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IN THE SUPREME COURT OF THE UNITED STATES
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TAYLOR JAMES BLOATE, :
Petitioner :
v. : No. 08-728
UNITED STATES. :

- - - - - x
Washington, D.C.
Tuesday, October 6, 2009

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 12:59 p.m.

APPEARANCES:
MARK T. STANCIL, ESQ., Washington, D.C.; on behalf of
the Petitioner.
MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the Respondent.

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C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
MARK T. STANCIL, ESQ.	
On behalf of the Petitioner	3
MATTHEW D. ROBERTS, ESQ.	
On behalf of the Respondent	26
REBUTTAL ARGUMENT OF	
MARK T. STANCIL, ESQ.	
On behalf of the Petitioner	53

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2
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6
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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-728, *Bloate v. United States*.
Mr. Stancil.

ORAL ARGUMENT OF MARK K. STANCIL
ON BEHALF OF THE PETITIONER

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

Pretrial motion preparation time is not automatically excluded under Section 3161(h)(1) of the Speedy Trial Act. Such delays are subject to exclusion only on a case-by-case basis under (h)(7).

I would like to focus today on three features of the statutory text that make that abundantly clear. First and foremost, when crafting (h)(1) Congress specifically addressed pretrial motion delays and precisely defined that exclusion. Subparagraph (D) declares that the exclusion shall begin with the filing of the motion and end with the hearing on or other prompt disposition of the motion.

Reading the general language in (h)(1) to encompass preparation time would circumvent the deliberate legislative choice to limit the pretrial motion exclusion.

1 JUSTICE GINSBURG: That would allow the
2 prosecutor's time to be excluded, right? On your theory
3 that it starts -- the trigger is the filing of the
4 motion, and it ends when the motion is disposed of. So
5 the prosecutor might say, I need additional time, and
6 that would be included in the suspension period, right?

7 MR. STANCIL: Yes, Your Honor. The
8 government's motions and the defense motions are treated
9 equally under (h)(1), which is why the government's rule
10 to treat defense motions, or defense requests for
11 additional time differently --

12 JUSTICE GINSBURG: But I'm --

13 MR. STANCIL: The exclusion -- I'm sorry,
14 Your Honor.

15 JUSTICE GINSBURG: Yes.

16 MR. STANCIL: The exclusion begins with the
17 filing of the motion, be it the defense motion or the
18 government's motion. That is clear on the text, the
19 face of the text of the statute, which --

20 JUSTICE GINSBURG: But the clock -- the
21 clock would run, on your theory, during the preparation
22 time of the defendant. It would not run during the
23 preparation time of the prosecutor. So I don't think
24 they are being treated the same.

25 MR. STANCIL: No, Your Honor, that is not

1 our position. The clock runs up until the moment of
2 filing.

3 JUSTICE GINSBURG: Right.

4 MR. STANCIL: Whether it is a defense motion
5 or a government motion. So --

6 JUSTICE GINSBURG: No, no. I'm talking
7 about the prosecutor's answer to the defense motion.

8 MR. STANCIL: Oh, yes, Your Honor. Their
9 response to the motion, it is tolled -- or the clock
10 stops during the preparation of the response by either
11 side. And that was a deliberate legislative choice by
12 Congress. It says -- on the face of (h)(1), it says the
13 clock stops at filing and remains stopped through the
14 conclusion of the hearing or other prompt disposition of
15 the motion.

16 That was an express choice by Congress. It
17 was not lost on them that a response time would be
18 treated differently. And the government's suggestion
19 that that, therefore, means we should factor back in
20 preparation time is --

21 JUSTICE SOTOMAYOR: Shouldn't we be
22 looking --

23 JUSTICE GINSBURG: One point that I would
24 like you to clarify. I -- I understand you to take the
25 position that the interest of justice would be the route

1 to take, where the judge would have to stop and make a
2 finding. In your view, would it be appropriate,
3 assuming your interpretation of (B)(i) holds, for us to
4 send the case back, or is it too late, because the
5 interest of justice finding was never made?

6 MR. STANCIL: It is too late because this
7 Court answered that question -- that very question in
8 Zedner and held that an (h)(7) ends of justice finding
9 cannot be supplied retrospectively on remand. That was
10 the precise question put to this Court and it was
11 rejected by the Court unanimously.

12 JUSTICE GINSBURG: But you think it could be
13 found. If it doesn't have to be found on the spot by
14 the judge, when is the latest time the judge could make
15 the interest of justice filing?

16 MR. STANCIL: Zedner says that as long as it
17 is made -- or the latest it could be made is the time by
18 which the district court rules on the motion to dismiss
19 on speedy trial -- on speedy trial grounds. So it can
20 be made in the district court up until the time the
21 district court decides the speedy trial motion. It does
22 not -- at least it is left open in Zedner.

23 JUSTICE GINSBURG: So the result in your
24 case would be that the case is dismissed, period.

25 MR. STANCIL: Yes, Your Honor. It would be

1 -- it would be remanded with instructions to dismiss.
2 However, the district court -- it remains for the
3 district court to determine whether to dismiss with or
4 without prejudice according to the factors specified in
5 the act.

6 JUSTICE ALITO: Is it clear that a period of
7 time attributable to a defense request for time to
8 prepare pretrial motions can fall within (h)(7)?
9 Because (h)(7) speaks of a continuance. Isn't that a
10 very -- wouldn't that be a very odd use of the word
11 "continuance"?

12 If you make an application to a judge for
13 time, additional time to prepare pretrial motions, do
14 you say, "I want a continuance of the date on which my
15 pretrial motions are due"?

16 MR. STANCIL: I think that's not an unusual
17 reading of the term "continuance," yes, Your Honor. I
18 think they frequently -- trial counsel will frequently
19 ask for a continuance of the date. But what I think
20 both parties agree is that that is how the courts almost
21 universally interpret (h)(7), that any time that is
22 excluded, even if it doesn't result in the moving of the
23 trial date per se, is treated as an (h)(7) exclusion.

24 JUSTICE ALITO: Well, there's -- but the
25 courts of appeals have almost universally read

1 (h)(1)(D), or overwhelmingly read (h)(1)(D) to apply in
2 this situation as well.

3 I'm sorry. Not (h)(1)(D), but the
4 introductory phrase.

5 MR. STANCIL: Yes, Your Honor, but this rule
6 wasn't confined to pretrial motions. So even in those
7 jurisdictions that follow the majority position at issue
8 here, also to my understanding use (h)(7) to exclude
9 intermediate delays before trial. In fact, in the
10 government's brief, the government acknowledges that
11 courts treat pretrial motion delays under either (h)(1)
12 or (h)(7), and more specifically (h)(7)(B)(iv), which
13 specifically speaks in terms of preparation. And in
14 fact, that's still further evidence that Congress
15 specifically contemplated that preparation time would go
16 under (h)(7). Both (h)(7)(B)(ii) and (h)(7)(B)(iv)
17 specifically direct district courts to consider the need
18 for additional time for adequate or effective
19 preparation.

20 And Justice Alito, back to your concern
21 specifically with motions. (B)(ii) specifically refers
22 to pretrial proceedings. So I think there, in that
23 sense, there is evidence that Congress didn't think that
24 a continuance under (h)(7) would refer only to a
25 continuance of the trial date. At least, that's --

1 that's my understanding.

2 JUSTICE SOTOMAYOR: Counsel, at the time
3 that (h)(1)(C) -- or (D) was being looked at, wasn't it
4 a fact that some circuits had reviewed the prior
5 exclusion as applying only to the date in which there
6 were actual hearings before the court?

7 MR. STANCIL: Yes, Your Honor.

8 JUSTICE SOTOMAYOR: So isn't it -- shouldn't
9 we be looking at what you did with respect to this time
10 period in light of the need that it was addressing?

11 MR. STANCIL: Yes, Your Honor. And the
12 Court -- and Congress did decide to expand or clarify
13 the end point and beginning point of the (h)(1)(D)
14 exclusion.

15 JUSTICE SOTOMAYOR: Well, what's wrong with
16 the logic of district courts who have ruled in this --
17 in the government's favor, that say Congress was only
18 looking at that particular part of the proceeding --
19 what related to the hearing, the filing of the motion,
20 its actual adjudication -- but they weren't considering
21 a motion by the defendant for time to investigate, and
22 that can be another proceeding?

23 Can you imagine a situation in which a court
24 grants that adjournment to a defense attorney where we
25 would reverse that finding by the court?

1 MR. STANCIL: I'm sorry, Your Honor?

2 Reverse --

3 JUSTICE SOTOMAYOR: But -- it would seem to
4 me that if a defense attorney comes to a court and says,
5 I need an adjournment, and the Court says, you can have
6 it, isn't that implicitly a proceeding in which the
7 court is saying there is a need for this?

8 MR. STANCIL: Not in a speedy trial context,
9 Your Honor, for two reasons. First, it is not a
10 proceeding. There is no pretrial proceeding until the
11 motion is filed. That is -- that is the definition of a
12 pretrial motion proceeding. It is a formal initiation
13 before the district court.

14 JUSTICE SOTOMAYOR: "Proceeding" doesn't
15 mean an act -- it is an act before the court. The
16 entire action is before the court. But it is a
17 proceeding in which the defense attorney is looking at
18 whether there's anything to file motions about.

19 MR. STANCIL: If that were correct, Your
20 Honor, then preparing your witnesses is a proceeding
21 respecting trial. I think that takes "proceeding" and
22 expands it so that everything would be excludable delay.

23 But if -- if I may return to your original
24 question, Congress did look at preparation time when
25 drafting (h)(1) and (h)(1)B) specifically --

1 JUSTICE SOTOMAYOR: Well, the Senate did.

2 MR. STANCIL: Pardon me. Yes, the Senate
3 Judiciary Committee specifically considered a proposal
4 by the government no less to include preparation time,
5 and the committee rejected that proposal as
6 unreasonable. I think this is simply not a case in
7 which we are left to guess whether preparation time was
8 on the table. It was on the table and it was declared
9 unreasonable to suggest that it would be within the
10 automatic exclusion.

11 Moreover, I think that makes abundant sense.
12 It is not the case that simply asking for more time
13 necessarily means that you have some prejudice in the
14 speedy trial context, or even that the trial date
15 necessarily would move. In this case, the counsel
16 requested the extension for pretrial motions. That
17 extension was granted. The trial date held. It wasn't
18 moved until much later, under an (h)(7) exclusion on
19 unrelated grounds. So I think it's a -- I think it's a
20 false -- a red herring, if you will, for the government
21 to suggest that when the defendant asks for something,
22 it's necessarily -- it ought to be granted, fair enough,
23 but that it's necessarily going to prejudice the speedy
24 trial calculation.

25 With respect, I don't think that's the case.

1 I think ordinarily, these things will come very early in
2 the speedy trial -- speedy trial clock, and there will
3 be relatively brief delays. And so I think it's quite
4 reasonable to think that district courts could be
5 allowed to give more flexible preparation time to decide
6 whether to file, what to file, and then the exclusion
7 starts with the filing. And I think Congress has made
8 that abundantly clear in -- on the text of the statute.

9 JUSTICE GINSBURG: That would certainly
10 encourage judges who don't want to get involved with
11 making findings, which you have to do to satisfy
12 interest of justice, to just say: Motion denied; I'm
13 sorry, I'm not going to let you have the clock run while
14 you -- you are asking me for a favor. You want time to
15 prepare, and the clock is going to run in the meantime.
16 Forget it. You are not going to get the extension.

17 MR. STANCIL: I disagree, Your Honor.

18 First, I think courts will granted them when
19 necessary. Again because it is early in the clock,
20 there won't necessarily be speedy trial -- some sort of
21 speedy prejudice to the government. But moreover, all
22 this means is that the court needs to put findings on
23 the record to say this is preparation time that is
24 legitimately needed, the defendant's interests here
25 outweigh the public's interest, and so I'm going to

1 grant that and I'm going to put those findings on the
2 record. And I think it's clear from the statute that
3 that's how Congress anticipated this would work. But
4 I --

5 JUSTICE GINSBURG: What must the judge --
6 the judge must make a finding orally or in writing. Can
7 it just say, okay, I'm giving it to you in the interest
8 of justice?

9 MR. STANCIL: I think -- I don't believe
10 that precise question has come to the Court. But courts
11 are very permissive in terms of how much needs to be put
12 on the record, and it's my understanding that this
13 happens quite literally every day in scores of contexts
14 where courts, as long as they make the finding, it is
15 reviewed for an abuse of discretion only and that's
16 sufficient.

17 JUSTICE ALITO: So the rule that you are
18 arguing for really will accomplish nothing, other than
19 to benefit a small set of defendants who -- who got
20 pretrial preparation time in reliance on court of
21 appeals decisions saying that those could be done
22 without making explicit ends of justice findings on the
23 record?

24 MR. STANCIL: No, Your Honor. If we are
25 correct, the decision will have significant effect on

1 the public's interest. In fact, an individual defendant
2 has very little to gain from such gamesmanship as the
3 government suggests would be at issue. What you get is
4 a dismissal of your indictment with or without
5 prejudice, and there are no statute of limitations
6 problems --

7 JUSTICE ALITO: Well, how is the public
8 going to benefit if all the judge needs -- presumably,
9 district judges are not granting these extensions of
10 time in situations in which they do not think that the
11 ends of justice are served by granting the extension of
12 time.

13 So what is going to be served by requiring
14 them to recite this -- to make this rote recitation on
15 the record?

16 MR. STANCIL: First, Your Honor, it's not
17 rote. It specifies four factors that they have to
18 consider, including and before, it says, whether its
19 time -- the time is necessary for effective preparation,
20 taking into account the exercise of due diligence.

21 What this -- what putting this under (h)(7)
22 and making that process required will do is weed out the
23 very worst sorts of delays where counsel, even for the
24 defendant or the government, comes in and asks for the
25 delay without the exercise of due diligence and without

1 any showing that this is actually necessary. And I
2 think that's exactly what Congress was doing by not
3 putting this under the automatic exclusion in (h)(1).

4 If it's automatically excluded, and there is
5 additional time granted for no reason whatsoever or for
6 something that wouldn't meet the due diligence standard
7 in (B)(iv), the speedy trial clock is effectively
8 lengthened automatically.

9 JUSTICE KENNEDY: Could you tell me how it
10 works in district courts? This district court set
11 September 13 originally for the -- for the motion. Do
12 the district courts generally have a custom schedule for
13 every case where they set times or do they have local
14 rules on the subject?

15 MR. STANCIL: With respect to pretrial
16 motions specifically?

17 JUSTICE KENNEDY: Yes.

18 MR. STANCIL: It varies widely from district
19 to district. For example, in some districts the default
20 is 21 days. So, if you try a case in Chicago, you go to
21 arraignment, your pretrial motions, unless set by a
22 different rule, are due in 21 --

23 JUSTICE KENNEDY: And that's -- that's part
24 of -- that there in the local rule of court?

25 MR. STANCIL: Yes, Your Honor. In D.C., it

1 is 11 days. In many other jurisdictions and here, there
2 is no set time limit.

3 And one of the problems -- one of the
4 fundamental problems with the government's rule that a
5 request -- a defense request for additional time must be
6 treated differently and does stop the clock, is that
7 gives speedy trial consequences to those variations in
8 local rules. So, in districts where you have a very
9 short standard timeframe, the defendant has to run in,
10 if he wants to file pretrial motions, and stop the clock
11 almost automatically. If you have -- say, your motions
12 are due automatically in seven days; you have got to run
13 in there and stop the clock.

14 As a practical matter, the speedy trial, the
15 70 days, it's that much longer in those districts
16 because you have got to stop the clock compared to
17 districts where, say, 21 days are ordinarily allotted.
18 Well, they may not have to stop the clock. It's clear
19 that Congress did not --

20 JUSTICE KENNEDY: But I'm -- I'm not sure
21 that that isn't -- that that argument doesn't cut both
22 ways.

23 MR. STANCIL: I'm sorry, Your Honor?

24 JUSTICE KENNEDY: I'm not sure if that -- if
25 you have a district where you have five days, a very

1 short period and almost nobody can comply with it, then
2 maybe that's an argument for the government's rule.

3 MR. STANCIL: I disagree, Your Honor. I
4 think that illustrates the problem, because if there is
5 a -- call it an unreasonably short time period in this
6 district, the speedy trial clock only burns for four or
7 five days or a week, and then someone is going to have
8 to run in and stop it. So those trials are just going
9 to take longer.

10 Let's assume that it takes two weeks on
11 average or three weeks on average to prepare a
12 reasonable pretrial motion. Well, in those
13 jurisdictions that have that local rule, the short local
14 rule, you get two extra weeks on the speedy trial clock,
15 because you have to run in and hit stop on the clock by
16 asking for additional time.

17 In those districts that give you 21 days by
18 default, by contrast, that whole 21 days counts against
19 the 70 days. And that is, I think -- I think that is an
20 essential judgment that Congress made. It decided on 70
21 days --

22 JUSTICE KENNEDY: Well, I think an
23 assumption in your mathematical analysis is that there
24 will be a difference in the time that it takes to
25 dispose of the motion. If the time to dispose of the

1 motion is the same, then you are wrong, I think. I will
2 work it out.

3 MR. STANCIL: I don't believe so, Your
4 Honor. If you assume hypothetically 21 days to prepare
5 --

6 JUSTICE KENNEDY: Right.

7 MR. STANCIL: -- 21 days to respond and call
8 it 21 days to rule --

9 JUSTICE KENNEDY: Right.

10 MR. STANCIL: -- in a district that allows
11 21 days of preparation time by default rule, 21 days
12 will burn and then 42 days with response and ruling.

13 JUSTICE KENNEDY: Right.

14 MR. STANCIL: In a district that allows only
15 five days, five days burn, and then you have to stop the
16 clock for the additional 16 days of preparation, plus
17 21, plus 21. You end up effectively, if the difference
18 is 5 days or 21 days, there is an 86-day speedy trial
19 clock in the district with the short rule and a 70-day
20 speedy trial clock in the district with the local
21 rule -- with the 21-day rule.

22 And so I think it's -- and it's clear that
23 what Congress did not want in the Speedy Trial Act was
24 these time periods to be amended by local rule
25 effectively. And that's what would happen. I think

1 more fundamentally --

2 JUSTICE ALITO: Where does that show,
3 because the disposition time isn't going to be the same
4 from district to district? Districts vary.

5 MR. STANCIL: That's correct.

6 JUSTICE ALITO: Congress could have
7 required, as they have in some instances, to have a
8 judge decide a matter within a certain period of time.
9 They didn't do that, did they?

10 MR. STANCIL: That's not correct, Your
11 Honor. In subparagraph (H), 3161(h)(1)(H) allows only
12 30 days during which a matter is actively under --
13 actually under advisement by the district court. So
14 here they actual did set a 30-day clock on which to
15 rule.

16 There is an exception to that. If there is
17 a hearing subparagraph (D) says, well, you know, we are
18 not going to govern the time in the hearing, and this
19 Court's in Henderson gives district courts flexibility
20 in that regard, when there is a hearing. But Congress
21 was pretty clear in trying to put a book end at either
22 end. It starts on filing and it ends with disposition,
23 and we only give you 30 days without a hearing or after
24 the hearing to dispose of it.

25 And I think more fundamentally this is a

1 quintessentially legislative judgment. Congress said,
2 this is a system of rules that we need in place to move
3 cases more expeditiously toward trial. We are going to
4 give you 70 days. We are going to exclude certain
5 things automatically, and we are going to give district
6 courts flexibility under (h)(7).

7 CHIEF JUSTICE ROBERTS: Could a district
8 judge, as part of his normal pretrial order, say that I
9 am inclined to grant normal motions for extensions, but
10 I think so we don't run into these problems that it's in
11 the best interest of justice that whatever time I grant,
12 I issue an order covered by (h)(7)(A)? That avoids all
13 this problem. I don't have to worry about the Speedy
14 Trial Act when I grant you a motion, because whatever I
15 grant you is going to be excluded under (h)(7)(A).

16 MR. STANCIL: I don't -- that sounds a lot
17 like a prospective waiver of speedy trial, which is --
18 this court rejected in Zedner. If I understand the
19 hypothetical correctly, if the district court says if I
20 give you extra time, we are not going to complain about
21 it later. I don't think that the court could do that,
22 and I don't think that would be consistent --

23 CHIEF JUSTICE ROBERTS: But presumably, a
24 judge can do it in every case. You are saying they
25 can't tell you in advance this is what they are going to

1 do, but they can do it automatically in every case?

2 MR. STANCIL: I don't believe so, Your
3 Honor. I think, if I understand the hypothetical
4 correctly, if a -- if we appear before the district
5 judge and the judge says exclusions or extensions for
6 pretrial motions will qualify for (h)(7), that sounds
7 like to me in an individual case a prospective waiver of
8 that defendant's Speedy Trial Act --

9 JUSTICE SOTOMAYOR: Wait a minute. If a
10 defense attorney comes in to you and says -- I'm a
11 district court judge -- I need time to prepare; granted,
12 I am excluding time under (7)(A). You are saying that
13 is insufficient?

14 MR. STANCIL: No, Your Honor. If it's done
15 on a case-by-case basis, where the time is requested and
16 the continuance or the delay is granted with the (h)(7)
17 findings made either then or later, that would be
18 perfectly appropriate. That's how Congress --

19 JUSTICE SOTOMAYOR: But it's not okay for a
20 district court to say, you tell me how much or you have
21 21 days to prepare motions and I'm excluding time
22 because of that?

23 MR. STANCIL: No. I'm not sure I -- I
24 apologize. I'm not sure I under --

25 JUSTICE SOTOMAYOR: Local rule from a

1 district court judge: Defendant is arraigned; you have
2 21 days to file motions.

3 MR. STANCIL: Yes, Your Honor. That is --
4 that time is not excluded if it is just set by local
5 rule.

6 JUSTICE SOTOMAYOR: Could you finish
7 answering one earlier question. You said that there is
8 no statute of limitations problems if we rule in your
9 favor. Could you explain why?

10 MR. STANCIL: Yes. Under 18 U.S.C., I
11 believe it's 3288 and 3289, essentially gives the
12 government six months after the dismissal of an
13 indictment to reindict a defendant. And courts have
14 almost universally held that that applies -- or I
15 believe it's universally held that that applies where
16 the dismissal is based on Speedy Trial Act grounds. I
17 think we are in agreement with the government that there
18 is not a statute of limitations problem.

19 JUSTICE SOTOMAYOR: Could under that retrial
20 provision the court begin excluding time?

21 MR. STANCIL: The speedy trial clock starts
22 anew after a new --

23 JUSTICE SOTOMAYOR: That's what I mean.

24 MR. STANCIL: Yes, Your Honor. That is
25 clear under the statute.

1 JUSTICE SOTOMAYOR: Do you have any idea how
2 many convictions would be at risk for reversal under
3 this rule, that would be currently pending and subject
4 to a ruling in your favor now?

5 MR. STANCIL: I don't know. My supposition
6 is that it's not very many. The government certainly
7 hasn't suggested that there are a lot. It would have to
8 be cases within those eight districts or -- pardon me --
9 I guess it would be nine or ten, that have either not
10 taken a position or take the government's position, in
11 which the defendant raised this argument in the trial
12 court --

13 JUSTICE SOTOMAYOR: In a timely manner.

14 MR. STANCIL: -- in a timely manner. So I
15 think if that is the case, it's an exceedingly small
16 number, and for that matter, that would be a problem in
17 any case in which this Court reverses an incorrect
18 ruling.

19 JUSTICE GINSBURG: Is -- is there any
20 indication in the circuits that follow what seems to be
21 the majority rule -- that is that the clock is stopped
22 during preparation time -- that there have been
23 excessive delays, in comparison to the -- what is it,
24 two circuits who go the other way?

25 MR. STANCIL: Not that I am aware of, Your

1 Honor, but nor has there been any indication that
2 district courts in the two jurisdiction where they get
3 the rule right in our view deny defense requests for
4 additional time.

5 I think -- I think this rule will matter if
6 you assume that the average pretrial motion extension is
7 relatively modest and that the lawyers are fairly
8 reasonable in what they request. We are talking about,
9 you know, additional delays of a week or two weeks, but
10 that is -- again, that backs right up into the
11 congressional judgment, the legislative judgment that
12 Congress made.

13 And so those trials will on average in the
14 majority of jurisdictions, I think, just take that much
15 longer to get to trial.

16 JUSTICE KENNEDY: Well, what is your
17 systemic concern with the -- with the government's rule?
18 The judge has to grant the continuance under either --
19 under either of your rules, and you say he has to make a
20 finding that it's good. But are you concerned the
21 continuance would be because the attorney wants to play
22 golf or take a vacation with his kids, and that that's
23 not the cause?

24 MR. STANCIL: Well, that --

25 JUSTICE KENNEDY: Is that's what's driving

1 your concern?

2 MR. STANCIL: Well, that would be -- that is
3 the most important function of (h)(7), to screen out the
4 truly unmeritorious delays. That's what Congress wanted
5 to get at most of all.

6 JUSTICE KENNEDY: But wouldn't judges in
7 many cases do that anyway just in the course of deciding
8 whether to grant a continuance?

9 MR. STANCIL: The court may --

10 JUSTICE KENNEDY: Give -- give me the
11 consequences of ruling for the government that you see
12 that are adverse in your view.

13 MR. STANCIL: The consequence -- ruling for
14 the government would mean that any time a defendant
15 needs any extra time, or -- or we would say either side
16 needs any extra time, the clock stops. And so any time
17 you need additional time for pretrial motions there is
18 no balancing.

19 So in the routine case that is not complex,
20 where the -- where the defendant's counsel may be just
21 simply not exercising due diligence, you could ask for
22 two weeks and there is no -- there is no balancing. The
23 district court doesn't even have to ask, what's the
24 delay, you know, why the extra delay? And that time is
25 automatically excluded.

1 JUSTICE KENNEDY: But that's my point.

2 MR. STANCIL: Yes.

3 JUSTICE KENNEDY: I assume the district
4 judge will ask. Or is --

5 MR. STANCIL: In the absence --

6 JUSTICE KENNEDY: Or do you doubt that?

7 MR. STANCIL: I am sure it will vary from
8 court to court. But in the absence of (h)(7) and
9 putting it on the record, the district court is
10 certainly not required to ask and may not -- certainly
11 won't put those findings on the record. And I think
12 this Court made that point very clear in Zedner, that
13 (h)(7) balances substantive open-endedness with
14 procedural strictness, and the procedure is what
15 matters, and Congress made that explicitly clear in
16 drafting (h)(7).

17 If I may, I would like to reserve the
18 remainder of my time for rebuttal.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Roberts.

21 ORAL ARGUMENT OF MATTHEW D. ROBERTS

22 ON BEHALF OF THE RESPONDENT

23 MR. ROBERTS: Mr. Chief Justice, and may it
24 please the Court:

25 Additional time granted for preparation of

1 pretrial motions is automatically excluded from the
2 Speedy Trial Act deadline for commencing trial. For
3 three reasons, that time falls under section 3161(h)(1)
4 which excludes delay resulting from other proceedings
5 concerning the defendant.

6 First, Section (h)(1) excludes delay
7 resulting from various listed proceedings and other
8 proceedings that are analogous or ancillary to those
9 proceedings. A court's grant of additional motions
10 preparation time is ancillary to pretrial motions
11 themselves, which are a listed proceeding. It
12 facilitates the motions because adequate time to prepare
13 them is critical to their fair and accurate resolution.
14 The exclusion is similar to other excludable delays that
15 result from proceedings ancillary to listed proceedings.

16 CHIEF JUSTICE ROBERTS: Could I ask a
17 specific date question? Am I right that you would
18 exclude the time from September 7th to October 4th?

19 MR. ROBERTS: Yes, the time from
20 September 7th to October 4th.

21 CHIEF JUSTICE ROBERTS: Well, that
22 doesn't -- I'm not sure that makes much sense. Before
23 the motion for extension was filed, the hearing date for
24 pretrial motions was September 20. After the extension
25 was filed and granted, the hearing date was October 4th.

1 So the only period of delay that you could say resulted
2 from the extension was from September 20 to October 4,
3 or 13 days.

4 Well, how can you possibly count the time as
5 a delay after he filed his extension up to the point
6 when things would have been due anyway?

7 MR. ROBERTS: Well, the delay is just the
8 time that's being used for preparation, which was
9 presumably the time all the way up to the period at
10 which the waiver of the intent to file motions was
11 filed.

12 CHIEF JUSTICE ROBERTS: Well, but how is
13 that a -- how is the time being spent for preparation a
14 delay, when some of that time was going to be allowed
15 anyway?

16 MR. ROBERTS: Well, I think the act --

17 CHIEF JUSTICE ROBERTS: In other words, the
18 motions were not due until September 25th. So I don't
19 see how the time he spent before then can be regarded as
20 a delay.

21 MR. ROBERTS: Well, that's -- that's a
22 result of the fact that the act doesn't exclude the time
23 before a routine deadline for filing the motion, because
24 it only excludes the time -- the delay resulting from an
25 individualized proceeding. But it makes sense not to

1 exclude the -- the time before the routine deadline as a
2 general matter, because if you excluded all that time,
3 then you -- the result would be that the basic deadline
4 of the act would be extended and time would be excluded
5 in cases where no time was being used for consideration
6 or preparation of pretrial motions. But once you
7 know --

8 CHIEF JUSTICE ROBERTS: What is the -- what
9 is the proceeding from which you count in determining
10 what should be excluded?

11 MR. ROBERTS: The time running from the
12 order of the district court granting additional time.

13 CHIEF JUSTICE ROBERTS: Okay, that order --
14 that proceeding was initiated and ruled on the same day.
15 The person comes in and says: I would like time. The
16 judge that same day says yes.

17 MR. ROBERTS: There were --

18 CHIEF JUSTICE ROBERTS: That proceeding
19 takes a day.

20 MR. ROBERTS: The request -- the request for
21 time, that proceeding was done. But the order -- the
22 order granting additional time is a proceeding, and the
23 additional time that --

24 CHIEF JUSTICE ROBERTS: The additional time
25 flowing from the order is a proceeding?

1 MR. ROBERTS: The order -- an order is a
2 step in the case, an act of the court --

3 CHIEF JUSTICE ROBERTS: Right.

4 MR. ROBERTS: -- and it's a proceeding.

5 CHIEF JUSTICE ROBERTS: Right.

6 MR. ROBERTS: And it's --

7 CHIEF JUSTICE ROBERTS: And that's one day.

8 MR. ROBERTS: Yes, but it's the delay
9 resulting from the order that we are talking about.

10 CHIEF JUSTICE ROBERTS: Ah. Now that -- now
11 -- now I don't see how that's consistent with the other
12 provisions of the act. If you take (h)(1)(A), that
13 excludes delay resulting from any proceeding to
14 determine mental competency. Okay?

15 MR. ROBERTS: Yes.

16 CHIEF JUSTICE ROBERTS: And under your
17 theory that would include the time from the filing of
18 that motion to the end of the determination of mental
19 competency, right?

20 MR. ROBERTS: I think courts have excluded
21 from the filing of a motion seeking an examination, yes.
22 You could also, that would probably be excluded under
23 (h)(1)(D) --

24 CHIEF JUSTICE ROBERTS: Ah. Well -- yes.
25 Well, or -- yes ---no, I'm looking at (h)(4). Now

1 (h)(4) excludes any period of delay resulting from the
2 fact that the defendant is -- is mentally incompetent.

3 MR. ROBERTS: Right.

4 CHIEF JUSTICE ROBERTS: It seems to me
5 redundant if you exclude the delay from the examination
6 and then also exclude mental incompetence.

7 MR. ROBERTS: I don't think so, Your Honor,
8 because the delay resulting from the examination would
9 -- would be excluded from the order granting the
10 examination until the examination was complete. And
11 then there would be a determination of competence or
12 incompetence.

13 CHIEF JUSTICE ROBERTS: All right. Well,
14 let's look at (h)(1)(G). That excludes delay resulting
15 from consideration by the court of a proposed plea
16 agreement. But then (h)(2) says any period of delay in
17 which prosecution is deferred pursuant to a written --
18 written agreement with the defendant, for the purpose of
19 allowing the defendant to demonstrate his good conduct,
20 which sounds an awful lot like a plea agreement to me.

21 MR. ROBERTS: I don't -- I think that
22 that's -- that that's a different -- a different
23 deferral, Your Honor. It's not for the court's
24 consideration of a plea agreement or even for
25 negotiations. It's saying we're going to take time out

1 so that the defendant can demonstrate his -- his good
2 conduct.

3 I think that the plea agreement provision is
4 once the parties have proposed an agreement to the
5 court, the court has time to consider whether it should
6 approve that and that time's excluded. And in fact
7 courts have excluded the time that the parties are
8 engaged in plea negotiations as ancillary to that
9 provision of consideration of the proposed plea
10 agreement.

11 CHIEF JUSTICE ROBERTS: If I disagree with
12 you that, when the time that is extended before a
13 hearing on the pretrial motions and the acceptance of a
14 waiver, which runs from 13 days, September 20, the
15 original date, and the date that it actually took place,
16 which is 13 days, and if I think, contrary to your
17 submission, which is that the whole time from the filing
18 of the extension to the final hearing is delay, even
19 though it was only 13 days that was pushed back, then
20 you lose, right?

21 MR. ROBERTS: I'm not sure. If you think
22 that the -- that there's delay that results from the
23 grant of the extension, I don't think that the
24 Petitioners ever challenged the length of the delay that
25 was excluded, so the only issue that's before the Court

1 is whether that delay is excluded.

2 I don't know that the Petitioners preserved
3 any argument about the length of the delay, Your Honor.

4 CHIEF JUSTICE ROBERTS: Putting aside what
5 Petitioners may or may not have argued, if I think that
6 the delay is only how far the date for consideration of
7 a motion and acting on the motion has been moved -- in
8 this case, from September 20 to October 4; in other
9 words, it's 13 days, not 28 days -- then you lose,
10 right?

11 MR. ROBERTS: I'm not sure that we lose. I
12 have to confess that I haven't calculated the -- the
13 exact amount of time that that results. In any case,
14 there are other periods of delays --

15 CHIEF JUSTICE ROBERTS: Well, I guess it
16 would be, take 15 days from what time you have
17 calculated, and that's -- that's under the wire -- or is
18 it above the wire?

19 MR. ROBERTS: Yeah. I'm sorry, Your Honor.

20 CHIEF JUSTICE ROBERTS: In other words, I am
21 contesting 15 of your days, and you figured out how much
22 days you think can be excluded or not excluded.

23 MR. ROBERTS: Right. I guess I would say,
24 if there was some question about the length of delay,
25 the appropriate thing would be to -- to rule for us on

1 the issue that's before the Court, remand to the courts
2 below, allow them to decide whether the Petitioners
3 preserved the question about the length of delay and
4 what the effect is on a rule that would only limit the
5 additional delay.

6 You know, we also have other arguments for
7 the fact that we think that, even if this time isn't
8 excluded, that, based on -- based on the additional
9 preparation time, that there's still no Speedy Trial Act
10 here, that we raised in the -- in the brief of -- in
11 opposition, and we would think that that should be taken
12 into account on any remand like that as well.

13 JUSTICE GINSBURG: What was -- what was the
14 second point you just made, Mr. Roberts? That, even if
15 the clock is running, you would still have an argument
16 that you come within the 70 days because?

17 MR. ROBERTS: Because the -- on
18 September 25th, Petitioner filed a notice of intent to
19 waive pretrial motions, and then there was a hearing on
20 that on the 4th, and so that filing would be analogous
21 to a motion or a motion that would trigger it's own
22 delay, that it would trigger it's own exclusion of time
23 even if the time starting on September 7th was not
24 excluded.

25 JUSTICE KENNEDY: Just for my -- just for my

1 information, what's a motion to -- to waive? I mean,
2 why does he need permission to waive?

3 MR. ROBERTS: The -- the court had
4 originally said -- the court had originally provided in
5 its order that on the deadline for filing motions the --
6 the Petitioner should either file the motions or
7 indicate whether he wanted to waive the motions and then
8 set a hearing on either one, on the 4th, and that's what
9 happened.

10 After he filed that paper on the 4th, the
11 court held a hearing, and the defendant -- discussed
12 with the defendant personally whether he wanted to waive
13 his right to file motions.

14 JUSTICE KENNEDY: I see.

15 MR. ROBERTS: And the defendant waived his
16 right to file motions, which had a consequence, you
17 know, in the case.

18 The second reason that the additional time
19 granted for preparation of pretrial motions is
20 automatically excluded is that the exclusion in Section
21 (h)(1)(D) for delay resulting from pretrial motions
22 themselves excludes the time that a court grants the
23 non-moving party to prepare a response.

24 And, as Justice Ginsburg, in her questions
25 suggested, it would make little sense automatically to

1 exclude time granted to respond to motions, but not the
2 time granted for the specific purpose of preparing them.

3 In fact, this Court employed similar
4 reasoning to that in the Henderson case when it held
5 that the Act excludes the time after a court has held a
6 hearing on a motion while the court's awaiting further
7 written submissions.

8 The Court reasoned that it would make no
9 sense not to exclude that time because the act excludes
10 all the time before the hearing, as well as 30 days
11 after a motion's taken under advisement; and likewise it
12 would make no sense not to exclude time that is
13 specifically granted to prepare motions when the Court
14 excludes the time granted to respond to them.

15 Third --

16 JUSTICE SCALIA: Except for the -- for the
17 language, which -- which says that you -- you time it
18 from the beginning of the time granted.

19 MR. ROBERTS: Well, section -- Section
20 (h)(1), Your Honor, expressly states that it excludes
21 delays, including, but not limited, to the listed
22 delays, so no negative inference arises from the fact
23 that the listed examples don't specifically address
24 delays resulting from the grant of additional motions
25 preparation time.

1 Section (h)(1)(D) is addressing a related,
2 but different delay, the delay from the pretrial motion
3 itself.

4 JUSTICE SCALIA: Well, what's the effect of
5 that language then? Why didn't (D) just read "delay
6 resulting from any pretrial motion"?

7 MR. ROBERTS: Because Congress specifically
8 amended it in 1979, in response to previous
9 interpretations by some courts that had excluded only
10 the time that was spent in actual court hearings, and
11 the language makes clear that all the time from the
12 filing of the motion through the hearings, including
13 the -- not just the Court hearing time -- is excluded,
14 and it -- the language continues to -- to make that
15 clear, even if preparation time is also sometimes
16 excluded.

17 JUSTICE SOTOMAYOR: Counsel, do you disagree
18 with your adversary, that there is no statute of
19 limitations problem if we rule against you?

20 MR. ROBERTS: No. I don't think that there
21 are statute of limitations problems, Your Honor, but
22 requiring judges to make superfluous ends of justice
23 findings --

24 JUSTICE SOTOMAYOR: But is it superfluous?
25 Because what your adversary is saying is that Congress

1 wanted district courts to think about why some things
2 were being -- additional time was being requested. Not
3 all motions by defendants would a district court
4 actually feel were warranted and might say to that
5 individual if they came in: Look; that shouldn't take
6 you three weeks; that should only take you a week.

7 MR. ROBERTS: Well, a court should always be
8 doing that in considering whether to grant additional
9 time that's requested, Your Honor. Neither the
10 defendant nor the public is going to have an interest in
11 rushing to trial without adequate time to prepare --

12 JUSTICE SOTOMAYOR: But that doesn't answer
13 my point. Without a requirement that the judge actually
14 has to make a finding in the interest of justice, once
15 the defense attorney comes in and says, I want a month,
16 and isn't the judge required to give him the month
17 because it's automatically excludable?

18 What, otherwise, forces the judge to look at
19 the request and say, no; is it really in the interest of
20 justice for me to give you that month?"

21 MR. ROBERTS: The -- the judge doesn't have
22 to give him the additional time. Presumably, the judge
23 should only give him the -- the additional time if more
24 time is needed to prepare the -- the motions, based on
25 the justification that the defendant --

1 JUSTICE SOTOMAYOR: So what -- so what
2 additional requirements are we imposing on the judge
3 that the statute itself doesn't command?

4 MR. ROBERTS: Well, what --

5 JUSTICE SOTOMAYOR: If the judge always has
6 to listen to the reason, weigh it, determine whether or
7 not it is in fact in the interest of justice or not, how
8 much more burden are we putting on a judge than to say,
9 look, you are right, you need a month; I will exclude it
10 under (7)(H).

11 MR. ROBERTS: The judge has to specifically
12 consider all of the specified factors that are in (b)(1)
13 through (4).

14 JUSTICE SOTOMAYOR: We have never required
15 the judge to give a litany of each of the factors under
16 (h)(7). We have never required him or her to do a
17 detailed finding. We've just required them to say
18 there's some reason for it.

19 MR. ROBERTS: Well, the court -- the statute
20 says that the judge shall consider the specific factors,
21 and some courts at least have -- have reversed -- if
22 a -- situations where the court hasn't considered the
23 factors.

24 In addition, there have to be specific ends
25 of justice findings, which I would respectfully disagree

1 with counsel on the other side: The findings have to be
2 made before the continuance is granted. What --

3 JUSTICE SOTOMAYOR: That's what Zedner seems
4 to suggest.

5 MR. ROBERTS: What Zedner says is the
6 findings have to be made before the continuance is
7 granted. They can be recorded later, but they have to
8 be made, because otherwise the continuance isn't made on
9 the basis of the findings. So if the judge didn't go
10 through, consider the factors, and make the findings, if
11 only in the judge's mind, then the judge shouldn't be
12 recording them later on.

13 JUSTICE STEVENS: Mr. Roberts --

14 JUSTICE SCALIA: And counsel wouldn't know
15 until -- wouldn't know whether the time was excluded or
16 not until -- until a later finding is either made or not
17 made.

18 MR. ROBERTS: Is recorded. I guess -- I
19 guess not, Your Honor.

20 JUSTICE STEVENS: May I ask you,
21 Mr. Roberts, to comment on your opponent's argument that
22 you are creating a rule that if a particular district
23 has a standing order that motions be filed after seven
24 days and then another district has a standing order that
25 it be 21 days, the effect of your rule would be to make

1 the seven-day district an 86-day -- give them 86 days
2 under the Speedy Trial Act?

3 MR. ROBERTS: Yes, Your Honor. The -- the
4 act just doesn't operate so that -- so that all the
5 districts' excludable delays are even across districts.
6 The exclusion in Section (h)(1)(D), the exclusion for
7 pretrial motions, excludes the time that's allotted to
8 prepare responses. And there is wide variation among
9 the different districts in the time that's allotted to
10 prepare responses.

11 So, for example, the Northern District of
12 Florida gives 14 days after the motion. The Northern
13 District of Illinois gives ten days after the motion.

14 JUSTICE STEVENS: That's for response time.

15 MR. ROBERTS: For response time.

16 JUSTICE STEVENS: And that's automatically
17 excluded, so that won't affect the -- well, like you
18 said, it's --

19 MR. ROBERTS: It's going to be different.

20 JUSTICE STEVENS: Yes.

21 MR. ROBERTS: So it's the same -- it's the
22 same issue. They're just -- it isn't in lockstep.

23 JUSTICE STEVENS: But if the difference is
24 specifically authorized by Congress?

25 MR. ROBERTS: Well, this is specifically

1 authorized by Congress, too, because section (h)(1) is
2 -- is a general exclusion for delay resulting from
3 proceedings concerning the defendant.

4 And, you know, these are -- the list of
5 things are examples only. And this covers those
6 proceedings and other proceedings, including those that
7 like this one that are ancillary to the listed ones.

8 JUSTICE STEVENS: But doesn't it seem fairly
9 clear that the district which has a 21-day rule, they
10 won't have to -- normally, they won't need extra time in
11 the routine case for an extra motion, whereas the
12 districts with a seven-day rule would pretty
13 automatically need another 10 days or so.

14 MR. ROBERTS: I think it depends on the
15 particular case and what motions are in -- or what
16 motions are involved, Your Honor.

17 But the -- the rule is going to operate
18 differentially, too. Under Petitioner's theory, people
19 come in asking for different extensions of time to get
20 (h)(7) continuances, which Petitioner says are not going
21 to be very difficult to get granted. So I think, both
22 in terms of the response time varying and in terms of
23 the rule having the same effect, whether it's excluded
24 under (h)(1) or (h)(7), I'm not sure that you are going
25 to ever get a complete parity. That's really not what

1 Congress was intending.

2 CHIEF JUSTICE ROBERTS: Counsel, this may be
3 the same question I was asking earlier, but I want to
4 make sure I've got your answer. Let's say the original
5 date for filing motions is, as it was here,
6 September 13th, right? On September 7th, Mr. Bloate
7 asks for additional time. So the judge's, you know,
8 runs a tight ship, and he says, I will give you one day.
9 One more day, so now it's due on September 14th.

10 You would say the delay resulting from that
11 extension was seven days, from September 7th, when he
12 filed it, to September 14th, and not one day.

13 MR. ROBERTS: That's the way the courts have
14 interpreted it, because once the -- once the
15 determination has been made that there should be time to
16 prepare a response, then you know that you're outside of
17 the case where you don't know whether any of this time
18 in the routine deadline is being used for response --
19 for consideration of motions or preparation of motions.
20 You know that counsel is using time for that purpose.

21 But I would say, you know, the same answer
22 back to you, that -- that the issue here is whether
23 additional time should -- is excluded when it's granted.
24 The issue isn't how much time should have been excluded.
25 And if -- if the court thinks that an incorrect amount

1 of time has been -- was calculated as excluded, I think
2 that the appropriate thing to do in that circumstance
3 would be for the Court to leave that open on remand,
4 assuming that it's -- that it's preserved. But, you
5 know, I think that -- that --

6 JUSTICE GINSBURG: And you would argue it
7 wasn't reserved because both sides thought the period
8 was from September 7th until October 4th, and one
9 thought that that whole period should be excluded? That
10 was your position, and then the other side said none of
11 it --

12 MR. ROBERTS: That's right, Your Honor. I
13 -- Petitioner never argued, at least as far as I am
14 aware, that the error was a miscalculation of the amount
15 of time, rather than the exclusion of the time under the
16 wrong statutory provision.

17 JUSTICE BREYER: How -- how do you think it
18 should work? It seems to me they are two separate
19 things. On September 7th, the defendant comes in and
20 says, "Judge, you've told me I have to have everything
21 ready by the 13th. I would like additional time to
22 prepare." And what he said was, "until September 25th."
23 He said that on the 13th: "I want until
24 September 25th." This is what I think the Chief Justice
25 is asking, in part.

1 Now, what the judge did is excluded
2 everything from September 7th all the way to
3 October 4th. And if I understand your argument -- I'm
4 not sure I agree with it, but on the 7th to the 13th,
5 that really wasn't additional time, but nonetheless,
6 maybe there's something there.

7 What about the period from the 25th to the
8 4th? I don't know what the theory could be on excluding
9 that one, because what the defendant said on the 7th --
10 on September 13th, he said, "Judge, I don't want any
11 more time. I don't even want to file any motions."

12 MR. ROBERTS: On the 25th.

13 JUSTICE BREYER: Yes. On the 25th, he said
14 that. So what is the basis of excluding the 25th to the
15 4th?

16 MR. ROBERTS: As I was saying before, what
17 -- he did make a filing on the 25th, and the Court took
18 action in response to that filing on the 4th, by holding
19 a hearing at which he waived the motions as he indicated
20 that he was doing on the -- on the 25th. So --

21 CHIEF JUSTICE ROBERTS: So the delay -- so
22 saying I'm not going to file any pretrial motions
23 results in a delay from a pretrial motion?

24 MR. ROBERTS: Well, in this particular
25 instance, Your Honor, he made a filing and then the

1 Court -- the Court held a hearing in response to that,
2 and actually engaged in a colloquy with the defendant,
3 asked the -- asked the defendant, "Do you understand
4 what you are giving up? Do you want to waive these
5 motions?" He said, "Yes, I want to do that," and the
6 Court ruled, then, on that on the 4th.

7 JUSTICE SOTOMAYOR: Is that a normal course
8 of practice? I've never quite heard of other --

9 MR. ROBERTS: I don't think it's a general
10 practice, Your Honor. It does seem to be typical in
11 this -- in this district, but I think that --

12 JUSTICE SOTOMAYOR: But then the Court's
13 view a decision or statement that no motions are going
14 to be filed as a request for a waiver of that
15 obligation?

16 MR. ROBERTS: Well, it was in fact a waiver
17 notice, a notice of intent to waive, that the defendant
18 filed. Not just --

19 JUSTICE SOTOMAYOR: Intent to waive.

20 MR. ROBERTS: Well, I mean, it was framed as
21 a waiver, a waiver of pretrial motions. It's Docket
22 Entry 21. But I don't think it's -- you know, it's in
23 the record, but not in the -- in the JA.

24 JUSTICE SOTOMAYOR: Well, I didn't see it as
25 a motion. It didn't move to waive. It said, "I waive."

1 MR. ROBERTS: That -- that's true, but the
2 Court didn't -- the Court held the hearing on the 4th.
3 And it engaged in this conversation with the defendant
4 and then made a decision on the 4th that the time was
5 waived, that the -- the waiver, not --

6 JUSTICE BREYER: So it's --

7 MR. ROBERTS: Not at the time it was filed.

8 JUSTICE BREYER: That's what I understand.
9 You get the period from the -- the 25th to the 4th comes
10 under (D) or (H). It's a motion that is filed, and it's
11 under advisement.

12 MR. ROBERTS: I think that the --

13 JUSTICE BREYER: So it comes under (D) or
14 (H). Is that right?

15 MR. ROBERTS: It comes under -- it probably
16 comes under (h)(1), Your Honor.

17 JUSTICE BREYER: I mean, I don't mean little
18 (h)(1). I mean big (H). It's attributed to a period
19 during which any proceedings actually under any
20 advisement -- or maybe it comes under (D) -- a motion
21 not to file a motion is a motion.

22 MR. ROBERTS: I mean, it could come under
23 (D), Your Honor. It could come under (h)(1). I would
24 say it really comes under both -- best fits under (h)(1)
25 as analogous to a motion that's not exactly a motion.

1 But, you know, either way, the point is that
2 it was something that the Court required the Court
3 action, or at least as the Court had set the rules in
4 this proceeding required Court action, and then it did
5 ultimately did have Court action on the Court.

6 JUSTICE STEVENS: Would you repeat that just
7 so I have you: It comes under (h)(1) -- what sub?

8 MR. ROBERTS: I think just under -- I would
9 say, Your Honor, just under the general language of
10 (h)(1), because it's not strictly a pretrial motion, but
11 it's the equivalent of a pretrial motion.

12 But you could say that it falls under --
13 under (h)(1)(D), and think of it as a motion itself.

14 JUSTICE STEVENS: Did --

15 JUSTICE SOTOMAYOR: Do you have any idea of
16 how many, if we rule against you, until we -- speaking
17 hypothetically, how many convictions would be at risk
18 for --

19 MR. ROBERTS: I couldn't say precisely, Your
20 Honor, but it is the rule that's been followed in eight
21 courts of appeals.

22 JUSTICE SOTOMAYOR: But it's -- it's not
23 everybody who invokes a Speedy Trial Act violation
24 objection.

25 MR. ROBERTS: No. That's true. That's

1 true. I mean, I can't say that they are going to be --
2 and I would have to agree with -- with Petitioner's
3 counsel that, you know, that there are consequences in
4 whatever ruling that the Court -- that the Court makes
5 in a case.

6 JUSTICE SOTOMAYOR: I would have been -- I
7 would have been interested in knowing the effects of
8 Zedner.

9 MR. ROBERTS: Yeah.

10 JUSTICE SOTOMAYOR: And how -- what kind of
11 burden it placed.

12 MR. ROBERTS: I'm sorry, I don't have any
13 precise -- precise information on that. But I think
14 that, you know, even apart from the transitional effects
15 that there are going to be on a going-forward basis,
16 sometimes judges are going -- would -- would grant
17 additional preparation time and neglect to make the
18 required finding.

19 JUSTICE SOTOMAYOR: But that's true of all
20 Speedy Trial Act actions by the district court. They
21 always run the risk of forgetting to make a finding.
22 That's why you have two attorneys, presumably --

23 MR. ROBERTS: That's right --

24 JUSTICE SOTOMAYOR: -- to remind them.

25 MR. ROBERTS: And that would be perfectly

1 appropriate if findings under (h)(7) were necessary.
2 But section (h)(1) is designed to address frequently
3 recurring situations in which the ends of justice are
4 virtually always going to be served by delaying the
5 trial for the purpose. And that's exactly what we have
6 here.

7 JUSTICE SCALIA: Can I ask you about the
8 language of (h)(1)? Do you think it's -- do you think
9 it's proper to consider a period of delay that precedes
10 the filing of the motion? That is, a period of delay in
11 order to prepare the motion, as a delay resulting from a
12 proceeding that has not yet occurred?

13 MR. ROBERTS: No, we -- we agree with that,
14 Your Honor. That's why Petitioner is wrong in saying
15 that (D) addresses the delay we are talking about here
16 and precludes its recognition under -- under (h)(1).
17 The delay we are talking about here is not resulting
18 from the pretrial motion, it's resulting from the grant
19 of -- the order granting additional time to prepare for
20 the motion. And that, that is the related but different
21 proceeding and a different kind of delay related to
22 motions practice. So I would agree with Your Honor
23 that --

24 JUSTICE SCALIA: The grant of the motion is
25 the proceeding?

1 MR. ROBERTS: That the order granting the
2 additional time of the proceeding --

3 JUSTICE SCALIA: Is the proceeding.

4 MR. ROBERTS: -- and if the delay results
5 from that order and the order is ancillary to a listed
6 proceeding, which is the pretrial motions because it
7 facilitates that proceeding, because it provides for
8 adequate preparation, which enabled the motions to be
9 resolved favorably and accurately.

10 JUSTICE STEVENS: But what -- what
11 subsection does all this? I really -- I got lost in --

12 MR. ROBERTS: I'm sorry, Your Honor.

13 JUSTICE STEVENS: Because you agree, as I
14 understand it, it is not covered by (D).

15 MR. ROBERTS: Right.

16 JUSTICE STEVENS: And what subsection does
17 cover it?

18 MR. ROBERTS: It's (h)(1), the general
19 provision, which courts have used to exclude numerous --

20 JUSTICE STEVENS: But it's not governed by
21 any lettered subsection?

22 MR. ROBERTS: No. It's a -- another
23 proceeding that -- that is covered by the including but
24 not limited to language on --

25 JUSTICE STEVENS: But there is no period --

1 MR. ROBERTS: -- (h)(1).

2 JUSTICE STEVENS: -- no subsection talks
3 about another proceeding? That's just your gloss on the
4 statute; is that right?

5 MR. ROBERTS: Well, I think (h)(1) says any
6 period of delay resulting from other proceedings
7 concerning the defendant. That could be a period, and
8 it covers a whole range of proceedings that generate
9 delay. And then --

10 JUSTICE STEVENS: I see.

11 MR. ROBERTS: Then there is a list of
12 examples. And the examples are intended only to be
13 illustrative. And what's -- what's covered is in
14 addition to those examples, other proceedings that are
15 analogous or ancillary to them.

16 JUSTICE SCALIA: And you say the order is a
17 proceeding for that purpose, the order granting the
18 extension of time?

19 MR. ROBERTS: That is the proceedings
20 beforehand, Your Honor. Yes. But the -- that's not
21 the -- you know, first of all, as I said, a proceeding
22 is a -- is an act done by the court or under the court's
23 authority, so in order to fit squarely within that.
24 Plus I would direct you to (h)(1)(F), which indicates
25 that orders can be proceedings here because it excludes

1 delay following an order of removal or an order
2 directing the transportation of the defendant.

3 And, so, I think that there's indication in
4 the examples themselves when orders are sometimes
5 proceedings.

6 JUSTICE STEVENS: But just one quick
7 question. It seems to me that everything described in
8 (7)(A) would fit your description of proceedings.

9 MR. ROBERTS: It -- there -- there would be
10 an order, so there would be a proceeding. But it
11 wouldn't be a proceeding that would be covered under
12 (h)(1) because it -- to be covered it has to be a
13 proceeding of the type that is listed here. It has to
14 be analogous to these proceedings or ancillary to them,
15 facilitating these proceedings in some way, Your Honor.

16 JUSTICE STEVENS: That's a tough argument.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Mr. Stancil, five minutes.

19 REBUTTAL ARGUMENT OF MARK T. STANCIL

20 ON BEHALF OF THE PETITIONER

21 MR. STANCIL: I would like to quickly
22 address what I hope to be just four points. The first
23 is the government's fundamental principle. The
24 fundamental tenet is that the specific treatment of
25 pretrial motions in subparagraph (D) suggests no

1 negative inference or limiting inference on the general
2 standard of (h)(1).

3 The fall on that is evident by looking at
4 subparagraph (h), which automatically excludes up to
5 30 days during which a matter is under advisement by the
6 district court. If the government's reasoning is
7 correct, subparagraph (h) just does not address or
8 contains -- or suggests no negative inference on whether
9 the 31st day of a matter being under advisement is
10 automatically excludable under (h)(1). That's why there
11 are settle -- in the statutory interpretation.

12 We take the general standard, first of all,
13 is it a proceeding? There is no pretrial motion
14 proceeding until the motion is filed.

15 Second, if you think there is any
16 uncertainty as to what a proceeding is, well, look at
17 how the enumerated subparagraphs that follow, what do
18 they describe. One specifically addresses pretrial
19 motions. It has a starting point and it has an end
20 point. That's the end of this case.

21 But even if you think you want to look
22 further. Well, is there any support in these enumerated
23 subparagraphs for the government's rule that you would
24 treat a defense request for additional time differently?
25 No. None of the enumerated subparagraphs distinguishes

1 between defense requests and government requests. None
2 distinguishes between routinely granted time or
3 specifically allotted time.

4 In fact, with respect to defense requests
5 specifically, it was not lost on Congress how to -- how
6 to treat government counsel and defense counsel
7 differently. In (h)(7)(C), which is about the end of
8 justice exclusion, it specifies that the government
9 cannot get an end of justice exclusion based on its
10 inability to exercise due diligence in obtaining a
11 witness or preparing.

12 JUSTICE SCALIA: I don't understand -- I
13 don't understand the government to be argue -- to be
14 arguing that they are treated differently.

15 MR. STANCIL: Well, the government's rule I
16 think is --

17 JUSTICE SCALIA: They are saying whoever --
18 whoever asked for the extension of time in order to
19 prepare the motion gets it. And -- and it's the time
20 limit's suspended.

21 MR. STANCIL: That's not their position in
22 their brief, Your Honor. They say the defense requests
23 for additional time --

24 JUSTICE SCALIA: Well --

25 MR. STANCIL: They don't say anything about

1 government request.

2 JUSTICE SCALIA: -- they made it very clear
3 here that they think it applies to both the defendant
4 and the government.

5 MR. STANCIL: If that's their position, it's
6 more unmoored from the text of subparagraph (D), because
7 then both types of requests -- so subparagraph -- pardon
8 me -- so (h)(1)'s general standard is expanded even
9 farther --

10 JUSTICE BREYER: You are right, (D) has a
11 special time limit built into it -- I mean, (h) or
12 whatever the number is now. It says not to exclude
13 30 days. Okay?

14 MR. STANCIL: Yes.

15 JUSTICE BREYER: None of the others do. So
16 I would say right there, Congress doesn't want the judge
17 to have it for more than 30 days. Congress doesn't say
18 a word in any of the others that says anything about
19 preparation time.

20 MR. STANCIL: Well, I disagree about
21 subparagraph (D) Your Honor. (D) says from point B
22 to --

23 JUSTICE BREYER: No, I know. But there is
24 not an indication about preparation time. Their
25 argument is a literal argument under the statute. Is it

1 from other proceedings? Yes, we know that because of
2 (D), okay? Does it result from other proceedings? Yes,
3 because, in fact, the preparation time is a direct
4 result of the other proceedings as defined in (D).
5 Therefore, it is an ancillary matter related to other
6 proceedings that was caused by the other proceedings.
7 QED, their argument is literal and there is no policy
8 against it. That's what they said.

9 Now, as soon as you get to the last (h), you
10 would find a big policy against it. Called not
11 exceeding 30 days. Now, I take it that's roughly their
12 argument.

13 MR. STANCIL: But there is no --

14 JUSTICE BREYER: At least my interpretation
15 of it.

16 MR. STANCIL: There is no difference, Your
17 Honor, between not exceeding 30 days and from and to.
18 And I think this is -- this case -- it comes to that and
19 that alone, which is Congress specifically addressed
20 pretrial motions, any delay resulting from a pretrial
21 motion and it said from point A to point B. And even if
22 you had to look behind that, you would look at the
23 legislative history and the Senate Judiciary Committee
24 was asked a specific question by the government no less,
25 can we include preparation time, and they said no.

1 CHIEF JUSTICE ROBERTS: Counsel, is your
2 friend correct that the issue of the proper calculation
3 is not before us? So that the time I spent figuring
4 that out should be excluded from something?

5 (Laughter.)

6 MR. STANCIL: As the question was presented,
7 Your Honor, it was specific to preparation time and the
8 period -- and the period from -- I don't want to get the
9 dates wrong but, September 7th to October 4th. But I
10 would add that the government didn't raise this argument
11 below, either. Nor did the government suggest, as I
12 understand it, that the delay that's at issue here
13 results from the grant on September 7th of additional
14 time. Rather their argument as I have understood it and
15 understood it when reading their briefs is that the
16 delay -- the ancillary delay stems from the pretrial
17 motion, the time allotted for pretrial motions itself.

18 CHIEF JUSTICE ROBERTS: I would have thought
19 that whether or not you think that type of delay is
20 excludable depends on what that type of delay is, which
21 requires some sense of how it's going to be calculated.

22 MR. STANCIL: Yes, Your Honor.

23 JUSTICE BREYER: Does six days make a
24 difference to your case? If they lose six days, do you
25 win?

1 MR. STANCIL: I'm not sure, Your Honor, I
2 would have to plead ignorance the same.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel,
4 this case is submitted.

5 (Whereupon, at 2:01 p.m., the case in the
6 above-entitled matter was submitted.)

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above-entitled 1:11 59:6	43:7,23 44:21 45:5 49:17 50:19 51:2 54:24 55:23 58:13	allowing 31:19 allows 18:10,14 19:11 amended 18:24 37:8 amount 33:13 43:25 44:14 analogous 27:8 34:20 47:25 52:15 53:14 analysis 17:23 ancillary 27:8 27:10,15 32:8 42:7 51:5 52:15 53:14 57:5 58:16 anew 22:22 answer 5:7 38:12 43:4,21 answered 6:7 answering 22:7 anticipated 13:3 anyway 25:7 28:6,15 apart 49:14 apologize 21:24 appeals 7:25 13:21 48:21 appear 21:4 APPEARAN... 1:14 application 7:12 applies 22:14,15 56:3 apply 8:1 applying 9:5 appropriate 6:2 21:18 33:25 44:2 50:1 approve 32:6 argue 44:6 55:13 argued 33:5 44:13 arguing 13:18 55:14 argument 1:12	2:2,7 3:4,6 16:21 17:2 23:11 26:21 33:3 34:15 40:21 45:3 53:16,19 56:25 56:25 57:7,12 58:10,14 arguments 34:6 arises 36:22 arraigned 22:1 arraignment 15:21 aside 33:4 asked 46:3,3 55:18 57:24 asking 11:12 12:14 17:16 42:19 43:3 44:25 asks 11:21 14:24 43:7 Assistant 1:17 assume 17:10 18:4 24:6 26:3 assuming 6:3 44:4 assumption 17:23 attorney 9:24 10:4,17 21:10 24:21 38:15 attorneys 49:22 attributable 7:7 attributed 47:18 authority 52:23 authorized 41:24 42:1 automatic 11:10 15:3 automatically 3:11 15:4,8 16:11,12 20:5 21:1 25:25 27:1 35:20,25 38:17 41:16 42:13 54:4,10	average 17:11 17:11 24:6,13 avoids 20:12 awaiting 36:6 aware 23:25 44:14 awful 31:20	B
act 3:12 7:5 10:15,15 18:23 20:14 21:8 22:16 27:2 28:16,22 29:4 30:2,12 34:9 36:5,9 41:2,4 48:23 49:20 52:22 acting 33:7 action 10:16 45:18 48:3,4,5 actions 49:20 actively 19:12 actual 9:6,20 19:14 37:10 add 58:10 addition 39:24 52:14 additional 4:5 4:11 7:13 8:18 15:5 16:5 17:16 18:16 24:4,9 25:17 26:25 27:9 29:12,22,23,24 34:5,8 35:18 36:24 38:2,8 38:22,23 39:2	address 36:23 50:2 53:22 54:7 addressed 3:17 57:19 addresses 50:15 54:18 addressing 9:10 37:1 adequate 8:18 27:12 38:11 51:8 adjournment 9:24 10:5 adjudication 9:20 advance 20:25 adversary 37:18 37:25 adverse 25:12 advisement 19:13 36:11 47:11,20 54:5 54:9 affect 41:17 agree 7:20 45:4 49:2 50:13,22 51:13 agreement 22:17 31:16,18 31:20,24 32:3 32:4,10 Ah 30:10,24 Alito 7:6,24 8:20 13:17 14:7 19:2,6 alloted 55:3 allotted 16:17 41:7,9 58:17 allow 4:1 34:2 allowed 12:5 28:14	allowing 31:19 allows 18:10,14 19:11 amended 18:24 37:8 amount 33:13 43:25 44:14 analogous 27:8 34:20 47:25 52:15 53:14 analysis 17:23 ancillary 27:8 27:10,15 32:8 42:7 51:5 52:15 53:14 57:5 58:16 anew 22:22 answer 5:7 38:12 43:4,21 answered 6:7 answering 22:7 anticipated 13:3 anyway 25:7 28:6,15 apart 49:14 apologize 21:24 appeals 7:25 13:21 48:21 appear 21:4 APPEARAN... 1:14 application 7:12 applies 22:14,15 56:3 apply 8:1 applying 9:5 appropriate 6:2 21:18 33:25 44:2 50:1 approve 32:6 argue 44:6 55:13 argued 33:5 44:13 arguing 13:18 55:14 argument 1:12	2:2,7 3:4,6 16:21 17:2 23:11 26:21 33:3 34:15 40:21 45:3 53:16,19 56:25 56:25 57:7,12 58:10,14 arguments 34:6 arises 36:22 arraigned 22:1 arraignment 15:21 aside 33:4 asked 46:3,3 55:18 57:24 asking 11:12 12:14 17:16 42:19 43:3 44:25 asks 11:21 14:24 43:7 Assistant 1:17 assume 17:10 18:4 24:6 26:3 assuming 6:3 44:4 assumption 17:23 attorney 9:24 10:4,17 21:10 24:21 38:15 attorneys 49:22 attributable 7:7 attributed 47:18 authority 52:23 authorized 41:24 42:1 automatic 11:10 15:3 automatically 3:11 15:4,8 16:11,12 20:5 21:1 25:25 27:1 35:20,25 38:17 41:16 42:13 54:4,10	average 17:11 17:11 24:6,13 avoids 20:12 awaiting 36:6 aware 23:25 44:14 awful 31:20	

58:23 brief 8:10 12:3 34:10 55:22 briefs 58:15 built 56:11 burden 39:8 49:11 burn 18:12,15 burns 17:6	27:16,21 28:12 28:17 29:8,13 29:18,24 30:3 30:5,7,10,16 30:24 31:4,13 32:11 33:4,15 33:20 43:2 44:24 45:21 53:17 58:1,18 59:3 choice 3:24 5:11 5:16 circuits 9:4 23:20,24 circumstance 44:2 circumvent 3:23 clarify 5:24 9:12 clear 3:16 4:18 7:6 12:8 13:2 16:18 18:22 19:21 22:25 26:12,15 37:11 37:15 42:9 56:2 clock 4:20,21 5:1,9,13 12:2 12:13,15,19 15:7 16:6,10 16:13,16,18 17:6,14,15 18:16,19,20 19:14 22:21 23:21 25:16 34:15 colloquy 46:2 come 12:1 13:10 34:16 42:19 47:22,23 comes 10:4 14:24 21:10 29:15 38:15 44:19 47:9,13 47:15,16,20,24 48:7 57:18 command 39:3 commencing	27:2 comment 40:21 committee 11:3 11:5 57:23 compared 16:16 comparison 23:23 competence 31:11 competency 30:14,19 complain 20:20 complete 31:10 42:25 complex 25:19 comply 17:1 concern 8:20 24:17 25:1 concerned 24:20 concerning 27:5 42:3 52:7 conclusion 5:14 conduct 31:19 32:2 confess 33:12 confined 8:6 Congress 3:17 5:12,16 8:14 8:23 9:12,17 10:24 12:7 13:3 15:2 16:19 17:20 18:23 19:6,20 20:1 21:18 24:12 25:4 26:15 37:7,25 41:24 42:1 43:1 55:5 56:16,17 57:19 congressional 24:11 consequence 25:13 35:16 consequences 16:7 25:11 49:3 consider 8:17	14:18 32:5 39:12,20 40:10 50:9 consideration 29:5 31:15,24 32:9 33:6 43:19 considered 11:3 39:22 considering 9:20 38:8 consistent 20:22 30:11 contains 54:8 contemplated 8:15 contesting 33:21 context 10:8 11:14 contexts 13:13 continuance 7:9 7:11,14,17,19 8:24,25 21:16 24:18,21 25:8 40:2,6,8 continuances 42:20 continues 37:14 contrary 32:16 contrast 17:18 conversation 47:3 convictions 23:2 48:17 correct 10:19 13:25 19:5,10 54:7 58:2 correctly 20:19 21:4 counsel 7:18 9:2 11:15 14:23 25:20 26:19 37:17 40:1,14 43:2,20 49:3 53:17 55:6,6 58:1 59:3 count 28:4 29:9	counts 17:18 course 25:7 46:7 court 1:1,12 3:9 6:7,10,11,18 6:20,21 7:2,3 9:6,12,23,25 10:4,5,7,13,15 10:16 12:22 13:10,20 15:10 15:24 19:13 20:18,19,21 21:11,20 22:1 22:20 23:12,17 25:9,23 26:8,8 26:9,12,24 29:12 30:2 31:15 32:5,5 32:25 34:1 35:3,4,11,22 36:3,5,8,13 37:10,13 38:3 38:7 39:19,22 43:25 44:3 45:17 46:1,1,6 47:2,2 48:2,2,3 48:4,5,5 49:4,4 49:20 52:22 54:6 courts 7:20,25 8:11,17 9:16 12:4,18 13:10 13:14 15:10,12 19:19 20:6 22:13 24:2 30:20 32:7 34:1 37:9 38:1 39:21 43:13 48:21 51:19 court's 19:19 27:9 31:23 36:6 46:12 52:22 cover 51:17 covered 20:12 51:14,23 52:13 53:11,12 covers 42:5 52:8
<hr/> C <hr/> C 2:1 3:1 9:3 55:7 calculated 33:12 33:17 44:1 58:21 calculation 11:24 58:2 call 17:5 18:7 Called 57:10 case 3:4 6:4,24 6:24 11:6,12 11:15,25 15:13 15:20 20:24 21:1,7 23:15 23:17 25:19 30:2 33:8,13 35:17 36:4 42:11,15 43:17 49:5 54:20 57:18 58:24 59:4,5 cases 20:3 23:8 25:7 29:5 case-by-case 3:13 21:15 cause 24:23 caused 57:6 certain 19:8 20:4 certainly 12:9 23:6 26:10,10 challenged 32:24 Chicago 15:20 Chief 3:3,8 20:7 20:23 26:19,23				

crafting 3:16	35:5 43:18	30:8,13 31:1,5	31:22,22 37:2	40:24 41:1,11
creating 40:22	decide 9:12 12:5	31:8,14,16	41:9,19 42:19	41:13 42:9
critical 27:13	19:8 34:2	32:18,22,24	50:20,21	46:11 49:20
currently 23:3	decided 17:20	33:1,3,6,24	differentially	54:6
custom 15:12	decides 6:21	34:3,5,22	42:18	districts 15:19
cut 16:21	deciding 25:7	35:21 37:2,2,5	differently 4:11	16:8,15,17
	decision 13:25	42:2 43:10	5:18 16:6	17:17 19:4
	46:13 47:4	45:21,23 50:9	54:24 55:7,14	23:8 41:5,5,9
	decisions 13:21	50:10,11,15,17	difficult 42:21	42:12
	declared 11:8	50:21 51:4	diligence 14:20	Docket 46:21
	declares 3:19	52:6,9 53:1	14:25 15:6	doing 15:2 38:8
	default 15:19	57:20 58:12,16	25:21 55:10	45:20
	17:18 18:11	58:16,19,20	direct 8:17	doubt 26:6
	defendant 4:22	delaying 50:4	52:24 57:3	drafting 10:25
	9:21 11:21	delays 3:12,17	directing 53:2	26:16
	14:1,24 16:9	8:9,11 12:3	disagree 12:17	driving 24:25
	22:1,13 23:11	14:23 23:23	17:3 32:11	due 7:15 14:20
	25:14 27:5	24:9 25:4	37:17 39:25	14:25 15:6,22
	31:2,18,19	27:14 33:14	56:20	16:12 25:21
	32:1 35:11,12	36:21,22,24	discretion 13:15	28:6,18 43:9
	35:15 38:10,25	41:5	discussed 35:11	55:10
	42:3 44:19	deliberate 3:24	dismiss 6:18 7:1	D.C 1:8,15,18
	45:9 46:2,3,17	5:11	7:3	15:25
	47:3 52:7 53:2	demonstrate	dismissal 14:4	
	56:3	31:19 32:1	22:12,16	
	defendants	denied 12:12	dismissed 6:24	E
	13:19 38:3	deny 24:3	dispose 17:25,25	E 2:1 3:1,1
	defendant's	Department	19:24	earlier 22:7 43:3
	12:24 21:8	1:18	disposed 4:4	early 12:1,19
	25:20	depends 42:14	disposition 3:21	effect 13:25 34:4
	defense 4:8,10	58:20	5:14 19:3,22	37:4 40:25
	4:10,17 5:4,7	describe 54:18	distinguishes	42:23
	7:7 9:24 10:4	described 53:7	54:25 55:2	effective 8:18
	10:17 16:5	description 53:8	district 6:18,20	14:19
	21:10 24:3	designed 50:2	6:21 7:2,3 8:17	effectively 15:7
	38:15 54:24	detailed 39:17	9:16 10:13	18:17,25
	55:1,4,6,22	determination	12:4 14:9	effects 49:7,14
	deferral 31:23	30:18 31:11	15:10,10,12,18	eight 23:8 48:20
	deferred 31:17	43:15	15:19 16:25	either 5:10 8:11
	defined 3:18	determine 7:3	17:6 18:10,14	19:21 21:17
	57:4	30:14 39:6	18:19,20 19:4	23:9 24:18,19
	definition 10:11	determining	19:4,13,19	25:15 35:6,8
	delay 10:22	29:9	20:5,7,19 21:4	40:16 48:1
	14:25 21:16	difference 17:24	21:11,20 22:1	58:11
	25:24,24 27:4	18:17 41:23	24:2 25:23	employed 36:3
	27:6 28:1,5,7	57:16 58:24	26:3,9 29:12	enabled 51:8
	28:14,20,24	different 15:22	38:1,3 40:22	encompass 3:23
				encourage 12:10

ends 4:4 6:8 13:22 14:11 19:22 37:22 39:24 50:3	51:19 56:12	extended 29:4 32:12	file 10:18 12:6,6 16:10 22:2 28:10 35:6,13 35:16 45:11,22 47:21	focus 3:14
engaged 32:8 46:2 47:3	excluded 3:11 4:2 7:22 15:4 20:15 22:4 25:25 27:1 29:2,4,10 30:20,22 31:9 32:6,7,25 33:1 33:22,22 34:8 34:24 35:20 37:9,13,16 40:15 41:17 42:23 43:23,24 44:1,9 45:1 58:4	extension 11:16 11:17 12:16 14:11 24:6 27:23,24 28:2 28:5 32:18,23 43:11 52:18 55:18	filed 10:11 27:23 27:25 28:5,11 34:18 35:10 40:23 43:12 46:14,18 47:7 47:10 54:14	follow 8:7 23:20 54:17
entire 10:16	excludes 27:4,6 28:24 30:13 31:1,14 35:22 36:5,9,14,20 41:7 52:25 54:4	extensions 14:9 20:9 21:5 42:19	filings 3:19 4:3 4:17 5:2,13 6:15 9:19 12:7 19:22 28:23 30:17,21 32:17 34:20 35:5 37:12 43:5 45:17,18,25 50:10	followed 48:20
Entry 46:22	excluding 21:12 21:21 22:20 45:8,14	extra 17:14 20:20 25:15,16 25:24 42:10,11	final 32:18	following 53:1
enumerated 54:17,22,25	exclusion 3:12 3:18,19,25 4:13,16 7:23 9:5,14 11:10 11:18 12:6 15:3 27:14 34:22 35:20 41:6,6 42:2 44:15 55:8,9	face 4:19 5:12	find 57:10	forces 38:18
equally 4:9	exclusions 21:5	facilitates 27:12 51:7	finding 6:2,5,8 9:25 13:6,14 24:20 38:14 39:17 40:16 49:18,21	foremost 3:16
equivalent 48:11	exercise 14:20 14:25 55:10	facilitating 53:15	findings 12:11 12:22 13:1,22 21:17 26:11 37:23 39:25 40:1,6,9,10 50:1	Forget 12:16
error 44:14	exercising 25:21	fact 8:9,14 9:4 14:1 28:22 31:2 32:6 34:7 36:3,22 39:7 46:16 55:4 57:3	finish 22:6	forgetting 49:21
ESQ 1:15,17 2:3 2:5,8	expand 9:12	factor 5:19	first 3:16 10:9 12:18 14:16 27:6 52:21 53:22 54:12	formal 10:12
essential 17:20	expanded 56:8	factors 7:4 14:17 39:12,15 39:20,23 40:10	fit 52:23 53:8	found 6:13,13
essentially 22:11	expands 10:22	fair 11:22 27:13	fits 47:24	four 14:17 17:6 53:22
everybody 48:23	expeditiously 20:3	fairly 24:7 42:8	five 16:25 17:7 18:15,15 53:18	framed 46:20
evidence 8:14,23	explain 22:9	false 11:20	flexibility 19:19 20:6	frequently 7:18 7:18 50:2
evident 54:3	explicit 13:22	far 33:6 44:13	flexible 12:5	friend 58:2
exact 33:13	explicitly 26:15	farther 56:9	Florida 41:12	function 25:3
exactly 15:2 47:25 50:5	express 5:16	favor 9:17 12:14 22:9 23:4	flowing 29:25	fundamental 16:4 53:23,24
examination 30:21 31:5,8 31:10,10	expressly 36:20	favorably 51:9		fundamentally 19:1,25
example 15:19 41:11		features 3:15		further 8:14 36:6 54:22
examples 36:23 42:5 52:12,12 52:14 53:4		feel 38:4		
exceeding 57:11 57:17		figured 33:21		
exceedingly 23:15		figuring 58:3		
exception 19:16				
excessive 23:23				
excludable 10:22 27:14 38:17 41:5 54:10 58:20				
exclude 8:8 20:4 27:18 28:22 29:1 31:5,6 36:1,9,12 39:9				

<p>39:15 41:1 43:8 gives 16:7 19:19 22:11 41:12,13 giving 13:7 46:4 gloss 52:3 go 8:15 15:20 23:24 40:9 going 11:23 12:13,15,16,25 13:1 14:8,13 17:7,8 19:3,18 20:3,4,5,15,20 20:25 28:14 31:25 38:10 41:19 42:17,20 42:24 45:22 46:13 49:1,15 49:16 50:4 58:21 going-forward 49:15 golf 24:22 good 24:20 31:19 32:1 govern 19:18 governed 51:20 government 5:5 8:10 11:4,20 12:21 14:3,24 22:12,17 23:6 25:11,14 55:1 55:6,8,13 56:1 56:4 57:24 58:10,11 government's 4:8,9,18 5:18 8:10 9:17 16:4 17:2 23:10 24:17 53:23 54:6,23 55:15 grant 13:1 20:9 20:11,14,15 24:18 25:8 27:9 32:23 36:24 38:8 49:16 50:18,24</p>	<p>58:13 granted 11:17 11:22 12:18 15:5 21:11,16 26:25 27:25 35:19 36:1,2 36:13,14,18 40:2,7 42:21 43:23 55:2 granting 14:9,11 29:12,22 31:9 50:19 51:1 52:17 grants 9:24 35:22 grounds 6:19 11:19 22:16 guess 11:7 23:9 33:15,23 40:18 40:19</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>h 3:13,16,22 4:9 5:12 6:8 7:8,9 7:21,23 8:1,1,3 8:8,11,12,16 8:16,16,24 9:3 9:13 10:25,25 11:18 14:21 15:3 19:11 20:6,12,15 21:6,16 25:3 26:8,13,16 27:6 30:12,23 30:25 31:1,14 31:16 35:21 36:20 37:1 39:10,16 41:6 42:1,20,24,24 47:10,14,16,18 47:18,23,24 48:7,10,13 50:1,2,8,16 51:18 52:1,5 52:24 53:12 54:2,4,7,10 55:7 56:8,11</p>	<p>57:9 happen 18:25 happened 35:9 happens 13:13 hear 3:3 heard 46:8 hearing 3:20 5:14 9:19 19:17,18,20,23 19:24 27:23,25 32:13,18 34:19 35:8,11 36:6 36:10 37:13 45:19 46:1 47:2 hearings 9:6 37:10,12 held 6:8 11:17 22:14,15 35:11 36:4,5 46:1 47:2 Henderson 19:19 36:4 herring 11:20 history 57:23 hit 17:15 holding 45:18 holds 6:3 Honor 4:7,14,25 5:8 6:25 7:17 8:5 9:7,11 10:1 10:9,20 12:17 13:24 14:16 15:25 16:23 17:3 18:4 19:11 21:3,14 22:3,24 24:1 31:7,23 33:3 33:19 36:20 37:21 38:9 40:19 41:3 42:16 44:12 45:25 46:10 47:16,23 48:9 48:20 50:14,22 51:12 52:20 53:15 55:22</p>	<p>56:21 57:17 58:7,22 59:1 hope 53:22 hypothetical 20:19 21:3 hypothetically 18:4 48:17 h)7 8:12</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 23:1 48:15 ignorance 59:2 ii 8:16,21 Illinois 41:13 illustrates 17:4 illustrative 52:13 imagine 9:23 implicitly 10:6 important 25:3 imposing 39:2 inability 55:10 inclined 20:9 include 11:4 30:17 57:25 included 4:6 including 14:18 36:21 37:12 42:6 51:23 incompetence 31:6,12 incompetent 31:2 incorrect 23:17 43:25 indicate 35:7 indicated 45:19 indicates 52:24 indication 23:20 24:1 53:3 56:24 indictment 14:4 22:13 individual 14:1 21:7 38:5 individualized 28:25</p>	<p>inference 36:22 54:1,1,8 information 35:1 49:13 initiated 29:14 initiation 10:12 instance 45:25 instances 19:7 instructions 7:1 insufficient 21:13 intended 52:12 intending 43:1 intent 28:10 34:18 46:17,19 interest 5:25 6:5 6:15 12:12,25 13:7 14:1 20:11 38:10,14 38:19 39:7 interested 49:7 interests 12:24 intermediate 8:9 interpret 7:21 interpretation 6:3 54:11 57:14 interpretations 37:9 interpreted 43:14 introductory 8:4 investigate 9:21 invokes 48:23 involved 12:10 42:16 issue 8:7 14:3 20:12 32:25 34:1 41:22 43:22,24 58:2 58:12 iv 8:12,16 15:7</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>JA 46:23</p>
---	---	---	---	--

JAMES 1:3	27:16,21 28:12	35:17 40:14,15	litany 39:15	MATTHEW
judge 6:1,14,14	28:17 29:8,13	42:4 43:7,16	literal 56:25	1:17 2:5 26:21
7:12 13:5,6	29:18,24 30:3	43:17,20,21	57:7	mean 10:15
14:8 19:8 20:8	30:5,7,10,16	44:5 45:8	literally 13:13	22:23 25:14
20:24 21:5,5	30:24 31:4,13	46:22 48:1	little 14:2 35:25	35:1 46:20
21:11 22:1	32:11 33:4,15	49:3,14 52:21	47:17	47:17,17,18,22
24:18 26:4	33:20 34:13,25	56:23 57:1	local 15:13,24	49:1 56:11
29:16 38:13,16	35:14,24 36:16	knowing 49:7	16:8 17:13,13	means 5:19
38:18,21,22	37:4,17,22,24		18:20,24 21:25	11:13 12:22
39:2,5,8,11,15	38:12,14,20	L	22:4	meet 15:6
39:20 40:9,11	39:1,5,7,14,25	language 3:22	lockstep 41:22	mental 30:14,18
44:20 45:1,10	40:3,13,14,20	36:17 37:5,11	logic 9:16	31:6
56:16	41:14,16,20,23	37:14 48:9	long 6:16 13:14	mentally 31:2
judges 12:10	42:8 43:2 44:6	50:8 51:24	longer 16:15	mind 40:11
14:9 25:6	44:17,24 45:13	late 6:4,6	17:9 24:15	minute 21:9
37:22 49:16	45:21 46:7,12	latest 6:14,17	look 10:24 31:14	minutes 53:18
judge's 40:11	46:19,24 47:6	Laughter 58:5	38:5,18 39:9	miscalculation
43:7	47:8,13,17	lawyers 24:7	54:16,21 57:22	44:14
judgment 17:20	48:6,14,15,22	leave 44:3	57:22	modest 24:7
20:1 24:11,11	49:6,10,19,24	left 6:22 11:7	looked 9:3	moment 5:1
Judiciary 11:3	50:3,7,24 51:3	legislative 3:24	looking 5:22 9:9	month 38:15,16
57:23	51:10,13,16,20	5:11 20:1	9:18 10:17	38:20 39:9
jurisdiction	51:25 52:2,10	24:11 57:23	30:25 54:3	months 22:12
24:2	52:16 53:6,16	legitimately	lose 32:20 33:9	motion 3:10,17
jurisdictions 8:7	53:17 55:8,9	12:24	33:11 58:24	3:20,21,25 4:4
16:1 17:13	55:12,17,24	length 32:24	lost 5:17 51:11	4:4,17,17,18
24:14	56:2,10,15,23	33:3,24 34:3	55:5	5:4,5,7,9,15
justice 1:18 3:3	57:14 58:1,18	lengthened 15:8	lot 20:16 23:7	6:18,21 8:11
3:8 4:1,12,15	58:23 59:3	lettered 51:21	31:20	9:19,21 10:11
4:20 5:3,6,21	justification	let's 17:10 31:14		10:12 12:12
5:23,25 6:5,8	38:25	43:4	M	15:11 17:12,25
6:12,15,23 7:6		light 9:10	majority 8:7	18:1 20:14
7:24 8:20 9:2,8	K	likewise 36:11	23:21 24:14	24:6 27:23
9:15 10:3,14	K 3:6	limit 3:24 16:2	making 12:11	28:23 30:18,21
11:1 12:9,12	KENNEDY	34:4 56:11	13:22 14:22	33:7,7 34:21
13:5,8,17,22	15:9,17,23	limitations 14:5	manner 23:13	34:21 35:1
14:7,11 15:9	16:20,24 17:22	22:8,18 37:19	23:14	36:6 37:2,6,12
15:17,23 16:20	18:6,9,13	37:21	MARK 1:15 2:3	41:12,13 42:11
16:24 17:22	24:16,25 25:6	limited 36:21	2:8 3:6 53:19	45:23 46:25
18:6,9,13 19:2	25:10 26:1,3,6	51:24	mathematical	47:10,20,21,21
19:6 20:7,11	34:25 35:14	limiting 54:1	17:23	47:25,25 48:10
20:23 21:9,19	kids 24:22	limit's 55:20	matter 1:11	48:11,13 50:10
21:25 22:6,19	kind 49:10	list 42:4 52:11	16:14 19:8,12	50:11,18,20,24
22:23 23:1,13	50:21	listed 27:7,11,15	23:16 24:5	54:13,14 55:19
23:19 24:16,25	know 19:17 23:5	36:21,23 42:7	29:2 54:5,9	57:21 58:17
25:6,10 26:1,3	24:9 25:24	51:5 53:13	57:5 59:6	motions 4:8,8,10
26:6,19,23	29:7 33:2 34:6	listen 39:6	matters 26:15	7:8,13,15 8:6

8:21 10:18 11:16 15:16,21 16:10,11 20:9 21:6,21 22:2 25:17 27:1,9 27:10,12,24 28:10,18 29:6 32:13 34:19 35:5,6,7,13,16 35:19,21 36:1 36:13,24 38:3 38:24 40:23 41:7 42:15,16 43:5,19,19 45:11,19,22 46:5,13,21 50:22 51:6,8 53:25 54:19 57:20 58:17 motion's 36:11 move 11:15 20:2 46:25 moved 11:18 33:7 moving 7:22	negotiations 31:25 32:8 Neither 38:9 never 6:5 39:14 39:16 44:13 46:8 new 22:22 nine 23:9 non-moving 35:23 normal 20:8,9 46:7 normally 42:10 Northern 41:11 41:12 notice 34:18 46:17,17 number 23:16 56:12 numerous 51:19	34:11 oral 1:11 2:2 3:6 26:21 orally 13:6 order 20:8,12 29:12,13,21,22 29:25 30:1,1,9 31:9 35:5 40:23,24 50:11 50:19 51:1,5,5 52:16,17,23 53:1,1,10 55:18 orders 52:25 53:4 ordinarily 12:1 16:17 original 10:23 32:15 43:4 originally 15:11 35:4,4 ought 11:22 outside 43:16 outweigh 12:25 overwhelmingly 8:1	7:6 9:10 17:1,5 19:8 28:1,9 31:1,16 44:7,9 45:7 47:9,18 50:9,10 51:25 52:6,7 58:8,8 periods 18:24 33:14 permission 35:2 permissive 13:11 person 29:15 personally 35:12 Petitioner 1:4 1:16 2:4,9 3:7 34:18 35:6 42:20 44:13 50:14 53:20 Petitioners 32:24 33:2,5 34:2 Petitioner's 42:18 49:2 phrase 8:4 place 20:2 32:15 placed 49:11 play 24:21 plea 31:15,20,24 32:3,8,9 plead 59:2 please 3:9 26:24 plus 18:16,17 52:24 point 5:23 9:13 9:13 26:1,12 28:5 34:14 38:13 48:1 54:19,20 56:21 57:21,21 points 53:22 policy 57:7,10 position 5:1,25 8:7 23:10,10 44:10 55:21 56:5 possibly 28:4	practical 16:14 practice 46:8,10 50:22 precedes 50:9 precise 6:10 13:10 49:13,13 precisely 3:18 48:19 precludes 50:16 prejudice 7:4 11:13,23 12:21 14:5 preparation 3:10,23 4:21 4:23 5:10,20 8:13,15,19 10:24 11:4,7 12:5,23 13:20 14:19 18:11,16 23:22 26:25 27:10 28:8,13 29:6 34:9 35:19 36:25 37:15 43:19 49:17 51:8 56:19,24 57:3 57:25 58:7 prepare 7:8,13 12:15 17:11 18:4 21:11,21 27:12 35:23 36:13 38:11,24 41:8,10 43:16 44:22 50:11,19 55:19 preparing 10:20 36:2 55:11 presented 58:6 preserved 33:2 34:3 44:4 presumably 14:8 20:23 28:9 38:22 49:22 pretrial 3:10,17 3:24 7:8,13,15 8:6,11,22
<hr/> N <hr/> N 2:1,1 3:1 necessarily 11:13,15,22,23 12:20 necessary 12:19 14:19 15:1 50:1 need 4:5 8:17 9:10 10:5,7 20:2 21:11 25:17 35:2 39:9 42:10,13 needed 12:24 38:24 needs 12:22 13:11 14:8 25:15,16 negative 36:22 54:1,8 neglect 49:17	<hr/> O <hr/> O 2:1 3:1 objection 48:24 obligation 46:15 obtaining 55:10 occurred 50:12 October 1:9 27:18,20,25 28:2 33:8 44:8 45:3 58:9 odd 7:10 Oh 5:8 okay 13:7 21:19 29:13 30:14 56:13 57:2 once 29:6 32:4 38:14 43:14,14 ones 42:7 open 6:22 44:3 open-endedness 26:13 operate 41:4 42:17 opponent's 40:21 opposition	<hr/> P <hr/> P 3:1 PAGE 2:2 paper 35:10 pardon 11:2 23:8 56:7 parity 42:25 part 9:18 15:23 20:8 44:25 particular 9:18 40:22 42:15 45:24 parties 7:20 32:4,7 party 35:23 pending 23:3 people 42:18 perfectly 21:18 49:25 period 4:6 6:24		

<p>10:10,12 11:16 13:20 15:15,21 16:10 17:12 20:8 21:6 24:6 25:17 27:1,10 27:24 29:6 32:13 34:19 35:19,21 37:2 37:6 41:7 45:22,23 46:21 48:10,11 50:18 51:6 53:25 54:13,18 57:20 57:20 58:16,17 pretty 19:21 42:12 previous 37:8 principle 53:23 prior 9:4 probably 30:22 47:15 problem 17:4 20:13 22:18 23:16 37:19 problems 14:6 16:3,4 20:10 22:8 37:21 procedural 26:14 procedure 26:14 proceeding 9:18 9:22 10:6,10 10:10,12,14,17 10:20,21 27:11 28:25 29:9,14 29:18,21,22,25 30:4,13 48:4 50:12,21,25 51:2,3,6,7,23 52:3,17,21 53:10,11,13 54:13,14,16 proceedings 8:22 27:4,7,8,9 27:15,15 42:3 42:6,6 47:19 52:6,8,14,19</p>	<p>52:25 53:5,8 53:14,15 57:1 57:2,4,6,6 process 14:22 prompt 3:21 5:14 proper 50:9 58:2 proposal 11:3,5 proposed 31:15 32:4,9 prosecution 31:17 prosecutor 4:5 4:23 prosecutor's 4:2 5:7 prospective 20:17 21:7 provided 35:4 provides 51:7 provision 22:20 32:3,9 44:16 51:19 provisions 30:12 public 14:7 38:10 public's 12:25 14:1 purpose 31:18 36:2 43:20 50:5 52:17 pursuant 31:17 pushed 32:19 put 6:10 12:22 13:1,11 19:21 26:11 putting 14:21 15:3 26:9 33:4 39:8 p.m 1:13 3:2 59:5</p>	<p>6:10 10:24 13:10 22:7 27:17 33:24 34:3 43:3 53:7 57:24 58:6 questions 35:24 quick 53:6 quickly 53:21 quintessentially 20:1 quite 12:3 13:13 46:8</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 raise 58:10 raised 23:11 34:10 range 52:8 read 7:25 8:1 37:5 reading 3:22 7:17 58:15 ready 44:21 really 13:18 38:19 42:25 45:5 47:24 51:11 reason 15:5 35:18 39:6,18 reasonable 12:4 17:12 24:8 reasoned 36:8 reasoning 36:4 54:6 reasons 10:9 27:3 rebuttal 2:7 26:18 53:19 recitation 14:14 recite 14:14 recognition 50:16 record 12:23 13:2,12,23 14:15 26:9,11 46:23</p>	<p>recorded 40:7 40:18 recording 40:12 recurring 50:3 red 11:20 redundant 31:5 refer 8:24 refers 8:21 regard 19:20 regarded 28:19 reindict 22:13 rejected 6:11 11:5 20:18 related 9:19 37:1 50:20,21 57:5 relatively 12:3 24:7 reliance 13:20 remainder 26:18 remains 5:13 7:2 remand 6:9 34:1 34:12 44:3 remanded 7:1 remind 49:24 removal 53:1 repeat 48:6 request 7:7 16:5 16:5 24:8 29:20,20 38:19 46:14 54:24 56:1 requested 11:16 21:15 38:2,9 requests 4:10 24:3 55:1,1,4 55:22 56:7 required 14:22 19:7 26:10 38:16 39:14,16 39:17 48:2,4 49:18 requirement 38:13 requirements</p>	<p>39:2 requires 58:21 requiring 14:13 37:22 reserve 26:17 reserved 44:7 resolution 27:13 resolved 51:9 respect 9:9 11:25 15:15 55:4 respectfully 39:25 respecting 10:21 respond 18:7 36:1,14 Respondent 1:19 2:6 26:22 response 5:9,10 5:17 18:12 35:23 37:8 41:14,15 42:22 43:16,18 45:18 46:1 responses 41:8 41:10 result 6:23 7:22 27:15 28:22 29:3 57:2,4 resulted 28:1 resulting 27:4,7 28:24 30:9,13 31:1,8,14 35:21 36:24 37:6 42:2 43:10 50:11,17 50:18 52:6 57:20 results 32:22 33:13 45:23 51:4 58:13 retrial 22:19 retrospectively 6:9 return 10:23 reversal 23:2 reverse 9:25</p>
--	---	---	---	--

<p>10:2 reversed 39:21 reverses 23:17 reviewed 9:4 13:15 right 4:2,6 5:3 18:6,9,13 24:3 24:10 27:17 30:3,5,19 31:3 31:13 32:20 33:10,23 35:13 35:16 39:9 43:6 44:12 47:14 49:23 51:15 52:4 56:10,16 risk 23:2 48:17 49:21 Roberts 1:17 2:5 3:3 20:7,23 26:19,20,21,23 27:16,19,21 28:7,12,16,17 28:21 29:8,11 29:13,17,18,20 29:24 30:1,3,4 30:5,6,7,8,10 30:15,16,20,24 31:3,4,7,13,21 32:11,21 33:4 33:11,15,19,20 33:23 34:14,17 35:3,15 36:19 37:7,20 38:7 38:21 39:4,11 39:19 40:5,13 40:18,21 41:3 41:15,19,21,25 42:14 43:2,13 44:12 45:12,16 45:21,24 46:9 46:16,20 47:1 47:7,12,15,22 48:8,19,25 49:9,12,23,25 50:13 51:1,4 51:12,15,18,22</p>	<p>52:1,5,11,19 53:9,17 58:1 58:18 59:3 rote 14:14,17 roughly 57:11 route 5:25 routine 25:19 28:23 29:1 42:11 43:18 routinely 55:2 rule 4:9 8:5 13:17 15:22,24 16:4 17:2,13 17:14 18:8,11 18:19,21,21,24 19:15 21:25 22:5,8 23:3,21 24:3,5,17 33:25 34:4 37:19 40:22,25 42:9,12,17,23 48:16,20 54:23 55:15 ruled 9:16 29:14 46:6 rules 6:18 15:14 16:8 20:2 24:19 48:3 ruling 18:12 23:4,18 25:11 25:13 49:4 run 4:21,22 12:13,15 16:9 16:12 17:8,15 20:10 49:21 running 29:11 34:15 runs 5:1 32:14 43:8 rushing 38:11</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>s 2:1 3:1 56:8 satisfy 12:11 saying 10:7 13:21 20:24 21:12 31:25</p>	<p>37:25 45:16,22 50:14 55:17 says 5:12,12 6:16 10:4,5 14:18 19:17 20:19 21:5,10 29:15,16 31:16 36:17 38:15 39:20 40:5 42:20 43:8 44:20 52:5 56:12,18,21 SCALIA 36:16 37:4 40:14 50:7,24 51:3 52:16 55:12,17 55:24 56:2 schedule 15:12 scores 13:13 screen 25:3 se 7:23 second 34:14 35:18 54:15 section 3:11 27:3,6 35:20 36:19,19 37:1 41:6 42:1 50:2 see 25:11 28:19 30:11 35:14 46:24 52:10 seeking 30:21 Senate 11:1,2 57:23 send 6:4 sense 8:23 11:11 27:22 28:25 35:25 36:9,12 58:21 separate 44:18 September 15:11 27:18,20 27:24 28:2,18 32:14 33:8 34:18,23 43:6 43:6,9,11,12 44:8,19,22,24 45:2,10 58:9</p>	<p>58:13 served 14:11,13 50:4 set 13:19 15:10 15:13,21 16:2 19:14 22:4 35:8 48:3 settle 54:11 seven 16:12 40:23 43:11 seven-day 41:1 42:12 ship 43:8 short 16:9 17:1 17:5,13 18:19 show 19:2 showing 15:1 side 5:11 25:15 40:1 44:10 sides 44:7 significant 13:25 similar 27:14 36:3 simply 11:6,12 25:21 situation 8:2 9:23 situations 14:10 39:22 50:3 six 22:12 58:23 58:24 small 13:19 23:15 Solicitor 1:17 soon 57:9 sorry 4:13 8:3 10:1 12:13 16:23 33:19 49:12 51:12 sort 12:20 sorts 14:23 SOTOMAYOR 5:21 9:2,8,15 10:3,14 11:1 21:9,19,25 22:6,19,23</p>	<p>23:1,13 37:17 37:24 38:12 39:1,5,14 40:3 46:7,12,19,24 48:15,22 49:6 49:10,19,24 sounds 20:16 21:6 31:20 speaking 48:16 speaks 7:9 8:13 special 56:11 specific 27:17 36:2 39:20,24 53:24 57:24 58:7 specifically 3:17 8:12,13,15,17 8:21,21 10:25 11:3 15:16 36:13,23 37:7 39:11 41:24,25 54:18 55:3,5 57:19 specified 7:4 39:12 specifies 14:17 55:8 speedy 3:12 6:19 6:19,21 10:8 11:14,23 12:2 12:2,20,21 15:7 16:7,14 17:6,14 18:18 18:20,23 20:13 20:17 21:8 22:16,21 27:2 34:9 41:2 48:23 49:20 spent 28:13,19 37:10 58:3 spot 6:13 squarely 52:23 Stancil 1:15 2:3 2:8 3:5,6,8 4:7 4:13,16,25 5:4 5:8 6:6,16,25 7:16 8:5 9:7,11</p>
---	---	---	---	--

<p>10:1,8,19 11:2 12:17 13:9,24 14:16 15:15,18 15:25 16:23 17:3 18:3,7,10 18:14 19:5,10 20:16 21:2,14 21:23 22:3,10 22:21,24 23:5 23:14,25 24:24 25:2,9,13 26:2 26:5,7 53:18 53:19,21 55:15 55:21,25 56:5 56:14,20 57:13 57:16 58:6,22 59:1 standard 15:6 16:9 54:2,12 56:8 standing 40:23 40:24 starting 34:23 54:19 starts 4:3 12:7 19:22 22:21 statement 46:13 states 1:1,6,12 3:4 36:20 statute 4:19 12:8 13:2 14:5 22:8 22:18,25 37:18 37:21 39:3,19 52:4 56:25 statutory 3:15 44:16 54:11 stems 58:16 step 30:2 STEVENS 40:13,20 41:14 41:16,20,23 42:8 48:6,14 51:10,13,16,20 51:25 52:2,10 53:6,16 stop 6:1 16:6,10 16:13,16,18</p>	<p>17:8,15 18:15 stopped 5:13 23:21 stops 5:10,13 25:16 strictly 48:10 strictness 26:14 sub 48:7 subject 3:12 15:14 23:3 submission 32:17 submissions 36:7 submitted 59:4 59:6 subparagraph 3:18 19:11,17 53:25 54:4,7 56:6,7,21 subparagraphs 54:17,23,25 subsection 51:11,16,21 52:2 substantive 26:13 sufficient 13:16 suggest 11:9,21 40:4 58:11 suggested 23:7 35:25 suggestion 5:18 suggests 14:3 53:25 54:8 superfluous 37:22,24 supplied 6:9 support 54:22 supposition 23:5 Supreme 1:1,12 sure 16:20,24 21:23,24 26:7 27:22 32:21 33:11 42:24 43:4 45:4 59:1 suspended</p>	<p>55:20 suspension 4:6 system 20:2 systemic 24:17</p> <hr/> <p>T</p> <p>T 1:15 2:1,1,3,8 53:19 table 11:8,8 take 5:24 6:1 17:9 23:10 24:14,22 30:12 31:25 33:16 38:5,6 54:12 57:11 taken 23:10 34:11 36:11 takes 10:21 17:10,24 29:19 talking 5:6 24:8 30:9 50:15,17 talks 52:2 TAYLOR 1:3 tell 15:9 20:25 21:20 ten 23:9 41:13 tenet 53:24 term 7:17 terms 8:13 13:11 42:22,22 text 3:15 4:18,19 12:8 56:6 Thank 26:19 53:17 59:3 theory 4:2,21 30:17 42:18 45:8 thing 33:25 44:2 things 12:1 20:5 28:6 38:1 42:5 44:19 think 4:23 6:12 7:16,18,19 8:22,23 10:21 11:6,11,19,19 11:25 12:1,3,4 12:7,18 13:2,9</p>	<p>14:10 15:2 17:4,19,19,22 18:1,22,25 19:25 20:10,21 20:22 21:3 22:17 23:15 24:5,5,14 26:11 28:16 30:20 31:7,21 32:3,16,21,23 33:5,22 34:7 34:11 37:20 38:1 42:14,21 44:1,5,17,24 46:9,11,22 47:12 48:8,13 49:13 50:8,8 52:5 53:3 54:15,21 55:16 56:3 57:18 58:19 thinks 43:25 Third 36:15 thought 44:7,9 58:18 three 3:14 17:11 27:3 38:6 tight 43:8 time 3:10,23 4:2 4:5,11,22,23 5:17,20 6:14 6:17,20 7:7,7 7:13,13,21 8:15,18 9:2,9 9:21 10:24 11:4,7,12 12:5 12:14,23 13:20 14:10,12,19,19 15:5 16:2,5 17:5,16,24,25 18:11,24 19:3 19:8,18 20:11 20:20 21:11,12 21:15,21 22:4 22:20 23:22 24:4 25:14,15 25:16,16,17,24</p>	<p>26:18,25 27:3 27:10,12,18,19 28:4,8,9,13,14 28:19,22,24 29:1,2,4,5,11 29:12,15,21,22 29:23,24 30:17 31:25 32:5,7 32:12,17 33:13 33:16 34:7,9 34:22,23 35:18 35:22 36:1,2,5 36:9,10,12,14 36:17,18,25 37:10,11,13,15 38:2,9,11,22 38:23,24 40:15 41:7,9,14,15 42:10,19,22 43:7,15,17,20 43:23,24 44:1 44:15,15,21 45:5,11 47:4,7 49:17 50:19 51:2 52:18 54:24 55:2,3 55:18,19,23 56:11,19,24 57:3,25 58:3,7 58:14,17 timeframe 16:9 timely 23:13,14 times 15:13 time's 32:6 today 3:14 told 44:20 tolled 5:9 tough 53:16 transitional 49:14 transportation 53:2 treat 4:10 8:11 54:24 55:6 treated 4:8,24 5:18 7:23 16:6 55:14</p>
---	--	---	--	--

<p>treatment 53:24 trial 3:12 6:19 6:19,21 7:18 7:23 8:9,25 10:8,21 11:14 11:14,17,24 12:2,2,20 15:7 16:7,14 17:6 17:14 18:18,20 18:23 20:3,14 20:17 21:8 22:16,21 23:11 24:15 27:2,2 34:9 38:11 41:2 48:23 49:20 50:5 trials 17:8 24:13 trigger 4:3 34:21,22 true 47:1 48:25 49:1,19 truly 25:4 try 15:20 trying 19:21 Tuesday 1:9 two 10:9 17:10 17:14 23:24 24:2,9 25:22 44:18 49:22 type 53:13 58:19 58:20 types 56:7 typical 46:10</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately 48:5 unanimously 6:11 uncertainty 54:16 understand 5:24 20:18 21:3 45:3 46:3 47:8 51:14 55:12,13 58:12 understanding 8:8 9:1 13:12</p>	<p>understood 58:14,15 United 1:1,6,12 3:4 universally 7:21 7:25 22:14,15 unmeritorious 25:4 unmoored 56:6 unreasonable 11:6,9 unreasonably 17:5 unrelated 11:19 unusual 7:16 use 7:10 8:8 U.S.C 22:10</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:4 vacation 24:22 variation 41:8 variations 16:7 varies 15:18 various 27:7 vary 19:4 26:7 varying 42:22 view 6:2 24:3 25:12 46:13 violation 48:23 virtually 50:4</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>Wait 21:9 waive 34:19 35:1,2,7,12 46:4,17,19,25 46:25 waived 35:15 45:19 47:5 waiver 20:17 21:7 28:10 32:14 46:14,16 46:21,21 47:5 want 7:14 12:10 12:14 18:23 38:15 43:3</p>	<p>44:23 45:10,11 46:4,5 54:21 56:16 58:8 wanted 25:4 35:7,12 38:1 wants 16:10 24:21 warranted 38:4 Washington 1:8 1:15,18 wasn't 8:6 9:3 11:17 44:7 45:5 way 23:24 28:9 43:13 45:2 48:1 53:15 ways 16:22 weed 14:22 week 17:7 24:9 38:6 weeks 17:10,11 17:14 24:9 25:22 38:6 weigh 39:6 weren't 9:20 we're 31:25 We've 39:17 whatsoever 15:5 wide 41:8 widely 15:18 win 58:25 wire 33:17,18 witness 55:11 witnesses 10:20 word 7:10 56:18 words 28:17 33:9,20 work 13:3 18:2 44:18 works 15:10 worry 20:13 worst 14:23 wouldn't 7:10 15:6 25:6 40:14,15 53:11 writing 13:6 written 31:17,18</p>	<p>36:7 wrong 9:15 18:1 44:16 50:14 58:9</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,7</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Yeah 33:19 49:9</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>Zedner 6:8,16 6:22 20:18 26:12 40:3,5 49:8</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>08-728 1:5 3:4</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 3:16,22 4:9 5:12 8:1,1,3,11 9:3,13 10:25 15:3 27:6 30:12,23 31:14 35:21 36:20 37:1 39:12 41:6 42:1,24 47:16,18,23,24 48:7,10,13 50:2,8,16 51:18 52:1,5 52:24 53:12 54:2,10 56:8</p>	<p>18 22:10 1979 37:8</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 31:16 2:01 59:5 20 27:24 28:2 32:14 33:8 2009 1:9 21 15:20,22 16:17 17:17,18 18:4,7,8,11,11 18:17,17,18 21:21 22:2 40:25 46:22 21-day 18:21 42:9 25th 28:18 34:18 44:22,24 45:7 45:12,13,14,17 45:20 47:9 26 2:6 28 33:9</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 30 19:12,23 36:10 54:5 56:13,17 57:11 57:17 30-day 19:14 31st 54:9 3161(h)(1) 3:11 27:3 3161(h)(1)(H) 19:11 3288 22:11 3289 22:11</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 28:2 30:25 31:1 33:8 39:13 4th 27:18,20,25 34:20 35:8,10 44:8 45:3,8,15 45:18 46:6 47:2,4,9 58:9</p>
---	---	--	--	---

42 18:12				
<hr/> 5 <hr/>				
5 18:18 53 2:9				
<hr/> 6 <hr/>				
6 1:9				
<hr/> 7 <hr/>				
7 3:13 6:8 7:8,9 7:21,23 8:8,12 8:16,16,16,24 11:18 14:21 20:6,12,15 21:6,12,16 25:3 26:8,13 26:16 39:10,16 42:20,24 50:1 53:8 55:7				
7th 27:18,20 34:23 43:6,11 44:8,19 45:2,4 45:9 58:9,13				
70 16:15 17:19 17:20 20:4 34:16				
70-day 18:19				
<hr/> 8 <hr/>				
86 41:1 86-day 18:18 41:1				