



C O N T E N T S	
	PAGE
1	
2	ORAL ARGUMENT OF
3	MARK T. STANCIL, ESQ.
4	On behalf of the Petitioner
5	MATTHEW D. ROBERTS, ESQ.
6	On behalf of the Respondent
7	REBUTTAL ARGUMENT OF
8	MARK T. STANCIL, ESQ.
9	On behalf of the Petitioner
10	
11	
12	
13	
14	
15	
16	
17	
18	
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21	
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23	
24	
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12  
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18  
19  
20  
21  
22  
23  
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P R O C E E D I N G S

(12:59 p.m.)

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

Mr. Stancil.

ORAL ARGUMENT OF MARK K. STANCIL

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

12 JUSTICE GINSBURG: But I'm --

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

15 JUSTICE GINSBURG: Yes.

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

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

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

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

3 JUSTICE GINSBURG: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 -- that's my understanding.

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

7 MR. STANCIL: Yes, Your Honor.

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

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

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

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

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

2 Reverse --

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

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

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

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

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

1 JUSTICE SOTOMAYOR: Well, the Senate did.

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

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

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

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

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

17 MR. STANCIL: I disagree, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 JUSTICE KENNEDY: Yes.

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

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

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

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

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

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

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

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

24 JUSTICE KENNEDY: I'm not sure that -- if  
25 you have a district where you have 5 days, a very

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

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

10 Let's assume that it takes 2 weeks on  
11 average or 3 weeks on average to prepare a  
12 reasonable pretrial motion. Well, in those  
13 jurisdictions that have that local rule, the short local  
14 rule, you get 2 extra weeks on the speedy trial clock,  
15 because you have to run in and hit stop on the clock by  
16 asking for additional time.

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

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

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

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

6 JUSTICE KENNEDY: Right.

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

9 JUSTICE KENNEDY: Right.

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

13 JUSTICE KENNEDY: Right.

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

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

1 more fundamentally --

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

5 MR. STANCIL: That's correct.

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

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

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

25 And I think, more fundamentally, this is a

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

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

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

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

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

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

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

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

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

22 MR. STANCIL: No. I'm not sure I -- I  
23 apologize. I'm not sure I understand --

24 JUSTICE SOTOMAYOR: Local rule from a  
25 district court judge: Defendant is arraigned; you have

1 21 days to file motions.

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

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

9 MR. STANCIL: Yes. Under 18 U.S.C., I  
10 believe it's 3288 and 3289, essentially gives the  
11 government 6 months after the dismissal of an  
12 indictment to re-indict a defendant. And courts have  
13 almost universally held that that applies -- or I  
14 believe it's universally held that that applies where  
15 the dismissal is based on Speedy Trial Act grounds. I  
16 think we are in agreement with the government that there  
17 is not a statute of limitations problem.

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

20 MR. STANCIL: The speedy trial clock starts  
21 anew after a new indictment, yes.

22 JUSTICE SOTOMAYOR: That's what I mean.

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

25 JUSTICE SOTOMAYOR: Do you have any idea how

1 many convictions would be at risk for reversal under  
2 this rule, that would be currently pending and subject  
3 to a ruling in your favor now?

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

12 JUSTICE SOTOMAYOR: In a timely manner.

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

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

24 MR. STANCIL: Not that I am aware of, Your  
25 Honor, but nor has there been any indication that

1 district courts in the two jurisdiction where they get  
2 the rule right in our view deny defense requests for  
3 additional time.

4 I think -- I think this rule will matter if  
5 you assume that the average pretrial motion extension is  
6 relatively modest and that the lawyers are fairly  
7 reasonable in what they request. We are talking about,  
8 you know, additional delays of a week or 2 weeks, but  
9 that is -- again, that backs right up into the  
10 congressional judgment -- the legislative judgment that  
11 Congress made.

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

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

23 MR. STANCIL: Well, that --

24 JUSTICE KENNEDY: I mean, is that what's  
25 driving your concern?

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

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

8 MR. STANCIL: The court may --

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

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

18 So in the routine case that is not complex,  
19 where the -- where the defendant's counsel may be just  
20 simply not exercising due diligence, you could ask for  
21 2 weeks and there is no -- there is no balancing. The  
22 district court doesn't even have to ask, what's the  
23 delay, you know, why the extra delay? And that time is  
24 automatically excluded.

25 JUSTICE KENNEDY: But that's my point.

1 MR. STANCIL: Yes.

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

4 MR. STANCIL: In the absence --

5 JUSTICE KENNEDY: Or do you doubt that?

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

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

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Roberts.

20 ORAL ARGUMENT OF MATTHEW D. ROBERTS

21 ON BEHALF OF THE RESPONDENT

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

24 Additional time granted for preparation of  
25 pretrial motions is automatically excluded from the

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

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

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

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

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

1 from the extension was from September 20 to October 4th,  
2 or 13 days.

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

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

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

15 MR. ROBERTS: Well, I think the Act --

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

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

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

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

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

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

16 MR. ROBERTS: There were --

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

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

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

25 MR. ROBERTS: The order -- an order is a

1 step in the case, an act of the court --

2 CHIEF JUSTICE ROBERTS: Right.

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

4 CHIEF JUSTICE ROBERTS: Right.

5 MR. ROBERTS: And it's --

6 CHIEF JUSTICE ROBERTS: And that's 1 day.

7 MR. ROBERTS: Yes, but it's the delay

8 resulting from the order --

9 CHIEF JUSTICE ROBERTS: Ah. Now that --

10 MR. ROBERTS: -- that we are talking about.

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

15 MR. ROBERTS: Yes.

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

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

24 CHIEF JUSTICE ROBERTS: Ah. Well -- yes.

25 Well, or -- yes -- no, I'm looking at (h)(4). Now

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

3 MR. ROBERTS: Right.

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

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

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

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

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

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

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

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

1 is whether that delay is excluded.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 JUSTICE KENNEDY: I see. I see.

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

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

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

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

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

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

15 Third --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 MR. ROBERTS: Well, what --

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

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

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

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

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

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

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

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

13 JUSTICE STEVENS: Mr. Roberts --

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

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

20 JUSTICE STEVENS: May I ask you,  
21 Mr. Roberts, to comment on your opponent's argument that  
22 you are creating a rule that if the particular district  
23 has a standing order that motions be filed after 7  
24 days and another district has a standing order that  
25 it be 21 days, the effect of your rule would be to make

1 the 7-day district an 86-day -- give them 86 days  
2 under the Speedy Trial Act?

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

11 So, for example, the Northern District of  
12 Florida gives 14 days after the motion. The Northern  
13 District of Illinois gives 10 days after the motion.

14 JUSTICE STEVENS: That's for response time.

15 MR. ROBERTS: For response time.

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

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

20 JUSTICE STEVENS: Yes.

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

23 JUSTICE STEVENS: But it's a difference that's  
24 specifically authorized by Congress?

25 MR. ROBERTS: Well, this is specifically

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

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

8 JUSTICE STEVENS: But doesn't it seem fairly  
9 clear that the district which has a 21-day rule -- they  
10 won't have to -- normally, they won't need extra time in  
11 the routine case for an extra motion, whereas the  
12 districts with a 7-day rule would pretty  
13 automatically need another 10 days or so?

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

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

1 Congress was intending.

2 CHIEF JUSTICE ROBERTS: Counsel, this may be  
3 the same question I was asking earlier, but I want to  
4 make sure I've got your answer. Let's say the original  
5 date for filing motions is, as it was here,  
6 September 13th, right? On September 7th, Mr. Bloate  
7 asks for additional time. So the judge is -- you know,  
8 runs a tight ship, and he says, I will give you 1 day.  
9 One more day, so now it's due on September 14th.

10 You would say the delay resulting from that  
11 extension was 7 days, from September 7th, when he  
12 filed it, to September 14th, and not 1 day.

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

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

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

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

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

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

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

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

12           MR. ROBERTS: On the 25th.

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

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

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

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

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

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

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

12 JUSTICE SOTOMAYOR: That -- that the courts  
13 view a decision or statement that no motions are going  
14 to be filed as a request for a waiver of that  
15 obligation?

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

19 JUSTICE SOTOMAYOR: Intent to waive.

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

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

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

6 JUSTICE BREYER: So it's --

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

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

12 MR. ROBERTS: I think that the --

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

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

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

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

1 motion.

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

7 JUSTICE SOTOMAYOR: Could you --

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

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

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

16 JUSTICE STEVENS: Did --

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

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

24 JUSTICE SOTOMAYOR: But it's -- it's not  
25 everybody who invokes a Speedy Trial Act violation

1 objection.

2 MR. ROBERTS: No. That's true. That's  
3 true. I mean, I can't say that they are going to be --  
4 and I would have to agree with -- with Petitioner's  
5 counsel that, you know, that there are consequences in  
6 whatever ruling that the Court -- that the Court makes  
7 in a case.

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

11 MR. ROBERTS: Yes, and --

12 JUSTICE SOTOMAYOR: And how -- what kind of  
13 burden it placed.

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

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

25 MR. ROBERTS: That's right, and that's --

1 JUSTICE SOTOMAYOR: To remind them.

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

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

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

1 JUSTICE SCALIA: The grant of the motion is  
2 the proceeding?

3 MR. ROBERTS: The -- the order granting the  
4 additional time is the proceeding --

5 JUSTICE SCALIA: Right. Is the proceeding.

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

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

14 MR. ROBERTS: Okay. I'm sorry, Your Honor.

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

17 MR. ROBERTS: Right.

18 JUSTICE STEVENS: And what subsection does  
19 cover it?

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

22 JUSTICE STEVENS: But it's not governed by  
23 any lettered subsection?

24 MR. ROBERTS: No. It's a -- another  
25 proceeding that -- that is covered by the "including but

1 not limited to" language on --

2 JUSTICE STEVENS: But there is no period --

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

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

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

12 JUSTICE STEVENS: I see.

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

18 JUSTICE SCALIA: And you -- and you say the  
19 order is a proceeding for that purpose, the order granting  
20 the extension of time?

21 MR. ROBERTS: That -- that's the proceeding  
22 beforehand, Your Honor. Yes. But the -- that's not  
23 -- you know, first of all, as I said, a proceeding  
24 is a -- is an act done by the court or under the court's  
25 authority, so in order to fit squarely within that.

1 Plus I would direct you to (h)(1)(F), which indicates  
2 that orders can be proceedings here because it excludes  
3 delay following an order of removal or an order  
4 directing the transportation of the defendant.

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

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

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

18 JUSTICE STEVENS: That's a tough argument.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Stancil, 5 minutes.

21 REBUTTAL ARGUMENT OF MARK T. STANCIL

22 ON BEHALF OF THE PETITIONER

23 MR. STANCIL: I would like to quickly  
24 address what I hope to be just four points. The first  
25 is the government's fundamental principle. Their

1 fundamental tenet is that the specific treatment of  
2 pretrial motions in subparagraph (D) suggests no  
3 negative inference or limiting inference on the general  
4 standard of (h)(1).

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

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

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

23           But even if you think you want to look  
24 Further, well, is there any support in these enumerated  
25 subparagraphs for the government's rule that you would

1 treat a defense request for additional time differently?  
2 No. None of the enumerated subparagraphs distinguishes  
3 between defense requests and government requests. None  
4 distinguishes between routinely granted time or  
5 specifically allotted time.

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

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

17 MR. STANCIL: Well, the government's rule I  
18 think is --

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

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

1 JUSTICE SCALIA: Well --

2 MR. STANCIL: They don't say anything about  
3 government requests.

4 JUSTICE SCALIA: -- they've made it very clear  
5 here that they think it applies to both the defendant  
6 and the government.

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

12 JUSTICE BREYER: No, wait -- (D) has a  
13 special time limit built into it -- I mean, (h) or  
14 whatever the number is now. It says not to exclude  
15 30 days. Okay?

16 MR. STANCIL: Yes.

17 JUSTICE BREYER: None of the others do.

18 MR. STANCIL: Right.

19 JUSTICE BREYER: So I'd say, right there,  
20 Congress doesn't want the judge to have it for more than 30  
21 days. Congress doesn't say a word in any of the others  
22 that says anything about preparation time.

23 MR. STANCIL: Well, I disagree about  
24 subparagraph (D), Your Honor. (D) says from point B,  
25 the filing --

1 JUSTICE BREYER: No, I know. But there is  
2 not an indication about preparation time. Their  
3 argument is a literal argument under the statute. Is it  
4 from other proceedings? Yes, we know that because of  
5 (D), okay? Does it result from other proceedings? Yes,  
6 because, in fact, the preparation time is a direct  
7 result of the other proceedings as defined in (D).  
8 Therefore, it is an ancillary matter related to other  
9 proceedings that was caused by the other proceedings.  
10 QED. Their argument is literal, and there is no policy  
11 against it. That's what they say.

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

16 MR. STANCIL: But there is no --

17 JUSTICE BREYER: At least my interpretation  
18 of it.

19 MR. STANCIL: There is no difference, Your  
20 Honor, between not exceeding 30 days and from and to.  
21 And I think this is -- this case -- it comes down to that  
22 and that alone, which is Congress specifically addressed  
23 pretrial motions, any delay resulting from a pretrial  
24 motion, and it said from point A to point B. And even if  
25 you had to look behind that, you would look at the

1 legislative history, and the Senate Judiciary Committee  
2 was asked a specific question by the government no less:  
3 Can we include preparation time? And they said no.

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

8 (Laughter.)

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

22 CHIEF JUSTICE ROBERTS: I would have thought  
23 that whether or not you think that type of delay is  
24 excludable depends upon what that type of delay is, which  
25 requires some sense of how it's going to be calculated.

1 MR. STANCIL: Yes, Your Honor.

2 JUSTICE BREYER: Does 6 days make a  
3 difference to your case? If they lose 6 days, do you  
4 win?

5 MR. STANCIL: I'm not sure, Your Honor. I  
6 would have -- I would plead ignorance the same.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
8 This case is submitted.

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

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<b>A</b>	38:22,23 39:2 43:7,23 44:21 45:5 49:19 50:21 51:4 55:1,25 58:17	28:13 <b>allowing</b> 31:19 <b>allows</b> 18:10,14 19:11 <b>amended</b> 18:24 37:8 <b>amount</b> 33:13 43:25 44:14 <b>analogous</b> 27:7 34:20 47:25 52:17 53:16 <b>analysis</b> 17:23 <b>ancillary</b> 27:7,9 27:14 32:8 42:7 51:7 52:17 53:16 57:8 58:19 <b>anew</b> 22:21 <b>answer</b> 5:7 22:5 38:12 43:4,21 <b>answered</b> 6:7 <b>answering</b> 22:6 <b>anticipated</b> 13:3 <b>anyway</b> 25:6 28:5,14 <b>apart</b> 49:16 <b>apologize</b> 21:23 <b>appeals</b> 7:25 13:21 48:23 <b>appear</b> 21:4 <b>APPEARAN...</b> 1:14 <b>application</b> 7:12 <b>applies</b> 22:13,14 56:5 <b>apply</b> 8:1 <b>applying</b> 9:5 <b>appropriate</b> 6:2 21:17 33:25 44:2 50:3 <b>approve</b> 32:6 <b>argue</b> 44:6 <b>argued</b> 33:5 44:13 <b>arguing</b> 13:18 55:16	<b>argument</b> 1:12 2:2,7 3:4,6 16:21 17:2 23:10 26:20 33:3 34:15 40:21 45:3 53:18,21 57:3 57:3,10,15 58:13,17 <b>arguments</b> 34:6 <b>arises</b> 36:22 <b>arraigned</b> 21:25 <b>arraignment</b> 15:21 <b>aside</b> 33:4 <b>asked</b> 46:3,3 55:20 58:2 <b>asking</b> 11:12 12:14 17:16 42:19 43:3 44:25 <b>asks</b> 11:21 14:24 43:7 <b>Assistant</b> 1:17 <b>assume</b> 17:10 18:4 24:5 26:2 <b>assuming</b> 6:3 44:4 <b>assumption</b> 17:23 <b>attorney</b> 9:24 10:4,17 21:10 24:20 38:15 <b>attorneys</b> 49:24 <b>attributable</b> 7:7 <b>attributed</b> 47:18 <b>authority</b> 52:25 <b>authorized</b> 41:24 42:1 <b>automatic</b> 11:10 15:3 <b>automatically</b> 3:11 15:4,8 16:11,12 20:5 21:1 25:24 26:25 35:20,25	38:17 41:16 42:13 54:6,12 <b>average</b> 17:11 17:11 24:5,12 <b>avoids</b> 20:12 <b>awaiting</b> 36:6 <b>aware</b> 23:24 44:14 <b>awful</b> 31:20
	<b>address</b> 36:23 50:4 53:24 54:9 <b>addressed</b> 3:17 57:22 <b>addresses</b> 50:17 54:20 <b>addressing</b> 9:10 37:1 <b>adequate</b> 8:18 27:11 38:11 51:10 <b>adjournment</b> 9:24 10:5 <b>adjudication</b> 9:20 <b>advance</b> 20:25 <b>adversary</b> 37:18 37:25 <b>adverse</b> 25:11 <b>advisement</b> 19:13 36:11 47:11,20 54:7 54:11 <b>affect</b> 41:17 <b>agree</b> 7:20 45:4 49:4 50:15,24 51:15 <b>agreement</b> 22:16 31:16,18 31:20,24 32:3 32:4,10 <b>Ah</b> 30:9,24 <b>Alito</b> 7:6,24 8:20 13:17 14:7 19:2,6 <b>allotted</b> 16:17 41:7,9 55:5 58:20 <b>allow</b> 4:1 34:2 <b>allowed</b> 12:5	<b>argument</b> 1:12 2:2,7 3:4,6 16:21 17:2 23:10 26:20 33:3 34:15 40:21 45:3 53:18,21 57:3 57:3,10,15 58:13,17 <b>arguments</b> 34:6 <b>arises</b> 36:22 <b>arraigned</b> 21:25 <b>arraignment</b> 15:21 <b>aside</b> 33:4 <b>asked</b> 46:3,3 55:20 58:2 <b>asking</b> 11:12 12:14 17:16 42:19 43:3 44:25 <b>asks</b> 11:21 14:24 43:7 <b>Assistant</b> 1:17 <b>assume</b> 17:10 18:4 24:5 26:2 <b>assuming</b> 6:3 44:4 <b>assumption</b> 17:23 <b>attorney</b> 9:24 10:4,17 21:10 24:20 38:15 <b>attorneys</b> 49:24 <b>attributable</b> 7:7 <b>attributed</b> 47:18 <b>authority</b> 52:25 <b>authorized</b> 41:24 42:1 <b>automatic</b> 11:10 15:3 <b>automatically</b> 3:11 15:4,8 16:11,12 20:5 21:1 25:24 26:25 35:20,25	<b>B</b>	
			<b>b</b> 6:3 8:12,16,16 8:21 10:25 15:7 39:12 56:24 57:24 <b>back</b> 5:19 6:4 8:20,20 32:19 43:22 <b>backs</b> 24:9 <b>balances</b> 26:12 <b>balancing</b> 25:17 25:21 <b>based</b> 22:15 34:8,8 38:24 55:11 <b>basic</b> 29:2 <b>basis</b> 3:13 21:14 40:9 45:14 49:17 <b>beginning</b> 9:13 36:18 <b>begins</b> 4:16 <b>behalf</b> 1:15,19 2:4,6,9 3:7 26:21 53:22 <b>believe</b> 13:9 18:3 21:2 22:10,14 <b>benefit</b> 13:19 14:8 <b>best</b> 20:11 47:24 <b>beyond</b> 56:11 <b>big</b> 47:18 57:13 <b>Bloate</b> 1:3 3:4 43:6 <b>book</b> 19:21 <b>BREYER</b> 44:17	

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

<p>27:8 31:23 36:6 52:24 <b>cover</b> 51:19 <b>covered</b> 20:12 51:16,25 52:15 53:13,14 <b>covers</b> 42:5 52:10 <b>crafting</b> 3:16 <b>creating</b> 40:22 <b>critical</b> 27:12 <b>currently</b> 23:2 <b>custom</b> 15:12 <b>cut</b> 16:21</p> <hr/> <p style="text-align: center;"><b>D</b></p> <p><b>D</b> 1:17 2:5 3:1 3:18 8:1,1,3 9:3,13 19:17 26:20 30:23 35:21 37:1,5 41:6 47:10,13 47:20,23 48:15 50:17 51:16 54:2 56:8,12 56:24,24 57:5 57:7 <b>date</b> 7:14,19,23 8:25 9:5 11:14 11:17 27:16,22 27:24 32:15,15 33:6 43:5 <b>dates</b> 58:12 <b>day</b> 13:13 29:13 29:15,18 30:6 43:8,9,12 54:11 <b>days</b> 15:20 16:1 16:12,15,17,25 17:7,17,18,19 17:21 18:4,7,8 18:11,11,12,15 18:15,16,18,18 19:12,23 20:4 21:20 22:1 28:2 32:14,16 32:19 33:9,9</p>	<p>33:16,21,22 34:16 36:10 40:24,25 41:1 41:12,13 42:13 43:11 54:7 56:15,21 57:14 57:20 59:2,3 <b>deadline</b> 27:1 28:22,25 29:2 35:5 43:18 <b>decide</b> 9:12 12:5 19:8 34:2 <b>decided</b> 17:20 <b>decides</b> 6:21 <b>deciding</b> 25:6 <b>decision</b> 13:25 19:19 46:13 47:4 <b>decisions</b> 13:21 <b>declared</b> 11:8 <b>declares</b> 3:19 <b>default</b> 15:19 17:18 18:11 <b>defendant</b> 4:22 9:21 11:21 14:1,24 16:9 21:25 22:12 23:10 25:13 27:4 31:2,18 31:19 32:1 35:11,12,15 38:10,25 42:3 44:19 45:9 46:2,3,17 47:3 52:9 53:4 56:5 <b>defendants</b> 13:19 38:3 <b>defendant's</b> 12:24 21:8 25:19 <b>defense</b> 4:8,10 4:10,17 5:4,7 7:7 9:24 10:4 10:17 16:5 21:9 24:2 38:15 55:1,3,6</p>	<p>55:8,24 <b>deferral</b> 31:23 <b>deferred</b> 31:17 <b>defined</b> 3:18 57:7 <b>definition</b> 10:11 <b>delay</b> 10:22 14:25 21:15 25:23,23 27:3 27:5,25 28:4,6 28:13,19,23 30:7,13 31:1,5 31:8,14,16 32:18,22,24 33:1,3,6,14,24 34:3,5,22 35:21 37:2,2,5 42:2 43:10 45:21,23 50:11 50:12,13,17,19 50:23 51:6 52:8,11 53:3 57:23 58:15,19 58:19,23,24 <b>delaying</b> 50:6 <b>delays</b> 3:12,17 8:9,11 12:3 14:23 23:22 24:8 25:3 27:13 36:21,22 36:24 41:5 <b>deliberate</b> 3:24 5:11 <b>demonstrate</b> 31:19 32:1 <b>denied</b> 12:12 <b>deny</b> 24:2 <b>Department</b> 1:18 <b>depends</b> 42:14 58:24 <b>describe</b> 54:20 <b>described</b> 53:9 <b>description</b> 53:10 <b>designed</b> 50:4</p>	<p><b>detailed</b> 39:17 <b>determination</b> 30:18 31:11 43:15 <b>determine</b> 7:3 30:14 39:6 <b>determining</b> 29:8 <b>difference</b> 17:24 18:17 41:23 57:19 59:3 <b>different</b> 15:22 31:22,22 37:2 41:9,19 42:19 50:22,23 <b>differentially</b> 42:18 <b>differently</b> 4:11 5:18 16:6 55:1 55:9,16 <b>difficult</b> 42:21 <b>diligence</b> 14:20 14:25 15:6 25:20 55:12 <b>direct</b> 8:17 53:1 57:6 <b>directing</b> 53:4 <b>disagree</b> 12:17 17:3 32:11 37:17 39:25 56:23 <b>discretion</b> 13:15 <b>discussed</b> 35:11 <b>dismiss</b> 6:18 7:1 7:3 <b>dismissal</b> 14:4 22:11,15 <b>dismissed</b> 6:24 <b>dispose</b> 17:25,25 19:24 <b>disposed</b> 4:4 <b>disposition</b> 3:21 5:14 19:3,23 <b>distinguishes</b> 55:2,4 <b>district</b> 6:18,20</p>	<p>6:21 7:2,3 8:17 9:16 10:13 12:4 14:9 15:10,10,12,18 15:19 16:25 17:6 18:10,14 18:19,20 19:4 19:4,13,19 20:5,7,19 21:4 21:10,19,25 24:1 25:22 26:2,8 29:11 38:1,3 40:22 40:24 41:1,11 41:13 42:9 46:11 49:22 54:8 <b>districts</b> 15:19 16:8,15,17 17:17 19:4 23:7 41:5,5,9 42:12 <b>Docket</b> 46:21 <b>doing</b> 15:2 38:8 45:20 <b>doubt</b> 26:5 <b>drafting</b> 10:25 26:15 <b>driving</b> 24:25 <b>due</b> 7:15 14:20 14:25 15:6,22 16:12 25:20 28:5,17 43:9 55:12 <b>D.C</b> 1:8,15,18 15:25</p> <hr/> <p style="text-align: center;"><b>E</b></p> <p><b>E</b> 2:1 3:1,1 <b>earlier</b> 22:6 43:3 <b>early</b> 12:1,19 <b>effect</b> 13:25 34:4 37:4 40:25 42:23 <b>effective</b> 8:18 14:19 <b>effectively</b> 15:7</p>
---	---	---	---	--

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

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

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

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

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

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

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

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

<p><b>28</b> 33:9</p>	<p>25:2 26:7,12</p>			
<hr/> <p style="text-align: center;"><b>3</b></p>	<p>26:15 39:10,16</p>			
<p><b>3</b> 2:4 17:11 38:6</p>	<p>40:23 42:20,24</p>			
<p><b>30</b> 19:12,23</p>	<p>43:11 50:3</p>			
<p>36:10 54:7</p>	<p>53:10 55:9</p>			
<p>56:15,20 57:14</p>	<p><b>7th</b> 27:17,19</p>			
<p>57:20</p>	<p>34:23 43:6,11</p>			
<p><b>30-day</b> 19:14</p>	<p>44:8,19 45:2,4</p>			
<p><b>31st</b> 54:11</p>	<p>58:12,16</p>			
<p><b>3161(h)(1)</b> 3:11</p>	<p><b>7-day</b> 41:1 42:12</p>			
<p>27:2</p>	<p><b>70</b> 16:15 17:19</p>			
<p><b>3161(h)(1)(H)</b></p>	<p>17:20 20:4</p>			
<p>19:11</p>	<p>34:16</p>			
<p><b>3288</b> 22:10</p>	<p><b>70-day</b> 18:19</p>			
<p><b>3289</b> 22:10</p>	<hr/> <p style="text-align: center;"><b>8</b></p>			
<hr/> <p style="text-align: center;"><b>4</b></p>	<p><b>86</b> 41:1</p>			
<p><b>4</b> 17:6 30:25</p>	<p><b>86-day</b> 18:18</p>			
<p>31:1 33:8</p>	<p>41:1</p>			
<p>39:13</p>				
<p><b>4th</b> 27:17,19,24</p>				
<p>28:1 34:20</p>				
<p>35:8,10 44:8</p>				
<p>45:3,8,15,18</p>				
<p>46:6 47:2,4,9</p>				
<p>48:6 58:12</p>				
<p><b>42</b> 18:12</p>				
<hr/> <p style="text-align: center;"><b>5</b></p>				
<p><b>5</b> 16:25 17:7</p>				
<p>18:15,15,18</p>				
<p>53:20</p>				
<p><b>53</b> 2:9</p>				
<hr/> <p style="text-align: center;"><b>6</b></p>				
<p><b>6</b> 1:9 22:11 59:2</p>				
<p>59:3</p>				
<hr/> <p style="text-align: center;"><b>7</b></p>				
<p><b>7</b> 3:13 6:8 7:8,9</p>				
<p>7:21,23 8:8,12</p>				
<p>8:12,16,16,16</p>				
<p>8:24 11:18</p>				
<p>14:21 16:12</p>				
<p>20:6,12,15</p>				
<p>21:6,12,15</p>				