

1 convictions to qualify as ACCA predicates, can make sure
2 they have a generic offense where the conviction clearly
3 requires proof of generic burglary. The government's
4 position will -- will cause a significant
5 Sixth Amendment problem because sentence enhancements
6 are going to be based on something beyond the mere fact
7 of a conviction. It would require this Court to
8 consider whether to expand the Almendarez-Torres
9 exception.

10 JUSTICE ALITO: You're seriously arguing
11 that -- you're seriously arguing that all of the States
12 will or should go back and reformulate their burglary
13 statutes so as --

14 MR. FLEMING: No, Your Honor.

15 JUSTICE ALITO: -- to make the conviction?

16 Well, that's what you just said. So if they
17 want them to count as ACCA predicates, no problem. They
18 can just go back and change their burglary statutes.

19 MR. FLEMING: As -- as some States have
20 generic burglary statutes that do require proof of all
21 the elements of generic burglary, if Congress is
22 dissatisfied with the reach of ACCA, it can amend ACCA.
23 ACCA used to have a definition of burglary in it in
24 1984. It said burglary involves a building. Congress
25 could very easily say, you know what? That was too

1 narrow. We're going to overrule that aspect of Taylor,
2 and we'll say burglary, for purposes of ACCA, will
3 include boats and houses.

4 Nothing prevents themselves from doing that.
5 They could amend ACCA so it focuses on conduct instead
6 of convictions. There have been many calls for Congress
7 to do that. But for 25 years -- and stare decisis is
8 particularly important -- in this statutory area,
9 Congress has let this Court --

10 JUSTICE ALITO: What do you make of the fact
11 that until this case, the Court has never analyzed
12 whether something was an element or a means?

13 MR. FLEMING: The -- the same point could
14 have been made in Descamps. And Descamps
15 specifically --

16 JUSTICE ALITO: Well, you said this has been
17 established for 25 years and the Court has used the term
18 element, element, element, but has it ever before gone
19 into the question of whether what it was talking about
20 in that particular case was in the technical sense,
21 either an element or a means?

22 MR. FLEMING: May I respond, Mr. Chief
23 Justice?

24 The issue did not come up before Descamps.
25 So as the previous cases came to the Court, the issue

1 either did not matter or it was not disputed. And it is
2 not uncommon for this Court to take as assumed issues
3 that the parties are not disputing. In Descamps, it was
4 disputed; in this case, it is disputed. And for it to
5 be resolved consistently with what the Court has said
6 for -- for 25 years, it's important that the Court
7 maintain the focus on the elements and not on the means.
8 Otherwise, Descamps would have come out the wrong way.

9 We submit it came out the right way, and
10 this case should come out the same way. We would
11 respectfully submit the judgment should be reversed and
12 the case remanded so Mr. Mathis can be resentenced
13 without regard to ACCA.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 The case is submitted.

16 (Whereupon, at 11:09 a.m., the case in the
17 above-entitled matter was submitted.)

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A				
a.m 1:13 3:2 65:16	aim 51:3	47:11 49:11	argue 26:2	27:13 28:5
able 6:23 33:21 41:21 45:6	air 5:6	anybody 41:8	arguing 23:23 63:10,11	32:14,19 37:19 43:22 59:21
above-entitled 1:11 65:17	Alito 9:11 10:7 10:11,18 11:7 11:15,25 13:22 14:8,19,21 24:8,13,22 63:10,15 64:10 64:16	anymore 55:15	argument 1:12 2:2,5,8 3:3,7 27:9 28:24 30:10 38:11 39:19 61:15,25	63:12,18 backdrop 20:15 20:20
absolutely 10:12 15:21 41:22	Allen 15:12	Appeals 20:18 46:10	arises 11:19 44:20	balance 30:7 banc 27:5
ACCA 17:24 21:15 23:3,7 24:10 25:16,24 37:24 50:1 59:23 60:5 62:1 63:1,17 63:22,22,23 64:2,5 65:13	allowed 8:15	APPEARAN... 1:14	art 22:22	based 25:25 30:4 47:24 63:6
ACCA's 3:18	Almanza-Are... 27:5	appearing 22:6	artificial 26:6	basic 28:23
accept 39:18	Almendarez-... 63:8	appears 28:21	ascertaining 20:5	basis 8:13 49:9 55:19,21 56:3
acquitted 9:22	alternative 20:12 36:5 40:9,14 41:15 42:5 46:17	Appendix 15:11	aside 37:22 38:2	behalf 1:15,19 2:4,7,10 3:8 30:11 61:16
act 24:21	alternatives 31:2 33:5,9 42:19 50:8,21 52:6,8 53:5,8 53:21 54:20,22 54:23 55:22,25	application 33:17 48:7 60:6	asked 8:18 26:13	believe 17:5
add 15:22	amalgamated 20:22	applies 5:16 19:24	asking 48:13 49:3 54:16 56:8	belonging 15:15
adding 62:7	amazing 45:19	apply 11:19 38:20 62:22,24	asks 42:25	bending 48:7
additional 60:17	amend 63:22 64:5	applying 38:18 38:21	aspect 19:7 64:1	best 57:4 60:6
address 37:11	amended 25:24	appreciate 29:14	assault 32:3,11 40:2,3,4	beyond 18:22 21:12 63:6
administration 30:19	Amendment 30:3 63:5	Approendi 24:13	assault-with-a... 31:25 32:1	bit 52:1
admit 5:8 19:4 30:1	American 20:19	approach 3:15 3:19 9:10,12 10:19 20:3 21:15 23:15,21 25:20 26:7,10 26:12,21,24 31:4,4 33:12 33:18 36:12 37:18 38:16,21 42:13 43:12,15 43:16 46:4 49:15,20,21,22 49:23 50:5,5 51:19 52:13,17 53:24 55:14,17 56:24 59:7,14 60:4,6,8,12,14 61:20 62:2,14 62:22,24	Assistant 1:17	boat 6:6,13,15 7:5,8,11 8:24 9:6 12:18,23 13:8 14:14 17:1 22:2 27:21 37:13 40:25 43:2 44:22 45:1,2 46:8
admitted 8:25 18:13	analysis 31:19 31:21 54:4	approaches 48:4	assume 16:20 19:19	blah 8:22,23,23
admitting 22:10	analyzed 64:11	April 1:9	assumed 6:17,24 45:25 65:2	books 6:6,13,15 7:5,8,11 8:24 9:6 12:18,23 13:8 14:14 17:1 22:2 27:21 37:13 40:25 43:2 44:22 45:1,2 46:8
adopted 30:15 59:21,23	animal 5:17	area 16:25 48:9 64:8	assuring 32:13 39:18	boats 40:22 44:4 64:3
adopting 30:17	answer 6:25 7:2 12:14,15 19:21 19:22,23 20:8 42:11 46:2 47:7,9,19,20 49:2 59:10	areas 60:8	assurance 50:22 50:24 51:1	break 8:11 15:13 18:17,17
affect 22:12,13	answered 43:16 49:24 54:19		attacks 35:19	breaking 15:20 18:3 24:24 25:3 31:15,15
affirmed 61:12	answers 43:12		attorney 8:16	Breyer 5:11,14 5:15,20,25 6:2 6:4,9,19,22 7:2 7:10,14,18
ago 51:13			attribute 9:24	
agree 48:17,19 60:3			authoritative 12:5	
agreement 9:21 23:11 39:12 53:4			available 20:9	
Aguila-Montes 23:21			avoid 9:23 13:8	
aids 26:19			B	
			B 46:22 47:3	
			back 19:12 21:14 23:19	

8:18,22 16:21 27:7,11 28:8 28:23 29:1,3,4 29:7,10,13,15 44:2 46:12 47:6 brief 20:19 21:11 48:4 62:20 bright-line 48:5 48:22 broke 8:11,23 8:24 15:14 17:11,18 18:10 39:12,13 broken 4:9 18:19 building 5:5 17:5 18:1 37:13 42:22,24 43:2,3,5,5,8,9 44:22 46:8 52:10 54:11 55:19 58:15,15 58:17,18 63:24 buildings 40:21 44:4 burden 8:16 burglaring 42:22,22 burglarized 4:18 burglarizing 8:10 burglary 3:13 3:24 5:3,5,5 8:2 9:5,6,14 18:7 21:3 23:6 27:19 28:11 30:25 32:7 36:16,20 37:13 39:4,7 40:19 40:20,21,24,24 42:6,7,10,16 43:14 44:3,22 46:8 50:23 54:1,9,11	55:20,20 56:5 56:15,17,20 58:14,15,16,17 58:17 59:2,22 59:23,24 60:4 61:8 63:3,12 63:18,20,21,23 63:24 64:2 burgled 12:22 13:1 37:12 burgling 58:24 <hr/> C C 1:15 2:1,3,9 3:1,7 46:22 61:15 California 4:5 4:13,23,25 18:9,22 19:7 29:20,25 45:19 46:2 62:6,10 62:16 called 55:16 calling 55:19 calls 16:2 62:13 64:6 car 6:6 8:11 22:2 22:8 27:22 care 8:1 10:16 60:25 61:5,9 case 3:4 4:6 7:15 7:17 8:8 10:1,2 10:4,21,22 11:8,9,16,21 12:1,13 14:21 15:7 16:6,18 16:19 20:9,13 20:15,18,19 23:10 25:11,13 26:9,18,20,20 27:4,5,6 28:4 28:11,20 30:22 30:24 32:7,10 36:16,18,21 37:10 38:1,19 39:1,20 40:14 41:3,24 42:21	43:1,4,8 44:11 44:12 45:6,8 45:22 46:2,10 46:15 47:8 48:15 49:19 51:1 52:3,4 54:3,6 57:17 58:8,9,11 59:12 61:6,11 62:3,4 64:11 64:20 65:4,10 65:12,15,16 cases 19:25 23:4 23:8 26:2 28:9 32:5,18 41:10 43:25 44:10,12 45:8,13 49:24 57:12 61:7 62:5 64:25 categorical 3:15 3:19 9:10 20:3 21:15 23:15 25:20 26:24 31:3 33:12,18 42:13 43:11,16 46:4 49:15,23 52:13,17 53:24 55:14 56:24 60:4,8,12 61:19 62:2,14 62:22,24 categories 46:20 category 13:25 cause 63:4 cautious 13:21 central 37:20 certain 6:12 certainly 8:15 13:5,6,15 50:3 certainty 52:15 certify 49:12 certifying 49:15 cetera 27:22 30:22 44:5 60:9 challenge 11:13 11:13 20:2	change 30:1 38:8 46:3 60:15 63:18 changed 29:25 charge 4:2,2 14:19,22 28:12 28:17 58:24 charged 4:7 8:10 13:8 14:23 15:20 21:21 23:10 36:19 43:2 44:21 57:20 58:10,14 59:13 charges 14:13 charging 12:16 12:21,25 14:1 14:9,22 15:11 27:22 Chief 3:3,9 27:6 30:8,12 61:13 61:17 64:22 65:14 choice 10:6 13:4 49:19 chosen 7:24 Circuit 3:14 26:8 27:5 31:24 38:13,15 45:17 49:10 55:15,16 62:18 62:18 Circuit's 23:21 circumstance 8:6 9:8 11:24 15:2 26:24 circumstances 46:22 47:15 cite 11:10 62:19 cited 20:19 civil 19:25 clarify 51:25 classify 44:17 clean 55:10 clear 9:2 12:20 12:23 15:19 16:12 26:23	33:20 52:24 57:17 61:24 clearly 10:5 63:2 client 22:5 24:23 28:19 clue 13:10,14,15 14:16 57:14 Code 23:7 colleague's 61:24 colloquy 17:22 comb 40:18 combination 42:18 56:1 combing 40:15 come 38:22,22 45:11 46:14 59:15 64:24 65:8,10 comes 35:12 coming 16:23 comitted 28:11 commentaries 12:6 commission 3:18 8:14 14:17 27:2 62:12 commit 15:16 27:21 52:11 committed 17:12 21:4 24:17 39:6 committing 3:25 20:23 21:6,8 common 47:16 60:1 comparable 12:8 completely 29:23 component 30:25 32:7,9 32:11,13 48:11 components 20:5 56:19 concern 43:12
---	--	--	---	--

<p>53:24 56:13 57:1 59:15 conclusion 35:10,24 37:22 conduct 25:21 25:24 58:24 64:5 conduct-based 58:22,23 confidently 36:19 Congress 21:18 22:15,18,23 23:2 24:4,11 24:16,19 25:6 25:14,15,16,21 25:23 29:7 59:2 63:21,24 64:6,9 conjunction 52:5 consider 63:8 consistently 65:5 constitutes 48:23,23 constitutional 48:13,20 contest 8:14 context 11:12 44:18 continue 62:24 contrary 3:18 25:9 50:14 convict 3:13 6:23 7:3 8:3 41:8 43:6 convicted 3:12 9:13 23:16,17 24:24 25:3,17 33:14,22 34:1 36:20 39:6 40:23 42:7,10 42:15,22 43:2 43:9,10,14 50:23 51:16 52:14,20,21</p>	<p>53:1,25 54:13 56:4,14 58:1 59:4,8 61:7,11 conviction 3:17 4:15 5:9 6:14 6:16 18:10 21:13,17 23:3 23:6,25 24:5 24:20 31:5 34:9 36:14 40:12 41:1 51:18 56:3 61:21,22 62:15 63:2,7,15 conviction-ba... 58:22,23 59:1 convictions 10:14,16 21:18 24:17 25:18 45:20 63:1 64:6 correct 13:22 16:18 36:12 correctly 30:23 correspond 39:7 corresponded 39:4 corresponds 42:5 50:8 counsel 30:8,20 61:13 65:14 count 5:18 13:8 14:14 63:17 country 39:11 counts 6:12 couple 37:6,6 course 16:7 34:2 35:5 57:3 60:7 court 1:1,12 3:10 4:12 6:17 6:24 7:7 10:20 10:22,24 11:2 11:19 12:2 13:21 16:12 19:23 20:3,18 21:9 23:5,20 24:1,15 25:23</p>	<p>26:19 27:20 28:4,10,15 30:13,14 31:23 33:4,8,8,13 34:17,22 35:2 35:7,25 36:3,4 36:24 37:4,11 37:15 38:4,8 39:5,25 40:16 40:20 43:13,19 43:23 44:6,9 45:12,15,25 46:3,7,9,10,21 46:25 47:12,15 47:19 48:10,14 49:19 50:2,20 51:8 53:13,20 54:9,18 55:16 55:22 56:7,17 57:3 59:1,21 59:23,25 60:11 61:21 63:7 64:9,11,17,25 65:2,5,6 Court's 3:20 18:9 21:14 30:6 31:21,23 32:6 35:2,9,22 35:24 38:3,6 40:5,10 43:19 43:20 46:5,8 48:11,21 50:14 50:15 53:14 56:13,21 59:14 61:19 courts 11:11 12:8,10 16:15 20:4 37:9 39:10,18 46:20 47:17,22 48:3 48:8 49:4,8,8 49:12,16 51:3 51:4 53:15 55:24 covers 40:20,21 44:3,4 create 50:1</p>	<p>created 30:2 34:18 crime 3:12,24 7:9 10:12 16:14 17:12 18:3 19:24 20:1 21:14 23:3,12,16,16 24:5,20 26:17 27:1,16,24 29:5,6,9 41:23 47:2,4,16 53:18,22 54:25 56:11 crimes 7:24 16:12 23:14 29:8 47:16 criminal 17:4 critical 33:1 39:1 41:17 48:21 55:25 curious 22:14</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 D.C 1:8,18 da 46:18,18,18 date 15:12 day 49:14,18 De 23:22 decide 10:13 27:14 50:17 51:11,23 decided 25:23 39:25 decision 3:20 20:17 34:21 36:24 37:4 56:2 decisions 37:7 37:11 41:19 47:14 62:19,23 decisis 64:7 defendant 8:24 9:21 21:20 23:25 33:14 41:14 42:21</p>	<p>43:1 48:18 54:13 55:10,18 56:9 58:9,18 59:12 61:9 defendant's 31:5 40:11 54:3 defendants 59:7 defense 8:16 defer 16:15 define 5:12 7:24 10:11 16:11 47:15 48:14 53:22 defined 41:3 47:3,17 52:9 54:12 55:3 56:11,18 defines 3:12 26:25 53:17 defining 16:14 definitely 43:20 definition 5:16 5:22,23 6:6 21:9 53:21 54:24 59:24 63:23 definitions 53:16 59:25 definitively 11:17 denominator 60:1 Department 1:18 depend 43:25 depends 13:23 Descamps 3:21 4:6,7,9,10,20 12:12,15 16:2 17:3,9,13,24 18:3,6,10,18 23:5,20 25:11 27:15 29:20 30:22,24,24 31:11,23 32:19 32:21 33:19,21</p>
--	---	--	---	--

<p>34:4,6 35:3,6 37:21 38:4,12 38:17,22,22 39:1 40:1,5,10 40:16 41:18 43:20,22,24 44:7 46:17 47:13,19 50:2 52:24 53:14 54:19 55:7,14 56:8,13 57:4,6 57:19 60:15 64:14,14,24 65:3,8 Descamps' 62:4 Descamps's 17:4 describing 33:2 description 25:2 designed 42:13 detail 15:22 determination 44:19 determine 10:25 13:7 20:1 determined 20:21 determines 19:23 detrimental 30:18 dialogue 22:19 difference 6:8 7:6,20 8:13 9:3 9:4,7 18:15 28:1 29:18 30:23 31:19,21 32:5 39:1 40:1 different 7:24 8:21 14:15,17 17:17 20:23 23:14,14 25:19 28:2,11 29:24 33:20 36:18 42:1,2 43:1 46:20 47:3,4 51:20 52:4 54:3,6,10,17</p>	<p>55:7,23 58:9 59:12 60:8,11 differently 62:10 difficult 20:7 difficulties 30:3 difficulty 29:11 29:16 discussion 34:13 35:23 36:2 disjunctive 31:13 32:17 62:6 disjunctively 31:17 dispositive 16:9 16:11 17:23 19:17 26:18,20 37:4 dispute 5:7 8:5 58:16 disputed 6:25 21:10 65:1,4,4 disputing 65:3 disruptive 30:18 dissatisfied 63:22 dissent 34:13,16 35:13,13,19 dissental 27:3 distinction 30:15 33:10 34:9,18,20,21 34:23,23 35:8 62:4 distinguish 35:15 62:3 distinguishing 35:17 district 46:9 diversity 19:25 divide 8:3 33:3 40:6 42:1 47:2 divided 4:1 5:7 46:23 divisibility 33:2 33:11 38:20</p>	<p>43:18 divisible 4:3,6 4:13 9:9 37:15 37:17 42:4 44:8,10,10,12 46:1 47:17 50:7 52:18 62:21 document 12:25 14:9,22,25 27:23 documents 12:17,22 13:7 13:10,17 18:6 23:24 26:16 33:18 36:6,8 36:14 37:25 39:23 40:13,16 41:1 42:14,17 51:2,7,14,15 51:23 52:5,15 55:4,11 56:2 56:16,25 57:8 57:10,14,14,19 57:25 58:13 59:9 61:6 doing 26:3 30:21 38:15 40:11,17 49:4 52:7 55:5 56:9 60:14 64:4 double 11:12 20:1 doubt 18:23 21:13 23:18 drafted 36:5 driving 7:19 drug 45:12,13 45:20,21,21 46:1 62:16,20 62:21 drugs 45:14 Duenas-Alvarez 20:4 Duncan 8:4 duplicitous 14:15</p>	<p>duplicity 13:9 dwelling 9:5</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 26:13 36:7 easier 10:13 easily 4:1 63:25 easy 49:2 effect 60:2 eight 32:4 40:3 Eighth 3:13 either 6:15 7:4 12:22 17:22 20:25 23:7 25:5 28:17 43:8 47:22 49:7 64:21 65:1 element 4:20 11:1,17 12:19 12:24 13:2,11 13:16 14:10,23 15:17,22 16:3 17:15,16 21:1 21:5,9 22:11 25:4 28:18 32:14,16 33:4 33:8 36:9,25 37:1,25 43:7 44:18 47:2,4 47:24 48:23 50:11,17 52:21 53:2 57:15,22 58:5 60:20 61:1,10 64:12 64:18,18,18,21 elements 7:8 9:16 11:24 14:4,15 15:11 16:11 18:14 19:23 20:1,14 21:16 23:14 26:17 32:20,21 32:22 33:10 34:10,18,24</p>	<p>35:9,15,16,18 36:3 46:23 48:15 50:13,21 52:19,25 53:8 53:9,17,20 56:21,22 57:7 61:20 62:15 63:21 65:7 elements-based 41:19 50:16 embezzlement 20:23 en 27:5 enacted 24:4 enactment 20:16 20:20 encompassed 59:25 ended 30:21 enhance 30:3 58:13 enhancements 63:5 ensuring 43:13 53:25 enter 16:24 17:1 19:8 entered 4:8,10 15:14 17:5,10 17:11 18:1,11 18:19 19:4 39:13,14 entering 18:4 21:22 31:15,16 enters 29:22,22 62:7 entire 16:17 34:13 35:14 entitled 26:2 entries 55:7 entry 4:14,24 5:1 17:13 32:9 52:9 equated 33:5 equates 53:15 ESQ 1:15,17 2:3 2:6,9</p>
--	--	--	---	--

essence 27:8	30:16 37:13	48:1 49:11	35:2,8,11,12	give 9:2 16:4
essentially 23:22	38:11 44:10	59:11	35:21,23 37:23	31:22 42:20,20
31:12 37:23	52:5 63:6	finding 34:7	57:5,11	58:18
established	64:10	41:23,24 51:18	form 42:16 54:9	given 40:20
61:22 64:17	fact-based 51:6	51:22,23 52:2	forth 18:7 26:8	49:21 62:10
et 27:22 30:22	fact-finder	62:20	forward 30:14	gives 12:13,15
44:5 60:9	33:15	finish 22:24	found 33:15	glad 50:6
evidence 9:14	fact-finding	first 3:4 13:6	37:10 45:8	go 7:5 9:9 15:25
24:9,10,14	54:17,18	16:9 24:3	Fourth 62:18	19:12 23:19,23
exact 4:4 31:13	facts 40:11,18	28:10,20 32:6	frankly 45:5	27:13 28:5
31:17 46:11	41:5 52:8	32:14 33:2	53:12 57:2	57:18 59:21
59:8	53:11 55:8,9	37:7 42:4	free 10:11	63:12,18
exactly 18:24	55:18 56:16	47:11 49:5,25	front 20:6	goes 21:14 32:19
19:5 25:10	61:22	57:24	function 50:2	39:25 43:22,23
26:12,21 34:19	factual 55:16	five 27:21 44:6	functioning 43:7	44:23,24 54:5
36:24 58:4	failed 11:5	Fleming 1:15	functions 37:25	54:15
59:9	falls 5:21 6:5	2:3,9 3:6,7,9	funny 32:23,23	going 10:16 14:4
example 9:3	far 46:4	4:4,23 5:14,19	further 15:25	22:23 39:13
31:22 37:14	federal 10:19,19	5:23 6:1,3,8,17	37:4	49:4,11 63:6
40:20 42:21	11:2 12:2	6:21,24 7:7,13		64:1
44:22 45:10	16:15 20:4	7:16,23 8:20	G	good 13:14
48:5 54:20	27:16 30:19	9:1 10:3,10	G 3:1	27:23 28:19,20
55:7 62:17	31:8 32:8,12	11:4,9,18 12:4	garage 8:10,11	32:16 34:2
examples 31:25	40:8,13 41:3	13:5,12,19,23	8:12 21:22	government
43:24,25 44:1	45:14,16,17	14:6,11,20,24	22:7,8 24:25	3:14 21:11
46:7,9,11	49:4,8,25 50:9	15:3,4,8,18,21	25:4 39:13,14	23:22 29:17
49:21	53:6 54:25	16:7,10,19,22	general 1:18	61:25 62:2
exception 63:9	55:12	17:2,8,20	12:9 19:21,23	government's
exclude 22:5	felonious 17:13	18:21,25 19:6	35:3 36:12	29:12,17,24
excuse 36:23	feloniously 4:8	19:14,18,21	generic 3:13 5:2	63:3
60:21	17:4,10 18:1	21:7,24 22:4	17:23 18:7	Graber's 27:3
expand 63:8	19:3	22:17,25 24:12	23:17 30:25	grocery 4:8,10
explain 33:12	felony 48:18	24:15 25:1,9	32:7 33:14,16	17:5 18:4
explained 33:13	figure 13:17	25:15 26:4,11	39:4,7 40:13	39:17
explaining	23:15 45:15	26:15 27:10	41:4,23 42:6,7	guilt 22:11,13
24:23	47:23 52:20	28:6,22,25	42:10 43:14	guilty 8:25,25
explicit 31:13	57:13	29:2,6,9,11,14	50:9,23 52:22	19:2 21:21,22
express 62:11	figuring 17:23	31:12,14,18	53:2,5 54:1	24:23 42:23
extent 23:18	26:17	61:14,15,17	55:12 56:19	guy 7:12 51:14
26:18 47:13	filling 55:8	63:14,19 64:13	58:15 59:24	
53:4	find 8:3 23:24	64:22	61:7 63:2,3,20	H
extraordinary	28:18 34:3,7	floating 41:12	63:21	happen 58:8
38:10 49:17	39:13 40:12	focus 35:18	Ginsburg 3:23	59:12
F	41:13 43:3,3,5	62:13 65:7	4:5,19 20:25	happened 28:16
face 31:17 47:1	43:8,9 44:11	focused 30:5	21:7,20 22:1	happens 11:15
fact 21:12 24:16	44:12,25 45:1	focuses 64:5	44:14,16 58:21	31:3 39:22
	45:2,7 46:15	footnote 12:16	Ginsburg's 54:5	54:3,6 58:11

happy 22:25	identified 30:23	42:2,11 43:17	irreconcilable	11:25 12:11
hard 35:15	54:24	50:10,16,25	3:19	13:10,13,22
harshly 20:12	identify 3:16,17	53:10 57:24	issue 4:5 16:1	14:8,12,19,21
hear 3:3	ignore 60:21,23	60:17	36:16 42:24	15:3,4,6,10,19
hearing 18:2	60:24	instance 11:21	43:5 45:23	15:23 16:8,17
heart 33:11	illustrates 45:11	13:7 25:19	54:7 64:24,25	16:20,21,23
39:25 42:8	imagine 27:19	49:5,25	issues 5:7 65:2	17:7,9,20
held 4:13	32:1,3 40:6	instinct 56:21		18:15,24 19:1
help 47:9	Immigration	instructions	J	19:12,16,19
highly 30:18	20:19	11:14 12:5,14	James 20:4	20:25 21:7,20
history 12:7	impermissible	23:12	jeopardy 11:13	22:1,14,18,22
24:18	14:1	instrument 16:3	20:2	22:25 24:8,13
holds 8:4	important 23:19	intend 22:23	Johnson 20:4	24:22 25:6,13
hole 55:6,8	35:25 37:21	intended 21:18	32:20	26:1,5,13,14
Honor 6:1 7:17	42:1 64:8 65:6	22:15,19 23:2	Joint 15:11	27:6,7,11 28:8
10:3 13:19	impossible	24:11	judge 8:14 16:4	28:23 29:1,3,4
14:6 15:9,18	46:21	intent 19:8 24:3	16:5 26:7,12	29:7,10,13,14
16:7,10 17:21	include 64:3	49:6	26:20 27:3	30:8,12,23
22:5 25:9 26:4	including 40:19	intention 15:15	34:3 47:15	31:7,10 32:13
26:11 63:14	inconclusive	30:4	49:10 55:15	33:19,25 34:16
hook 9:19	14:25	interchangeably	judge-made	35:11 36:10,22
hopefully 47:21	indicated 24:19	33:9	46:19	37:3 38:21
hoping 50:19	indicates 12:15	interested 25:6	judges 45:18	39:9,16,22
house 6:6,14,16	13:1	25:12,16 61:25	49:13,25	41:6,17 44:2
7:5,8,12 8:23	indicative 15:1	interpretation	judgment 61:12	44:14,15,16
9:18 12:18,23	indictment 4:7	11:6,20 16:16	65:11	46:12 47:6
13:1,7 14:14	6:11 11:13	46:19	judicial 47:14	50:4,12 51:5
18:17 21:22	14:1,2,15	interpreted 7:7	60:22,25	52:16 53:7,17
27:22,23 36:16	17:17,22,25	12:8	jurisdiction 14:5	54:4 57:11
36:20 40:24	19:3	interpretive	jurors 9:17	58:3,20,21
44:25 45:1	individual 32:4	16:5 26:19	jury 5:7 8:2,7	59:16,18 60:18
58:24	43:10 53:25	interrupt 35:12	9:16 10:15	61:13,17 63:10
houseboat 6:11	58:12 61:6	introduction	11:14 12:5,14	63:15 64:10,16
7:3,11,12 10:1	individuals	32:21	21:12 23:12	64:23 65:14
12:25 46:15,18	58:12	intrusion 49:17	28:13,17,17	justices 45:17
houseboats 10:8	infer 34:3	intuitive 51:11	33:15 34:3	
houses 44:4,4	inferences 34:5	involved 17:24	42:23 44:24,24	K
64:3	inferential 39:19	18:3	44:24 46:15	Kagan 12:11
hypothetical	infinitely 40:6	involves 3:25	48:16,19	13:10,13 26:13
43:1 51:1	information	4:1 9:14 63:24	Justice 1:18 3:3	31:7,10 32:13
58:11	14:2 17:4	Iowa 3:11,12	3:9,23 4:5,19	33:19,25 34:16
hypothetically	21:21,24 22:7	4:16,24 5:4,10	5:11,14,15,20	35:11 36:10,22
52:3	41:12	7:17,23,25	5:25 6:2,4,9,19	37:3 41:6,17
	ingenious 7:20	8:13 9:12,23	6:22 7:2,10,14	44:15 50:12
I	ingraft 43:17	10:12 15:13	7:18 8:18,22	51:5 52:16
i.e 53:16	inquiry 30:17	16:2,20 22:12	9:11 10:7,11	53:7,17 57:11
idea 47:7	38:10 39:8	23:6,7 62:5,11	10:18 11:7,15	58:3,20 59:16

<p>59:18 60:18 Kagan's 14:12 keeps 35:14 Kennedy 22:14 22:18,22 23:1 25:6,13 26:1,5 26:14 key 28:9 48:10 kind 3:16 27:18 36:1 38:15 39:19 40:15 45:5 49:7 kinds 33:20 knew 47:9 know 3:17 5:16 6:19 7:18 9:19 11:24 12:13 15:16 17:13,16 20:13 22:6,6 22:14 23:16 32:18 34:5,12 36:13,17,19 37:16 43:18 45:15,19,24 46:1,14 47:21 48:5,8 49:3,7 49:15,16,18 52:13 53:13 55:13,14,20 57:6 60:7,14 60:15 63:25 knows 45:12 57:3 Kozinski's 26:7 26:12,21</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>land 5:5 language 25:18 32:20 larceny 20:22 Laughter 10:9 22:21 law 6:20,22 8:13 11:10 13:2,23 14:5 16:8,10 16:15 19:16,19</p>	<p>19:25 20:5,9 20:15 22:12 26:18,20 30:16 30:19 31:11 36:2,4,4 37:16 38:5,9,10,18 38:20 41:22,22 42:11 43:10,17 44:1,11,13 45:4,20 47:16 48:2,24 49:2 49:24 50:10,24 51:16,17,21 52:2 54:2 57:7 57:12,16,24 58:4,4 59:11 60:9,16 lawfully 19:8 29:22 31:14 62:8 laws 16:16 lawyer 22:6,9 Lawyers 20:19 layers 57:18 left 16:1 47:12 legislative 12:7 24:18 legislature 9:23 9:25 10:5 20:16 41:3 48:14,16 52:9 54:12,24 55:3 56:10,18 legislature's 49:6 let's 8:16 16:9 16:20 51:14,15 59:21 light 37:12 likelihood 22:9 limit 48:20 limitations 48:13 limited 12:17 14:11 26:16 60:5 list 45:13 62:6</p>	<p>62:11 lists 36:3 52:6 little 52:1 living 26:6 location 8:2 10:15 locations 11:23 long 8:3 13:20 32:17 look 4:2 12:4,6,6 12:7,16 13:16 16:24 20:9,15 26:15 27:2,16 34:2 35:7,23 36:7,13 37:3 38:14 41:1 42:13,16 45:6 51:6,13,14,15 51:23 52:1 53:16 54:2 56:15 57:8,9 58:3 59:9 looked 20:20 21:1 24:18 39:11 45:18,18 48:1,2 49:1 looking 11:20 13:6 18:6 27:15 33:21 45:5 47:8 52:8 55:2,9 56:10 56:25 looks 12:1 25:21 57:21,21 62:1 lost 17:25 lot 9:11 45:13 49:3 50:1 lots 49:24 lower 55:23</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>Main 25:4 maintain 65:7 majority 34:14 34:19 MARK 1:15 2:3 2:9 3:7 61:15</p>	<p>Maryland 20:17 20:22 Mass 1:15 Massachusetts 6:10,15,20,22 7:4,14,16,22 7:23 8:19,20 9:1,25 10:2,4,8 10:21,22 12:2 12:8,10 13:2 37:14 46:13 48:2 match 31:4 32:8 32:12 40:7 41:4 53:2 54:25 55:11,18 matches 41:23 52:22 matching 31:3 33:4 40:11 41:2 53:5 Mathis 1:3 3:4 3:11 4:16 5:8 8:9 15:12 62:1 65:12 matter 1:11 18:11,12,13 20:2 22:10 23:9,10,11 29:3 32:15 33:10 35:3 41:19,20 43:10 48:24 50:13 52:24 58:8,10 65:1,17 matters 16:14 mean 3:23 5:16 5:18 12:21 15:23 24:19 25:1 27:17 28:5 31:11,16 32:10 34:5 35:12 43:7 44:7 45:4 47:16 48:1 49:5 52:4 53:20 54:3</p>	<p>57:23 59:22 meaning 15:25 33:25 42:5 51:16 meaningful 46:6 meanings 17:11 means 3:18 8:1 8:2,14 11:1,17 12:19,24 13:11 13:16,25 14:10 14:17 15:17 16:2 17:16 20:23 21:1,5,9 27:2,18 28:12 32:16,22 33:10 34:10,18,24 35:3,9,16 36:4 36:18,25 41:15 44:17 46:24 47:24 48:14,23 50:11,16,25 54:4 56:22 57:7,15,21 61:10 62:12 64:12,21 65:7 means-elements 30:15 meant 32:22 35:7 57:4 Mellouli 45:15 members 34:22 45:1,2 mere 63:6 message 57:3,5 mind 29:24 48:7 minutes 61:14 modified 3:15 9:10 23:15 26:23 31:3 33:11,17 42:12 42:17 43:11,16 46:4 49:14,23 52:13,17 53:24 55:16 56:24 60:3,7,12 62:14,21,24 Moncrieffe</p>
--	---	--	--	--

<p>61:21 morning 3:4 movable 9:18 move 9:20 multi-factor 48:6 multiple 23:13 23:14 40:20 multiplied 60:10 murder 48:17 48:17,18</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:1,1 3:1 narrow 64:1 necessarily 33:15,22 36:17 51:16 61:22 necessary 23:15 34:7,8 41:7,11 need 3:12 5:4 9:7 18:10,22 33:13 36:4,10 37:3 40:17,22 42:9,11 50:9 52:19 54:1 57:12,24 never 21:18 22:15,16,17,18 30:14 46:14 49:11 64:11 new 20:6,21 60:16 NICOLE 1:17 2:6 30:10 Nijhawan 25:19 nine 34:22 Ninth 23:21 26:8 27:4 31:24 38:12,15 45:17 49:10 55:15,15 62:18 nonelemental 53:11 nongeneric 19:6 notwithstandi... 51:21</p>	<p>number 11:10 16:9 40:7 numerous 62:23</p> <hr/> <p style="text-align: center;">O</p> <p>O 2:1 3:1 object 4:11 objection 18:2 obviously 11:19 12:4 62:25 Oca 23:22 occasion 27:18 occasions 44:7 55:23 occupied 4:17 4:25 5:23 8:4 occur 17:3 34:9 51:18 occurred 17:3 odd 44:8 58:18 offense 5:2,3 14:18 17:23 19:7 20:24 21:3,6,8 22:12 23:4,17,24 24:18 31:8 32:8,12 33:14 33:16 39:6 40:8,13,23 41:2,4,14 45:16,17 50:9 52:10,11,22 53:2,6 54:10 54:11,12,14 55:1,12 56:19 56:20 59:4 60:20 61:23 63:2 offered 37:15 62:3 oh 8:10 okay 6:2 28:4 29:10 33:24 34:25 36:11 58:23 on/off 23:6 24:5 50:3</p>	<p>once 56:9 open 16:1 47:12 opinion 16:13 21:14 26:8 31:23 32:6 33:6 35:14,18 35:22 37:22 38:3,4,5,17 40:5,10 48:12 48:21 53:13,14 55:13 56:8,13 57:4 60:22,25 opinions 32:24 41:13 43:19,20 46:5 opposed 5:5 24:17 54:21 opposite 30:17 option 54:23 oral 1:11 2:2,5 3:7 30:10 order 4:14 5:9 21:13 25:24 34:8 51:18 ordinary 11:20 25:2 33:17 outcome 29:23 outlier 38:15 60:14 outside 8:12 22:8 overbroad 35:5 39:2 overrule 64:1</p> <hr/> <p style="text-align: center;">P</p> <p>P 3:1 page 2:2 56:7 paradigmatic 37:14 44:2 parked 8:12 22:8 parse 36:4 57:7 57:12 parsing 30:16 44:1 60:9 part 29:4 48:21</p>	<p>52:10 53:14 54:16,24 particular 11:22 17:18 20:6,11 20:17 23:3,10 24:5,20 27:17 36:23,23,24 37:17 41:14,22 51:17,22 52:21 64:20 particularly 20:7 23:9 64:8 parties 37:10 45:8 65:3 parts 38:3 42:2 pass 58:19 passed 25:21 passing 25:16 people 7:11,11 51:10,12 percent 39:10 41:9 permission 30:6 permit 5:9 10:1 person 6:23 7:3 9:13 12:22 13:1 25:2,7,16 27:17 29:21,22 33:22 36:20 39:6 40:23 42:7,9,15 43:8 43:13 44:21 50:22 52:14 56:4,23 58:1 Petitioner 1:4,16 2:4,10 3:8 60:13 61:16 Petitioner's 30:20 37:17 38:11 43:15 49:21,22 59:7 60:2,6 phrase 56:3,7 phrased 13:20 29:21 32:17 phrasing 31:17 picture 22:3</p>	<p>pie 10:25 place 5:6 37:11 57:24 places 40:21 plain 11:11 plea 8:9 17:22 18:2 22:6 23:11 30:2 39:11 42:23 plead 41:11,14 pleading 13:23 14:5 19:1 pleas 41:10 please 3:10 30:13 59:18 pled 21:21,22 24:23 plurality 16:13 48:12 point 9:2 10:10 10:18 11:11 13:6 18:21 19:10 28:9 33:7 38:6 52:12,16 53:23 55:13,17 56:11 59:19 64:13 pointing 35:1 points 41:9 posited 14:12 position 14:7 27:3 29:12,17 38:19 60:2 62:17 63:4 possibility 22:2 possible 9:19 20:16 possibly 28:2 potential 17:10 power 47:1 powerful 34:6 precedent 38:6 precedents 50:14,15 predicate 23:4,8 24:21 predicates 63:1</p>
--	--	--	--	---

<p>63:17 predictable 48:9 prefers 10:13 premeditated 48:17 prerogative 7:25 presence 55:24 present 31:1 pretty 38:6 prevail 26:11 prevents 64:4 previous 64:25 principle 62:3 principles 12:9 16:5 prior 20:17 24:13 45:13 probably 26:2 problem 17:2,7 35:14 59:6 63:5,17 problematic 37:12,17 problems 60:9 proceeding 30:5 proceedings 34:2 produces 24:6 progeny 25:10 prohibits 40:2,3 promise 27:13 proof 63:3,20 proper 9:9 properly 4:12 property 20:23 prosecution 21:12 prosecutor 4:9 6:13 7:4 8:17 8:23 9:6 12:18 13:4 14:13,16 15:21 18:2,12 29:25 39:12 57:20 prosecutors 10:14 prove 3:13 4:14</p>	<p>4:17,22,24,25 5:1,4,11,15,21 6:5,7,10,10,13 13:3 18:10 21:12 30:1 proved 4:21 6:15 proven 45:22 56:23 61:10 provided 43:23 43:24 46:7 punishable 19:9 punished 20:12 punishes 9:5 punishing 11:22 21:2 purporting 38:8 38:9 purpose 3:16 12:17 26:16 44:16 purposes 17:24 33:4 37:24 58:10 64:2 put 28:15 61:21</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualify 63:1 quarrel 13:20 question 13:18 14:12 16:21 18:5 19:13,22 19:22 29:16 33:1,3 35:21 37:20 38:7,8 38:25 42:8,12 42:25 43:17 44:20,23 45:3 46:14 47:7,9 47:11,12,21 49:24 52:12 54:2,5,13,16 54:19 58:2 64:19 questions 26:13 36:7 37:8 42:3 49:2,5,7,12</p>	<p>51:11 quite 4:12 33:20 52:24</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 reach 60:1,4 63:22 reacting 20:17 read 15:16 16:2 27:13 28:5 38:17 reading 17:13 37:21 reaffirmed 23:5 real 47:25 real-world 36:1 reality 52:3 really 32:22 33:1,11 34:17 37:14,21 38:15 39:25 40:10 42:12 46:3,5 46:14 48:19 49:3,16,19,22 50:19 56:11,17 57:1,22 59:15 59:20 60:13 reason 4:4 9:4 28:22 29:2 33:7 36:1 50:20 52:7 59:20 60:24 61:4 62:3,9 reasonable 18:23 21:13 reasoning 3:20 48:11 reasons 9:12 23:20 24:2 REBUTTAL 2:8 61:15 receiving 20:22 recommends 48:10 record 8:9 21:25 22:4</p>	<p>reformulate 63:12 regard 65:13 regardless 43:19 rejected 23:21 24:1 27:5 relied 24:16 46:9,10 55:24 relying 39:23 remained 17:11 remanded 65:12 remarkable 46:3 Rendon 27:4 reply 62:20 request 11:14 require 28:16 38:10 49:23 51:22 63:7,20 required 4:14 5:2 26:2 41:22 51:17,17 52:2 requires 34:1 63:3 resentenced 65:12 reserve 30:6 reserved 47:18 resolve 11:12 resolved 38:7 65:5 resolves 43:12 resort 36:5 resources 37:10 respect 28:13 respectfully 65:11 respond 61:3 64:22 Respondent 1:19 2:7 30:11 responses 33:1 34:25 37:7 rest 35:22 result 3:20 9:22 26:9 31:2 38:24,24</p>	<p>results 24:6 retrying 39:20 revealed 8:8 reversed 65:11 review 51:2 Rice 20:18 Richard 1:3 15:12 Richardson 16:13 21:10 ridiculous 9:15 right 5:12,20 6:6 10:12 13:4,5 15:10 21:23 26:14 31:18 34:15,20 35:8 35:20 37:2 39:21,24 40:21 42:3,21 46:12 53:2,19 54:5 54:18 55:6,17 56:12 58:14,25 59:2,22 65:9 ROBERTS 3:3 27:6 30:8 61:13 65:14 routine 49:9 rules 47:22 48:6 48:7,22</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 Saharsky 1:17 2:6 30:9,10,12 31:8,11,20 32:25 33:24 34:15,25 35:20 36:11 37:2,6 38:24 39:15,21 39:24 41:16,25 44:20 47:5,10 50:6,18 51:25 53:3,12,19 57:23 58:7,25 59:17,19 61:3 satisfies 57:1 saying 6:20</p>
--	---	--	---	---

17:18 19:2 21:5 28:9,9 29:21 30:21 40:18 51:21 53:9 55:3 57:9 60:20 61:2 says 6:11,13 7:4 7:25 10:2 11:16 12:12 15:11,12 17:1 22:7 25:11 27:24 29:17 32:1,3,6 33:21 34:4,6 35:13 35:25 36:3,24 37:23 38:5 40:4,5,10 44:7 53:15 55:14 57:6 58:4,17 Schad 16:13 48:11,12 schedule 45:14 schedules 45:13 second 24:7 32:3 32:9 33:7 42:6 47:20 section 8:22 23:7 28:2 see 12:9 18:15 33:19 36:8 40:22 42:14 51:7,14,15 52:1 56:16 seeing 12:17 sense 34:8 64:20 sentence 9:8 19:15 22:13 30:3 49:14 63:5 sentencing 10:20 11:2,19 12:2 49:13 53:15 separate 9:16 26:8 42:11 43:1 52:19,25 54:2	seriously 63:10 63:11 set 12:21 18:7 26:8 48:6 53:21 62:18 sets 23:13 42:18 50:7 54:8 setting 62:11 settled 38:5,9,14 38:18,20 60:16 settles 38:7 severely 9:5 11:23 shed 15:14,20 17:1 Shepard 6:17,25 7:8 13:7,17 14:25 18:6 23:23 26:16 32:19 33:18 36:6,8,14 37:25 39:23 40:12 42:14,17 51:2,6 52:5,15 55:4,10 56:1 56:16,25 57:8 57:9,13,14,19 57:25 58:13 59:9 61:6 shop 19:8 shoplift 19:9 show 9:7 18:22 52:9 55:4,5 showed 31:24 significant 30:2 63:4 silence 62:7,11 silent 16:21 similar 5:6 61:7 similarly 5:4 6:4 simple 10:25 simplifying 47:8 simply 62:7 single 14:17 27:1 41:8 situation 9:15 10:20,21 11:3	11:5,18 14:12 14:13,24 57:16 situations 62:9 six 7:10,11 9:17 45:1,1 Sixth 30:2 63:5 Solicitor 1:17 someone's 30:3 sorry 15:13 32:10 39:17 50:4 sort 17:17 59:11 Sotomayor 15:3 15:5,6,10,19 15:23 16:8,17 16:20,23 17:7 17:9,20 18:15 18:24 19:1,12 19:16,19 30:23 38:21 39:9,16 39:22 50:4 soundly 24:1 sounds 51:5,6 source 48:1 sources 12:5 specific 10:15 19:22 20:8 specifically 5:9 23:25 24:19 60:19 64:15 specified 35:4 40:4 specifies 32:4 specify 14:2 32:2 standard 11:5 stare 64:7 start 16:9 27:25 30:20 49:9 60:16 started 45:5 59:22 starts 38:4 State 4:21 8:4 10:11,13 11:10 11:11,16 13:23 13:24 14:5	16:8,10,14,15 16:15 19:16,19 19:24,24 20:1 20:5,5,9,16 26:17,18,20,25 30:5,16 31:1,5 36:2,4,4,23,24 37:4,9,11,16 38:10 42:11 43:17 44:1,11 44:17,18 45:4 45:13 46:25 47:22 48:3,8 48:14,15,24 49:2,6,8,12,15 49:24 50:10,24 54:2 57:7,12 57:16,24 58:4 58:4 59:8,11 60:9,18,22,22 60:24 61:23 stated 4:9 statement 32:15 61:19 states 1:1,6,12 3:5 16:11 21:24 45:7,9 59:8,25 60:1,5 62:25 63:11,19 statute 3:11 4:5 4:21 5:10,13 9:2,8 14:4 18:14,14 19:10 19:11 20:6,10 20:11,21,21 21:2,2,16 23:13 25:7,19 25:22 27:1,16 27:18,20,24 28:2,15,19,21 29:19,20 31:1 31:5,18,25 32:1,3 33:3,25 34:8 35:4 36:3 36:14,21,23 37:15 38:14 39:3 40:2,6,19	41:6,7,10 42:4 42:18 44:3,8,9 46:13,16,18,19 46:23 47:1 50:7 52:6,18 52:18 53:22 54:8,20,21,22 55:6 56:25 58:16 59:9 60:19,22 61:20 62:5,15 statute's 6:5 47:24 statutes 12:8 40:19 45:12 46:1 60:11 62:16,20 63:13 63:18,20 statutory 11:6 11:20 24:3,9 24:10,14 28:3 31:1 33:5,9 35:5 39:2 40:9 40:14 50:8,21 53:5,8,16,20 55:19,21,22,25 56:3,6 64:8 stay 39:16,17 stayed 18:19 steps 16:4 19:13 19:14 stolen 20:22 stopping 56:11 storage 15:14 16:25 17:1 store 4:8,10 17:5 18:4 39:17 strange 9:22 Street 25:4 stretching 39:10 structure 3:25 4:2,17,25 5:12 5:17,24 8:4 16:25,25 17:18 stuff 24:14 subcrimes 40:7 subject 37:5
---	--	---	---	---

57:18	23:5 24:15	45:24 47:2	62:14	unanimous
submit 65:9,11	25:10,23 30:14	53:13	trailer 9:14,17	11:14 28:13
submitted 65:15	32:19 59:1	think 7:11,11	treat 13:2 62:9	unanimously
65:17	61:2,19 62:13	9:18 13:6,19	treated 59:5	28:18 44:25
substance 35:13	64:1	14:11,24 21:10	treating 12:18	45:22 48:16
such-and-such	technical 64:20	21:11 22:1	trial 8:7 42:23	uncertain 34:4
15:12	tees 29:16	23:19 26:22	44:23	51:8
suggested 36:7	tell 11:2 14:4,8	27:15 28:16	trigger 25:20	uncertainty 50:1
38:25 43:13	19:13 33:17	29:16 30:22	trouble 47:25	unclear 19:20
44:3 49:10	42:15 50:4	31:18,20 32:25	truck 9:20	uncommon 65:2
suppose 5:16	55:6 57:19,25	33:11 34:20	true 4:16 16:13	understand
9:13,14 11:25	61:5	35:1,24 36:6,9	31:10 61:4	35:20 56:20
12:1 21:1	telling 13:24	36:11,17,19	truly 11:4 52:17	understood
supposed 10:20	28:10 35:25	37:2,8,9,12,19	try 13:17 23:24	36:13
10:23 12:3	38:3 59:20	37:20,23 38:2	27:7 40:7,18	undertake 50:10
50:2	tells 20:11 21:3	38:25 39:10,24	43:17 47:23	unfortunate
supposedly 4:18	60:19	41:25 42:1,8	48:1 56:15	46:7
Supreme 1:1,12	ten 32:22	42:10,25 43:11	trying 27:8,10	uniform 30:18
sure 8:6 22:18	tenses 15:14	43:22,23 44:1	29:13 31:4	uniformity 59:2
24:4 31:10	term 35:5 39:2	44:15 45:8,10	41:4 54:25	59:15
33:13 42:9	64:17	45:12 46:2,6	55:11,18 58:12	unitary 23:13
50:6 56:22	terms 14:3 34:4	46:24,25 47:10	60:15	United 1:1,6,12
59:3 63:1	40:6 51:8	47:11,14,20,25	Tuesday 1:9	3:5
surprised 7:15	terrible 34:17	48:9 49:1,3,4	turn 59:10	unlawful 4:14
45:5	test 48:6	49:16,18,19,22	turns 21:16	4:22 5:1
swept 19:11	text 11:21 20:9	49:25 50:5,19	30:15 61:20	unlawfully 4:7
switch 23:6 24:5	20:11 24:9,10	51:3,10,12	twice 44:7	15:13,24 17:12
50:3	38:14	52:1 53:3,12	two 3:24 17:10	18:1,20 19:3
synonym 21:8	Thank 29:1 30:8	53:19 54:1,15	17:14 18:18	21:21 29:23
	61:13,17 65:14	54:15,18 56:12	19:5 21:3	31:14 39:18
T	theft 15:16	56:21,23 57:23	31:24 32:5,25	62:8
T 2:1,1	20:21,24	58:1 59:6,14	33:1,20 35:17	use 3:15 15:6
take 9:12 28:14	thing 7:19,19,21	59:20 60:3,13	36:18 37:11	25:2,17,18
31:11 51:22	10:1 12:24	60:17 61:4,12	38:2 42:1,2,3	26:19 32:20
52:17 53:23	14:2 15:20	thinks 43:4	45:8 47:10	47:13 48:6
58:5 65:2	27:18 28:21	thought 9:17	53:15 59:8	49:14 58:13
takes 52:25	31:13,17 32:23	17:21 34:22	62:5	uses 21:11 29:19
talk 34:13 35:21	34:11 36:15	45:6 60:21	type 4:17 21:5	32:21 62:5
45:24	38:12,13 41:18	three 6:7 24:2	45:21 55:20	usual 3:16 16:14
talked 50:20	42:24 44:21	52:19,25 61:14	59:4 62:21	utterly 57:17
54:10	46:17 48:10	thumb 47:22	types 55:7	
talking 34:12	50:13,19 52:9	time 24:6 30:7	U	V
35:2,4,15 49:6	52:14 54:6	times 32:22 44:9	ultimate 19:12	v 1:5 3:4 8:4
49:9,13 53:4	58:9,14 59:13	today 22:20 36:2	35:9,24 53:24	variation 48:24
64:19	things 18:18	told 8:9 48:3	ultimately 8:1	vehicle 4:1,3 5:6
talks 35:8	35:4,17 36:18	tools 11:6,20	unanimity 10:15	9:20 18:17
Taylor 6:4 21:15	39:10 41:9,11	traditional		Vermont 9:3,4,6

<p>10:4,5,8 11:22 20:13 version 39:5 40:23 54:10,10 56:4 versus 48:15 victim 15:15 view 11:1 21:7 viewed 14:16 violated 8:22 virtually 46:21</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>waiting 28:6 want 3:14 9:12 9:23,24,25,25 30:20 38:19 59:2,3 62:25 63:17 wanted 25:14 29:7 38:13 60:1 wants 50:22 Washington 1:8 1:18 wasn't 6:25 18:8 19:1 22:2 25:6 38:9 water 5:6 way 13:14 19:2 19:24 21:4,4,6 21:8 22:11 26:21 30:5 31:12,14,23 32:23 37:22 40:1 43:23 46:6 50:23 51:11 52:10 56:10 57:20 65:8,9,10 ways 3:24 19:5 21:3 27:21 28:12 31:16 47:8 we'll 3:3 51:22 56:15 64:2 we're 22:19 26:6</p>	<p>30:21 34:20 36:2 37:21 38:18 39:13 40:17,18 49:9 49:11 52:8 53:3,4,10 57:9 58:12 64:1 we've 26:3 37:10 48:1,2 51:20 53:9 61:1 weapon 32:2,4 40:3,5 weapons 32:2,4 40:4 54:21 welcome 15:8 went 22:7 wide 48:24 willfully 15:13 15:24,24,25 17:25 wishes 10:12 won 23:20 word 24:16 25:17 27:16,19 29:19 32:21 46:16 62:5,7 words 7:10 18:9 28:3,14,16 52:18 work 26:21 workability 62:17 works 26:24,25 world 26:6 29:18 53:10 worry 36:1 wouldn't 5:18 24:24,25 27:23 50:3 58:3,5 wow 48:18 write 32:24 written 26:3 47:25 wrong 31:24 65:8</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 6:21 50:6 years 38:6 49:20 50:14 51:13 53:9 60:16 61:18 64:7,17 65:6</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zillion 31:16 zoo 5:17</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1,000 57:18 10:08 1:13 3:2 11:09 65:16 123 25:4 15-6092 1:4 3:4 1984 63:24</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 12:16 35:2,8 35:11,12,21,24 37:23 57:5,11 20 38:6 20-plus 60:15 2016 1:9 2287 56:7 25 49:20 50:14 51:13 53:9 61:18 64:7,17 65:6 26 1:9</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 30 2:7</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>50 45:6</p> <hr/> <p style="text-align: center;">6</p> <hr/>	<p>61 2:10</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>713.1 23:7</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>95 41:9 99 39:10</p>
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