

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DWAYNE BARRETT,)
 Petitioner,)
 v.) No. 24-5774
UNITED STATES,)
 Respondent.)
- - - - -

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	MATTHEW B. LARSEN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	AIMEE BROWN, ESQ.	
7	On behalf of the Respondent in	
8	support of the Petitioner	36
9	ORAL ARGUMENT OF:	
10	CHARLES L. McCLOUD, ESQ.	
11	Court-appointed amicus curiae in	
12	support of the judgment below	56
13	REBUTTAL ARGUMENT OF:	
14	MATTHEW B. LARSEN, ESQ.	
15	On behalf of the Petitioner	74
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:32 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 24-5774, Barrett versus
5 United States.

6 Mr. Larsen.

7 ORAL ARGUMENT OF MATTHEW B. LARSEN

8 ON BEHALF OF THE PETITIONER

9 MR. LARSEN: Mr. Chief Justice, and
10 may it please the Court:

11 Possessing a gun in violation of
12 924(c)(1)(A) is a lesser-included offense of
13 using it lethally in violation of 924(j). The
14 offenses are therefore the same for purposes of
15 double jeopardy, meaning there's a presumption
16 that Congress did not intend two punishments
17 for one fatal shooting.

18 And this presumption controls unless
19 there is a clear indication that Congress
20 wanted to double-punish, but there isn't any.
21 As Court-appointed amicus acknowledges, 924(j)
22 says nothing about punishment under both
23 statutes. And, as detailed in our briefing,
24 neither does 924(c).

25 On the contrary, while 924(c) is very

1 clear that its punishment applies in addition
2 to that for the underlying felony, it does not
3 say its punishment applies in addition to that
4 for a lethal shooting in violation of 924(j).

5 And the reason for this, as Your
6 Honors explained in Lora, is that Congress
7 designed 924(j)'s penalties, which include life
8 in prison and even death, to account for the
9 seriousness of the offense by themselves,
10 without incorporating penalties from subsection
11 (c). Indeed, as the Court also noted in Lora,
12 when Congress wrote 924(j) in 1994, it
13 specifically considered but rejected a proposal
14 to impose multiple punishments for a fatal
15 shooting. Only in 2005 did Congress write
16 924(c)(5) to cumulatively punish fatal gun use
17 but only where armor-piercing ammunition is
18 used. And that is not this case.

19 In short, Your Honors, and as
20 924(c)(5) confirms, Congress knows how to order
21 multiple punishments for a lethal shooting when
22 it wants to. It has not done so here.

23 I welcome the Court's questions.

24 JUSTICE THOMAS: So are you saying
25 that all of 924(c)(1) is a lesser-included

1 offense of 924(j)?

2 MR. LARSEN: So not necessarily, Your
3 Honor. If you're referring to things like
4 machine gun use or use of a silencer, we
5 recognize that question isn't presented here.
6 We address it in one of our briefs, the -- the
7 scenario of voluntary manslaughter with a
8 machine gun, and we say maybe those are
9 different crimes, maybe they're not.

10 There's --

11 JUSTICE THOMAS: What about -- what
12 about 924(c)(1)(A)(ii) and (iii)?

13 MR. LARSEN: (1)(A)(ii)?

14 JUSTICE THOMAS: That's one -- (ii) is
15 brandishing and (iii) is discharge.

16 MR. LARSEN: Ah, yes. So the same
17 answer to our situation involving the machine
18 gun. So perhaps -- this could go either way,
19 Your Honor, in that scenario, which is not, of
20 course, the case here. Strictly speaking, you
21 know, brandishing is a requirement under (c),
22 but brandishing may or may not be an element of
23 924(g).

24 This Court, however, explained in the
25 Whalen case, where there was a lesser-included

1 offense of rape and a greater-included offense
2 of murder, felony murder, the Court said, well,
3 strictly speaking, rape is not an element of
4 felony murder, but it is one way you can commit
5 felony murder. And, in this case, the Court
6 said in Whalen that is the lesser-included
7 offense.

8 So it may be, Your Honor, that in a
9 case where brandishing is shown, discharge is
10 shown, use of a machine gun or silencer is
11 shown, and a jury convicts on (j), they will
12 necessarily find that's the lesser included.
13 Of course, that's not the posture here. We
14 have simple possession, which is always a
15 lesser-included offense of illegal use.

16 JUSTICE KAVANAUGH: Your -- your whole
17 point was that Congress didn't speak clearly
18 enough here. But (c)(1)(D)(ii), as you know,
19 because amicus emphasizes it, I mean, I don't
20 know how that could be clearer. "No term" --

21 MR. LARSEN: So --

22 JUSTICE KAVANAUGH: -- "of
23 imprisonment imposed on a person under this
24 subsection shall run concurrently with any
25 other term of imprisonment imposed on the

1 person."

2 I mean, that's -- that's very clear,
3 and it starts with "notwithstanding any other
4 provision of law" in (D), notwithstanding
5 any -- any other provision of law, no term of
6 imprisonment imposed shall run concurrently.

7 MR. LARSEN: Indeed, Your Honor. So
8 the operative language to activate this section
9 is that a term of imprisonment has to be
10 imposed under this subsection. That is the
11 question here. May a term of imprisonment be
12 imposed under (c) if someone is punished under
13 (j) for the same offense? That's the question
14 here.

15 And as to that question, (c)(1)(D)(ii)
16 is silent. It doesn't address it. And as the
17 Court has explained, silence cannot be a clear
18 indication to double-punish.

19 JUSTICE KAVANAUGH: And what would
20 be --

21 MR. LARSEN: Also, Your Honor --

22 JUSTICE KAVANAUGH: -- what would be
23 necessary, do you think, to make that clear?

24 MR. LARSEN: What would be necessary
25 would be something like what appears elsewhere

1 in the statute. We have two examples in 924(c)
2 of where Congress has ordered multiple
3 punishments.

4 One, it said, if you possess a gun,
5 you get a punishment for that in addition to
6 the underlying crime of violence. It also in
7 (c)(5) said, if you use a gun loaded with
8 armor-piercing ammunition to kill, you're
9 getting a lot of punishments.

10 JUSTICE KAVANAUGH: (c)(5) came in
11 much later. I mean, this was in '71, right,
12 that 924(c)(1)(D)(ii) came in?

13 MR. LARSEN: Yes. And even when it
14 came in, Your Honor, in Simpson and Busic, this
15 language was in the statute. And this Court
16 said in Simpson and Busic that this language
17 requiring a minimum, requiring it to be
18 consecutive, was not sufficient to constitute a
19 clear indication. That's why Congress had to
20 amend the statute to make it crystal-clear that
21 it wanted to double-punish both possession --

22 JUSTICE KAVANAUGH: So you want it --
23 you want it to be in both 924(j) and in 924(c),
24 the provision that it -- that it can -- can't
25 be concurrent?

1 MR. LARSEN: No, Your Honor. There is
2 no -- there is no provision in either of these
3 statutes addressing this scenario here,
4 saying --

5 JUSTICE JACKSON: And is that because
6 you -- is that because you are distinguishing
7 two convictions versus two punishments? In
8 other words, it seems to me that this provision
9 that Justice Kavanaugh is pointing to is about
10 whether you can run the sentences that have
11 been validly determined relative to two
12 separate convictions -- whether you can run
13 those or have to run those concurrently.

14 But your question is, can we have two
15 separate convictions under these circumstances?

16 MR. LARSEN: Precisely, Your Honor.

17 JUSTICE JACKSON: Right. So that's
18 why this doesn't have anything to do with that.

19 MR. LARSEN: Precisely, Your Honor.

20 JUSTICE JACKSON: The question that's
21 at issue at this -- under double jeopardy, it's
22 can we have two separate convictions for the
23 same offense, for the same conduct, not whether
24 the sentences that flow from those two separate
25 convictions can be run concurrently or -- or --

1 JUSTICE KAVANAUGH: Well, I thought we
2 talked --

3 JUSTICE JACKSON: -- consecutively or
4 whatever.

5 JUSTICE KAVANAUGH: I'm sorry.

6 JUSTICE JACKSON: Yeah.

7 MR. LARSEN: Well --

8 JUSTICE KAVANAUGH: I thought we
9 talked about that in oral argument in Lora.
10 We -- we foresaw, I think, exactly what was
11 going to happen at the oral argument in Lora
12 about -- about this.

13 MR. LARSEN: Well, Justice Jackson,
14 you're absolutely right. We don't get to
15 sentencing unless there's a valid
16 constitutional conviction imposed. That is the
17 question in this case. Can someone be
18 convicted under (c)(1) and also (j) for the
19 same crime? And nothing in the --

20 JUSTICE SOTOMAYOR: So can you
21 explain -- and I think maybe this would address
22 Justice Kavanaugh; he'll correct me if it does
23 not -- what is it in 924(c) that requires, that
24 permits the two sent -- the two convictions to
25 run consecutively? So you're -- I think you're

1 saying an intent to allow for dual convictions
2 is what you need to have Congress show and not
3 speaking only to the length or timing of a
4 sentence, correct? You need more than --

5 MR. LARSEN: Right.

6 JUSTICE SOTOMAYOR: -- length or
7 timing. So what is it in 924(c) that permits a
8 dual conviction?

9 MR. LARSEN: Right. The -- the -- the
10 dual conviction in 924(c)(1)(A) is for gun
11 possession and the underlying crime of violence
12 or drug trafficking offense.

13 JUSTICE SOTOMAYOR: Okay.

14 MR. LARSEN: Congress is very clear
15 you can stack those punishments. And if you
16 do, in fact, impose a sentence under (c) in
17 that scenario, that sentence will have to run
18 consecutive to the underlying offense.

19 That is not this case, Your Honor.

20 JUSTICE SOTOMAYOR: All right. But,
21 if it's dual convictions, generally, you have a
22 drug offense for carrying a firearm, you get
23 a sentence for that, you have to run this
24 consecutively.

25 What is it in the statute that you say

1 makes it clear that it's speaking not just
2 about punishment but about conviction as well?

3 MR. LARSEN: Well, when it talks about
4 punishment, conviction, sentence, these words
5 in the case law are kind of used
6 interchangeably. The idea under the Double
7 Jeopardy Clause is that you can't be punished
8 twice for the same offense.

9 We know here we're talking about one
10 offense. So the question is, is there any
11 clear indication that Congress wanted someone
12 like Mr. Barrett to get multiple punishments?

13 And I think it's important to remember
14 that when Congress wrote 924(j), the statutes
15 didn't look like they look today.

16 In 1994, 924(c)'s penalty was a fixed
17 five years. It was not a minimum. So Congress
18 found that insufficient. They're like: If you
19 kill someone, you need more than five years in
20 prison.

21 It wrote (j) to allow for the death
22 penalty and up to life in prison. It rejected
23 the proposal that a fatal shooting should be
24 subject to (c)'s multiple punishment regime.
25 And this Court explained in Lora it designed

1 (j) to account for the seriousness of killing
2 by itself.

3 There's no indication that Congress
4 thought someone sentenced to death under (j) or
5 up to life in prison should get five years on
6 top. What's the point of that?

7 There may be something strange
8 nowadays when we look at (c) saying it's a
9 minimum of five and, you know, why -- why
10 would Congress want to have a minimum for gun
11 possession but not fatal use? But this Court
12 unanimously rejected that argument in Lora.

13 That was the government's argument
14 there. If you have a minimum for possession,
15 you've got to have one for lethal use.

16 This Court said, no, there's no
17 indication in the statute of that. Congress
18 didn't clearly indicate that that's what it
19 wanted.

20 JUSTICE ALITO: Well, when we -- when
21 we interpret what a particular provision means
22 today, don't we have to look at the entire --
23 all of the relevant provisions that are in
24 place at the present time?

25 MR. LARSEN: Yes, Your Honor. And I

1 think it's very telling that in the 30-plus
2 years since (j) was written --

3 JUSTICE ALITO: In other words, we
4 have to -- you know, we have to assume that
5 it's all meant to fit together somehow, right?

6 MR. LARSEN: I think it's fair to look
7 at the passage of time, the passage of time,
8 Your Honor, and I think that works in our favor
9 because there's no suggestion by anyone here
10 that in 1994 Congress wanted someone sentenced
11 to death to get five years on top.

12 It may seem odd now that five is a
13 floor rather than a fixed term, but Congress
14 has had 31 years, Your Honor, to address this
15 problem if it is a problem. Congress has
16 decided it's not a problem. And why? Because
17 (j) is enough on its own to punish someone who
18 lethally uses a gun.

19 JUSTICE ALITO: Do you think that a
20 clear congressional desire to provide multiple
21 punishments for a greater- and lesser-included
22 offense can be inferred from the penalty
23 scheme?

24 MR. LARSEN: Well, I think --

25 JUSTICE ALITO: Can it ever be

1 inferred from the penalty scheme?

2 MR. LARSEN: If I'm -- I'm -- so the
3 penalty -- Your Honor says the penalty scheme.
4 So every statute has a penalty.

5 JUSTICE ALITO: Suppose that --
6 suppose --

7 MR. LARSEN: Right.

8 JUSTICE ALITO: -- that the -- the
9 maximum penalty for the greater offense in the
10 sense that it includes more elements is one
11 year, but the maximum penalty for the
12 lesser-included offense in that it has fewer
13 elements is two years.

14 Do you think it would be -- that a
15 clear congressional desire to have multiple
16 punishments in that situation could be
17 inferred?

18 MR. LARSEN: No, Your Honor. And
19 there is a case that we found after briefing
20 by Judge Posner, it's U.S. v. Peel, P-e-e-l,
21 Seventh Circuit, 2010.

22 There, the judge explained the
23 lesser-included offense was obstruction of
24 justice with a 20-year maximum. The greater
25 offense in that case was bankruptcy fraud,

1 which is a five-year max. So it's exactly the
2 scenario that Your Honor has just posited, this
3 weird situation where the greater offense
4 actually has a lower penalty.

5 Judge Posner says, same offense, no
6 clear indication to double-punish, I'm sending
7 it back for one of them to be -- one conviction
8 to be vacated.

9 JUSTICE ALITO: Well, are we bound by
10 that decision?

11 MR. LARSEN: No, but I think it's a
12 good example --

13 JUSTICE ALITO: Then why does it make
14 sense?

15 MR. LARSEN: I think it makes sense
16 because --

17 JUSTICE ALITO: Why does it make --
18 why does it make sense?

19 MR. LARSEN: I think it makes sense,
20 Your Honor, because it's entirely in line with
21 this Court's consistent jurisprudence that
22 because courts don't decide punishments, it's
23 Congress that does so.

24 Courts have to be very careful before
25 they decide that Congress wanted to pile on and

1 double-punish one crime. It needs a clear
2 indication.

3 And the fact that two different
4 statutes may require punishment, may require
5 even minimum punishments, or even have clauses
6 saying notwithstanding any other provision
7 of law, don't suspend this sentence, I'm
8 describing now the scenario as in Rutledge.

9 This Court said that is not enough to
10 be a clear indication to double-punish. There
11 must be more. And, here, there is no more.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 What exactly short of express language
15 would you say allows multiple punishments?

16 MR. LARSEN: So the two examples that
17 both we and the government cite in (c), namely
18 (c)(1)(A) and (c)(5), there's language -- it's
19 not the same language, you can use different
20 language -- it clearly indicates there that
21 Congress did want multiple punishments.

22 And I think we do look to the text.
23 That's the best expression of Congress's
24 intent. And, here, there simply is no text
25 indicating a wish to double-punish in this

1 scenario.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Justice Thomas?

4 Justice Alito?

5 JUSTICE ALITO: Well, just out of
6 curiosity, suppose there is a -- a person who
7 is committing a crime and this person is very
8 well versed in the -- in statutory -- in -- in
9 the criminal code and in our double jeopardy
10 jurisprudence.

11 And so this person commits an offense
12 that has two elements, A and B, and the maximum
13 punishment for that offense is five years, and
14 the person says: Wow, if I get caught and
15 convicted, I don't want to go to jail for five
16 years, but I know that if I commit two other
17 elements, C and D, then the maximum penalty
18 for that offense is only one year. So let me
19 go ahead and commit the -- the -- the greater
20 offense.

21 Does that make any sense?

22 MR. LARSEN: So such a -- such a
23 skilled defendant may engage in that conduct,
24 Your Honor. There are ample safeguards in
25 place to protect against any injustice.

1 In that scenario, the person would be
2 tried and convicted of both offenses, and if
3 they are, in fact, the same and there's no
4 clear indication to pile them on top of each
5 other, he would be subject to punishment under
6 either one.

7 If the government or the court feels
8 that they need to use the statute with the
9 higher maximum, he'll be punished under that
10 one.

11 And that's the situation here, Your
12 Honors. If Mr. Barrett is ultimately punished
13 under (c) instead of (j), he still faces up to
14 life in prison.

15 And the government has pointed to
16 no scenario in which someone punished under
17 (c) -- or rather under (j) gets -- gets off or
18 gets a light sentence.

19 JUSTICE ALITO: Well, what I'm getting
20 at is that under your view, a defendant who
21 commits a murder while violating 924(c) can be
22 sentenced to less time than a defendant who
23 does not commit murder while violating 924.

24 MR. LARSEN: Right.

25 JUSTICE ALITO: Isn't that right?

1 MR. LARSEN: So, yes, Your Honor.
2 "Can be," I think, is the key phraseology
3 there.

4 So, in addition to the fact that
5 amicus has cited no actual example of this ever
6 happening, there is also the safeguard in
7 addition to what I've discussed of appellate
8 review.

9 If some crazy judge says: I'm giving
10 you a day in jail for killing somebody, you can
11 bet there's going to be a government appeal and
12 a -- a review in court is going to most likely
13 find that unreasonable.

14 There are multiple safeguards here.
15 No injustice is going to result from our
16 reading of the statute, which is the only
17 reasonable reading given the text here.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 JUSTICE SOTOMAYOR: There is another
21 situation in which we found that the sentences
22 should be running consecutively, and that's
23 Garrett.

24 MR. LARSEN: Ah, yes.

25 JUSTICE SOTOMAYOR: In Garrett, the

1 RICO versus the substantive crime, correct?

2 MR. LARSEN: Mm.

3 JUSTICE SOTOMAYOR: And so distinguish
4 that case.

5 MR. LARSEN: Garrett could not --

6 JUSTICE SOTOMAYOR: Where we looked
7 at -- there was no language there, but it was
8 the nature of the statute.

9 MR. LARSEN: Garrett could not be more
10 unlike the scenario here, Your Honor. The two
11 crimes there was one -- literally one on one
12 day on importation of marijuana on one day.
13 The other crime was a years-long, multi-state,
14 spanning all of the coasts of the country,
15 continuing criminal enterprise.

16 This Court looked at the statutes,
17 said Congress could not possibly have intended
18 that if you import marijuana on one day, you
19 then get a get-out-of-jail-free card for the
20 next several years of your continuing criminal
21 enterprise.

22 That is -- and in the court -- in
23 the court's decision -- or rather discussion of
24 the situation there, it contrasted that
25 scenario to the one here, a single course of

1 conduct.

2 Here, (j) requires that the shooting
3 occur in the course of a violation of (c), and
4 that's what happened. Mr. Dore shot Mr.
5 Dafalla within seconds or minutes of robbing
6 his compatriots. This was not something
7 spanning years or months. This is one course
8 of action, the classic and simple situation.

9 JUSTICE SOTOMAYOR: Going back to
10 Justice Alito's question about does it make any
11 sense that the lesser-punished crime would --
12 Congress would want that one to control, that
13 wasn't the case when the statute was passed,
14 correct?

15 MR. LARSEN: Absolutely right.

16 JUSTICE SOTOMAYOR: So we have to
17 discern intent at the time the statute was
18 passed, correct?

19 MR. LARSEN: Yes. I do think it's
20 fair, as Justice Alito indicated, to look at
21 what's happened since then. But looking at
22 that only helps our position because Congress
23 has had over 30 years to change this scenario
24 if it felt like something unjust --

25 JUSTICE SOTOMAYOR: And they did it in

1 one situation.

2 MR. LARSEN: That's right, for
3 armor-piercing ammunition, not the case here.

4 JUSTICE SOTOMAYOR: Exactly.

5 MR. LARSEN: Correct.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?
7 Justice Gorsuch?

8 JUSTICE GORSUCH: I had a question
9 from a totally different direction, Mr. Larsen.

10 So everybody's litigated on the
11 premise that Congress can double-punish for
12 greater- and lesser-included offenses if it
13 speaks clearly, but it must speak clearly.
14 Where does that presumption come from?

15 MR. LARSEN: It comes from a couple of
16 places that -- Your Honors talked about this in
17 the Whalen decision. Number one, separation of
18 powers. Courts don't write laws punishing
19 criminal conduct. They don't set the
20 penalties. Congress does that. That function
21 by the Constitution is committed to Congress.
22 So courts are very careful --

23 JUSTICE GORSUCH: Well, we normally
24 interpret statutes without a thumb on the
25 scale. And you asked us, everybody asks us, to

1 put a thumb on the scale. Where does that
2 thumb come from?

3 MR. LARSEN: Yes. The presumption,
4 right, because we're -- we're afraid --

5 JUSTICE GORSUCH: Yeah.

6 MR. LARSEN: -- of violating the
7 separation of powers --

8 JUSTICE GORSUCH: Where -- where --

9 MR. LARSEN: -- and we're also
10 afraid --

11 JUSTICE GORSUCH: Is that lenity? Is
12 that -- are you just afraid to utter the word?

13 MR. LARSEN: I -- no. I'm a great fan
14 of lenity, and I -- I believe Your Honor is
15 too. Maybe not everyone in the room is a fan
16 of lenity, but I am.

17 But putting lenity to the side --

18 JUSTICE GORSUCH: It has to come from
19 somewhere.

20 MR. LARSEN: Yes. It comes from the
21 historical practice that Con- -- that
22 historically speaking, legislatures don't
23 double-punish one crime, right? And also,
24 constitutionally, it's the legislature that
25 decides on the punishment, not a court. So a

1 court, before it veers out of its lane and says
2 you have to double-punish this person, there
3 better be something very clear from Congress
4 indicating that that's allowed because, as the
5 Court said in Whalen, if we get this wrong, we
6 violate not only the separation-of-powers
7 principle, but we also trench especially
8 harshly on the individual freedom aspects that
9 are protected by the Double Jeopardy Clause.

10 JUSTICE GORSUCH: And -- and this
11 Court has sometimes said the presumption, but
12 in other cases, it said there is no -- double
13 jeopardy prohibits two punishments for one
14 offense, and that includes greater and lesser.
15 I'm thinking of Pearce; I'm thinking of Shiro.
16 How do we reconcile, like, Hunter on the one
17 hand and those cases on the other?

18 MR. LARSEN: Well, Hunter -- Hunter
19 was just Missouri's version of 924(c). You
20 know, if you commit a crime with a gun, you get
21 a punishment for the gun in addition to the
22 punishment for the underlying crime. Nothing
23 in Hunter speaks to the situation here.

24 JUSTICE GORSUCH: Well, I'm wondering,
25 Hunter was issued during the Grady era, when we

1 treated Blockburger as a -- a tool of statutory
2 interpretation and, therefore, kind of a
3 presumption, if you will. But Dixon overruled
4 Grady, right? And so I wonder, you know, is
5 Hunter still good law, or is it Shiro and
6 Pearce?

7 And -- and let me add on to that, you
8 know, the possibility of punishment, dual
9 punishments, for greater- and lesser-included
10 offenses really wasn't possible for much of our
11 history because you didn't have joinder of
12 criminal offenses. And so, necessarily, once
13 you try one, you're done. You know, you try
14 the greater and you're done and there is no
15 opportunity for double punishment. So I'm just
16 wondering what you make of all of that.

17 MR. LARSEN: Well, historically
18 speaking also, Your Honor, most -- most
19 felonies resulted in losing of life.

20 JUSTICE GORSUCH: Death.

21 MR. LARSEN: Yes. So this question
22 wasn't, you know, as present that it -- as it
23 is nowadays. But the Court has consistently
24 adhered to the Blockburger rule for over 100
25 years. Even in Blockburger, it cited a case

1 from 1911, citing a Massachusetts case from the
2 19th Century. The Court has had many
3 opportunities it's observed in Rutledge and
4 other cases to abandon this rule, and it
5 hasn't.

6 And it's just a presumption. We -- we
7 acknowledge that. The presumption can be
8 overcome. But that's what's missing here, Your
9 Honor.

10 JUSTICE GORSUCH: And I'm wondering,
11 why -- why can the presumption be overcome?

12 MR. LARSEN: Because the Court has
13 decided that despite the double --

14 JUSTICE GORSUCH: Well, why does the
15 Double Jeopardy --

16 MR. LARSEN: Yes.

17 JUSTICE GORSUCH: -- Clause say --

18 MR. LARSEN: That's precisely right.

19 JUSTICE GORSUCH: -- you can't be
20 punished twice for one offense? We have one
21 offense here.

22 MR. LARSEN: And that's the funny
23 thing that I also, you know, discovered in this
24 case, Your Honor. Despite those plain words of
25 the Double Jeopardy Clause, the Court has

1 consistently understood that to be a check on
2 courts and not on the legislature because
3 punishments --

4 JUSTICE GORSUCH: Thank you,
5 Mr. Larsen.

6 MR. LARSEN: -- can be whatever
7 Congress says they are.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh?

10 JUSTICE KAVANAUGH: Well, the lower --
11 the Second Circuit here -- I mean, I feel
12 unfortunate position they're in because they're
13 trying to interpret Lora, right? So you talk
14 about 31 years. They're interpreting Lora and
15 they say, after Lora, where we said that
16 Congress specifically chose to locate 924(j)
17 outside 924(c) -- they're separated by several
18 unrelated subsections -- we said this
19 reinforces the conclusion, and the Second
20 Circuit said that Congress intended to create
21 different crimes subject to different penalty
22 schemes, 924(c) focusing on the firearm, 924(j)
23 focusing on the death caused by the use of
24 firearm.

25 And -- and, again, that was discussed

1 at oral argument in Lora. In fact, the
2 government cautioned us against not answering
3 this question in the way that the Second
4 Circuit, you know, ended up saying. And now
5 we're back.

6 So what -- you know, Lora has got to
7 be part of your analysis here. How do you --
8 how do you explain Lora?

9 MR. LARSEN: Lora favors us, Your
10 Honor.

11 JUSTICE KAVANAUGH: Why?

12 MR. LARSEN: Because it's odd that the
13 Second Circuit said, you know, we're kind of
14 compelled now by Lora to reach this conclusion.

15 JUSTICE KAVANAUGH: You think that's
16 odd? Okay.

17 MR. LARSEN: I think it's odd.

18 JUSTICE KAVANAUGH: Keep going.

19 MR. LARSEN: And this is why, Your
20 Honor.

21 JUSTICE KAVANAUGH: I don't think it's
22 that odd, but anyway.

23 MR. LARSEN: Well, the reason I think
24 it's odd, Your Honor, is because this Court
25 said that our position in this case aligns with

1 Your Honor's ruling in Lora, right? This Court
2 said, you know, (j) does not incorporate (c)'s
3 penalties. Congress wrote (j) to punish a
4 killing. The penalties it set out were
5 sufficient in themselves. It didn't want to
6 replicate. It didn't want to pile on.

7 And although the precise question here
8 was reserved, Your Honor, whether these two
9 crimes are the same for double jeopardy
10 purposes, there is no dispute among the parties
11 that they are the same. So the only question
12 is, is there a clear indication? Is there
13 special authorization, to use the phrase in
14 Whalen, from Congress to double-punish one --
15 the one fatal shooting here?

16 And there simply isn't. Amicus has
17 not pointed to anything saying so.

18 JUSTICE KAVANAUGH: Well, I think
19 they've pointed to in 1994, when Congress comes
20 in with (j), they already know that
21 924(c)(D)(1)(ii) -- (D)(ii), sorry,
22 (c)(1)(D)(ii) already says that any new
23 punishment will be consecutive.

24 MR. LARSEN: So -- so (c)(1) --

25 JUSTICE KAVANAUGH: So that -- if

1 Congress knows that in '94, they don't -- they
2 know they don't have to put something in to
3 make clear that it's double-punished. It's
4 already by -- by definition going to be
5 double-punished given what that already says,
6 correct?

7 MR. LARSEN: So (c)(1) -- no, Your
8 Honor, respectfully, (c)(1)(D)(ii), as Justice
9 Sotomayor was describing, is an instruction on
10 how a sentence should run if imposed under (c).
11 That's the question here. If we assume --

12 JUSTICE KAVANAUGH: You said the
13 question was an intent by Congress to
14 double-punish.

15 MR. LARSEN: That's correct. So did
16 Congress want a sentence to be imposed under
17 (c) along with one under (j) for one crime?
18 That's the question to which (c)(1)(D)(ii) says
19 nothing.

20 And, finally, Your Honor, if we
21 presuppose (c)(1)(D)(ii) applies here, we
22 presuppose the answer to the question.

23 JUSTICE KAVANAUGH: Last, the Second
24 Circuit also noted that the district judge said
25 he was going to do a 50-year sentence

1 regardless here. That -- the Second Circuit
2 can deal with that, I suppose, even if you
3 prevail.

4 MR. LARSEN: Ah, yes. And just --
5 just to be clear, you know, Lora came up while
6 we were waiting -- while we were litigating
7 Barrett in the -- in the court below, so we
8 filed supplemental briefing based on Lora, and,
9 you know, the district judge rejected our
10 argument given circuit law at the time, but he
11 specifically told Mr. Barrett, you know, if I'm
12 wrong, you'll be back here for a new sentence.
13 So --

14 JUSTICE KAVANAUGH: Right. And that's
15 why the Second Circuit didn't find it --

16 MR. LARSEN: Right.

17 JUSTICE KAVANAUGH: -- harmless.

18 MR. LARSEN: Right. So we don't know
19 what the judge will do on remand. We don't.

20 JUSTICE KAVANAUGH: Yeah. Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett?

23 Justice Jackson?

24 JUSTICE JACKSON: So can I just follow
25 up on the Lora clarification here? I guess

1 Justice Kavanaugh makes a point about the
2 Second Circuit believing that Lora compelled
3 its view. But I guess, as I understand your
4 argument, you are saying that Lora signaled
5 that Congress intended (j)'s punishment to
6 supplant (c), not supplement (c), that the fact
7 that there was a separate punishment scheme in
8 (j), but the elements were the same because
9 they were overlapping, meant that where the (j)
10 scenario occurred with the additional element,
11 Congress meant for it to be the punishment
12 scheme that you used in that scenario?

13 MR. LARSEN: One punishment for one
14 crime, Your Honor, yes. The fact that there
15 are different statutes here --

16 JUSTICE JACKSON: Yes.

17 MR. LARSEN: -- you know, (c) versus
18 (j), that was -- that was a feature of all of
19 Your Honors' cases. That was the situation in
20 Whalen, that was the situation in Rutledge.
21 They were different statutes. They had
22 different penalties. Didn't matter. They were
23 the same offense for double jeopardy purposes,
24 and because there wasn't a clear indication to
25 double-punish, this Court said no double

1 punishment.

2 JUSTICE JACKSON: In going to Justice
3 Alito's questions about the Peel scenario, I
4 guess I didn't understand that odd circumstance
5 to be presented on these facts because I
6 thought that (j) allowed for additional
7 punishment, in other words, that we didn't have
8 a situation in which (j) was capping the
9 punishment lower than (c) would allow.

10 Is that right?

11 MR. LARSEN: That is correct. The
12 only difference is, you know, in this
13 particular case, under (c), the minimum is five
14 years. No one thinks Mr. Barrett is getting
15 five years, right?

16 JUSTICE JACKSON: Right.

17 MR. LARSEN: And --

18 JUSTICE JACKSON: But the -- and
19 that's because the minimum is not really at
20 issue in a case like this when you're talking
21 about death. I mean, what we care about is the
22 maximum in a situation in which the harms and
23 the offense is so egregious, correct?

24 MR. LARSEN: That's right, Your Honor.
25 And justice can be done under either one of the

1 statutes here. The simple point is that
2 convictions cannot be entered under both
3 statutes.

4 JUSTICE JACKSON: Right. And doesn't
5 it have to be done -- I mean, aren't sentencing
6 judges also bound by other statutory provisions
7 that require them to provide sentences that are
8 sufficient but not greater than necessary, that
9 avoid unwarranted sentencing disparities?

10 So it's not even realistic, I think,
11 given the sentencing judges' other obligations,
12 that you would be in a situation in which a
13 sentencing judge would sentence someone who had
14 used a gun to a fatal result less than someone
15 who had just used a gun, correct?

16 MR. LARSEN: I agree, Your Honor. And
17 that's why amicus has cited not even one
18 example of that ever happening.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Ms. Brown.

23

24

25

1 ORAL ARGUMENT OF AIMEE BROWN
2 ON BEHALF OF THE RESPONDENT
3 IN SUPPORT OF THE PETITIONER

4 MS. BROWN: Thank you, Mr. Chief
5 Justice, and may it please the Court:

6 Section 924(c)(1)(A) is a
7 lesser-included offense of 924(j), which
8 triggers the Blockburger presumption against
9 cumulative punishments. Nothing in the
10 statutory text, structure, or history rebuts
11 that presumption.

12 The text points in the opposite
13 direction. Congress expressly authorized
14 cumulative punishments for 924(c) and its
15 predicate, but when Congress enacted 924(j) and
16 made 924(c) the predicate, it omitted that
17 language. That different text indicates a
18 different intent.

19 The court of appeals focused on
20 924(c)'s mandatory minimum and consecutive
21 sentencing provisions, but those provisions
22 address the proper sentence after a conviction,
23 not whether a defendant can be convicted under
24 924(c) and another provision.

25 Amicus also relies on structural

1 arguments that 924(c) and (j) involve different
2 harms, subsections, and penalties, but 924(c)'s
3 predicate offenses share those features, yet
4 Congress specifically authorized cumulative
5 punishments there.

6 And Congress's history with 924(c)
7 confirms that it understood the clarity this
8 Court has required to authorize cumulative
9 punishments. Because there's no clear
10 indication Congress did so here, the
11 Blockburger presumption controls.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Are you approaching
14 the point where you're going to require a clear
15 statement rule?

16 MS. BROWN: No, Your Honor. And we
17 resisted that -- that implication in our reply
18 brief as well. We don't think that this is a
19 requirement that there has to be language in
20 the text of the statute.

21 We agree with the -- the Court's
22 decision in Garrett, where the Court held,
23 looking at the statutory text along with the
24 structure, the context, the history, that
25 cumulative punishment had been authorized, and

1 we think that that same analysis should apply
2 in -- in every case.

3 It is -- it is a statutory
4 interpretation question, and the Court should
5 take account of the full toolkit for statutory
6 interpretation in -- in -- in that instance.

7 JUSTICE JACKSON: Does your position
8 differ from Barrett's in any meaningful way?

9 MS. BROWN: So, I mean, I think that
10 to the extent that Barrett was suggesting that
11 there might be some kind of clear statement
12 rule and relying on the sovereign immunity
13 decisions, which do, I think, require some kind
14 of heightened -- some kind of language
15 specifically in the statutory text, we do
16 resist that.

17 There is a part of Petitioner's
18 opening brief that -- that discusses lenity.
19 We don't think that the Rule of Lenity analysis
20 should be applied here either. But, as far as
21 the -- the construction of the statutory text
22 itself, I think we're -- we're aligned.

23 JUSTICE KAVANAUGH: Can you take me
24 through the history of how the government got
25 here? Because, in the oral argument in Lora,

1 it was explained that if the Court disagrees
2 with us on this, and the Court did disagree, it
3 should say that these are separate offenses for
4 purposes of Blockburger because, for the
5 reasons I've just noting, it really makes no
6 sense to have one offense. Okay? That's the
7 government's words.

8 And then -- and I specifically asked
9 then later how we should write the opinion to
10 avoid this problem, and the government lawyer
11 very succinctly and clearly said, the Court
12 should also make clear that because of the
13 intertwined relationship to the two questions,
14 these are separate offenses for Blockburger.

15 Now that was ultimately left open.
16 The Second Circuit, I think, reasonably,
17 debatably, but reasonably read Lora as
18 supporting what the government was saying we
19 should have made clear.

20 So what happened then?

21 MS. BROWN: So our argument in Lora
22 was essentially that the statutory construction
23 question that we were -- that the Court was
24 facing there, whether 924(g) incorporates all
25 of 924(c), including its penalties, we thought

1 that that was intertwined with the double
2 jeopardy question and that those two questions
3 should rise and fall together.

4 And we also thought that one reason
5 that our interpretation was the better one was
6 that otherwise you would have these implausible
7 results where a 924(j) offense could be
8 punished -- could receive a lower punishment
9 than 924(c).

10 And I think that the Court in Lora
11 rejected two of those points. It rejected the
12 idea that the -- the statutory analysis in Lora
13 rises and falls with the double jeopardy
14 question. The Court expressly said that its
15 analysis there was -- was -- was consistent
16 with or could be consistent with the -- the
17 government's longstanding double jeopardy
18 position.

19 And then the Court in Lora went on to
20 explain that it didn't find the possibility of
21 924(j) having the ability to be sentenced at a
22 lower -- a lower punishment than 924(c)
23 implausible because, instead of applying these
24 mandatory minimums or this consecutive sentence
25 mandate, Congress in 924(j) chose a different

1 approach to sentencing.

2 And that approach is the kind of
3 standard approach that Congress uses for murder
4 and manslaughter offenses where, instead of
5 constraining judicial discretion through the
6 use of minimums or consecutive sentence
7 mandates, Congress goes in a different
8 direction. It authorizes sentences up to the
9 death penalty for murder, any term of years,
10 life imprisonment, and the same penalties in
11 Section 1112 that apply to manslaughter
12 offenses in other places as well.

13 And the Court expressly said in Lora
14 as well that it viewed there to be indications
15 from the statutory text that Congress intended
16 for 924(j) to take account of the seriousness
17 of the offense without incorporating the
18 penalties from subsection (c).

19 So, because of that, I think we
20 decided after looking through and analyzing the
21 decision in Lora that our interpretation for
22 double jeopardy purposes was still the -- the
23 better interpretation of the statute because, I
24 think, the Court had rejected the kind of
25 premises that we had built into the analysis

1 earlier.

2 JUSTICE KAVANAUGH: Okay. That's
3 helpful.

4 In overcoming the presumption, though,
5 can you look at -- and this is Justice Alito's
6 question from before -- whether Congress has
7 specified that they should not be concurrent?

8 MS. BROWN: So I think that that could
9 be some kind of indication in certain
10 circumstances --

11 JUSTICE KAVANAUGH: In other words --

12 MS. BROWN: Sure. Sorry.

13 JUSTICE KAVANAUGH: -- if they were --
14 it's said in both provisions.

15 MR. BROWN: That they're consecutive
16 sentences?

17 JUSTICE KAVANAUGH: Mm-hmm.

18 MS. BROWN: So I do think that a
19 consecutive sentence provision is, as my friend
20 said, an indication of how the offense should
21 be -- should be sentenced and not necessarily
22 an authorization for the punishment in the
23 first instance.

24 I think the best way to see the
25 distinction between those two is to compare the

1 language in 924(c)(1)(A) that does authorize
2 cumulative punishments with the
3 924(c)(1)(D)(ii) language.

4 And so the language that we think is
5 the authorizing language is on page 1a of our
6 appendix, and it's that it says that the
7 punishment should be in addition to the
8 punishment provided for such crime of violence
9 or drug trafficking crime.

10 JUSTICE KAVANAUGH: And that's good
11 enough?

12 MS. BROWN: That's -- that's the
13 authorization language that we see here. That
14 is certainly good enough. That's similar
15 language to what Congress used in (c)(5). In
16 fact, it was broader in (c)(5) and said that
17 punishment should be in addition --

18 JUSTICE KAVANAUGH: But, if that's
19 good enough, couldn't Congress -- and I'm sorry
20 to prolong this, but if that's good enough,
21 couldn't Congress in '94, when they're putting
22 (j) in, think: Well, we don't have to put in
23 "in addition" because it already makes clear in
24 924(c)(1)(D)(ii) that no term shall run
25 concurrently?

1 MS. BROWN: So that is --

2 JUSTICE KAVANAUGH: I mean, that just
3 seems as a matter of English language, those
4 two things seem to me the same. And if you've
5 conceded that the first "in addition to" would
6 make it multiple offenses, I'm -- and Congress
7 in '94, yeah, they could have gone through the
8 exercise, but I think, you know, they read
9 (c)(1)(D)(ii) and it's like, yeah, of course.
10 No term of imprisonment, notwithstanding any
11 other provision of law.

12 MS. BROWN: So, again, I think that
13 (c)(1)(D)(ii) is -- is focused on a different
14 question and that's the question of, when you
15 have a sentence, how is it structured with
16 other sentences.

17 JUSTICE KAVANAUGH: I guess that's --
18 but you've already conceded -- and conceded --

19 MS. BROWN: So --

20 JUSTICE KAVANAUGH: -- I don't want to
21 use, but "in addition" language --

22 MS. BROWN: -- the --

23 JUSTICE KAVANAUGH: -- punishment in
24 addition would be good enough.

25 MS. BROWN: The punishment in addition

1 would be good enough if it were specific to the
2 offenses at issue here. But, in (c)(1)(A),
3 it's only authorizing cumulative punishment for
4 the (c)(1)(A) offense and its predicate.

5 JUSTICE JACKSON: And is that because
6 you're reading punishment to mean conviction?

7 MS. BROWN: Punishment, we think, does
8 include both a conviction and a sentence. And
9 that's consistent with what this Court held in
10 Ball. In that case, the punishments were -- or
11 the sentences themselves, excuse me, were --
12 were concurrent sentences, and so the
13 government had argued that it was a harmless
14 error for double jeopardy purposes because you
15 were really only serving the same time you
16 would serve otherwise.

17 The Court in Ball said that that is
18 incorrect. For purposes of double jeopardy,
19 the conviction is part of the punishment and
20 that is part of it as well.

21 JUSTICE JACKSON: Okay. But we don't
22 have the word "punishment" in the (d)
23 subsection, right?

24 MS. BROWN: That's correct.

25 JUSTICE JACKSON: We're talk -- in the

1 D subsection, we're talking about the sentence,
2 no term of imprisonment shall be imposed to run
3 concurrently. And you only get to the sentence
4 after you have the punishment/conviction.

5 MS. BROWN: Correct. And so that's
6 why we see the authorizing language in
7 (c)(1)(A) as doing the work of authorizing
8 cumulative punishments in the specific instance
9 in which the offense is the (c)(1)(A) offense
10 and its predicate offense.

11 JUSTICE JACKSON: And if that --
12 and -- and we -- and you're saying we would
13 have needed that kind of language in the (j)
14 scenario in order to arrive at the same --

15 MS. BROWN: Yes, that's correct. And
16 if you thought that the (c)(1)(D)(ii) language
17 were sufficient to authorize cumulative
18 punishments on its own, then that would mean
19 that the language I was just pointing you to in
20 (c)(1)(A) would be superfluous. And that's a
21 superfluity that would have existed at the time
22 Congress was enacting the statute as well.

23 JUSTICE KAVANAUGH: Right. But, I
24 mean, superfluity is usually defeated by
25 notwithstanding any other provision of law.

1 But I take -- I understand your argument on
2 that and I understand Justice Jackson's point.
3 I think the Second Circuit was quite reasonable
4 in what it -- what it did in the wake of Lora.

5 Let me ask you another question. Does
6 this matter from the government's perspective
7 in terms of sentences that'll actually be
8 imposed in the real world in cases of this
9 nature?

10 MS. BROWN: So I think likely not in
11 practice because --

12 JUSTICE KAVANAUGH: That's why I
13 assume you're where you are.

14 MS. BROWN: -- the government is going
15 to have the ability to dismiss convictions or
16 dismiss the guilty verdicts that it gets on
17 certain counts before sentencing happens, and
18 so it can have the ability to choose, I think,
19 which of the counts a sentence is imposed
20 under. And that might take into account the --
21 the sentencing exposure that we think is going
22 to occur under either (j) or -- or (c), and we
23 can choose which one we think is the more
24 appropriate under those circumstances.

25 JUSTICE KAGAN: Do you think that

1 there are cumulative punishments authorized for
2 both (j) and the predicate offense?

3 MS. BROWN: We don't, no, because
4 there's no language in 924(j) that authorizes
5 those cumulative punishments for the predicate
6 offense of (c) or (c)'s own predicate. It's
7 like they're not stacked at all.

8 JUSTICE KAGAN: I really meant, like,
9 (c)'s own predicate.

10 MS. BROWN: Correct, yes. There's --

11 JUSTICE KAGAN: So you think you --
12 your position is consistent all the way
13 through, we're going to make you have language,
14 and because there's no language for the
15 original predicate offense, let's say, a
16 robbery or something --

17 MS. BROWN: Mm-hmm.

18 JUSTICE KAGAN: -- that cumulative
19 punishment is not authorized?

20 MS. BROWN: We think that that is the
21 necessary implication of the language in the --
22 in the text of the statute here. If Congress
23 had put (j) into subsection (c), then, of
24 course, that language authorizing punishment in
25 addition to the cumulative offense would apply

1 to -- to that part of -- of the subsection as
2 well, but because it put it in its own
3 subsection, that introductory language just
4 doesn't apply.

5 And it is also a lesser-included
6 offense, so the same analysis that you have
7 here would apply there as well.

8 JUSTICE KAGAN: Okay.

9 MS. BROWN: I did want to address just
10 a couple of the kind of results-based or
11 anomalies that -- that amicus has suggested
12 might occur under our interpretation and
13 especially with respect to Justice Thomas's
14 earlier question about the machine gun
15 hypothetical.

16 We believe that under the -- under
17 that hypothetical, the -- these would be two
18 separate offenses for purposes of Blockburger
19 because then both would have an element that
20 the other would not. And Congress can indicate
21 an intent to authorize cumulative punishments
22 by adding elements to the two offenses that
23 would authorize -- that would -- that would
24 make them separate offenses for purposes of
25 Blockburger. So we don't think that the

1 analysis here would apply in the same way to
2 924(c)(1)(B) offenses in that same way.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas?

6 Justice Alito?

7 Justice Sotomayor?

8 Justice Kagan?

9 Justice Gorsuch?

10 JUSTICE GORSUCH: You know exactly
11 what I'm going to ask you.

12 (Laughter.)

13 JUSTICE GORSUCH: The government
14 acknowledges that there's a presumption that
15 we're not doing our normal statutory
16 interpretation here. There's a presumption
17 against two punishments for one double jeopardy
18 offense. Where does that come from?

19 MS. BROWN: I think it is largely a
20 factor of -- of -- of the courts presuming that
21 Congress generally doesn't intend to authorize
22 cumulative punishments for the same offense --

23 JUSTICE GORSUCH: Why?

24 MS. BROWN: -- under Blockburger.

25 JUSTICE GORSUCH: Why do you

1 presume -- that's just repeating the words back
2 to me. Why? Why do we presume that?

3 MS. BROWN: I think, originally, there
4 were some -- there were some early cases that
5 did suggest that under the Double Jeopardy
6 Clause, the Double Jeopardy Clause applied to
7 cumulative punishments as well, and so there
8 was this form of constitutional avoidance.

9 In later cases, the Court made very
10 clear that the -- the constitutional analysis
11 and the statutory analysis collapse into one
12 another. As long as Congress has, in fact,
13 authorized it, then -- then that's fine. And
14 we think that that's sufficient.

15 JUSTICE GORSUCH: All right. Let --
16 let me just stop you there --

17 MS. BROWN: Sure.

18 JUSTICE GORSUCH: -- and just say I
19 think you've got two possible answers. One is
20 lenity, which is rooted in the separation of
21 powers and the presumption that we -- of
22 freedom, of liberty. And I -- I took that to
23 be Mr. Larsen's answer after a while.

24 The other answer is it might come from
25 the Double Jeopardy Clause itself, which, after

1 all, says you cannot be punished twice for the
2 same offense, in which case it's not a
3 presumption. It's the law.

4 Now I know we said it's a presumption
5 in Hunter, but Hunter was back when we were
6 treating Blockburger not as authoritative under
7 the Double -- Double Jeopardy Clause but as a
8 tool of statutory interpretation.

9 We've rejected that since in Dixon.
10 We overruled Grady. And since then, we've said
11 in Shiro and Pearce you can't have two
12 punishments for one crime, two sets of
13 punishments. Now, of course, a punishment
14 might include a term of imprisonment and
15 supervised -- yada, yada, but you can't have
16 two sets of punishments for one crime.

17 So we've spoken out of both sides of
18 our mouth on this. Would you object to a
19 footnote at least acknowledging we've spoken
20 out of both sides of our mouth on this and
21 applying the presumption anyway?

22 MS. BROWN: So I -- we certainly don't
23 object to applying the presumption as the Court
24 has done in all of these case. I -- I would
25 push back a little on the idea that we think

1 that -- or the idea that this is compelled by
2 the Double Jeopardy Clause itself.

3 JUSTICE GORSUCH: Or at least our
4 precedents. I mean, we -- what did -- Pearce
5 and Shiro say it.

6 MS. BROWN: Sure. I think, if you
7 were going back to original principles in the
8 Double Jeopardy Clause, it -- it -- it
9 actually --

10 JUSTICE GORSUCH: You might be shocked
11 to hear I'm interested in that.

12 MS. BROWN: I -- I am somewhat
13 unsurprised, but it does refer to being twice
14 put in jeopardy of life or limb, not for the --

15 JUSTICE GORSUCH: For the same
16 offense.

17 MS. BROWN: Yes, for the same offense.
18 But Congress, of course, can define offenses
19 however it chooses to do so.

20 JUSTICE GORSUCH: Of course.

21 MS. BROWN: It can also define
22 punishments, so I think --

23 JUSTICE GORSUCH: But, once you've got
24 one offense, you get one set of punishments is
25 a -- is a natural conclusion from that text.

1 MS. BROWN: I think --

2 JUSTICE GORSUCH: And we have said
3 that twice at least.

4 MS. BROWN: I think what Justice
5 Scalia said when he was looking at the original
6 meaning of this is that, in fact, it was --
7 it -- the Double Jeopardy Clause should apply
8 to successive prosecutions but not to --

9 JUSTICE GORSUCH: And -- but that's
10 what --

11 MS. BROWN: -- cumulative punishments.

12 JUSTICE GORSUCH: Ah, I agree with
13 that, right? And his point was, well, there
14 might be multiple punishments for one
15 offense --

16 MS. BROWN: Mm-hmm.

17 JUSTICE GORSUCH: -- and that's fine.

18 MS. BROWN: Mm-hmm.

19 JUSTICE GORSUCH: And I -- of course,
20 fines, imprisonment, supervisory. Ah, but what
21 is a successive prosecution? Through most of
22 our history, you couldn't have a successive
23 prosecution. There was no joinder of offenses.
24 But now there is, and we use Blockburger to
25 tease it out.

1 And, here, we have, as you concede,
2 one offense. One offense. Forget about (j)
3 and (c). There's one offense. Why isn't
4 the -- the natural implication, again, in the
5 last -- I'll leave you alone after this, I
6 promise -- the natural implication and our
7 precedents that say you get one -- one set of
8 punishments the obvious implication? Or at
9 least we should acknowledge the tension between
10 our cases on this, which speak out of both
11 sides of their mouth?

12 MS. BROWN: So I -- again, I don't
13 think we would object to any kind of, you know,
14 footnote that suggests something like that that
15 could be revisited in future cases in which the
16 issue was briefed, but we would encourage the
17 Court to continue to adhere to the -- the
18 precedents that do apply the Blockburger
19 presumption and that do acknowledge that
20 Congress has the authority to punish in this --
21 in this way.

22 JUSTICE GORSUCH: Thank you, Ms.
23 Brown.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh?

1 Justice Barrett?

2 Justice Jackson?

3 MS. BROWN: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. McCloud.

7 ORAL ARGUMENT OF CHARLES L. MCCLOUD

8 COURT-APPOINTED AMICUS CURIAE

9 IN SUPPORT OF THE JUDGMENT BELOW

10 MR. MCCLOUD: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 Petitioner and his crew used guns to
13 rob Gamar Dafalla. That robbery violated
14 Section 924(c). When Mr. Dafalla resisted, one
15 of those guns was used to murder him. That
16 murder violated Section 924(j).

17 The Second Circuit correctly held that
18 Congress intended Petitioner's separate
19 violations to be punished separately, subject
20 to the sentencing schemes of both statutes, not
21 one or the other. Text, structure, and history
22 support that conclusion.

23 Petitioner and the government
24 disagree. They say that if Congress wanted to
25 authorize cumulative punishment, Blockburger

1 required it to speak more clearly. But this
2 Court has already rejected attempts to convert
3 Blockburger from a rule of thumb into a
4 conclusive presumption.

5 Precedent also shows that there's no
6 one-size-fits-all approach Congress must follow
7 in this area. Sometimes it's true that
8 Congress says punishment under one statute is
9 in addition to punishment under another
10 statute. But other times, like in Garrett,
11 Congress makes its intent clear through
12 statutory structure and purpose, creating
13 separate offenses targeting separate evils.

14 Here, Section 924(c)'s consecutive
15 sentence mandate makes clear that Congress
16 wanted that provision to impose additional
17 punishment on top of the punishment a defendant
18 received for any other offense. And after
19 Lora, Sections 924(c) and 924(j) are
20 undoubtedly different offenses. On top of
21 that, this Court typically assumes that
22 Congress acts rationally.

23 But Petitioner's and the government's
24 interpretation means that the way to avoid
25 Section 924(c)'s otherwise unavoidable

1 mandatory penalties is to kill someone.
2 Congress did not intend that irrational result,
3 and the Constitution doesn't require it.

4 This Court should interpret
5 Section 924(c) and 924(j) to complement each
6 other, not to conflict, and affirm the judgment
7 below.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Wouldn't you have an
10 easier argument for the -- for 924(c)(1)(A)(ii)
11 and (iii) than you would for (i)?

12 MR. McCLOUD: I -- I think that's
13 right. I heard my friends on the other side
14 concede that they now view those as
15 establishing different offenses that would not
16 be subject to the double jeopardy bar.

17 I think that with respect to the
18 statutory text, the argument is fairly similar.
19 It is true that there is use of the "in
20 addition to" language in (c)(1), but as we
21 pointed out in our brief, this is not a magic
22 words requirement. I heard Petitioner's
23 counsel suggest that Congress had made it
24 crystal-clear in (c)(1)(A) by using the words
25 "in addition to."

1 But the standard is not whether
2 Congress was crystal-clear. It's whether it
3 was clear. And I think it is clear from the
4 structure and from the purpose and the history
5 of these provisions that Congress viewed (c) as
6 imposing additional mandatory punishment on top
7 of any other punishment that a defendant
8 received for a relevant offense.

9 JUSTICE JACKSON: Isn't the question
10 here -- excuse me -- whether the defendant can
11 receive additional punishment under (j)? I
12 mean, fine, (c) might have been intended to be
13 stacked, (c).

14 But I thought the issue before us
15 today is whether you can punish under (j) given
16 the Blockburger test and the relationship
17 between (c) and (j).

18 MR. McCLOUD: So, Justice Jackson, I
19 have three responses to that question.

20 The first is, when the Court has
21 looked at this double jeopardy question in the
22 past, it has not typically asked whether there
23 was an authorization for a cumulative
24 conviction.

25 So in a case like Whalen, which is a

1 very good case for Petitioner, the Court asked
2 whether there was an authorization for a
3 cumulative sentence, and that's exactly the
4 same way that Petitioner phrased the question
5 presented in his petition. He said, can he
6 get two sentences for his two convictions.

7 JUSTICE JACKSON: Isn't that just sort
8 of, you know, language differences? I mean,
9 there is a fundamental understanding that
10 the Double Jeopardy Clause is about the
11 punishments -- the United States says, you
12 know, punishment, I say conviction -- versus
13 the sentence?

14 MR. McCLOUD: Well, I think that the
15 sentence is a form of punishment. It is, in
16 fact, probably the most critical form of
17 punishment that the defendant sees.

18 JUSTICE JACKSON: I understand. But
19 the Double -- you're not raising a double
20 jeopardy problem when you say that I have --
21 my sentence has been run concurrently or
22 consecutively. You're talking about something
23 different than the core constitutional mandate
24 that you cannot be punished/convicted for the
25 same offense.

1 MR. McCLOUD: And I -- I think the
2 core mandate goes to the question of whether
3 there is an authorization for punishment. I
4 think (d)(2) is such an authorization because
5 it speaks to the sentence.

6 I think that Petitioner's argument
7 on (d)(2) is just another variation in his
8 magic words requirement. He is saying that
9 not only must Congress say punishment is in
10 addition to but that it must say a conviction
11 is in addition to. And I don't see any basis
12 for that requirement in this Court's precedent.

13 JUSTICE KAVANAUGH: You said --

14 MR. McCLOUD: The last thing I would
15 say on this point --

16 JUSTICE KAVANAUGH: Well, you said you
17 had three responses. I wanted to make sure you
18 got them all out.

19 MR. McCLOUD: The third response is,
20 even if you think that (c)(1)(D)(ii) is not
21 dispositive on this question, it is certainly a
22 relevant piece of data about Congress's intent.
23 It shows that at least with respect to a large
24 subset of the (c) offenders, Congress thought
25 that there would be additional unavoidable

1 punishment. And there's no reason to think
2 that Congress --

3 JUSTICE JACKSON: Punish -- additional
4 unavoidable punishment relative to the
5 predicate offense in (c).

6 MR. McCLOUD: No, Your Honor. In
7 fact, Congress amended (d)(2) --

8 JUSTICE JACKSON: Yeah.

9 MR. McCLOUD: -- to specifically say
10 that it refers to any other offense, not just
11 the predicate, in response to this Court's
12 decision in Simpson and Busic.

13 So Congress was --

14 JUSTICE JACKSON: Any other offense.
15 And the question here is whether this is the
16 same offense.

17 MR. McCLOUD: And -- and I think
18 that's the relevance of Lora, Your Honor,
19 because Lora shows Congress intended these
20 provisions not simply to create a supercharged
21 version of (c) but instead for (j) to stand on
22 its own, to be a distinct offense that's
23 subject to its own distinct penalty scheme.

24 And so the best way, I think, to
25 reconcile what Congress was trying to do is, as

1 Justice Kavanaugh referenced earlier, Congress,
2 when it enacted (j), understood that it already
3 had the consecutive sentence mandate on the
4 books. It had enforced that multiple times
5 and, in fact, reinforced it when this Court
6 improperly narrowed (c) in Simpson and Busic.

7 And so, from Congress's perspective,
8 I think it would have been clearer that anyone
9 who receives the (j) conviction would get the
10 (j) penalties and the unavoidable (c)
11 penalties.

12 And there are really two possibilities
13 on the table here. One is Congress enacted
14 (j), but it intended for (c) to do most of the
15 work. I -- I think that's what I heard my
16 friend, Ms. Brown, suggest is going to be the
17 government's approach when these anomalies
18 arise. It will just focus on (c).

19 But that raises the question of why
20 would Congress go to the trouble to enact (j)
21 at all?

22 JUSTICE JACKSON: Because it was
23 trying to bring the death penalty into play.

24 MR. McCLOUD: And I think, Justice
25 Jackson, that answer would be plausible if all

1 Congress had done was create (j)(1). But, of
2 course, Congress didn't stop at (j)(1). It
3 enacted the manslaughter provisions in (j)(2).
4 And with respect to (j)(2), the anomalies are
5 truly anomalous.

6 JUSTICE JACKSON: I understand.

7 But Ms. Brown says that there was
8 already a pre-existing set of punishments and
9 circumstances for murder and manslaughter.

10 And Congress, I would think, could be
11 rationally understood to be trying to import
12 those in a situation in which a person had
13 committed the crime and the crime is the (c)
14 set of elements and murder or manslaughter
15 resulted.

16 MR. McCLOUD: I actually agree with
17 that explanation. I think what Congress was --

18 JUSTICE JACKSON: Then why would you
19 get two -- two convictions under those
20 circumstances?

21 MR. McCLOUD: Because Congress created
22 that (j) offense, the separate offense, in a
23 way that is independent of (c).

24 JUSTICE JACKSON: That just begs the
25 question. I'm suggesting it's not a separate

1 offense. I'm saying what Congress was doing
2 with (j) is just making available the penalties
3 that exist when, with respect to the one
4 offense, a murder or manslaughter happens, a
5 crime -- a death occurs.

6 MR. McCLOUD: So then, Justice
7 Jackson, I think I go back to the anomalies
8 that I raised with respect to (j)(2), which is,
9 you have a scenario where the maximum that is
10 authorized under (j)(2) for the manslaughter is
11 15 years or eight years, whereas the minimum
12 that would be required under (c) would be five
13 years currently, but it could be much higher
14 than that.

15 And then, of course, with respect
16 to the other (c) offenses, the machine gun,
17 et cetera, you would have a much more
18 significant anomaly.

19 Now I have heard Petitioner and the
20 government both to concede that those are
21 separate offenses, so I take the point that
22 that anomaly is not quite as powerful, but I
23 think that ultimately it shows that Congress
24 wanted these offenses to punish the full
25 gravity of the harm committed by someone who

1 carries a gun during a violent crime and
2 then uses that gun to commit a killing.

3 And I -- I want to be clear the
4 consequence of this position is not that every
5 single defendant will receive cumulative
6 punishment. I agree that it is ultimately up
7 to the sentencing court to decide what the
8 appropriate punishment is. And there may be
9 cases where a cumulative sentence is not
10 appropriate.

11 The question is, did Congress and
12 the Constitution bar district courts from
13 determining that, in some circumstances,
14 cumulative punishment was warranted?

15 And I think, based on the text,
16 structure, and history, for all the reasons
17 we've said, there is no evidence that Congress
18 wanted that bar.

19 JUSTICE KAVANAUGH: What do you say to
20 the government's point that this really isn't
21 going to prevent them -- or prevent a district
22 judge who wants to sentence heavily from
23 sentencing heavily in cases, and there's a
24 killing, so, presumably, it's going to be
25 sentenced heavily one would usually suspect?

1 MR. McCLOUD: I think that that is
2 right as a factual matter. I guess I would
3 push back and say the question is not can
4 district courts and prosecutors figure out a
5 work-around. The question is, what did
6 Congress intend?

7 And when you look at the provisions --

8 JUSTICE KAVANAUGH: I -- I agree with
9 that on the legal analysis. I'm just -- you
10 know, you've -- you've looked at this
11 carefully, kind of how this would play out.
12 And it seems like a district judge, like the
13 district judge in this case, seems to at least
14 have an idea of 50 years in mind, that that
15 would -- that would -- nothing we're talking
16 about here is really going to affect any of
17 that.

18 MR. McCLOUD: I think that's right.
19 And I don't have any basis, to be clear, to
20 question what Ms. Brown said about the
21 practical consequences going forward. I do
22 think this is something courts can work out.

23 I will note, you know, Petitioner
24 pointed out we didn't cite an example of one of
25 these anomalies. I think the explanation for

1 that is that prior to Lora, the government had
2 won the Lora argument in every court of appeals
3 except the Eleventh Circuit, which actually
4 agrees with the position I'm advocating on
5 double jeopardy, so you never had a sit- -- a
6 situation where someone was not getting the
7 (c) penalties along with the (j) penalties
8 because you can merge the two offenses.

9 JUSTICE KAVANAUGH: Right. So the
10 31 years reference is really just not accurate
11 in your view? Is that what you're saying
12 there?

13 MR. McCLOUD: Exactly, Your Honor

14 JUSTICE KAVANAUGH: And so all that
15 really matters is post-Lora in the Second
16 Circuit. Yeah. Okay.

17 MR. McCLOUD: Exactly. But -- but,
18 again, I'm not disputing that it is possible
19 under the government's position to construct an
20 appropriate sentence.

21 My point is I don't think that's
22 actually how Congress wanted this statutory
23 scheme to operate.

24 And I read this Court's precedents to
25 suggest that is the operative question, what

1 was Congress's intent, not simply what can the
2 government do operationally on that.

3 JUSTICE JACKSON: Can we take into
4 account 3553(a) when assessing that?

5 I mean, Congress was obviously
6 legislating against the backdrop of a system
7 in which it had already told district judges,
8 sentencing judges, to sentence proportionally
9 based on what happens in terms of the facts,
10 et cetera.

11 So, in that world, the anomalies that
12 you're identifying maybe Congress wasn't
13 worried about because it had already instructed
14 the court to make sure that the penalties in a
15 situation like this are higher.

16 MR. McCLOUD: I think that would be
17 plausible if all Congress had done was adopt
18 (j)(1), the murder provision, because those are
19 the sort of anomalies that a district court
20 could work out.

21 If you have a situation like the
22 day -- the (j)(2) penalties where you have a
23 floor that is very low and a ceiling under the
24 other statute that's very high, that is not
25 something a district court could really

1 reconcile.

2 But I take the point that 3553(a)
3 certainly was operating in the background. And
4 the Second Circuit noted that in the ordinary
5 course, of course, a district court is going to
6 take account of the (c) penalty in fashioning
7 the (j) remedy. I think that's certainly
8 appropriate for the court to do.

9 I'd like to turn just briefly to the
10 precedent and the question of the status of
11 Blockburger.

12 So, Justice Gorsuch, I actually read
13 this Court's cases to suggest that Blockburger
14 is not a substantive canon, it is more of a
15 linguistic canon, to borrow a phrase from
16 Justice Barrett.

17 It is a tool of statutory construction
18 that the court applies to determine Congress's
19 intent, but it is ultimately just a proxy for
20 Congress's intent.

21 And so Blockburger yields in the face
22 of clear evidence of a congressional intent to
23 authorize cumulative punishment.

24 JUSTICE GORSUCH: I still think,
25 though, you need some account why we have that

1 canon in this context but no others.

2 MR. McCLOUD: I agree. I think --

3 JUSTICE GORSUCH: Not many others. I
4 mean, there has to be an account, right? Why?

5 MR. McCLOUD: I agree. I think that
6 that is an area of this Court's double jeopardy
7 precedents that's under-theorized. There was a
8 pretty robust debate about the status of
9 Blockburger with respect to cumulative
10 punishment, in particular, in the '80s in cases
11 like Ball and Garrett and Albernaz, and I don't
12 know that the Court landed at any sort of
13 satisfactory --

14 JUSTICE GORSUCH: Like, in Hunter --
15 in Hunter, it just said it, and that's what
16 we've been doing ever since. But we also said
17 the opposite in Shiro and Pearce. So ---

18 MR. McCLOUD: That's right. And,
19 Justice Gorsuch, I don't have any particular
20 dog in that fight, so --

21 JUSTICE GORSUCH: Yeah, I didn't --
22 that's why I wasn't going to bother you with
23 it, but you -- you brought it up, counsel.

24 (Laughter.)

25 MR. McCLOUD: Oh, Your Honor, I

1 brought it up simply because --

2 JUSTICE GORSUCH: So you -- you -- you
3 put the dog in the fight this time.

4 (Laughter.)

5 MR. McCLOUD: Well, let me defend the
6 dog.

7 (Laughter.)

8 MR. McCLOUD: I referenced that
9 because I do think that it is a strong
10 indication that Petitioner cannot be right in
11 the suggestion that Congress really does have
12 to use the words "in addition to."

13 Text is one part of the analysis that
14 this Court has performed in double jeopardy
15 cases, but it is not the entirety of the
16 analysis. Courts look to things like statutory
17 structure and history and purpose.

18 And I think, if you look to that
19 evidence in this case, it suggests an intent
20 for cumulative punishment.

21 JUSTICE ALITO: Well, isn't the
22 answer -- isn't part of the answer that if you
23 don't have Blockburger, you have the vexing
24 question of defining what is an offense for
25 double jeopardy purposes? And the -- that

1 could be defined more narrowly than Blockburger
2 or it could be defined more broadly than --
3 than Blockburger?

4 MR. McCLOUD: I think that's right.
5 And I don't mean to suggest that Blockburger is
6 not useful. It's particularly useful in cases
7 like Ball, where Congress is essentially using
8 different words to focus on and criminalize the
9 same act.

10 But, in cases like this one or like in
11 Garrett, where you have a compound predicate
12 offense, I think Blockburger becomes less
13 useful. Justice Rehnquist wrote a number of
14 opinions expressing that view. The government
15 endorsed it in Garrett.

16 And I think it remains true that
17 Blockburger in such cases can sometimes obscure
18 what Congress intended rather than clarifying.

19 CHIEF JUSTICE ROBERTS: Justice
20 Thomas, anything further?

21 Justice Alito? No?

22 Justice Gorsuch?

23 Justice Kavanaugh?

24 Justice Barrett?

25 Justice Jackson?

1 Thank you, counsel.

2 MR. McCLOUD: Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: Rebuttal,
4 Mr. Larsen?

5 REBUTTAL ARGUMENT OF MATTHEW B. LARSEN
6 ON BEHALF OF THE PETITIONER

7 MR. LARSEN: Thank you, Mr. Chief
8 Justice. Just a couple of points to clarify.
9 Rutledge and Ball make very clear you
10 cannot impose two convictions if we have a
11 double jeopardy problem here. It's not just
12 about the sentence. And if you can't impose
13 two convictions, then we don't get to
14 (c)(1)(D)(ii) about how a sentence under (c)
15 should run. That's a procedural instruction,
16 not a substantive authorization to twice punish
17 one crime.

18 I did want to address Justice
19 Kavanaugh's point about notwithstanding. This
20 language was in the statute in Rutledge. The
21 drug statute in Rutledge said -- 8 -- 841,
22 notwithstanding any other provision of law, the
23 court shall not suspend this sentence.
24 Likewise, in the CCE statute, "this sentence
25 shall not be suspended." Each of those

1 sentence -- each of those statutes said you
2 cannot avoid a sentence.

3 Mr. Rutledge was convicted under both
4 of them. This Court said only one conviction
5 can stand. There's a double jeopardy problem
6 here, and there's no clear indication allowing
7 double punishment. That is the situation, Your
8 Honor.

9 This Court has traditionally
10 recognized that different statutes with
11 different penalties, even minimum penalties,
12 even ones that can't be avoided or suspended,
13 language like this does not speak to the
14 question here. The question is whether
15 Congress has clearly authorized twice punishing
16 one crime. It hasn't done so.

17 Amicus has pointed to no text in these
18 statutes saying so. He's pointed to no history
19 saying so. In fact, Congress specifically
20 rejected the proposal to double-punish a lethal
21 shooting when it wrote 924(j). It -- as this
22 Court explained in Lora, Congress decided, if
23 you're going to get sentenced to death or up to
24 life in prison under (j), we don't need to put
25 the five years on top. There's no point in

1 that.

2 Congress has not authorized two
3 punishments for the one crime here, Your
4 Honors. This Court should reverse the judgment
5 below.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. McCloud, this Court appointed you
9 to brief and argue this case as an amicus
10 curiae in support of the judgment below. You
11 have ably discharged that responsibility, for
12 which we are grateful.

13 The case is submitted.

14 (Whereupon, at 12:35 p.m., the case
15 was submitted.)

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Official - Subject to Final Review

1 1)(A)(ii) [1] 5:13 100 [1] 26:24 11:32 [2] 1:15 3:2 1112 [1] 41:11 12:35 [1] 76:14 15 [1] 65:11 1911 [1] 27:1 1994 [4] 4:12 12:16 14:10 30:19 19th [1] 27:2 1a [1] 43:5 2 20-year [1] 15:24 2005 [1] 4:15 2010 [1] 15:21 2025 [1] 1:11 24-5774 [1] 3:4 3 3 [1] 2:4 30 [1] 22:23 30-plus [1] 14:1 31 [3] 14:14 28:14 68:10 3553(a) [2] 69:4 70:2 36 [1] 2:8 5 50 [1] 67:14 50-year [1] 31:25 56 [1] 2:12 7 7 [1] 1:11 71 [1] 8:11 74 [1] 2:15 8 8 [1] 74:21 80s [1] 71:10 841 [1] 74:21 9 924 [1] 19:23 924(c) [2] 3:24,25 8:1,23 10:23 11:7 19:21 25:19 28:17,22 36:14,16,24 37:1,6 39:25 40:9,22 56:14 57:19 58:5 924(c)'s [5] 12:16 36:20 37:2 57:14,25 924(c)(1) [1] 4:25 924(c)(1)(A) [4] 3:12 11:10 36:6 43:1 924(c)(1)(A)(ii) [2] 5:12 58:10 924(c)(1)(B) [1] 50:2 924(c)(1)(D)(ii) [3] 8:12 43:3,24 924(c)(5) [2] 4:16,20 924(c)(D)(1)(ii) [1] 30:21 924(g) [2] 5:23 39:24 924(j) [20] 3:13,21 4:4,12 5:1 8:23 12:14 28:16,22 36:	7,15 40:7,21,25 41:16 48:4 56:16 57:19 58:5 75:21 924(j)'s [1] 4:7 94 [3] 31:1 43:21 44:7 A a.m [2] 1:15 3:2 abandon [1] 27:4 ability [3] 40:21 47:15,18 ably [1] 76:11 above-entitled [1] 1:13 absolutely [2] 10:14 22:15 account [9] 4:8 13:1 38:5 41:16 47:20 69:4 70:6,25 71:4 accurate [1] 68:10 acknowledge [3] 27:7 55:9,19 acknowledges [2] 3:21 50:14 acknowledging [1] 52:19 act [1] 73:9 action [1] 22:8 activate [1] 7:8 acts [1] 57:22 actual [1] 20:5 actually [7] 16:4 47:7 53:9 64:16 68:3,22 70:12 add [1] 26:7 adding [1] 49:22 addition [20] 4:1,3 8:5 20:4,7 25:21 43:7,17,23 44:5,21,24,25 48:25 57:9 58:20,25 61:10,11 72:12 additional [7] 33:10 34:6 57:16 59:6,11 61:25 62:3 address [7] 5:6 7:16 10:21 14:14 36:22 49:9 74:18 addressing [1] 9:3 adhere [1] 55:17 adhered [1] 26:24 adopt [1] 69:17 advocating [1] 68:4 affect [1] 67:16 affirm [1] 58:6 afraid [3] 24:4,10,12 agree [8] 35:16 37:21 54:12 64:16 66:6 67:8 71:2,5 58:5 agrees [1] 68:4 Ah [5] 5:16 20:24 32:4 54:12,20 ahead [1] 18:19 AIMEE [3] 1:20 2:6 36:1 Albernaz [1] 71:11 aligned [1] 38:22 aligns [1] 29:25 ALITO [17] 13:20 14:3,19,25 15:5,8 16:9,13,17 18:4,5 19:19,25 22:20 50:6 72:21 73:21 Alito's [3] 22:10 34:3 42:5 allow [3] 11:1 12:21 34:9 allowed [2] 25:4 34:6 allowing [1] 75:6	allows [1] 17:15 alone [1] 55:5 already [11] 30:20,22 31:4,5 43:23 44:18 57:2 63:2 64:8 69:7,13 although [1] 30:7 amend [1] 8:20 amended [1] 62:7 amicus [12] 1:24 2:11 3:21 6:19 20:5 30:16 35:17 36:25 49:11 56:8 75:17 76:9 ammunition [3] 4:17 8:8 23:3 among [1] 30:10 ample [1] 18:24 analysis [13] 29:7 38:1,19 40:12,15 41:25 49:6 50:1 51:10,11 67:9 72:13,16 analyzing [1] 41:20 anomalies [7] 49:11 63:17 64:4 65:7 67:25 69:11,19 anomalous [1] 64:5 anomaly [2] 65:18,22 another [6] 20:20 36:24 47:5 51:12 57:9 61:7 answer [7] 5:17 31:22 51:23,24 63:25 72:22,22 answering [1] 29:2 answers [1] 51:19 anyway [2] 29:22 52:21 appeal [1] 20:11 appeals [2] 36:19 68:2 APPEARANCES [1] 1:17 appears [1] 7:25 appellate [1] 20:7 appendix [1] 43:6 applied [2] 38:20 51:6 applies [4] 4:1,3 31:21 70:18 apply [8] 38:1 41:11 48:25 49:4,7 50:1 54:7 55:18 applying [3] 40:23 52:21,23 appointed [1] 76:8 approach [5] 41:1,2,3 57:6 63:17 approaching [1] 37:13 appropriate [5] 47:24 66:8,10 68:20 70:8 area [2] 57:7 71:6 aren't [1] 35:5 argue [1] 76:9 argued [1] 45:13 argument [24] 1:14 2:2,5,9,13 3:4,7 10:9,11 13:12,13 29:1 32:10 33:4 36:1 38:25 39:21 47:1 56:7 58:10,18 61:6 68:2 74:5 arguments [1] 37:1 arise [1] 63:18 armor-piercing [3] 4:17 8:8 23:3 arrive [1] 46:14 asks [1] 23:25	aspects [1] 25:8 assessing [1] 69:4 Assistant [2] 1:18,20 assume [3] 14:4 31:11 47:13 assumes [1] 57:21 attempts [1] 57:2 authoritative [1] 52:6 authority [1] 55:20 authorization [8] 30:13 42:22 43:13 59:23 60:2 61:3,4 74:16 authorize [8] 37:8 43:1 46:17 49:21,23 50:21 56:25 70:23 authorized [9] 36:13 37:4,25 48:1,19 51:13 65:10 75:15 76:2 authorizes [2] 41:8 48:4 authorizing [5] 43:5 45:3 46:6,7 48:24 available [1] 65:2 avoid [4] 35:9 39:10 57:24 75:2 avoidance [1] 51:8 avoided [1] 75:12 B back [10] 16:7 22:9 29:5 32:12 51:1 52:5,25 53:7 65:7 67:3 backdrop [1] 69:6 background [1] 70:3 Ball [5] 45:10,17 71:11 73:7 74:9 bankruptcy [1] 15:25 bar [3] 58:16 66:12,18 BARRETT [12] 1:3 3:4 12:12 19:12 32:7,11,22 34:14 38:10 56:1 70:16 73:24 Barrett's [1] 38:8 based [3] 32:8 66:15 69:9 basis [2] 61:11 67:19 becomes [1] 73:12 begs [1] 64:24 behalf [8] 1:19,21 2:4,7,15 3:8 36:2 74:6 believe [2] 24:14 49:16 believing [1] 33:2 below [7] 1:24 2:12 32:7 56:9 58:7 76:5,10 best [3] 17:23 42:24 62:24 bet [1] 20:11 better [3] 25:3 40:5 41:23 between [3] 42:25 55:9 59:17 Blockburger [26] 26:1,24,25 36:8 37:11 39:4,14 49:18,25 50:24 52:6 54:24 55:18 56:25 57:3 59:16 70:11,13,21 71:9 72:23 73:1,3,5,12,17 books [1] 63:4 borrow [1] 70:15	both [16] 3:22 8:21,23 17:17 19:2 35:2 42:14 45:8 48:2 49:19 52:17,20 55:10 56:20 65:20 75:3 bother [1] 71:22 bound [2] 16:9 35:6 brandishing [4] 5:15,21,22 6:9 brief [4] 37:18 38:18 58:21 76:9 briefed [1] 55:16 briefing [3] 3:23 15:19 32:8 briefly [1] 70:9 briefs [1] 5:6 bring [1] 63:23 broaden [1] 43:16 broadly [1] 73:2 brought [2] 71:23 72:1 BROWN [49] 1:20 2:6 35:22 36:1,4 37:16 38:9 39:21 42:8,12,15,18 43:12 44:1,12,19,22,25 45:7,24 46:5,15 47:10,14 48:3,10,17,20 49:9 50:19,24 51:3,17 52:22 53:6,12,17,21 54:1,4,11,16,18 55:12,23 56:3 63:16 64:7 67:20 built [1] 41:25 Busic [4] 8:14,16 62:12 63:6 C c)'s [4] 12:24 30:2 48:6,9 c)(1) [4] 10:18 30:24 31:7 58:20 c)(1)(A) [7] 17:18 45:2,4 46:7,9,20 58:24 c)(1)(D)(ii) [11] 6:18 7:15 30:22 31:8,18,21 44:9,13 46:16 61:20 74:14 c)(5) [5] 8:7,10 17:18 43:15,16 came [5] 1:13 8:10,12,14 32:5 cannot [7] 7:17 35:2 52:1 60:24 72:10 74:10 75:2 canon [3] 70:14,15 71:1 capping [1] 34:8 card [1] 21:19 care [1] 34:21 careful [2] 16:24 23:22 carefully [1] 67:11 carries [1] 66:1 carrying [1] 11:22 Case [31] 3:4 4:18 5:20,25 6:5,9 10:17 11:19 12:5 15:19,25 21:4 22:13 23:3 26:25 27:1,24 29:25 34:13,20 38:2 45:10 52:2,24 59:25 60:1 67:13 72:19 76:9,13,14 cases [17] 25:12,17 27:4 33:19 47:8 51:4,9 55:10,
---	--	--	--	--

Official - Subject to Final Review

15 66:9,23 70:13 71:10 72:15 73:6,10,17 caught ^[1] 18:14 caused ^[1] 28:23 cautioned ^[1] 29:2 CCE ^[1] 74:24 ceiling ^[1] 69:23 Century ^[1] 27:2 certain ^[2] 42:9 47:17 certainly ^[5] 43:14 52:22 61:21 70:3,7 cetera ^[2] 65:17 69:10 change ^[1] 22:23 CHARLES ^[3] 1:23 2:10 56:7 check ^[1] 28:1 CHIEF ^[18] 3:3,9 17:12 18:2 20:18 23:6 28:8 32:21 35:20 36:4 50:3 55:24 56:4,10 73:19 74:3,7 76:6 choose ^[2] 47:18,23 chooses ^[1] 53:19 chose ^[2] 28:16 40:25 Circuit ^[16] 15:21 28:11,20 29:4,13 31:24 32:1,10,15 33:2 39:16 47:3 56:17 68:3,16 70:4 circumstance ^[1] 34:4 circumstances ^[6] 9:15 42:10 47:24 64:9,20 66:13 cite ^[2] 17:17 67:24 cited ^[3] 20:5 26:25 35:17 citing ^[1] 27:1 clarification ^[1] 32:25 clarify ^[1] 74:8 clarifying ^[1] 73:18 clarity ^[1] 37:7 classic ^[1] 22:8 Clause ^[12] 12:7 25:9 27:17,25 51:6,25 52:7 53:2,8 54:7 60:10 clauses ^[1] 17:5 clear ^[36] 3:19 4:1 7:2,17,23 8:19 11:14 12:1,11 14:20 15:15 16:6 17:1,10 19:4 25:3 30:12 31:3 32:5 33:24 37:9,14 38:11 39:12,19 43:23 51:10 57:11,15 59:3,3 66:3 67:19 70:22 74:9 75:6 clearer ^[2] 6:20 63:8 clearly ^[6] 6:17 13:18 17:20 23:13,13 39:11 57:1 75:15 coasts ^[1] 21:14 code ^[1] 18:9 collapse ^[1] 51:11 come ^[5] 23:14 24:2,18 50:18 51:24 comes ^[3] 23:15 24:20 30:19 commit ^[6] 6:4 18:16,19 19:23 25:20 66:2 commits ^[2] 18:11 19:21	committed ^[3] 23:21 64:13 65:25 committing ^[1] 18:7 compare ^[1] 42:25 compatriots ^[1] 22:6 compelled ^[3] 29:14 33:2 53:1 complement ^[1] 58:5 compound ^[1] 73:11 Con ^[1] 24:21 concede ^[3] 55:1 58:14 65:20 conceded ^[3] 44:5,18,18 conclusion ^[4] 28:19 29:14 53:25 56:22 conclusive ^[1] 57:4 concurrent ^[3] 8:25 42:7 45:12 concurrently ^[7] 6:24 7:6 9:13,25 43:25 46:3 60:21 conduct ^[4] 9:23 18:23 22:1 23:19 confirms ^[2] 4:20 37:7 conflict ^[1] 58:6 Congress ^[103] 3:16,19 4:6,12,15,20 6:17 8:2,19 11:2,14 12:11,14,17 13:3,10,17 14:10,13,15 16:23,25 17:21 21:17 22:12,22 23:11,20,21 25:3 28:7,16,20 30:3,14,19 31:1,13,16 33:5,11 36:13,15 37:4,10 40:25 41:3,7,15 42:6 43:15,19,21 44:6 46:22 48:22 49:20 50:21 51:12 53:18 55:20 56:18,24 57:6,8,11,15,22 58:2,23 59:2,5 61:9,24 62:2,7,13,19,25 63:1,13,20 64:1,2,10,17,21 65:1,23 66:11,17 67:6 68:22 69:5,12,17 72:11 73:7,18 75:15,19,22 76:2 Congress's ^[7] 17:23 37:6 61:22 63:7 69:1 70:18,20 congressional ^[3] 14:20 15:15 70:22 consecutive ^[10] 8:18 11:18 30:23 36:20 40:24 41:6 42:15,19 57:14 63:3 consecutively ^[5] 10:3,25 11:24 20:22 60:22 consequence ^[1] 66:4 consequences ^[1] 67:21 considered ^[1] 4:13 consistent ^[5] 16:21 40:15,16 45:9 48:12 consistently ^[2] 26:23 28:1 constitute ^[1] 8:18 Constitution ^[3] 23:21 58:3 66:12 constitutional ^[4] 10:16 51:8,10 60:23 constitutionally ^[1] 24:24	constraining ^[1] 41:5 construct ^[1] 68:19 construction ^[3] 38:21 39:22 70:17 context ^[2] 37:24 71:1 continue ^[1] 55:17 continuing ^[2] 21:15,20 contrary ^[1] 3:25 contrasted ^[1] 21:24 control ^[1] 22:12 controls ^[2] 3:18 37:11 convert ^[1] 57:2 convicted ^[5] 10:18 18:15 19:2 36:23 75:3 conviction ^[15] 10:16 11:8,10 12:2,4 16:7 36:22 45:6,8,19 59:24 60:12 61:10 63:9 75:4 convictions ^[14] 9:7,12,15,22,25 10:24 11:1,21 35:2 47:15 60:6 64:19 74:10,13 convicts ^[1] 6:11 core ^[2] 60:23 61:2 correct ^[15] 10:22 11:4 21:1 22:14,18 23:5 31:6,15 34:11,23 35:15 45:24 46:5,15 48:10 correctly ^[1] 56:17 couldn't ^[3] 43:19,21 54:22 counsel ^[8] 17:13 35:21 50:4 56:5 58:23 71:23 74:1 76:7 country ^[1] 21:14 counts ^[2] 47:17,19 couple ^[3] 23:15 49:10 74:8 course ^[15] 5:20 6:13 21:25 22:3,7 44:9 48:24 52:13 53:18,20 54:19 64:2 65:15 70:5,5 COURT ^[7] 1:1,14 3:10 4:11 5:24 6:2,5 7:17 8:15 12:25 13:11,16 17:9 19:7 20:12 21:16,22 24:25 25:1,5,11 26:23 27:2,12,25 29:24 30:1 32:7 33:25 36:5,19 37:8,22 38:4 39:1,2,11,23 40:10,14,19 41:13,24 45:9,17 51:9 52:23 55:17 56:11 57:2,21 58:4 59:20 60:1 63:5 66:7 68:2 69:14,19,25 70:5,8,18 71:12 72:14 74:23 75:4,9,22 76:4,8 Court's ^[11] 4:23 16:21 21:23 37:12,21 58:8 61:12 62:11 68:24 70:13 71:6 Court-appointed ^[4] 1:23 2:11 3:21 56:8 courts ^[10] 16:22,24 23:18,22 28:2 50:20 66:12 67:4,22 72:16 crazy ^[1] 20:9 create ^[3] 28:20 62:20 64:1 created ^[1] 64:21	creating ^[1] 57:12 crew ^[1] 56:12 crime ^[24] 8:6 10:19 11:11 17:1 18:7 21:1,13 22:11 24:23 25:20,22 31:17 33:14 43:8,9 52:12,16 64:13,13 65:5 66:1 74:17 75:16 76:3 crimes ^[4] 5:9 21:11 28:21 30:9 criminal ^[5] 18:9 21:15,20 23:19 26:12 criminalize ^[1] 73:8 critical ^[1] 60:16 crystal-clear ^[3] 8:20 58:24 59:2 cumulative ^[26] 36:9,14 37:4,8,25 43:2 45:3 46:8,17 48:1,5,18,25 49:21 50:22 51:7 54:11 56:25 59:23 60:3 66:5,9,14 70:23 71:9 72:20 cumulatively ^[1] 4:16 curiae ^[4] 1:24 2:11 56:8 76:10 curiosity ^[1] 18:6 currently ^[1] 65:13	detailed ^[1] 3:23 determine ^[1] 70:18 determined ^[1] 9:11 determining ^[1] 66:13 differ ^[1] 38:8 difference ^[1] 34:12 differences ^[1] 60:8 different ^[21] 5:9 17:3,19 23:9 28:21,21 33:15,21,22 36:17,18 37:1 40:25 41:7 44:13 57:20 58:15 60:23 73:8 75:10,11 direction ^[3] 23:9 36:13 41:8 disagree ^[2] 39:2 56:24 disagrees ^[1] 39:1 discern ^[1] 22:17 discharge ^[2] 5:15 6:9 discharged ^[1] 76:11 discovered ^[1] 27:23 discretion ^[1] 41:5 discussed ^[2] 20:7 28:25 discusses ^[1] 38:18 discussion ^[1] 21:23 dismiss ^[2] 47:15,16 disparities ^[1] 35:9 dispositive ^[1] 61:21 dispute ^[1] 30:10 disputing ^[1] 68:18 distinct ^[2] 62:22,23 distinction ^[1] 42:25 distinguish ^[1] 21:3 distinguishing ^[1] 9:6 district ^[11] 31:24 32:9 66:12,21 67:4,12,13 69:7,19,25 70:5 Dixon ^[2] 26:3 52:9 dog ^[3] 71:20 72:3,6 doing ^[4] 46:7 50:15 65:1 71:16 done ^[9] 4:22 26:13,14 34:25 35:5 52:24 64:1 69:17 75:16 Dore ^[1] 22:4 double ^[40] 3:15 9:21 12:6 18:9 25:9,12 26:15 27:13,15,25 30:9 33:23,25 40:1,13,17 41:22 45:14,18 50:17 51:5,6,25 52:7,7 53:2,8 54:7 58:16 59:21 60:10,19,19 68:5 71:6 72:14,25 74:11 75:5,7 double-punish ^[14] 3:20 7:18 8:21 16:6 17:1,10,25 23:11 24:23 25:2 30:14 31:14 33:25 75:20 double-punished ^[2] 31:3,5 drug ^[4] 11:12,22 43:9 74:21 dual ^[5] 11:1,8,10,21 26:8 during ^[2] 25:25 66:1 DWAYNE ^[1] 1:3
--	---	--	--	---

Official - Subject to Final Review

E each [4] 19:4 58:5 74:25 75:1 earlier [3] 42:1 49:14 63:1 early [1] 51:4 easier [1] 58:10 egregious [1] 34:23 eight [1] 65:11 either [6] 5:18 9:2 19:6 34:25 38:20 47:22 element [4] 5:22 6:3 33:10 49:19 elements [7] 15:10,13 18:12,17 33:8 49:22 64:14 Eleventh [1] 68:3 elsewhere [1] 7:25 emphasizes [1] 6:19 enact [1] 63:20 enacted [4] 36:15 63:2,13 64:3 enacting [1] 46:22 encourage [1] 55:16 ended [1] 29:4 endorsed [1] 73:15 enforced [1] 63:4 engage [1] 18:23 English [1] 44:3 enough [9] 6:18 14:17 17:9 43:11,14,19,20 44:24 45:1 entered [1] 35:2 enterprise [2] 21:15,21 entire [1] 13:22 entirely [1] 16:20 entirety [1] 72:15 era [1] 25:25 error [1] 45:14 especially [2] 25:7 49:13 ESQ [4] 2:3,6,10,14 essentially [2] 39:22 73:7 establishing [1] 58:15 et [2] 65:17 69:10 even [11] 4:8 8:13 17:5,5 26:25 32:2 35:10,17 61:20 75:11,12 everybody [1] 23:25 everybody's [1] 23:10 everyone [1] 24:15 evidence [3] 66:17 70:22 72:19 evils [1] 57:13 exactly [8] 10:10 16:1 17:14 23:4 50:10 60:3 68:13,17 example [4] 16:12 20:5 35:18 67:24 examples [2] 8:1 17:16 except [1] 68:3 excuse [2] 45:11 59:10 exercise [1] 44:8 exist [1] 65:3 existed [1] 46:21 explain [3] 10:21 29:8 40:	20 explained [7] 4:6 5:24 7:17 12:25 15:22 39:1 75:22 explanation [2] 64:17 67:25 exposure [1] 47:21 express [1] 17:14 expressing [1] 73:14 expression [1] 17:23 expressly [3] 36:13 40:14 41:13 extent [1] 38:10 F face [1] 70:21 faces [1] 19:13 facing [1] 39:24 fact [14] 11:16 17:3 19:3 20:4 29:1 33:6,14 43:16 51:12 54:6 60:16 62:7 63:5 75:19 factor [1] 50:20 facts [2] 34:5 69:9 factual [1] 67:2 fair [2] 14:6 22:20 fairly [1] 58:18 fall [1] 40:3 falls [1] 40:13 fan [2] 24:13,15 far [1] 38:20 fashioning [1] 70:6 fatal [7] 3:17 4:14,16 12:23 13:11 30:15 35:14 favor [1] 14:8 favours [1] 29:9 feature [1] 33:18 features [1] 37:3 Federal [1] 1:18 feel [1] 28:11 feels [1] 19:7 felonies [1] 26:19 felony [4] 4:2 6:2,4,5 felt [1] 22:24 fewer [1] 15:12 fight [2] 71:20 72:3 figure [1] 67:4 filed [1] 32:8 finally [1] 31:20 find [4] 6:12 20:13 32:15 40:20 fine [3] 51:13 54:17 59:12 finer [1] 54:20 firearm [3] 11:22 28:22,24 first [3] 42:23 44:5 59:20 fit [1] 14:5 five [12] 12:17,19 13:5,9 14:11,12 18:13,15 34:13,15 65:12 75:25 five-year [1] 16:1 fixed [2] 12:16 14:13 floor [2] 14:13 69:23 flow [1] 9:24 focus [2] 63:18 73:8 focused [2] 36:19 44:13	focusing [2] 28:22,23 follow [2] 32:24 57:6 footnote [2] 52:19 55:14 foresaw [1] 10:10 Forget [1] 55:2 form [3] 51:8 60:15,16 forward [1] 67:21 found [3] 12:18 15:19 20:21 fraud [1] 15:25 freedom [2] 25:8 51:22 friend [2] 42:19 63:16 friends [1] 58:13 full [2] 38:5 65:24 function [1] 23:20 fundamental [1] 60:9 funny [1] 27:22 further [1] 73:20 future [1] 55:15 G Gamar [1] 56:13 Garrett [9] 20:23,25 21:5,9 37:22 57:10 71:11 73:11,15 General [1] 1:20 generally [2] 11:21 50:21 get-out-of-jail-free [1] 21:19 gets [4] 19:17,17,18 47:16 getting [4] 8:9 19:19 34:14 68:6 given [5] 20:17 31:5 32:10 35:11 59:15 giving [1] 20:9 Gorsuch [41] 23:7,8,23 24:5,8,11,18 25:10,24 26:20 27:10,14,17,19 28:4 50:9,10,13,23,25 51:15,18 53:3,10,15,20,23 54:2,9,12,17,19 55:22 70:12,24 71:3,14,19,21 72:2 73:22 got [6] 13:15 29:6 38:24 51:19 53:23 61:18 government [16] 17:17 19:7,15 20:11 29:2 38:24 39:10,18 45:13 47:14 50:13 56:23 65:20 68:1 69:2 73:14 government's [8] 13:13 39:7 40:17 47:6 57:23 63:17 66:20 68:19 Grady [3] 25:25 26:4 52:10 grateful [1] 76:12 gravity [1] 65:25 great [1] 24:13 greater [10] 14:21 15:9,24 16:3 18:19 23:12 25:14 26:9,14 35:8 greater-included [1] 6:1 guess [5] 32:25 33:3 34:4 44:17 67:2 guilty [1] 47:16 gun [19] 3:11 4:16 5:4,8,18	6:10 8:4,7 11:10 13:10 14:18 25:20,21 35:14,15 49:14 65:16 66:1,2 guns [2] 56:12,15 H hand [1] 25:17 happen [1] 10:11 happened [3] 22:4,21 39:20 happening [2] 20:6 35:18 happens [3] 47:17 65:4 69:9 harm [1] 65:25 harmless [2] 32:17 45:13 harms [2] 34:22 37:2 harshly [1] 25:8 he'll [2] 10:22 19:9 hear [2] 3:3 53:11 heard [4] 58:13,22 63:15 65:19 heavily [3] 66:22,23,25 heightened [1] 38:14 held [3] 37:22 45:9 56:17 helpful [1] 42:3 helps [1] 22:22 high [1] 69:24 higher [3] 19:9 65:13 69:15 historical [1] 24:21 historically [2] 24:22 26:17 history [11] 26:11 36:10 37:6,24 38:24 54:22 56:21 59:4 66:16 72:17 75:18 Honor [40] 5:3,19 6:8 7:7,21 8:14 9:1,16,19 11:19 13:25 14:8,14 15:3,18 16:2,20 18:24 20:1 21:10 24:14 26:18 27:9,24 29:10,20,24 30:8 31:8,20 33:14 34:24 35:16 37:16 62:6,18 68:13 71:25 74:2 75:8 Honor's [1] 30:1 Honors [5] 4:6,19 19:12 23:16 76:4 Honors' [1] 33:19 however [2] 5:24 53:19 Hunter [10] 25:16,18,18,23,25 26:5 52:5,5 71:14,15 hypothetical [2] 49:15,17 I idea [5] 12:6 40:12 52:25 53:1 67:14 identifying [1] 69:12 ii [1] 5:14 iii [3] 5:12,15 58:11 illegal [1] 6:15 immunity [1] 38:12 implausible [2] 40:6,23 implication [5] 37:17 48:21 55:4,6,8 import [2] 21:18 64:11 important [1] 12:13	importation [1] 21:12 impose [5] 4:14 11:16 57:16 74:10,12 imposed [11] 6:23,25 7:6,10,12 10:16 31:10,16 46:2 47:8,19 imposing [1] 59:6 imprisonment [10] 6:23,25 7:6,9,11 41:10 44:10 46:2 52:14 54:20 improperly [1] 63:6 include [3] 4:7 45:8 52:14 included [1] 6:12 includes [2] 15:10 25:14 including [1] 39:25 incorporate [1] 30:2 incorporates [1] 39:24 incorporating [2] 4:10 41:17 incorrect [1] 45:18 Indeed [2] 4:11 7:7 independent [1] 64:23 indicate [2] 13:18 49:20 indicated [1] 22:20 indicates [2] 17:20 36:17 indicating [2] 17:25 25:4 indication [17] 3:19 7:18 8:19 12:11 13:3,17 16:6 17:2,10 19:4 30:12 33:24 37:10 42:9,20 72:10 75:6 indications [1] 41:14 individual [1] 25:8 inferred [3] 14:22 15:1,17 injustice [2] 18:25 20:15 instance [3] 38:6 42:23 46:8 instead [4] 19:13 40:23 41:4 62:21 instructed [1] 69:13 instruction [2] 31:9 74:15 insufficient [1] 12:18 intend [4] 3:16 50:21 58:2 67:6 intended [9] 21:17 28:20 33:5 41:15 56:18 59:12 62:19 63:14 73:18 intent [13] 11:1 17:24 22:17 31:13 36:18 49:21 57:11 61:22 69:1 70:19,20,22 72:19 interchangeably [1] 12:6 interested [1] 53:11 interpret [4] 13:21 23:24 28:13 58:4 interpretation [10] 26:2 38:4,6 40:5 41:21,23 49:12 50:16 52:8 57:24 interpreting [1] 28:14 intertwined [2] 39:13 40:1 introductory [1] 49:3 involve [1] 37:1 involving [1] 5:17 irrational [1] 58:2 isn't [10] 3:20 5:5 19:25 30:
--	---	--	---	---

Official - Subject to Final Review

16 55:3 59:9 60:7 66:20 72:21,22 issue [5] 9:21 34:20 45:2 55:16 59:14 issued [1] 25:25 itself [4] 13:2 38:22 51:25 53:2 J j)'s [1] 33:5 j)(1 [3] 64:1,2 69:18 j)(2 [5] 64:3,4 65:8,10 69:22 JACKSON [35] 9:5,17,20 10:3,6,13 32:23,24 33:16 34:2,16,18 35:4,19 38:7 45:5,21,25 46:11 56:2 59: 9,18 60:7,18 62:3,8,14 63: 22,25 64:6,18,24 65:7 69:3 73:25 Jackson's [1] 47:2 jail [2] 18:15 20:10 jeopardy [35] 3:15 9:21 12: 7 18:9 25:9,13 27:15,25 30:9 33:23 40:2,13,17 41: 22 45:14,18 50:17 51:5,6, 25 52:7 53:2,8,14 54:7 58: 16 59:21 60:10,20 68:5 71: 6 72:14,25 74:11 75:5 joinder [2] 26:11 54:23 Judge [11] 15:20,22 16:5 20:9 31:24 32:9,19 35:13 66:22 67:12,13 judges [3] 35:6 69:7,8 judges' [1] 35:11 judgment [6] 1:24 2:12 56: 9 58:6 76:4,10 judicial [1] 41:5 jurisprudence [2] 16:21 18:10 jury [1] 6:11 Justice [203] 1:21 3:3,9 4: 24 5:11,14 6:16,22 7:19,22 8:10,22 9:5,9,17,20 10:1,3, 5,6,8,13,20,22 11:6,13,20 13:20 14:3,19,25 15:5,8,24 16:9,13,17 17:12 18:2,3,4, 5 19:19,25 20:18,18,20,25 21:3,6 22:9,10,16,20,25 23: 4,6,6,7,8,23 24:5,8,11,18 25:10,24 26:20 27:10,14, 17,19 28:4,8,10 29:11,15, 18,21 30:18,25 31:8,12,23 32:14,17,20,21,21,23,24 33:1,16 34:2,2,16,18,25 35: 4,19,20 36:5 37:13 38:7,23 42:2,5,11,13,17 43:10,18 44:2,17,20,23 45:5,21,25 46:11,23 47:2,12,25 48:8, 11,18 49:8,13 50:3,5,6,7,8, 9,10,13,23,25 51:15,18 53: 3,10,15,20,23 54:2,4,9,12, 17,19 55:22,24,24 56:1,2,4, 11 58:9 59:9,18 60:7,18 61:13,16 62:3,8,14 63:1,22,	24 64:6,18,24 65:6 66:19 67:8 68:9,14 69:3 70:12, 16,24 71:3,14,19,21 72:2, 21 73:13,19,19,21,22,23, 24,25 74:3,8,18 76:6 K Kagan [7] 23:6 47:25 48:8, 11,18 49:8 50:8 KAVANAUGH [47] 6:16,22 7:19,22 8:10,22 9:9 10:1,5, 8,22 28:9,10 29:11,15,18, 21 30:18,25 31:12,23 32: 14,17,20 33:1 38:23 42:2, 11,13,17 43:10,18 44:2,17, 20,23 46:23 47:12 55:25 61:13,16 63:1 66:19 67:8 68:9,14 73:23 Kavanaugh's [1] 74:19 Keep [1] 29:18 key [1] 20:2 kill [3] 8:8 12:19 58:1 killing [5] 13:1 20:10 30:4 66:2,24 kind [13] 12:5 26:2 29:13 38:11,13,14 41:2,24 42:9 46:13 49:10 55:13 67:11 knows [2] 4:20 31:1 L landed [1] 71:12 lane [1] 25:1 language [33] 7:8 8:15,16 17:14,18,19,20 21:7 36:17 37:19 38:14 43:1,3,4,5,13, 15 44:3,21 46:6,13,16,19 48:4,13,14,21,24 49:3 58: 20 60:8 74:20 75:13 large [1] 61:23 largely [1] 50:19 LARSEN [80] 1:18 2:3,14 3: 6,7,9 5:2,13,16 6:21 7:7, 21,24 8:13 9:1,16,19 10:7, 13 11:5,9,14 12:3 13:25 14:6,24 15:2,7,18 16:11,15, 19 17:16 18:22 19:24 20:1, 24 21:2,5,9 22:15,19 23:2, 5,9,15 24:3,6,9,13,20 25: 18 26:17,21 27:12,16,18, 22 28:5,6 29:9,12,17,19,23 30:24 31:7,15 32:4,16,18 33:13,17 34:11,17,24 35: 16 74:4,5,7 Larsen's [1] 51:23 Last [3] 31:23 55:5 61:14 later [3] 8:11 39:9 51:9 Laughter [4] 50:12 71:24 72:4,7 law [10] 7:4,5 12:5 17:7 26: 5 32:10 44:11 46:25 52:3 74:22 laws [1] 23:18 lawyer [1] 39:10 least [6] 52:19 53:3 54:3	55:9 61:23 67:13 leave [1] 55:5 left [1] 39:15 legal [1] 67:9 legislating [1] 69:6 legislature [2] 24:24 28:2 legislatures [1] 24:22 length [2] 11:3,6 lenity [7] 24:11,14,16,17 38: 18,19 51:20 less [3] 19:22 35:14 73:12 lesser [2] 6:12 25:14 lesser-included [12] 3:12 4:25 5:25 6:6,15 14:21 15: 12,23 23:12 26:9 36:7 49: 5 lesser-punished [1] 22: 11 lethal [4] 4:4,21 13:15 75: 20 lethally [2] 3:13 14:18 liberty [1] 51:22 life [8] 4:7 12:22 13:5 19:14 26:19 41:10 53:14 75:24 light [1] 19:18 likely [2] 20:12 47:10 Likewise [1] 74:24 limb [1] 53:14 line [1] 16:20 linguistic [1] 70:15 literally [1] 21:11 litigated [1] 23:10 litigating [1] 32:6 little [1] 52:25 loaded [1] 8:7 locate [1] 28:16 long [1] 51:12 longstanding [1] 40:17 look [11] 12:15,15 13:8,22 14:6 17:22 22:20 42:5 67: 7 72:16,18 looked [4] 21:6,16 59:21 67:10 looking [4] 22:21 37:23 41: 20 54:5 Lora [35] 4:6,11 10:9,11 12: 25 13:12 28:13,14,15 29:1, 6,8,9,14 30:1 32:5,8,25 33: 2,4 38:25 39:17,21 40:10, 12,19 41:13,21 47:4 57:19 62:18,19 68:1,2 75:22 losing [1] 26:19 lot [1] 8:9 low [1] 69:23 lower [6] 16:4 28:10 34:9 40:8,22,22 M machine [6] 5:4,8,17 6:10 49:14 65:16 made [4] 36:16 39:19 51:9 58:23 magic [2] 58:21 61:8 mandate [5] 40:25 57:15	60:23 61:2 63:3 mandates [1] 41:7 mandatory [4] 36:20 40:24 58:1 59:6 manslaughter [8] 5:7 41:4, 11 64:3,9,14 65:4,10 many [2] 27:2 71:3 marijuana [2] 21:12,18 Massachusetts [1] 27:1 matter [5] 1:13 33:22 44:3 47:6 67:2 matters [1] 68:15 MATTHEW [5] 1:18 2:3,14 3:7 74:5 max [1] 16:1 maximum [8] 15:9,11,24 18:12,17 19:9 34:22 65:9 McCLOUD [32] 1:23 2:10 56:6,7,10 58:12 59:18 60: 14 61:1,14,19 62:6,9,17 63: 24 64:16,21 65:6 67:1,18 68:13,17 69:16 71:2,5,18, 25 72:5,8 73:4 74:2 76:8 mean [17] 6:19 7:2 8:11 28: 11 34:21 35:5 38:9 44:2 45:6 46:18,24 53:4 59:12 60:8 69:5 71:4 73:5 meaning [2] 3:15 54:6 meaningful [1] 38:8 means [2] 13:21 57:24 meant [4] 14:5 33:9,11 48: 8 merge [1] 68:8 might [8] 38:11 47:20 49: 12 51:24 52:14 53:10 54: 14 59:12 mind [1] 67:14 minimum [11] 8:17 12:17 13:9,10,14 17:5 34:13,19 36:20 65:11 75:11 minimums [2] 40:24 41:6 minutes [1] 22:5 missing [1] 27:8 Missouri's [1] 25:19 Mm [1] 21:2 Mm-hmm [4] 42:17 48:17 54:16,18 months [1] 22:7 most [6] 20:12 26:18,18 54: 21 60:16 63:14 mouth [3] 52:18,20 55:11 Ms [45] 35:22 36:4 37:16 38: 9 39:21 42:8,12,18 43:12 44:1,12,19,22,25 45:7,24 46:5,15 47:10,14 48:3,10, 17,20 49:9 50:19,24 51:3, 17 52:22 53:6,12,17,21 54: 1,4,11,16,18 55:12,22 56:3 63:16 64:7 67:20 much [4] 8:11 26:10 65:13, 17 multi-state [1] 21:13 multiple [13] 4:14,21 8:2 12:12,24 14:20 15:15 17:	15,21 20:14 44:6 54:14 63: 4 murder [14] 6:2,2,4,5 19:21, 23 41:3,9 56:15,16 64:9,14 65:4 69:18 must [5] 17:11 23:13 57:6 61:9,10 N namely [1] 17:17 narrowed [1] 63:6 narrowly [1] 73:1 natural [3] 53:25 55:4,6 nature [2] 21:8 47:9 necessarily [4] 5:2 6:12 26:12 42:21 necessary [4] 7:23,24 35:8 48:21 need [6] 11:2,4 12:19 19:8 70:25 75:24 needed [1] 46:13 needs [1] 17:1 neither [1] 3:24 never [1] 68:5 New [4] 1:18,19 30:22 32: 12 next [2] 3:4 21:20 normal [1] 50:15 normally [1] 23:23 note [1] 67:23 noted [3] 4:11 31:24 70:4 nothing [6] 3:22 10:19 25: 22 31:19 36:9 67:15 noting [1] 39:5 notwithstanding [7] 7:3,4 17:6 44:10 46:25 74:19,22 nowadays [2] 13:8 26:23 Number [2] 23:17 73:13 O object [3] 52:18,23 55:13 obligations [1] 35:11 obscure [1] 73:17 observed [1] 27:3 obstruction [1] 15:23 obvious [1] 55:8 obviously [1] 69:5 occur [3] 22:3 47:22 49:12 occurred [1] 33:10 occurs [1] 65:5 October [1] 1:11 odd [7] 14:12 29:12,16,17, 22,24 34:4 offenders [1] 61:24 offense [68] 3:12 4:9 5:1 6: 1,1,7,15 7:13 9:23 11:12, 18,22 12:8,10 14:22 15:9, 12,23,25 16:3,5 18:11,13, 18,20 25:14 27:20,21 33: 23 34:23 36:7 39:6 40:7 41:17 42:20 45:4 46:9,9, 10 48:2,6,15,25 49:6 50:18, 22 52:2 53:16,17,24 54:15 55:2,2,3 57:18 59:8 60:25
---	---	--	--	---

62:5,10,14,16,22 64:22,22 65:1,4 72:24 73:12 offenses [25] 3:14 19:2 23: 12 26:10,12 37:3 39:3,14 41:4,12 44:6 45:2 49:18, 22,24 50:2 53:18 54:23 57: 13,20 58:15 65:16,21,24 68:8 Okay [7] 11:13 29:16 39:6 42:2 45:21 49:8 68:16 omitted [1] 36:16 once [2] 26:12 53:23 one [69] 3:17 5:6,14 6:4 8:4 12:9 13:15 15:10 16:7,7 17:1 18:18 19:6,10 21:11, 11,11,12,18,25 22:7,12 23: 1,17 24:23 25:13,16 26:13 27:20,20 30:14,15 31:17, 17 33:13,13 34:14,25 35: 17 39:6 40:4,5 47:23 50: 17 51:11,19 52:12,16 53: 24,24 54:14 55:2,2,3,7,7 56:14,21 57:8 63:13 65:3 66:25 67:24 72:13 73:10 74:17 75:4,16 76:3 one-size-fits-all [1] 57:6 ones [1] 75:12 Only [14] 4:15,17 11:3 18: 18 20:16 22:22 25:6 30:11 34:12 45:3,15 46:3 61:9 75:4 open [1] 39:15 opening [1] 38:18 operate [1] 68:23 operating [1] 70:3 operationally [1] 69:2 operative [2] 7:8 68:25 opinion [1] 39:9 opinions [1] 73:14 opportunities [1] 27:3 opportunity [1] 26:15 opposite [2] 36:12 71:17 oral [11] 1:14 2:2,5,9 3:7 10: 9,11 29:1 36:1 38:25 56:7 order [2] 4:20 46:14 ordered [1] 8:2 ordinary [1] 70:4 original [3] 48:15 53:7 54: 5 originally [1] 51:3 other [33] 6:25 7:3,5 9:8 14: 3 17:6 18:16 19:5 21:13 25:12,17 27:4 34:7 35:6, 11 41:12 42:11 44:11,16 46:25 49:20 51:24 56:21 57:10,18 58:6,13 59:7 62: 10,14 65:16 69:24 74:22 others [2] 71:1,3 otherwise [3] 40:6 45:16 57:25 out [14] 18:5 25:1 30:4 52: 17,20 54:25 55:10 58:21 61:18 67:4,11,22,24 69:20 outside [1] 28:17	over [2] 22:23 26:24 overcome [2] 27:8,11 overcoming [1] 42:4 overlapping [1] 33:9 overruled [2] 26:3 52:10 own [7] 14:17 46:18 48:6,9 49:2 62:22,23 P P-e-e-l [1] 15:20 p.m [1] 76:14 PAGE [2] 2:2 43:5 part [7] 29:7 38:17 45:19, 20 49:1 72:13,22 particular [4] 13:21 34:13 71:10,19 particularly [1] 73:6 parties [1] 30:10 passage [2] 14:7,7 passed [2] 22:13,18 past [1] 59:22 Pearce [5] 25:15 26:6 52: 11 53:4 71:17 Peel [2] 15:20 34:3 penalties [20] 4:7,10 23:20 30:3,4 33:22 37:2 39:25 41:10,18 58:1 63:10,11 65: 2 68:7,7 69:14,22 75:11,11 penalty [16] 12:16,22 14:22 15:1,3,3,4,9,11 16:4 18:17 28:21 41:9 62:23 63:23 70: 6 performed [1] 72:14 perhaps [1] 5:18 permits [2] 10:24 11:7 person [9] 6:23 7:1 18:6,7, 11,14 19:1 25:2 64:12 perspective [2] 47:6 63:7 petition [1] 60:5 Petitioner [16] 1:4,19,22 2: 4,8,15 3:8 36:3 56:12,23 60:1,4 65:19 67:23 72:10 74:6 Petitioner's [5] 38:17 56: 18 57:23 58:22 61:6 phrase [2] 30:13 70:15 phrased [1] 60:4 phraseology [1] 20:2 piece [1] 61:22 pile [3] 16:25 19:4 30:6 place [2] 13:24 18:25 places [2] 23:16 41:12 plain [1] 27:24 plausible [2] 63:25 69:17 play [2] 63:23 67:11 please [3] 3:10 36:5 56:11 point [14] 6:17 13:6 33:1 35:1 37:14 47:2 54:13 61: 15 65:21 66:20 68:21 70:2 74:19 75:25 pointed [7] 19:15 30:17,19 58:21 67:24 75:17,18 pointing [2] 9:9 46:19 points [3] 36:12 40:11 74:8	posited [1] 16:2 position [9] 22:22 28:12 29:25 38:7 40:18 48:12 66: 4 68:4,19 Posner [2] 15:20 16:5 possess [1] 8:4 Possessing [1] 3:11 possession [5] 6:14 8:21 11:11 13:11,14 possibilities [1] 63:12 possibility [2] 26:8 40:20 possible [3] 26:10 51:19 68:18 possibly [1] 21:17 post-Lora [1] 68:15 posture [1] 6:13 powerful [1] 65:22 powers [3] 23:18 24:7 51: 21 practical [1] 67:21 practice [2] 24:21 47:11 pre-existing [1] 64:8 Precedent [3] 57:5 61:12 70:10 precedents [5] 53:4 55:7, 18 68:24 71:7 precise [1] 30:7 Precisely [3] 9:16,19 27:18 predicate [13] 36:15,16 37: 3 45:4 46:10 48:2,5,6,9,15 62:5,11 73:11 premise [1] 23:11 premises [1] 41:25 present [2] 13:24 26:22 presented [3] 5:5 34:5 60: 5 presumably [1] 66:24 presume [2] 51:1,2 presuming [1] 50:20 presumption [22] 3:15,18 23:14 24:3 25:11 26:3 27: 6,7,11 36:8,11 37:11 42:4 50:14,16 51:21 52:3,4,21, 23 55:19 57:4 presuppose [2] 31:21,22 pretty [1] 71:8 prevail [1] 32:3 prevent [2] 66:21,21 principle [1] 25:7 principles [1] 53:7 prior [1] 68:1 prison [6] 4:8 12:20,22 13: 5 19:14 75:24 probably [1] 60:16 problem [7] 14:15,15,16 39:10 60:20 74:11 75:5 procedural [1] 74:15 prohibits [1] 25:13 prolong [1] 43:20 promise [1] 55:6 proper [1] 36:22 proportionally [1] 69:8 proposal [3] 4:13 12:23 75: 20	prosecution [2] 54:21,23 prosecutions [1] 54:8 prosecutors [1] 67:4 protect [1] 18:25 protected [1] 25:9 provide [2] 14:20 35:7 provided [1] 43:8 provision [14] 7:4,5 8:24 9: 2,8 13:21 17:6 36:24 42: 19 44:11 46:25 57:16 69: 18 74:22 provisions [9] 13:23 35:6 36:21,21 42:14 59:5 62:20 64:3 67:7 proxy [1] 70:19 punish [8] 4:16 14:17 30:3 55:20 59:15 62:3 65:24 74: 16 punished [9] 7:12 12:7 19: 9,12,16 27:20 40:8 52:1 56:19 punished/convicted [1] 60:24 punishing [2] 23:18 75:15 punishment [62] 3:22 4:1, 3 8:5 12:2,4,24 17:4 18:13 19:5 24:25 25:21,22 26:8, 15 30:23 33:5,7,11,13 34:1, 7,9 37:25 40:8,22 42:22 43:7,8,17 44:23,25 45:3,6, 7,19,22 48:19,24 52:13 56: 25 57:8,9,17,17 59:6,7,11 60:12,15,17 61:3,9 62:1,4 66:6,8,14 70:23 71:10 72: 20 75:7 punishment/conviction [1] 46:4 punishments [42] 3:16 4: 14,21 8:3,9 9:7 11:15 12: 12 14:21 15:16 16:22 17:5, 15,21 25:13 26:9 28:3 36: 9,14 37:5,9 43:2 45:10 46: 8,18 48:1,5 49:21 50:17,22 51:7 52:12,13,16 53:22,24 54:11,14 55:8 60:11 64:8 76:3 purpose [3] 57:12 59:4 72: 17 purposes [10] 3:14 30:10 33:23 39:4 41:22 45:14,18 49:18,24 72:25 push [2] 52:25 67:3 put [8] 24:1 31:2 43:22 48: 23 49:2 53:14 72:3 75:24 putting [2] 24:17 43:21 Q question [45] 5:5 7:11,13, 15 9:14,20 10:17 12:10 22: 10 23:8 26:21 29:3 30:7, 11 31:11,13,18,22 38:4 39: 23 40:2,14 42:6 44:14,14 47:5 49:14 59:9,19,21 60: 4 61:2,21 62:15 63:19 64:	25 66:11 67:3,5,20 68:25 70:10 72:24 75:14,14 questions [6] 4:23 34:3 37: 12 39:13 40:2 58:8 quite [2] 47:3 65:22 R raised [1] 65:8 raises [1] 63:19 raising [1] 60:19 rape [2] 6:1,3 rather [4] 14:13 19:17 21: 23 73:18 rationality [2] 57:22 64:11 reach [1] 29:14 read [4] 39:17 44:8 68:24 70:12 reading [3] 20:16,17 45:6 real [1] 47:8 realistic [1] 35:10 really [12] 26:10 34:19 39:5 45:15 48:8 63:12 66:20 67: 16 68:10,15 69:25 72:11 reason [4] 4:5 29:23 40:4 62:1 reasonable [2] 20:17 47:3 reasonably [2] 39:16,17 reasons [2] 39:5 66:16 rebutts [1] 36:10 REBUTTAL [3] 2:13 74:3, 5 receive [3] 40:8 59:11 66:5 received [2] 57:18 59:8 receives [1] 63:9 recognize [1] 5:5 recognized [1] 75:10 reconcile [3] 25:16 62:25 70:1 refer [1] 53:13 reference [1] 68:10 referenced [2] 63:1 72:8 referring [1] 5:3 refers [1] 62:10 regardless [1] 32:1 regime [1] 12:24 Rehnquist [1] 73:13 reinforced [1] 63:5 reinforces [1] 28:19 rejected [10] 4:13 12:22 13: 12 32:9 40:11,11 41:24 52: 9 57:2 75:20 relationship [2] 39:13 59: 16 relative [2] 9:11 62:4 relevance [1] 62:18 relevant [3] 13:23 59:8 61: 22 relies [1] 36:25 relying [1] 38:12 remains [1] 73:16 remand [1] 32:19 remedy [1] 70:7 remember [1] 12:13 repeating [1] 51:1
---	--	--	---	--

replicate ^[1] 30:6 reply ^[1] 37:17 require ^[6] 17:4,4 35:7 37:14 38:13 58:3 required ^[3] 37:8 57:1 65:12 requirement ^[5] 5:21 37:19 58:22 61:8,12 requires ^[2] 10:23 22:2 requiring ^[2] 8:17,17 reserved ^[1] 30:8 resist ^[1] 38:16 resisted ^[2] 37:17 56:14 respect ^[8] 49:13 58:17 61:23 64:4 65:3,8,15 71:9 respectfully ^[1] 31:8 Respondent ^[4] 1:7,22 2:7 36:2 response ^[2] 61:19 62:11 responses ^[2] 59:19 61:17 responsibility ^[1] 76:11 result ^[3] 20:15 35:14 58:2 resulted ^[2] 26:19 64:15 results ^[1] 40:7 results-based ^[1] 49:10 reverse ^[1] 76:4 review ^[2] 20:8,12 revisited ^[1] 55:15 RICO ^[1] 21:1 rise ^[1] 40:3 rises ^[1] 40:13 rob ^[1] 56:13 robbery ^[4] 48:16 56:13 robbing ^[1] 22:5 ROBERTS ^[14] 3:3 17:12 18:2 20:18 23:6 28:8 32:21 35:20 50:3 55:24 56:4 73:19 74:3 76:6 robust ^[1] 71:8 room ^[1] 24:15 rooted ^[1] 51:20 rule ^[6] 26:24 27:4 37:15 38:12,19 57:3 ruling ^[1] 30:1 run ^[14] 6:24 7:6 9:10,12,13, 25 10:25 11:17,23 31:10 43:24 46:2 60:21 74:15 running ^[1] 20:22 Rutledge ^[7] 17:8 27:3 33:20 74:9,20,21 75:3 S safeguard ^[1] 20:6 safeguards ^[2] 18:24 20:14 same ^[30] 3:14 5:16 7:13 9:23,23 10:19 12:8 16:5 17:19 19:3 30:9,11 33:8,23 38:1 41:10 44:4 45:15 46:14 49:6 50:1,2,22 52:2 53:15,17 60:4,25 62:16 73:9 satisfactory ^[1] 71:13 saying ^[15] 4:24 9:4 11:1 13:8 17:6 29:4 30:17 33:4	39:18 46:12 61:8 65:1 68:11 75:18,19 says ^[15] 3:22 15:3 16:5 18:14 20:9 25:1 28:7 30:22 31:5,18 43:6 52:1 57:8 60:11 64:7 scale ^[2] 23:25 24:1 Scalia ^[1] 54:5 scenario ^[17] 5:7,19 9:3 11:17 16:2 17:8 18:1 19:1,16 21:10,25 22:23 33:10,12 34:3 46:14 65:9 scheme ^[7] 14:23 15:1,3 33:7,12 62:23 68:23 schemes ^[2] 28:22 56:20 Second ^[13] 28:11,19 29:3,13 31:23 32:1,15 33:2 39:16 47:3 56:17 68:15 70:4 seconds ^[1] 22:5 section ^[8] 7:8 36:6 41:11 56:14,16 57:14,25 58:5 Sections ^[1] 57:19 see ^[4] 42:24 43:13 46:6 61:11 seem ^[2] 14:12 44:4 seems ^[4] 9:8 44:3 67:12,13 sees ^[1] 60:17 sending ^[1] 16:6 sense ^[8] 15:10 16:14,15,18,19 18:21 22:11 39:6 sent ^[1] 10:24 sentence ^[38] 11:4,16,17,23 12:4 17:7 19:18 31:10,16,25 32:12 35:13 36:22 40:24 41:6 42:19 44:15 45:8 46:1,3 47:19 57:15 60:3,13,15,21 61:5 63:3 66:9,22 68:20 69:8 74:12,14,23,24 75:1,2 sentenced ^[7] 13:4 14:10 19:22 40:21 42:21 66:25 75:23 sentences ^[11] 9:10,24 20:21 35:7 41:8 42:16 44:16 45:11,12 47:7 60:6 sentencing ^[13] 10:15 35:5,9,11,13 36:21 41:1 47:17,21 56:20 66:7,23 69:8 separate ^[15] 9:12,15,22,24 33:7 39:3,14 49:18,24 56:18 57:13,13 64:22,25 65:21 separated ^[1] 28:17 separately ^[1] 56:19 separation ^[3] 23:17 24:7 51:20 separation-of-powers ^[1] 25:6 seriousness ^[3] 4:9 13:1 41:16 serve ^[1] 45:16 serving ^[1] 45:15 set ^[6] 23:19 30:4 53:24 55:	7 64:8,14 sets ^[2] 52:12,16 Seventh ^[1] 15:21 several ^[2] 21:20 28:17 shall ^[6] 6:24 7:6 43:24 46:2 74:23,25 share ^[1] 37:3 Shiro ^[5] 25:15 26:5 52:11 53:5 71:17 shocked ^[1] 53:10 shooting ^[8] 3:17 4:4,15,21 12:23 22:2 30:15 75:21 short ^[2] 4:19 17:14 shot ^[1] 22:4 show ^[1] 11:2 shown ^[3] 6:9,10,11 shows ^[4] 57:5 61:23 62:19 65:23 side ^[2] 24:17 58:13 sides ^[3] 52:17,20 55:11 signaled ^[1] 33:4 significant ^[1] 65:18 silence ^[1] 7:17 silencer ^[2] 5:4 6:10 silent ^[1] 7:16 similar ^[2] 43:14 58:18 simple ^[3] 6:14 22:8 35:1 simply ^[5] 17:24 30:16 62:20 69:1 72:1 Simpson ^[4] 8:14,16 62:12 63:6 since ^[5] 14:2 22:21 52:9,10 71:16 single ^[2] 21:25 66:5 sit ^[1] 68:5 situation ^[19] 5:17 15:16 16:3 19:11 20:21 21:24 22:8 23:1 25:23 33:19,20 34:8,22 35:12 64:12 68:6 69:15,21 75:7 skilled ^[1] 18:23 Solicitor ^[1] 1:20 somebody ^[1] 20:10 somehow ^[1] 14:5 someone ^[13] 7:12 10:17 12:11,19 13:4 14:10,17 19:16 35:13,14 58:1 65:25 68:6 sometimes ^[3] 25:11 57:7 73:17 somewhat ^[1] 53:12 somewhere ^[1] 24:19 sorry ^[4] 10:5 30:21 42:12 43:19 sort ^[3] 60:7 69:19 71:12 SOTOMAYOR ^[15] 10:20 11:6,13,20 20:19,20,25 21:3,6 22:9,16,25 23:4 31:9 50:7 sovereign ^[1] 38:12 spanning ^[2] 21:14 22:7 speaking ^[6] 5:20 6:3 11:3 12:1 24:22 26:18 speaks ^[3] 23:13 25:23 61:	5 special ^[1] 30:13 specific ^[2] 45:1 46:8 specifically ^[8] 4:13 28:16 32:11 37:4 38:15 39:8 62:9 75:19 specified ^[1] 42:7 spoken ^[2] 52:17,19 stack ^[1] 11:15 stacked ^[2] 48:7 59:13 stand ^[2] 62:21 75:5 standard ^[2] 41:3 59:1 starts ^[1] 7:3 statement ^[2] 37:15 38:11 STATES ^[5] 1:1,6,15 3:5 60:11 status ^[2] 70:10 71:8 statute ^[21] 8:1,15,20 11:25 13:17 15:4 19:8 20:16 21:8 22:13,17 37:20 41:23 46:22 48:22 57:8,10 69:24 74:20,21,24 statutes ^[14] 3:23 9:3 12:14 17:4 21:16 23:24 33:15,21 35:1,3 56:20 75:1,10,18 statutory ^[20] 18:8 26:1 35:6 36:10 37:23 38:3,5,15,21 39:22 40:12 41:15 50:15 51:11 52:8 57:12 58:18 68:22 70:17 72:16 still ^[4] 19:13 26:5 41:22 70:24 stop ^[2] 51:16 64:2 strange ^[1] 13:7 Strictly ^[2] 5:20 6:3 strong ^[1] 72:9 structural ^[1] 36:25 structure ^[7] 36:10 37:24 56:21 57:12 59:4 66:16 72:17 structured ^[1] 44:15 subject ^[6] 12:24 19:5 28:21 56:19 58:16 62:23 submitted ^[2] 76:13,15 subsection ^[9] 4:10 6:24 7:10 41:18 45:23 46:1 48:23 49:1,3 subsections ^[2] 28:18 37:2 subset ^[1] 61:24 substantive ^[3] 21:1 70:14 74:16 successive ^[3] 54:8,21,22 succinctly ^[1] 39:11 sufficient ^[5] 8:18 30:5 35:8 46:17 51:14 suggest ^[6] 51:5 58:23 63:16 68:25 70:13 73:5 suggested ^[1] 49:11 suggesting ^[2] 38:10 64:25 suggestion ^[2] 14:9 72:11 suggests ^[2] 55:14 72:19 supercharged ^[1] 62:20	superfluity ^[2] 46:21,24 superfluous ^[1] 46:20 supervised ^[1] 52:15 supervisory ^[1] 54:20 supplant ^[1] 33:6 supplement ^[1] 33:6 supplemental ^[1] 32:8 support ^[8] 1:22,24 2:8,12 36:3 56:9,22 76:10 supporting ^[1] 39:18 Suppose ^[4] 15:5,6 18:6 32:2 SUPREME ^[2] 1:1,14 suspect ^[1] 66:25 suspend ^[2] 17:7 74:23 suspended ^[2] 74:25 75:12 system ^[1] 69:6 T table ^[1] 63:13 talked ^[3] 10:2,9 23:16 talks ^[1] 12:3 targeting ^[1] 57:13 tease ^[1] 54:25 tension ^[1] 55:9 term ^[11] 6:20,25 7:5,9,11 14:13 41:9 43:24 44:10 46:2 52:14 terms ^[2] 47:7 69:9 test ^[1] 59:16 text ^[18] 17:22,24 20:17 36:10,12,17 37:20,23 38:15,21 41:15 48:22 53:25 56:21 58:18 66:15 72:13 75:17 that'll ^[1] 47:7 themselves ^[3] 4:9 30:5 45:11 there's ^[22] 3:15 5:10 10:15 13:3,16 14:9 17:18 19:3 20:11 37:9 48:4,10,14 50:14,16 55:3 57:5 62:1 66:23 75:5,6,25 therefore ^[2] 3:14 26:2 they've ^[1] 30:19 thinking ^[2] 25:15,15 thinks ^[1] 34:14 third ^[1] 61:19 THOMAS ^[8] 4:24 5:11,14 18:3 37:13 50:5 58:9 73:20 Thomas's ^[1] 49:13 though ^[2] 42:4 70:25 three ^[2] 59:19 61:17 thumb ^[4] 23:24 24:1,2 57:3 timing ^[2] 11:3,7 today ^[3] 12:15 13:22 59:15 together ^[2] 14:5 40:3 took ^[1] 51:22 tool ^[3] 26:1 52:8 70:17 toolkit ^[1] 38:5
---	--	--	--	---

Official - Subject to Final Review

top ^[7] 13:6 14:11 19:4 57:17,20 59:6 75:25 totally ^[1] 23:9 traditionally ^[1] 75:9 trafficking ^[2] 11:12 43:9 treated ^[1] 26:1 treating ^[1] 52:6 trench ^[1] 25:7 tried ^[1] 19:2 triggers ^[1] 36:8 trouble ^[1] 63:20 true ^[3] 57:7 58:19 73:16 truly ^[1] 64:5 try ^[2] 26:13,13 trying ^[4] 28:13 62:25 63:23 64:11 Tuesday ^[1] 1:11 turn ^[1] 70:9 twice ^[7] 12:8 27:20 52:153:13 54:3 74:16 75:15 two ^[39] 3:16 8:1 9:7,7,11,14,22,24 10:24,24 15:13 17:3,16 18:12,16 21:10 25:13 30:8 39:13 40:2,11 42:25 44:4 49:17,22 50:17 51:19 52:11,12,16 60:6,6 63:12 64:19,19 68:8 74:10,13 76:2 typically ^[2] 57:21 59:22 U U.S ^[1] 15:20 ultimately ^[5] 19:12 39:15 65:23 66:6 70:19 unanimously ^[1] 13:12 unavoidable ^[4] 57:25 61:25 62:4 63:10 under ^[46] 3:22 5:21 6:23 7:10,12,12 9:15,21 10:18 11:16 12:6 13:4 19:5,9,13,16,17,20 31:10,16,17 34:13,25 35:2 36:23 47:20,22,24 49:12,16,16 50:24 51:5 52:6 57:8,9 59:11,15 64:19 65:10,12 68:19 69:23 74:14 75:3,24 under-theorized ^[1] 71:7 underlying ^[5] 4:2 8:6 11:11,18 25:22 understand ^[6] 33:3 34:4 47:1,2 60:18 64:6 understanding ^[1] 60:9 understood ^[4] 28:1 37:7 63:2 64:11 undoubtedly ^[1] 57:20 unfortunate ^[1] 28:12 UNITED ^[5] 1:1,6,15 3:5 60:11 unjust ^[1] 22:24 unless ^[2] 3:18 10:15 unlike ^[1] 21:10 unreasonable ^[1] 20:13 unrelated ^[1] 28:18 unsurprised ^[1] 53:13	unwarranted ^[1] 35:9 up ^[11] 12:22 13:5 19:13 29:4 32:5,25 41:8 66:6 71:23 72:1 75:23 useful ^[3] 73:6,6,13 uses ^[3] 14:18 41:3 66:2 using ^[3] 3:13 58:24 73:7 utter ^[1] 24:12 V vacated ^[1] 16:8 valid ^[1] 10:15 validly ^[1] 9:11 variation ^[1] 61:7 veers ^[1] 25:1 verdicts ^[1] 47:16 versed ^[1] 18:8 version ^[2] 25:19 62:21 versus ^[5] 3:4 9:7 21:1 33:17 60:12 vexing ^[1] 72:23 view ^[5] 19:20 33:3 58:14 68:11 73:14 viewed ^[2] 41:14 59:5 violate ^[1] 25:6 violated ^[2] 56:13,16 violating ^[3] 19:21,23 24:6 violation ^[4] 3:11,13 4:4 22:3 violations ^[1] 56:19 violence ^[3] 8:6 11:11 43:8 violent ^[1] 66:1 voluntary ^[1] 5:7 W waiting ^[1] 32:6 wake ^[1] 47:4 wanted ^[12] 3:20 8:21 12:11 13:19 14:10 16:25 56:24 57:16 61:17 65:24 66:18 68:22 wants ^[2] 4:22 66:22 warranted ^[1] 66:14 Washington ^[3] 1:10,21,23 way ^[13] 5:18 6:4 29:3 38:8 42:24 48:12 50:1,2 55:21 57:24 60:4 62:24 64:23 weird ^[1] 16:3 welcome ^[3] 4:23 37:12 58:8 Whalen ^[7] 5:25 6:6 23:17 25:5 30:14 33:20 59:25 whatever ^[2] 10:4 28:6 whereas ^[1] 65:11 Whereupon ^[1] 76:14 whether ^[16] 9:10,12,23 30:8 36:23 39:24 42:6 59:1,2,10,15,22 60:2 61:2 62:15 75:14 whole ^[1] 6:16 will ^[8] 6:11 11:17 26:3 30:23 32:19 63:18 66:5 67:23 wish ^[1] 17:25	within ^[1] 22:5 without ^[3] 4:10 23:24 41:17 won ^[1] 68:2 wonder ^[1] 26:4 wondering ^[3] 25:24 26:16 27:10 word ^[2] 24:12 45:22 words ^[13] 9:8 12:4 14:3 27:24 34:7 39:7 42:11 51:1 58:22,24 61:8 72:12 73:8 work ^[4] 46:7 63:15 67:22 69:20 work-around ^[1] 67:5 works ^[1] 14:8 world ^[2] 47:8 69:11 worried ^[1] 69:13 Wow ^[1] 18:14 write ^[3] 4:15 23:18 39:9 written ^[1] 14:2 wrote ^[6] 4:12 12:14,21 30:3 73:13 75:21 Y yada ^[2] 52:15,15 year ^[2] 15:11 18:18 years ^[23] 12:17,19 13:5 14:2,11,14 15:13 18:13,16 21:20 22:7,23 26:25 28:14 34:14,15 41:9 65:11,11,13 67:14 68:10 75:25 years-long ^[1] 21:13 yields ^[1] 70:21 York ^[2] 1:19,19
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