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IN THE SUPREME COURT OF THE UNITED STATES

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BRIAN RUSSELL DOLAN, :

Petitioner, : No. 09-367

v. :

UNITED STATES. :

- - - - - x

Washington, D.C.

Tuesday, April 20, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:11 a.m.

APPEARANCES:

PAMELA S. KARLAN, ESQ., Stanford, California; on behalf of the Petitioner.

TOBY J. HEYTENS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	PAMELA S. KARLAN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	TOBY J. HEYTENS, ESQ.	
7	On behalf of the Respondent	28
8	REBUTTAL ARGUMENT OF	
9	PAMELA S. KARLAN, ESQ.	
10	On behalf of the Petitioner	55
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

(10:11 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 09-367, Dolan v. United States.

Ms. Karlan.

ORAL ARGUMENT OF PAMELA S. KARLAN

ON BEHALF OF THE PETITIONER

MS. KARLAN: Thank you, Mr. Chief Justice, and may it please the Court:

The Mandatory Victim Restitution Act makes restitution a mandatory part of a defendant's sentence for certain crimes, and it sets out two paths by which a district court can meet its responsibilities.

First, section 3663A(a)(1) authorizes district courts to impose restitution when sentencing a defendant; that is, at the same time that they impose terms of imprisonment, fines, probation, or the like. Second, section 3664(d)(5) of the Act allows final determination of the amount of restitution to occur during a period not to exceed 90 days.

Once those periods and the general deadlines for correcting or appealing a sentence have passed, a court's judgment is final, even if it fails to order restitution. In this, the Mandatory Victim Restitution

1 Act is like all other mandatory sentencing provisions,
2 and as this Court confirmed 2 years ago in *Greenlaw v.*
3 *United States*, when a court fails to impose a mandatory
4 sentence, that error can be corrected only by following
5 what this Court called the dispositive direction
6 regarding sentencing errors.

7 JUSTICE SOTOMAYOR: Excuse me. Is your
8 argument that if the district court -- for whatever
9 reason, unlikely as it may be -- starts a hearing the
10 day after the rest of the sentence was imposed and has
11 to continue that hearing for 91 days before it can
12 render a judgment --

13 MS. KARLAN: No.

14 JUSTICE SOTOMAYOR: -- that it's now barred
15 from entering that judgment?

16 MS. KARLAN: No. If I understand your
17 question correctly, the district court has imposed
18 sentence on day one announcing imprisonment. Any time
19 during the next 90 days, it has a power to set a date
20 and make final determination of the restitution amount.
21 Once that 90-day period has run -- in this case, on
22 October 28th, because the sentencing occurred on
23 July 30th -- the district court loses the authority to
24 impose restitution.

25 JUSTICE SCALIA: And the sentence is not

1 final until then?

2 MS. KARLAN: That's our position.

3 JUSTICE SCALIA: And -- and what if -- what
4 if the court does set a date for additional sentencing?
5 Then it's not final until then, right?

6 MS. KARLAN: No, Justice Scalia. It would
7 be that once a court has started the sentencing process,
8 it has 90 days within which to complete that process, if
9 it announces at the initial sentencing that it intends
10 to hold open the sentence for final determination of
11 restitution.

12 JUSTICE SOTOMAYOR: I -- I'm not sure I
13 understood your response to my question. It must impose
14 that restitution order, complete all its proceedings
15 within the 90-day period?

16 MS. KARLAN: Yes, that's correct.

17 JUSTICE SOTOMAYOR: So it can't hold a
18 hearing over from the 90th day to the 91st day?

19 MS. KARLAN: No, it cannot do that. And if
20 it were to do that in a case where restitution were
21 mandatory, the sentence would become final, the
22 government would file an appeal, and that appeal would
23 certainly succeed, because it's plain error not to have
24 to imposed the restitution.

25 JUSTICE ALITO: Your position is that if the

1 court puts off the order of restitution for 90 days,
2 during that period, the defendant cannot take an appeal?

3 MS. KARLAN: If the court has announced at
4 the initial sentencing that it intends to do so, no, then
5 it cannot.

6 JUSTICE ALITO: Isn't that dramatically
7 contrary to the way criminal appeals have been handled
8 for a long time? There's a very short period of time
9 for a defendant to file a notice of appeal in a criminal
10 case, and you're saying that that is dramatically
11 extended by the possibility of -- of restitution later
12 on or by the fact that the restitution order will be
13 entered later?

14 MS. KARLAN: No, Justice Alito. What I'm
15 saying is that a defendant can only appeal from a final
16 sentence, and until the restitutionary term is imposed
17 within the time period allowed by the MVRA, there is not
18 a final sentence. Then he has from the time that
19 restitution is --

20 JUSTICE ALITO: Yes, I understand that. But
21 you're saying the defendant is -- the defendant is
22 incarcerated, let's say; is convicted, is sentenced to
23 prison. The defendant wants to take a quick appeal.
24 The defendant thinks he's going to win on appeal. And
25 you're saying, well, no, you have to wait 90 days

1 before you can file your notice of appeal?

2 MS. KARLAN: I believe that's correct,
3 because he has to have a final judgment before he can
4 appeal.

5 JUSTICE SCALIA: Well, what -- what do you
6 do about the further provision that at any time later,
7 if the government -- or the victim finds additional
8 basis for restitution, so long as after discovering it,
9 within 60 days after that, the victim can come to the
10 court and ask for restitution? What does that do?

11 Does that --

12 MS. KARLAN: Well --

13 JUSTICE SCALIA: I mean, doesn't that
14 necessarily mean that there are indeed two final
15 judgments? That -- that one has to be -- has to go up
16 on its own, doesn't it?

17 MS. KARLAN: That's correct, but section
18 3664(o) of the statute says that the initial restitution
19 amount constitutes a final judgment, even though there
20 can be amendment after it's been entered.

21 JUSTICE SCALIA: Where is that?

22 MS. KARLAN: In our brief, it's on page --

23 JUSTICE SCALIA: Oh. Oh -- "a sentence that
24 imposes an order" --

25 MS. KARLAN: It's on page --

1 JUSTICE SCALIA: -- "is a final judgment,
2 notwithstanding the fact that" --

3 MS. KARLAN: Yes, petition appendix 60a.

4 JUSTICE SCALIA: Got you.

5 MS. KARLAN: So that's why that has to be in
6 there, because otherwise the defendant really would be
7 in the position that Justice Alito --

8 JUSTICE SOTOMAYOR: Is there any circuit
9 court who has addressed this issue of when an appeal is
10 timely, in a situation in which a restitution order has
11 not been entered at the initial sentencing?

12 MS. KARLAN: Not in precisely that way.
13 There are a couple of cases that are -- that kind of
14 circle around that.

15 So for example, Kapelushnik, which we cite
16 in our petition for certiorari and in our brief as the
17 wisest way of thinking about this, held that once the
18 90 days has lapsed, the judgment is final by operation
19 of law.

20 There's an opinion by Judge Posner in the
21 Seventh Circuit that's not on restitution but on a
22 related issue, which says that if you have several
23 components to the sentence, until that last component is
24 entered, the time for filing an appeal under F.R.A.P. 4
25 does not begin to run. And that's --

1 CHIEF JUSTICE ROBERTS: In this -- when the
2 judge did not enter a date for restitution, did you
3 object to that?

4 MS. KARLAN: We were not required to do so,
5 so we did not.

6 CHIEF JUSTICE ROBERTS: Well, why not? It
7 seems that that's when the violation occurred. The
8 statute said the court shall set a date if they're not
9 ready to calculate the restitution, and he didn't do
10 that.

11 MS. KARLAN: Well, that's correct,
12 Mr. Chief Justice, but the statute doesn't say when he
13 has to set the date. The statute simply says the date
14 has to be set so that final restitution will occur
15 during the period -- and here I quote again from the
16 statute -- "not to exceed 90 days." So he can set that
17 date once he gets the information from --

18 CHIEF JUSTICE ROBERTS: Well, I thought it
19 says -- maybe I am misreading it. It says the court --
20 this is at sentencing. When sentencing -- you look at
21 the previous provision -- what is it? 3663A(a)(1) --

22 MS. KARLAN: Yes.

23 CHIEF JUSTICE ROBERTS: -- talks about what
24 you do when sentencing it.

25 MS. KARLAN: Right.

1 CHIEF JUSTICE ROBERTS: And the statute
2 says, "the court shall set a date for the final
3 determination" ... "not to exceed 90 days." And he didn't.

4 MS. KARLAN: That's correct, he did not set
5 it. But the statute -- I'm now looking at petition
6 appendix 55a, which is where section 3664(d)(5) of the
7 Act is set out. It says, "The court shall set a date
8 for the final determination of the victim's losses, not
9 to exceed 90 days after sentencing."

10 The 90 days modifies the final
11 determination. It doesn't modify the setting of the
12 date. So within that 90-day period, I think
13 that what was --

14 CHIEF JUSTICE ROBERTS: No, I think that's
15 right. I -- I agree with you that.

16 MS. KARLAN: Yes.

17 CHIEF JUSTICE ROBERTS: In other words, the
18 final determination -- the date for the -- the final
19 determination can't exceed 90 days --

20 MS. KARLAN: Right.

21 CHIEF JUSTICE ROBERTS: -- but that doesn't
22 mean that the provision saying the court shall set a date
23 can wait -- that he can wait 89 days to do that.

24 MS. KARLAN: No, I think it would be very
25 unwise for a district court to do that, but the court

1 can't really set the date until it receives the
2 information that it hopes to receive from the probation
3 office or from the victim. So that --

4 CHIEF JUSTICE ROBERTS: No, no, no --

5 JUSTICE GINSBURG: It can say 90 days. It
6 can say 90 days.

7 MS. KARLAN: It -- it could, yes. Or it
8 could say, as the district court did here, I'm going to
9 hold open the date. But it can only hold open that date
10 until the point at which it actually imposes the
11 restitution, within the 90 days.

12 JUSTICE GINSBURG: This is a -- this is, in
13 one respect, Ms. Karlan, a technical argument, is it
14 not? Because it's true that this defendant, from the
15 probation officer's report, knew within the 90 days what
16 restitution was going to be recommended.

17 MS. KARLAN: Yes. He knew within the
18 90 days what the government's claim was going to be, but
19 the court did not hold the hearing and did not impose
20 the judgment. And so the August 8th judgment became
21 final by operation of law on October 28th, because that
22 was 90 days after the July 30th sentencing.

23 At that point, the government could have
24 filed an appeal in this case, and, quite frankly, they
25 would have won. As it was --

1 JUSTICE ALITO: How is your position -- how
2 is your position consistent with the thrust of the
3 victims' rights legislation that Congress has enacted in
4 recent years, including the statute that's before us
5 here?

6 Now, in this case, the victim -- the
7 victim's medical bills were paid by the United States.
8 But that isn't always going to be the case, and
9 sometimes victims are going to have a lot of lost
10 income. So you have the victim, like the victim here,
11 who is beaten to a pulp by a defendant and loses a
12 substantial amount of future income as a result, and you
13 say that if the judge makes a mistake, it's just too bad
14 for the victim. The victim gets nothing because the
15 judge waited too long.

16 MS. KARLAN: No, I don't --

17 JUSTICE ALITO: Do you think that's what
18 Congress had in mind?

19 MS. KARLAN: I don't say that, and I don't
20 think that's what Congress had in mind. First, what
21 Congress had in mind was to strike the balance it struck
22 in this statute, which was to give victims the right to
23 receive restitution as part of a criminal sentence, as
24 long as it was done within 90 days of sentencing.

25 Second, the government can appeal if a court

1 doesn't follow the rules.

2 Third --

3 JUSTICE ALITO: Yes, but wasn't -- wasn't
4 the whole thrust of the victims' rights legislation that
5 up to that point, Congress thought prosecutors were not
6 sufficiently attending to the rights and the interests
7 of victims? They were doing their own prosecutorial
8 thing, but they weren't involving victims, making sure
9 they knew about court proceedings, and so forth.

10 And you're saying, well, if the court makes
11 a mistake and the prosecution falls down in its
12 responsibility, the person who suffers is the victim who
13 gets victimized again.

14 MS. KARLAN: No, that's not what I'm saying.
15 What I'm saying is Congress struck a balance. They
16 wanted to give restitution to victims. They also wanted
17 final sentencing for defendants. Congress struck that
18 balance by giving a 90-day extension. It didn't provide --

19 JUSTICE KENNEDY: Well, you're not
20 really -- you're not really answering Justice Alito's
21 question. He says he understands that, as I understand
22 the question. We understand that argument.

23 But it doesn't address the fact that the net
24 result of your argument is (a) unfair to the victim and
25 (b) inconsistent with the whole design and thrust of the

1 Victims Act.

2 MS. KARLAN: It's --

3 JUSTICE KENNEDY: And you, it seems to me,
4 have to say: So be it; the technical rule prevails.
5 That's too bad.

6 I mean, that's your argument, it seems
7 to me.

8 MS. KARLAN: No, my argument is Congress
9 struck that balance, and in some cases, yes, too bad --

10 JUSTICE SCALIA: Of course, the same thing
11 would happen if the trial judge makes a mistake of law
12 which causes the -- the defendant to be acquitted, so
13 that he not only escapes the liability to the victim, he
14 escapes any -- any criminal punishment. It happens all
15 the time. The judge makes a mistake; society pays for
16 it.

17 MS. KARLAN: That's correct, and Congress
18 here has said 90 days. And they meant it. If they had
19 meant to say, at any time, a victim can receive
20 restitution, they would have said that.

21 JUSTICE BREYER: But Congress says -- to
22 paraphrase and not get it accurate -- that the
23 Department of Transportation shall enact a rule
24 governing tire safety within 9 months from the
25 effective date of this legislation. And the Department

1 of Transportation fails to do that. It doesn't
2 promulgate its law for 18 months. Is that law invalid?
3 The rule?

4 MS. KARLAN: No, generally, under this --

5 JUSTICE BREYER: Of course, it isn't.

6 MS. KARLAN: Because that's --

7 JUSTICE BREYER: So how is this different?

8 MS. KARLAN: Well, this is a criminal
9 sentencing statute which is different than a civil
10 agency action.

11 JUSTICE BREYER: I understand that point.
12 I'm just asking what's a relevant difference?

13 MS. KARLAN: That is the incredibly relevant
14 difference, for the following reason --

15 JUSTICE BREYER: Because?

16 MS. KARLAN: -- that finality in sentencing
17 is important, because otherwise a defendant cannot even
18 appeal his conviction.

19 JUSTICE BREYER: Why couldn't he?

20 MS. KARLAN: Because he --

21 JUSTICE BREYER: You just read us the
22 provision.

23 MS. KARLAN: It's not a final --

24 JUSTICE BREYER: The judge enters a -- an
25 order, a final order. And that final judgment, as was

1 true here, says: I haven't decided restitution yet. He
2 can appeal. Then what it says is when you get around to
3 the restitution, then enter another judgment, and you'll
4 appeal that, as happens precisely in the case of
5 the 60 days -- you know, that extra stuff that Justice
6 Scalia was referring to. That's a possible
7 interpretation of the Federal Rules of Appellate
8 Procedure. I don't see, you know, the appeals thing. I
9 don't see anything -- I don't have in front of me the
10 language on filing an appeal, but I can't think of
11 anything that's contrary.

12 MS. KARLAN: What's contrary to that is
13 that the Federal courts of appeals only have
14 jurisdiction to decide cases that come up, in criminal
15 cases, on final judgment or under the collateral order.

16 JUSTICE BREYER: That's right.

17 MS. KARLAN: This is not --

18 JUSTICE BREYER: It's a final judgment, and
19 because there is another provision that says an order of
20 restitution is itself a final judgment.

21 MS. KARLAN: No. With all respect,
22 Justice Breyer, there is no provision that says an order
23 of restitution --

24 JUSTICE BREYER: You read it to us. I mean
25 the one you read to us.

1 MS. KARLAN: No. That says --

2 JUSTICE BREYER: What?

3 MS. KARLAN: -- that a sentence that
4 includes a term of restitution can be a final judgment,
5 even though that 60-day provision to which
6 Justice Scalia pointed is on the books.

7 But you can't have a final judgment in a
8 criminal case that involves several different components
9 of a sentence until those aspects of the sentence have
10 actually been imposed.

11 JUSTICE ALITO: Well, why isn't the --

12 MS. KARLAN: Justice Scalia, I believe, was
13 referring to the 60-day provision.

14 JUSTICE BREYER: Yes, the same problem.

15 MS. KARLAN: The 60-day provision is
16 specifically immunized from the final judgment rule by
17 section 3664(o) of the statute. The 90-day provision is
18 not. So until a defendant -- perhaps I could -- perhaps
19 I could use a slightly different example, which is:
20 Suppose a defendant is supposed to be sentenced to a
21 fine, a mandatory fine --

22 JUSTICE BREYER: I see.

23 MS. KARLAN: -- and a mandatory prison sentence.
24 If you sentence him to the mandatory prison sentence and
25 say I still need to calculate the fine -- there is no

1 final judgment. He cannot appeal that sentence.

2 JUSTICE ALITO: But isn't there a difference
3 between those two situations? A fine is a criminal
4 penalty. It goes -- it -- the prosecution is brought in
5 the same of the sovereign. The fine goes to the
6 sovereign. It's a traditional criminal penalty.

7 Restitution is not a traditional criminal
8 penalty. It's much like, arguably, attorneys' fees in a
9 civil case. It is -- it is like -- it is really a -- a
10 benefit for the victim. It is not something that inures
11 to the benefit of the sovereign.

12 And so why doesn't it make sense to view
13 that judgment of restitution as a separate judgment,
14 just as the award of an attorney's fees is a separate
15 final appealable order in a civil case?

16 MS. KARLAN: Well, because this judgment of
17 restitution is not a civil judgment. It is part of the
18 defendant's criminal punishment, and, therefore, it is
19 not like attorneys' fees, something that's separate.

20 As we point out in our reply brief, in order
21 to calculate the amount of imprisonment, in order to
22 calculate the fine, the Federal criminal sentencing
23 provisions -- and I should note that section 3664(a)
24 appears in Title 18 in the section under miscellaneous
25 sentencing provisions, not civil provisions. All of

1 those things interact. And so you can't calculate one
2 of those without knowing all of them.

3 JUSTICE GINSBURG: But, functionally, isn't
4 it a substitute for the remedy that the victim of a
5 crime might have? Wasn't what Congress was trying to do
6 was to spare the victim the necessity of suing the
7 defendant and having his kind of civil restitution
8 tacked onto the criminal proceeding?

9 MS. KARLAN: That's certainly Congress's
10 purpose, but they did it within the context of
11 sentencing. So, for example, Justice Ginsburg, if this
12 really were a civil penalty, defendants would not be
13 entitled to the assistance of counsel in challenging the
14 amount of restitution, because the Sixth Amendment would
15 not apply. The dates for filing an appeal would be
16 different. There would be a jurisdictional bar that
17 doesn't exist in criminal cases.

18 This Court said several times that
19 restitution under these kinds of circumstances -- in
20 Hughey, under the predecessor to this Act, and in Kelly
21 v. Robinson -- is a penal statute. Justice Sotomayor in
22 her opinion for the Second Circuit in Varrone said this
23 is a penal statute.

24 So there is no question here that this is a
25 substitute for a civil remedy or a supplement for a

1 civil remedy, but it is a criminal punishment. And
2 Congress has said that you have to order it at
3 sentencing or within 90 days, or else it is error that
4 can be corrected through Rule 35 or by appeal, but not
5 otherwise.

6 JUSTICE SCALIA: Now, what -- what can the
7 defendant do within that 90 days? He has to wait
8 90 days before he appeals the sentence that he has been
9 given; is that right?

10 MS. KARLAN: That's correct. There is not a
11 final judgment in his case.

12 JUSTICE SCALIA: That's 3 months that --
13 that he has to sit on his hands.

14 MS. KARLAN: That's correct.

15 JUSTICE BREYER: Where does it say that?

16 MS. KARLAN: Well, the final judgment rule
17 says that.

18 JUSTICE BREYER: Well, this is a court-made
19 rule of what counts as a final judgment.

20 MS. KARLAN: Right. And -- and --

21 JUSTICE BREYER: All right. Is there
22 anything in the decisions of this Court interpreting
23 that rule? I mean, you could have collateral orders. You
24 could have all kinds of things. And doesn't it boil down
25 to the same question?

1 I mean, I agree with you that if Congress
2 wanted to make a 90-day deadline, you really have to do
3 it, and you can't reconstitute thereafter. All right.
4 That's one thing. But if they didn't, why didn't they
5 equally intend the judgment without the restitution
6 order to be a final judgment?

7 MS. KARLAN: Well --

8 JUSTICE BREYER: And then later on, just as
9 in (o), if the judge does impose an order of restitution,
10 then of course, that's appealable, and that's a different
11 judgment. Is there -- what in the law prevents the --
12 that interpretation?

13 MS. KARLAN: I think two things prevent that
14 interpretation.

15 JUSTICE BREYER: Yes.

16 MS. KARLAN: One is this Court's precedent,
17 and let me talk about that. And two is a proper reading
18 of section 3664(o). So I'll turn first to the
19 precedent and then to 3664(o).

20 JUSTICE BREYER: So you have precedent.

21 MS. KARLAN: So the precedent is, for
22 example, this Court said in Parr v. United States, which
23 is cited on page 12 of the reply brief, among other
24 places, that "a judgment or decision is final for purpose
25 of appeal only when it terminates the litigation between the

1 parties on the merits of the case, and leaves nothing to
2 be done but to enforce by execution what has been determined."

3 Until restitution has been determined, a
4 case does not fit within Parr. Parr is, I believe, an
5 interpretation of 1291, 28 U.S.C. 1291, which is the
6 provision that gives the courts of appeals jurisdiction.

7 CHIEF JUSTICE ROBERTS: So you can -- under
8 your view, you can change the amount of jail time up to
9 the point at which you have to set the restitution. The
10 judge says: I'm going to sentence you to 3 years, and
11 I'm going to figure out the restitution.

12 He looks, and the restitution turns out to
13 be a lot more than he thought. So he says: Well, I'm
14 only going to give you 2 years. Or it's less, and he
15 says: I'm going to give you 4 years.

16 Because the judgment is still open, he can
17 do that?

18 MS. KARLAN: I believe, Your Honor, that he
19 can. And the reason for that is the sentencing statute
20 itself -- 18 U.S.C. section 3553, I believe it is --
21 talks about how a court, in sentencing a defendant, is
22 supposed to be considering all of these penalties and
23 how they interact with one another.

24 So if a defendant can make restitution to a
25 victim by, for example, being put on community release

1 or probation rather than serving time in prison, a court
2 can take that into account in setting the sentence.

3 JUSTICE SCALIA: Must take it into account --

4 MS. KARLAN: Yes.

5 JUSTICE SCALIA: -- if you read 3553 the way
6 it's written.

7 MS. KARLAN: Yes, I think they must take it
8 into account. Now, whether -- how they'll actually
9 strike that balance is --

10 JUSTICE GINSBURG: Is there no -- is there
11 no possibility that a judge could say: I want to make
12 this analogous to 54(b) under the civil rules; that is,
13 I don't want to delay the time that the defendant can
14 appeal from the -- from the -- from the sentence. So
15 this order is final, and 3 months later, I'll take up
16 the question of restitution when all the information is
17 in. The court is prevented from doing that?

18 MS. KARLAN: I'm unaware of any criminal
19 rules analogue to Rule 54(b) in the civil context, because
20 in general, as I understand the way this Court's
21 precedents have worked, there have been what might look
22 like interlocutory appeals in criminal cases, but they've
23 always involved collateral issues.

24 And the problem here, for the reason that
25 Justice Scalia just pointed to, is restitution and the

1 amount of imprisonment are not collateral to one
2 another; that is, they may interact. And a fine
3 certainly isn't, because the statute itself says you
4 can't impose a fine to the extent that it will impair
5 restitution. So if --

6 JUSTICE GINSBURG: So the judge -- but the
7 judge could say -- once she thinks she needs -- that
8 they need time for more information: I'm going to
9 defer the whole sentencing. So, Defendant, you'll have to
10 wait 3 months to find out how much time you're going to
11 serve. That would be all right. You could use the
12 90-day period to extend the time for imposing the
13 sentence.

14 Well, in effect, you're saying the sentence
15 isn't final, so she could change it any time within the
16 90 days?

17 MS. KARLAN: There's a slight complication
18 there, but I think the answer to your question is yes;
19 that is, the judge could delay the entire sentencing
20 under Federal Rule of Criminal Procedure 32.

21 Look, we're not saying that you couldn't
22 get restitution in a case like this. We're simply
23 saying that you have to follow the rules.

24 JUSTICE BREYER: All right. Well, what about
25 that as a possible answer? If we accept -- the -- the judge,

1 of course, could say to the defendant: I'm not going to
2 sentence you; I'm not going to put that sentence -- I'm
3 not going to sentence you at all --

4 MS. KARLAN: That's correct.

5 JUSTICE BREYER: -- for 100 days.

6 MS. KARLAN: That's correct.

7 JUSTICE BREYER: And your remedy, then,
8 might be to ask for mandamus, if that was too long a
9 period?

10 MS. KARLAN: It -- it might be. I --

11 JUSTICE BREYER: And -- and -- so why
12 wouldn't that be similar here? If the judge is going to
13 go after the 90 days, he'd have the power to do it,
14 but it would be like a continuance, and he'd have to
15 exercise that reasonably.

16 MS. KARLAN: Because you have to follow the
17 rules as laid down.

18 JUSTICE BREYER: No, no. I know. You're
19 interpreting it literally, and --

20 MS. KARLAN: Yes. Yes.

21 JUSTICE BREYER: -- and that's --

22 MS. KARLAN: -- that is, there are many
23 mechanisms for ensuring that a victim --

24 JUSTICE BREYER: But I mean, if I thought,
25 for argument's sake --

1 MS. KARLAN: You can't --

2 JUSTICE BREYER: -- that Congress doesn't care about
3 whether it's after 90 days -- it was just to sort of
4 speed things up -- on that assumption, wouldn't you
5 still have a remedy, because it would be like the
6 unreasonable continuance?

7 MS. KARLAN: That's correct.

8 JUSTICE BREYER: That is correct? I've got
9 it?

10 MS. KARLAN: If -- if you -- you can't have
11 a continuance from the 90 days. You can have a
12 continuance --

13 JUSTICE BREYER: No, no. I'm thinking of --

14 MS. KARLAN: -- of sentencing itself.

15 JUSTICE BREYER: I'm thinking of the
16 general problems --

17 MS. KARLAN: Yes.

18 JUSTICE BREYER: -- of continuances for
19 sentencing.

20 MS. KARLAN: Yes, that's correct.

21 JUSTICE BREYER: And your argument is that
22 90 days is long enough?

23 MS. KARLAN: That's correct.

24 JUSTICE BREYER: Okay. I've got it.

25 MS. KARLAN: And I'd like to reserve the

1 remainder --

2 JUSTICE STEVENS: May I ask you one
3 question?

4 JUSTICE SCALIA: I -- I have a question going
5 just to that. It seems to me that if 3553, as -- as I said
6 -- maybe you shouldn't have agreed -- requires the
7 sentencing court to consider the totality of the
8 sentence it's imposing, including the restitution,
9 that would mean that the judge cannot impose a sentence
10 before the expiration of the 90 days; that is, has to
11 wait until the restitutionary issue is resolved to
12 impose the incarceration part of the sentence. No?

13 MS. KARLAN: I think the way that the
14 statute is written contemplates that the judge will do
15 the regular sentencing at which he imposes these other
16 terms, but may keep it open for 90 days.

17 JUSTICE STEVENS: May I ask this question
18 before you sit down? Are you aware -- maybe you cite
19 them in the briefs and I didn't catch it -- of any cases
20 in which the courts -- a court of appeals has
21 dismissed an appeal because it was taken before the --
22 the civil remedy had been imposed?

23 MS. KARLAN: I'm not aware of a case that
24 does that directly under the Mandatory Victims
25 Restitution Act.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Heytens.

3 ORAL ARGUMENT OF TOBY J. HEYTENS
4 ON BEHALF OF THE RESPONDENT

5 MR. HEYTENS: Thank you, Mr. Chief Justice,
6 and may it please the Court:

7 To begin by addressing the question just
8 raised by Justice Stevens, the government agrees that we
9 are not aware of any cases that directly confront this
10 finality question. There are, however, at least four
11 cases in the courts of appeals where one of two things
12 happened: Either the defendant took an appeal from the
13 original term of his imprisonment, then later took an
14 appeal from the order of restitution and the appeals
15 were consolidated. That happened, among other things,
16 in the Cheal case, which is the First Circuit decision
17 cited in our brief. There are at least two other
18 circuit court cases that do that as well.

19 JUSTICE SCALIA: Was it within the 90 days?

20 MR. HEYTENS: No. It --

21 JUSTICE SCALIA: The restitution sentence
22 was after the 90 days?

23 MR. HEYTENS: That's correct,
24 Justice Scalia. Now --

25 JUSTICE STEVENS: In those -- in those -- in

1 that case, or any of those four cases, did they discuss
2 the problem of whether there was -- both appeals were
3 proper?

4 MR. HEYTENS: Justice Stevens, I'm not
5 aware of any case that squarely --

6 JUSTICE STEVENS: They just went ahead and
7 consolidated?

8 MR. HEYTENS: That's correct, Justice
9 Stevens. I'm not aware of any case that directly
10 confronts this issue. Now --

11 JUSTICE SOTOMAYOR: Under your view of
12 things, however, that's fortuity that the underlying
13 conviction was still in the appeal process, because
14 there is no statute of limitations under your reading.
15 A victim could come 1, 2, 5, 10, 15, 20, or 100 years
16 later and say: I'm entitled to restitution.

17 MR. HEYTENS: The statute --

18 JUSTICE SOTOMAYOR: And absent prejudice to
19 the defendant, that would be okay?

20 MR. HEYTENS: Absent prejudice or some sort
21 of double jeopardy problem, that's correct. The
22 statute, by its terms, says as long as the victim comes
23 forward within 60 days of the discovery of his losses,
24 (d)(5) expressly says that the victim can do that. So I
25 think this --

1 JUSTICE SOTOMAYOR: I'm sorry, that's
2 60 days after the restitution order has been issued. Am
3 I --

4 MR. HEYTENS: I believe that's incorrect,
5 Your Honor. The provision that we're referring to,
6 subsection (d)(5), is reproduced on page 6A of the
7 appendix to the government's brief. It's the, I
8 believe, second sentence of (d)(5) that we're
9 discussing right now that states: "If the victim
10 subsequently discovers further losses, the victim shall
11 have 60 days after the discovery of those losses in
12 which to petition the court for an amended restitution
13 order."

14 JUSTICE SOTOMAYOR: That 60 days says after
15 there has been an -- a restitution order. I'm positing
16 the situation where the victim comes 10 years later.

17 MR. HEYTENS: That's correct.

18 JUSTICE SOTOMAYOR: That says there's no
19 restitution order. It's the initial action. And
20 you're saying that's okay? It's an endless statute?

21 MR. HEYTENS: It is -- it is certainly not
22 okay, Your Honor. Congress has directed that this
23 determination must be made and that it must be made
24 within 90 days. And Federal district courts are
25 required to comply with that obligation.

1 But what Congress has not done is to specify
2 a consequence that occurs in the situation where the --

3 JUSTICE SCALIA: But it -- it -- it's sort
4 of a ridiculous consequence that 5 years later, and
5 the judge who tried the original case is dead.

6 I think it's bad enough to have the issue of
7 whether this victim suffered \$100,000 damages
8 decided by the judge, if that's what you're going to be
9 sentenced to, but at least it's being decided by the
10 judge who tried the case. And under your proposal, it
11 can be decided by some other judge who is just -- just
12 pulled in, because the -- the trial judge has -- has
13 been deceased. That doesn't seem to me to make any
14 sense at all.

15 MR. HEYTENS: Your Honor, I don't think it
16 is our proposal. Congress has not specified -- Congress
17 has certainly required this to be done within 90 days.
18 That meant Congress wanted it to be done within 90 days.
19 But Congress has not specified a consequence for --

20 CHIEF JUSTICE ROBERTS: Well, the
21 consequence is the usual consequence when trial courts
22 make errors, which is to appeal.

23 MR. HEYTENS: Your Honor, I think this Court
24 said in Montalvo-Murillo what the consequence is in this
25 category of cases, which is when a trial court fails to

1 comply with a mandatory time limitation for doing
2 something that the court is required to do, the remedy
3 is -- unless Congress provides otherwise, such as it
4 does in the Speedy Trial Act, the remedy is not a loss
5 of the power on the part of the court to act.

6 JUSTICE SCALIA: Doesn't the statute
7 establish time limits for filing an appeal?

8 MR. HEYTENS: The statute does, Your Honor.

9 JUSTICE SCALIA: Does it -- does it state a
10 remedy for it? I don't think so. But if you don't
11 comply with the time limit, you're too late; you can't
12 file the appeal.

13 MR. HEYTENS: Justice Scalia --

14 JUSTICE SCALIA: Same thing here.

15 MR. HEYTENS: There's a critical difference
16 between a statute of limitations for filing a notice of
17 appeal and what's happening here that's illustrated by
18 the example given by Judge Gorsuch in his opinion for
19 the courts of appeals.

20 There can be two kinds of time limits. The
21 first kind can say, if you want to do something -- you're
22 not required to do it -- but if you want to do it,
23 you have to do it within a certain time. That's what a
24 statute of limitations is.

25 The second kind of time limit is to say you

1 must do something and you must do it within a second --
2 within a certain amount of time. This case is the
3 second category, just as the statute at issue in
4 Montalvo-Murillo was in the second category of cases, and
5 just as --

6 JUSTICE SOTOMAYOR: Except that that was a
7 bail question, where there's not issues of finality at
8 play, and bail is a question that repeats itself
9 throughout the proceedings. Defendants are denied bail
10 and then make a different showing of other
11 resources or less danger or whatever, and they get out.
12 And vice versa, defendants are out and are put in.
13 That's it. There are no finality questions there.

14 What do you do in this situation when you're
15 dealing with a criminal sentence where there are
16 finality rules?

17 And I'm going to tie that back to my starting
18 point, which is I'm looking in your brief for the
19 precedent and/or legal basis for us to treat restitution
20 as not part of the final judgment in this criminal
21 action. What -- what other examples do we have in the
22 criminal context?

23 MR. HEYTENS: We cited the things we cite in
24 our brief. There is, however, also a statute; I
25 apologize to the Court, it is not cited in our brief,

1 but it is section 18 U.S.C. section 3582(b). That
2 provision is captioned Imposition of a Sentence of
3 Imprisonment. Subsection (b) -- subsection (b) of that
4 provision says Effect of Finality of the Judgment. It
5 then says, "Notwithstanding the fact that a sentence of
6 imprisonment can subsequently be" modified or altered in
7 certain ways, and then this is the critical language: "a
8 judgment of conviction that includes such a sentence
9 constitutes a final judgment for all other purposes."

10 In this case there was a judgment of
11 conviction. It was entered on July 3, 2007. And that
12 judgment of conviction imposed a sentence of
13 imprisonment on Mr. Dolan.

14 JUSTICE BREYER: Okay, now suppose -- now
15 we're getting to exactly the point where I thought your
16 co-counsel, your sister counsel had a good point that I
17 wasn't -- hadn't thought through, and that is what
18 happens now in -- on day -- we're finished the
19 trial. The sentencing is over. They got the
20 presentence report, and the judge enters -- suppose he
21 entered a judgment but didn't say anything about
22 restitution, because he says: I'd like to give you a
23 chance to appeal this. And I'm not going to deal with
24 restitution for a month when the victim recovers -- all
25 within the 90 days.

1 Can the defendant appeal that piece of
2 paper?

3 MR. HEYTENS: Yes.

4 JUSTICE BREYER: The answer is because of
5 this provision?

6 MR. HEYTENS: We think because of that
7 provision and because of general principles of law.

8 JUSTICE BREYER: Whoa, whoa. What about
9 what the -- what -- what you just heard quoted,
10 forgetting this particular sentence in the code, was that
11 a judgment isn't final -- you can only appeal a final
12 judgment until all the parts that are there, and the
13 restitution is part of it. And so until it's final, you
14 can't appeal it. That's what -- that's what the case
15 Parr, which it quoted. What is -- what is your response
16 to that?

17 MR. HEYTENS: That certainly establishes the
18 general rule that this Court has said repeatedly --

19 JUSTICE BREYER: Yes.

20 MR. HEYTENS: -- that the jurisdiction of the
21 Federal courts is established by Congress.

22 JUSTICE KENNEDY: Well, I just want to make
23 clear where we are. Justice Breyer said, can the
24 defendant appeal? You said yes. Suppose he said, must
25 the defendant appeal?

1 MR. HEYTENS: The defendant in our view is
2 required to appeal --

3 JUSTICE KENNEDY: Must?

4 MR. HEYTENS: Once the district court enters
5 a judgment that imposes a sentence of imprisonment, if
6 the defendant wishes to appeal that sentence of
7 imprisonment he has 14 days to do so following the entry
8 of the judgment, yes, which is the normal rule in
9 Federal criminal cases.

10 JUSTICE GINSBURG: And if he misses --

11 JUSTICE KENNEDY: Even though -- even though
12 he says the restitution shall be held in abeyance
13 pending receipt of information?

14 MR. HEYTENS: Well, to the extent that he
15 has an objection to the district court's -- it depends
16 on the precise circumstances of the case, Justice
17 Kennedy. To the extent what he says is, I think the
18 district court needs to, when it imposes the sentence of
19 restitution, take into account the other aspects of the
20 sentence, at that time the issues become interrelated.

21 JUSTICE SCALIA: Let me see if I understand
22 this. He has 14 days to appeal that. And if he doesn't
23 do that, then later within the 90 days or even after the
24 90 days, a sentence of restitution is imposed, he can --
25 he can appeal that sentence of restitution, right?

1 MR. HEYTENS: Absolutely.

2 JUSTICE SCALIA: On the same grounds on
3 which he would have appealed the -- the sentence of
4 imprisonment, right?

5 MR. HEYTENS: Well, it -- to the extent --

6 JUSTICE SCALIA: If -- if it's an error in
7 the trial, he claims: I was innocent.

8 MR. HEYTENS: No, Justice Scalia.

9 JUSTICE SCALIA: No?

10 MR. HEYTENS: To the -- his time for
11 appealing from the judgment of conviction runs from the
12 entry of the judgment of conviction, which is
13 contemporaneous with the imposition of the sentence of
14 imprisonment. If he wants to appeal that, he needs to do
15 that like any other --

16 JUSTICE BREYER: Well, I suppose it's no -- no
17 imprisonment; it's supervised release. Now what
18 happens?

19 MR. HEYTENS: If it's -- if the judge imposes a
20 sentence of supervised release, I am not aware if there
21 is a specific statute.

22 JUSTICE BREYER: Yes, but I mean, what's
23 bothering me about this, and I'm not aware -- but you're
24 quoting a sentence that wasn't in your brief and what I
25 hadn't taken in at all is the extent to which this is

1 inextricably mixed up with the rules of appeals, which are
2 very important.

3 So unless I have in my own mind how -- how
4 this all fits together, I -- I don't know how to decide
5 this case. I don't want to say something in here that's
6 going to muck up the -- the rules of appealing from a
7 criminal case.

8 Now, what you've told me is I'm supposed to say
9 that within 14 days of a -- of a judgment imposing imprisonment,
10 he has to appeal, but of course if it's supervised release,
11 he doesn't, or I'm not sure.

12 MR. HEYTENS: Justice Breyer, first and
13 foremost, the Court doesn't need to say anything about
14 any of these issues.

15 JUSTICE BREYER: Why not?

16 MR. HEYTENS: For one very simple reason:
17 The only thing that this defendant has ever attempted to
18 appeal at any point is the order of restitution. He
19 never attempted to appeal from his guilty plea.

20 JUSTICE BREYER: Yes, but if -- but I have
21 to be able to write my reasons, and in doing that I have
22 to respond to the argument of the other side, which is
23 that the strongest reason for thinking Congress intended
24 this to be final and not beyond 90 days is that if you
25 don't do that, you muck up the rules of appeal. Now,

1 explain to me why that isn't so.

2 MR. HEYTENS: A couple of reasons, Your
3 Honor: First of all, I think it's actually one of the
4 strongest arguments against their position, because it
5 creates the unlikely scenario where it will be
6 routinely -- we know that Congress has authorized these
7 determinations to be made up to 90 days after the
8 imposition of sentence. So their rule would create the
9 situation where it would be completely consistent with
10 Congress's intent to routinely create a situation where
11 a Federal criminal defendant has to wait 3 months after
12 sentencing until he can appeal.

13 JUSTICE BREYER: Which is just what you say
14 he has to do if the sentence is supervised release.

15 MR. HEYTENS: What I'm saying, Justice
16 Breyer, is I -- I -- I know there is a statute that
17 governs imprisonment. I believe there is a similar
18 statute that governs a sentence of probation.

19 JUSTICE SCALIA: What was that statute on
20 imprisonment?

21 MR. HEYTENS: 18 U.S.C. 3582(b), Justice
22 Scalia. I know there is a statute that governs that.
23 We also know there is a statute governing a term of
24 restitution itself. That's the provision cited, 3664(o),
25 which is reproduced at 11a of the appendix to our

1 brief --

2 JUSTICE SCALIA: I've got it.

3 MR. HEYTENS: -- which is the rules
4 governing finality with regard to an order imposing
5 restitution.

6 JUSTICE GINSBURG: Mr. Heytens, one problem
7 with the -- we have said that notice of appeal -- that
8 that time limit is jurisdictional, which means if the
9 defendant misses that deadline, no appeal. And we're
10 leaving this in a nebulous state if the judge says,
11 within -- this is -- this is a judgment of conviction
12 and sentence, but I'm still thinking about the
13 restitution.

14 The defendant has to know at that point,
15 must I appeal that first judgment? Because if I don't,
16 I'll never be able to appeal it.

17 But on your reading, the defendant can't
18 wait. When the judge imposes a sentence, the defendant
19 must meet the time clock for notice of appeal from the
20 sentence.

21 MR. HEYTENS: That's correct,
22 Justice Ginsburg. In our view, the defendant -- when
23 the judgment of conviction was imposed on this case,
24 which imposed a sentence of imprisonment on Mr. Dolan,
25 the time for appealing the judgment of conviction and

1 the term of imprisonment began to run.

2 If I could go back to Justice Breyer's
3 question --

4 JUSTICE GINSBURG: But that -- that would
5 mean even if the judge says, I'm going to impose the
6 restitution order 10 days from now, defendant's time
7 clock for notice of appeal would begin at -- at the time
8 the sentence is imposed, not 10 days later when
9 restitution is --

10 MR. HEYTENS: That's correct. He files a
11 notice of appeal when the judgment of conviction
12 is entered, and then 10 days later he can file a second
13 notice of appeal, and courts of appeal can consolidate
14 that case in the ordinary course.

15 You don't -- to answer Justice Breyer's very
16 specific question about the supervised released, I have
17 been advised that a district court cannot impose a term
18 of supervised release unless it also imposes a sentence
19 of imprisonment. So that particular hypothetical that
20 Justice Breyer raised wouldn't arise. The court
21 can't just --

22 CHIEF JUSTICE ROBERTS: Counsel, let's --
23 let's suppose there's no 3664(d)(5), and we're back to
24 just 363(a)(1), which says when sentencing a defendant,
25 the court shall order restitution. What if the

1 judge doesn't -- is that mandatory? It has to be when
2 sentencing the defendant?

3 MR. HEYTENS: I don't think so, Your Honor.
4 I think what --

5 CHIEF JUSTICE ROBERTS: So you think even
6 without 3664(d)(5), the judge can say: I know it says
7 when I'm sentencing I've got to order restitution.
8 But 2 months later, he can do it?

9 MR. HEYTENS: Mr. Chief Justice, let me
10 amend my answer slightly. He -- the judge is required
11 to do it when sentencing --

12 CHIEF JUSTICE ROBERTS: Yes, but nothing
13 happens if he doesn't. Is that --

14 MR. HEYTENS: Well, the question then
15 becomes one of a remedy. The court is required to do it,
16 and the question becomes what is the remedy when the
17 court does not. And what the Court said in
18 Montalvo-Murillo is that we presume that Federal
19 district courts will comply with the law, and that it is
20 inappropriate in situations where Congress doesn't
21 specify a remedy for courts to impose their own remedy.
22 That was exactly the situation in Montalvo-Murillo.

23 JUSTICE BREYER: Why don't we go back to my
24 hypothetical --

25 MR. HEYTENS: Sure.

1 JUSTICE BREYER: -- and just substitute the
2 word "fine" for "supervised release."

3 MR. HEYTENS: Justice Breyer, I'm -- I'm fairly
4 certain there is a statute that addresses the finality
5 when it comes to a sentence that imposes a term of a
6 fine, which is similar to the statute that addresses
7 finality of a judgment of conviction that imposes only
8 a term of imprisonment.

9 JUSTICE BREYER: I'm not -- I'm not an
10 expert in this area, as you can see. And -- and I need
11 to have a place to go to look so that I can see that
12 these things, in your view, all work out, and you're
13 not creating some odd appellate system. Do you have any
14 suggestions for me as to what I could go and read and
15 look at that would help me?

16 MR. HEYTENS: Justice Breyer, to address
17 your very specific fine question, there is in fact a
18 statute that addresses that as well. That is 18 U.S.C.
19 3572(c). It's structured very similarly to the -- the
20 section regarding judgments of imprisonment that I
21 quoted to the Court earlier, and Congress has addressed
22 that. It says: "Notwithstanding the fact that a
23 sentence to pay a fine can subsequently be altered in
24 various respects, a judgment that includes such a
25 sentence is a final judgment for all other" --

1 JUSTICE BREYER: Can the (o) -- you
2 remember -- you know what I'm referring to by (o)?

3 MR. HEYTENS: Yes, Justice Breyer.

4 JUSTICE BREYER: All right. Can that be
5 read to refer to initial -- an initial judgment of
6 restitution as well as an amended judgment?

7 MR. HEYTENS: Absolutely, Justice Breyer.
8 That's exactly what the First Circuit said in the Cheal
9 case, which is cited in our brief. The First Circuit in
10 that case addressed an initial judgment that said,
11 similarly, somewhat, to the judgment in this one -- the
12 original judgment, if you recall, in this case says the
13 Mandatory Victims Restitution Act is applicable;
14 however, the court does not have sufficient information
15 to calculate restitution at this time. What the First
16 Circuit reasoned in Cheal is that that can be
17 interpreted as a judgment imposing a restitution
18 obligation, which is thus final under subsection (o).
19 If you conclude that, you don't need to look at any
20 other statute to resolve --

21 JUSTICE SCALIA: Even though there's no
22 amount given?

23 MR. HEYTENS: Yes, Justice Scalia. Because
24 the one thing we know for certain is that even if it had
25 stated an amount, the fact that the amount can be amended

1 later doesn't deprive the judgment of finality.

2 JUSTICE STEVENS: May I ask this --

3 JUSTICE SCALIA: Simply because when you
4 state an amount, that amount can be amended later, that
5 leads to the conclusion that you need not even state an
6 amount? Do you do the same thing for imprisonment? You
7 say: I'm going to send you to prison; I'm not sure how
8 many years, but I'm going to send you to prison. Is
9 that appealable right away?

10 MR. HEYTENS: Well, Justice Scalia, the
11 district court is not permitted to do any of this.
12 Congress has required the district court to set the
13 amount --

14 JUSTICE SCALIA: I understand that, but
15 district courts don't always do what they are supposed
16 to. And it seems to me a very strange result that
17 you're --

18 MR. HEYTENS: It's true that, regrettably,
19 district courts sometimes don't do what they are
20 supposed to. What this Court has said, most notably in
21 Montalvo-Murillo, is that we should assume that they
22 will, and that it's inappropriate for courts to craft
23 legal rules that are based on the presumption that they
24 are going to violate their legal obligations.

25 JUSTICE STEVENS: May I ask this

1 hypothetical? Supposing the defendant fails to appeal
2 when he's sentenced, and then 90 days later, they impose
3 a restitution order and he appeals from that. May he
4 raise the issues about guilt and innocence and error in
5 the trial in that appeal?

6 MR. HEYTENS: Justice Stevens, just to make
7 sure I understand -- I want to make sure I understand
8 the hypothetical -- it's that the district court
9 sentences him, enters a judgment of conviction, and then
10 90 days later imposes an order of restitution?

11 JUSTICE STEVENS: Correct.

12 MR. HEYTENS: Okay. In that situation, no.
13 It is the government's view that he has -- the time for
14 appealing the judgment of conviction and the sentence of
15 imprisonment has run.

16 JUSTICE STEVENS: But he -- he can appeal
17 just the restitution order.

18 MR. HEYTENS: Just the restitution order, in
19 that situation, yes. Now, if he has appealed them both,
20 they can be consolidated, which has been done in several
21 cases in the courts --

22 JUSTICE STEVENS: No, I understand that.

23 MR. HEYTENS: -- in the circuit court of
24 appeals.

25 JUSTICE KENNEDY: You attach no significance

1 to the fact that in this case the judge said: I shall
2 order restitution? It's the same as if he said nothing
3 at all about restitution, so far as you are concerned?

4 MR. HEYTENS: We think this makes it an
5 easier case, in terms of it establishes that there is no
6 conceivable prejudice to Mr. Dolan as a result of the
7 delay in this case.

8 JUSTICE STEVENS: Let me ask you this
9 question: If we conclude there's a hole in the statute
10 that Congress has to amend, is it more likely that
11 Congress will cure the statute if we rule for you or if
12 we rule against you? It's pretty clear, the answer to
13 that, isn't it?

14 MR. HEYTENS: Yes, Justice Stevens. I think
15 Montalvo-Murillo supplies the answer to that.
16 Montalvo-Murillo says, where Congress does not supply a
17 remedy for violation of a statutory time obligation, it
18 is inappropriate for courts to invent their own in order
19 to coerce district courts into complying --

20 JUSTICE GINSBURG: So this then becomes a
21 goal, not a time line -- a deadline?

22 MR. HEYTENS: I think -- at some point, it
23 becomes a debate over precise wording, Justice Ginsburg.
24 I think it is a deadline. I think Congress intended for
25 district courts to do this. I think district courts who

1 have sworn an oath to uphold the Constitution and laws
2 of the United States are required to do it.

3 The question is: What is the remedy in the
4 rare, regrettable situation where they do not do it? And --

5 CHIEF JUSTICE ROBERTS: So a -- a defendant
6 who is sentenced to a week in prison, and he decides,
7 that's no big deal, I'm not going to appeal, and then
8 finds out, you know, 90 days later he has got to pay a
9 million dollars in restitution, is just out of luck,
10 right?

11 MR. HEYTENS: Well, that would be -- yes.
12 That would be our view, Mr. Chief Justice. Now, what I
13 would say is, it is, first of all, our view that the Court
14 doesn't need to resolve any of this. But, second of all,
15 one of the reasons is there is another way the Court
16 could resolve this, which is to follow the approach the
17 Court took in its decision in *Corey v. United States*,
18 which is cited in the blue brief.

19 Now, *Corey* involved a statute. It's
20 presentence -- it's pre-Federal sentencing guidelines.
21 It involves a statute that said if, at the time of the
22 sentencing, the district court feels like it needs more
23 information to decide how long to send the defendant to
24 jail for, it may commit the defendant to the discretion
25 of the Attorney General for a period of either 3 to

1 6 months; get, essentially, a PSR, before there were
2 PSRs; and then make a determination then.

3 The Court in Corey faced the question: When
4 the district court does that -- it says, I'm going to
5 give you to the Attorney General, and we'll come back in
6 6 months and decide what your sentence will be -- when
7 does the defendant have to appeal? That was the
8 question before the Court in Corey.

9 What the Court said in Corey is that the
10 defendant may appeal either at the time he is committed
11 to the discretion of the Attorney General or at the time
12 the district court imposes the final sentence. The
13 reason the Court said that -- this is the language
14 that's cited in the blue brief -- is the Court said it
15 would be extraordinary to tell a Federal criminal
16 defendant that he might have to wait up to 6 months in
17 order to take a notice of appeal from his judgment of
18 conviction.

19 JUSTICE BREYER: Look, you straightened me
20 out, from your point of view. But now you've mixed me
21 up again.

22 (Laughter.)

23 MR. HEYTENS: Sorry. I didn't realize,
24 Justice Breyer.

25 JUSTICE BREYER: Because I think you said

1 that the defendant is just out of luck. But, previously,
2 you had said that (o) applies, so I thought what you
3 were saying was that the sentence of imprisonment is
4 immediately appealable and must be appealed within
5 14 days because of that 3582.

6 MR. HEYTENS: That's our --

7 JUSTICE BREYER: And then you said (o)
8 applies, and (o) says that a sentence that imposes an
9 order of restitution is a final judgment. So if (o)
10 applies, when, 8 months later or 20 months later,
11 that restitution is made final and embodied in another
12 judgment, that is a final judgment which can't be
13 appealed.

14 So if you're right about (o) applying, then
15 the answer to the question is, no, he is not out of
16 luck. Now, don't just agree with me because I seem to
17 be on your side in this question.

18 (Laughter.)

19 MR. HEYTENS: No --

20 JUSTICE BREYER: I've got to figure this
21 out.

22 MR. HEYTENS: I apologize, Justice Breyer.
23 The government's position is that at the time the
24 judgment of conviction and the sentence of imprisonment
25 are entered, that is the time at which the defendant has

1 to appeal and, in our view, he may appeal. Later, when
2 the sentence of restitution is imposed, that is when
3 he appeals that.

4 What I was suggesting is that, to the extent
5 the Court has any concern about that, the alternative
6 way of resolving this issue would be the same way the
7 Court approached the issue in Corey, and you could say
8 that the defendant could appeal at either time.

9 Now, we think that would be incorrect, but
10 it would be open to the Court to do so to -- or to leave
11 the issue open in order to resolve this case. Because
12 as I said before, this defendant never attempted to
13 appeal his judgment of conviction or his original term
14 of imprisonment. So it's not, in this case, necessary
15 to decide what exactly would have happened had he
16 attempted to do so.

17 JUSTICE SCALIA: This criminal judgment of
18 restitution -- I assume it's the judge who finds that the
19 victim suffered so much money?

20 MR. HEYTENS: That's correct,
21 Justice Scalia.

22 JUSTICE SCALIA: Does he find that beyond a
23 reasonable doubt?

24 MR. HEYTENS: No, Justice Scalia. The
25 burden --

1 JUSTICE SCALIA: Just more likely than not?

2 MR. HEYTENS: That's correct.

3 JUSTICE SCALIA: And it's a criminal --
4 it's a criminal judgment?

5 MR. HEYTENS: That's what Congress has
6 provided. And in this Court's decision in Oregon v.
7 Ice, the Court, admittedly in dictum, stated that
8 restitution determinations are a category of
9 determinations that have been historically made by the
10 court, not by the jury. And regardless of what anyone
11 thinks is the answer to that question, it is certainly
12 not within the question presented. It has not been
13 raised at any point by the Petitioner in this case.

14 JUSTICE KENNEDY: I suppose that an answer to
15 the Chief Justice's concern about the 1-week sentence and
16 -- and he's not concerned -- is that all criminal
17 defendants know that an adjudication of guilt is
18 preclusive of later issues with -- with respect to civil
19 -- civil liability, and they take their chances.

20 But that -- that points up a difference
21 between this case and Montalvo-Murillo. In this case,
22 finality is central to the system, and that wasn't --
23 that's not really -- wasn't really true in Montalvo.

24 MR. HEYTENS: That's certainly correct,
25 Justice Kennedy. That was by its terms a bail

1 determination, which by its nature is not a final
2 determination in the sense that a criminal statute is,
3 though the Court's language doesn't really suggest that
4 that would make any difference. And I would say that
5 some of the other cases in this same line of cases,
6 including some of the ones Justice Breyer mentioned, did
7 raise finality concerns. There was a very strong
8 finality concern raised in the Peabody Coal case. There
9 were finality concerns raised in Brock, that Congress
10 had said this needs to be done, and once it's done, it
11 needs to be done. And so, there are -- some of the
12 cases in this same line have also involved finality,
13 admittedly not in the criminal context.

14 But I think the -- the most important thing
15 that the Court said in -- the two most important things
16 that the Court said in Montalvo-Murillo, as are relevant
17 here, is that, first, when Congress doesn't specify a
18 remedy -- and Congress has not specified a remedy in
19 this case -- it's inappropriate for courts to impose
20 their own.

21 The second thing that the Court said is that
22 we should presume that Federal district courts are going
23 to comply with legal obligations, and we shouldn't make
24 rules based on the assumption that they won't.

25 And third is that when courts do impose

1 remedies, they shouldn't make -- impose a remedy where
2 there's a profound lack of fit between the violation that
3 occurred and the remedy that the defendant is asking
4 them to impose.

5 Let me give you an example on that. The
6 general rule in Federal criminal litigation is that the
7 Federal district court is supposed to impose sentence
8 without unnecessary delay. Now, say the district court
9 violates that obligation. It takes too long to impose a
10 sentence. I think it would be extraordinary to suggest
11 that the remedy of a district court's unnecessary delay
12 in sentencing the defendant means the defendant should
13 get off scot-free.

14 The remedy is to tell the district court you
15 have taken too long to impose the sentence; impose the
16 sentence forthwith.

17 The same thing is true here. Congress has
18 told the district court you need to impose restitution
19 in every case where the defendant is convicted of a
20 crime of violence.

21 CHIEF JUSTICE ROBERTS: So, your argument is
22 "not to exceed 90 days" means the same thing as "without
23 undue delay"?

24 MR. HEYTENS: We don't think it means the
25 same thing, Mr. Chief Justice. What we think it means

1 is the violation should have the same consequences. The
2 violation is to say if you don't do what you are
3 supposed to, the remedy is to do it immediately. The
4 remedy isn't to say you don't have to do it anymore.

5 If there are no further questions, the
6 government urges that the judgment of the court below be
7 affirmed.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Ms. Karlan, you have 4 minutes.

10 REBUTTAL ARGUMENT OF PAMELA S. KARLAN

11 ON BEHALF OF THE PETITIONER

12 MS. KARLAN: I have three points -- excuse
13 me -- to make: The first goes to what the remedy is
14 here and what the error is here. The error here
15 occurred when the district court did not impose
16 restitution. The government should have filed a timely
17 appeal under Rule 4. They had 30 days to do so. The
18 government did not appeal the failure to make
19 restitution.

20 That error is not before this Court now.
21 What's before this Court is a second judgment.

22 JUSTICE SOTOMAYOR: They couldn't do that
23 until the end of the 90 days. If the judge has 90 days
24 to order restitution, that's a vicious cycle argument.

25 MS. KARLAN: No, Justice Sotomayor, because

1 had the -- had the government on October 28 looked and
2 said, there's no restitution order in this case, they
3 could have filed an appeal then under Rule 4, and they
4 would have won. They didn't do so.

5 Second --

6 JUSTICE GINSBURG: Well, that's rather
7 theoretical because if that -- I mean, the -- the judge
8 surely would have acted before he could process an
9 appeal.

10 MS. KARLAN: Well, he lacks actually the --
11 the power to do that. Once the appeal is taken, he
12 can't do that. And may I just say that here I think the
13 critical rule to understand is one sentence, one appeal.
14 So turning first --

15 JUSTICE SOTOMAYOR: But that's not true. I
16 don't know if you've had time to look at 3582 or 35 --

17 MS. KARLAN: Yes, I have.

18 JUSTICE SOTOMAYOR: Those do appear to say
19 that once there's a term of imprisonment, that that
20 constitutes a final judgment.

21 MS. KARLAN: But they do so in the context
22 of Section 3553(a), which is cited on page 6 of the
23 yellow brief, which says "the court shall impose a
24 sentence."

25 Now, the different components can each be

1 added together. But there is one sentence in a criminal
2 case on a particular charge, and that sentence can
3 include restitution, it can include a fine, it can
4 include imprisonment. That doesn't make it three
5 sentences. And only when all of those have been imposed
6 is there a final judgment. Until then, the judgment --

7 JUSTICE ALITO: It can also include
8 forfeiture. What's -- what is the rule for forfeiture?

9 MS. KARLAN: I don't know the rule for
10 forfeiture. I do know the rule for all of the other criminal
11 proceedings, which is 3582(b), to which the government
12 refers; 3572(c) for fines; 3562(b) for community
13 release; and 3664(o) for restitution. All of those have
14 to make one sentence, and then there is one appeal.

15 Under our rule, which I think comports with
16 the plain language of the statute, we know when an
17 appeal takes place, and there will be one appeal. Under
18 the government's rule --

19 JUSTICE ALITO: What is the difference -- in
20 response to the last argument that your opponent made,
21 what is the difference between the provision here and
22 Rule 32(b)(1) of the criminal rules, the court must
23 impose sentence without unnecessary delay?

24 MS. KARLAN: There, the question is, did it
25 do it without unnecessary delay? Here the question is,

1 did it do it within 90 days? When it didn't, the
2 government had to appeal. The government did not do
3 that.

4 JUSTICE ALITO: So if the -- I didn't
5 understand the answer. If the sentence is not imposed
6 without unnecessary delay, the consequence is that there
7 can be no sentence?

8 MS. KARLAN: No. This Court has never
9 decided what the rule means there. But this is a
10 statute. And if I could turn to the question of what
11 the statute --

12 JUSTICE SCALIA: Before you do that, tell me
13 what the government appeal would consist of. The 90 days
14 has expired --

15 MS. KARLAN: And the judgment of August 8th
16 became final.

17 JUSTICE SCALIA: And you -- you tell
18 me the court -- the court has no ability to impose
19 restitution after 90 days.

20 MS. KARLAN: That's right. The --

21 JUSTICE SCALIA: What's the use of appealing?

22 MS. KARLAN: Because on appeal you say the
23 court erred, and it imposed an illegal sentence --

24 JUSTICE SCALIA: And the appellate court says
25 too bad --

1 MS. KARLAN: No --

2 JUSTICE SCALIA -- 90 days are up.

3 MS. KARLAN: No, Justice Scalia. In the
4 same way that if a court failed to impose a mandatory minimum
5 sentence and there was a final judgment, the government
6 could appeal. And the fact that the initial sentence
7 didn't do that doesn't mean anything at that point.

8 JUSTICE SCALIA: There is no time limit on
9 the mandatory minimum.

10 MS. KARLAN: But the -- but -- but, Your
11 Honor, if the government appeals an illegal sentence,
12 that sentence can be corrected and the new mandate from
13 the court of appeals saying you erred in not imposing
14 mandatory restitution starts the 90-day clock again.
15 Now, this is --

16 JUSTICE BREYER: Could you go back to --
17 could you go back to Justice Alito's question,
18 because --

19 MS. KARLAN: Yes.

20 JUSTICE BREYER: -- that was exactly the
21 same thing. I think what he may be saying, though, is
22 it makes more sense to read these statutes as saying
23 imprisonment or community -- or community service, a
24 form of supervised release, or fines -- I don't know
25 about forfeiture -- can be appealed as separate final

1 judgments, because then you don't have to wait for
2 90 days.

3 MS. KARLAN: No.

4 JUSTICE BREYER: And if you read it that
5 way, it's fairer to the defendant, and you don't have to
6 worry about the restitution appeal because of (o).

7 Now, what blocks the reading -- what blocks
8 the reading I just gave?

9 MS. KARLAN: The principle that there must
10 be one sentence that determines each of the punishments
11 for a particular crime.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 The case is submitted.

14 (Whereupon, at 11:08 a.m., the case in the
15 above-entitled matter was submitted.)

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A				
abeyance 36:12	12:17 13:3	21:25 23:14	applicable 44:13	award 18:14
ability 58:18	17:11 18:2	27:21 28:12,14	applies 50:2,8	aware 27:18,23
able 38:21 40:16	57:7,19 58:4	29:13 31:22	50:10	28:9 29:5,9
above-entitled	Alito's 13:20	32:7,12,17	apply 19:15	37:20,23
1:11 60:15	59:17	34:23 35:1,11	applying 50:14	a.m 1:13 3:2
absent 29:18,20	allowed 6:17	35:14,24,25	approach 48:16	60:14
Absolutely 37:1	allows 3:19	36:2,6,22,25	approached	
44:7	altered 34:6	37:14 38:10,18	51:7	B
accept 24:25	43:23	38:19,25 39:12	April 1:9	b 13:25 34:3,3
account 23:2,3,8	alternative 51:5	40:7,9,15,16	area 43:10	back 33:17 41:2
36:19	amend 42:10	40:19 41:7,11	arguably 18:8	41:23 42:23
accurate 14:22	47:10	41:13,13 46:1	argument 1:12	49:5 59:16,17
acquitted 14:12	amended 30:12	46:5,16 48:7	2:2,5,8 3:4,7	bad 12:13 14:5,9
act 3:11,19 4:1	44:6,25 45:4	49:7,10,17	4:8 11:13	31:6 58:25
10:7 14:1	amendment	51:1,1,8,13	13:22,24 14:6	bail 33:7,8,9
19:20 27:25	7:20 19:14	55:17,18 56:3	14:8 26:21	52:25
32:4,5 44:13	amount 3:20	56:9,11,13	28:3 38:22	balance 12:21
acted 56:8	4:20 7:19	57:14,17,17	54:21 55:10,24	13:15,18 14:9
action 15:10	12:12 18:21	58:2,13,22	57:20	23:9
30:19 33:21	19:14 22:8	59:6 60:6	arguments 39:4	bar 19:16
added 57:1	24:1 33:2	appealable	argument's	barred 4:14
additional 5:4	44:22,25,25	18:15 21:10	25:25	based 45:23
7:7	45:4,4,6,13	45:9 50:4	asking 15:12	53:24
address 13:23	analogous 23:12	appealed 37:3	54:3	basis 7:8 33:19
43:16	analogue 23:19	46:19 50:4,13	aspects 17:9	beaten 12:11
addressed 8:9	and/or 33:19	59:25	36:19	began 41:1
43:21 44:10	announced 6:3	appealing 3:23	assistance 19:13	behalf 1:15,19
addresses 43:4,6	announces 5:9	37:11 38:6	Assistant 1:17	2:4,7,10 3:8
43:18	announcing	40:25 46:14	assume 45:21	28:4 55:11
addressing 28:7	4:18	58:21	51:18	believe 7:2
adjudication	answer 24:18,25	appeals 6:7 16:8	assumption 26:4	17:12 22:4,18
52:17	35:4 41:15	16:13 20:8	53:24	22:20 30:4,8
admittedly 52:7	42:10 47:12,15	22:6 23:22	attach 46:25	39:17
53:13	50:15 52:11,14	27:20 28:11,14	attempted 38:17	benefit 18:10,11
advised 41:17	58:5	29:2 32:19	38:19 51:12,16	beyond 38:24
affirmed 55:7	answering 13:20	38:1 46:3,24	attending 13:6	51:22
agency 15:10	anymore 55:4	51:3 59:11,13	Attorney 48:25	big 48:7
ago 4:2	apologize 33:25	appear 56:18	49:5,11	bills 12:7
agree 10:15 21:1	50:22	APPEARAN...	attorneys 18:8	blocks 60:7,7
50:16	appeal 5:22,22	1:14	18:19	blue 48:18 49:14
agreed 27:6	6:2,9,15,23,24	appears 18:24	attorney's 18:14	boil 20:24
agrees 28:8	7:1,4 8:9,24	appellate 16:7	August 11:20	books 17:6
ahead 29:6	11:24 12:25	43:13 58:24	58:15	bothering 37:23
Alito 5:25 6:6,14	15:18 16:2,4	appendix 8:3	authority 4:23	Breyer 14:21
6:20 8:7 12:1	16:10 18:1	10:6 30:7	authorized 39:6	15:5,7,11,15
	19:15 20:4	39:25	authorizes 3:15	15:19,21,24
				16:16,18,22,24

17:2,14,22 20:15,18,21 21:8,15,20 24:24 25:5,7 25:11,18,21,24 26:2,8,13,15 26:18,21,24 34:14 35:4,8 35:19,23 37:16 37:22 38:12,15 38:20 39:13,16 41:20 42:23 43:1,3,9,16 44:1,3,4,7 49:19,24,25 50:7,20,22 53:6 59:16,20 60:4 Breyer's 41:2,15 BRIAN 1:3 brief 7:22 8:16 18:20 21:23 28:17 30:7 33:18,24,25 37:24 40:1 44:9 48:18 49:14 56:23 briefs 27:19 Brock 53:9 brought 18:4 burden 51:25	22:1,4 24:22 27:23 28:16 29:1,5,9 31:5 31:10 33:2 34:10 35:14 36:16 38:5,7 40:23 41:14 44:9,10,12 47:1,5,7 51:11 51:14 52:13,21 52:21 53:8,19 54:19 56:2 57:2 60:13,14 cases 8:13 14:9 16:14,15 19:17 23:22 27:19 28:9,11,18 29:1 31:25 33:4 36:9 46:21 53:5,5 53:12 catch 27:19 category 31:25 33:3,4 52:8 causes 14:12 central 52:22 certain 3:13 32:23 33:2 34:7 43:4 44:24 certainly 5:23 19:9 24:3 30:21 31:17 35:17 52:11,24 certiorari 8:16 challenging 19:13 chance 34:23 chances 52:19 change 22:8 24:15 charge 57:2 Cheal 28:16 44:8,16 Chief 3:3,9 9:1,6 9:12,18,23	10:1,14,17,21 11:4 22:7 28:1 28:5 31:20 41:22 42:5,9 42:12 48:5,12 52:15 54:21,25 55:8 60:12 circle 8:14 circuit 8:8,21 19:22 28:16,18 44:8,9,16 46:23 circumstances 19:19 36:16 cite 8:15 27:18 33:23 cited 21:23 28:17 33:23,25 39:24 44:9 48:18 49:14 56:22 civil 15:9 18:9 18:15,17,25 19:7,12,25 20:1 23:12,19 27:22 52:18,19 claim 11:18 claims 37:7 clear 35:23 47:12 clock 40:19 41:7 59:14 Coal 53:8 code 35:10 coerce 47:19 collateral 16:15 20:23 23:23 24:1 come 7:9 16:14 29:15 49:5 comes 29:22 30:16 43:5 commit 48:24 committed 49:10 community	22:25 57:12 59:23,23 complete 5:8,14 completely 39:9 complication 24:17 comply 30:25 32:1,11 42:19 53:23 complying 47:19 component 8:23 components 8:23 17:8 56:25 comports 57:15 conceivable 47:6 concern 51:5 52:15 53:8 concerned 47:3 52:16 concerns 53:7,9 conclude 44:19 47:9 conclusion 45:5 confirmed 4:2 confront 28:9 confronts 29:10 Congress 12:3 12:18,20,21 13:5,15,17 14:8,17,21 19:5 20:2 21:1 26:2 30:22 31:1,16,16,18 31:19 32:3 35:21 38:23 39:6 42:20 43:21 45:12 47:10,11,16,24 52:5 53:9,17 53:18 54:17 Congress's 19:9 39:10 consequence 31:2,4,19,21 31:21,24 58:6	consequences 55:1 consider 27:7 considering 22:22 consist 58:13 consistent 12:2 39:9 consolidate 41:13 consolidated 28:15 29:7 46:20 constitutes 7:19 34:9 56:20 Constitution 48:1 contemplates 27:14 contemporane... 37:13 context 19:10 23:19 33:22 53:13 56:21 continuance 25:14 26:6,11 26:12 continuances 26:18 continue 4:11 contrary 6:7 16:11,12 convicted 6:22 54:19 conviction 15:18 29:13 34:8,11 34:12 37:11,12 40:11,23,25 41:11 43:7 46:9,14 49:18 50:24 51:13 Corey 48:17,19 49:3,8,9 51:7 correct 5:16 7:2 7:17 9:11 10:4 14:17 20:10,14
<hr/> C <hr/> C 2:1 3:1 calculate 9:9 17:25 18:21,22 19:1 44:15 California 1:15 called 4:5 can't 26:1 captioned 34:2 care 26:2 case 3:4 4:21 5:20 6:10 11:24 12:6,8 16:4 17:8 18:9 18:15 20:11				

<p>25:4,6 26:7,8 26:20,23 28:23 29:8,21 30:17 40:21 41:10 46:11 51:20 52:2,24 corrected 4:4 20:4 59:12 correcting 3:23 correctly 4:17 counsel 19:13 28:1 34:16 41:22 55:8 60:12 counts 20:19 couple 8:13 39:2 course 14:10 15:5 21:10 25:1 38:10 41:14 court 1:1,12 3:10,14 4:2,3,5 4:8,17,23 5:4,7 6:1,3 7:10 8:9 9:8,19 10:2,7 10:22,25,25 11:8,19 12:25 13:9,10 19:18 20:22 21:22 22:21 23:1,17 27:7,20 28:6 28:18 30:12 31:23,25 32:2 32:5 33:25 35:18 36:4,18 38:13 41:17,20 41:25 42:15,17 42:17 43:21 44:14 45:11,12 45:20 46:8,23 48:13,15,17,22 49:3,4,8,9,12 49:13,14 51:5 51:7,10 52:7 52:10 53:15,16 53:21 54:7,8</p>	<p>54:14,18 55:6 55:15,20,21 56:23 57:22 58:8,18,18,23 58:24 59:4,13 courts 3:16 16:13 22:6 27:20 28:11 30:24 31:21 32:19 35:21 41:13 42:19,21 45:15,19,22 46:21 47:18,19 47:25,25 53:19 53:22,25 court's 3:24 21:16 23:20 36:15 52:6 53:3 54:11 court-made 20:18 co-counsel 34:16 craft 45:22 create 39:8,10 creates 39:5 creating 43:13 crime 19:5 54:20 60:11 crimes 3:13 criminal 6:7,9 12:23 14:14 15:8 16:14 17:8 18:3,6,7 18:18,22 19:8 19:17 20:1 23:18,22 24:20 33:15,20,22 36:9 38:7 39:11 49:15 51:17 52:3,4 52:16 53:2,13 54:6 57:1,10 57:22 critical 32:15 34:7 56:13 cure 47:11</p>	<p>cycle 55:24</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>d 3:1 29:24 30:6 30:8 damages 31:7 danger 33:11 date 4:19 5:4 9:2 9:8,13,13,17 10:2,7,12,18 10:22 11:1,9,9 14:25 dates 19:15 day 4:10,18 5:18 5:18 34:18 days 3:21 4:11 4:19 5:8 6:1,25 7:9 8:18 9:16 10:3,9,10,19 10:23 11:5,6 11:11,15,18,22 12:24 14:18 16:5 20:3,7,8 24:16 25:5,13 26:3,11,22 27:10,16 28:19 28:22 29:23 30:2,11,14,24 31:17,18 34:25 36:7,22,23,24 38:9,24 39:7 41:6,8,12 46:2 46:10 48:8 50:5 54:22 55:17,23,23 58:1,13,19 59:2 60:2 dead 31:5 deadline 21:2 40:9 47:21,24 deadlines 3:22 deal 34:23 48:7 dealing 33:15 debate 47:23 deceased 31:13 decide 16:14 38:4 48:23</p>	<p>49:6 51:15 decided 16:1 31:8,9,11 58:9 decides 48:6 decision 21:24 28:16 48:17 52:6 decisions 20:22 defendant 3:17 6:2,9,15,21,21 6:23,24 8:6 11:14 12:11 14:12 15:17 17:18,20 19:7 20:7 22:21,24 23:13 24:9 25:1 28:12 29:19 35:1,24 35:25 36:1,6 38:17 39:11 40:9,14,17,18 40:22 41:24 42:2 46:1 48:5 48:23,24 49:7 49:10,16 50:1 50:25 51:8,12 54:3,12,12,19 60:5 defendants 13:17 19:12 33:9,12 52:17 defendant's 3:12 18:18 41:6 defer 24:9 delay 23:13 24:19 47:7 54:8,11,23 57:23,25 58:6 denied 33:9 Department 1:18 14:23,25 depends 36:15 deprive 45:1 design 13:25 determination</p>	<p>3:20 4:20 5:10 10:3,8,11,18 10:19 30:23 49:2 53:1,2 determinations 39:7 52:8,9 determined 22:2 22:3 determines 60:10 dictum 52:7 didn't 49:23 difference 15:12 15:14 18:2 32:15 52:20 53:4 57:19,21 different 15:7,9 17:8,19 19:16 21:10 33:10 56:25 directed 30:22 direction 4:5 directly 27:24 28:9 29:9 discovering 7:8 discovers 30:10 discovery 29:23 30:11 discretion 48:24 49:11 discuss 29:1 discussing 30:9 dismissed 27:21 dispositive 4:5 district 3:14,16 4:8,17,23 10:25 11:8 30:24 36:4,15 36:18 41:17 42:19 45:11,12 45:15,19 46:8 47:19,25,25 48:22 49:4,12 53:22 54:7,8 54:11,14,18 55:15</p>
--	---	--	--	---

doing 13:7 23:17 32:1 38:21	escapes 14:13,14	15:1 31:25	28:10 33:7,13	future 12:12
Dolan 1:3 3:4 34:13 40:24 47:6	ESQ 1:15,17 2:3 2:6,9	46:1	33:16 34:4	F.R.A.P 8:24
dollars 48:9	essentially 49:1	failure 55:18	40:4 43:4,7	<hr/>
double 29:21	establish 32:7	fairer 60:5	45:1 52:22	G
doubt 51:23	established 35:21	fairly 43:3	53:7,8,9,12	G 3:1
dramatically 6:6 6:10	establishes 35:17 47:5	falls 13:11	find 24:10 51:22	general 1:18 3:22 23:20 26:16 35:7,18 48:25 49:5,11 54:6
D.C 1:8,18	exactly 34:15 42:22 44:8 51:15 59:20	far 47:3	finds 7:7 48:8 51:18	generally 15:4
<hr/>	examples 8:15 17:19 19:11 21:22 22:25 32:18 54:5	Federal 16:7,13 18:22 24:20 30:24 35:21 36:9 39:11 42:18 49:15 53:22 54:6,7	fine 17:21,21,25 18:3,5,22 24:2 24:4 43:2,6,17 43:23 57:3	getting 34:15
E	example 8:15 17:19 19:11 21:22 22:25 32:18 54:5	feels 48:22	finer 3:18 57:12 59:24	Ginsburg 11:5 11:12 19:3,11 23:10 24:6 36:10 40:6,22 41:4 47:20,23 56:6
E 2:1 3:1,1	examples 33:21	fees 18:8,14,19	finished 34:18	give 12:22 13:16 22:14,15 34:22 49:5 54:5
earlier 43:21	exceed 3:21 9:16 10:3,9,19 54:22	figure 22:11 50:20	first 3:4,15 12:20 21:18 28:16 32:21 38:12 39:3 40:15 44:8,9 44:15 48:13 53:17 55:13 56:14	given 20:9 32:18 44:22
easier 47:5	excuse 4:7 55:12	file 5:22 6:9 7:1 32:12 41:12	fit 22:4 54:2	gives 22:6
effect 24:14 34:4	execution 22:2	filed 11:24 55:16 56:3	fits 38:4	giving 13:18
effective 14:25	exercise 25:15	files 41:10	follow 13:1 24:23 25:16 48:16	go 7:15 25:13 41:2 42:23 43:11,14 59:16 59:17
either 28:12 48:25 49:10 51:8	exist 19:17	filing 8:24 16:10 19:15 32:7,16	following 4:4 15:14 36:7	goal 47:21
embodied 50:11	expert 43:10	final 3:19,24 4:20 5:1,5,10 5:21 6:15,18 7:3,14,19 8:1 8:18 9:14 10:2 10:8,10,18,18 11:21 13:17 15:23,25,25 16:15,18,20 17:4,7,16 18:1 18:15 20:11,16 20:19 21:6,24 23:15 24:15 33:20 34:9 35:11,11,13 38:24 43:25 44:18 49:12 50:9,11,12 53:1 56:20 57:6 58:16 59:5,25	foremost 38:13	goes 18:4,5 55:13
enact 14:23	expiration 27:10	finality 15:16	forfeiture 57:8,8 57:10 59:25	going 6:24 11:8 11:16,18 12:8 12:9 22:10,11 22:14,15 24:8 24:10 25:1,2,3 25:12 27:4 31:8 33:17 34:23 38:6 41:5 45:7,8,24 48:7 49:4 53:22
enacted 12:3	expired 58:14		forgetting 35:10	good 34:16
endless 30:20	explain 39:1		form 59:24	Gorsuch 32:18
enforce 22:2	expressly 29:24		forth 13:9	governing 14:24 39:23 40:4
ensuring 25:23	extend 24:12		forthwith 54:16	
enter 9:2 16:3	extended 6:11		fortuity 29:12	
entered 6:13 7:20 8:11,24 34:11,21 41:12 50:25	extension 13:18		forward 29:23	
entering 4:15	extent 24:4 36:14,17 37:5 37:25 51:4		four 28:10 29:1	
enters 15:24 34:20 36:4 46:9	extra 16:5		frankly 11:24	
entire 24:19	extraordinary 49:15 54:10		front 16:9	
entitled 19:13 29:16	<hr/>		functionally 19:3	
entry 36:7 37:12	F		further 7:6 30:10 55:5	
equally 21:5	faced 49:3			
erred 58:23 59:13	fact 6:12 8:2 13:23 34:5 43:17,22 44:25 47:1 59:6			
error 4:4 5:23 20:3 37:6 46:4 55:14,14,20	failed 59:4			
errors 4:6 31:22	fails 3:24 4:3			

government 5:22 7:7 11:23 12:25 28:8 55:6,16,18 56:1 57:11 58:2,2,13 59:5 59:11	39:15,21 40:3 40:6,21 41:10 42:3,9,14,25 43:3,16 44:3,7 44:23 45:10,18 46:6,12,18,23 47:4,14,22 48:11 49:23 50:6,19,22 51:20,24 52:2 52:5,24 54:24	56:23 57:23 58:18 59:4 imposed 4:10,17 5:24 6:16 17:10 27:22 34:12 36:24 40:23,24 41:8 51:2 57:5 58:5 58:23 imposes 7:24 11:10 27:15 36:5,18 37:19 40:18 41:18 43:5,7 46:10 49:12 50:8 imposing 24:12 27:8 38:9 40:4 44:17 59:13 imposition 34:2 37:13 39:8 imprisonment 3:18 4:18 18:21 24:1 28:13 34:3,6 34:13 36:5,7 37:4,14,17 38:9 39:17,20 40:24 41:1,19 43:8,20 45:6 46:15 50:3,24 51:14 56:19 57:4 59:23	inconsistent 13:25 incorrect 30:4 51:9 incredibly 15:13 inextricably 38:1 information 9:17 11:2 23:16 24:8 36:13 44:14 48:23 initial 5:9 6:4 7:18 8:11 30:19 44:5,5 44:10 59:6 innocence 46:4 innocent 37:7 intend 21:5 intended 38:23 47:24 intends 5:9 6:4 intent 39:10 interact 19:1 22:23 24:2 interests 13:6 interlocutory 23:22 interpretation 16:7 21:12,14 22:5 interpreted 44:17 interpreting 20:22 25:19 interrelated 36:20 inures 18:10 invalid 15:2 invent 47:18 involved 23:23 48:19 53:12 involves 17:8 48:21 involving 13:8 issue 8:9,22	27:11 29:10 31:6 33:3 51:6 51:7,11 issued 30:2 issues 23:23 33:7 36:20 38:14 46:4 52:18 it's 14:2 27:8 37:19 45:22 53:10,19 I'd 26:25 34:22 I'll 21:18 23:15 I'm 23:18 29:4 33:18 41:5 43:3,3 I've 26:24 42:7 50:20
H				J
handled 6:7 hands 20:13 happen 14:11 happened 28:12 28:15 51:15 happening 32:17 happens 14:14 16:4 34:18 37:18 42:13 hear 3:3 heard 35:9 hearing 4:9,11 5:18 11:19 held 8:17 36:12 help 43:15 Heytens 1:17 2:6 28:2,3,5,20 28:23 29:4,8 29:17,20 30:4 30:17,21 31:15 31:23 32:8,13 32:15 33:23 35:3,6,17,20 36:1,4,14 37:1 37:5,8,10,19 38:12,16 39:2	he'd 25:13,14 historically 52:9 hold 5:10,17 11:9,9,19 hole 47:9 Honor 22:18 30:5,22 31:15 31:23 32:8 39:3 42:3 59:11 hopes 11:2 Hughey 19:20 hypothetical 41:19 42:24 46:1,8	Ice 52:7 illegal 58:23 59:11 illustrated 32:17 immediately 50:4 55:3 immunized 17:16 impair 24:4 important 15:17 38:2 53:14,15 impose 3:16,17 4:3,24 5:13 11:19 21:9 24:4 27:9,12 41:5,17 42:21 46:2 53:19,25 54:1,4,7,9,15 54:15,18 55:15	inappropriate 42:20 45:22 47:18 53:19 incarcerated 6:22 incarceration 27:12 include 57:3,3,4 57:7 includes 17:4 34:8 43:24 including 12:4 27:8 53:6 income 12:10,12	J J 1:17 2:6 28:3 jail 22:8 48:24 jeopardy 29:21 judge 8:20 9:2 12:13,15 14:11 14:15 15:24 21:9 22:10 23:11 24:6,7 24:19,25 25:12 27:9,14 31:5,8 31:10,11,12 32:18 34:20 37:19 40:10,18 41:5 42:1,6,10 47:1 51:18 55:23 56:7 judgment 3:24 4:12,15 7:3,19 8:1,18 11:20 11:20 15:25 16:3,15,18,20 17:4,7,16 18:1 18:13,13,16,17 20:11,16,19 21:5,6,11,24 22:16 33:20 34:4,8,9,10,12

34:21 35:11,12 36:5,8 37:11 37:12 38:9 40:11,15,23,25 41:11 43:7,24 43:25 44:5,6 44:10,11,12,17 45:1 46:9,14 49:17 50:9,12 50:12,24 51:13 51:17 52:4 55:6,21 56:20 57:6,6 58:15 59:5 judgments 7:15 43:20 60:1 July 4:23 11:22 34:11 jurisdiction 16:14 22:6 35:20 jurisdictional 19:16 40:8 jury 52:10 Justice 1:18 3:3 3:9 4:7,14,25 5:3,6,12,17,25 6:6,14,20 7:5 7:13,21,23 8:1 8:4,7,8 9:1,6 9:12,18,23 10:1,14,17,21 11:4,5,12 12:1 12:17 13:3,19 13:20 14:3,10 14:21 15:5,7 15:11,15,19,21 15:24 16:5,16 16:18,22,24 17:2,6,11,12 17:14 18:2 19:3,11,21 20:6,12,15,18 20:21 21:8,15 21:20 22:7 23:3,5,10,25	24:6,24 25:5,7 25:11,18,21,24 26:2,8,13,15 26:18,21,24 27:2,4,17 28:1 28:5,8,19,21 28:24,25 29:4 29:6,8,11,18 30:1,14,18 31:3,20 32:6,9 32:13,14 33:6 34:14 35:4,8 35:19,22,23 36:3,10,11,16 36:21 37:2,6,8 37:9,16,22 38:12,15,20 39:13,15,19,21 40:2,6,22 41:2 41:4,15,20,22 42:5,9,12,23 43:1,3,9,16 44:1,3,4,7,21 44:23 45:2,3 45:10,14,25 46:6,11,16,22 46:25 47:8,14 47:20,23 48:5 48:12 49:19,24 49:25 50:7,20 50:22 51:17,21 51:22,24 52:1 52:3,14,25 53:6 54:21,25 55:8,22,25 56:6,15,18 57:7,19 58:4 58:12,17,21,24 59:2,3,8,16,17 59:20 60:4,12 Justice's 52:15 JUTICE 17:22	2:9 3:6,7,9 4:13,16 5:2,6 5:16,19 6:3,14 7:2,12,17,22 7:25 8:3,5,12 9:4,11,22,25 10:4,16,20,24 11:7,13,17 12:16,19 13:14 14:2,8,17 15:4 15:6,8,13,16 15:20,23 16:12 16:17,21 17:1 17:3,12,15,23 18:16 19:9 20:10,14,16,20 21:7,13,16,21 22:18 23:4,7 23:18 24:17 25:4,6,10,16 25:20,22 26:1 26:7,10,14,17 26:20,23,25 27:13,23 55:9 55:10,12,25 56:10,17,21 57:9,24 58:8 58:15,20,22 59:1,3,10,19 60:3,9 keep 27:16 Kelly 19:20 Kennedy 13:19 14:3 35:22 36:3,11,17 46:25 52:14,25 kind 8:13 19:7 32:21,25 kinds 19:19 20:24 32:20 knew 11:15,17 13:9 know 16:5,8 25:18 38:4 39:6,16,22,23 40:14 42:6	44:2,24 48:8 52:17 56:16 57:9,10,16 59:24 knowing 19:2	26:22 29:22 48:23 54:9,15 look 9:20 23:21 24:21 43:11,15 44:19 49:19 56:16 looked 56:1 looking 10:5 33:18 looks 22:12 loses 4:23 12:11 loss 32:4 losses 10:8 29:23 30:10,11 lost 12:9 lot 12:9 22:13 luck 48:9 50:1 50:16
				L
			lack 54:2 lacks 56:10 laid 25:17 language 16:10 34:7 49:13 53:3 57:16 lapsed 8:18 late 32:11 Laughter 49:22 50:18 law 8:19 11:21 14:11 15:2,2 21:11 35:7 42:19 laws 48:1 leads 45:5 leave 51:10 leaves 22:1 leaving 40:10 legal 33:19 45:23,24 53:23 legislation 12:3 13:4 14:25 let's 6:22 41:22 41:23 liability 14:13 52:19 limit 32:11,25 40:8 59:8 limitation 32:1 limitations 29:14 32:16,24 limits 32:7,20 line 47:21 53:5 53:12 literally 25:19 litigation 21:25 54:6 long 6:8 7:8 12:15,24 25:8	
				M
			making 13:8 mandamus 25:8 mandate 59:12 mandatory 3:11 3:12,25 4:1,3 5:21 17:21,23 17:24 27:24 32:1 42:1 44:13 59:4,9 59:14 matter 1:11 60:15 mean 7:13,14 10:22 14:6 16:24 20:23 21:1 25:24 27:9 37:22 41:5 56:7 59:7 means 40:8 54:12,22,24,25 58:9 meant 14:18,19 31:18 mechanisms 25:23 medical 12:7 meet 3:14 40:19	
	K			
	Kapelushnik 8:15 Karlan 1:15 2:3			

mentioned 53:6	48:14 54:18	24:7 36:4	part 3:12 12:23	52:13 59:7
merits 22:1	needs 24:7 36:18	53:10 56:11,19	18:17 27:12	pointed 17:6
million 48:9	37:14 48:22	ones 53:6	32:5 33:20	23:25
mind 12:18,20	53:10,11	open 5:10 11:9,9	35:13	points 52:20
12:21 38:3	net 13:23	22:16 27:16	particular 35:10	55:12
minimum 59:4,9	never 38:19	51:10,11	41:19 57:2	positing 30:15
minutes 55:9	40:16 51:12	operation 8:18	60:11	position 5:2,25
miscellaneous	58:8	11:21	parties 22:1	8:7 12:1,2 39:4
18:24	new 59:12	opinion 8:20	parts 35:12	50:23
misreading 9:19	normal 36:8	19:22 32:18	passed 3:23	Posner 8:20
misses 36:10	notably 45:20	opponent 57:20	paths 3:13	possibility 6:11
40:9	note 18:23	oral 1:11 2:2,5	pay 43:23 48:8	23:11
mistake 12:13	notice 6:9 7:1	3:7 28:3	pays 14:15	possible 16:6
13:11 14:11,15	32:16 40:7,19	order 3:24 5:14	Peabody 53:8	24:25
mixed 38:1	41:7,11,13	6:1,12 7:24	penal 19:21,23	power 4:19
49:20	49:17	8:10 15:25,25	penalties 22:22	25:13 32:5
modified 34:6	notwithstandi...	16:15,19,22	penalty 18:4,6,8	56:11
modifies 10:10	8:2 34:5 43:22	18:15,20,21	19:12	precedent 21:16
modify 10:11		20:2 21:6,9	pending 36:13	21:19,20,21
money 51:19	O	23:15 28:14	period 3:21 4:21	33:19
Montalvo 52:23	o 2:1 3:1 21:9	30:2,13,15,19	5:15 6:2,8,17	precedents
Montalvo-Mu...	44:1,2,18 50:2	38:18 40:4	9:15 10:12	23:21
31:24 33:4	50:7,8,9,14	41:6,25 42:7	24:12 25:9	precise 36:16
42:18,22 45:21	60:6	46:3,10,17,18	48:25	47:23
47:15,16 52:21	oath 48:1	47:2,18 49:17	periods 3:22	precisely 8:12
53:16	object 9:3	50:9 51:11	permitted 45:11	16:4
month 34:24	objection 36:15	55:24 56:2	person 13:12	preclusive 52:18
months 14:24	obligation 30:25	orders 20:23	petition 8:3,16	predecessor
15:2 20:12	44:18 47:17	ordinary 41:14	10:5 30:12	19:20
23:15 24:10	54:9	Oregon 52:6	Petitioner 1:4,16	prejudice 29:18
39:11 42:8	obligations	original 28:13	2:4,10 3:8	29:20 47:6
49:1,6,16	45:24 53:23	31:5 44:12	52:13 55:11	presented 52:12
50:10,10	occur 3:20 9:14	51:13	piece 35:1	presentence
morning 3:4	occurred 4:22		place 43:11	34:20 48:20
muck 38:6,25	9:7 54:3 55:15	P	57:17	presume 42:18
MVRA 6:17	occurs 31:2	P 3:1	places 21:24	53:22
	October 4:22	page 2:2 7:22,25	plain 5:23 57:16	presumption
N	11:21 56:1	21:23 30:6	play 33:8	45:23
N 2:1,1 3:1	odd 43:13	56:22	plea 38:19	pretty 47:12
nature 53:1	office 11:3	paid 12:7	please 3:10 28:6	prevails 14:4
nebulous 40:10	officer's 11:15	PAMELA 1:15	point 11:10,23	prevent 21:13
necessarily 7:14	Oh 7:23,23	2:3,9 3:7 55:10	13:5 15:11	prevented 23:17
necessary 51:14	okay 26:24	paper 35:2	18:20 22:9	prevents 21:11
necessity 19:6	29:19 30:20,22	paraphrase	33:18 34:15,16	previous 9:21
need 17:25 24:8	34:14 46:12	14:22	38:18 40:14	previously 50:1
38:13 43:10	once 3:22 4:21	Parr 21:22 22:4	47:22 49:20	pre-Federal
44:19 45:5	5:7 8:17 9:17	22:4 35:15		

<p>48:20 principle 60:9 principles 35:7 prison 6:23 17:23,24 23:1 45:7,8 48:6 probation 3:18 11:2,15 23:1 39:18 problem 17:14 23:24 29:2,21 40:6 problems 26:16 Procedure 16:8 24:20 proceeding 19:8 proceedings 5:14 13:9 33:9 57:11 process 5:7,8 29:13 56:8 profound 54:2 promulgate 15:2 proper 21:17 29:3 proposal 31:10 31:16 prosecution 13:11 18:4 prosecutorial 13:7 prosecutors 13:5 provide 13:18 provided 52:6 provides 32:3 provision 7:6 9:21 10:22 15:22 16:19,22 17:5,13,15,17 22:6 30:5 34:2 34:4 35:5,7 39:24 57:21 provisions 4:1 18:23,25,25 PSR 49:1</p>	<p>PSRs 49:2 pulled 31:12 pulp 12:11 punishment 14:14 18:18 20:1 punishments 60:10 purpose 19:10 21:24 purposes 34:9 put 22:25 25:2 33:12 puts 6:1</p> <hr/> <p style="text-align: center;">Q</p> <p>question 4:17 5:13 13:21,22 19:24 20:25 23:16 24:18 27:3,4,17 28:7 28:10 33:7,8 41:3,16 42:14 42:16 43:17 47:9 48:3 49:3 49:8 50:15,17 52:11,12 57:24 57:25 58:10 59:17 questions 33:13 55:5 quick 6:23 quite 11:24 quote 9:15 quoted 35:9,15 43:21 quoting 37:24</p> <hr/> <p style="text-align: center;">R</p> <p>R 3:1 raise 46:4 53:7 raised 28:8 41:20 52:13 53:8,9 rare 48:4 read 15:21 16:24,25 23:5</p>	<p>43:14 44:5 59:22 60:4 reading 21:17 29:14 40:17 60:7,8 ready 9:9 realize 49:23 really 8:6 11:1 13:20,20 18:9 19:12 21:2 52:23,23 53:3 reason 4:9 15:14 22:19 23:24 38:16,23 49:13 reasonable 51:23 reasonably 25:15 reasoned 44:16 reasons 38:21 39:2 48:15 REBUTTAL 2:8 55:10 recall 44:12 receipt 36:13 receive 11:2 12:23 14:19 receives 11:1 recommended 11:16 recovers 34:24 refer 44:5 referring 16:6 17:13 30:5 44:2 refers 57:12 regard 40:4 regarding 4:6 43:20 regardless 52:10 regrettable 48:4 regrettably 45:18 regular 27:15 related 8:22 release 22:25</p>	<p>37:17,20 38:10 39:14 41:18 43:2 57:13 59:24 released 41:16 relevant 15:12 15:13 53:16 remainder 27:1 remedies 54:1 remedy 19:4,25 20:1 25:7 26:5 27:22 32:2,4 32:10 42:15,16 42:21,21 47:17 48:3 53:18,18 54:1,3,11,14 55:3,4,13 remember 44:2 render 4:12 repeatedly 35:18 repeats 33:8 reply 18:20 21:23 report 11:15 34:20 reproduced 30:6 39:25 required 9:4 30:25 31:17 32:2,22 36:2 42:10,15 45:12 48:2 requires 27:6 reserve 26:25 resolve 44:20 48:14,16 51:11 resolved 27:11 resolving 51:6 resources 33:11 respect 11:13 16:21 52:18 respects 43:24 respond 38:22 Respondent 1:19 2:7 28:4</p>	<p>response 5:13 35:15 57:20 responsibilities 3:14 responsibility 13:12 rest 4:10 restitute 21:3 restitution 3:11 3:12,16,20,25 3:25 4:20,24 5:11,14,20,24 6:1,11,12,19 7:8,10,18 8:10 8:21 9:2,9,14 11:11,16 12:23 13:16 14:20 16:1,3,20,23 17:4 18:7,13 18:17 19:7,14 19:19 21:5,9 22:3,9,11,12 22:24 23:16,25 24:5,22 27:8 27:25 28:14,21 29:16 30:2,12 30:15,19 33:19 34:22,24 35:13 36:12,19,24,25 38:18 39:24 40:5,13 41:6,9 41:25 42:7 44:6,13,15,17 46:3,10,17,18 47:2,3 48:9 50:9,11 51:2 51:18 52:8 54:18 55:16,19 55:24 56:2 57:3,13 58:19 59:14 60:6 restitutionary 6:16 27:11 result 12:12 13:24 45:16 47:6</p>
---	---	--	---	---

<p>ridiculous 31:4 right 5:5 9:25 10:15,20 12:22 16:16 20:9,20 20:21 21:3 24:11,24 30:9 36:25 37:4 44:4 45:9 48:10 50:14 58:20 rights 12:3 13:4 13:6 ROBERTS 3:3 9:1,6,18,23 10:1,14,17,21 11:4 22:7 28:1 31:20 41:22 42:5,12 48:5 54:21 55:8 60:12 Robinson 19:21 routinely 39:6 39:10 rule 14:4,23 15:3 17:16 20:4,16,19,23 23:19 24:20 35:18 36:8 39:8 47:11,12 54:6 55:17 56:3,13 57:8,9 57:10,15,18,22 58:9 rules 13:1 16:7 23:12,19 24:23 25:17 33:16 38:1,6,25 40:3 45:23 53:24 57:22 run 4:21 8:25 41:1 46:15 runs 37:11 RUSSELL 1:3</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 1:15 2:1,3,9 3:1,7 55:10</p>	<p>safety 14:24 sake 25:25 saying 6:10,15 6:21,25 10:22 13:10,14,15 24:14,21,23 30:20 39:15 50:3 59:13,21 59:22 says 7:18 8:22 9:13,19,19 10:2,7 13:21 14:21 16:1,2 16:19,22 17:1 20:17 22:10,13 22:15 24:3 29:22,24 30:14 30:18 34:4,5 34:22 36:12,17 40:10 41:5,24 42:6 43:22 44:12 47:16 49:4 50:8 56:23 58:24 Scalia 4:25 5:3,6 7:5,13,21,23 8:1,4 14:10 16:6 17:6,12 20:6,12 23:3,5 23:25 27:4 28:19,21,24 31:3 32:6,9,13 32:14 36:21 37:2,6,8,9 39:19,22 40:2 44:21,23 45:3 45:10,14 51:17 51:21,22,24 52:1,3 58:12 58:17,21,24 59:2,3,8 scenario 39:5 scot-free 54:13 second 3:19 12:25 19:22 30:8 32:25</p>	<p>33:1,3,4 41:12 48:14 53:21 55:21 56:5 section 3:15,19 7:17 10:6 17:17 18:23,24 21:18 22:20 34:1,1 43:20 56:22 see 16:8,9 17:22 36:21 43:10,11 send 45:7,8 48:23 sense 18:12 31:14 53:2 59:22 sentence 3:12,23 4:4,10,18,25 5:10,21 6:16 6:18 7:23 8:23 12:23 17:3,9,9 17:23,24,24 18:1 20:8 22:10 23:2,14 24:13,14 25:2 25:2,3 27:8,9 27:12 28:21 30:8 33:15 34:2,5,8,12 35:10 36:5,6 36:18,20,24,25 37:3,13,20,24 39:8,14,18 40:12,18,20,24 41:8,18 43:5 43:23,25 46:14 49:6,12 50:3,8 50:24 51:2 52:15 54:7,10 54:15,16 56:13 56:24 57:1,2 57:14,23 58:5 58:7,23 59:5,6 59:11,12 60:10 sentenced 6:22 17:20 31:9</p>	<p>46:2 48:6 sentences 46:9 57:5 sentencing 3:16 4:1,6,22 5:4,7 5:9 6:4 8:11 9:20,20,24 10:9 11:22 12:24 13:17 15:9,16 18:22 18:25 19:11 20:3 22:19,21 24:9,19 26:14 26:19 27:7,15 34:19 39:12 41:24 42:2,7 42:11 48:20,22 54:12 separate 18:13 18:14,19 59:25 serve 24:11 service 59:23 serving 23:1 set 4:19 5:4 9:8 9:13,14,16 10:2,4,7,7,22 11:1 22:9 45:12 sets 3:13 setting 10:11 23:2 Seventh 8:21 short 6:8 showing 33:10 side 38:22 50:17 significance 46:25 similar 25:12 39:17 43:6 similarly 43:19 44:11 simple 38:16 simply 9:13 24:22 45:3 sister 34:16 sit 20:13 27:18</p>	<p>situation 8:10 30:16 31:2 33:14 39:9,10 42:22 46:12,19 48:4 situations 18:3 42:20 Sixth 19:14 slight 24:17 slightly 17:19 42:10 society 14:15 Solicitor 1:17 somewhat 44:11 sorry 30:1 49:23 sort 26:3 29:20 31:3 Sotomayor 4:7 4:14 5:12,17 8:8 19:21 29:11,18 30:1 30:14,18 33:6 55:22,25 56:15 56:18 sovereign 18:5,6 18:11 spare 19:6 specific 37:21 41:16 43:17 specifically 17:16 specified 31:16 31:19 53:18 specify 31:1 42:21 53:17 speed 26:4 Speedy 32:4 squarely 29:5 Stanford 1:15 started 5:7 starting 33:17 starts 4:9 59:14 state 32:9 40:10 45:4,5 stated 44:25 52:7</p>
---	--	--	--	---

states 1:1,6,12 3:5 4:3 12:7 21:22 30:9 48:2,17	43:23 substantial 12:12 substitute 19:4 19:25 43:1 succeed 5:23 suffered 31:7 51:19 suffers 13:12 sufficient 44:14 sufficiently 13:6 suggest 53:3 54:10 suggesting 51:4 suggestions 43:14 suing 19:6 supervised 37:17,20 38:10 39:14 41:16,18 43:2 59:24 supplement 19:25 supplies 47:15 supply 47:16 suppose 17:20 34:14,20 35:24 37:16 41:23 52:14 supposed 17:20 22:22 38:8 45:15,20 54:7 55:3 Supposing 46:1 Supreme 1:1,12 sure 5:12 13:8 38:11 42:25 45:7 46:7,7 surely 56:8 sworn 48:1 system 43:13 52:22	23:3,7,15 36:19 49:17 52:19 taken 27:21 37:25 54:15 56:11 takes 54:9 57:17 talk 21:17 talks 9:23 22:21 technical 11:13 14:4 tell 49:15 54:14 58:12,17 term 6:16 17:4 28:13 39:23 41:1,17 43:5,8 51:13 56:19 terminates 21:25 terms 3:18 27:16 29:22 47:5 52:25 Thank 3:9 28:1 28:5 55:8 60:12 that's 8:21 12:4 12:17 15:6 16:11 18:19 19:9 32:17 38:5 56:6 58:20 theoretical 56:7 there's 8:20 30:18 32:15 41:23 44:21 47:9 54:2 56:2 56:19 they'll 23:8 they're 9:8 they've 23:22 thing 13:8 14:10 16:8 21:4 32:14 38:17 44:24 45:6 53:14,21 54:17 54:22,25 59:21	things 19:1 20:24 21:13 26:4 28:11,15 29:12 33:23 43:12 53:15 think 10:12,14 10:24 12:17,20 16:10 21:13 23:7 24:18 27:13 29:25 31:6,15,23 32:10 35:6 36:17 39:3 42:3,4,5 47:4 47:14,22,24,24 47:25 49:25 51:9 53:14 54:10,24,25 56:12 57:15 59:21 thinking 8:17 26:13,15 38:23 40:12 thinks 6:24 24:7 52:11 third 13:2 53:25 thought 9:18 13:5 22:13 25:24 34:15,17 50:2 three 55:12 57:4 thrust 12:2 13:4 13:25 tie 33:17 time 3:17 4:18 6:8,8,17,18 7:6 8:24 14:15,19 22:8 23:1,13 24:8,10,12,15 32:1,7,11,20 32:23,25 33:2 36:20 37:10 40:8,19,25 41:6,7 44:15 46:13 47:17,21 48:21 49:10,11	50:23,25 51:8 56:16 59:8 timely 8:10 55:16 times 19:18 tire 14:24 Title 18:24 TOBY 1:17 2:6 28:3 told 38:8 54:18 totality 27:7 traditional 18:6 18:7 Transportation 14:23 15:1 treat 33:19 trial 14:11 31:12 31:21,25 32:4 34:19 37:7 46:5 tried 31:5,10 true 11:14 16:1 45:18 52:23 54:17 56:15 trying 19:5 Tuesday 1:9 turn 21:18 58:10 turning 56:14 turns 22:12 two 3:13 7:14 18:3 21:13,17 28:11,17 32:20 53:15
subsequently 30:10 34:6	<hr/> T <hr/> T 2:1,1 tacked 19:8 take 6:2,23 23:2	16:8 21:4 32:14 38:17 44:24 45:6 53:14,21 54:17 54:22,25 59:21	46:13 47:17,21 48:21 49:10,11	<hr/> U <hr/> unaware 23:18 underlying 29:12 understand 4:16 6:20 13:21,22 15:11 23:20 36:21 45:14 46:7,7,22 56:13 58:5 understands 13:21 understood 5:13

<p>undue 54:23 unfair 13:24 United 1:1,6,12 3:5 4:3 12:7 21:22 48:2,17 unnecessary 54:8,11 57:23 57:25 58:6 unreasonable 26:6 unwise 10:25 uphold 48:1 urges 55:6 use 17:19 24:11 58:21 usual 31:21 U.S.C 22:5,20 34:1 39:21 43:18</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:4 4:2 19:21 21:22 48:17 52:6 various 43:24 Varrone 19:22 versa 33:12 vice 33:12 vicious 55:24 victim 3:11,25 7:7,9 11:3 12:6 12:10,10,14,14 13:12,24 14:13 14:19 18:10 19:4,6 22:25 25:23 29:15,22 29:24 30:9,10 30:16 31:7 34:24 51:19 victimized 13:13 victims 12:3,9 12:22 13:4,7,8 13:16 14:1 27:24 44:13 victim's 10:8 12:7 view 18:12 22:8</p>	<p>29:11 36:1 40:22 43:12 46:13 48:12,13 49:20 51:1 violate 45:24 violates 54:9 violation 9:7 47:17 54:2 55:1,2 violence 54:20</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait 6:25 10:23 10:23 20:7 24:10 27:11 39:11 40:18 49:16 60:1 waited 12:15 want 23:11,13 32:21,22 35:22 38:5 46:7 wanted 13:16,16 21:2 31:18 wants 6:23 37:14 Washington 1:8 1:18 wasn't 13:3,3 19:5 34:17 37:24 52:22,23 way 6:7 8:12,17 23:5,20 27:13 48:15 51:6,6 59:4 60:5 ways 34:7 week 48:6 went 29:6 weren't 13:8 we'll 49:5 we're 24:21,22 30:5,8 34:15 34:18 40:9 41:23 what's 15:12 16:12 32:17 55:21 57:8 whoa 35:8,8</p>	<p>win 6:24 wisest 8:17 wishes 36:6 won 11:25 56:4 word 43:2 wording 47:23 words 10:17 work 43:12 worked 23:21 worry 60:6 wouldn't 25:12 26:4 41:20 write 38:21 written 23:6 27:14</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,7</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>years 4:2 12:4 22:10,14,15 29:15 30:16 31:4 45:8 yellow 56:23 you'll 16:3 24:9 you're 6:10,21 6:25 13:10,19 13:20 24:10,14 25:18 30:20 31:8 32:21 33:14 37:23 43:12 50:14 you've 38:8 56:16</p> <hr/> <p style="text-align: center;">\$</p> <hr/> <p>\$100,000 31:7</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>09-367 1:4 3:4</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 29:15 1-week 52:15 10 29:15 30:16 41:6,8,12</p>	<p>10:11 1:13 3:2 100 25:5 29:15 11a 39:25 11:08 60:14 12 21:23 1291 22:5,5 14 36:7,22 38:9 50:5 15 29:15 18 15:2 18:24 22:20 34:1 39:21 43:18</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 4:2 22:14 29:15 42:8 20 1:9 29:15 50:10 2007 34:11 2010 1:9 28 2:7 22:5 56:1 28th 4:22 11:21</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 20:12 22:10 23:15 24:10 34:11 39:11 48:25 30 55:17 30th 4:23 11:22 32 24:20 32(b)(1) 57:22 35 20:4 56:16 3553 22:20 23:5 27:5 3553(a) 56:22 3562(b) 57:12 3572(c) 43:19 57:12 3582 50:5 56:16 3582(b) 34:1 39:21 57:11 363(a)(1) 41:24 3663A(a)(1) 3:15 9:21 3664(a) 18:23 3664(d)(5) 3:19</p>	<p>10:6 41:23 42:6 3664(o) 7:18 17:17 21:18,19 39:24 57:13</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 8:24 22:15 55:9,17 56:3</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 29:15,24 30:6 30:8 31:4 54(b) 23:12,19 55 2:10 55a 10:6</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>6 49:1,6,16 56:22 6A 30:6 60 7:9 16:5 29:23 30:2,11 30:14 60a 8:3 60-day 17:5,13 17:15</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>8 50:10 8th 11:20 58:15 89 10:23</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>9 14:24 90 3:21 4:19 5:8 6:1,25 8:18 9:16 10:3,9,10 10:19 11:5,6 11:11,15,18,22 12:24 14:18 20:3,7,8 24:16 25:13 26:3,11 26:22 27:10,16 28:19,22 30:24 31:17,18 34:25 36:23,24 38:24</p>
---	--	---	---	---

39:7 46:2,10 48:8 54:22 55:23,23 58:1 58:13,19 59:2 60:2 90th 5:18 90-day 4:21 5:15 10:12 13:18 17:17 21:2 24:12 59:14 91 4:11 91st 5:18				
---	--	--	--	--