5:9
doubted 5:7
12:14
dozens 35:4
drug 6:21,24 7:6
8:10,15,20 11:4
13:10 19:9,15
19:16 22:2
25:10,16 27:18
28:9 32:14 38:5
38:15 39:13,15
43:8 44:14 47:2
47:9,10,13,17
48:9
drugs ·15:20
dual 26:5,10,19
47:22
dual-motive
26:13,14
D.C 1:8,18

___

E

E 2:1 3:1,1
earlier 36:13
educated 44:22
education 38:6
38:14 44:14
educational
23:23 31:1 32:5
eerie 32:9
effect 4:4 10:3
27:1
effective 32:7
48:10 49:9,12
either 4:14 29:14
eligible 28:10

employed 12:21
empower 35:18
enacted 12:9,11
encouraged
48:12
ensure 7:8 41:9
41:16
enter 45:6,8
entire 34:16
entirely 41:9
entitled 33:2
entrusts 51:8
error 10:22
22:20 26:18
27:1
escalating 6:15
especially 43:19
48:4
ESQ 1:15,17,20
2:3,6,10,13
essential 10:23
established 20:9
etcetera 47:10
everybody 32:11
48:6
evidence 5:5
exactly 12:22
19:4 50:9
example 51:1
exceeding 40:12
exception 34:18
exclusive 18:8
expend 14:25
explanation 36:6
explanations
37:10
explicit 44:19
explicitly 25:24
41:4,7
expressly 14:15
14:19 15:4
extended 29:19
extending 39:12
extent 6:3 33:13

34:5 43:23
47:11
extra 7:15,17
11:21 50:13

F

facilitating 13:10
facility 22:2
24:23,25 25:2
28:25 29:6
fact 7:14 9:15
10:7 18:22 19:8
20:19 29:17
30:1 44:25,25
49:20
factor 19:19 26:2
27:25 34:12,13
34:22 36:23
37:18 41:7 42:2
factors 8:13 22:9
22:13 33:5,12
34:1,5 41:2,20
42:22 43:10,22
47:13 50:11
fail 22:22
failed 14:3
failure 22:8 26:3
fair 10:5 37:2,3
fallback 42:20
far 5:16,21 14:19
42:11
favor 44:7
feasible 4:24
Federal 29:7
find 43:6,24
fine 50:5
first 3:4 10:23
28:8 29:23
38:12 43:3
44:10
fits 42:16
fixed 32:17 48:10
flat 35:7 36:7
fleshed 36:24
flexibility 47:17

flip 6:12,21 9:3
follow 21:22
27:22 36:18
51:8
followed 36:15
44:4,5,9
forbid 27:16
43:13
forbidden 37:19
forces 37:14
format 34:4
37:19
former 33:17
forms 15:2
forth 22:9 31:2
33:12 34:1
forward-looking
29:25
found 27:14
34:16 35:4 43:3
four 32:1 43:10
framers 39:20
Frankel 32:9
Franklin 40:11
funded 48:11
further 26:1
48:13
future 30:1 44:22

G

G 3:1
gain 48:24
Gall 36:25 40:7
general 1:18 6:4
14:11 24:19
33:18 45:17
46:16
generally 15:16
16:12 19:25
41:16 47:2
generic 38:14
getting 51:10
GINSBURG
5:13 10:9,12,18
18:18,21 27:22

28:22 39:10
give 21:11,13
37:2,2 50:6,13
given 6:22 26:3
28:9 42:23
51:13
gives 19:14 20:3
go 11:18 14:18
29:15 34:24
50:10
goals 17:10,16
goes 34:4 48:1
49:15 51:4
going 6:18 7:1,4
7:4,24 8:11,22
9:8 11:16 14:13
14:14 16:17
19:20 20:22
21:5,8 22:1,4,5
22:6,15,16
23:16 25:13
32:12 34:24
37:10 38:1,9
39:16,19 40:18
42:11 43:13,25
44:3,4,20 50:8
50:8
good 47:1 48:5
gotten 43:11
govern 6:5
government
10:13,13,15
21:8 32:19 35:6
38:25
government's
13:14 28:15
37:14
granted 40:4
grateful 51:17
great 47:21
greater 30:18
49:16
ground 40:19
grounds 40:18

guarantee 16:7
44:20
guess 47:22
guidance 41:13
guide 11:17
41:25
guideline 15:15
15:17 42:4
49:15,19 50:4
guidelines 15:12
15:25 41:9,21
49:16,17
Guides 38:20

H

half 19:17,21
29:7 39:14,23
hand 16:9
happened 43:9
47:23
happening 43:9
hard 21:5,8 36:2
37:11 43:24
50:3.
harmless 26:18
harmonize 40:8
head 20:16
health 44:15
hear 3:3
help 30:9,12
44:23
hidden 43:20
highly 37:4
history 28:14
35:14 39:3
45:13
honestly 21:13
51:13
Honor 4:10
12:25 19:4 28:7
29:23 30:16
31:7,22 33:22
33:25 34:7,15
35:3 36:1 45:11
46:12 47:8

48:21
hope 37:12 48:5
hopes 25:15
40:12
huge 49:14
human 5:10
hypothetical
16:24 17:22
18:7,11 44:2

I

idea 14:12 38:8
38:17,25
ignore 44:1
ignoring 8:21
imply 30:20
important 4:6
16:10,10 25:5
36:22
impose 8:11
17:19 21:20
26:16 33:8,9
35:7,17,18 36:4
50:18
imposed 9:23
15:9 30:14
33:11 37:8
imposes 8:16
9:21 49:16
imposing 8:9
13:8 15:5 18:14
21:12,13 22:17
23:4,7,10 31:15
31:16,17 33:5
34:9 42:8
imposition 6:6
33:2,4
imprison 3:16
27:11
imprisonment
3:12 6:7 9:22
13:8 16:3,6,21
16:23 17:4,14
17:18,19,25
18:3,8,15,16

20:18 21:15,18
21:21 22:4,7,25
23:3,11,20
26:16 31:10
33:4,9,11,14
33:19,20 34:13
34:14 35:10,11
35:12,17,18,20
35:25 36:4
48:25 49:2
improper 11:24
inappropriate
  41:17
incapacitation
  9:11
incarcerate 47:4
incarcerated
  24:22,25 39:15
incarceration
  4:15 15:21
  27:25
includes 33:6
including 13:9
  22:10,13
inconsistent
  14:12
incorrect 38:12
increase 4:8 51:9
increasing 50:22
indefinitely
  27:14
indeterminant
  32:22
indeterminate
  27:20
indicates 5:9
  18:6,7
indication 47:6
individual 4:14
  4:16 6:7 7:8
  43:23
individualize
  41:19,23
individuals 5:6

5:11 12:17
induce 14:23
induced 5:8
  12:15
infer 50:24
influence 50:11
influenced 51:1
infrequently
  49:19
initial 36:8
inmate 27:13
  28:25 29:5
inmates 40:3
input 45:24
inquire 20:24
inside 9:13 20:15
insignificant
  29:16
instance 34:17
instances 17:21
  35:4,7
instruct 37:21
instructed 3:11
instructs 37:23
intended 3:13 4:1
  5:24 12:10,23
  17:15 45:22
intending 13:21
interested 22:6
  28:12 29:9
interpretation
  36:19 41:25
  44:6
introduce 45:16
introduces 35:5
introducing
  39:20
involved 6:15
  8:24 29:1 30:17
  30:18,18
in-prison 48:9
  49:11
isolation 38:18
issue 6:3 9:19

26:9 27:18 40:4
issues 10:21 29:2
  37:13 46:13
i.e 9:3

J
jail 7:22 29:15
  32:20 34:24,25
Joint 8:7 11:1
judge 4:5,13,13
  5:17,22 6:13,19
  7:1,7,21 8:4,5
  8:17 9:3,7,10
  9:15,20,22,25
  10:5,18,25
  11:14 15:13,16
  16:17,25 18:23
  19:1,1,2,3,12
  19:24 20:7
  21:17,25 23:21
  24:1,4,5,6,13
  24:22,24 25:1,2
  25:5,5,8,11,19
  25:23 26:15
  27:23 28:1,1,3
  28:4 29:17 30:1
  30:3,10,24,25
  31:5 32:2,8
  35:16 36:11
  37:1,2,4,8,10
  39:13,16,22
  40:9,10,16 41:1
  41:8 42:3,5,7
  43:10,11 44:13
  44:19,22 45:2,7
  45:24 46:2,9,16
  47:15 48:3
  49:15 50:3,12
  50:21 51:4
judges 3:20,22
  19:5 27:9 28:16
  28:21 29:24
  30:19,21 31:8,9
  32:8 36:1,3
  38:19 40:6,18

41:19,22 43:3,6
45:17,18 46:20
47:16 48:14
51:8
judge's 9:19
  36:14,18 44:3,4
  44:11
judging 50:9
judgment 6:20
  48:15
jump 8:12
Justice 1:18 3:3
  3:9 4:4,19 5:13
  6:11 7:10,11,12
  7:15,20 8:4,21
  9:17,24 10:9,12
  10:18,25 11:13
  12:1 13:1,5,12
  13:13 14:5 15:8
  16:16,24 17:3,9
  17:13,20,24
  18:5,17,18,21
  19:1,11,23 20:5
  20:8;13,23 21:7
  21:23,25 22:14
  22:18,21,24
  23:5,10,13,21
  24:8,11,20 25:8
  25:15,22 26:8
  26:12,19,22
  27:3,7,22 28:22
  29:10,22 30:6
  30:22 31:11,14
  32:25 33:23
  34:11,19 35:2,8
  35:16 36:9,11
  36:21 37:9,20
  38:3 39:10
  41:24 42:12
  43:24 44:10
  45:4,18,20 46:1
  46:5,7,23 47:21
  48:1,17 49:13
  50:20 51:14

justification
  40:20
justified 17:18
  20:3 37:17
justify 9:11

K
KAGAN 13:12
  18:17 30:22
  31:11,14 37:20
  38:3
keep 32:20,21
keeping 14:25
Kennedy 4:4
  16:16,24 17:3,9
  17:13,20,24
  18:5 21:25
  22:14,18,21,24
  35:8 36:9,21
  43:24 44:10
Kennedy's 13:13
kept 13:23
Kimbrough
  36:25 40:8
kind 6:23 43:14
  50:7
know 5:10 6:20
  9:14 10:12,17
  15:24 20:11,12
  20:22 24:17
  26:8 29:10
  33:23 34:11,20
  46:22 47:23
  50:5,6,8,9
knowledge 11:10
  49:24
known 35:14,15
knows 7:1

L
lacked 15:18
language 34:10
  48:23
large 28:8
Laughter 35:1

law 40:7 42:25
lead 39:11 41:22
leading 46:15
leave 45:5
led 15:18,21
left 31:5,21
   41:18 47:15
   49:6
legal 10:24 46:13
legislative 28:14
   45:12
legitimate 14:17
length 5:18 8:25
   11:5 24:21
   33:11,19 34:13
   34:23
lengthen 3:17
   13:17 21:20
   25:13 50:18
lengthening 10:7
   13:8 18:16
   21:14 23:4 34:9
   43:7
lengthens 9:21
lengthier 15:11
lengthy 8:22
let's 18:10
liberty 5:25
   14:25
lieu 16:3
life 15:18 37:25
likelihood 37:1
limited 32:4,17
lines 40:15
link 44:16
list 21:1
listen 28:20
litigation 46:13
   46:18
little 5:4 18:9
location 24:15
locking 37:24
   38:9
logic 4:12 36:6

logical 36:5
logically 6:16
   35:9
long 5:1 6:17
   7:23 8:14 23:16
   27:11 38:8 51:2
longer 4:2 28:3
   32:8
look 12:8,21
   28:14 31:23,25
   37:7 42:25
looked 34:15
lot 40:17 49:14
lower 4:15 15:9
   39:25

M

main 33:25 43:21
making 27:24
   28:2 30:8
man 6:14 18:24
mandate 51:9
mandatory 15:13
manner 32:7
   49:9,12
manual 38:19
map 21:24
matter 1:11
   16:18 17:21
   20:10 24:19
   29:25 51:20
matters 33:7
MATTHEW
   1:17 2:6 13:3
mean 5:15 8:4
   20:11,12 29:15
   30:3 34:18
   35:19
meaning 3:18
means 3:12 18:3
   20:17,19 21:19
   26:20 27:19
   31:10 33:15
   34:20 35:2,12
   48:25

meant 30:21 36:7
   41:5,11 46:20
measurable
   32:17
measure 30:14
medical 32:6
mental 44:15
mentioned 12:11
   33:13 36:11
middle 50:5
mind 12:9,10
   13:20 37:24
minute 7:20
minutes 48:18
mitigating 15:24
   41:22
mix 22:4 43:11
   48:4
model 13:22,23
   39:2,4
model's 27:12
modify 38:22
Monday 1:9
month 50:13
months 7:2 8:12
   8:12 10:14,16
   10:16 22:1 40:1
   42:5 49:23,24
   50:6,7
morning 3:4
Moskowitz
   21:17
Moskowitz's 8:6
   10:6
motivated 10:3
motive 26:5,10
   26:20 47:22
motives 47:24
moving 4:14
   24:14
multiple 18:18
   37:10 39:9
muse 40:19
mutually 18:7

N

N 2:1,1 3:1
named 29:4
Narcotic 3:23
narrow 49:20
national 41:10
nearly 39:14
necessary 38:21
need 4:12 8:13
   9:4 42:24 51:5
needed 11:2,3,8
   15:11 16:15
   17:16 27:9 29:4
   32:5 42:15
   48:14
needs 7:22 18:24
   25:20 32:13
neutral 41:9
never 4:8 14:17
   19:3 44:20
nevertheless
   25:11
nonsense 32:10
note 29:23
number 37:17
   39:25 41:15

O

O 2:1 3:1
obtain 21:5
occurs 35:10
odd 44:5
offender 44:15
   44:21 47:4
offenses 6:16
offer 40:20
offered 36:5,15
officer's 44:24
okay 26:6 29:12
omit 41:5
once 3:22 21:18
   31:19
ones 44:13
one-and-a-half...

19:16
one-half 14:5
one-way 4:5,9
   13:14
open 43:14
open-ended
   38:14 39:7
   40:12
opinion 43:25
opposed 33:9
option 16:3 39:14
oral 1:11 2:2,5,9
   3:7 13:3 27:5
order 7:16 34:25
   43:15 44:7
ordinarily 24:16
   47:14
ordinary 36:23
   42:16
original 41:10
ought 42:19 48:3
outside 5:1,6
   9:16 15:10,14
   15:20 23:24
   24:12 47:14
   49:16
overturn 12:11
overturned
   12:16

P

P 3:1
page 2:2 11:1
   25:24 45:15
pages 8:7,8
parole 27:14
   33:10
paroled 14:9
part 32:23
participate 8:19
   11:12 15:6 16:8
   19:8
participation
   13:25 14:2 19:7
   25:2

particular 10:21
11:14 12:9 15:7
22:2 23:25
24:23,25 25:1,3
25:4 29:3 34:6
44:17,21 51:3
particularly 8:8
37:6 48:8
passed 38:8
pathologies
27:17
pathology 32:13
32:16
pattern 37:25
penitentiary 39:3
Pennsylvania
1:20
penological
35:14
people 14:7,9,16
19:12,17 21:3
31:3 38:4 39:15
44:13 51:10,12
percent 28:10
36:14,16,17,25
40:3 44:1,3,9
44:12
percent-10 44:1
perfectly 50:5
permissible
26:13
permitted 19:19
person 7:6 12:3
19:15,20 23:14
25:20 28:2,4
29:18 39:16
45:6,8 47:19
person's 25:17
Petitioner 1:4,16
2:4,14 3:8 19:8
26:25 28:11,14
32:19 35:6 39:1
48:20
Petitioner's

31:24 37:14
Philadelphia
1:20
phrased 31:8
pick 19:20
picked 26:23
place 19:5,6
24:10 41:6
places 40:22
41:15
placing 28:24
plain 3:18 6:9
10:22 26:25
48:23 50:21
plainly 50:22
play 47:3
please 3:10 13:6
27:8
plus 8:12
point 3:16 7:21
8:6 16:20 28:13
30:7,8 31:8
32:18 35:8,9
37:6 38:24 39:1
44:18 47:19
48:9 49:5
pointed 37:9
points 39:24
48:22
policy 35:6,14
population 39:23
portion 6:8 30:14
49:2
position 44:1,8
possibility 5:5
15:2 30:5
possible 29:4
45:9 51:7
possibly 50:24
power 3:20,22,25
28:16 35:17
46:10
practically 37:20
practice 3:14

precise 50:9
preclude 18:14
precludes 23:2,2
23:4
predict 30:1
predictability
37:1
predictable 4:25
prediction 36:22
44:22,25 45:3
predictions
29:24
premise 30:23
prerequisite
44:12
prescribe 24:22
24:24 35:20
45:8,18,21 46:3
prescribed 50:14
presentencing
19:14
presumably 42:5
presume 21:12
pretrial 44:23
pretty 47:6
prevailing 13:22
prevent 16:2
prevented 35:22
primary 4:6 9:18
9:19 16:4 42:13
principal 36:10
principle 35:5
prison 3:14,17
3:21,21 4:2,7
5:2,2,6,8,19,25
6:9 7:9 9:16
11:11 12:15,17
12:17 13:10,24
14:2,4,23,25
15:10 16:13
17:7,8 18:13,25
19:6,10,16
23:16,24 25:20
28:2 29:3,19

32:11 39:5,23
43:4 45:15
46:14,25 47:1
47:20,20 48:15
48:24 49:21
50:25 51:4,12
prisoner 16:19
16:20,22 17:1,4
17:6 46:3 51:6
prisoners 19:6
prisons 18:18
28:18 29:7,7
35:21 36:18
45:6,23 46:17
probated 23:15
probation 4:15
15:5 16:3 23:17
23:20 24:5 25:4
33:6 44:23
problem 7:7
19:15,23 44:2
50:23
problems 15:21
procedural 22:20
39:2
procedures
27:13
process 46:21
program 6:24 7:2
8:11,15,20 11:4
11:12 13:11
16:18,25 17:1
18:25 19:2,9,16
21:16 22:3
24:16 25:3,11
25:16 27:24
28:9 29:14
36:15 39:13,18
40:1 44:13,15
44:17 45:7 46:3
47:1 48:4,7
50:7 51:3
programs 3:22
12:19 13:25

14:2 15:7 16:8
18:13,15,19
19:7,8 24:18
27:17 29:7 31:1
31:1,2,17,19
31:20 32:21
38:5,6,7 39:6
44:11,14 48:15
48:25 49:11
51:11
prohibition 26:17
49:3
prohibits 13:7
prominent 12:12
promote 13:9
49:1
promoting 3:12
18:4 20:18,19
21:19 27:19
31:10 33:15
35:12
proper 42:23
properly 4:17
proposal 39:11
proscription
12:23
protect 25:21
26:1
protecting 16:11
17:17
provable 40:2
provide 8:14
11:2,7 50:25
provided 15:5
36:12 49:9
providing 18:15
24:16
provision 5:16
24:6 33:1,3
41:25 46:22
provisions 46:24
public 16:11
17:18 25:9,12
25:21 26:1

punish 9:4 21:1
punishment 6:12
  8:1,10 10:4
  11:15,22,23
  32:2 43:22
purpose 9:18,19
  11:15,25 14:18
  14:20 15:1,15
  16:4 18:15,16
  21:21 29:19
  49:7
purposes 3:17
  4:2 8:10 10:7
  12:8 16:10 20:1
  22:13 32:1 34:4
  44:19 49:18
  50:19 51:10
push 4:13
put 6:16 29:6
  43:8 47:21
putting 11:13
  29:3 37:5 43:4
  51:12

___

Q

question 10:24
  13:13 18:6
  20:12 26:12
  31:12 36:13
  48:2
questions 12:24
  48:13
quite 42:11
quote 38:21
  45:13 48:5

___

R

R 3:1
race 41:10 43:16
raise 20:24
range 7:3 15:15
  15:17 37:9,11
  37:16 40:15
  41:12,18,20,23
  42:4,10 47:14

47:15 50:4
ranges 49:19
  50:10
rarely 43:2
ratchet 4:5,9
  13:14
rationale 35:6
RDAP 28:9 40:1
reached 40:17
read 6:13 8:2
  26:10 32:25
  33:1,24 40:24
reading 10:5
  37:14
reads 34:7 46:8
really 4:5 6:25
  8:7,10,22 10:3
  22:3 24:6 30:23
  38:3 47:23
reason 12:20
  20:21 26:15
  28:10 29:8 30:9
  30:20
reasonable
  37:16
reasonably 4:24
reasoned 40:20
  43:14
reasons 20:3
  21:12,13 28:8
  30:2 40:5 51:13
REBUTTAL
  2:12 48:19
receive 9:12
  17:25
received 11:7
receiving 16:19
  16:21,23 17:1,4
  17:7
recidivism 48:10
recognize 3:11
  18:2 19:18
  34:21 35:3
recognizing 9:7

20:17 33:14
  34:8,12,17 35:5
  35:11 42:13
recommend 28:1
recommendation
  25:1 36:14,18
  44:8,12
recommendati...
  28:21 44:4
recommended
  44:14
recommends
  8:19,19 16:25
reconcile 33:16
  33:17
reduce 48:10
reduces 4:7
reduction 48:12
reference 38:15
references 38:13
reflected 14:20
reform 3:24 4:22
  27:11 38:1 39:8
  39:20 40:5,23
reformed 27:14
refuse 29:13
refused 28:12
  29:9,12 30:11
  30:12
regard 5:20 6:2
  49:11
regular 5:11
Regularly 19:18
rehab 7:2 10:2
rehabilitate 5:10
  34:25 38:9
rehabilitated
  4:25 5:1 12:5
  13:24 14:10
  32:10,22
rehabilitating 5:6
  38:25
rehabilitation
  3:13,18,24 4:3

4:6,13,17,21
  4:24 5:7,14,17
  5:23 6:12,17
  9:5,18 10:8
  11:21 12:2,14
  12:16 13:9,16
  13:18,22 14:3,6
  14:8,11,13,14
  14:17,19 15:1,4
  15:10,15 16:5
  16:15,18,21
  17:5,14,16,25
  18:4,8,24 19:19
  20:17,19 21:19
  22:5,10,17,25
  23:3,7,14,19
  25:16 27:12,19
  27:21 29:18
  30:25 31:4,9,10
  31:15,16,19
  32:3,4 33:15,21
  34:21 35:13
  36:3 38:5 39:1
  39:4·42:1,8
  43:2 45:7 49:1
  49:11,18 50:19
  50:23,25 51:3,5
rehabilitative 6:1
  9:13 17:7 18:13
  22:13 30:10,14
  48:25 49:8
  51:11
reject 13:22
rejected 27:12
  27:19
relatively 5:4
release 4:16 5:15
  5:16,21,22,24
  6:5,8 16:7
  18:23 24:4 25:3
  25:4 29:14
  30:15 33:6,10
  35:24 36:2 39:5
  41:1

relevant 37:8
  47:10,12
reliability 36:22
reliably 5:8
  12:14 14:4,23
relied 19:10
relying 18:22
remained 15:2
remaining 48:18
remand 27:2
reply 28:15
report 12:13
  19:15 28:16
  32:14 38:13
  39:4 42:21
  44:24 45:13,15
  46:23
requested 10:16
require 11:11
  15:6 19:7 23:12
  24:3,3,7 25:2
required 5:22
  18:2 21:11
  23:15 49:8
requires 23:7
  29:24 40:1,5
requiring 6:7
  37:18
resentencing
  36:5 47:25
reserve 12:25
reside 24:9
Residential 28:9
resides 24:1
residing 25:3
resources 9:13
  14:25 49:9
respect 41:10
responded 28:23
Respondent 1:19
  2:7 13:4
responding 30:7
responses 38:11
responsibility

51:17

rest 12:25 32:8

result 43:12

retain 14:16

retained 14:19

retribution 9:11
41:4 43:17

REUBEN 1:15
2:3,13 3:7
48:19

reversal 21:5
40:21

review 10:22
30:3 36:24 37:7
40:6 42:1,17
43:14,15 44:25

revocation 6:2,5

rid 39:9

right 19:22 20:24
22:18,21 23:8
26:11 39:12
42:22 45:21

rights 27:2

Rita 36:25 40:7

road 8:23 38:2

robbery 19:12

Roberts 1:17 2:6
3:3 11:13 12:1
13:1,2,3,5,12
13:21 14:15
15:23 16:22
17:2,6,12,15
17:23 18:1,12
18:20 19:4,11
19:22,23,25
20:7,11,13,15
20:23 21:4,7,10
21:24 22:11,16
22:19,22 23:1,9
23:12,18 24:2,9
24:13,24 25:14
25:19 26:7,11
26:14,21,24
27:3 48:17

51:14

role 45:17 47:3

roles 45:24

routinely 49:23

rule 43:25 44:7
50:12,21

rules 44:3

S

S 2:1 3:1

safer 22:4

San 1:15

saying 6:19 9:7
9:10 15:9 23:6
30:8,24 31:14
31:18 35:19
43:21 46:2

says 8:9,11,17
8:17,18 9:25
11:15 18:6
19:15,18,24
30:13 33:3,7
34:1,4,5 40:25
41:20 42:20
46:24 50:4,12
50:21 51:9

Scalia 7:10,12,15
10:25 19:1 20:5
20:8 23:5,10,13
24:20 29:10,22
30:6 32:25
33:23 34:11,19
35:2,16 36:11
45:4,18,20 46:1
46:5,7

scopes 49:20

se 40:21

second 28:13
38:17 44:18

section 13:7
14:20 33:2 34:3
40:25 41:14

sections 33:16

see 9:2 38:15
43:2 50:2

selecting 16:2
26:15

Senate 12:13
28:16 32:9,14
38:13 39:4
42:20 45:13,15
46:23

send 19:19 34:24
47:24

sending 3:14

sense 4:1 29:22
35:19,24 45:9
46:9 49:14

sent 4:2 7:9
12:17 46:25
47:20 48:24

sentence 3:21
4:7,15,16 6:23
8:12,17,18 9:12
9:21,21 10:1,3
10:7 11:2,6,18
12:21 13:16,17
13:18,19 15:5,9
15:11,13 16:5,6
16:13,17 19:20
20:2,2 21:8,12
21:14 22:1,17
23:8,19,20
24:21 25:13,25
26:2,5,13,14
26:16,17,23
28:5 31:15,16
31:18 33:2,4,5
33:19 34:9,23
37:8,11 40:10
40:14,15,17
41:1 42:8 43:7
48:12 49:2,15
49:16 50:22
51:1,2

sentenced 14:8
49:21,22

sentences 3:17
12:18 19:12,17

37:15 39:8
40:11 41:19,23
50:18 51:10

sentencing 3:24
4:13,21 7:3
9:10 10:6 13:23
14:18,20 15:2
16:2 17:10,17
19:9 20:4 21:21
27:9,11,13,20
30:19 33:18
34:3 36:8 37:19
38:20 39:8,11
40:5,23 41:8,14
44:19 46:14
47:14,18 48:15
49:7 51:8

separated 29:5

series 6:15,15

serious 6:16 7:23
8:25 9:4 10:1

seriously 28:20

seriousness 9:1

serve 6:8 7:2
21:21 28:5

services 17:7
44:23

set 4:12 22:9
33:12 34:1 49:7

setting 5:8,18,21
12:15 14:4
18:25 19:10

sex 41:10 43:16
44:15

shorten 13:19
16:5

show 26:25 27:1
38:12

showed 19:2

side 10:3 30:13

sides 6:12

simple 28:17
32:1 42:7

simplification

28:17

simplify 45:14
46:19

simply 4:23 6:4,9
30:11 32:10,11
37:24 43:17
49:12

simultaneously
41:18

single 34:17

situation 9:3 25:6

situations 50:13
50:24

skepticism 14:11
30:2,20

skills 15:19

skips 41:4

small 50:10

smooth 5:24

smuggling 8:24

social 32:12

socioeconomic
41:11

sole 42:21

solely 43:4,7

Solicitor 1:17 6:4

solves 29:11

somebody 4:25
12:22 51:2

sorry 6:14 8:18
10:22

Sotomayor 6:11
7:11,20 8:21
9:17,24 21:23
25:8,15,22 26:8
26:12,19,22
37:9 41:24
42:12 49:13

Sotomayor's
48:2

speaking 37:21
49:3

specialized 24:17
27:24

specific 27:17
  48:7,11
specifically 5:25
  8:6,9 12:21
  32:4 48:7
speculative 30:4
speed 16:6
spell 36:7
spoke 41:12
SRA 19:5
start 13:13
state 51:11
statement 11:14
  12:12 30:2 35:5
  50:21
statements 10:6
  12:12 40:5
States 1:1,6,12
  3:5 34:16
statistically
  39:25
status 41:11
statute 3:19,20
  4:12,18 12:9,11
  18:6 20:21 23:2
  23:6 29:24 33:1
  33:3 36:19
  43:17 44:6 46:8
  48:14,23
statutory 31:23
stay 23:16
STEPHANOS
  1:20 2:10 27:5
stops 9:7,9,15
strange 5:13
stresses 49:1
strictly 49:3
stripped 28:15
strongly 8:19 9:4
structure 3:19,25
subject 39:19
  40:6 43:14
  44:24
submitted 51:18

51:20
subordinate
  43:19
subset 32:4
substantial 27:2
substantive
  38:25 45:16,20
success 32:16
successful 39:5
sufficient 11:2,7
supervised 5:15
  5:16,21,22,24
  6:5,8 16:7
  18:23 24:4 25:3
  25:4 29:14
  30:15 33:6,10
  35:23 36:1 41:1
supervisory 4:16
support 1:19 2:7
  13:4 44:5
suppose 16:16
  16:16 21:25
  23:21 36:16,17
  44:8
supposed 16:13
  28:20
supposedly
  29:19
Supreme 1:1,12
sure 8:1 10:10
  28:2 42:11
surveyed 43:1
suspicious 42:24
sustain 36:20
swings 39:21
system 11:11
  12:10,10,15
  45:15

___ T ___

T 2:1,1
take 5:14,17,22
  7:4 13:12 14:12
  14:14 19:25
  29:14 30:15

34:22 35:25
  46:9 47:11 51:3
taken 15:25
  41:21
talismanic 9:25
talismanically
  10:2
talismatic 26:22
talk 18:10
talked 25:23
  38:4
talking 8:22,25
  9:3,17 17:20
  18:5 24:21 38:5
  38:6,7,7 40:14
  44:17 46:24
  49:14
talks 42:21
Tapia 1:3 3:4
  11:12
targeted 48:7
targeting 27:17
  32:24
tell 34:19 37:11
  40:18
tendencies 38:23
term 4:8 5:18,21
  6:6,8 13:8
  16:21,23,24
  17:4,18,19
  18:16,23 19:10
  21:15,20 23:4
  23:15 26:15
  27:24 29:20
  33:9,10,12
  34:14 36:4
  39:12 48:11
terms 6:4,9
text 31:23
Thank 13:1 27:3
  27:7 48:17,21
  51:14
theory 13:15
  14:10 15:10,17

thicket 37:13
thing 47:25
things 24:18
  28:19 31:4,6
  40:19 43:18
  48:2
think 4:19,20,22
  5:21 7:1,3,18
  8:17 9:10 10:5
  10:23 11:3,17
  11:18 12:7,8,20
  13:16,17 15:23
  16:1 17:6 19:25
  20:5 21:2,4,7
  21:10 22:11
  23:1 24:2 25:19
  26:21,24 31:3,3
  31:22 36:23
  38:12 39:14,25
  48:1 50:4 51:7
thinking 4:22,23
  5:3 13:15 14:6
  14:7
thinks 4:5 23:21
  24:4,5 25:5,10
  42:19
third 32:18 38:24
thought 4:20 5:5
  38:3
thoughtful 40:20
three 43:10
throwing 32:11
tied 12:18 32:20
ties 39:5
time 5:19 6:17
  7:23 8:9 12:24
  12:25 14:6
  15:14,14 17:14
  17:25 18:9
  19:18 25:21
  28:20 32:17
  36:14,16,17
  38:22 44:3,9
  50:3

tracked 34:10
training 23:23
  32:6 51:6
transcript 8:3
  26:10 40:15
transition 5:24
treatment 3:15
  6:21,24 7:6,9
  7:13,16,17,22
  8:14 11:3,4,6,8
  12:22 13:10,25
  15:7,20 18:19
  18:22 19:6,9
  22:2 25:11
  27:16,18 28:3,5
  30:10 31:1 32:7
  32:13,15,22
  35:10,20 36:12
  38:15 42:16
  43:8 48:9,15
treatments 27:10
trouble 36:10
troubled 8:23
true 5:25
truthfully 51:13
trying 16:1 18:14
  39:21
turned 7:17
two 10:19 17:10
  19:20 29:2
  33:16 44:16
type 23:22
typically 19:13

___ U ___

ultimately 28:19
  46:17
uncertainty 45:1
unclarity 46:15
undercutting
  43:21
understand 7:5
  8:23 23:5 30:23
  36:2 42:11,12
  46:1

61

unevenness 39:11
unfortunately 46:21
United 1:1,6,12 3:5 34:16
unpredictability 39:9
unpredictable 37:4 39:7
unreasonable 50:16
unstructured 27:12
urging 9:15
use 9:14 17:9 31:9 34:13
usually 41:13 43:8
U.S 35:4
U.S.C 41:7

V

v 1:5 3:4
vacatur 1:19 2:8 13:4
varying 40:6
vehicle 6:1
versus 37:12 43:4 49:15
view 37:22 47:2 47:7
violate 9:6
violates 26:16
violating 20:21
violation 9:23
vocation 38:7,14
vocational 15:19 18:21 23:23 31:1 32:6 51:6

W

wait 7:20
want 9:24 12:5 18:24 26:22

wanted 18:2 19:2 30:11 46:11
wants 21:15 28:3
Washington 1:8 1:18
wasn't 14:2,24 28:22,24,25 29:9 50:17
way 4:11 14:2 28:2 33:17,23 34:7 35:22 40:24 43:16,17 44:5 46:8
ways 15:3 37:17 39:9
weighing 45:2
weight 37:2,3,5 42:23 47:22
we're 18:5,5 20:15,22 36:16 40:14 44:17 49:14
we've 34:15 36:5 38:1 43:1 46:24
whited 40:16
widely 38:19 40:7
wishes 12:3,4
within-guideline 47:18
woman 6:14 18:24
word 9:6 20:1 47:22
wording 43:18
words 8:14 9:25 21:11 26:23 43:17 49:6
work 5:2
workers 32:12
works 14:17
worth 24:16
wouldn't 24:20 36:19 39:10

40:16
write 43:25
wrong 8:23 11:20 20:6,9,13,13 50:1

X

x 1:2,7 9:12 10:1

Y

year 11:21 19:13 19:14 49:22,24 50:1
years 7:16,17 8:2 11:18,19 16:17 19:13,17 40:9 40:12 42:4,5 46:14
Youth 3:22

1

1 19:13,13,14
10 21:2 36:16,17 44:9
10-5400 1:5 3:4
10:04 1:13 3:2
100 44:12
11:02 51:19
12 22:1 40:1 49:23,24
12-month 48:12
13 2:7
141 45:15
150 43:1
18 1:9
1970s 35:15 38:19
1974 38:20
1984 38:4

2

2 11:18 16:17 19:13 31:24 34:2,2,3,10,10 41:2,2,3 42:16

2-year 16:18
2011 1:9
24 42:5
25 8:7
26 25:24
27 2:11 8:8 11:1
28 41:7
29 8:8

3

3 2:4 11:19 31:25 48:18
30 40:3
35 40:3
3553(a) 33:13 34:2
3553(a)(1) 41:2
3553(a)(2)(C) 25:12
3553(a)(2)(D) 14:21 32:1 49:5
3553(a)(3)(D) 42:15
3582 3:15 4:12 6:4 9:6,6,23 34:5 43:21
3582's 42:13
3582(a) 13:7 33:7 34:1
3583 34:4 43:16
3583(c) 40:25
3583(e)(3) 36:3
36 10:16
38 8:7

4

45 7:3
46 8:12
48 2:14

5

5 8:12 40:9,12 42:4,5
50 7:2,4,5 50:4
500-hour 8:15,20

11:4,12
51-month 8:11
54 50:6
55 7:3 50:6,7

6

60 50:4
63 10:13,15

9

90 36:14 44:1,2
93 28:10 36:25
991(b)(1)(B) 41:20
994 41:14 43:16
994(d) 41:7