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IN THE SUPREME COURT OF THE UNITED STATES

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ANTOINE BRUCE, :

Petitioner : No. 14-844

v. :

CHARLES E. SAMUELS, JR., :

ET AL. :

- - - - - x

Washington, D.C.

Wednesday, November 4, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:51 a.m.

APPEARANCES:

ANTHONY F. SHELLEY, ESQ., Washington, D.C.; on behalf of Petitioner.

NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondents.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	ANTHONY F. SHELLEY, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	NICOLE A. SAHARSKY, ESQ.	
7	On behalf of the Respondents	27
8	REBUTTAL ARGUMENT OF	
9	ANTHONY F. SHELLEY, ESQ.	
10	On behalf of the Petitioner	50
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:51 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 14-844, Bruce v. Samuels.

5 Mr. Shelley.

6 ORAL ARGUMENT OF ANTHONY F. SHELLEY

7 ON BEHALF OF THE PETITIONER

8 MR. SHELLEY: Mr. Chief Justice, and may it
9 please the Court:

10 There are at least three reasons why the
11 Court should adopt what the courts of appeals have
12 called the per-prisoner approach under PLRA
13 Section 1915(b) (2).

14 One, the per-prisoner approach best comports
15 with the statutory text.

16 Two, the per-prisoner approach is the only
17 one consistent with the careful balance Congress struck
18 between deterring frivolous prisoner lawsuits and
19 preserving their right to bring meritorious ones.

20 And three, the per-prisoner approach avoids
21 anomalies and disincentives that Congress could never
22 have intended, disincentives such as discouraging
23 prisoner work by taking one hundred percent of their
24 income month after month.

25 I would like to, of course, start with the

1 text. The key sentence is in -- the key sentence is the
2 second sentence of Subsection (b) (2). It says the
3 following: "The agency having custody of the prisoner
4 shall forward payments from the prisoner's account to
5 the clerk of the court" -- singular -- "each time the
6 amount in the account exceeds \$10 until the filing
7 fees" -- plural -- "are paid."

8 The combination of that singular, clerk of
9 the court, and filing fees, plural, indicates the
10 per-prisoner approach because it means one clerk is to
11 receive payments, even when there are numerous filing
12 fees.

13 Filing fees, the plural, appears in the --

14 JUSTICE SCALIA: There -- there --

15 MR. SHELLEY: -- in the statute exactly
16 twice.

17 JUSTICE SCALIA: Can't there be more than
18 one filing fee for a single court?

19 MR. SHELLEY: No, there cannot, not in the
20 way Congress understood the term in the PLRA. If you
21 look to (b) (1) and (b) (3), Congress creates it almost as
22 a term of art. A filing fee includes -- a filing fee,
23 with the word "filing" in front of "fee," a filing fee
24 includes all of the subsidiary costs to start up a case.

25 So a court of appeals, for instance, has a

1 \$500 docketing fee and a \$5 statutory fee, and that's
2 referred to as a --

3 JUSTICE GINSBURG: So what happens if you
4 have -- the district court makes an order, there has to
5 be a filing fee?

6 MR. SHELLEY: In the district court?

7 JUSTICE GINSBURG: Yes, and then that fee is
8 not totally paid. In fact, the prisoner loses, so
9 there's a cost award in addition. And then it goes up
10 to the court of appeals, where there's another filing
11 fee.

12 MR. SHELLEY: Right.

13 JUSTICE GINSBURG: Does -- does -- on your
14 reading, does the court of appeals filing fee also have
15 to wait until the district court filing fee is fully
16 paid?

17 MR. SHELLEY: Yes. There would be an
18 initial partial filing fee that's paid upon the -- the
19 filing of the appeal. Under Subsection (b)(1) there's a
20 20 percent initial partial filing fee that would be
21 assessed against the prisoner.

22 JUSTICE GINSBURG: And that would be across
23 the board that you always have to pay.

24 MR. SHELLEY: Always have to pay that.

25 But the second filing fee, the one from the

1 court of appeals, would line up. So the first filing
2 fee from the district court would be paid off first, and
3 then sequentially the court of appeals would be paid
4 off, but only 20 percent would be taken every month from
5 the prisoner. You wouldn't take 40 percent.

6 JUSTICE SCALIA: If he files enough cases,
7 he's never going to have to pay for it, right? I mean,
8 you know, he files 20 cases, that 20 percent will
9 never -- will never come home to roost.

10 What -- what's the disincentive for him --
11 for his continuing to file cases?

12 MR. SHELLEY: Well, first of all, it would
13 come to roost back in 1995 when Congress enacted the
14 statute because the filing fee for a district court case
15 was only \$120, and a court of appeals was 105. And so a
16 prisoner who earned, say, 55 or 100 -- 50 or \$100 a
17 month, which is not outlandish given the small wages,
18 could pay off a filing fee in a -- in a matter of months
19 under that. It's much higher now.

20 But to get to the rest of your question,
21 Justice Scalia, there are a number of other things in
22 the statute that work in tandem with (b) (2) to stop that
23 kind of behavior. So there's the initial partial filing
24 fee. He or she is always going to have to pay that.
25 There's the three-strikes rule, which comes into being.

1 There's the ability of the district court or court of
2 appeals to sui sponte dismiss under the PLRA those cases
3 that are frivolous.

4 JUSTICE SCALIA: All right. So -- so you
5 say there are disincentives, but this was intended to be
6 a disincentive. Was this not intended to be a
7 disincentive?

8 MR. SHELLEY: It was and it is.

9 JUSTICE SCALIA: I'm pointing out that it's
10 a very ineffective disincentive if the person keeps
11 filing a lot of cases.

12 MR. SHELLEY: Well, it's not an ineffective
13 disincentive because it creates months and months more
14 of additional income being garnished. So it lines up
15 with the others. None of them were anticipated to be
16 wholly barriers to filing a lawsuit. And this one, as
17 with the others, creates a whole scheme where there are
18 added disincentives.

19 But Congress also wanted to make sure the
20 meritorious cases would be brought. And so it didn't
21 want to be overwhelming and put -- and put the thumb too
22 much on the scale to kill all of those cases.

23 JUSTICE KAGAN: Mr. Shelley, can we go back
24 to the sentence that you're relying on, because I have
25 to admit I don't understand your reading. The -- the

1 sentence says -- and I'm taking out some unnecessary
2 words. It says, the agency shall forward payments to
3 the clerk, singular, until the filing fees are paid.

4 Now, that makes perfect sense if the filing
5 fees are all in one case, going to a single clerk. But
6 if you're right and what they mean is the filing fees
7 are in multiple cases, then it doesn't make sense to say
8 that the agency shall forward payments to the clerk.
9 The only way to make that sentence makes sense, if the
10 filing fees are in multiple cases, is for Congress -- is
11 for the statute to have read, the agency shall forward
12 payments to many clerks or to several clerks seriatim.
13 And that suggests not the per-prisoner approach, but the
14 per-case approach.

15 MR. SHELLEY: I think that's incorrect
16 because I think what -- what you should insert, if -- if
17 necessary, in front of the clerk of the court is the
18 relevant clerk of the court. So the prison officials
19 are going to distribute to the relevant clerk of the
20 court.

21 JUSTICE KAGAN: But then -- so that -- that
22 seems right, to make the sentence work the way you want
23 it to work -- and this is the sentence you are relying
24 on. To make it work the way you want it to work, you
25 have to add language to it.

1 MR. SHELLEY: You -- you do not, because
2 there's still -- there's one clerk of the court, and
3 there's always going to be a clerk, because every case
4 the filing fee is paid to a clerk; so there's always
5 going to be the clerk of the court. And -- and in most
6 cases -- in -- in all cases, there's only one filing.

7 JUSTICE KAGAN: Yes, I'm going to say, you
8 know what, even as I look at that, even if you add that
9 language, it still doesn't make sense. "The agency
10 shall forward payment to the relevant clerk until
11 multiple filing fees are paid." It's just -- it
12 doesn't -- the two halves of the sentence don't connect
13 there.

14 MR. SHELLEY: Well, the filing fee's plural.
15 It -- it can't allow for the -- for the per-case
16 approach, the opposite approach, because filing fees we
17 know means more than one. And so it has to mean more
18 than one, because in (b)(1) and (b)(3) Congress used
19 this term of art to mean filing fee encompasses. It's
20 the thing that comprises all of the other fees.

21 And so I would say that the opposite side is
22 the one that cannot make any textual sense out of that
23 sentence, because there's never more than one filing fee
24 from a -- to a single clerk.

25 JUSTICE KAGAN: Well, but Congress doesn't

1 know that. Congress just thinks fees in a case, fees in
2 a case. So then it makes perfect sense. Give the fees
3 in a case to the clerk. But you're saying give fees in
4 multiple cases to the clerk, when it's not. It's give
5 fees to -- in multiple cases to multiple clerks.

6 MR. SHELLEY: It's give the fee to that
7 clerk that that clerk is owed until all the fees are
8 paid. You keep going back to a clerk until all the fees
9 are paid. So --

10 JUSTICE GINSBURG: Isn't -- isn't the
11 statute drafted, though, that with a single-case focus,
12 that is, 1915 throughout, talks about an action?

13 MR. SHELLEY: Not -- not true. First of
14 all, the whole purpose of the statute was to deal
15 with -- with multiple filers. So the whole -- Congress
16 comes into it with a purpose of dealing with individuals
17 who file many cases.

18 But second of all, the three-strikes rule
19 assumes numerous cases. And I'd also point to
20 Section 1915(d), which has the statutory language, "The
21 officers of the court shall issue and serve all process
22 and perform all duties in such cases."

23 So there are references to more than one
24 case in various places. But even if it was written in a
25 singular way, in a way to deal only with one case, that

1 really doesn't prove anything against us. It just means
2 you got to look to other statutory construction tools,
3 because it would just say that there's going to be an
4 initial partial filing fee in every case. And there
5 needs to be installment payments in every case.

6 And we don't disagree with that. We agree
7 that there are installment payments in every case, and
8 it's just a matter of when. And the statute doesn't
9 answer when, necessarily, right off the bat.

10 JUSTICE GINSBURG: But why is the initial
11 fee -- the initial partial fee, you say each time you
12 file it, you've got to pay that? Why shouldn't that go
13 the same way?

14 MR. SHELLEY: Well, the -- the two sections
15 are written differently. (b) (1) is very different from
16 (b) (2). It's a different collector. One is the prison
17 official. The other is the clerk of the court. One
18 mentions filing fees, plural. The other only mentions
19 filing fee, singular. There's a \$10 rule in the
20 second -- in the second -- in (b) (2) but not in (b) (1).
21 So they -- they are a little bit different.

22 But even if --

23 JUSTICE BREYER: If you don't know -- I
24 mean, I can't get anything out of the second sentence,
25 to tell you the truth, because I think that a prison is

1 usually within a single district. And so when you're
2 worried about a multiple filer, what he does is he files
3 about 15 cases in the same court.

4 And -- and therefore, it's perfectly
5 understandable why Congress would refer to multiple
6 fees, because they are going to be like ten of them.
7 It's the people they are really worried about are -- are
8 what's at issue. So I can't get anything out of the
9 second sentence.

10 It's the first sentence that -- that is, it
11 seems to me, both your strength and your weakness.
12 There it talks about after payments of the -- the
13 initial partial filing fee. Okay. It sounds as if it's
14 talking about a case. And so what do we do about that?
15 I mean, there it is. "After the initial partial filing
16 fee, the prisoner shall be required to make monthly
17 payments of 20 percent," et cetera. That's where you
18 have the word "fee."

19 MR. SHELLEY: Well, first of all, I don't
20 think Congress necessarily had in mind a prisoner who is
21 filing numerous cases in the same court, because if you
22 look up to (a)(2), for instance, it talks about the
23 prisoner having to file a statement of his indigency.
24 And Congress talked about it needed to be obtained from
25 the appropriate official of each prison at which the

1 prisoner is or was confined.

2 And the government concedes that prisoners
3 are moved around all the time, and therefore, there are
4 numerous districts --

5 JUSTICE BREYER: I don't mean it's
6 exclusive.

7 MR. SHELLEY: Sure.

8 JUSTICE BREYER: I'm just giving you an
9 explanation as to why they might have used the words
10 "fees," even though they previously defined a filing fee
11 of \$350.

12 MR. SHELLEY: So then let's go to that first
13 sentence in -- in the statutory text in
14 Subsection (b)(2). We don't disagree that after a
15 partial filing fee is assessed, the installment payments
16 will also start to kick in. It's just a matter of do
17 they line up or do they -- or do they come first.

18 So I don't think under that -- I don't think
19 (b) -- (b)(2) in that first sentence then would answer
20 the question. It -- under our theory, you also get a --
21 you also get an installment payment after the payment of
22 the initial partial filing fee.

23 But --

24 JUSTICE SOTOMAYOR: In terms of one of your
25 purposes, why isn't the government's concession that in

1 no circumstance can a fee 20 percent be taken until --
2 unless it's above \$10? Why doesn't that take care of
3 your problem?

4 MR. SHELLEY: Because I don't think the
5 government's position is -- is statutory allowed. So if
6 you take a situation where, let's say \$11 was earned by
7 the prisoner the -- the previous month, and that's all
8 that was in the account. In that case you'd have to
9 take -- under the statute, you meet the statutory terms.
10 There's \$10 in -- in the account, and you have to take
11 20 percent. "Shall" is the word. Shall take 20 percent
12 if there's over \$10. Well, there's \$11 in there. The
13 government would say, we're not going to take the 20
14 percent because it's going to send it under \$10. So
15 that -- that can't work out.

16 JUSTICE SOTOMAYOR: No, what the
17 government -- I understand -- and they'll correct me --
18 is I think they are saying that if you pay a -- the
19 initial filing fee, and you're down to \$8, they can't
20 take another 10 -- another 20 percent.

21 MR. SHELLEY: Sure. Well, that's --

22 JUSTICE SOTOMAYOR: That's how I understood
23 their concession.

24 MR. SHELLEY: So that was their alternative
25 position. But even that one won't hurt our purposes

1 argument, because if you take a prisoner who now, let's
2 say, he has \$55 in income. And that's not outlandish
3 because if you earn 35 cents an hour and you work a
4 40-hour week, you have \$55. In that situation, the
5 first four encumbrances will take \$11 each, \$44, leaving
6 you at \$11. The last one is going to take the whole
7 amount, cause you have got a fifth encumbrance and
8 you're over \$10.

9 So under even this alternative approach, you
10 take 100 percent of the income every time the income is
11 more than \$55. Maybe I should go through that again.

12 Okay. So --

13 JUSTICE BREYER: If you're clarifying it,
14 \$11, I guess you'd take a dollar. All right. I mean,
15 what's unclear?

16 JUSTICE SOTOMAYOR: If you're at 55, you
17 take 10.

18 MR. SHELLEY: The statute says 20 percent if
19 it exceeds \$10. So if you have \$11 in there after
20 the -- after the fourth one, you have to take the fifth
21 20 percent increment --

22 JUSTICE BREYER: They can't administer it
23 that way. I mean, is there somebody who is
24 administering this that way?

25 MR. SHELLEY: Every circuit who has looked

1 at it has described the per-prisoner approach as one
2 that as long as there's \$10 in the account, it's the
3 trigger. You can take the whole income.

4 JUSTICE BREYER: And they are really doing
5 that?

6 MR. SHELLEY: As far as I know, yes. Well,
7 the BOP says it is not. I understand the States, where
8 many of the prisoner are, are doing exactly that. And
9 we showed two -- we cited two district court cases where
10 they went over what the States were doing, and they
11 drain it down to zero.

12 I mean, the Newlin case says you can drain
13 it down to zero. Torres, Siluk. In fact, that's why
14 they -- they -- the -- the Second, Third, and Fourth
15 Circuits all got into this issue of -- of the
16 constitutionality or the purposes because they said,
17 look, prisoners are going to be left with zero.

18 JUSTICE SCALIA: That's inconceivable to me.
19 I mean, what? Is -- is there a constitutional
20 requirement that prisoners be given income while they
21 are in prison?

22 MR. SHELLEY: There isn't, I -- I don't
23 think. They are given the essentials, but the point of
24 it is, is that --

25 JUSTICE SCALIA: Especially if the fact that

1 they don't have any is their own fault, if they keep
2 filing baseless suits.

3 MR. SHELLEY: Well, but the -- you'd be out
4 of -- you wouldn't be filing baseless suits because you
5 got the three strikes, eventually. But Mr. Bruce, for
6 instance, had -- had six cases before he incurred his
7 first strike, even. And so the -- the constitutional
8 dimension that the Second, Third, and Fourth Circuits
9 have all adopted goes to the point of you can't put
10 the -- the prisoner in the position of losing
11 100 percent of the income that he works to earn as -- as
12 the Hobson's choice to filing what may be a meritorious
13 case. They haven't said it's unconstitutional. They've
14 just said the statute leaves you scratching your head.

15 JUSTICE SCALIA: Well, it -- it's not a
16 Hobson's choice if he forfeits all except \$10. That's
17 going to be the difference, whether he has \$10 in his
18 account or nothing.

19 MR. SHELLEY: Yes. Yes. And as this Court
20 has said, and as Congress said in 1892 when it enacted
21 the in forma pauperis statute, a man who has very little
22 cares about each penny. And in prison if you have \$6,
23 it makes a difference. It makes a difference that month
24 than if you had zero. It's a difference between --

25 JUSTICE BREYER: Is there a way of

1 interpreting the statute, which I think would make --
2 I -- I would guess, not in every case, where this
3 multiple thing is likely to arise is where: Files a
4 frivolous case, it's dismissed by the district court,
5 and then he takes an appeal. Okay? There we have two.

6 And so the question is -- he has to get the
7 filing fee. Then the next slot is going to be, like,
8 20 percent or 40 percent, right? But you should leave
9 him with \$10.

10 Given the purpose of the statute, which is
11 to stop these frivolous suits, or at least make it a
12 little tougher, doesn't it make sense, say, what I just
13 said: Leave him with the \$10, but you can take the
14 40 percent: 20 percent for one court, 20 percent for
15 the other?

16 Now, maybe what I've just said doesn't make
17 sense. To me, it makes sense at the moment. But it
18 would -- it would both leave him with the \$10, but allow
19 the clerks to collect the 20 percent for the district
20 court, 20 percent for the Court of Appeals.

21 Is -- is that impossible to bring about?

22 MR. SHELLEY: I think it is, given the
23 statutory language. I think, given the fact that the
24 prison officials shall forward payments each time the
25 amount in the account is greater than \$10 doesn't allow

1 the prison official to say I'm going to use it as a
2 floor, as opposed to a trigger.

3 And while that might have been the way
4 Congress could have written it, it did not. And given
5 the way Congress did write it, the best approach is that
6 per-prisoner approach that leaves some money to the
7 prisoner for things like phone calls.

8 JUSTICE SOTOMAYOR: Actually, I -- I didn't
9 realize the back end of this. Forget about the
10 prisoner. I'm thinking about the courts.

11 Basically, you're saying the last court that
12 brings him over 10 -- the moment he has over \$10, the
13 court who gives -- no. That doesn't happen. The
14 court -- he pays a filing fee. He now has more than \$10
15 in the account. That court gets more money than the
16 other courts?

17 MR. SHELLEY: No. They all get -- they all
18 get 20 percent. The -- the way it should work is, is
19 there \$10 in the account? If there's \$10.01, you then
20 can take 20 percent, a 20 percent installment. Perhaps
21 another 20 percent for cost; that's a different issue.
22 But you -- for the filing fees you take a 20 percent
23 installment, and it goes down to, say, \$8 at that point.
24 That's the end of it under the -- under the per-prisoner
25 approach that we espouse.

1 Under the per-case approach, the way the
2 courts of appeals at least have understood it, if there
3 is \$10.01 in the account and there are five filing fees,
4 that's 100 percent of the \$10.01 that goes. 20 percent
5 for each.

6 JUSTICE GINSBURG: That wouldn't be true for
7 a Federal prisoner, because the Bureau of Prisons says
8 no matter what, the prisoner has to be left with \$10.

9 MR. SHELLEY: It's a matter of grace. It's
10 not set out in regulation. It's not set out in
11 guidance. It's --

12 JUSTICE GINSBURG: Do they know to the
13 extent to which the States are following that?

14 MR. SHELLEY: Yes. To the extent we've been
15 able to investigate that, we've cited two -- two
16 district courts in our reply brief. I think one from
17 Iowa and maybe one from another Midwest state --
18 Maryland and Iowa. Those two cases, the -- the way the
19 Court's decision reads, it indicates that they are
20 looking to see if there's \$10.01, and then they're
21 taking -- they're going down 20, 20, 20, and 20.

22 And I would also note, if you look at Siluk,
23 the Third Circuit; Torres, the Fourth Circuit; and
24 Judge Easterbrook's decision in Newlin, they all talk
25 about if there's more than the \$10, you take 100 percent

1 if there's five filing fees.

2 JUSTICE GINSBURG: If -- if --

3 CHIEF JUSTICE ROBERTS: Now, I don't see how
4 the Bureau of Prisons can do this as a matter of grace.
5 I mean, the statute says what it says, "shall." I
6 don't -- I don't know why think they can do -- they may
7 have their own views on what's good policy, but
8 Congress, it seems to me, has written the statute
9 exactly the way you say.

10 MR. SHELLEY: I agree. I agree with that.
11 The only possibility is that alternative approach they
12 say, where they stop after the first one goes below \$10.
13 But that one takes 100 percent of the income and helps
14 us in proving the per-prisoner approach, because in most
15 cases, where there's any -- any -- any job or wage
16 income being earned by the prisoner, you're going to
17 take 100 percent because the last 20 percent increment
18 will be above the \$10 threshold.

19 JUSTICE BREYER: You can interpret it the
20 other way, linguistically. You say, you forward the
21 20 percent each time the amount in the account exceeds
22 \$10. Well, the instant you write that check, you say,
23 it -- it does not exceed \$10, and therefore you can't
24 forward it. So you can't write that kind of a check.

25 I mean, isn't that literally --

1 CHIEF JUSTICE ROBERTS: Well, it exceeds \$10
2 until they cash the check.

3 MR. SHELLEY: I would agree with that.

4 JUSTICE BREYER: Well, now we're getting
5 into the technicalities of banking --

6 (Laughter.)

7 JUSTICE BREYER: -- which -- so -- so I --
8 I -- I think you can read it the way I suggested, if
9 you're not too technical about it. It seems consistent
10 with the language.

11 JUSTICE SCALIA: Does the Fed have a
12 position on this that -- that -- that Chevron requires
13 us to defer to?

14 MR. SHELLEY: No. No Chevron deference
15 here. There's no regulation. There's no guidance.
16 It's a statement in an adversary brief.

17 But, Justice Breyer, I think that there
18 are -- there are a number of machinations that can be
19 go -- that can be gone through in order to defend
20 this -- this idea or that idea, and the government comes
21 up with alternative ones that they're not even using to
22 try to deal with the plural filing fees, for instance.

23 But our approach is much simpler. Our
24 approach is you read the statute the way it -- the way
25 it states a "shall." You know, "shall the prisoner."

1 You don't look to see if it's -- the payment's going to
2 be under \$10 afterwards, but look to see if it's over as
3 a trigger and then pay.

4 In addition, you don't have a lot of other
5 problems with our approach. You just figure out which
6 one was first, which one was second, which one was
7 third.

8 JUSTICE GINSBURG: What happens -- I think
9 this -- this -- Mr. Bruce had multiple filings, right?

10 MR. SHELLEY: At this point, yes.

11 JUSTICE GINSBURG: Yes. It's something
12 like -- how many? 17?

13 MR. KIMBERLY: 19. But -- but the first --

14 JUSTICE GINSBURG: 19. So it is --
15 realistically, those later fees are never going to be
16 paid, because he's going to be released from prison
17 somewhere along that chain.

18 MR. SHELLEY: First of all, Mr. Bruce didn't
19 incur -- the last seven or so have not been filed,
20 essentially because he had had three strikes by the
21 12th. So there's really only 12 lawsuits we're -- we're
22 talking about that could have filing fees.

23 But the answer to the question, Justice
24 Ginsburg, of whether he's never going to pay those,
25 again I would go back to 1995 and say Congress thought,

1 well, they could be paid relatively quickly if the
2 filing fees were lower.

3 But you -- you touch on a question that is
4 unsettled in the lower courts, which is does the amount
5 come due at the end of when the prisoner -- when the
6 prisoner sentence ends? And the courts of appeals are
7 divided about that, with the Fifth Circuit saying, yes,
8 it does come due, and you have to come up with some kind
9 of a plan with each of the clerks to which you owe
10 money, and you shall pay it off. Other circuits say it
11 is. It does come due, but it only comes due and you
12 have to pay it if you're not in forma pauperis at the
13 time the government seeks to collect it after you're
14 out -- out of release.

15 So I don't think it's correct to say, at
16 least as a matter of law, it's settled as to whether
17 these filing fees forever go away once the prisoner --
18 prisoner leaves prison.

19 I had also started just talking about the
20 difference -- the different problems of the per-case
21 approach that ours avoids. And the, as I mentioned,
22 the -- the per-prisoner approach allows you to line up
23 the fees one after another. You just have to figure out
24 which one was incurred first, second, third, fourth.
25 But under their approach, what happens after the fifth

1 one? You have five. Takes 100 percent of income. And
2 at that point, well, the sixth one becomes our approach.
3 If you have six, seven, eight, it then becomes the --
4 the sequential approach that has all the problems they
5 say our --

6 JUSTICE GINSBURG: I thought the
7 government's position was you can't get blood out of a
8 stone, so when it's 100 percent, that's it. Sixth,
9 seventh, eighth, we'll just have to --

10 MR. SHELLEY: They stood in line. What --
11 the government says that -- page 30 of their brief is
12 that that gets deferred. Deferred until one of them
13 gets paid off. So then you have to figure out, well,
14 one of them got paid off, so which one do you switch in,
15 and how much do you switch in? And it just -- the
16 problems start to multiply.

17 JUSTICE SCALIA: Why do you pick the
18 earliest? I mean, all of them -- all of them are owed.
19 Why don't you pick the nearest court?

20 MR. SHELLEY: Well, you could. You could
21 pick the nearest court; you could pick the last one, the
22 most -- the most --

23 JUSTICE SCALIA: Right.

24 MR. SHELLEY: -- the most current.

25 But the way the courts of appeals have

1 looked at it, they've looked at, in time, the first.

2 And I don't think the government disagrees
3 because, at least when you get to the sixth one, it's --
4 they -- they treat that one as being deferred under
5 their approach, with the first five being paid.

6 CHIEF JUSTICE ROBERTS: Is he on the hook
7 for the filing fees here?

8 MR. SHELLEY: He is not. He is not.

9 CHIEF JUSTICE ROBERTS: Why not?

10 MR. SHELLEY: I don't understand the Court
11 to apply the PLRA for its cert petitions, for instance.
12 And in any event, I believe his filing fee was paid
13 on -- oh, he is -- he is subject to a filing fee in this
14 case, and he did pay it. But I don't understand the
15 Court to apply the PLRA to cert petitions.

16 One last point I wanted to make is that I
17 think it is often thought that a prisoner who has 12
18 filing fees or 10 filing fees is a recidivist prisoner,
19 but that's not the case.

20 As the -- the Second Circuit noted in the
21 Whitfield case, that single case produced five
22 encumbrances. It was a district court appeal, it was a
23 district court case, a Second Circuit appeal. There
24 were two cost awards from the district court and the
25 court of appeals, and there was a second appeal. There

1 were five encumbrances in one single piece of
2 litigation. So these encumbrances can add up quite
3 quickly, and you can get up to five, seven, eight.

4 And that case, it was a meritorious case,
5 the Second Circuit said. It wasn't a frivolous case.
6 The prisoner didn't win, but it was -- it was a case
7 that wasn't, as -- as Justice Kagan used in the last
8 argument, it wasn't a laughing-stock case. These
9 were -- it was a meritorious case in the sense that it
10 was one that could be brought by any other American that
11 the prisoner -- that the prisoner brought.

12 So I'd like to reserve the remainder of my
13 time for rebuttal.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Ms. Saharsky.

16 ORAL ARGUMENT OF NICOLE A. SAHARSKY
17 ON BEHALF OF THE RESPONDENTS

18 MS. SAHARSKY: Mr. Chief Justice, and may it
19 please the Court:

20 This statute is written from the perspective
21 of a single case. And what I mean by that is that for
22 each action or appeal, it provides a list of things for
23 the Court to do: To check for the affidavit of
24 indigency, to check for three strikes, and as relevant
25 here, to require full payment of filing fees on an

1 installment schedule.

2 So what we're talking about here is
3 Subsection (b), which is the filing fee provision, and
4 it says, first, that an IFP prisoner has to pay the full
5 amount of each action or appeal, talking about a single
6 action or appeal, and then it sets out an installment
7 plan, which is an initial payment and a monthly payment.

8 So we're at the point where Petitioner
9 agrees that the initial payment is for each case, but
10 the -- he says that the statute somehow shifts
11 perspective to all of an inmate's cases when it starts
12 talking about the monthly payments.

13 And we just don't think there's any kind of
14 clear explanation in the statute that does that. We
15 think the burden should be really on him to show a shift
16 from a single case to all of the cases, and it wouldn't
17 make sense to do that.

18 I think Justice Scalia made the point in
19 this discussion that there just wouldn't be any marginal
20 deterrence if an inmate could file as many lawsuits as
21 he wanted and not make any additional --

22 JUSTICE BREYER: You say the word "fees."
23 What about the word "fees"? Does that show?

24 MS. SAHARSKY: Right. What petitioner says
25 is that the word "fees," plural, always means more than

1 one case. And we know from the text of this statute
2 that that's not true, because there are several places
3 where Congress says "fees" and it's referring to a
4 single case.

5 So for example, in Subsection (b) (3),
6 Congress talks about the amount of fees permitted by
7 statute for a civil action or an appeal. In (b) (1) it
8 talks about any court fees required by law for an action
9 or appeal. Similarly, in (a) (1) and (a) (2) it talks
10 about fees, plural, for a -- a single action or a single
11 appeal.

12 And to be clear, we think that in this
13 statute Congress used "fee" and "fees" somewhat
14 interchangeably in the way that people do out in the
15 world; that people would say "attorney's fees," "an
16 attorney fee award," "fee shifting," "we're shifting all
17 the fees," that sort of thing, that that's just common
18 usage, and that the single/plural fees in
19 Subsection (b) (2) just does not provide the kind of
20 strong indication that would be necessary to overcome
21 the real thrust of the rest of the statute, which is
22 that it's something that a court does for each of these
23 cases. It sets out this payment plan; it does each of
24 the other things that are set out in the statute.

25 CHIEF JUSTICE ROBERTS: Ms. Saharsky, I

1 don't -- I can't -- I'm not terribly persuaded by your
2 deterrence argument. I mean, no statute pursues its
3 purposes at every cost. And maybe Congress decided they
4 could -- they didn't need to take the last 23 cents an
5 hour the prisoner earned to promote the deterrence when
6 they have all these other anti-filing provisions in the
7 law.

8 MS. SAHARSKY: Well, this is the only
9 provision that provides a financial deterrent. There
10 are other provisions, like the three-strikes provisions,
11 et cetera. But this is the one, and this is in the
12 record, where members of Congress said it makes an
13 inmate stop and think: Is this lawsuit worth the cost?

14 And in the amount that --

15 CHIEF JUSTICE ROBERTS: Yes, but Congress is
16 talking about, okay, they have to pay the filing fee.
17 Certainly Congress didn't focus, I wouldn't think, on
18 whether it's -- well, I assume they didn't focus on
19 whether it's per case or per prisoner, because it's
20 really quite unclear.

21 MS. SAHARSKY: Well, we think that Congress
22 did make that decision when it wrote the -- the statute
23 from a perspective of a single case. Congress --

24 CHIEF JUSTICE ROBERTS: I wanted to talk
25 about that. I -- the first reading, two struck me as

1 different than one, because in -- in one you're talking
2 about, oh, this is what the Court should do. But on two
3 you say this is what's required of the prisoner, and it
4 just says up to 20 percent.

5 Now I know one says required two, but it
6 immediately shifts its -- he's required to pay the whole
7 thing, and that's the important point. But -- but two,
8 it says this is what's required of the prisoner, monthly
9 payments of 20 percent of the preceding month's income.

10 MS. SAHARSKY: Right. Towards --

11 CHIEF JUSTICE ROBERTS: To me that seems to
12 be more a prisoner focus than a case-by-case.

13 MS. SAHARSKY: But it's -- it's linked to
14 Subsection (b)(1). This whole thing is talking about
15 what happens in a -- in a specific case. It starts by
16 saying the -- "When a civil action or an appeal is
17 filed, you shall pay the full amount of the filing fee,
18 and here's the way to do it." And Subsection (b) then
19 triggers -- Subsection (b)(1) then triggers
20 Subsection (b)(2).

21 We think Judge Shreenavossen got this
22 exactly right in the opinion for the D.C. Circuit where
23 he said that when you start reading (b)(2), it is
24 triggered from (b)(1), and it continues the per-case
25 focus that it's talking about, first we have an initial

1 partial payment for one case, and then we have monthly
2 payments to pay off the balance of that case.

3 And that's --

4 CHIEF JUSTICE ROBERTS: I'm not sure that's
5 responsive to my point. I guess what I was saying is I
6 don't think it carries forward the case-by-case basis
7 because it speaks solely of what's required of the
8 prisoner in a way that doesn't address case by case at
9 all. I mean, that's why this is such a confusing
10 statute.

11 MS. SAHARSKY: Well, we think -- the reason
12 that we think it does, just to be clear as possible, is
13 because of the language that starts Subsection (b) (2),
14 which is, "After payment of the initial partial filing
15 fee" -- which is for one case -- "then the prisoner is
16 required to make monthly payments," which is to pay the
17 remaining amount because we know he has to pay the full
18 amount for one case.

19 CHIEF JUSTICE ROBERTS: Of 20 percent of the
20 preceding month's income. To me, I -- well, I would
21 think at least as reasonable as you're reading, to say
22 when you look at what is required of the prisoner, 20
23 percent of his income, that doesn't have anything to do
24 case by case, because what you would require, of course,
25 is that he pay 40 percent if there are two cases, or 60

1 percent if there are three, or all of it, if it's above
2 \$10. And I think he -- anyone -- someone looking at
3 that may say, no, he's only supposed to pay 20 percent
4 of his income.

5 MS. SAHARSKY: But this -- this part of the
6 statute, and all the parts of this statute, really, are
7 talking about the perspective of a single case. And we
8 think the 20 percent makes sense in that regard, because
9 as one member of Congress said -- and this was quoted in
10 the D.C. Circuit's opinion -- the filing fee of -- of 20
11 percent is small enough not to deter a prisoner with a
12 meritorious claim, but it's large enough to deter
13 frivolous claims or multiple filings.

14 So the 20 percent essentially leaves room
15 for multiple filings that you could apply at more than
16 one time when a prisoner has a second case, a third
17 case, a --

18 CHIEF JUSTICE ROBERTS: Well, yes, but he
19 doesn't get off the hook for the other ones. It's
20 just -- has to pay it further down, you know, it's --
21 it's like a mortgage. I mean, you get 30 years, you
22 have to pay it further down. If you're on 15 years, you
23 have to pay it less.

24 MS. SAHARSKY: Well, I think --

25 CHIEF JUSTICE ROBERTS: I mean, it's not

1 like he's getting off Scott-free.

2 MS. SAHARSKY: Right. I understand your
3 question, but I think that there are a couple of
4 problems with that. One is that there's nothing in the
5 statute that suggests that you would delay the payments.
6 And it doesn't make sense in terms of the statutory
7 purpose to delay them.

8 As Judge Easterbrook's opinion for the
9 Seventh Circuit said, if you want to have a
10 pay-as-you-go system where there's an immediate cost to
11 each individual case, the person needs to have an
12 obligation to start paying right away, not five years in
13 the future, or perhaps never.

14 CHIEF JUSTICE ROBERTS: Well, he pays the 20
15 percent in every case right away.

16 MS. SAHARSKY: Right. But that's a one-time
17 payment, and it could be quite small. And that's very
18 different from having an ongoing monthly payment that
19 starts right away and that you have to pay.

20 But I do want to address another -- another
21 point that I think your question raised, which is are
22 prisoners ever going to be paying these amounts,
23 particularly where they have filed numerous cases like
24 the individual in this case. And I think the answer is
25 no, for two reasons. The first is a practical one. The

1 second one is a legal one.

2 I guess I'll start with the legal one that
3 numerous courts that have considered this issue have
4 said that once a prisoner is out in the world and is no
5 longer a prisoner but wants to continue his case, he can
6 try to qualify for regular IFP status and no longer have
7 to make his payments. So potentially, he's not making
8 those payments.

9 And regardless of how you would decide
10 that legal --

11 CHIEF JUSTICE ROBERTS: You agree with that
12 interpretation?

13 MS. SAHARSKY: It's not something that we've
14 taken a position on in this case.

15 CHIEF JUSTICE ROBERTS: Then I don't think
16 it's fair to rely on it.

17 MS. SAHARSKY: Well, then I -- I do think
18 it's fair to rely on it in light of the fact that no one
19 is collecting -- no one is -- there's not any
20 centralized mechanism to collect now.

21 And that's really the second point that I
22 wanted to make, which is regardless of how you would
23 resolve that legal question, and actually the reason
24 that the administrative office has not, so far as we
25 know, taken a position on that, is because there are

1 serious practical problems to collecting.

2 One of those problems -- when you -- when
3 you look at the statute, Subsection (b) allows you to
4 take money from the trust accounts, so it's fairly easy
5 to collect while the individual is in prison. But once
6 the person is out in the world, courts -- each
7 individual court trying to collect filing fees that
8 are -- that the inmates -- the former inmate's on the
9 hook for is quite a difficult thing.

10 We have spoken with folks from the
11 administrative office who tell us that there is not now
12 any centralized system for trying to refer those
13 obligations for treasury, and I think you could imagine
14 how cumbersome that would be. So to think that
15 potentially paying five years down the road, or never
16 paying is any kind of marginal deterrent I think would
17 be wrong.

18 We think that Congress knew that there were
19 multiple filers out there, and that if they were going
20 to file more lawsuits, they should pay more. And just
21 to be clear about what Congress was saying here, no one
22 is precluded from going to court. All Congress is
23 saying is something very reasonable, which is if you
24 have funds available and you continue filing more
25 lawsuits and appeals, you should have to pay. You

1 should have to contribute. And we think that that makes
2 complete sense.

3 JUSTICE KAGAN: Ms. Saharsky, can I get back
4 to the \$10 rule and the BOP policy with respect to this?
5 I think it was the Chief Justice who said that he didn't
6 really understand. And I share his lack of
7 understanding about how the BOP is actually doing this,
8 given the language of the statute.

9 The statute says, you know, "shall forward
10 payments each time the amount in the account exceeds
11 \$10." So that suggests to me that if you're looking at
12 an account with \$10 and 1 cent, you make the next
13 payment. And I understand from your brief that that's
14 not what the BOP is doing. And how can the BOP be not
15 doing that?

16 MS. SAHARSKY: Well, a -- a couple of
17 answers. First of all, we think that that language that
18 you -- you cited can be read multiple ways, as I think
19 the discussion with Justice Breyer perhaps suggested,
20 that it could mean a \$10 floor or it could mean that you
21 start making payments at the \$10 and then go below the
22 \$10.

23 The BOP has long-standing -- has taken the
24 position, long-standing position, that you have a \$10
25 floor that is not in any kind of regulation or published

1 guidance. The way that we do it is we have a database
2 that is basically for inmate trust accounts. It's just
3 an electronic system for having money coming in and out
4 of the accounts. And we have had that \$10 floor in
5 there since that database was set up in 2001. But we
6 think the statute could be read both ways, and we think
7 it is more consistent with Congress's intention to leave
8 the \$10 in --

9 JUSTICE SCALIA: Yes, that's probably right.
10 But how can it be read that way? Tell me how it can be
11 read that way.

12 MS. SAHARSKY: Right.

13 JUSTICE SCALIA: You're saying you can't
14 touch \$10. In -- in all cases, \$10 will always remain
15 in the account. How can you read it that way?

16 MS. SAHARSKY: Well, because when it says
17 "exceeds \$10," I think you could -- you could read it as
18 that it can't -- kind of the flip side, that you can't
19 go below the \$10. Or you could say that you could start
20 at the --

21 JUSTICE SCALIA: Just read the language.
22 Read the language. What -- what language produces that
23 result?

24 MS. SAHARSKY: Right. We think that it
25 is -- when you say it exceeds \$10 that that means that

1 you can't -- there's the flip side of it that you can't
2 go below \$10. But to be --

3 JUSTICE SCALIA: That doesn't follow. It --
4 it says you can take 20 percent if the account exceeds
5 \$10. If the account exceeds \$10, you take 20 percent of
6 the account.

7 MS. SAHARSKY: Well, Justice Scalia --

8 JUSTICE SCALIA: That's what it says.

9 MS. SAHARSKY: Right. If -- if you -- we
10 think that it can read both ways, but this is -- if you
11 disagreed about that, we don't think that that issue
12 resolves this case for a number --

13 JUSTICE BREYER: Anyway, why can't you read
14 it that way? You forward the payment each time the
15 amount exceeds \$10. Forwarding it consists of pressing
16 an electronic button. And so the instant you press that
17 button, it does not exceed \$10. And there we have it.
18 So there is a way of construing the language which is
19 consistent with the obvious purpose to me, which is to
20 leave this prisoner with at least \$10.

21 MS. SAHARSKY: Well, that's what we think.
22 We think it can be read multiple ways. And so far as we
23 know about the experience, it has been read multiple
24 ways. There are cases in the courts of appeals that
25 have read it one way versus the other. To be clear

1 though, these cases not ones that have gone through any
2 detailed statutory analysis, not even as much detail as
3 this Court's discussion at argument today, but have just
4 said in an offhand line either you can go below the \$10
5 or can't. They've kind of gone both ways on that.

6 And in terms of experience, we know from the
7 Second Circuit's case that's cited in the briefs,
8 Whitfield, that New York did not go below the \$10. I
9 asked counsel of record for the States. The States
10 filed a brief on our side of this case, and -- and the
11 counsel of record is the Solicitor General of Michigan.
12 He said that Michigan does not go below the \$10. My
13 friend on the other side has suggested --

14 JUSTICE SOTOMAYOR: But does all of this by
15 all of the States, all of the prisons? Because your
16 adversary says that some are going below the \$10.

17 MS. SAHARSKY: I'm not sure that that's
18 true. He cites two cases. One is -- they're from
19 Maryland and from Iowa. One of the cases said that
20 there was -- that it went below the \$10 in a -- in one
21 case. But it didn't say that was the State policy.
22 I -- you know, I don't know if it was.

23 And then the second was an individual
24 accounting clerk who had gone below the \$10 and who had
25 done it manually. So I don't know that that represents

1 any kind of policy either.

2 But if I could step back, I think it is not
3 necessary for this Court to resolve the \$10 issue to
4 resolve the question presented, because the question is
5 should an inmate who files more cases have to make
6 monthly payments?

7 And just as -- and just parenthetically to
8 highlight why the Court doesn't need to resolve the \$10
9 issue to resolve this case, this was not an issue that
10 Petitioner briefed before the D.C. Circuit. It's not
11 anything that the D.C. Circuit's opinion addressed. And
12 it's not something that was in the certiorari petition.
13 So why --

14 JUSTICE SCALIA: And that issue could come
15 up in the very first payment, couldn't it? If the guy
16 has \$10 and 1 cent in his account, the very first
17 payment could raise that issue.

18 MS. SAHARSKY: Yes, that's true.

19 JUSTICE SCALIA: So it's not an issue
20 presented by the -- by the question of whether you use
21 the per-case or per-prisoner approach.

22 MS. SAHARSKY: I completely agree.

23 JUSTICE SCALIA: It's a problem either way.

24 MR. SULLIVAN: However you resolve the
25 question presented, that would still be a separate

1 question, one that the courts of appeals have not
2 considered in any level of detail.

3 The extent --

4 CHIEF JUSTICE ROBERTS: Ms. Saharsky, I
5 find -- I -- I think others may too. I find the issue
6 that's before us very difficult to resolve based on the
7 statutory language. Is there any doctrine tantamount to
8 the rule of lenity in interpreting a criminal statute
9 that applies here? Because the thing that strikes me
10 most is the extreme harshness of your position. We're
11 talking about earning 23 cents an hour, filing fees of
12 \$350, \$505. And the money is used to -- for what?
13 Phone calls to family and friends, stamps for letters,
14 and to buy books. And you're going to take the last,
15 you know, whatever so that someone who's in there for 20
16 years can't even buy a book? That seems very, very
17 harsh.

18 And you seem to be willing to interpret the
19 ambiguity in the statute to save the last \$10, but
20 you're unwilling to interpret what I think at least I
21 regard as the ambiguity in the statute to allow
22 prisoners -- I mean, they are prisoners. They're not --
23 that's perhaps not entitled to any grace, but who in
24 some States earn 10 cents an hour. You're not willing
25 to interpret that ambiguity in a way that allows them to

1 keep that so they can pay for phone calls to their
2 family.

3 MS. SAHARSKY: Well, a couple of answers.
4 First of all, we think that this is not -- this -- this
5 question of a person having so little in their money --
6 money in their the account only arises in the case that
7 you're talking about someone who has filed five or more
8 lawsuits, which is not the ordinary case. I mean, it is
9 obviously a case to consider. But at least in the BOP's
10 experience, the vast majority of people who have orders
11 owed are for one lawsuit, two lawsuits. Most of the
12 court of appeals' cases below are like that, et cetera.

13 Putting that to the side, of course, this
14 statute never prevents a prisoner from bringing a
15 meritorious case because of the safety-valve provision.
16 We also interpret the \$10 amount to leave money in the
17 account.

18 There's also, of course, administrative
19 remedies, which administrative exhaustion is required.
20 So that helps resolve any questions about making sure
21 that claims are heard. And, in fact, the BOP does have
22 the discretion to allow phone calls, et cetera, to
23 indigent prisoner, also stamps, et cetera, et cetera.

24 So in terms of what you potentially perceive
25 as harshness, this only arises in cases where an inmate

1 is filing so many cases, that potentially a large
2 portion of his income used to pay filing fees. And
3 really that's --

4 CHIEF JUSTICE ROBERTS: Just a thought.
5 Well, if you're there for 20 years, maybe you should let
6 them buy a book.

7 MS. SAHARSKY: Right. And this -- again,
8 this situation there -- I think most prisons actually
9 have libraries that books are available. And like the
10 Court has had some cases about what libraries --

11 CHIEF JUSTICE ROBERTS: I'm sure they are --
12 I'm sure they are very good libraries, too.

13 MS. SAHARSKY: Well, just -- just to be
14 clear, you know, this is a situation that only arises in
15 the fairly atypical situation. We -- it's true that the
16 statute does not specifically address the -- the
17 situation of a prisoner with five lawsuits or six
18 lawsuits and orders et cetera. But we think the reason
19 that that is and that the Seventh Circuit suggested in
20 one of the early opinions after PLRA was enacted is
21 because Congress thought that the three -- three-strikes
22 provision was going to prevent all of these lawsuits,
23 but it --

24 JUSTICE SCALIA: Do a lot of prisoners buy
25 books? I mean, does Amazon really make a lot of money

1 off these people?

2 MS. SAHARSKY: I can't say, you know --

3 JUSTICE SCALIA: I don't think --

4 MS. SAHARSKY: -- the experience that we have
5 in this case, for example, might be good to highlight,
6 which is Pinson, the individual who has filed more than
7 a hundred cases -- gets regular deposits into his
8 account, had been using them to buy books and other
9 materials. Those are in the Joint Appendix starting on
10 pages 55, 56, et cetera. So it shows that prisoners are
11 able to -- even Pinson who has filed over a hundred
12 cases is able to -- to pay those amounts.

13 And just to -- just to clarify, I think the
14 Court is thinking of a situation of, you know, a
15 prisoner who has 10 cents of income or \$10 of income.
16 But we don't think that that is the typical situation.
17 Pinson's account at the time he filed shows that he
18 received an average of -- I think it was \$48 a month of
19 income. I have asked the BOP for statistics just
20 because I was curious about what is the median income
21 that's received, what is the median deposit. They said
22 that for the -- the past fiscal year, the median --
23 median income an inmate receives is approximately \$120 a
24 month. So, in fact, with that, if an inmate has 20
25 percent that he's paying towards filing fees, he could

1 pay them off at a reasonable rate. And we think that
2 that's just really a much better alternative from what
3 Congress intended.

4 JUSTICE KAGAN: But that does raise -- I
5 mean, as Mr. Shelley says, using that exact \$50 number.
6 If you have \$50 and you have five lawsuits, the \$50 is
7 gone, assuming that the BOP's policy is not uniform and
8 maybe is not statutorily authorized.

9 MS. SAHARSKY: Yes, I think that -- I think
10 that that is the implication of it, and we think that
11 that is what Congress intended.

12 I am not sure if the Court is interested in
13 such information, but we actually did go ahead and just
14 look in our database to see how many inmates have one
15 PLRA order that they're paying as opposed to five orders
16 that we're paying. And what we found, just checking
17 last week, was that inmates -- there are 944 inmates of
18 the over 200,000 in the federal system who are paying on
19 one order, and only 60 inmates of the over 200,000 who
20 are paying on five or more orders or who had six, and
21 then 42 inmates who have six or more orders.

22 So this actually is a -- a very small
23 problem, at least federally, and we would not want this
24 very small tail to wag the dog of this statute that is
25 clearly -- clearly intended by Congress to make sure

1 that inmates who are filing frivolous lawsuits have a
2 financial disincentive to do so. And --

3 JUSTICE SOTOMAYOR: Be clear about your
4 policy. And I think your adversary agrees. Under (a),
5 the 20 percent has to be paid on all five cases whether
6 the amount is above 10 or -- the amount in the account
7 is above 10 or below 10, correct?

8 MS. SAHARSKY: Correct.

9 JUSTICE SOTOMAYOR: So those five cases
10 would always wipe out the \$10.

11 MS. SAHARSKY: The \$10 is not an impediment
12 to the initial partial filing fee. It is only in the
13 second part of it. That --

14 JUSTICE SOTOMAYOR: So -- and so the \$10
15 floor starts once the account goes up -- you have to --
16 a bottom. You have always \$10 in your account, but any
17 dollar that goes into your account after that,
18 20 percent has to be paid.

19 MS. SAHARSKY: Right. Be we think --
20 assuming that it's over the \$10. But we think that --
21 that there's a -- you know, that there's at least \$10 in
22 the account or would wait until there was \$10 in the
23 account. So if I'm understanding your question
24 correctly, we would wait until there was \$10 in the
25 account as just a matter of --

1 JUSTICE SOTOMAYOR: But you would take
2 20 percent. Let's say there's \$10 and -- there's \$11.
3 The one extra dollar is paid to whom?

4 MS. SAHARSKY: To --

5 JUSTICE SOTOMAYOR: Let's assume there's
6 five cases there.

7 MS. SAHARSKY: We would -- if we can't pay
8 all of the five cases, as we believe Congress intended,
9 we would pay the oldest lawsuit. The oldest -- and --
10 and -- and I don't mean that by filing date. I mean the
11 oldest order that was --

12 JUSTICE SOTOMAYOR: Would take that entire
13 \$1?

14 MS. SAHARSKY: Yes. Because the statute
15 says to pay 20 percent per case, so we would try to do
16 the closest thing that we -- we could to that.

17 And as Justice Ginsburg said, you can't get
18 blood out of a stone. There comes a point at which, if
19 there's not funds, we can't pay. But as we understand
20 the statute, and we think it makes perfect sense in
21 terms of what Congress wanted, if you have money
22 available and you continue to file more lawsuits and get
23 orders entered, that you -- the inmate should have to
24 pay for them.

25 So at the end of the day, we think that the

1 D.C. Circuit got it right, that both when you look at
2 the specific text of this provision, which is
3 Subsection (b) about filing fees but really the entire
4 statute written from the perspective of a single case, a
5 checklist for a single case, that Congress wanted
6 inmates who were filing more lawsuits to pay more.

7 And we think that that makes sense and that
8 also -- and I want -- this is, I think, a partial answer
9 to one of the prior questions of the Chief Justice in
10 terms of interpretative canons, etc., that it's
11 consistent with what this Court did last term in the
12 Coleman case.

13 In the Coleman case the Court was
14 considering the three-strikes provision, but it
15 recognized that that provision is written from the
16 perspective of a single case, a single action, or
17 appeal. You could get a strike for the action. You
18 could get a strike for the appeal.

19 And the same thing we think is true for the
20 filing fees. You could owe the filing fees for the
21 action. You could owe the filing fees for the appeal.
22 And we think that that makes complete sense.

23 So unless there are further questions, we
24 would urge the Court to affirm the decision of the
25 D.C. Circuit.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Oh, you have four minutes remaining.

3 REBUTTAL ARGUMENT OF ANTHONY F. SHELLEY
4 ON BEHALF OF THE PETITIONER

5 MR. SHELLEY: Thank you, Mr. Chief Justice.
6 First of all, with respect to the -- the
7 hypothetical that Justice Sotomayor asked, in fact, I
8 think if the account had \$11 in it, the government's
9 position would lead to none of the clerks of the courts
10 being paid because the first payment would take the --
11 the balance under \$10. So that seems, again, as a
12 number of justices have mentioned, other than
13 Justice Breyer, a perverse reading of the \$10 rule.

14 But I also want to take on the idea that
15 this is the only provision in the statute that provides
16 for a financial effect on the prisoner when filing a
17 lawsuit. No -- as the Chief Justice mentioned, the
18 initial partial filing fee applies in every case. No
19 \$10 rule. No minimum.

20 So that is a -- an immediate financial
21 incentive not to file a frivolous lawsuit because money
22 is going to go immediately. And if it doesn't go
23 immediately, it's a debt that gets paid sequentially,
24 much like the per-prisoner approach would adopt for
25 (b) (2). But (b) (2) then takes a longer-term point of

1 view. (b) (1) is an immediate financial disincentive.

2 (b) (2) is the longer financial disincentive month after
3 month with the installment payments.

4 I also want to take on the idea that "fees"
5 and "filing fee" appear interchangeably in the statute.
6 They do not. Ms. Saharsky mentioned the word "fees,"
7 but "fees" unadorned with the word "filing" in front of
8 it appears differently than does the word "filing fees."

9 The plural "filing fees" appears in exactly
10 two spots: (b) (2). And then in the cross-reference to
11 the cost section, I believe it's (f) -- in the (f)
12 section where it says that costs shall be charged the
13 same way as filing fees. They both use the plural
14 "filing fees."

15 So this was purposeful. Congress used the
16 plural "filing fees" only twice. And that's because, I
17 think, they were talking about the -- the numerous cases
18 being paid to a single clerk.

19 And finally, I'd like to say, it has often
20 been said that the measure of a society is not how it
21 treats it's outstanding citizens but how it treats
22 weakest.

23 Here there's no -- it's criminals. Here
24 there's no real reason to pile on to prisoners with this
25 additional onerous financial incentive when the other

1 aspects of the PLRA do the work of deterring frivolous
2 lawsuits along with the disincentive that's provided
3 under the per-prisoner approach.

4 We would ask that the Court reverse the
5 D.C. Circuit.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

8 (Whereupon, at 11:41 a.m., the case in the
9 above-entitled matter was submitted.)

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A			B	
a.m 1:14 3:2 52:8	agrees 28:9 47:4	1:15	b 4:2,21,21 5:19	37:19 39:13 50:13
ability 7:1	ahead 46:13	appears 4:13 51:8	6:22 9:18,18	brief 20:16 22:16
able 20:15 45:11,12	AL 1:7	51:9	11:15,16,20,20	25:11 37:13 40:10
above-entitled 1:12	allow 9:15 18:18,25	Appendix 45:9	13:14,19,19 28:3	briefed 41:10
52:9	42:21 43:22	applies 42:9 50:18	29:5,7,19 31:14	briefs 40:7
account 4:4,6 14:8	allowed 14:5	apply 26:11,15	31:18,19,20,23,24	bring 3:19 18:21
14:10 16:2 17:18	allows 24:22 36:3	33:15	32:13 36:3 49:3	bringing 43:14
18:25 19:15,19	42:25	approach 3:12,14	50:25,25 51:1,2	brings 19:12
20:3 21:21 37:10	alternative 14:24	3:16,20 4:10 8:13	51:10	brought 7:20 27:10
37:12 38:15 39:4	15:9 21:11 22:21	8:14 9:16,16 15:9	back 6:13 7:23 10:8	27:11
39:5,6 41:16 43:6	46:2	16:1 19:5,6,25	19:9 23:25 37:3	Bruce 1:3 3:4 17:5
43:17 45:8,17	Amazon 44:25	20:1 21:11,14	41:2	23:9,18
47:6,15,16,17,22	ambiguity 42:19,21	22:23,24 23:5	balance 3:17 32:2	burden 28:15
47:23,25 50:8	42:25	24:21,22,25 25:2	50:11	Bureau 20:7 21:4
accounting 40:24	American 27:10	25:4 26:5 41:21	banking 22:5	button 39:16,17
accounts 36:4 38:2	amount 4:6 15:7	50:24 52:3	barriers 7:16	buy 42:14,16 44:6
38:4	18:25 21:21 24:4	appropriate 12:25	based 42:6	44:24 45:8
action 10:12 27:22	28:5 29:6 30:14	approximately	baseless 17:2,4	
28:5,6 29:7,8,10	31:17 32:17,18	45:23	basically 19:11	C
31:16 49:16,17,21	37:10 39:15 43:16	argument 1:13 2:2	38:2	C 2:1 3:1
add 8:25 9:8 27:2	47:6,6	2:5,8 3:3,6 15:1	basis 32:6	called 3:12
added 7:18	amounts 34:22	27:8,16 30:2 40:3	bat 11:9	calls 19:7 42:13
addition 5:9 23:4	45:12	50:3	behalf 1:16,20 2:4	43:1,22
additional 7:14	analysis 40:2	arises 43:6,25	2:7,10 3:7 27:17	canons 49:10
28:21 51:25	anomalies 3:21	44:14	50:4	care 14:2
address 32:8 34:20	answer 11:9 13:19	art 4:22 9:19	behavior 6:23	careful 3:17
44:16	23:23 34:24 49:8	asked 40:9 45:19	believe 26:12 48:8	cares 17:22
addressed 41:11	answers 37:17 43:3	50:7	51:11	carries 32:6
administer 15:22	ANTHONY 1:16	aspects 52:1	best 3:14 19:5	case 3:4 4:24 6:14
administering	2:3,9 3:6 50:3	assessed 5:21 13:15	better 46:2	8:5 9:3 10:1,2,3
15:24	anti-filing 30:6	Assistant 1:18	bit 11:21	10:24,25 11:4,5,7
administrative	anticipated 7:15	assume 30:18 48:5	blood 25:7 48:18	12:14 14:8 16:12
35:24 36:11 43:18	ANTOINE 1:3	assumes 10:19	board 5:23	17:13 18:2,4
43:19	Anyway 39:13	assuming 46:7	book 42:16 44:6	26:14,19,21,21,23
admit 7:25	appeal 5:19 18:5	47:20	books 42:14 44:9	27:4,4,5,6,8,9,21
adopt 3:11 50:24	26:22,23,25 27:22	attorney 29:16	44:25 45:8	28:9,16 29:1,4
adopted 17:9	28:5,6 29:7,9,11	attorney's 29:15	BOP 16:7 37:4,7,14	30:19,23 31:15
adversary 22:16	31:16 49:17,18,21	atypical 44:15	37:14,23 43:21	32:1,2,8,8,15,18
40:16 47:4	appeals 3:11 4:25	authorized 46:8	45:19	32:24,24 33:7,16
affidavit 27:23	5:10,14 6:1,3,15	available 36:24	BOP's 43:9 46:7	33:17 34:11,15,24
affirm 49:24	7:2 18:20 20:2	44:9 48:22	bottom 47:16	35:5,14 39:12
agency 4:3 8:2,8,11	24:6 25:25 26:25	average 45:18	Breyer 11:23 13:5	40:7,10,21 41:9
9:9	36:25 39:24 42:1	avoids 3:20 24:21	13:8 15:13,22	43:6,8,9,15 45:5
agree 11:6 21:10,10	appeals' 43:12	award 5:9 29:16	16:4 17:25 21:19	48:15 49:4,5,12
22:3 35:11 41:22	appear 51:5	awards 26:24	22:4,7,17 28:22	49:13,16 50:18
	APPEARANCES			52:7,8

<p>case-by-case 31:12 32:6 cases 6:6,8,11 7:2 7:11,20,22 8:7,10 9:6,6 10:4,5,17,19 10:22 12:3,21 16:9 17:6 20:18 21:15 28:11,16 29:23 32:25 34:23 38:14 39:24 40:1 40:18,19 41:5 43:12,25 44:1,10 45:7,12 47:5,9 48:6,8 51:17 cash 22:2 cause 15:7 cent 37:12 41:16 centralized 35:20 36:12 cents 15:3 30:4 42:11,24 45:15 cert 26:11,15 Certainly 30:17 certiorari 41:12 cetera 12:17 30:11 43:12,22,23,23 44:18 45:10 chain 23:17 charged 51:12 CHARLES 1:6 check 21:22,24 22:2 27:23,24 checking 46:16 checklist 49:5 Chevron 22:12,14 Chief 3:3,8 21:3 22:1 26:6,9 27:14 27:18 29:25 30:15 30:24 31:11 32:4 32:19 33:18,25 34:14 35:11,15 37:5 42:4 44:4,11 49:9 50:1,5,17 52:6 choice 17:12,16 circuit 15:25 20:23</p>	<p>20:23 24:7 26:20 26:23 27:5 31:22 34:9 41:10 44:19 49:1,25 52:5 Circuit's 33:10 40:7 41:11 circuits 16:15 17:8 24:10 circumstance 14:1 cited 16:9 20:15 37:18 40:7 cites 40:18 citizens 51:21 civil 29:7 31:16 claim 33:12 claims 33:13 43:21 clarify 45:13 clarifying 15:13 clear 28:14 29:12 32:12 36:21 39:25 44:14 47:3 clearly 46:25,25 clerk 4:5,8,10 8:3,5 8:8,17,18,19 9:2,3 9:4,5,10,24 10:3,4 10:7,7,8 11:17 40:24 51:18 clerks 8:12,12 10:5 18:19 24:9 50:9 closest 48:16 Coleman 49:12,13 collect 18:19 24:13 35:20 36:5,7 collecting 35:19 36:1 collector 11:16 combination 4:8 come 6:9,13 13:17 24:5,8,8,11 41:14 comes 6:25 10:16 22:20 24:11 48:18 coming 38:3 common 29:17 complete 37:2 49:22 completely 41:22</p>	<p>comports 3:14 comprises 9:20 concedes 13:2 concession 13:25 14:23 confined 13:1 confusing 32:9 Congress 3:17,21 4:20,21 6:13 7:19 8:10 9:18,25 10:1 10:15 12:5,20,24 17:20 19:4,5 21:8 23:25 29:3,6,13 30:3,12,15,17,21 30:23 33:9 36:18 36:21,22 44:21 46:3,11,25 48:8 48:21 49:5 51:15 Congress's 38:7 connect 9:12 consider 43:9 considered 35:3 42:2 considering 49:14 consistent 3:17 22:9 38:7 39:19 49:11 consists 39:15 constitutional 16:19 17:7 constitutionality 16:16 construction 11:2 construing 39:18 continue 35:5 36:24 48:22 continues 31:24 continuing 6:11 contribute 37:1 correct 14:17 24:15 47:7,8 correctly 47:24 cost 5:9 19:21 26:24 30:3,13 34:10 51:11 costs 4:24 51:12</p>	<p>counsel 27:14 40:9 40:11 50:1 52:6 couple 34:3 37:16 43:3 course 3:25 32:24 43:13,18 court 1:1,13 3:9,11 4:5,9,18,25 5:4,6 5:10,14,15 6:1,2,3 6:14,15 7:1,1 8:17 8:18,20 9:2,5 10:21 11:17 12:3 12:21 16:9 17:19 18:4,14,20,20 19:11,13,14,15 25:19,21 26:10,15 26:22,23,24,25 27:19,23 29:8,22 31:2 36:7,22 41:3 41:8 43:12 44:10 45:14 46:12 49:11 49:13,24 52:4 Court's 20:19 40:3 courts 3:11 19:10 19:16 20:2,16 24:4,6 25:25 35:3 36:6 39:24 42:1 50:9 creates 4:21 7:13 7:17 criminal 42:8 criminals 51:23 cross-reference 51:10 cumbersome 36:14 curious 45:20 current 25:24 custody 4:3</p>	<p>46:14 date 48:10 day 48:25 deal 10:14,25 22:22 dealing 10:16 debt 50:23 decide 35:9 decided 30:3 decision 20:19,24 30:22 49:24 defend 22:19 defer 22:13 deference 22:14 deferred 25:12,12 26:4 defined 13:10 delay 34:5,7 Department 1:19 deposit 45:21 deposits 45:7 described 16:1 detail 40:2 42:2 detailed 40:2 deter 33:11,12 deterrence 28:20 30:2,5 deterrent 30:9 36:16 detering 3:18 52:1 difference 17:17,23 17:23,24 24:20 different 11:15,16 11:21 19:21 24:20 31:1 34:18 differently 11:15 51:8 difficult 36:9 42:6 dimension 17:8 disagree 11:6 13:14 disagreed 39:11 disagrees 26:2 discouraging 3:22 discretion 43:22 discussion 28:19 37:19 40:3 disincentive 6:10</p>
--	---	--	---	--

<p>7:6,7,10,13 47:2 51:1,2 52:2 disincentives 3:21 3:22 7:5,18 dismiss 7:2 dismissed 18:4 distribute 8:19 district 5:4,6,15 6:2 6:14 7:1 12:1 16:9 18:4,19 20:16 26:22,23,24 districts 13:4 divided 24:7 docketing 5:1 doctrine 42:7 dog 46:24 doing 16:4,8,10 37:7,14,15 dollar 15:14 47:17 48:3 drafted 10:11 drain 16:11,12 due 24:5,8,11,11 duties 10:22</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 1:6 2:1 3:1,1 earliest 25:18 early 44:20 earn 15:3 17:11 42:24 earned 6:16 14:6 21:16 30:5 earning 42:11 Easterbrook's 20:24 34:8 easy 36:4 effect 50:16 eight 25:3 27:3 eighth 25:9 either 40:4 41:1,23 electronic 38:3 39:16 enacted 6:13 17:20 44:20 encompasses 9:19</p>	<p>encumbrance 15:7 encumbrances 15:5 26:22 27:1,2 ends 24:6 entered 48:23 entire 48:12 49:3 entitled 42:23 Especially 16:25 espouse 19:25 ESQ 1:16,18 2:3,6 2:9 essentially 23:20 33:14 essentials 16:23 et 1:7 12:17 30:11 43:12,22,23,23 44:18 45:10 event 26:12 eventually 17:5 exact 46:5 exactly 4:15 16:8 21:9 31:22 51:9 example 29:5 45:5 exceed 21:23 39:17 exceeds 4:6 15:19 21:21 22:1 37:10 38:17,25 39:4,5 39:15 exclusive 13:6 exhaustion 43:19 experience 39:23 40:6 43:10 45:4 explanation 13:9 28:14 extent 20:13,14 42:3 extra 48:3 extreme 42:10</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>f 1:16 2:3,9 3:6 50:3 51:11,11 fact 5:8 16:13,25 18:23 35:18 43:21 45:24 50:7 fair 35:16,18</p>	<p>fairly 36:4 44:15 family 42:13 43:2 far 16:6 35:24 39:22 fault 17:1 Fed 22:11 federal 20:7 46:18 federally 46:23 fee 4:18,22,22,23 4:23 5:1,1,5,7,11 5:14,15,18,20,25 6:2,14,18,24 9:4 9:19,23 10:6 11:4 11:11,11,19 12:13 12:16,18 13:10,15 13:22 14:1,19 18:7 19:14 26:12 26:13 28:3 29:13 29:16,16 30:16 31:17 32:15 33:10 47:12 50:18 51:5 fee's 9:14 fees 4:7,9,12,13 8:3 8:5,6,10 9:11,16 9:20 10:1,1,2,3,5 10:7,8 11:18 12:6 13:10 19:22 20:3 21:1 22:22 23:15 23:22 24:2,17,23 26:7,18,18 27:25 28:22,23,25 29:3 29:6,8,10,13,15 29:17,18 36:7 42:11 44:2 45:25 49:3,20,20,21 51:4,6,7,8,9,13,14 51:16 fifth 15:7,20 24:7 24:25 figure 23:5 24:23 25:13 file 6:11 10:17 11:12 12:23 28:20 36:20 48:22 50:21 filed 23:19 31:17 34:23 40:10 43:7</p>	<p>45:6,11,17 filer 12:2 filers 10:15 36:19 files 6:6,8 12:2 18:3 41:5 filing 4:6,9,11,13 4:18,22,22,23,23 5:5,10,14,15,18 5:19,20,25 6:1,14 6:18,23 7:11,16 8:3,4,6,10 9:4,6 9:11,14,16,19,23 11:4,18,19 12:13 12:15,21 13:10,15 13:22 14:19 17:2 17:4,12 18:7 19:14,22 20:3 21:1 22:22 23:22 24:2,17 26:7,12 26:13,18,18 27:25 28:3 30:16 31:17 32:14 33:10 36:7 36:24 42:11 44:1 44:2 45:25 47:1 47:12 48:10 49:3 49:6,20,20,21 50:16,18 51:5,7,8 51:9,13,14,16 filings 23:9 33:13 33:15 finally 51:19 financial 30:9 47:2 50:16,20 51:1,2 51:25 find 42:5,5 first 6:1,2,12 10:13 12:10,19 13:12,17 13:19 15:5 17:7 21:12 23:6,13,18 24:24 26:1,5 28:4 30:25 31:25 34:25 37:17 41:15,16 43:4 50:6,10 fiscal 45:22 five 20:3 21:1 25:1 26:5,21 27:1,3</p>	<p>34:12 36:15 43:7 44:17 46:6,15,20 47:5,9 48:6,8 flip 38:18 39:1 floor 19:2 37:20,25 38:4 47:15 focus 10:11 30:17 30:18 31:12,25 folks 36:10 follow 39:3 following 4:3 20:13 forever 24:17 forfeits 17:16 Forget 19:9 forma 17:21 24:12 former 36:8 forward 4:4 8:2,8 8:11 9:10 18:24 21:20,24 32:6 37:9 39:14 Forwarding 39:15 found 46:16 four 15:5 50:2 fourth 15:20 16:14 17:8 20:23 24:24 friend 40:13 friends 42:13 frivolous 3:18 7:3 18:4,11 27:5 33:13 47:1 50:21 52:1 front 4:23 8:17 51:7 full 27:25 28:4 31:17 32:17 fully 5:15 funds 36:24 48:19 further 33:20,22 49:23 future 34:13</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 garnished 7:14 General 1:19 40:11 getting 22:4 34:1</p>
---	--	---	--	---

<p>Ginsburg 5:3,7,13 5:22 10:10 11:10 20:6,12 21:2 23:8 23:11,14,24 25:6 48:17 give 10:2,3,4,6 given 6:17 16:20,23 18:10,22,23 19:4 37:8 gives 19:13 giving 13:8 go 7:23 11:12 13:12 15:11 22:19 23:25 24:17 37:21 38:19 39:2 40:4,8,12 46:13 50:22,22 goes 5:9 17:9 19:23 20:4 21:12 47:15 47:17 going 6:7,24 8:5,19 9:3,5,7 10:8 11:3 12:6 14:13,14 15:6 16:17 17:17 18:7 19:1 20:21 21:16 23:1,15,16 23:24 34:22 36:19 36:22 40:16 42:14 44:22 50:22 good 21:7 44:12 45:5 government 13:2 14:13,17 22:20 24:13 25:11 26:2 government's 13:25 14:5 25:7 50:8 grace 20:9 21:4 42:23 greater 18:25 guess 15:14 18:2 32:5 35:2 guidance 20:11 22:15 38:1 guy 41:15</p> <hr/> <p style="text-align: center;">H</p>	<p>halves 9:12 happen 19:13 happens 5:3 23:8 24:25 31:15 harsh 42:17 harshness 42:10 43:25 head 17:14 hear 3:3 heard 43:21 helps 21:13 43:20 higher 6:19 highlight 41:8 45:5 Hobson's 17:12,16 home 6:9 hook 26:6 33:19 36:9 hour 15:3 30:5 42:11,24 hundred 3:23 45:7 45:11 hurt 14:25 hypothetical 50:7</p> <hr/> <p style="text-align: center;">I</p> <p>idea 22:20,20 50:14 51:4 IFP 28:4 35:6 imagine 36:13 immediate 34:10 50:20 51:1 immediately 31:6 50:22,23 impediment 47:11 implication 46:10 important 31:7 impossible 18:21 incentive 50:21 51:25 includes 4:22,24 income 3:24 7:14 15:2,10,10 16:3 16:20 17:11 21:13 21:16 25:1 31:9 32:20,23 33:4 44:2 45:15,15,19</p>	<p>45:20,23 inconceivable 16:18 incorrect 8:15 increment 15:21 21:17 incur 23:19 incurred 17:6 24:24 indicates 4:9 20:19 indication 29:20 indigency 12:23 27:24 indigent 43:23 individual 34:11,24 36:5,7 40:23 45:6 individuals 10:16 ineffective 7:10,12 information 46:13 initial 5:18,20 6:23 11:4,10,11 12:13 12:15 13:22 14:19 28:7,9 31:25 32:14 47:12 50:18 inmate 28:20 30:13 38:2 41:5 43:25 45:23,24 48:23 inmate's 28:11 36:8 inmates 36:8 46:14 46:17,17,19,21 47:1 49:6 insert 8:16 installment 11:5,7 13:15,21 19:20,23 28:1,6 51:3 instance 4:25 12:22 17:6 22:22 26:11 instant 21:22 39:16 intended 3:22 7:5,6 46:3,11,25 48:8 intention 38:7 interchangeably 29:14 51:5 interested 46:12 interpret 21:19 42:18,20,25 43:16</p>	<p>interpretation 35:12 interpretative 49:10 interpreting 18:1 42:8 investigate 20:15 Iowa 20:17,18 40:19 issue 10:21 12:8 16:15 19:21 35:3 39:11 41:3,9,9,14 41:17,19 42:5</p> <hr/> <p style="text-align: center;">J</p> <p>job 21:15 Joint 45:9 JR 1:6 Judge 20:24 31:21 34:8 Justice 1:19 3:3,8 4:14,17 5:3,7,13 5:22 6:6,21 7:4,9 7:23 8:21 9:7,25 10:10 11:10,23 13:5,8,24 14:16 14:22 15:13,16,22 16:4,18,25 17:15 17:25 19:8 20:6 20:12 21:2,3,19 22:1,4,7,11,17 23:8,11,14,23 25:6,17,23 26:6,9 27:7,14,18 28:18 28:22 29:25 30:15 30:24 31:11 32:4 32:19 33:18,25 34:14 35:11,15 37:3,5,19 38:9,13 38:21 39:3,7,8,13 40:14 41:14,19,23 42:4 44:4,11,24 45:3 46:4 47:3,9 47:14 48:1,5,12 48:17 49:9 50:1,5 50:7,13,17 52:6</p>	<p>justices 50:12</p> <hr/> <p style="text-align: center;">K</p> <p>Kagan 7:23 8:21 9:7,25 27:7 37:3 46:4 keep 10:8 17:1 43:1 keeps 7:10 key 4:1,1 kick 13:16 kill 7:22 KIMBERLY 23:13 kind 6:23 21:24 24:8 28:13 29:19 36:16 37:25 38:18 40:5 41:1 knew 36:18 know 6:8 9:8,17 10:1 11:23 16:6 20:12 21:6 22:25 29:1 31:5 32:17 33:20 35:25 37:9 39:23 40:6,22,22 40:25 42:15 44:14 45:2,14 47:21</p> <hr/> <p style="text-align: center;">L</p> <p>lack 37:6 language 8:25 9:9 10:20 18:23 22:10 32:13 37:8,17 38:21,22,22 39:18 42:7 large 33:12 44:1 laughing-stock 27:8 Laughter 22:6 law 24:16 29:8 30:7 lawsuit 7:16 30:13 43:11 48:9 50:17 50:21 lawsuits 3:18 23:21 28:20 36:20,25 43:8,11 44:17,18 44:22 46:6 47:1 48:22 49:6 52:2</p>
---	--	--	---	--

<p>lead 50:9 leave 18:8,13,18 38:7 39:20 43:16 leaves 17:14 19:6 24:18 33:14 leaving 15:5 left 16:17 20:8 legal 35:1,2,10,23 lenity 42:8 let's 13:12 14:6 15:1 48:2,5 letters 42:13 level 42:2 libraries 44:9,10,12 light 35:18 line 6:1 13:17 24:22 25:10 40:4 lines 7:14 linguistically 21:20 linked 31:13 list 27:22 literally 21:25 litigation 27:2 little 11:21 17:21 18:12 43:5 long 16:2 long-standing 37:23,24 longer 35:5,6 51:2 longer-term 50:25 look 4:21 9:8 11:2 12:22 16:17 20:22 23:1,2 32:22 36:3 46:14 49:1 looked 15:25 26:1,1 looking 20:20 33:2 37:11 loses 5:8 losing 17:10 lot 7:11 23:4 44:24 44:25 lower 24:2,4</p> <hr/> <p style="text-align: center;">M</p> <p>machinations 22:18</p>	<p>majority 43:10 making 35:7 37:21 43:20 man 17:21 manually 40:25 marginal 28:19 36:16 Maryland 20:18 40:19 materials 45:9 matter 1:12 6:18 11:8 13:16 20:8,9 21:4 24:16 47:25 52:9 mean 6:7 8:6 9:17 9:19 11:24 12:15 13:5 15:14,23 16:12,19 21:5,25 25:18 27:21 30:2 32:9 33:21,25 37:20,20 42:22 43:8 44:25 46:5 48:10,10 means 4:10 9:17 11:1 28:25 38:25 measure 51:20 mechanism 35:20 median 45:20,21 45:22,23 meet 14:9 member 33:9 members 30:12 mentioned 24:21 50:12,17 51:6 mentions 11:18,18 meritorious 3:19 7:20 17:12 27:4,9 33:12 43:15 Michigan 40:11,12 Midwest 20:17 mind 12:20 minimum 50:19 minutes 50:2 moment 18:17 19:12 money 19:6,15</p>	<p>24:10 36:4 38:3 42:12 43:5,6,16 44:25 48:21 50:21 month 3:24,24 6:4 6:17 14:7 17:23 45:18,24 51:2,3 month's 31:9 32:20 monthly 12:16 28:7 28:12 31:8 32:1 32:16 34:18 41:6 months 6:18 7:13 7:13 mortgage 33:21 moved 13:3 multiple 8:7,10 9:11 10:4,5,5,15 12:2,5 18:3 23:9 33:13,15 36:19 37:18 39:22,23 multiply 25:16</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:1,1 3:1 nearest 25:19,21 necessarily 11:9 12:20 necessary 8:17 29:20 41:3 need 30:4 41:8 needed 12:24 needs 11:5 34:11 never 3:21 6:7,9,9 9:23 23:15,24 34:13 36:15 43:14 New 40:8 Newlin 16:12 20:24 NICOLE 1:18 2:6 27:16 note 20:22 noted 26:20 November 1:10 number 6:21 22:18 39:12 46:5 50:12 numerous 4:11 10:19 12:21 13:4 34:23 35:3 51:17</p>	<hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 obligation 34:12 obligations 36:13 obtained 12:24 obvious 39:19 obviously 43:9 offhand 40:4 office 35:24 36:11 officers 10:21 official 11:17 12:25 19:1 officials 8:18 18:24 oh 26:13 31:2 50:2 okay 12:13 15:12 18:5 30:16 oldest 48:9,9,11 once 24:17 35:4 36:5 47:15 one-time 34:16 onerous 51:25 ones 3:19 22:21 33:19 40:1 ongoing 34:18 opinion 31:22 33:10 34:8 41:11 opinions 44:20 opposed 19:2 46:15 opposite 9:16,21 oral 1:12 2:2,5 3:6 27:16 order 5:4 22:19 46:15,19 48:11 orders 43:10 44:18 46:15,20,21 48:23 ordinary 43:8 outlandish 6:17 15:2 outstanding 51:21 overcome 29:20 overwhelming 7:21 owe 24:9 49:20,21 owed 10:7 25:18 43:11</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 25:11 pages 45:10 paid 4:7 5:8,16,18 6:2,3 8:3 9:4,11 10:8,9 23:16 24:1 25:13,14 26:5,12 47:5,18 48:3 50:10,23 51:18 parenthetically 41:7 part 33:5 47:13 partial 5:18,20 6:23 11:4,11 12:13,15 13:15,22 32:1,14 47:12 49:8 50:18 particularly 34:23 parts 33:6 pauperis 17:21 24:12 pay 5:23,24 6:7,18 6:24 11:12 14:18 23:3,24 24:10,12 26:14 28:4 30:16 31:6,17 32:2,16 32:17,25 33:3,20 33:22,23 34:19 36:20,25 43:1 44:2 45:12 46:1 48:7,9,15,19,24 49:6 pay-as-you-go 34:10 paying 34:12,22 36:15,16 45:25 46:15,16,18,20 payment 9:10 13:21,21 27:25 28:7,7,9 29:23 32:1,14 34:17,18 37:13 39:14 41:15 41:17 50:10 payment's 23:1 payments 4:4,11 8:2,8,12 11:5,7</p>
--	--	---	---

<p>12:12,17 13:15 18:24 28:12 31:9 32:2,16 34:5 35:7 35:8 37:10,21 41:6 51:3 pays 19:14 34:14 penny 17:22 people 12:7 29:14 29:15 43:10 45:1 per-case 8:14 9:15 20:1 24:20 31:24 41:21 per-prisoner 3:12 3:14,16,20 4:10 8:13 16:1 19:6,24 21:14 24:22 41:21 50:24 52:3 perceive 43:24 percent 3:23 5:20 6:4,5,8 12:17 14:1 14:11,11,14,20 15:10,18,21 17:11 18:8,8,14,14,14 18:19,20 19:18,20 19:20,21,22 20:4 20:4,25 21:13,17 21:17,21 25:1,8 31:4,9 32:19,23 32:25 33:1,3,8,11 33:14 34:15 39:4 39:5 45:25 47:5 47:18 48:2,15 perfect 8:4 10:2 48:20 perfectly 12:4 perform 10:22 permitted 29:6 person 7:10 34:11 36:6 43:5 perspective 27:20 28:11 30:23 33:7 49:4,16 persuaded 30:1 perverse 50:13 petition 41:12 petitioner 1:4,17</p>	<p>2:4,10 3:7 28:8,24 41:10 50:4 petitions 26:11,15 phone 19:7 42:13 43:1,22 pick 25:17,19,21,21 piece 27:1 pile 51:24 Pinson 45:6,11 Pinson's 45:17 places 29:2 plan 24:9 28:7 29:23 plays 10:24 please 3:9 27:19 PLRA 3:12 4:20 7:2 26:11,15 44:20 46:15 52:1 plural 4:7,9,13 9:14 11:18 22:22 28:25 29:10 51:9,13,16 point 10:19 16:23 17:9 19:23 23:10 25:2 26:16 28:8 28:18 31:7 32:5 34:21 35:21 48:18 50:25 pointing 7:9 policy 21:7 37:4 40:21 41:1 46:7 47:4 portion 44:2 position 14:5,25 17:10 22:12 25:7 35:14,25 37:24,24 42:10 50:9 possibility 21:11 possible 32:12 potentially 35:7 36:15 43:24 44:1 practical 34:25 36:1 preceding 31:9 32:20 precluded 36:22 presented 41:4,20</p>	<p>41:25 preserving 3:19 press 39:16 pressing 39:15 prevent 44:22 prevents 43:14 previous 14:7 previously 13:10 prior 49:9 prison 8:18 11:16 11:25 12:25 16:21 17:22 18:24 19:1 23:16 24:18 36:5 prisoner 3:18,23 4:3 5:8,21 6:5,16 12:16,20,23 13:1 14:7 15:1 16:8 17:10 19:7,10 20:7,8 21:16 22:25 24:5,6,17 24:18 26:17,18 27:6,11,11 28:4 30:5,19 31:3,8,12 32:8,15,22 33:11 33:16 35:4,5 39:20 43:14,23 44:17 45:15 50:16 prisoner's 4:4 prisoners 13:2 16:17,20 34:22 42:22,22 44:24 45:10 51:24 prisons 20:7 21:4 40:15 44:8 probably 38:9 problem 14:3 41:23 46:23 problems 23:5 24:20 25:4,16 34:4 36:1,2 process 10:21 produced 26:21 produces 38:22 promote 30:5 prove 11:1 provide 29:19</p>	<p>provided 52:2 provides 27:22 30:9 50:15 proving 21:14 provision 28:3 30:9 43:15 44:22 49:2 49:14,15 50:15 provisions 30:6,10 30:10 published 37:25 purpose 10:14,16 18:10 34:7 39:19 purposeful 51:15 purposes 13:25 14:25 16:16 30:3 pursues 30:2 put 7:21,21 17:9 Putting 43:13</p> <hr/> <p style="text-align: center;">Q</p> <p>qualify 35:6 question 6:20 13:20 18:6 23:23 24:3 34:3,21 35:23 41:4,4,20,25 42:1 43:5 47:23 questions 43:20 49:9,23 quickly 24:1 27:3 quite 27:2 30:20 34:17 36:9 quoted 33:9</p> <hr/> <p style="text-align: center;">R</p> <p>R 3:1 raise 41:17 46:4 raised 34:21 rate 46:1 read 8:11 22:8,24 37:18 38:6,10,11 38:15,17,21,22 39:10,13,22,23,25 reading 5:14 7:25 30:25 31:23 32:21 50:13 reads 20:19</p>	<p>real 29:21 51:24 realistically 23:15 realize 19:9 really 11:1 12:7 16:4 23:21 28:15 30:20 33:6 35:21 37:6 44:3,25 46:2 49:3 reason 32:11 35:23 44:18 51:24 reasonable 32:21 36:23 46:1 reasons 3:10 34:25 rebuttal 2:8 27:13 50:3 receive 4:11 received 45:18,21 receives 45:23 recidivist 26:18 recognized 49:15 record 30:12 40:9 40:11 refer 12:5 36:12 references 10:23 referred 5:2 referring 29:3 regard 33:8 42:21 regardless 35:9,22 regular 35:6 45:7 regulation 20:10 22:15 37:25 relatively 24:1 release 24:14 released 23:16 relevant 8:18,19 9:10 27:24 rely 35:16,18 relying 7:24 8:23 remain 38:14 remainder 27:12 remaining 32:17 50:2 remedies 43:19 reply 20:16 represents 40:25 require 27:25</p>
--	--	---	--	---

<p>32:24 required 12:16 29:8 31:3,5,6,8 32:7,16,22 43:19 requirement 16:20 requires 22:12 reserve 27:12 resolve 35:23 41:3 41:4,8,9,24 42:6 43:20 resolves 39:12 respect 37:4 50:6 Respondents 1:20 2:7 27:17 responsive 32:5 rest 6:20 29:21 result 38:23 reverse 52:4 right 3:19 5:12 6:7 7:4 8:6,22 11:9 15:14 18:8 23:9 25:23 28:24 31:10 31:22 34:2,12,15 34:16,19 38:9,12 38:24 39:9 44:7 47:19 49:1 road 36:15 ROBERTS 3:3 21:3 22:1 26:6,9 27:14 29:25 30:15 30:24 31:11 32:4 32:19 33:18,25 34:14 35:11,15 42:4 44:4,11 50:1 52:6 room 33:14 roost 6:9,13 rule 6:25 10:18 11:19 37:4 42:8 50:13,19</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 safety-valve 43:15 Saharsky 1:18 2:6 27:15,16,18 28:24</p>	<p>29:25 30:8,21 31:10,13 32:11 33:5,24 34:2,16 35:13,17 37:3,16 38:12,16,24 39:7 39:9,21 40:17 41:18,22 42:4 43:3 44:7,13 45:2 45:4 46:9 47:8,11 47:19 48:4,7,14 51:6 Samuels 1:6 3:4 save 42:19 saying 10:3 14:18 19:11 24:7 31:16 32:5 36:21,23 38:13 says 4:2 8:1,2 15:18 16:7,12 20:7 21:5 21:5 25:11 28:4 28:10,24 29:3 31:4,5,8 37:9 38:16 39:4,8 40:16 46:5 48:15 51:12 scale 7:22 Scalia 4:14,17 6:6 6:21 7:4,9 16:18 16:25 17:15 22:11 25:17,23 28:18 38:9,13,21 39:3,7 39:8 41:14,19,23 44:24 45:3 schedule 28:1 scheme 7:17 Scott-free 34:1 scratching 17:14 second 4:2 5:25 10:18 11:20,20,24 12:9 16:14 17:8 23:6 24:24 26:20 26:23,25 27:5 33:16 35:1,21 40:7,23 47:13 section 3:13 10:20 51:11,12</p>	<p>sections 11:14 see 20:20 21:3 23:1 23:2 46:14 seeks 24:13 send 14:14 sense 8:4,7,9 9:9,22 10:2 18:12,17,17 27:9 28:17 33:8 34:6 37:2 48:20 49:7,22 sentence 4:1,1,2 7:24 8:1,9,22,23 9:12,23 11:24 12:9,10 13:13,19 24:6 separate 41:25 sequential 25:4 sequentially 6:3 50:23 seriatim 8:12 serious 36:1 serve 10:21 set 20:10,10 29:24 38:5 sets 28:6 29:23 settled 24:16 seven 23:19 25:3 27:3 seventh 25:9 34:9 44:19 share 37:6 Shelley 1:16 2:3,9 3:5,6,8 4:15,19 5:6,12,17,24 6:12 7:8,12,23 8:15 9:1 9:14 10:6,13 11:14 12:19 13:7 13:12 14:4,21,24 15:18,25 16:6,22 17:3,19 18:22 19:17 20:9,14 21:10 22:3,14 23:10,18 25:10,20 25:24 26:8,10 46:5 50:3,5 shift 28:15</p>	<p>shifting 29:16,16 shifts 28:10 31:6 show 28:15,23 showed 16:9 shows 45:10,17 Shreenavossen 31:21 side 9:21 38:18 39:1 40:10,13 43:13 Siluk 16:13 20:22 Similarly 29:9 simpler 22:23 single 4:18 8:5 9:24 12:1 26:21 27:1 27:21 28:5,16 29:4,10,10 30:23 33:7 49:4,5,16,16 51:18 single-case 10:11 single/plural 29:18 singular 4:5,8 8:3 10:25 11:19 situation 14:6 15:4 44:8,14,15,17 45:14,16 six 17:6 25:3 44:17 46:20,21 sixth 25:2,8 26:3 slot 18:7 small 6:17 33:11 34:17 46:22,24 society 51:20 solely 32:7 Solicitor 1:18 40:11 somebody 15:23 somewhat 29:13 sort 29:17 Sotomayor 13:24 14:16,22 15:16 19:8 40:14 47:3,9 47:14 48:1,5,12 50:7 sounds 12:13 speaks 32:7 specific 31:15 49:2</p>	<p>specifically 44:16 spoken 36:10 sponte 7:2 spots 51:10 stamps 42:13 43:23 start 3:25 4:24 13:16 25:16 31:23 34:12 35:2 37:21 38:19 started 24:19 starting 45:9 starts 28:11 31:15 32:13 34:19 47:15 state 20:17 40:21 statement 12:23 22:16 states 1:1,13 16:7 16:10 20:13 22:25 40:9,9,15 42:24 statistics 45:19 status 35:6 statute 4:15 6:14 6:22 8:11 10:11 10:14 11:8 14:9 15:18 17:14,21 18:1,10 21:5,8 22:24 27:20 28:10 28:14 29:1,7,13 29:21,24 30:2,22 32:10 33:6,6 34:5 36:3 37:8,9 38:6 42:8,19,21 43:14 44:16 46:24 48:14 48:20 49:4 50:15 51:5 statutorily 46:8 statutory 3:15 5:1 10:20 11:2 13:13 14:5,9 18:23 34:6 40:2 42:7 step 41:2 stone 25:8 48:18 stood 25:10 stop 6:22 18:11 21:12 30:13 strength 12:11</p>
--	--	--	--	---

<p>strike 17:7 49:17 49:18 strikes 17:5 23:20 27:24 42:9 strong 29:20 struck 3:17 30:25 subject 26:13 submitted 52:7,9 Subsection 4:2 5:19 13:14 28:3 29:5 29:19 31:14,18,19 31:20 32:13 36:3 49:3 subsidiary 4:24 suggested 22:8 37:19 40:13 44:19 suggests 8:13 34:5 37:11 sui 7:2 suits 17:2,4 18:11 SULLIVAN 41:24 supposed 33:3 Supreme 1:1,13 sure 7:19 13:7 14:21 32:4 40:17 43:20 44:11,12 46:12,25 switch 25:14,15 system 34:10 36:12 38:3 46:18</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 tail 46:24 take 6:5 14:2,6,9,10 14:11,13,20 15:1 15:5,6,10,14,17 15:20 16:3 18:13 19:20,22 20:25 21:17 30:4 36:4 39:4,5 42:14 48:1 48:12 50:10,14 51:4 taken 6:4 14:1 35:14,25 37:23 takes 18:5 21:13</p>	<p>25:1 50:25 talk 20:24 30:24 talked 12:24 talking 12:14 23:22 24:19 28:2,5,12 30:16 31:1,14,25 33:7 42:11 43:7 51:17 talks 10:12 12:12 12:22 29:6,8,9 tandem 6:22 tantamount 42:7 technical 22:9 technicalities 22:5 tell 11:25 36:11 38:10 ten 12:6 term 4:20,22 9:19 49:11 terms 13:24 14:9 34:6 40:6 43:24 48:21 49:10 terribly 30:1 text 3:15 4:1 13:13 29:1 49:2 textual 9:22 Thank 27:14 50:1,5 52:6 theory 13:20 thing 9:20 18:3 29:17 31:7,14 36:9 42:9 48:16 49:19 things 6:21 19:7 27:22 29:24 think 8:15,16 11:25 12:20 13:18,18 14:4,18 16:23 18:1,22,23 20:16 21:6 22:8,17 23:8 24:15 26:2,17 28:13,15,18 29:12 30:13,17,21 31:21 32:6,11,12,21 33:2,8,24 34:3,21 34:24 35:15,17</p>	<p>36:13,14,16,18 37:1,5,17,18 38:6 38:6,17,24 39:10 39:11,21,22 41:2 42:5,20 43:4 44:8 44:18 45:3,13,16 45:18 46:1,9,9,10 47:4,19,20 48:20 48:25 49:7,8,19 49:22 50:8 51:17 thinking 19:10 45:14 thinks 10:1 third 16:14 17:8 20:23 23:7 24:24 33:16 thought 23:25 25:6 26:17 44:4,21 three 3:10,20 17:5 23:20 27:24 33:1 44:21 three-strikes 6:25 10:18 30:10 44:21 49:14 threshold 21:18 thrust 29:21 thumb 7:21 time 4:5 11:11 13:3 15:10 18:24 21:21 24:13 26:1 27:13 33:16 37:10 39:14 45:17 today 40:3 tools 11:2 Torres 16:13 20:23 totally 5:8 touch 24:3 38:14 tougher 18:12 treasury 36:13 treat 26:4 treats 51:21,21 trigger 16:3 19:2 23:3 triggered 31:24 triggers 31:19,19 true 10:13 20:6</p>	<p>29:2 40:18 41:18 44:15 49:19 trust 36:4 38:2 truth 11:25 try 22:22 35:6 48:15 trying 36:7,12 twice 4:16 51:16 two 3:16 9:12 11:14 16:9,9 18:5 20:15 20:15,18 26:24 30:25 31:2,5,7 32:25 34:25 40:18 43:11 51:10 typical 45:16</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>unadorned 51:7 unclear 15:15 30:20 unconstitutional 17:13 understand 7:25 14:17 16:7 26:10 26:14 34:2 37:6 37:13 48:19 understandable 12:5 understanding 37:7 47:23 understood 4:20 14:22 20:2 uniform 46:7 United 1:1,13 unnecessary 8:1 unsettled 24:4 unwilling 42:20 urge 49:24 usage 29:18 use 19:1 41:20 51:13 usually 12:1</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:4 various 10:24</p>	<p>vast 43:10 versus 39:25 view 51:1 views 21:7</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wag 46:24 wage 21:15 wages 6:17 wait 5:15 47:22,24 want 7:21 8:22,24 34:9,20 46:23 49:8 50:14 51:4 wanted 7:19 26:16 28:21 30:24 35:22 48:21 49:5 wants 35:5 Washington 1:9,16 1:19 wasn't 27:5,7,8 way 4:20 8:9,22,24 10:25,25 11:13 15:23,24 17:25 19:3,5,18 20:1,18 21:9,20 22:8,24 22:24 25:25 29:14 31:18 32:8 38:1 38:10,11,15 39:14 39:18,25 41:23 42:25 51:13 ways 37:18 38:6 39:10,22,24 40:5 we'll 3:3 25:9 we're 14:13 22:4 23:21,21 28:2,8 29:16 42:10 46:16 we've 20:14,15 35:13 weakest 51:22 weakness 12:11 Wednesday 1:10 week 15:4 46:17 went 16:10 40:20 Whitfield 26:21 40:8 wholly 7:16</p>
---	---	--	---	---

<p>willing 42:18,24 win 27:6 wipe 47:10 word 4:23 12:18 14:11 28:22,23,25 51:6,7,8 words 8:2 13:9 work 3:23 6:22 8:22,23,24,24 14:15 15:3 19:18 52:1 works 17:11 world 29:15 35:4 36:6 worried 12:2,7 worth 30:13 wouldn't 6:5 17:4 20:6 28:16,19 30:17 write 19:5 21:22,24 written 10:24 11:15 19:4 21:8 27:20 49:4,15 wrong 36:17 wrote 30:22</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,8</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year 45:22 years 33:21,22 34:12 36:15 42:16 44:5 York 40:8</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zero 16:11,13,17 17:24</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 4:21 5:19 9:18 11:15,20 29:7,9 31:14,19,24 37:12 41:16 48:13 51:1</p>	<p>10 4:6 11:19 14:2 14:10,12,14,20 15:8,17,19 16:2 17:16,17 18:9,13 18:18,25 19:12,12 19:14,19 20:8,25 21:12,18,22,23 22:1 23:2 26:18 33:2 37:4,11,12 37:20,21,22,24 38:4,8,14,14,17 38:19,25 39:2,5,5 39:15,17,20 40:4 40:8,12,16,20,24 41:3,8,16 42:19 42:24 43:16 45:15 45:15 47:6,7,7,10 47:11,14,16,20,21 47:22,24 48:2 50:11,13,19 10.01 19:19 20:3,4 20:20 10:51 1:14 3:2 100 6:16,16 15:10 17:11 20:4,25 21:13,17 25:1,8 105 6:15 11 14:6,12 15:5,6 15:14,19 48:2 50:8 11:41 52:8 12 23:21 26:17 120 6:15 45:23 12th 23:21 14-844 1:4 3:4 15 12:3 33:22 17 23:12 1892 17:20 19 23:13,14 1915 10:12 1915(b)(2) 3:13 1915(d) 10:20 1995 6:13 23:25</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 4:2 6:22 11:16,20</p>	<p>12:22 13:14,19 29:9,19 31:20,23 32:13 50:25,25 51:2,10 20 5:20 6:4,8,8 12:17 14:1,11,11 14:13,20 15:18,21 18:8,14,14,19,20 19:18,20,20,21,22 20:4,21,21,21,21 21:17,21 31:4,9 32:19,22 33:3,8 33:10,14 34:14 39:4,5 42:15 44:5 45:24 47:5,18 48:2,15 200,000 46:18,19 2001 38:5 2015 1:10 23 30:4 42:11 27 2:7</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 4:21 9:18 29:5 30 25:11 33:21 35 15:3 350 13:11 42:12</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 1:10 40 6:5 18:8,14 32:25 40-hour 15:4 42 46:21 44 15:5 48 45:18</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 5:1 50 2:10 6:16 46:5,6 46:6 500 5:1 505 42:12 55 6:16 15:2,4,11 15:16 45:10 56 45:10</p>	<hr/> <p style="text-align: center;">6</p> <hr/> <p>6 17:22 60 32:25 46:19</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>8 14:19 19:23</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>944 46:17</p>
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