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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL MUSACCHIO, :

Petitioner : No. 14-1095

v. :

UNITED STATES. :

- - - - - x

Washington, D.C.

Monday, November 30, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

ERIK S. JAFFE, ESQ., Washington, D.C.; on behalf of Petitioner.

ROMAN MARTINEZ, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	ERIK S. JAFFE, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	ROMAN MARTINEZ, ESQ.	
7	On behalf of the Respondent	29
8	REBUTTAL ARGUMENT OF	
9	ERIK S. JAFFE, ESQ.	
10	On behalf of the Petitioner	60
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 14-1095, Musacchio v. United States.

Mr. Jaffe.

ORAL ARGUMENT OF ERIK S. JAFFE

ON BEHALF OF THE PETITIONER

MR. JAFFE: Mr. Chief Justice, and may it please the Court:

This case presents two questions concerning the consequences of the failure to object or raise an issue at trial.

On the question of whether jury instructions not objected to by the government become the baseline for measuring the sufficiency of the evidence at later stages in the case, the critical point here is that only the jury can determine that a defendant is guilty. And if a jury does so under a particular framework, it should be evaluated under that framework. And if it cannot sustain that verdict on the reasons it used in its own deliberations, that verdict is not rational.

In --

JUSTICE SCALIA: Well, there -- there's -- there's no doubt in this case, is there, that the jury

1 found beyond a reasonable doubt that the defendant had
2 committed a crime set forth in the indictment?

3 MR. JAFFE: Your Honor, I think that is not
4 entirely correct. There is no doubt there was
5 sufficient evidence that they could have done that.
6 Whether they did that is --

7 JUSTICE SCALIA: They -- they had to.

8 MR. JAFFE: -- a different matter.

9 JUSTICE SCALIA: They had to find that, plus
10 something else, isn't -- wasn't that --

11 MR. JAFFE: So --

12 JUSTICE SCALIA: -- that the issue?

13 MR. JAFFE: It was the issue.

14 JUSTICE SCALIA: So if -- if they came in
15 and said both are true, the first has to -- has to have
16 been true.

17 MR. JAFFE: In the Fifth Circuit, we pointed
18 out that there was the potential for confusion the way
19 "and" could have been misread by them as "or," and they
20 would not have necessarily had unanimity on -- on which
21 elements of the "and" added up.

22 JUSTICE SCALIA: I didn't read that as being
23 a part of your case here.

24 MR. JAFFE: It is only so indirectly. So we
25 raised this as plain error, and we lost that because we

1 couldn't demonstrate prejudice because there was some
2 uncertainty.

3 Our point in this Court is that, if the
4 government wants to ignore or have a court disregard the
5 instructions, it would then be its burden to prove
6 harmlessness, and that same uncertainty about unanimity
7 would then read down to our benefit.

8 JUSTICE SCALIA: Well -- well, the -- the
9 "or" would have been accurate, wouldn't it have?

10 MR. JAFFE: Well, the "or" would have been
11 accurate, but would have required a unanimity
12 instruction to be clear which of the "ors" they agreed
13 on. If six thought it was "exceeding" and six thought
14 it was "unauthorized," that is a -- not a valid verdict.

15 JUSTICE SOTOMAYOR: On the basis of the
16 argument in this case, I didn't think there was any
17 argument that the government tried this case solely on
18 the theory that he encourage others to exceed their
19 authority.

20 MR. JAFFE: I think --

21 JUSTICE SOTOMAYOR: That's how they argued
22 the case. That's how it was indicted. So why isn't it
23 harmless error?

24 MR. JAFFE: Well, because the evidence is
25 not sufficient to actually support that conclusion. The

1 government certainly argued that.

2 JUSTICE SOTOMAYOR: It's not sufficient to
3 support the conclusion that he exceeded authority.

4 MR. JAFFE: Yes.

5 JUSTICE SOTOMAYOR: But it is more than
6 sufficient, if not the only theory they could have
7 convicted on, was that they -- that he had encouraged
8 others to exceed their authority.

9 MR. JAFFE: No. I -- I -- I disagree, Your
10 Honor. We argue that what he encouraged others to do,
11 if one accepts all those facts as true, still would not
12 constitute exceeding authority.

13 That the government's --

14 JUSTICE ALITO: Could I ask you -- I'm
15 sorry.

16 MR. JAFFE: Yes.

17 JUSTICE ALITO: You wanted to finish that.

18 MR. JAFFE: I was saying the government's
19 theory about what is and is not exceeding authority is
20 somewhat confused in this case as it was confused in the
21 presentation at the trial level; and therefore, it
22 wouldn't have been clear that that evidence would have
23 been sufficient to show conspiracy to exceed.

24 JUSTICE ALITO: It doesn't seem clear to me
25 that these two theories are actually separate. They --

1 they -- when Congress enacts a criminal statute, it
2 often adds a lot of synonyms. So, you know, in the --
3 in a theft statute, whoever embezzles, steals, or
4 unlawfully and willfully extracts or converts,
5 et cetera, they're not necessarily all distinct. And I
6 don't really see a difference between making
7 unauthorized access and exceeding authorized access.

8 Let's take the first, making unauthorized
9 access. Let's say somebody has access to some -- an
10 employee here in the building has access to -- lawful
11 access, proper access to some records. If that employee
12 at night sneaks into some other place in the building
13 and starts looking through files, that person is making
14 unauthorized access.

15 And in the other situation, exceeding
16 authorized access, let's say a person doesn't have
17 any -- any access to any files in the court, but sneaks
18 in and looks at those files. That person had zero
19 authorized access and, therefore, exceeded authorized
20 access.

21 I just think these are -- it seems to me,
22 reading them, they're two ways of saying the same thing.
23 So the issue that's presented here may not -- the issue
24 that you've asked us to decide may not actually be
25 presented by the facts of this case.

1 MR. JAFFE: Your Honor, that question is
2 actually not before this Court. The government does not
3 dispute that exceeding and unauthorized are discrete and
4 independent means of accomplishing a crime. The Ninth
5 Circuit has held that they are discrete. Even the Fifth
6 Circuit agrees that they're discrete. It just disagrees
7 as to what the content of those two separate elements
8 are.

9 But for this Court's purposes, you need not
10 ever go there. We've invited that in a footnote in our
11 brief. You declined the invitation, which is entirely
12 your prerogative, but that is an issue that will have to
13 be briefed.

14 I agree with you, it is not the clearest of
15 statutes, but suffice it to say, the way this issue has
16 been brought to this Court, it has been assumed by the
17 Fifth Circuit, assumed by the government, and I believe
18 assumed by the Ninth Circuit that they are discrete and
19 independent elements that would be separately and
20 distinctly proven.

21 JUSTICE KAGAN: If I could go back to your
22 main argument. You seem to be suggesting that the
23 inquiry that we should be undertaking really focuses on
24 this jury and how this jury made its decision. But I
25 had thought that some of our prior cases, in particular,

1 Jackson, suggests that that's not the correct inquiry.
2 That the correct inquiry really is -- is as to a
3 hypothetical jury, any jury. And so your focus on,
4 well, the way that these instructions might have
5 affected this particular jury just really isn't the
6 right one at all.

7 MR. JAFFE: I partially agree with you, Your
8 Honor. It is not that we are asking what the
9 individuals on the jury thought or what their literal
10 thought process was in the jury room; but it is, indeed,
11 could any jury in the position of this jury, with the
12 facts this jury received, with the instructions this
13 jury received, could possibly have come to this
14 conclusion?

15 And our point is no rational jury facing the
16 facts and instructions this jury faced could have
17 convicted on the exceeding portion of the charge.

18 JUSTICE GINSBURG: But they convicted on the
19 first portion and that was enough.

20 MR. JAFFE: They convicted on a combined --

21 JUSTICE GINSBURG: They found, beyond a
22 reasonable doubt, intentionally accessing a computer
23 without authorization, period. And they were told they
24 had to find that unanimously. So what -- what else is
25 there?

1 MR. JAFFE: It is not clear they understood
2 that because the unanimity instruction did not
3 distinguish between unauthorized access and exceeding
4 authorized access.

5 JUSTICE SCALIA: That -- that -- that's what
6 your case comes down to: Failure to instruct the jury
7 that they had to be unanimous as to both?

8 MR. JAFFE: No, that is what our objection
9 to the government's harmlessness argument comes down to,
10 which is the government cannot resolve the uncertainty
11 in the jury room.

12 JUSTICE SCALIA: It isn't a harmlessness
13 argument. It -- it's an argument that the jury was told
14 you can convict if A plus B. They came back and said,
15 beyond a reasonable doubt, A plus B, he's guilty.

16 And now you come and say, well, you know, he
17 really wasn't guilty on B. There wasn't enough
18 evidence.

19 That's okay. He's still guilty on A.

20 MR. JAFFE: Let me give you --

21 JUSTICE SCALIA: I -- I just don't see how
22 you get around that.

23 MR. JAFFE: I'll give an example that may
24 help clarify it: In murder charges, it is typically
25 charged that one knowingly and intentionally killed a

1 person. If the government fails to prove intentionally
2 but had sufficient evidence for knowingly, you cannot
3 support a murder conviction because they proved
4 manslaughter unless it was specifically charged as a
5 separate instruction to the jury. You can't just save
6 it because yes, of course, they found manslaughter by
7 implication.

8 JUSTICE KENNEDY: But that's not this case.
9 What you -- you -- what you have hypothesized is an
10 erroneous instruction that -- or -- or a -- a -- a
11 failure to find what was necessary. There's no failure
12 to find what was necessary here, so your hypo doesn't
13 work.

14 MR. JAFFE: Well, the "what was necessary"
15 sort of begs the question a bit on necessary to whom.
16 To the jury, it was necessary to find both. And they
17 only, at best, could have found one. We do not concede
18 that they did find one accurately, because there is --

19 JUSTICE KENNEDY: I can see that your
20 argument might work in some cases if the jury was
21 confused, if -- if this meant that it took their
22 attention away from a critical element. But I -- I
23 don't see that that's a possibility here, even assuming
24 that Justice Alito's comments, which I think have
25 considerable merit, are inapplicable, but you -- that

1 they're quite different.

2 MR. JAFFE: Well, as I said, I believe
3 Justice Alito's comments are a fair issue to be
4 litigated, and it could be litigated on remand if this
5 case goes back. It's not presented here.

6 As to whether the jury was confused, we
7 certainly argue the jury was confused. We couldn't meet
8 our burden of prejudice, but our point is the government
9 couldn't meet its burden of showing that didn't happen
10 either. That's the Olano situation, where right in the
11 middle where there is confusion, neither side can win --

12 JUSTICE BREYER: That sounds like what
13 you're saying -- I don't understand the point. What
14 Justice Scalia said seems right. It's charged. You
15 have to find A and B. Therefore, they must have found
16 A. The indictment, superseding indictment charged A.
17 The statute says A. Okay? So we know they found A.

18 Now, what's the problem?

19 MR. JAFFE: Well --

20 JUSTICE BREYER: The problem seems to have
21 been that they were also charged that they had to find
22 B. Fine. They made a mistake.

23 Did you object? No.

24 Was it harmless? It doesn't seem to me how
25 it -- how could it have been harmful.

1 I mean, I -- I think your problem is the
2 problem with the extra B in the jury instruction. And
3 so I would look to see what's your objection to B? Did
4 you object? No. Then it must have been plain error.
5 Well, it was -- it was erroneous, but was it harmful?

6 Now, that I could understand, but you're
7 arguing something else, and it is the something else
8 that I don't understand.

9 MR. JAFFE: Sure. We -- we are not arguing
10 that it was erroneous or harmful to include that. We
11 are arguing that it is binding. We are defending the
12 jury instruction; not rejecting it. It is the
13 government seeking to reject the jury instruction; and
14 therefore, we think it is incumbent upon the government,
15 if they want to analyze the verdict on grounds different
16 than the instruction, to prove that doing so --

17 JUSTICE BREYER: Is there anybody -- well --
18 well, I don't see the theory of it. The jury is
19 instructed. You -- he is guilty of murder if he killed
20 someone, da-da-da, and he had -- and he was looking at
21 the ceiling. Okay? Doesn't make any sense.

22 Okay. That was wrong.

23 So now you're saying if the judge makes a
24 mistake there, nobody objects, he says the wrong thing,
25 and he was looking at the ceiling, you have to let the

1 guy go because -- although he didn't hurt anybody, no
2 harm, you still have to let him go. And I just need the
3 "why."

4 MR. JAFFE: Sure. So the "why," I think,
5 comes from Jackson v. Virginia. So let's say they said
6 -- and he was --

7 JUSTICE BREYER: It was not a case involving
8 a jury instruction.

9 MR. JAFFE: It was a case involving
10 sufficiency of the evidence --

11 JUSTICE BREYER: To show that the charge
12 met -- the charge -- the evidence proved the crime on
13 either the statute or the indictment.

14 MR. JAFFE: But the reasons behind Jackson
15 explain that we are looking to whether or not the jury
16 could have rationally reached that conclusion. And the
17 reason we do so is to enforce the presumption of
18 innocence and to enforce the reasonable doubt
19 instruction.

20 So if a jury instructed erroneously that the
21 person needed to be wearing a green hat, had zero
22 evidence that that person was wearing a green hat, yet
23 found that they were wearing a green hat anyway, there
24 is a problem in that verdict, and we know there's a
25 problem in that verdict. No rational jury could find

1 that a fellow with a red hat was wearing a green hat.

2 JUSTICE SOTOMAYOR: My problem is that I
3 don't know that it's rational to say that a jury in --
4 that sufficiency of the evidence has to do with what was
5 charged as -- what was charged to the jury as opposed to
6 what was laid out in the statute and/or in the
7 indictment.

8 If it's sufficient under both, what you're
9 trying to say now is it may be sufficient under both.
10 You're conceding it is. You're conceding it is a
11 possibility the jury found what was charged in the
12 indictment, but the government now has added an element
13 to the crime.

14 MR. JAFFE: Absolutely. So the -- the fact
15 that that --

16 JUSTICE SOTOMAYOR: Do you have any case
17 where we've held that or anything close to it?

18 MR. JAFFE: This Court, no.

19 JUSTICE SOTOMAYOR: Have you had any case
20 discussing sufficiency of the evidence where we look to
21 the jury instruction as opposed to the statute and the
22 indictment?

23 MR. JAFFE: I'm not aware of one where that
24 has come up. However, in the circuits, every circuit to
25 consider the issue, as a general rule, accepts this

1 so-called law-of-the-case doctrine.

2 JUSTICE ALITO: Suppose that there's a --
3 that there's a two-count indictment and there's plenty
4 of evidence to convict on Count I and zero evidence, not
5 one scintilla of evidence, on Count II, and the jury
6 convicts on both counts; so the -- defendant is entitled
7 to a judgment of acquittal on Count II.

8 But you seem to be saying in that situation,
9 the court would say, this is a crazy jury. This is an
10 irrational jury because their verdict on Count II is
11 totally ridiculous; and therefore, the defendant is
12 entitled to judgment of acquittal on Count I as well,
13 despite the fact that there's plenty of evidence on
14 Count I.

15 Is that what you're saying?

16 MR. JAFFE: Not entirely. It is certainly a
17 reasonable conclusion from the implications of Jackson
18 v. Virginia. However --

19 JUSTICE ALITO: Well, what's different --
20 what's the difference between that and the argument you
21 just made?

22 MR. JAFFE: This Court has treated separate
23 counts as significant and distinct -- the Smith case,
24 for example, that the government cites. And given
25 that -- I'm not sure that's the right answer in an

1 abstract term, but given that, I believe the same thing
2 would be true where the jury made a terrible decision on
3 one count and an acceptable decision on another count,
4 that you wouldn't cross, in fact, from one count to the
5 other.

6 I could see the argument perfectly well, if
7 this Court were inclined to go there, that yes, a jury
8 that went that off the rails on one count is
9 questionable on everything it did. And one might well
10 question under the Jackson rationale whether or not they
11 properly applied the presumption of innocence and the
12 reasonable doubt standards.

13 JUSTICE ALITO: That -- that would be
14 revolutionary holding.

15 MR. JAFFE: It would. But I'm not asking
16 this Court to make --

17 JUSTICE ALITO: But, now, I don't see a
18 difference, other than a purely formal difference,
19 between that situation and what you're -- what you're
20 arguing.

21 MR. JAFFE: At some level, there is a
22 certain formality to it, but that is Smith. And Smith
23 made that formal distinction, I believe, to cabin the
24 implications of Jackson. And if, at the end of the day,
25 Jackson makes a good point, but one doesn't want to

1 extend it to its furthest logical reaches, that's
2 reasonable. But within a count --

3 JUSTICE SCALIA: Of course, this --

4 MR. JAFFE: Yes.

5 JUSTICE SCALIA: -- this case is even -- is
6 even worse than the hypothetical that Justice Alito
7 posits in that -- in his hypothetical, Count II was a
8 real count. In this case, the equivalent of Count II in
9 the hypothetical was not real at all. It was a
10 misinstruction which you did not object to.

11 MR. JAFFE: It was not our burden to object.

12 But the reason it's not worse is --

13 JUSTICE GINSBURG: You didn't object because
14 it was favorable to your client. I mean, it's always
15 better to -- if you have two than just one.

16 MR. JAFFE: We didn't object because we were
17 confused. The trial counsel was actually confused and
18 thought this was a case about both, as the government
19 itself sort of acknowledges towards the end of trial
20 where they -- where trial counsel makes a motion,
21 assuming both were in play, and the government
22 understands that trial counsel was confused.

23 JUSTICE GINSBURG: Didn't the -- didn't the
24 government correct the indictment so it would be "or"
25 not "and"?

1 MR. JAFFE: They corrected the formal
2 portion of the charge, but all of the allegations, the
3 means, the mechanisms of the conspiracy, the particular
4 facts charged as being supporting acts, all of that
5 included, continued to include "exceeding," just as the
6 prior indictment had.

7 And so, understandably or not, there was
8 some confusion both on the part of counsel, I believe on
9 the part of the court, potentially on the part of the
10 government that continued to argue "exceeding" even
11 through its closing.

12 CHIEF JUSTICE ROBERTS: Counsel, I'd like to
13 hear your argument on the statute of limitations
14 question at this point.

15 MR. JAFFE: Yes, Your Honor.

16 On the statute of limitations, both parties
17 agree that it is inevitable that a court will review a
18 forfeited limitations bar. Whether it comes at habeas
19 or sooner is really the only question before this Court
20 because the government concedes that it can be raised as
21 an ineffective assistance-of-counsel claim if it is a
22 meritorious limitations bar.

23 Our point is, doing it sooner, doing it on
24 direct appeal, doing it while you still have counsel, so
25 take -- in -- in point-of-counsel cases, is the better

1 and more efficient way of doing that.

2 JUSTICE SCALIA: That's a -- that's a --
3 that's a rule that will have application in a lot of
4 other situations. You're saying whenever an error can
5 be raised on habeas, we -- we should accord -- no matter
6 that it's been waived, no matter what else exists, we
7 should allow that point to be raised in initial review.

8 MR. JAFFE: No, Your Honor, that is not what
9 we are saying.

10 JUSTICE SCALIA: Well, why -- why wouldn't
11 it? I mean --

12 MR. JAFFE: Several reasons.

13 JUSTICE SCALIA: Why doesn't it follow?

14 MR. JAFFE: Because that's --

15 JUSTICE SCALIA: That's your argument:
16 Since it can be raised in habeas, why not do it now?

17 MR. JAFFE: Because statutes of limitations
18 can be distinguished from those other types of
19 arguments. The habeas argument is merely a reason not
20 to wait.

21 But it can be cabined -- our point can be
22 cabined to limitations issues for several reasons. If
23 you look at the habeas cases we cite at the tail end of
24 our blue brief, one, it is taking it for granted that
25 the failure to raise a meritorious statute of

1 limitations argument is indeed ineffective assistance.

2 JUSTICE GINSBURG: So you are, Mr. Jaffe, at
3 least saying, in every statute of limitations case,
4 whenever a statute of limitations is involved in every
5 case, the defendant can raise it for the first time on
6 appeal, every statute of limitations.

7 MR. JAFFE: Yes, though the theory under
8 which that would happen might be different. So in some
9 instances, it would be as a plain-error question; in
10 other instances, it might be on a stronger theory.

11 But yes, that is basically our point, with
12 one exception.

13 CHIEF JUSTICE ROBERTS: Maybe you should
14 take the exception out.

15 JUSTICE SOTOMAYOR: The court below --

16 MR. JAFFE: Yes.

17 JUSTICE SOTOMAYOR: The court below --

18 CHIEF JUSTICE ROBERTS: Maybe you should --

19 MR. JAFFE: Yes.

20 JUSTICE SOTOMAYOR: -- is by waiver. I --

21 MR. JAFFE: The --

22 CHIEF JUSTICE ROBERTS: You -- you just get
23 your exception out and then answer --

24 MR. JAFFE: The exception would be in the --
25 the example of the Powell case, where the burden to

1 prove withdrawal was actually on the defendant and not
2 the burden of proof complies with state of limitations
3 on the government. The shifting in burdens of proof in
4 that case might be an -- an exception to the general
5 statement I gave Justice Ginsburg.

6 I'm sorry.

7 JUSTICE SOTOMAYOR: I'd like to get to the
8 substance of your argument, but as I understand your
9 argument, this wasn't a waiver which the court found
10 below. You're arguing it's a forfeiture.

11 MR. JAFFE: Correct.

12 JUSTICE SOTOMAYOR: Forfeiture because it
13 was unintentionally done.

14 MR. JAFFE: Correct.

15 JUSTICE SOTOMAYOR: And so you are going
16 under plain error.

17 MR. JAFFE: Plain error is the -- the -- the
18 narrowest and easiest of the theories.

19 JUSTICE SOTOMAYOR: All right.

20 MR. JAFFE: You have to call up --

21 JUSTICE SOTOMAYOR: So you're saying when
22 there is plain error, when there isn't an intentional --
23 you don't disagree with the government that there are
24 intentional waivers that you can't raise on appeal of
25 the statute of limitations. We've gotten a few of them

1 here.

2 MR. JAFFE: For purposes of our case, we
3 would be perfectly content to accept that. Some of our
4 theories, in fact, would be broader. This Court need
5 not reach those broader theories --

6 JUSTICE SOTOMAYOR: All right.

7 MR. JAFFE: -- to vote in our favor.

8 JUSTICE SOTOMAYOR: So let's assume this is
9 under plain error. Now let's go to what -- what made
10 this plain. Okay?

11 We have a bunch of cases that say that this
12 is a statute of limitations as opposed to a
13 jurisdictional bar. Why would it be plain that this is
14 jurisdictional?

15 MR. JAFFE: You need -- if you're under
16 plain error, one need not conclude it as jurisdictional.
17 One simply needs to conclude that the government has
18 failed to bring the suit within the time required by a
19 statute.

20 On its face, the date of the indictment
21 compared to the date of the alleged crime is very
22 simple, very plain. It's more than five years. The
23 government may well have a defense -- relation back,
24 whatever their defense is -- and they can raise that.
25 But on its face --

1 JUSTICE SOTOMAYOR: I'm sorry. I --

2 MR. JAFFE: -- it's plain.

3 JUSTICE SOTOMAYOR: -- I -- I -- I'm having
4 a very hard time accepting that argument. If we say
5 that it -- it wasn't plain, that this was a
6 claim-processing rule --

7 MR. JAFFE: I believe there are two separate
8 lines of cases that are getting conflated.

9 Plain error could involve any error. It
10 need not be jurisdictional. It can simply be contrary
11 to statute, which is a non jurisdictional, merely a
12 substantive statute like the statute of limitations.

13 The jurisdictional argument is a different
14 and separate reason that need not infect -- or be
15 decided in order to resolve plain error. The error here
16 is simply the statute says you must bring it in
17 five years. They brought it in seven. That's error.
18 We failed to raise it, but that's the very purpose of
19 the plain-error rule, is to make up for mistakes of
20 counsel who failed to raise things they should have
21 otherwise raised, and so one gets to raise it as plain
22 error. That's --

23 CHIEF JUSTICE ROBERTS: Your -- your -- your
24 argument really does -- this is true of all
25 jurisdictional defenses, but I think it's particularly

1 problematic here, which is it encourages gamesmanship.
2 I mean, if you have what you think is an arguable
3 statute-of-limitations argument, you know, take your
4 chance at trial, and if you win, fine, but if you lose,
5 then raise this statute-of-limitations argument.

6 MR. JAFFE: I guess what I'd say is that no
7 sane lawyer would do that because they subject
8 themselves to claims of malpractice, they subject
9 themselves to the higher standards of plain-error
10 review. At the end of the day --

11 CHIEF JUSTICE ROBERTS: What's malpractice?
12 It sounds like a -- a good practice to me for his
13 client.

14 MR. JAFFE: Well, in subject on appeal to
15 the higher standards of plain-error review is still a
16 negative. If they end up losing and there was some
17 chance they could have won had they brought it timely,
18 that lawyer has now sent a man to jail based on not
19 merely a mistake, but an intentional decision.

20 JUSTICE GINSBURG: That's not true of your
21 jurisdictional categorization if it's jurisdictional and
22 it's not plain error --

23 MR. JAFFE: That's true.

24 JUSTICE GINSBURG: And your jurisdictional
25 argument surprised me because you cite a line of cases

1 that were meant to cabin the use of jurisdiction.

2 MR. JAFFE: Correct.

3 JUSTICE GINSBURG: The distinction between
4 claim processing and jurisdictional was to cut back on
5 exorbitant use of jurisdiction, and you just seemed to
6 switch it.

7 MR. JAFFE: I start with the case of
8 Bowles v. Russell, and merely point out that, on pretty
9 much every single ground in that case and those that
10 follow, this statute is stronger and more clearly a
11 limitation of the court's power.

12 JUSTICE GINSBURG: I thought Bowles went on
13 that the court had held that before, and so it was going
14 to adhere to its prior ruling.

15 MR. JAFFE: That was some of what Bowles
16 went on, but it gave many other reasons, as did the
17 follow-on cases. And if one looks at the wording of the
18 statute, one may not try or punish is a continuing
19 prohibition. It is not merely you can't prosecute,
20 which might just be thought to apply to the prosecutor.
21 This is a -- a restriction on the court.

22 JUSTICE GINSBURG: But again, you would be
23 making all statutes of limitations, quote,
24 "jurisdictional."

25 MR. JAFFE: No, we would not, Your Honor.

1 We would look --

2 JUSTICE GINSBURG: Which might that be?

3 MR. JAFFE: -- at the wording.

4 JUSTICE GINSBURG: Yes.

5 MR. JAFFE: Because -- because I believe the
6 wording of this statute is, in fact, unusually strong,
7 particularly with the "except as otherwise expressly
8 provided by law," meaning you cannot avoid it by
9 implication. It is such a strongly worded statute.
10 Others might not be that way at all, and one would not
11 extend this to differently worded limitations, period.

12 JUSTICE KAGAN: I -- I would have -- the --
13 the most recent case that we had, which was Wong, makes
14 clear the statute of -- of limitations generally are not
15 jurisdictional, and I would think suggests that you
16 really have to have language saying it is jurisdictional
17 to overcome that presumption. In other words, just a
18 strong-sounding statute of limitations wouldn't cut it
19 according to Wong. That's the way I would read that.

20 MR. JAFFE: I would read those cases as
21 dealing with civil situations as opposed to criminal
22 situations, where the limitations period is generally
23 thought of as a period of repose, not as a substantive
24 limit on the government's power. And that's the Toussie
25 case, as well as Benes, which followed that.

1 I would also point out that the -- the
2 clarity of Congress's language goes to, are you limiting
3 the court, as opposed to merely requiring bringing the
4 claim within a certain period of time, but without
5 specifying the consequence of failure.

6 Here, the language is so expressly directed
7 to the court's power, and it does indeed specify the
8 consequences of failure: You may not try or punish any
9 person.

10 JUSTICE KAGAN: But are you saying that we
11 should adopt a different interpretive rule in the
12 criminal context? Is that what I understood you to say?

13 MR. JAFFE: I'm saying that you already
14 have. That this Court views criminal statutes of
15 limitations more strictly. It views them as different
16 from civil statutes of limitations that is viewed as a
17 limit on the government's power rather than merely a
18 limit on a litigant's remedies. And that that's
19 already -- that's Toussie. And I believe Benes
20 discusses that at further depth.

21 But you need not reach jurisdiction. I
22 believe the easiest way to reach the -- to deal with
23 this case is on the Wood and Valiniff cases, where you
24 have already held that a limitations period cannot be
25 forfeited, only waived, and that's in the habeas

1 context, admittedly. The -- the sides are flipped. But
2 where the government in the habeas context inadvertently
3 fails to raise a limitations period, it is still allowed
4 to bring that up on appeal. The court, on appeal, is
5 allowed to raise that sua sponte.

6 I think this case is stronger, once again,
7 on every score than Day. And, consequently, if Day is
8 good law, this case is almost a fortiori the same
9 result.

10 And one need not give it any further
11 analysis than that, that if the government has to
12 affirmatively waive a limitations objection to a habeas
13 petition, then Petitioner, who has so much more at
14 stake, should have to affirmatively waive a limitations
15 objection to indictment.

16 If I may, I'd like to reserve the remainder
17 of my time.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Martinez.

20 ORAL ARGUMENT OF ROMAN MARTINEZ

21 ON BEHALF OF THE RESPONDENT

22 MR. MARTINEZ: Mr. Chief Justice, and may it
23 please the Court:

24 Petitioner is wrong that the sufficiency of
25 the evidence must be measured against an extra element

1 in an obviously erroneous jury instruction. That rule
2 is not consistent with the purpose of sufficiency
3 review, it contradicts how this Court has treated the
4 same issue in civil cases, and its whole purpose and
5 effect is to give guilty defendants windfall acquittals.

6 JUSTICE GINSBURG: If it was obviously
7 wrong, why did the government the first time, in the
8 original indictment, charge "and"?

9 MR. MARTINEZ: I -- it -- it was obviously
10 wrong to include the -- the -- the exceeding authorized
11 access component to the case at the jury instruction
12 stage after the superseding indictments had already made
13 clear that the case was about a conspiracy to commit
14 unauthorized access.

15 And I think my -- my friend on the other
16 side pointed out that -- that -- that Petitioner's
17 counsel was confused as to what the case was about at
18 that stage, but if you look at what Petitioner said the
19 case was about when he was briefing this case in the
20 Fifth Circuit, he made very, very clear that, in
21 Petitioner's view, the government had abandoned the
22 conspiracy to commit exceeding authorized access, and it
23 had abandoned that with its superseding indictments, and
24 it had abandoned that by the fact that, when we proposed
25 three different sets of jury instructions as to the

1 conspiracy count, the -- the instructions that we
2 proposed were limited to a conspiracy to commit
3 unauthorized access.

4 Petitioner's other counsel, Mr. Kendall,
5 during his oral argument in the Fifth Circuit, over and
6 over again -- at the beginning of his argument, in the
7 middle of his argument, at the end of his argument --
8 emphasized that the government had tried this case as a
9 "unauthorized access case from start to finish."

10 JUSTICE GINSBURG: Why didn't the government
11 ask the judge to correct his charge when the judge made
12 the mistake of saying "and"?

13 MR. MARTINEZ: I -- Your Honor, I -- I don't
14 know why we didn't do that. I think obviously the --
15 it -- it would be better for -- for all of us if -- if
16 we had -- if we had noticed the -- the change that was
17 made.

18 I will say that the change was made at the
19 last minute. The -- the parties had had a charging
20 conference the day before when the erroneous language
21 was not at issue. Petitioner had never asked for the
22 "exceeding authorized access" language to be included in
23 the instruction.

24 We had proposed three different sets of jury
25 instructions that didn't include that language. It was

1 a mistake on our part, and we suffered the consequences
2 of the mistake in the sense that, at that point, the
3 jury was charged incorrectly. But if the jury had
4 acquitted Mr. Musacchio based on its view that there was
5 insufficient evidence with respect to the extra element,
6 under this Court's decision in Evans, we wouldn't have
7 been able to -- to appeal that. That -- that would have
8 been the end of the case.

9 JUSTICE ALITO: Well, why was the
10 instruction erroneous? You concede that these two
11 methods of violating the statute are discrete? They're
12 not just different ways of describing the same thing?

13 MR. MARTINEZ: We do think that they are
14 discrete, and we think that's consistent with our -- our
15 sort of general reading of the statute and with the way
16 the courts have -- have addressed it. I think they're
17 very closely related.

18 I think what -- we agree with what -- what
19 Petitioner said in his petition at page 4, which was
20 that -- that these are essentially two different ways of
21 committing the same crime.

22 JUSTICE ALITO: Well, suppose you had an
23 indictment charging someone with exceeding authorized
24 access and there was a factual dispute about, let's say,
25 the date on which the employee's employment ended, so

1 therefore, the date on which any authorized access that
2 the employee had to records of the employer ended, you
3 would say that, if you did not succeed in proving beyond
4 a reasonable doubt that, as of the date when the access
5 was obtained, the employee had ceased to be employed,
6 that that employee would be entitled to a judgment of
7 acquittal? That seems rather odd.

8 MR. MARTINEZ: Justice Alito, I don't -- I
9 don't want to resist a broader reading of the statute,
10 but I -- I would only say that -- that the statute
11 defines the term "exceeding authorized access" in a
12 way -- this is at page 11-A of our statutory appendix.
13 It said, "The term" -- it says, "The term 'exceeds
14 authorized access' means to access a computer with
15 authorization and then to use such access to obtain or
16 alter information in the computer that the accessor is
17 not entitled so to obtain."

18 So if there were a circumstance in which
19 there was no authorization in the first place to -- to
20 access the computer, I think we would be in trouble.
21 But we would, of course, have the other -- the other way
22 of -- of proving that the statute had been violated,
23 which was the unauthorized access charge.

24 And that's why in this case, I think, there
25 was no dispute and there was no confusion whatsoever

1 that a conspiracy to commit unauthorized access was
2 alleged. There was overwhelming evidence that
3 Petitioner hasn't challenged on that point, and there
4 were, of course, two substantive convictions that --
5 Counts II and III of the indictment -- which had to do
6 with -- with unauthorized access.

7 JUSTICE ALITO: Well, couldn't there not be
8 --

9 JUSTICE KENNEDY: I understand -- I
10 understand your argument about, in effect, that this was
11 harmless error but -- something at page 20 of your
12 brief. You would like us to write in an opinion -- on
13 the very first line of page 20 -- even if courts should
14 generally look to jury instructions when assessing the
15 sufficiency of the evidence which they should not -- you
16 want us to write that in an opinion? It seems to me
17 that would surprise many, many lawyers.

18 MR. MARTINEZ: We --

19 JUSTICE KENNEDY: First thing --

20 MR. MARTINEZ: -- we would --

21 JUSTICE KENNEDY: -- we look at --

22 MR. MARTINEZ: -- that you don't have to do
23 that.

24 JUSTICE KENNEDY: -- when we -- the first
25 thing we look at in a sufficiency question is, well,

1 what are the instructions? So you want to say, oh,
2 well, don't look at instructions?

3 MR. MARTINEZ: Well, I think -- I think,
4 Your Honor, in -- in the -- the vast majority of cases,
5 the instructions are going to correctly reflect the --
6 the State statute that's being charged.

7 JUSTICE KENNEDY: But -- but you -- but you
8 say that we shouldn't look to jury instructions when
9 assessing the deficiency of the evidence. I -- I -- I
10 think that's an astounding proposition.

11 MR. MARTINEZ: I -- I don't think it's
12 astounding at all, Your Honor, and I think that's
13 expressly what the Court said in the Jackson case. If
14 you look at the footnote 16 of Jackson, the Court said
15 that, when conducting the sufficiency analysis, that --
16 that the -- the analysis should be conducted with,
17 "explicit reference to the substantive elements of the
18 criminal offense as defined by State law."

19 JUSTICE KAGAN: That suggests that you
20 wouldn't even look to the indictment. That you would
21 just look to the statute.

22 MR. MARTINEZ: I think you would have to
23 look to the statute, but the indictment would tell you
24 which statute is being -- is being charged.

25 JUSTICE KENNEDY: Well, it's -- it's,

1 frankly, a style point rather than a substantive point.
2 But it -- it -- it does seem to me that we should not
3 put that in the opinion.

4 MR. MARTINEZ: Well, I think that you
5 shouldn't put that into the opinion. I -- I would agree
6 on that -- with you on that because I think that -- I
7 think that, on our first argument, what you should
8 clarify and you should -- you can apply the same rule,
9 essentially, that the Court has applied in the civil
10 context when you've recognized that -- that jury
11 instructions and sufficiency review are essentially
12 on -- on two different tracks.

13 And when the -- the issue in the case is an
14 instructional error, then I think it's fair to look to
15 what the parties said about the instructional error.
16 But if the issue is sufficiency and there is -- there is
17 no dispute -- if the issue is sufficiency, then I think
18 the place to look would be the -- the elements of the
19 crime as defined by the statute. I think that's what
20 Jackson says, and I think that's what the Court
21 essentially held in -- in the civil context in these
22 cases --

23 JUSTICE KAGAN: So Mr. Martinez, just --

24 MR. MARTINEZ: -- like Praprotnik and Boyle.

25 JUSTICE KAGAN: I'm sorry. Just going back

1 to this question of whether it's the statute or the
2 indictment, you think you just look to the indictment to
3 tell you which statutes to look to, but if the
4 indictment would, let's say, add an extra element, that
5 doesn't matter? You should -- you should look to the
6 statute in the --

7 MR. MARTINEZ: Yes.

8 JUSTICE KAGAN: -- in the same way that
9 you're suggesting here we shouldn't look to the
10 instructions?

11 MR. MARTINEZ: I -- I think what the -- the
12 purpose of the indictment is to give the defendant
13 notice of the -- the crime with which he is charged.
14 But a lot of times, as the Court well knows, the
15 indictment is going to be a lengthy document that
16 contains a lot of allegations, a lot of different facts.
17 And what this Court has made clear is that, just because
18 the indictment says something happened at a certain time
19 or -- or in the narrative of a description of the
20 offense it includes some information, that doesn't mean
21 that the government is required to prove everything
22 that's identified there.

23 JUSTICE KAGAN: But -- but I guess I -- it
24 is -- that does seem a little bit troubling to me just
25 because of the function of an indictment is providing

1 notice, that if the indictment gets the statute wrong,
2 that -- that the government should be stuck with that
3 because that's what -- you know, that's what the
4 defendant now thinks is the charge.

5 MR. MARTINEZ: I -- I think that, in a case
6 like -- and I -- it may be that -- that in a different
7 case where -- I would have to see the indictment
8 that they -- you're hypothesizing, Justice Kagan. But
9 in a case like this, where the indictment says this is
10 the statutory offense and -- and -- and it -- and it
11 identifies the statutory code provision and it says
12 "unauthorized access," so it makes clear that the
13 conspiracy being alleged here is the unauthorized access
14 branch of a 1030(a)(2) violation.

15 I think that -- that shows you what the --
16 you know, that points to the law that needs to be
17 applied.

18 JUSTICE GINSBURG: I thought that the
19 government agreed that, if the charge in the indictment
20 was "and," A "and" B, the government would have to prove
21 A and B -- if that was what the indictment charged.

22 MR. MARTINEZ: I think if the -- if the
23 indictment had said that the conspiracy here was to
24 do -- was -- was to do A and B, the normal rule is that
25 if the -- that charge says "A and B," the government

1 could nonetheless prove the conspiracy theory under A or
2 B, and then the jury instructions could -- could so
3 specify.

4 And so I think -- I -- I think that's --
5 that's fairly well-established that the government can
6 charge in the conjunctive in that sense.

7 But I think what's important for this case
8 is that the -- the indictment in this case was very
9 specific. It changed from the original indictment,
10 which had the -- alleged the broader conspiracy to -- to
11 both commit unauthorized access and to exceed authorized
12 access, and it went to a narrower conspiracy that just
13 charged unauthorized access.

14 And that's why Petitioner's counsel said
15 repeatedly in his briefs and at oral argument on appeal,
16 this was an unauthorized access case from start to
17 finish.

18 CHIEF JUSTICE ROBERTS: Counsel, you can --
19 you can imagine cases, can't you, where the instruction
20 on an additional element could cause prejudice to the
21 defendant?

22 MR. MARTINEZ: I -- I think you -- one could
23 imagine such a case. And I think that the proper --

24 CHIEF JUSTICE ROBERTS: Try, just for an
25 example, if the additional element would cause the

1 reasonable jury to focus on particular evidence,
2 particularly damning evidence that they might otherwise
3 not have highlighted in their discussion.

4 MR. MARTINEZ: Mr. Chief Justice, I think --
5 in a case like that, I think the -- the proper way to
6 analyze that case would be the way you would analyze any
7 case where the -- the root error is an instructional
8 error. And -- and you would look to that, and if you
9 thought it was prejudicial, you might remand the case
10 or -- or vacate the conviction but allow for a new
11 trial.

12 But that's not what Petitioner is asking
13 for. What he is asking for is an acquittal, despite the
14 fact that the jury found with respect to all of the
15 actual elements of the crime. There was sufficient
16 evidence as to those actual elements.

17 And I think the other point to add is -- is
18 that this is not a case -- this particular case does not
19 involve the kind of confusion that you're hypothesizing.

20 Petitioner argued this -- a confusion theory
21 in the court of appeals, and the court of appeals -- and
22 this is at page A-10 of the Petition Appendix -- the
23 court of appeals expressly rejected the theory. The
24 court of appeals said that -- that if, you know, the --
25 the only error here was the erroneous jury instruction,

1 and if that jury instruction had any effect in this
2 case, it worked only to the benefit of the defendant.

3 I mean, Petitioner here really got a trial
4 that was -- that was biased in his favor, which is very
5 unusual for -- for -- for a defendant. And what he's
6 trying to do is -- is piggyback off of a trial that was
7 biased in his favor and nonetheless, you know, sort of
8 piggyback on that error and get -- get a -- an appeal
9 that's -- that's in his favor.

10 JUSTICE SOTOMAYOR: Let -- let -- let me --
11 I've been trying to break this down.

12 Let's assume that this had been charged as
13 "or."

14 MR. MARTINEZ: In -- in the jury
15 instruction?

16 JUSTICE SOTOMAYOR: In the jury instruction.

17 MR. MARTINEZ: Yes.

18 JUSTICE SOTOMAYOR: And you concede there
19 was no evidence of the second prong of the "exceeding
20 authorized." How would we look at the case then? It's
21 not A plus B, and we know they had to have found A and
22 B, and if they were wrong on B, they still found A.

23 MR. MARTINEZ: Just --

24 JUSTICE SOTOMAYOR: This is -- we're not
25 sure which they did, A or B.

1 MR. MARTINEZ: Right. And I just want to be
2 clear. I --

3 JUSTICE SOTOMAYOR: And B is not actionable,
4 let's just say, or there's insufficient --

5 MR. MARTINEZ: By assumption, if we assume
6 and -- and that -- we are -- we do not concede that we
7 think there is overwhelming evidence of both A and B.
8 But if you were to assume that there were not evidence
9 of the extra -- of the extra element, I think then the
10 question would be whether there was some sort of
11 unanimity instruction that would have been required to
12 specify which particular theory.

13 It's not this case and, you know --

14 JUSTICE SOTOMAYOR: But that's interesting
15 because I -- I -- I'm not sure that that's true.

16 MR. MARTINEZ: Well, I think in -- I -- I
17 think in this case because of the fact that A and B are
18 two different ways of committing the same crime, you
19 would not need an -- a unanimity instruction. But I --
20 I think -- I take it that Petitioner would have a
21 different view of that, and that would pose a -- a legal
22 question that obviously the parties could brief in an
23 appropriate case. It would be a slightly more
24 complicated --

25 JUSTICE SOTOMAYOR: My hypothetical was that

1 B is not statutorily proper.

2 MR. MARTINEZ: Oh, that B is not a --

3 JUSTICE SOTOMAYOR: Yes.

4 MR. MARTINEZ: -- not a proper at all.

5 Well, in that case, I think that -- that --
6 that that would posit harder questions for the
7 government, because there, I think, there would be
8 some -- there could potentially be confusion that it's
9 possible that the jury might have convicted on -- on a
10 theory that's not legally viable.

11 So just to -- to go back, Your Honors, I
12 think that the purpose of sufficiency review, both
13 from -- from Jackson and the due process origins of --
14 of sufficiency review, that they make clear the jury
15 instructions are distinct. This Court's decisions in
16 Praprotnik and Boyle make clear that forfeiture in the
17 context of jury instructions doesn't carry over into the
18 sufficiency context.

19 And I think the practical point is very
20 significant here, which is that his rule is only going
21 to have an effect in cases where a jury has found the
22 defendant guilty as to all the actual elements of the
23 crime, where there's sufficient evidence as to all the
24 actual elements of the crime, and where there's no
25 confusion.

1 And so we think this -- this is a rule
2 that's designed to produce -- designed to produce
3 windfall acquittals.

4 JUSTICE KAGAN: Suppose you took a converse
5 case where the instructions favored the government and
6 the defendant didn't object, is convicted, then brings a
7 sufficiency claim. Do you again say it really is
8 measured as against the statute? It has nothing to do
9 with the instructions?

10 MR. MARTINEZ: Yes. We think that if -- if
11 there had been an obvious clerical error in -- in the
12 defendant's favor and he had made all the right
13 arguments at trial about sufficiency and -- and -- we
14 don't think that the -- the error on the -- on the
15 instructional point would carry over into -- into the
16 sufficiency-of-the-evidence review. So we have a
17 neutral rule that really applies equally to both sides.

18 If there are no more questions as to the
19 first question presented, perhaps I can turn to the
20 statute-of-limitations issue.

21 JUSTICE SCALIA: You know, I -- I have a --
22 sort of a threshold question on that. Your -- your
23 friend says that he really doesn't have to demonstrate
24 that the statute here is jurisdictional because, even if
25 it's not jurisdictional, he wins anyway.

1 Do -- do you agree with that?

2 I don't know what the plain error is if
3 it's -- if it's not jurisdictional.

4 MR. MARTINEZ: We don't think there is a
5 plain error, partly because it's not jurisdictional and
6 partly for other reasons.

7 Maybe I could step back and just give --
8 give the Court my understanding of how I understand the
9 arguments that he's making.

10 I think he's got basically three distinct
11 arguments. The first is -- is that it's jurisdictional,
12 which would mean that it's not waivable, that the court
13 always has a duty to -- to raise it at any time.

14 The second argument --

15 JUSTICE SCALIA: In which case there would
16 be plain error.

17 MR. MARTINEZ: In which case, I think -- I
18 think what --

19 JUSTICE SCALIA: In -- in which case the --
20 the -- the trial court's failure to raise it would be
21 error.

22 MR. MARTINEZ: I -- I think it would be
23 error, but I think what Petitioner would say is that he
24 doesn't have to satisfy the plain-error rule because, if
25 it's a jurisdictional, then it can be raised --

1 JUSTICE SCALIA: That's true.

2 MR. MARTINEZ: -- and must be raised at any
3 time.

4 JUSTICE SCALIA: That's true.

5 MR. MARTINEZ: So I think his second
6 argument is that he -- he can get de novo review even if
7 it's not jurisdictional if he raises it for the first
8 time on appeal.

9 And I think his third argument is he has --
10 he can get plain-error review.

11 We think each of these arguments is wrong.

12 First of all, with respect to the
13 jurisdictional point, this Court has said for over 140
14 years that the statute of limitations is a matter of
15 defense that the defendant has the burden of introducing
16 into the case. That's completely contradictory to the
17 idea that the statute of limitations is jurisdictional,
18 which would mean that the government, as the -- the --
19 the party invoking the jurisdiction of the court, would
20 have the burden of establishing compliance with the
21 statute of limitations.

22 JUSTICE SOTOMAYOR: How do you deal with his
23 argument that we should -- if, in a civil case, we make
24 a presumption that a statute of limitations is a
25 claim-processing rule?

1 In a criminal case, we should have the
2 opposite presumption because of, A, the rule of lenity
3 and, B, because it is on the -- a question of the power
4 of the government.

5 MR. MARTINEZ: I don't think -- I don't
6 think you should have that presumption. I think that --
7 that this Court -- the ship has already sailed to some
8 extent because this Court -- again, for -- for 140
9 years, from Cook through Biddinger to this Court's
10 decision in Smith just a few terms ago -- has said
11 that -- that the statute of limitations is a matter of
12 defense that has to be introduced into the case by the
13 defendant.

14 And I think if -- if Petitioner's primary
15 argument, his jurisdictional argument were accepted,
16 that rule would go out the window, and what would be
17 required is that the government and the Court would have
18 to establish and raise the jurisdictional -- would --
19 would have to establish the statute of limitations was
20 not violated in every case.

21 JUSTICE ALITO: Why shouldn't the rule in
22 this context be the same as the rule for timely filing a
23 Federal habeas petition?

24 MR. MARTINEZ: Well, I think that -- for --
25 for a couple reasons, the most important of which is

1 that Rule 52(b) governs this case where Rule 52(b) does
2 not directly govern the filing of a -- of a habeas
3 petition.

4 And so Rule 52(b) makes clear that the --
5 the exclusive means by which a criminal defendant can
6 obtain appellate review of a -- of a claimed error where
7 they didn't object below is by satisfying the four-prong
8 Olano standard. And in the habeas context, that rule
9 doesn't apply.

10 If you look at the Court's analysis in one
11 of the habeas cases, which was drawn on by the other,
12 the Day v. McDonough case, the Court emphasized that its
13 holding was valid there because, in part, there was no
14 rule to the contrary. Here you have a rule to the
15 contrary.

16 I think the second point that could be made
17 on those -- on that -- on this front is that the habeas
18 context is special. And I think the Court's decisions
19 in both Day and in Wood v. Milyard really emphasize that
20 what's driving those cases is a desire to have a rule
21 that -- that takes account of the habeas context, the
22 desire to have finality with respect to criminal
23 convictions, and the desire to harmonize the rule that
24 applies to statute of limitations with the rules that
25 apply to other threshold barriers to habeas relief.

1 JUSTICE ALITO: You think that the State's
2 interest in the habeas context in finality and comity is
3 stronger than the defendant's interest in a direct
4 criminal appeal in requiring that the charge be filed on
5 time where what's at stake is -- is a criminal
6 conviction?

7 MR. MARTINEZ: I think that -- that -- I
8 think that criminal defendants are obviously going to
9 have an interest in raising arguments that they think
10 are meritorious when they didn't raise it below. I do
11 think that there's a very significant legal difference
12 in that those types of policy concerns don't really --
13 are not really applicable in -- when you're talking
14 about a direct appeal because Rule 52(b) sort of blocks
15 that.

16 And I also think that the -- the reasoning
17 of cases like Day and Wood really does turn on the fact
18 that you had a statute of limitations rule and you had a
19 bunch of other rules governing sort of threshold
20 barriers to habeas relief. Rules about procedural
21 default, rules about exhaustion, rules about
22 retroactivity. And what the COURT said in both of those
23 cases is that it's trying to harmonize those rules. And
24 the court --

25 JUSTICE ALITO: But -- but just take a

1 situation where, under the habeas rule, it would be
2 proper for the -- the district court to raise the
3 statute-of-limitations defense on its own motion. Why
4 would that not fit within the plain-error rule?

5 MR. MARTINEZ: I think that -- that, for it
6 to fit within the plain-error rule, and so we would be
7 shifting, I think, to Rule 52(b), you would -- the
8 defendant would need to show that there's both an error
9 and that the error is obvious. And as Justice Scalia
10 was hinting at, perhaps, with his question earlier, we
11 don't think there is an error here. The statute of
12 limitations is an affirmative defense; and therefore,
13 the burden is on the defendant to raise that issue.

14 In -- in the Cook case, the Court made clear
15 that, if there's an indictment that alleges a -- a crime
16 that's outside the statute of limitations, that
17 indictment is nonetheless not necessarily or inherently
18 flawed unless the statute-of-limitations defense is
19 raised and -- and subsequently litigated.

20 JUSTICE SCALIA: It still in all doesn't
21 make any sense to say we're going to let him off on
22 habeas because of inadequate assistance of counsel who
23 failed to raise the statute of limitations and yet he
24 cannot raise that point on appeal --

25 MR. MARTINEZ: I --

1 JUSTICE SCALIA: -- on direct appeal. Make
2 him go through -- why? Why -- why make the society
3 incur more expense, make him probably languish in jail
4 when he's going to -- going to get out on habeas? Why
5 not decide that statute-of-limitations thing in the
6 direct appeal?

7 MR. MARTINEZ: Well, I think -- I think --

8 JUSTICE SCALIA: Bear in mind I dissented in
9 both Day and Wood, so --

10 MR. MARTINEZ: As I recall, Your Honor, I
11 think -- I think there's a -- there's a couple of
12 reasons. The strongest is that the difference in the
13 habeas context is that the record can be developed.
14 When you're looking at a case on Rule 52(b), this Court
15 has always treated review under 52(b) as being limited
16 to the existing record, whereas in habeas case, the
17 record can be developed.

18 And that's very important in two fundamental
19 ways. First, it's important to know why the defense was
20 not raised by the defendant at the appropriate time.
21 The -- the defendant is going to have -- and including
22 in this case, could have a very strategic reason for not
23 raising the defense during the trial.

24 And I can get into that in -- in -- in this
25 particular case if the Court is interested.

1 In the second -- so that's one reason why
2 it's important to have a record. And the second reason
3 is the government has to have the ability to -- to
4 introduce evidence if it wants to rebut or establish
5 compliance with the statute-of-limitations defense.

6 That's what this Court said in Cook. In
7 Cook the whole point of the case was that it's unfair
8 to -- to allow for a -- a -- a indictment to be
9 dismissed on a demurer because that would deprive the
10 government of its right to reply and give evidence to
11 establish compliance with the statute of limitations
12 once the defense is raised.

13 So on -- on direct review, the record would
14 be frozen and you wouldn't be able to look out outside
15 the record, whereas on habeas you would be able to look
16 outside the record.

17 And in addition, I think the -- it's very
18 important to -- to sort of look at the theoretical basis
19 for the -- the error and -- and -- and recognize that it
20 doesn't satisfy Rule 52(b) in the way that that rule
21 has -- has traditionally been thought about.

22 First of all, Rule 52(b) is generally about
23 things that the trial judge is supposed to notice on his
24 own. And what this Court has said about statute of
25 limitations, including in the Day case, is that the

1 trial court doesn't have an obligation to serve as
2 the -- the co-counsel or the paralegal for -- for the
3 defendant. It doesn't have an obligation to go
4 searching through the record and finding potential
5 defenses for the defendant. Rather, that's something
6 that the defendant himself has an obligation to do.

7 JUSTICE ALITO: Suppose the court of appeals
8 in -- in a direct appeal sees that the statute of
9 limitations for a particular offense is six years and
10 the indictment was filed 25 years after the event. Can
11 the court of appeals say to the government, look at
12 this. It looks like it's too late. Do you have any
13 explanation for this? And the government says, well,
14 no, doesn't -- we can't think of anything. Do you have
15 to wait until habeas to correct that?

16 MR. MARTINEZ: I -- I think that the --
17 the -- the better way is to wait until habeas to -- to
18 correct that. And the reason for that is that
19 Rule 52(b) is limited to the existing record. And as
20 Your Honor, you know, made clear in your hypothetical,
21 the only way you can figure out that there's an error in
22 that case is by looking outside of the existing record
23 and asking the government, well, what's your
24 explanation? What evidence do you have? What would you
25 have done differently if this had been raised before?

1 JUSTICE KAGAN: Well, that might be true
2 sometimes, but it doesn't seem as though that's the
3 ordinary case. I mean, why would you have -- you
4 could -- you can make an exception for cases in which
5 there really -- the government has -- is able to come in
6 and say, we really need to develop the record. But
7 where that's not true, why wouldn't you decide this as
8 quickly as you could?

9 MR. MARTINEZ: I think I appreciate the --
10 I -- the sort of practical concern embedded in that
11 question. I think as a formal matter you would still
12 need to be looking outside the record.

13 JUSTICE BREYER: Why formal? I mean, we've
14 been through this many times. It comes up in all kinds
15 of instances. People are always alleging -- not always
16 but often allege that their counsel was inadequate.
17 Sometimes it would be possible to know that on direct
18 appeal, but in the mine run of cases, you want to find
19 out from the counsel why he did it.

20 MR. MARTINEZ: Right.

21 JUSTICE BREYER: And therefore I think every
22 circuit -- I don't know what this Court has said -- has
23 said that you raise IAC claims in collateral
24 proceedings.

25 Now, if we start making exceptions from

1 that, you're going to get a jurisprudence of when the
2 exception comes up --

3 MR. MARTINEZ: I think --

4 JUSTICE BREYER: -- and when it doesn't and
5 how clear does it have to be, and then we'll just add
6 further delay because I guess if I were a court of
7 appeals judge and I saw some obvious mistake, I would
8 say, go file it tomorrow.

9 MR. MARTINEZ: Right. And I -- and I think
10 that's the better way to handle this because the
11 alternative is to -- to -- because we see some cases
12 that look like they'd be pretty easy to decide, is to
13 say, well, let's -- let's erode what would otherwise be
14 pretty hard-and-fast rules about how Rule 52(b) is
15 supposed to operate.

16 Again, we don't think there is an error
17 under Rule 52(b) because this isn't something that the
18 trial judge is supposed to figure out on his own. We
19 don't think that an error is plain on the record because
20 the record itself is not sufficient in and of itself to
21 show that there is an error. And so we think that if
22 you have a rule that sometimes you should bring in on
23 plain error, sometimes you should bring in in habeas,
24 it's going to create a lot of confusion both for courts
25 and for litigants. You're going to be litigating about

1 when the exception applies, when the exception doesn't
2 apply.

3 And I think the key thing that --

4 JUSTICE GINSBURG: Of course -- of course,
5 if there was a -- a strong statute-of-limitations bar,
6 isn't it likely that the trial judge would suggest to
7 defense counsel, don't you want to raise a -- a
8 limitations defense?

9 MR. MARTINEZ: I think that's very, very
10 likely that the trial court might do that. I -- we
11 would think that, because there are sometimes strategic
12 reasons for not raising the defense, you know, the --
13 the trial judge should do it in a way that it doesn't
14 interfere with those strategic concerns.

15 We don't think that there is a problem if
16 the judge does it that way, but we certainly don't think
17 there's an obligation, and we don't think it's an error
18 if the judge doesn't do that.

19 CHIEF JUSTICE ROBERTS: What type of
20 strategic reason are you talking about?

21 MR. MARTINEZ: Well, I think there -- there
22 could be a couple of them. In this case, for example,
23 the -- the original indictment was undoubtedly filed
24 within the limitations period. Now that indictment was
25 superseded. But if the defendant had raised in a

1 pretrial motion a motion saying, you know, that the
2 superseded indictment's out of time because it doesn't
3 relate back and he had won, the effect of that would
4 have been just to resurrect the original indictment
5 which had never been dismissed.

6 And so if he had actually raised this before
7 trial and he had succeeded on his statute-of-limitations
8 challenge to the superseding indictment, we would have
9 just been back in the world where the original
10 indictment applied. And, as the Court has noted, the
11 original indictment was somewhat broader than -- than
12 the superseding indictment.

13 And so that might have been a good reason.

14 In another case, the -- there may be
15 circumstances in which a defendant's
16 statute-of-limitations defense will be in contradiction
17 to his defense of innocence. You know, it's one thing
18 to say, I was in Hawaii when the crime was committed,
19 and it's another thing to say, I committed the crime on
20 January 1st and not on, you know, March 15th.

21 And so there may -- you know, the defendant
22 might -- might look at those arguments and decide he's
23 going to pick the -- the stronger horse, and he might
24 decide he doesn't want to raise the
25 statute-of-limitations defense for that reason.

1 JUSTICE SOTOMAYOR: Could you summarize for
2 me your position on three arguments he made.

3 MR. MARTINEZ: Sure.

4 JUSTICE SOTOMAYOR: I -- I know the
5 jurisdictional one.

6 MR. MARTINEZ: Yes.

7 JUSTICE SOTOMAYOR: But then there's the --

8 MR. MARTINEZ: So --

9 JUSTICE SOTOMAYOR: -- the other two.

10 MR. MARTINEZ: So -- so on -- on his claim
11 for de novo review on appeal, we think that's
12 inconsistent with Rule 52(b), and we think that that
13 misreads Wood and Day, the habeas cases, because those
14 are really about the habeas context.

15 He makes another argument about Nguyen. We
16 don't think Nguyen is a -- a kind of all-season pass
17 for -- for ignoring Rule 52(b).

18 And then, finally, with respect to plain
19 error, we think there are two overriding arguments. The
20 first one is that we don't think there is an error here.
21 For there to be an error, we think the statute of
22 limitations would need to be something that the -- the
23 trial court is supposed to have an obligation to sort
24 out. We don't think the trial court has that obligation
25 because this Court's cases say that -- that the statute

1 of limitations is an affirmative defense that has to be
2 raised by the defendant.

3 Even if you disagree with us on that, we
4 think that -- that Cook makes clear that, whenever a
5 statute-of-limitations defense is raised in a case, the
6 government has to have the opportunity to reply and give
7 evidence. And what that means is that, if the defense
8 is not raised, that the government has not even had the
9 opportunity to explain what evidence it would have
10 brought in, what that means is that the record as it
11 stands, the existing record, is not sufficient to
12 diagnose an error because you would have to essentially
13 figure out, well, could the government have responded?
14 You know, would they have argued that -- that there was
15 tolling of the statute of limitations? Would they have
16 introduced a different set of evidence? You would have
17 to, essentially, reimagine how the trial would have gone
18 if -- if the defense had been raised at the appropriate
19 time.

20 And if you're trying to reimagine that,
21 that's another way of saying the error is not plain on
22 the --

23 JUSTICE SOTOMAYOR: So what would you argue
24 if this was brought up on habeas?

25 MR. MARTINEZ: On habeas?

1 JUSTICE SOTOMAYOR: Let's assume counsel
2 comes in and says, I just didn't notice it.

3 MR. MARTINEZ: In this particular case, Your
4 Honor?

5 JUSTICE SOTOMAYOR: Yes. And -- and it's
6 very clear -- and the evidence was super clear that this
7 was past the statute of limitations.

8 I don't want to get into the facts of this
9 case.

10 MR. MARTINEZ: Well, I -- I -- I think -- I
11 think -- in some cases, I think it would be fair for --
12 for the parties to litigate why the defense wasn't
13 raised. So if there -- if it looked like there may have
14 been a strategic reason, such as there may have been in
15 this case, then the parties could litigate that.

16 I think as well, if there were -- if there
17 were no dispute about the merits, then I think that
18 would be a case in which a habeas relief may well be
19 appropriate if -- if the party -- if the defendant could
20 establish the requirements of ineffective assistance of
21 counsel.

22 We ask the Court to affirm.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Four minutes, Mr. Jaffe.

25 REBUTTAL ARGUMENT OF ERIK S. JAFFE

1 ON BEHALF OF THE PETITIONER

2 MR. JAFFE: On the issue of whether or not
3 the jury instructions are binding, several points:

4 First of all, the confusion persists to this
5 day. Just as Justice Alito is pointing out that it's
6 very difficult to see the difference between
7 unauthorized and exceeding authorized access, that too
8 would have infected the jury. We could not prove it
9 sufficiently to show prejudice, but they cannot prove it
10 sufficiently to show harmlessness or inevitability of a
11 conviction had you not so instructed them.

12 Second of all, I believe that Jackson v.
13 Virginia talks from a jury-centric perspective. The
14 issue is not the statute. The issue is whether a
15 rational jury could have done what they did. And that
16 only works if you look at the instructions. It does not
17 work if you look at some hypothetical statute that they
18 didn't think they were applying. They thought they were
19 doing something different.

20 Third, their objection that we -- we
21 acknowledged that this was only about unauthorized
22 access is curious because he cites the appellate stuff
23 where there was new counsel, yet his own side's briefs
24 at the trial level recognized that trial counsel was
25 confused.

1 Yes, after that confusion was resolved
2 post-verdict, we argued. Okay. The government
3 abandoned it. That's fine. We absolutely argued that.

4 But at trial the harm was already done.
5 They confused themselves, they confused the jury, and
6 apparently confused the judge.

7 Third, it seems to me that the phrase
8 "unauthorized access" is not actually even in the
9 statute, which just goes to my point that there would be
10 confusion as to access without authorization and access
11 exceeding authorization. Both could have theoretically
12 been part of the rubric of unauthorized access. Neither
13 would be authorized there.

14 The -- moving onto the -- well, I guess the
15 last thing I'd say is every court to consider the
16 question, if this had been in the original indictment
17 where it also said "and" and in the jury instructions,
18 every court to consider this issue, including the Fifth
19 Circuit below, including the First Circuit, would have
20 held the government to it.

21 I don't think the government denies that.
22 They just say if it's in the indictment alone they can
23 do either/or. But if it's in the indictment and in the
24 instructions, they concede that the so-called law of the
25 case is binding.

1 The easy way for this Court to --
2 JUSTICE GINSBURG: The law of the
3 case you -- you are -- you are asserting that, if there
4 is a mistake but it's the law of the case, that applies
5 on appeal. As -- and I thought that law of the case
6 applied to the same court, different stages of
7 litigation, not that a -- a court of appeals has to
8 perpetuate a trial court error.

9 MR. JAFFE: Law of the case is a terrible
10 name. We unfortunately didn't come up with it. The
11 government -- we both agree that it's not an accurate
12 descriptor. It's just the phrase that's been used in
13 all the cases. At the end of the day, the issue is are
14 the instructions binding at the sufficiency stage
15 whatever court you're in? That's really the issue. The
16 law-of-the-case cases don't apply because they're
17 misnamed.

18 Turning to the statute of limitations, what
19 I'd say is this: There is error when something is
20 contrary to law whether or not it was the judge's
21 obligation to raise that. The Apprendi -- the
22 post-Apprendi cases are the best examples of this. The
23 judge is applying pre-Apprendi law. It did not make a
24 mistake. We're not expected to anticipate Apprendi.
25 Yet on appeal those cases were considered erroneous

1 because this Court adopted Apprendi.

2 Again, it is not about whether you made an
3 objection or whether the Court should have thought of it
4 themselves. It is about the merits of the result, and
5 in this instance, we claim the statute of limitations
6 was violated. That is the error regardless of who
7 needed to raise it.

8 Talking about raising the issue: Again,
9 calling the statute of limitations the affirmative
10 defense is a little misleading. It is not an
11 affirmative defense. One has to plead it. One -- but
12 the government has to actually prove that they satisfy
13 it. It is a hybrid kind of creature, and Cook and those
14 cases deal with pleading because they wanted the
15 government to have the opportunity to respond.

16 We do not disagree. The government should
17 have the opportunity to respond, and in the First
18 Circuit, the Seventh Circuit, and the Sixth Circuit, if
19 there is some need for evidentiary submissions, they
20 just remand it. Get it done more quickly with the court
21 that actually heard the case, which makes a lot more
22 sense than waiting till habeas.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 The case is submitted.

25 MR. JAFFE: Thank you.

1 (Whereupon, at 11:06 a.m., the case in the
2 above-entitled matter was submitted.)

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A				
A-10 40:22	actionable 42:3	35:15,16 48:10	argued 5:21 6:1	authorized 7:7,16
a.m 1:13 3:2 65:1	acts 19:4	analyze 13:15 40:6	40:20 59:14 62:2	7:19,19 10:4
abandoned 30:21	actual 40:15,16	40:6	62:3	30:10,22 31:22
30:23,24 62:3	43:22,24	and/or 15:6	arguing 13:7,9,11	32:23 33:1,11,14
ability 52:3	add 37:4 40:17	answer 16:25 21:23	17:20 22:10	39:11 41:20 61:7
able 32:7 52:14,15	55:5	anticipate 63:24	argument 1:12 2:2	62:13
54:5	added 4:21 15:12	anybody 13:17	2:5,8 3:3,7 5:16	avoid 27:8
above-entitled 1:11	addition 52:17	14:1	5:17 8:22 10:9,13	aware 15:23
65:2	additional 39:20,25	anyway 14:23	10:13 11:20 16:20	
absolutely 15:14	addressed 32:16	44:25	17:6 19:13 20:15	B
62:3	adds 7:2	apparently 62:6	20:19 21:1 22:8,9	B 10:14,15,17
abstract 17:1	adhere 26:14	appeal 19:24 21:6	24:4,13,24 25:3,5	12:15,22 13:2,3
accept 23:3	admittedly 29:1	22:24 25:14 29:4	25:25 29:20 31:5	38:20,21,24,25
acceptable 17:3	adopt 28:11	29:4 32:7 39:15	31:6,7,7 34:10	39:2 41:21,22,22
accepted 47:15	adopted 64:1	41:8 46:8 49:4,14	36:7 39:15 45:14	41:25 42:3,7,17
accepting 24:4	affirm 60:22	50:24 51:1,6 53:8	46:6,9,23 47:15	43:1,2 47:3
accepts 6:11 15:25	affirmative 50:12	54:18 58:11 63:5	47:15 58:15 60:25	back 8:21 10:14
access 7:7,7,9,9,10	59:1 64:9,11	63:25	arguments 20:19	12:5 23:23 26:4
7:11,11,14,16,17	affirmatively 29:12	appeals 40:21,21	44:13 45:9,11	36:25 43:11 45:7
7:19,20 10:3,4	29:14	40:23,24 53:7,11	46:11 49:9 57:22	57:3,9
30:11,14,22 31:3	ago 47:10	55:7 63:7	58:2,19	bar 19:18,22 23:13
31:9,22 32:24	agree 8:14 9:7	APPEARANCES	asked 7:24 31:21	56:5
33:1,4,11,14,15	19:17 32:18 36:5	1:14	asking 9:8 17:15	barriers 48:25
33:20,23 34:1,6	45:1 63:11	appellate 48:6	40:12,13 53:23	49:20
38:12,13 39:11,12	agreed 5:12 38:19	61:22	asserting 63:3	based 25:18 32:4
39:13,16 61:7,22	agrees 8:6	appendix 33:12	assessing 34:14	baseline 3:15
62:8,10,10,12	Alito 6:14,17,24	40:22	35:9	basically 21:11
access' 33:14	16:2,19 17:13,17	applicable 49:13	assistance 21:1	45:10
accessing 9:22	18:6 32:9,22 33:8	application 20:3	50:22 60:20	basis 5:15 52:18
accessor 33:16	34:7 47:21 49:1	applied 17:11 36:9	assistance-of-cou...	Bear 51:8
accomplishing 8:4	49:25 53:7 61:5	38:17 57:10 63:6	19:21	beginning 31:6
accord 20:5	Alito's 11:24 12:3	applies 44:17 48:24	Assistant 1:17	begs 11:15
account 48:21	all-season 58:16	56:1 63:4	assume 23:8 41:12	behalf 1:15,19 2:4
accurate 5:9,11	allegations 19:2	apply 26:20 36:8	42:5,8 60:1	2:7,10 3:8 29:21
63:11	37:16	48:9,25 56:2	assumed 8:16,17	61:1
accurately 11:18	allege 54:16	63:16	8:18	believe 8:17 12:2
acknowledged	alleged 23:21 34:2	applying 61:18	assuming 11:23	17:1,23 19:8 24:7
61:21	38:13 39:10	63:23	18:21	27:5 28:19,22
acknowledges	alleges 50:15	appreciate 54:9	assumption 42:5	61:12
18:19	alleging 54:15	Apprendi 63:21,24	astounding 35:10	benefit 5:7 41:2
acquittal 16:7,12	allow 20:7 40:10	64:1	35:12	Benes 27:25 28:19
33:7 40:13	52:8	appropriate 42:23	attention 11:22	best 11:17 63:22
acquittals 30:5	allowed 29:3,5	51:20 59:18 60:19	authority 5:19 6:3	better 18:15 19:25
44:3	alter 33:16	arguable 25:2	6:8,12,19	31:15 53:17 55:10
acquitted 32:4	alternative 55:11	argue 6:10 12:7	authorization 9:23	beyond 4:1 9:21
	analysis 29:11	19:10 59:23	33:15,19 62:10,11	10:15 33:3

<p>biased 41:4,7 Biddinger 47:9 binding 13:11 61:3 62:25 63:14 bit 11:15 37:24 blocks 49:14 blue 20:24 Bowles 26:8,12,15 Boyle 36:24 43:16 branch 38:14 break 41:11 BREYER 12:12,20 13:17 14:7,11 54:13,21 55:4 brief 8:11 20:24 34:12 42:22 briefed 8:13 briefing 30:19 briefs 39:15 61:23 bring 23:18 24:16 29:4 55:22,23 bringing 28:3 brings 44:6 broader 23:4,5 33:9 39:10 57:11 brought 8:16 24:17 25:17 59:10,24 building 7:10,12 bunch 23:11 49:19 burden 5:5 12:8,9 18:11 21:25 22:2 46:15,20 50:13 burdens 22:3</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 cabin 17:23 26:1 cabined 20:21,22 call 22:20 calling 64:9 carry 43:17 44:15 case 3:4,11,17,25 4:23 5:16,17,22 6:20 7:25 10:6 11:8 12:5 14:7,9 15:16,19 16:23</p>	<p>18:5,8,18 21:3,5 21:25 22:4 23:2 26:7,9 27:13,25 28:23 29:6,8 30:11,13,17,19,19 31:8,9 32:8 33:24 35:13 36:13 38:5 38:7,9 39:7,8,16 39:23 40:5,6,7,9 40:18,18 41:2,20 42:13,17,23 43:5 44:5 45:15,17,19 46:16,23 47:1,12 47:20 48:1,12 50:14 51:14,16,22 51:25 52:7,25 53:22 54:3 56:22 57:14 59:5 60:3,9 60:15,18 62:25 63:3,4,5,9 64:21 64:24 65:1</p> <p>cases 8:25 11:20 19:25 20:23 23:11 24:8 25:25 26:17 27:20 28:23 30:4 35:4 36:22 39:19 43:21 48:11,20 49:17,23 54:4,18 55:11 58:13,25 60:11 63:13,16,22 63:25 64:14</p> <p>categorization 25:21</p> <p>cause 39:20,25 ceased 33:5 ceiling 13:21,25 certain 17:22 28:4 37:18 certainly 6:1 12:7 16:16 56:16 cetera 7:5 challenge 57:8 challenged 34:3 chance 25:4,17 change 31:16,18 changed 39:9</p>	<p>charge 9:17 14:11 14:12 19:2 30:8 31:11 33:23 38:4 38:19,25 39:6 49:4 charged 10:25 11:4 12:14,16,21 15:5 15:5,11 19:4 32:3 35:6,24 37:13 38:21 39:13 41:12 charges 10:24 charging 31:19 32:23 Chief 3:3,9 19:12 21:13,18,22 24:23 25:11 29:18,22 39:18,24 40:4 56:19 60:23 64:23 circuit 4:17 8:5,6 8:17,18 15:24 30:20 31:5 54:22 62:19,19 64:18,18 64:18 circuits 15:24 circumstance 33:18 circumstances 57:15 cite 20:23 25:25 cites 16:24 61:22 civil 27:21 28:16 30:4 36:9,21 46:23 claim 19:21 26:4 28:4 44:7 58:10 64:5 claim-processing 24:6 46:25 claimed 48:6 claims 25:8 54:23 clarify 10:24 36:8 clarity 28:2 clear 5:12 6:22,24 10:1 27:14 30:13 30:20 37:17 38:12 42:2 43:14,16 48:4 50:14 53:20</p>	<p>55:5 59:4 60:6,6 clearest 8:14 clearly 26:10 clerical 44:11 client 18:14 25:13 close 15:17 closely 32:17 closing 19:11 co-counsel 53:2 code 38:11 collateral 54:23 combined 9:20 come 9:13 10:16 15:24 54:5 63:10 comes 10:6,9 14:5 19:18 54:14 55:2 60:2 comity 49:2 comments 11:24 12:3 commit 30:13,22 31:2 34:1 39:11 committed 4:2 57:18,19 committing 32:21 42:18 compared 23:21 completely 46:16 compliance 46:20 52:5,11 complicated 42:24 complies 22:2 component 30:11 computer 9:22 33:14,16,20 concede 11:17 32:10 41:18 42:6 62:24 concedes 19:20 conceding 15:10,10 concern 54:10 concerning 3:11 concerns 49:12 56:14 conclude 23:16,17 conclusion 5:25 6:3</p>	<p>9:14 14:16 16:17 conducted 35:16 conducting 35:15 conference 31:20 conflated 24:8 confused 6:20,20 11:21 12:6,7 18:17,17,22 30:17 61:25 62:5,5,6 confusion 4:18 12:11 19:8 33:25 40:19,20 43:8,25 55:24 61:4 62:1 62:10 Congress 7:1 Congress's 28:2 conjunctive 39:6 consequence 28:5 consequences 3:12 28:8 32:1 consequently 29:7 consider 15:25 62:15,18 considerable 11:25 considered 63:25 consistent 30:2 32:14 conspiracy 6:23 19:3 30:13,22 31:1,2 34:1 38:13 38:23 39:1,10,12 constitute 6:12 contains 37:16 content 8:7 23:3 context 28:12 29:1 29:2 36:10,21 43:17,18 47:22 48:8,18,21 49:2 51:13 58:14 continued 19:5,10 continuing 26:18 contradiction 57:16 contradictory 46:16 contradicts 30:3</p>
--	---	--	---	---

<p>contrary 24:10 48:14,15 63:20 converse 44:4 converts 7:4 convict 10:14 16:4 convicted 6:7 9:17 9:18,20 43:9 44:6 conviction 11:3 40:10 49:6 61:11 convictions 34:4 48:23 convicts 16:6 Cook 47:9 50:14 52:6,7 59:4 64:13 correct 4:4 9:1,2 18:24 22:11,14 26:2 31:11 53:15 53:18 corrected 19:1 correctly 35:5 counsel 18:17,20 18:22 19:8,12,24 24:20 29:18 30:17 31:4 39:14,18 50:22 54:16,19 56:7 60:1,21,23 61:23,24 64:23 count 16:4,5,7,10 16:12,14 17:3,3,4 17:8 18:2,7,8,8 31:1 counts 16:6,23 34:5 couple 47:25 51:11 56:22 course 11:6 18:3 33:21 34:4 56:4,4 court 1:1,12 3:10 5:3,4 7:17 8:2,16 15:18 16:9,22 17:7,16 19:9,17 19:19 21:15,17 22:9 23:4 26:13 26:21 28:3,14 29:4,23 30:3 35:13,14 36:9,20 37:14,17 40:21,21</p>	<p>40:23,24 45:8,12 46:13,19 47:7,8 47:17 48:12 49:22 49:24 50:2,14 51:14,25 52:6,24 53:1,7,11 54:22 55:6 56:10 57:10 58:23,24 60:22 62:15,18 63:1,6,7 63:8,15 64:1,3,20 court's 8:9 26:11 28:7 32:6 43:15 45:20 47:9 48:10 48:18 58:25 courts 32:16 34:13 55:24 crazy 16:9 create 55:24 creature 64:13 crime 4:2 8:4 14:12 15:13 23:21 32:21 36:19 37:13 40:15 42:18 43:23,24 50:15 57:18,19 criminal 7:1 27:21 28:12,14 35:18 47:1 48:5,22 49:4 49:5,8 critical 3:17 11:22 cross 17:4 curious 61:22 cut 26:4 27:18</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 D.C 1:8,15,18 da-da-da 13:20 damning 40:2 date 23:20,21 32:25 33:1,4 day 17:24 25:10 29:7,7 31:20 48:12,19 49:17 51:9 52:25 58:13 61:5 63:13 de 46:6 58:11</p>	<p>deal 28:22 46:22 64:14 dealing 27:21 decide 7:24 51:5 54:7 55:12 57:22 57:24 decided 24:15 decision 8:24 17:2 17:3 25:19 32:6 47:10 decisions 43:15 48:18 declined 8:11 default 49:21 defendant 3:18 4:1 16:6,11 21:5 22:1 37:12 38:4 39:21 41:2,5 43:22 44:6 46:15 47:13 48:5 50:8,13 51:20,21 53:3,5,6 56:25 57:21 59:2 60:19 defendant's 44:12 49:3 57:15 defendants 30:5 49:8 defending 13:11 defense 23:23,24 46:15 47:12 50:3 50:12,18 51:19,23 52:5,12 56:7,8,12 57:16,17,25 59:1 59:5,7,18 60:12 64:10,11 defenses 24:25 53:5 deficiency 35:9 defined 35:18 36:19 defines 33:11 delay 55:6 deliberations 3:22 demonstrate 5:1 44:23 demurer 52:9 denies 62:21 Department 1:18</p>	<p>deprive 52:9 depth 28:20 describing 32:12 description 37:19 descriptor 63:12 designed 44:2,2 desire 48:20,22,23 despite 16:13 40:13 determine 3:18 develop 54:6 developed 51:13,17 diagnose 59:12 difference 7:6 16:20 17:18,18 49:11 51:12 61:6 different 4:8 12:1 13:15 16:19 21:8 24:13 28:11,15 30:25 31:24 32:12 32:20 36:12 37:16 38:6 42:18,21 59:16 61:19 63:6 differently 27:11 53:25 difficult 61:6 direct 19:24 49:3 49:14 51:1,6 52:13 53:8 54:17 directed 28:6 directly 48:2 disagree 6:9 22:23 59:3 64:16 disagrees 8:6 discrete 8:3,5,6,18 32:11,14 discusses 28:20 discussing 15:20 discussion 40:3 dismissed 52:9 57:5 dispute 8:3 32:24 33:25 36:17 60:17 disregard 5:4 dissented 51:8 distinct 7:5 16:23 43:15 45:10 distinction 17:23</p>	<p>26:3 distinctly 8:20 distinguish 10:3 distinguished 20:18 district 50:2 doctrine 16:1 document 37:15 doing 13:16 19:23 19:23,24 20:1 61:19 doubt 3:25 4:1,4 9:22 10:15 14:18 17:12 33:4 drawn 48:11 driving 48:20 due 43:13 duty 45:13</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 50:10 easiest 22:18 28:22 easy 55:12 63:1 effect 30:5 34:10 41:1 43:21 57:3 efficient 20:1 either 12:10 14:13 either/or 62:23 element 11:22 15:12 29:25 32:5 37:4 39:20,25 42:9 elements 4:21 8:7 8:19 35:17 36:18 40:15,16 43:22,24 embedded 54:10 embezzles 7:3 emphasize 48:19 emphasized 31:8 48:12 employed 33:5 employee 7:10,11 33:2,5,6 employee's 32:25 employer 33:2</p>
---	--	---	---	---

<p>employment 32:25 enacts 7:1 encourage 5:18 encouraged 6:7,10 encourages 25:1 ended 32:25 33:2 enforce 14:17,18 entirely 4:4 8:11 16:16 entitled 16:6,12 33:6,17 equally 44:17 equivalent 18:8 ERIK 1:15 2:3,9 3:7 60:25 erode 55:13 erroneous 11:10 13:5,10 30:1 31:20 32:10 40:25 63:25 erroneously 14:20 error 4:25 5:23 13:4 20:4 22:16 22:17,22 23:9,16 24:9,9,15,15,17 24:22 25:22 34:11 36:14,15 40:7,8 40:25 41:8 44:11 44:14 45:2,5,16 45:21,23 48:6 50:8,9,11 52:19 53:21 55:16,19,21 55:23 56:17 58:19 58:20,21 59:12,21 63:8,19 64:6 ESQ 1:15,17 2:3,6 2:9 essentially 32:20 36:9,11,21 59:12 59:17 establish 47:18,19 52:4,11 60:20 establishing 46:20 et 7:5 evaluated 3:20 Evans 32:6</p>	<p>event 53:10 evidence 3:16 4:5 5:24 6:22 10:18 11:2 14:10,12,22 15:4,20 16:4,4,5 16:13 29:25 32:5 34:2,15 35:9 40:1 40:2,16 41:19 42:7,8 43:23 52:4 52:10 53:24 59:7 59:9,16 60:6 evidentiary 64:19 example 10:23 16:24 21:25 39:25 56:22 examples 63:22 exceed 5:18 6:8,23 39:11 exceeded 6:3 7:19 exceeding 5:13 6:12,19 7:7,15 8:3 9:17 10:3 19:5,10 30:10,22 31:22 32:23 33:11 41:19 61:7 62:11 exceeds 33:13 exception 21:12,14 21:23,24 22:4 54:4 55:2 56:1,1 exceptions 54:25 exclusive 48:5 exhaustion 49:21 existing 51:16 53:19,22 59:11 exists 20:6 exorbitant 26:5 expected 63:24 expense 51:3 explain 14:15 59:9 explanation 53:13 53:24 explicit 35:17 expressly 27:7 28:6 35:13 40:23 extend 18:1 27:11 extent 47:8</p>	<p>extra 13:2 29:25 32:5 37:4 42:9,9 extracts 7:4</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 23:20,25 faced 9:16 facing 9:15 fact 15:14 16:13 17:4 23:4 27:6 30:24 40:14 42:17 49:17 facts 6:11 7:25 9:12 9:16 19:4 37:16 60:8 factual 32:24 failed 23:18 24:18 24:20 50:23 fails 11:1 29:3 failure 3:12 10:6 11:11,11 20:25 28:5,8 45:20 fair 12:3 36:14 60:11 fairly 39:5 favor 23:7 41:4,7,9 44:12 favorable 18:14 favored 44:5 Federal 47:23 fellow 15:1 Fifth 4:17 8:5,17 30:20 31:5 62:18 figure 53:21 55:18 59:13 file 55:8 filed 49:4 53:10 56:23 files 7:13,17,18 filing 47:22 48:2 finality 48:22 49:2 finally 58:18 find 4:9 9:24 11:11 11:12,16,18 12:15 12:21 14:25 54:18 finding 53:4</p>	<p>fine 12:22 25:4 62:3 finish 6:17 31:9 39:17 first 3:4 4:15 7:8 9:19 21:5 30:7 33:19 34:13,19,24 36:7 44:19 45:11 46:7,12 51:19 52:22 58:20 61:4 62:19 64:17 fit 50:4,6 five 23:22 24:17 flawed 50:18 flipped 29:1 focus 9:3 40:1 focuses 8:23 follow 20:13 26:10 follow-on 26:17 followed 27:25 footnote 8:10 35:14 forfeited 19:18 28:25 forfeiture 22:10,12 43:16 formal 17:18,23 19:1 54:11,13 formality 17:22 forth 4:2 fortiori 29:8 found 4:1 9:21 11:6 11:17 12:15,17 14:23 15:11 22:9 40:14 41:21,22 43:21 Four 60:24 four-prong 48:7 framework 3:19,20 frankly 36:1 friend 30:15 44:23 front 48:17 frozen 52:14 function 37:25 fundamental 51:18 further 28:20 29:10 55:6</p>	<p>furthest 18:1</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 gamesmanship 25:1 general 1:18 15:25 22:4 32:15 generally 27:14,22 34:14 52:22 getting 24:8 Ginsburg 9:18,21 18:13,23 21:2 22:5 25:20,24 26:3,12,22 27:2,4 30:6 31:10 38:18 56:4 63:2 give 10:20,23 29:10 30:5 37:12 45:7,8 52:10 59:6 given 16:24 17:1 go 8:10,21 14:1,2 17:7 23:9 43:11 47:16 51:2 53:3 55:8 goes 12:5 28:2 62:9 going 22:15 26:13 35:5 36:25 37:15 43:20 49:8 50:21 51:4,4,21 55:1,24 55:25 57:23 good 17:25 25:12 29:8 57:13 gotten 22:25 govern 48:2 governing 49:19 government 3:15 5:4,17 6:1 8:2,17 10:10 11:1 12:8 13:13,14 15:12 16:24 18:18,21,24 19:10,20 22:3,23 23:17,23 29:2,11 30:7,21 31:8,10 37:21 38:2,19,20 38:25 39:5 43:7</p>
--	---	--	--	--

<p>44:5 46:18 47:4 47:17 52:3,10 53:11,13,23 54:5 59:6,8,13 62:2,20 62:21 63:11 64:12 64:15,16 government's 6:13 6:18 10:9 27:24 28:17 governs 48:1 granted 20:24 green 14:21,22,23 15:1 ground 26:9 grounds 13:15 guess 25:6 37:23 55:6 62:14 guilty 3:18 10:15 10:17,19 13:19 30:5 43:22 guy 14:1</p> <hr/> <p style="text-align: center;">H</p> <p>habeas 19:18 20:5 20:16,19,23 28:25 29:2,12 47:23 48:2,8,11,17,21 48:25 49:2,20 50:1,22 51:4,13 51:16 52:15 53:15 53:17 55:23 58:13 58:14 59:24,25 60:18 64:22 handle 55:10 happen 12:9 21:8 happened 37:18 hard 24:4 hard-and-fast 55:14 harder 43:6 harm 14:2 62:4 harmful 12:25 13:5 13:10 harmless 5:23 12:24 34:11 harmlessness 5:6</p>	<p>10:9,12 61:10 harmonize 48:23 49:23 hat 14:21,22,23 15:1,1 Hawaii 57:18 hear 3:3 19:13 heard 64:21 held 8:5 15:17 26:13 28:24 36:21 62:20 help 10:24 higher 25:9,15 highlighted 40:3 hinting 50:10 holding 17:14 48:13 Honor 4:3 6:10 8:1 9:8 19:15 20:8 26:25 31:13 35:4 35:12 51:10 53:20 60:4 Honors 43:11 horse 57:23 hurt 14:1 hybrid 64:13 hypo 11:12 hypothesized 11:9 hypothesizing 38:8 40:19 hypothetical 9:3 18:6,7,9 42:25 53:20 61:17</p> <hr/> <p style="text-align: center;">I</p> <p>IAC 54:23 idea 46:17 identified 37:22 identifies 38:11 ignore 5:4 ignoring 58:17 II 16:5,7,10 18:7,8 34:5 III 34:5 imagine 39:19,23 implication 11:7</p>	<p>27:9 implications 16:17 17:24 important 39:7 47:25 51:18,19 52:2,18 inadequate 50:22 54:16 inadvertently 29:2 inapplicable 11:25 inclined 17:7 include 13:10 19:5 30:10 31:25 included 19:5 31:22 includes 37:20 including 51:21 52:25 62:18,19 inconsistent 58:12 incorrectly 32:3 incumbent 13:14 incur 51:3 independent 8:4,19 indicted 5:22 indictment 4:2 12:16,16 14:13 15:7,12,22 16:3 18:24 19:6 23:20 29:15 30:8 32:23 34:5 35:20,23 37:2,2,4,12,15,18 37:25 38:1,7,9,19 38:21,23 39:8,9 50:15,17 52:8 53:10 56:23,24 57:4,8,10,11,12 62:16,22,23 indictment's 57:2 indictments 30:12 30:23 indirectly 4:24 individuals 9:9 ineffective 19:21 21:1 60:20 inevitability 61:10 inevitable 19:17</p>	<p>infect 24:14 infected 61:8 information 33:16 37:20 inherently 50:17 initial 20:7 innocence 14:18 17:11 57:17 inquiry 8:23 9:1,2 instance 64:5 instances 21:9,10 54:15 instruct 10:6 instructed 13:19 14:20 61:11 instruction 5:12 10:2 11:5,10 13:2 13:12,13,16 14:8 14:19 15:21 30:1 30:11 31:23 32:10 39:19 40:25 41:1 41:15,16 42:11,19 instructional 36:14 36:15 40:7 44:15 instructions 3:14 5:5 9:4,12,16 30:25 31:1,25 34:14 35:1,2,5,8 36:11 37:10 39:2 43:15,17 44:5,9 61:3,16 62:17,24 63:14 insufficient 32:5 42:4 intentional 22:22 22:24 25:19 intentionally 9:22 10:25 11:1 interest 49:2,3,9 interested 51:25 interesting 42:14 interfere 56:14 interpretive 28:11 introduce 52:4 introduced 47:12 59:16</p>	<p>introducing 46:15 invitation 8:11 invited 8:10 invoking 46:19 involve 24:9 40:19 involved 21:4 involving 14:7,9 irrational 16:10 issue 3:13 4:12,13 7:23,23 8:12,15 12:3 15:25 30:4 31:21 36:13,16,17 44:20 50:13 61:2 61:14,14 62:18 63:13,15 64:8 issues 20:22</p> <hr/> <p style="text-align: center;">J</p> <p>Jackson 9:1 14:5 14:14 16:17 17:10 17:24,25 35:13,14 36:20 43:13 61:12 Jaffe 1:15 2:3,9 3:6 3:7,9 4:3,8,11,13 4:17,24 5:10,20 5:24 6:4,9,16,18 8:1 9:7,20 10:1,8 10:20,23 11:14 12:2,19 13:9 14:4 14:9,14 15:14,18 15:23 16:16,22 17:15,21 18:4,11 18:16 19:1,15 20:8,12,14,17 21:2,7,16,19,21 21:24 22:11,14,17 22:20 23:2,7,15 24:2,7 25:6,14,23 26:2,7,15,25 27:3 27:5,20 28:13 60:24,25 61:2 63:9 64:25 jail 25:18 51:3 January 57:20 judge 13:23 31:11 31:11 52:23 55:7</p>
---	---	---	--	--

<p>55:18 56:6,13,16 56:18 62:6 63:23 judge's 63:20 judgment 16:7,12 33:6 jurisdiction 26:1,5 28:21 46:19 jurisdictional 23:13,14,16 24:10 24:11,13,25 25:21 25:21,24 26:4,24 27:15,16 44:24,25 45:3,5,11,25 46:7 46:13,17 47:15,18 58:5 jurisprudence 55:1 jury 3:14,18,19,25 8:24,24 9:3,3,5,9 9:10,11,11,12,13 9:15,16 10:6,11 10:13 11:5,16,20 12:6,7 13:2,12,13 13:18 14:8,15,20 14:25 15:3,5,11 15:21 16:5,9,10 17:2,7 30:1,11,25 31:24 32:3,3 34:14 35:8 36:10 39:2 40:1,14,25 41:1,14,16 43:9 43:14,17,21 61:3 61:8,15 62:5,17 jury-centric 61:13 Justice 1:18 3:3,9 3:24 4:7,9,12,14 4:22 5:8,15,21 6:2 6:5,14,17,24 8:21 9:18,21 10:5,12 10:21 11:8,19,24 12:3,12,14,20 13:17 14:7,11 15:2,16,19 16:2 16:19 17:13,17 18:3,5,6,13,23 19:12 20:2,10,13 20:15 21:2,13,15</p>	<p>21:17,18,20,22 22:5,7,12,15,19 22:21 23:6,8 24:1 24:3,23 25:11,20 25:24 26:3,12,22 27:2,4,12 28:10 29:18,22 30:6 31:10 32:9,22 33:8 34:7,9,19,21 34:24 35:7,19,25 36:23,25 37:8,23 38:8,18 39:18,24 40:4 41:10,16,18 41:24 42:3,14,25 43:3 44:4,21 45:15,19 46:1,4 46:22 47:21 49:1 49:25 50:9,20 51:1,8 53:7 54:1 54:13,21 55:4 56:4,19 58:1,4,7,9 59:23 60:1,5,23 61:5 63:2 64:23</p> <hr/> <p style="text-align: center;">K</p> <p>Kagan 8:21 27:12 28:10 35:19 36:23 36:25 37:8,23 38:8 44:4 54:1 Kendall 31:4 KENNEDY 11:8 11:19 34:9,19,21 34:24 35:7,25 key 56:3 killed 10:25 13:19 kind 40:19 58:16 64:13 kinds 54:14 know 7:2 10:16 12:17 14:24 15:3 25:3 31:14 38:3 38:16 40:24 41:7 41:21 42:13 44:21 45:2 51:19 53:20 54:17,22 56:12 57:1,17,20,21</p>	<p>58:4 59:14 knowingly 10:25 11:2 knows 37:14</p> <hr/> <p style="text-align: center;">L</p> <p>laid 15:6 language 27:16 28:2,6 31:20,22 31:25 languish 51:3 late 53:12 law 27:8 29:8 35:18 38:16 62:24 63:2 63:4,5,9,20,23 law-of-the-case 16:1 63:16 lawful 7:10 lawyer 25:7,18 lawyers 34:17 legal 42:21 49:11 legally 43:10 lengthy 37:15 lenity 47:2 let's 7:8,9,16 14:5 23:8,9 32:24 37:4 41:12 42:4 55:13 55:13 60:1 level 6:21 17:21 61:24 limit 27:24 28:17 28:18 limitation 26:11 limitations 19:13 19:16,18,22 20:17 20:22 21:1,3,4,6 22:2,25 23:12 24:12 26:23 27:11 27:14,18,22 28:15 28:16,24 29:3,12 29:14 46:14,17,21 46:24 47:11,19 48:24 49:18 50:12 50:16,23 52:11,25 53:9 56:8,24 58:22 59:1,15</p>	<p>60:7 63:18 64:5,9 limited 31:2 51:15 53:19 limiting 28:2 line 25:25 34:13 lines 24:8 literal 9:9 litigant's 28:18 litigants 55:25 litigate 60:12,15 litigated 12:4,4 50:19 litigating 55:25 litigation 63:7 little 37:24 64:10 logical 18:1 look 13:3 15:20 20:23 27:1 30:18 34:14,21,25 35:2 35:8,14,20,21,23 36:14,18 37:2,3,5 37:9 40:8 41:20 48:10 52:14,15,18 53:11 55:12 57:22 61:16,17 looked 60:13 looking 7:13 13:20 13:25 14:15 51:14 53:22 54:12 looks 7:18 26:17 53:12 lose 25:4 losing 25:16 lost 4:25 lot 7:2 20:3 37:14 37:16,16 55:24 64:21</p> <hr/> <p style="text-align: center;">M</p> <p>main 8:22 majority 35:4 making 7:6,8,13 26:23 45:9 54:25 malpractice 25:8 25:11 man 25:18</p>	<p>manslaughter 11:4 11:6 March 57:20 Martinez 1:17 2:6 29:19,20,22 30:9 31:13 32:13 33:8 34:18,20,22 35:3 35:11,22 36:4,23 36:24 37:7,11 38:5,22 39:22 40:4 41:14,17,23 42:1,5,16 43:2,4 44:10 45:4,17,22 46:2,5 47:5,24 49:7 50:5,25 51:7 51:10 53:16 54:9 54:20 55:3,9 56:9 56:21 58:3,6,8,10 59:25 60:3,10 matter 1:11 4:8 20:5,6 37:5 46:14 47:11 54:11 65:2 McDonough 48:12 mean 13:1 18:14 20:11 25:2 37:20 41:3 45:12 46:18 54:3,13 meaning 27:8 means 8:4 19:3 33:14 48:5 59:7 59:10 meant 11:21 26:1 measured 29:25 44:8 measuring 3:16 mechanisms 19:3 meet 12:7,9 merely 20:19 24:11 25:19 26:8,19 28:3,17 merit 11:25 meritorious 19:22 20:25 49:10 merits 60:17 64:4 met 14:12 methods 32:11</p>
--	--	---	---	---

<p>MICHAEL 1:3 middle 12:11 31:7 Milyard 48:19 mind 51:8 mine 54:18 minute 31:19 minutes 60:24 misinstruction 18:10 misleading 64:10 misnamed 63:17 misread 4:19 misreads 58:13 mistake 12:22 13:24 25:19 31:12 32:1,2 55:7 63:4 63:24 mistakes 24:19 Monday 1:9 morning 3:4 motion 18:20 50:3 57:1,1 moving 62:14 murder 10:24 11:3 13:19 Musacchio 1:3 3:4 32:4</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 name 63:10 narrative 37:19 narrower 39:12 narrowest 22:18 necessarily 4:20 7:5 50:17 necessary 11:11,12 11:14,15,16 need 8:9 14:2 23:4 23:15,16 24:10,14 28:21 29:10 42:19 50:8 54:6,12 58:22 64:19 needed 14:21 64:7 needs 23:17 38:16 negative 25:16</p>	<p>neither 12:11 62:12 neutral 44:17 never 31:21 57:5 new 40:10 61:23 Nguyen 58:15,16 night 7:12 Ninth 8:4,18 non 24:11 normal 38:24 noted 57:10 notice 37:13 38:1 52:23 60:2 noticed 31:16 November 1:9 novo 46:6 58:11</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 object 3:12 12:23 13:4 18:10,11,13 18:16 44:6 48:7 objected 3:15 objection 10:8 13:3 29:12,15 61:20 64:3 objects 13:24 obligation 53:1,3,6 56:17 58:23,24 63:21 obtain 33:15,17 48:6 obtained 33:5 obvious 44:11 50:9 55:7 obviously 30:1,6,9 31:14 42:22 49:8 odd 33:7 offense 35:18 37:20 38:10 53:9 oh 35:1 43:2 okay 10:19 12:17 13:21,22 23:10 62:2 Olano 12:10 48:8 once 29:6 52:12 operate 55:15</p>	<p>opinion 34:12,16 36:3,5 opportunity 59:6,9 64:15,17 opposed 15:5,21 23:12 27:21 28:3 opposite 47:2 oral 1:11 2:2,5 3:7 29:20 31:5 39:15 order 24:15 ordinary 54:3 original 30:8 39:9 56:23 57:4,9,11 62:16 origins 43:13 ors 5:12 outside 50:16 52:14 52:16 53:22 54:12 overcome 27:17 overriding 58:19 overwhelming 34:2 42:7</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 32:19 33:12 34:11,13 40:22 paralegal 53:2 part 4:23 19:8,9,9 32:1 48:13 62:12 partially 9:7 particular 3:19 8:25 9:5 19:3 40:1,18 42:12 51:25 53:9 60:3 particularly 24:25 27:7 40:2 parties 19:16 31:19 36:15 42:22 60:12 60:15 partly 45:5,6 party 46:19 60:19 pass 58:16 People 54:15 perfectly 17:6 23:3</p>	<p>period 9:23 27:11 27:22,23 28:4,24 29:3 56:24 perpetuate 63:8 persists 61:4 person 7:13,16,18 11:1 14:21,22 28:9 perspective 61:13 petition 29:13 32:19 40:22 47:23 48:3 Petitioner 1:4,16 2:4,10 3:8 29:13 29:24 30:18 31:21 32:19 34:3 40:12 40:20 41:3 42:20 45:23 61:1 Petitioner's 30:16 30:21 31:4 39:14 47:14 phrase 62:7 63:12 pick 57:23 piggyback 41:6,8 place 7:12 33:19 36:18 plain 4:25 13:4 22:16,17,22 23:9 23:10,13,16,22 24:2,5,9,15,21 25:22 45:2,5,16 55:19,23 58:18 59:21 plain-error 21:9 24:19 25:9,15 45:24 46:10 50:4 50:6 play 18:21 plead 64:11 pleading 64:14 please 3:10 29:23 plenty 16:3,13 plus 4:9 10:14,15 41:21 point 3:17 5:3 9:15 12:8,13 17:25</p>	<p>19:14,23 20:7,21 21:11 26:8 28:1 32:2 34:3 36:1,1 40:17 43:19 44:15 46:13 48:16 50:24 52:7 62:9 point-of-counsel 19:25 pointed 4:17 30:16 pointing 61:5 points 38:16 61:3 policy 49:12 portion 9:17,19 19:2 pose 42:21 posit 43:6 position 9:11 58:2 posits 18:7 possibility 11:23 15:11 possible 43:9 54:17 possibly 9:13 post-Apprendi 63:22 post-verdict 62:2 potential 4:18 53:4 potentially 19:9 43:8 Powell 21:25 power 26:11 27:24 28:7,17 47:3 practical 43:19 54:10 practice 25:12 Praprotnik 36:24 43:16 pre-Apprendi 63:23 prejudice 5:1 12:8 39:20 61:9 prejudicial 40:9 prerogative 8:12 presentation 6:21 presented 7:23,25 12:5 44:19 presents 3:11</p>
--	--	---	--	---

<p>presumption 14:17 17:11 27:17 46:24 47:2,6 pretrial 57:1 pretty 26:8 55:12 55:14 primary 47:14 prior 8:25 19:6 26:14 probably 51:3 problem 12:18,20 13:1,2 14:24,25 15:2 56:15 problematic 25:1 procedural 49:20 proceedings 54:24 process 9:10 43:13 processing 26:4 produce 44:2,2 prohibition 26:19 prong 41:19 proof 22:2,3 proper 7:11 39:23 40:5 43:1,4 50:2 properly 17:11 proposed 30:24 31:2,24 proposition 35:10 prosecute 26:19 prosecutor 26:20 prove 5:5 11:1 13:16 22:1 37:21 38:20 39:1 61:8,9 64:12 proved 11:3 14:12 proven 8:20 provided 27:8 providing 37:25 proving 33:3,22 provision 38:11 punish 26:18 28:8 purely 17:18 purpose 24:18 30:2 30:4 37:12 43:12 purposes 8:9 23:2 put 36:3,5</p>	<hr/> <p>Q</p> <hr/> <p>question 3:14 8:1 11:15 17:10 19:14 19:19 21:9 34:25 37:1 42:10,22 44:19,22 47:3 50:10 54:11 62:16 questionable 17:9 questions 3:11 43:6 44:18 quickly 54:8 64:20 quite 12:1 quote 26:23</p> <hr/> <p>R</p> <hr/> <p>R 3:1 rails 17:8 raise 3:12 20:25 21:5 22:24 23:24 24:18,20,21 25:5 29:3,5 45:13,20 47:18 49:10 50:2 50:13,23,24 54:23 56:7 57:24 63:21 64:7 raised 4:25 19:20 20:5,7,16 24:21 45:25 46:2 50:19 51:20 52:12 53:25 56:25 57:6 59:2,5 59:8,18 60:13 raises 46:7 raising 49:9 51:23 56:12 64:8 rational 3:22 9:15 14:25 15:3 61:15 rationale 17:10 rationality 14:16 reach 23:5 28:21 28:22 reached 14:16 reaches 18:1 read 4:22 5:7 27:19 27:20 reading 7:22 32:15 33:9</p>	<p>real 18:8,9 really 7:6 8:23 9:2 9:5 10:17 19:19 24:24 27:16 41:3 44:7,17,23 48:19 49:12,13,17 54:5 54:6 58:14 63:15 reason 14:17 18:12 20:19 24:14 51:22 52:1,2 53:18 56:20 57:13,25 60:14 reasonable 4:1 9:22 10:15 14:18 16:17 17:12 18:2 33:4 40:1 reasoning 49:16 reasons 3:21 14:14 20:12,22 26:16 45:6 47:25 51:12 56:12 rebut 52:4 REBUTTAL 2:8 60:25 recall 51:10 received 9:12,13 recognize 52:19 recognized 36:10 61:24 record 51:13,16,17 52:2,13,15,16 53:4,19,22 54:6 54:12 55:19,20 59:10,11 records 7:11 33:2 red 15:1 reference 35:17 reflect 35:5 regardless 64:6 reimagine 59:17,20 reject 13:13 rejected 40:23 rejecting 13:12 relate 57:3 related 32:17 relation 23:23</p>	<p>relief 48:25 49:20 60:18 remainder 29:16 remand 12:4 40:9 64:20 remedies 28:18 repeatedly 39:15 reply 52:10 59:6 repose 27:23 required 5:11 23:18 37:21 42:11 47:17 requirements 60:20 requiring 28:3 49:4 reserve 29:16 resist 33:9 resolve 10:10 24:15 resolved 62:1 respect 32:5 40:14 46:12 48:22 58:18 respond 64:15,17 responded 59:13 Respondent 1:19 2:7 29:21 restriction 26:21 result 29:9 64:4 resurrect 57:4 retroactivity 49:22 review 19:17 20:7 25:10,15 30:3 36:11 43:12,14 44:16 46:6,10 48:6 51:15 52:13 58:11 revolutionary 17:14 ridiculous 16:11 right 9:6 12:10,14 16:25 22:19 23:6 42:1 44:12 52:10 54:20 55:9 ROBERTS 3:3 19:12 21:13,18,22 24:23 25:11 29:18 39:18,24 56:19</p>	<p>60:23 64:23 ROMAN 1:17 2:6 29:20 room 9:10 10:11 root 40:7 rubric 62:12 rule 15:25 20:3 24:6,19 28:11 30:1 36:8 38:24 43:20 44:1,17 45:24 46:25 47:2 47:16,21,22 48:1 48:1,4,8,14,14,20 48:23 49:14,18 50:1,4,6,7 51:14 52:20,20,22 53:19 55:14,17,22 58:12 58:17 rules 48:24 49:19 49:20,21,21,23 55:14 ruling 26:14 run 54:18 Russell 26:8</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 1:15 2:1,3,9 3:1,7 60:25 sailed 47:7 sane 25:7 satisfy 45:24 52:20 64:12 satisfying 48:7 save 11:5 saw 55:7 saying 6:18 7:22 12:13 13:23 16:8 16:15 20:4,9 21:3 22:21 27:16 28:10 28:13 31:12 57:1 59:21 says 12:17 13:24 24:16 33:13 36:20 37:18 38:9,11,25 44:23 53:13 60:2 Scalia 3:24 4:7,9,12</p>
--	--	--	--	--

<p>4:14,22 5:8 10:5 10:12,21 12:14 18:3,5 20:2,10,13 20:15 44:21 45:15 45:19 46:1,4 50:9 50:20 51:1,8 scintilla 16:5 score 29:7 searching 53:4 second 41:19 45:14 46:5 48:16 52:1,2 61:12 see 7:6 10:21 11:19 11:23 13:3,18 17:6,17 38:7 55:11 61:6 seeking 13:13 sees 53:8 sense 13:21 32:2 39:6 50:21 64:22 sent 25:18 separate 6:25 8:7 11:5 16:22 24:7 24:14 separately 8:19 serve 53:1 set 4:2 59:16 sets 30:25 31:24 seven 24:17 Seventh 64:18 shifting 22:3 50:7 ship 47:7 show 6:23 14:11 50:8 55:21 61:9 61:10 showing 12:9 shows 38:15 side 12:11 30:16 side's 61:23 sides 29:1 44:17 significant 16:23 43:20 49:11 simple 23:22 simply 23:17 24:10 24:16 single 26:9</p>	<p>situation 7:15 12:10 16:8 17:19 50:1 situations 20:4 27:21,22 six 5:13,13 53:9 Sixth 64:18 slightly 42:23 Smith 16:23 17:22 17:22 47:10 sneaks 7:12,17 so-called 16:1 62:24 society 51:2 solely 5:17 Solicitor 1:17 somebody 7:9 somewhat 6:20 57:11 sooner 19:19,23 sorry 6:15 22:6 24:1 36:25 sort 11:15 18:19 32:15 41:7 42:10 44:22 49:14,19 52:18 54:10 58:23 SOTOMAYOR 5:15,21 6:2,5 15:2 15:16,19 21:15,17 21:20 22:7,12,15 22:19,21 23:6,8 24:1,3 41:10,16 41:18,24 42:3,14 42:25 43:3 46:22 58:1,4,7,9 59:23 60:1,5 sounds 12:12 25:12 special 48:18 specific 39:9 specifically 11:4 specify 28:7 39:3 42:12 specifying 28:5 sponte 29:5 stage 30:12,18 63:14</p>	<p>stages 3:17 63:6 stake 29:14 49:5 standard 48:8 standards 17:12 25:9,15 stands 59:11 start 26:7 31:9 39:16 54:25 starts 7:13 state 22:2 35:6,18 State's 49:1 statement 22:5 States 1:1,6,12 3:5 statute 7:1,3 12:17 14:13 15:6,21 19:13,16 20:25 21:3,4,6 22:25 23:12,19 24:11,12 24:12,16 26:10,18 27:6,9,14,18 32:11,15 33:9,10 33:22 35:6,21,23 35:24 36:19 37:1 37:6 38:1 44:8,24 46:14,17,21,24 47:11,19 48:24 49:18 50:11,16,23 52:11,24 53:8 58:21,25 59:15 60:7 61:14,17 62:9 63:18 64:5,9 statute-of-limitat... 25:3,5 44:20 50:3 50:18 51:5 52:5 56:5 57:7,16,25 59:5 statutes 8:15 20:17 26:23 28:14,16 37:3 statutorily 43:1 statutory 33:12 38:10,11 steals 7:3 step 45:7 strategic 51:22 56:11,14,20 60:14</p>	<p>strictly 28:15 strong 27:6 56:5 strong-sounding 27:18 stronger 21:10 26:10 29:6 49:3 57:23 strongest 51:12 strongly 27:9 stuck 38:2 stuff 61:22 style 36:1 sua 29:5 subject 25:7,8,14 submissions 64:19 submitted 64:24 65:2 subsequently 50:19 substance 22:8 substantive 24:12 27:23 34:4 35:17 36:1 succeed 33:3 succeeded 57:7 suffered 32:1 suffice 8:15 sufficiency 3:16 14:10 15:4,20 29:24 30:2 34:15 34:25 35:15 36:11 36:16,17 43:12,14 43:18 44:7,13 63:14 sufficiency-of-th... 44:16 sufficient 4:5 5:25 6:2,6,23 11:2 15:8 15:9 40:15 43:23 55:20 59:11 sufficiently 61:9,10 suggest 56:6 suggesting 8:22 37:9 suggests 9:1 27:15 35:19 suit 23:18</p>	<p>summarize 58:1 super 60:6 superseded 56:25 57:2 superseding 12:16 30:12,23 57:8,12 support 5:25 6:3 11:3 supporting 19:4 suppose 16:2 32:22 44:4 53:7 supposed 52:23 55:15,18 58:23 Supreme 1:1,12 sure 13:9 14:4 16:25 41:25 42:15 58:3 surprise 34:17 surprised 25:25 sustain 3:21 switch 26:6 synonyms 7:2</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 tail 20:23 take 7:8 19:25 21:14 25:3 42:20 49:25 takes 48:21 talking 49:13 56:20 64:8 talks 61:13 tell 35:23 37:3 term 17:1 33:11,13 33:13 terms 47:10 terrible 17:2 63:9 Thank 29:18 60:23 64:23,25 theft 7:3 theoretical 52:18 theoretically 62:11 theories 6:25 22:18 23:4,5 theory 5:18 6:6,19</p>
---	--	--	--	---

<p>13:18 21:7,10 39:1 40:20,23 42:12 43:10 they'd 55:12 thing 7:22 13:24 17:1 32:12 34:19 34:25 51:5 56:3 57:17,19 62:15 things 24:20 52:23 think 4:3 5:16,20 7:21 11:24 13:1 13:14 14:4 24:25 25:2 27:15 29:6 30:15 31:14 32:13 32:14,16,18 33:20 33:24 35:3,3,10 35:11,12,22 36:4 36:6,7,14,17,19 36:20 37:2,11 38:5,15,22 39:4,4 39:7,22,23 40:4,5 40:17 42:7,9,16 42:17,20 43:5,7 43:12,19 44:1,10 44:14 45:4,10,17 45:18,22,23 46:5 46:9,11 47:5,6,6 47:14,24 48:16,18 49:1,7,8,9,11,16 50:5,7,11 51:7,7 51:11,11 52:17 53:14,16 54:9,11 54:21 55:3,9,16 55:19,21 56:3,9 56:11,15,16,17,21 58:11,12,16,19,20 58:21,24 59:4 60:10,11,11,16,17 61:18 62:21 thinks 38:4 third 46:9 61:20 62:7 thought 5:13,13 8:25 9:9,10 18:18 26:12,20 27:23 38:18 40:9 52:21</p>	<p>61:18 63:5 64:3 three 30:25 31:24 45:10 58:2 threshold 44:22 48:25 49:19 till 64:22 time 21:5 23:18 24:4 28:4 29:17 30:7 37:18 45:13 46:3,8 49:5 51:20 57:2 59:19 timely 25:17 47:22 times 37:14 54:14 told 9:23 10:13 tolling 59:15 tomorrow 55:8 totally 16:11 Toussie 27:24 28:19 tracks 36:12 traditionally 52:21 treated 16:22 30:3 51:15 trial 3:13 6:21 18:17,19,20,22 25:4 40:11 41:3,6 44:13 45:20 51:23 52:23 53:1 55:18 56:6,10,13 57:7 58:23,24 59:17 61:24,24 62:4 63:8 tried 5:17 31:8 trouble 33:20 troubling 37:24 true 4:15,16 6:11 17:2 24:24 25:20 25:23 42:15 46:1 46:4 54:1,7 try 26:18 28:8 39:24 trying 15:9 41:6,11 49:23 59:20 turn 44:19 49:17 Turning 63:18 two 3:11 6:25 7:22</p>	<p>8:7 18:15 24:7 32:10,20 34:4 36:12 42:18 51:18 58:9,19 two-count 16:3 type 56:19 types 20:18 49:12 typically 10:24</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>unanimity 4:20 5:6 5:11 10:2 42:11 42:19 unanimous 10:7 unanimously 9:24 unauthorized 5:14 7:7,8,14 8:3 10:3 30:14 31:3,9 33:23 34:1,6 38:12,13 39:11,13 39:16 61:7,21 62:8,12 uncertainty 5:2,6 10:10 understand 12:13 13:6,8 22:8 34:9 34:10 45:8 understandably 19:7 understanding 45:8 understands 18:22 understood 10:1 28:12 undertaking 8:23 undoubtedly 56:23 unfair 52:7 unfortunately 63:10 unintentionally 22:13 United 1:1,6,12 3:5 unlawfully 7:4 unusual 41:5 unusually 27:6 use 26:1,5 33:15</p>	<hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:4 14:5 16:18 26:8 48:12,19 61:12 vacate 40:10 valid 5:14 48:13 Valiniff 28:23 vast 35:4 verdict 3:21,22 5:14 13:15 14:24 14:25 16:10 viable 43:10 view 30:21 32:4 42:21 viewed 28:16 views 28:14,15 violated 33:22 47:20 64:6 violating 32:11 violation 38:14 Virginia 14:5 16:18 61:13 vote 23:7</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait 20:20 53:15,17 waiting 64:22 waivable 45:12 waive 29:12,14 waived 20:6 28:25 waiver 21:20 22:9 waivers 22:24 want 13:15 17:25 33:9 34:16 35:1 42:1 54:18 56:7 57:24 60:8 wanted 6:17 64:14 wants 5:4 52:4 Washington 1:8,15 1:18 wasn't 4:10 10:17 10:17 22:9 24:5 60:12 way 4:18 8:15 9:4 20:1 27:10,19 28:22 32:15 33:12</p>	<p>33:21 37:8 40:5,6 52:20 53:17,21 55:10 56:13,16 59:21 63:1 ways 7:22 32:12,20 42:18 51:19 we'll 3:3 55:5 we're 41:24 50:21 63:24 we've 8:10 15:17 22:25 54:13 wearing 14:21,22 14:23 15:1 well-established 39:5 went 17:8 26:12,16 39:12 whatsoever 33:25 willfully 7:4 win 12:11 25:4 windfall 30:5 44:3 window 47:16 wins 44:25 withdrawal 22:1 won 25:17 57:3 Wong 27:13,19 Wood 28:23 48:19 49:17 51:9 58:13 worded 27:9,11 wording 26:17 27:3 27:6 words 27:17 work 11:13,20 61:17 worked 41:2 works 61:16 world 57:9 worse 18:6,12 wouldn't 5:9 6:22 17:4 20:10 27:18 32:6 35:20 52:14 54:7 write 34:12,16 wrong 13:22,24 29:24 30:7,10 38:1 41:22 46:11</p>
--	--	--	---	---

X	7			
x 1:2,7				
Y	8			
years 23:22 24:17 46:14 47:9 53:9 53:10	9			
Z				
zero 7:18 14:21 16:4				
0				
1				
10:05 1:13 3:2 1030(a)(2) 38:14 11-A 33:12 11:06 65:1 14-1095 1:4 3:4 140 46:13 47:8 15th 57:20 16 35:14 1st 57:20				
2				
20 34:11,13 2015 1:9 25 53:10 29 2:7				
3				
3 2:4 30 1:9				
4				
4 32:19				
5				
52(b) 48:1,1,4 49:14 50:7 51:14 51:15 52:20,22 53:19 55:14,17 58:12,17				
6				
60 2:10				