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IN THE SUPREME COURT OF THE UNITED STATES

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TERRY MICHAEL HONEYCUTT, :

Petitioner : No. 16-142

v. :

UNITED STATES, :

Respondent. :

- - - - - x

Washington, D.C.  
Wednesday, March 29, 2017

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

APPEARANCES:

ADAM G. UNIKOWSKY, ESQ., Washington, D.C.; on behalf of the Petitioner.

BRIAN H. FLETCHER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	ADAM G. UNIKOWSKY, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	BRIAN H. FLETCHER, ESQ.	
7	On behalf of the Respondent	18
8	REBUTTAL ARGUMENT OF	
9	ADAM G. UNIKOWSKY, ESQ.	
10	On behalf of the Petitioner	50
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 16-142, *Honeycutt v. United States*.

Mr. Unikowsky.

ORAL ARGUMENT OF ADAM G. UNIKOWSKY

ON BEHALF OF THE PETITIONER

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

Petitioner's brother obtained nearly \$270,000 in proceeds from the sales of Polar Pure. Petitioner obtained nothing, yet the government seeks to hold him jointly and severally liable for the entire amount. That position contradicts the text, structure, history, and purpose of Section 853.

The government's position boils down to the theory that even though Petitioner did not actually obtain this money, he should be deemed to have obtained it because his co-conspirator did based on supposed background principles of conspiracy law. But those background principles are both inconsistent with the text of Section 853 and also do not apply on their own terms.

So to begin with our textual argument, I'd like to focus on the structure of Section 853(a) because

1 Section 853(a) enumerates three categories of property  
2 subject to criminal forfeiture. 853(a)(1), at issue  
3 here, are proceeds obtained by the illegal activity;  
4 853(a)(2) addresses the instrumentalities of crime; and  
5 853(a)(3) addresses the criminal's interest in a  
6 criminal enterprise.

7 So we pointed out in our opening brief that  
8 really joint-and-several liability doesn't make a lot of  
9 sense as to 853(a)(2) and (a)(3), which supports the  
10 inference that it also doesn't apply to (a)(1). And the  
11 government's brief states, somewhat surprisingly in my  
12 view, that, in fact, joint-and-several liability for  
13 co-conspirators applies only as to (a)(1) and does not  
14 apply as to (a)(2) and (a)(3). But that position by the  
15 government really has no textual basis at all so far as  
16 we can discern.

17 JUSTICE KAGAN: But doesn't it seem that  
18 there's some back and forth about what's new and what's  
19 old in the government's theory, is that part of what's  
20 changed in the government's theory or not?

21 MR. UNIKOWSKY: Yeah. That is one thing  
22 that's changed. We quote a Third Circuit case from, I  
23 think, two years ago where the government took the exact  
24 opposite position and, in fact, persuaded the Third  
25 Circuit to apply joint-and-several liability under

1 (a) (2), which is one of the reasons we put this argument  
2 in our brief.

3 But the government's change in position, I  
4 just cannot reconcile it with the statute at all. I  
5 mean, the government's theory is that (a) (2) and (a) (3)  
6 are somehow tied to ownership whereas (a) (1) is not, but  
7 you cannot get that out of the statute. It just lists  
8 three categories of property, and if (a) (2) and (a) (3)  
9 are directed to ownership, then so is (a) (1). And  
10 conversely, if the government was faithfully applying  
11 its background principles, it would apply it to all  
12 subsections of 853.

13 I mean, under the government's theory, if  
14 one person obtains something, then they all do under  
15 (a) (1). Identical reasoning would require that if one  
16 person, say, uses a car in the conspiracy, they all do  
17 and then there's forfeiture liability for everybody  
18 under (a) (2). And so I just don't understand the  
19 distinction that the government has drawn here. And the  
20 fact that the -- the government feels compelled to argue  
21 one thing under (a) (1) and another under (a) (2) and  
22 (a) (3), I think, shows that this is really a form of --  
23 of common law criminal liability that's not required or  
24 not authorized by the text.

25 I just want to say one word about (a) (3) in

1 particular, which is about criminal enterprises  
2 specifically. That statute says that a criminal  
3 defendant forfeits his interest in, only his interest in  
4 the criminal enterprise, not the value of the enterprise  
5 as a whole. That's a conspiracy-specific forfeiture  
6 statute that requires the person only to forfeit the  
7 interest he obtained, which we think is just totally  
8 inconsistent with the government's theory than under  
9 (a) (1), which says nothing about conspiracy liability.  
10 There's this hidden Pinkerton rule.

11           So another -- another argument we make has  
12 to do with the rest of Section 853 as a whole, which  
13 supports our view that really Section 853(a) (1) is  
14 talking about forfeiture of tainted assets. And in the  
15 government's brief, again, they agree with this some --  
16 surprisingly in our view. They say that yes, Section  
17 853(a) (1) only requires a forfeiture of tainted assets,  
18 which means there is no joint-and-several liability. So  
19 what the government has essentially admitted here is  
20 that when one person obtains something, in fact, there  
21 is no joint-and-several liability. Only the tainted  
22 assets are subject to forfeiture, so only the person who  
23 actually obtains it can forfeit it.

24           And, in fact, at the time that Section 853  
25 was enacted, there was no substitute assets provision,

1 so at that time, just there was no joint-and-several  
2 liability at all, according to the new theory in the  
3 government's brief which I haven't heard before.

4 So the government's theory is that  
5 actually what opens the door to joint-and-several  
6 liability is the separate substitute assets forfeiture  
7 provision in 853(p). But that just has no basis  
8 whatsoever in the statutory text. I just ask the Court  
9 to just read Section 853(p). What it says is, if based  
10 on an act or omission of the defendant, property  
11 described in Section 853(a)(1) is unavailable for a  
12 series of enumerated reasons, then the government can  
13 seek substitute forfeiture. And I think it's just  
14 obvious what's that -- that's doing.

15 What it's saying is that if the defendant  
16 does something to thwart the forfeiture of the tainted  
17 asset, then the court can go after the defendant's  
18 substitute assets.

19 CHIEF JUSTICE ROBERTS: Well, I -- I suppose  
20 their answer would be that under Pinkerton, when you're  
21 talking about the defendant, you're also talking about  
22 co-conspirators.

23 MR. UNIKOWSKY: Your Honor, first of all,  
24 the government doesn't make that argument in their brief  
25 and actually I think it doesn't work. Because very

1 frequently, the dissipation of assets will not be  
2 attributable to other co-conspirators under Pinkerton.

3 Suppose one person goes to Las Vegas and  
4 gambles away the proceeds of a completed crime. That  
5 would not be in furtherance of the conspiracy. To the  
6 contrary, it would just expose the other conspirators to  
7 liability, so --

8 CHIEF JUSTICE ROBERTS: What -- what's your  
9 authority for that proposition?

10 MR. UNIKOWSKY: Well --

11 CHIEF JUSTICE ROBERTS: And under Pinkerton,  
12 the -- the need to reach the substitute assets because  
13 of dissipation wouldn't be attributed to the  
14 co-conspirator.

15 MR. UNIKOWSKY: I think that Pinkerton  
16 itself includes a requirement that attribution requires  
17 the act to be in furtherance of the conspiracy, so I  
18 think the Court would have to ask the --

19 CHIEF JUSTICE ROBERTS: Well, but it's --  
20 it -- in furtherance of the conspiracy, we're looking --  
21 the act at issue here is dissipation of tainted assets  
22 and the need for substitution. I don't know that that's  
23 in pursuance of the conspiracy as more as frustrating  
24 the identification of the tainted assets.

25 MR. UNIKOWSKY: Well, that may be, but I --



1 I think that when the text of Section 853(p) imposes a  
2 requirement that specifically because of an act or  
3 omission of the defendant, and that's what 853(p) says,  
4 that is a prerequisite to obtain forfeiture against the  
5 defendant, I think the government either has to show  
6 that that's -- the defendant did something to -- to  
7 cause the property to be unavailable, which the  
8 government hasn't shown and -- and can't necessarily  
9 show in general, or that the act that triggers the  
10 substitute forfeiture, which is the dissipation, is  
11 attributable to co-conspirators, which the government  
12 doesn't think it has to prove and hasn't proved here.

13 And I point out on the facts of this case,  
14 there's no showing of unavailability. All that happened  
15 is that the government agreed to a plea deal with the  
16 brother in which he would only forfeit a subset of all  
17 of the -- the tainted assets. And so as far as we know,  
18 those assets are just in a bank account somewhere. So  
19 the government hasn't even tried to prove the  
20 requirements that it claims opened the door to  
21 joint-and-several liability.

22 So I -- I think that the reason the  
23 government's theory doesn't work is that it's just  
24 inconsistent with these background principles, because  
25 we just think that the relevant background principles

1 are the ones governing, number one, forfeiture, and  
2 number two, sentencing, and neither of those background  
3 principles attributable in either of those areas support  
4 joint-and-several liability.

5 So first as to forfeiture, as I think the  
6 government agrees, the relevant historical tradition is  
7 in rem forfeiture and there's just no concept of  
8 joint-and-several liability there.

9 JUSTICE SOTOMAYOR: I have just a practical  
10 question.

11 MR. UNIKOWSKY: Yes.

12 JUSTICE SOTOMAYOR: Would our -- how would  
13 our ruling here affect the RICO forfeiture statute,  
14 1963?

15 MR. UNIKOWSKY: So --

16 JUSTICE SOTOMAYOR: The language is very  
17 similar.

18 MR. UNIKOWSKY: Yes. So --

19 JUSTICE SOTOMAYOR: So if we rule in your  
20 favor, does that mean we undo the RICO statute as well?

21 MR. UNIKOWSKY: I think there's a pretty  
22 good likelihood of that. I mean, I admit the language  
23 is very similar. I -- I haven't studied whether there's  
24 some other structural difference. I -- I would guess  
25 the government would come up with a way to distinguish

1 this case if it lost this case, but I -- I don't know  
2 what that is for sure, but it -- it is true that the  
3 language is very similar. I -- I acknowledge that, Your  
4 Honor.

5 JUSTICE SOTOMAYOR: RICO may be easier to  
6 prove the joint-and-several concept because RICO is an  
7 enterprise as defined.

8 MR. UNIKOWSKY: That -- that is true. So  
9 it -- the language in the forfeiture provision is -- is  
10 similar, but it -- it may be that some background aspect  
11 of RICO or some structural textual argument that doesn't  
12 apply here might apply. But I -- I haven't studied that  
13 issue specifically, and I'm sure that the government  
14 will probably come up with some theory if -- if it  
15 doesn't prevail today.

16 JUSTICE ALITO: Well, how would this work --  
17 how would your rule work as a practical matter in a drug  
18 conspiracy case or a racketeering case where the  
19 government can prove that a certain amount of money was  
20 taken in by the conspiracy over a period of time and  
21 then it was divide -- presumably, it was divided up in  
22 some way among the members of the conspiracy and -- do  
23 they have to show how much each of them got? I mean,  
24 they're not going to do this by check. It's all going  
25 to be by cash. So how -- how could that work as a

1 practical matter?

2 MR. UNIKOWSKY: Well, I think that  
3 Section 853(d) solves at least some of the government's  
4 problems in this area, which is this presumption that if  
5 you get money during the conspiracy and there's no other  
6 likely source, it's attributable to the conspiracy. So  
7 the way that would work in practice is suppose a bunch  
8 of money comes into a conspiracy, and there's no  
9 specific records of how it's distributed, but one day a  
10 conspirator buys a yacht or something, or buys a new  
11 car.

12 So the presumption in Section 853(d) allows  
13 the court to presume that the car is tainted. It's  
14 subject -- it's, you know, it's because of the -- the  
15 tainted money, even without a direct proof that a check  
16 was given, which I agree will not typically happen.

17 JUSTICE KENNEDY: Did the government ever  
18 try to invoke (d) here?

19 MR. UNIKOWSKY: No, Your Honor, there --  
20 there's no record of that at all. The government's  
21 entire theory in this case has been this pure  
22 joint-and-several liability, because this conspirator --  
23 co-conspirator obtained the money, she also obtained the  
24 money.

25 JUSTICE ALITO: And what do you do in the

1 situation that's similar to what I just -- I just  
2 described, where members of the conspiracy have -- have  
3 spent a lot of money. They've dissipated it in one way  
4 or another, so they don't have a yacht or some asset  
5 that can be -- can be identified, but it's clear that  
6 they had -- they had a lot of money and they spent a lot  
7 of money. Then what happens?

8 MR. UNIKOWSKY: Well, I think that, first of  
9 all, Section 853 has several powerful tools to determine  
10 how much each person obtained. You can take  
11 depositions, there's asset freezes, there's a bunch of  
12 other things.

13 JUSTICE ALITO: Oh, come on. You're going  
14 to take a, you know, a deposition of somebody, a  
15 mid-level person in a drug -- in a drug enterprise: How  
16 much did you get per week?

17 MR. UNIKOWSKY: Well, no, but if you have  
18 evidence the person spent money somewhere, you can go to  
19 the place where he allegedly spent the money and try to  
20 figure out how much he spent.

21 Yes, it's true, I can't -- I can't deny that  
22 there's probably some category of cases where forfeiture  
23 will be harder under our rule than the government's  
24 rule, and we think that's just part and parcel of the  
25 statute that requires forfeiture of tainted property

1    except as certain substrate assets are met.  I mean, if  
2    you -- if you repeal the obtained element, and the  
3    government is essentially asking for a judicial repeal  
4    of obtained element, then obviously, in cases where it's  
5    hard to prove the obtaining, the government will have an  
6    easier time winning.  But I just don't think that's the  
7    way that the Court should construe the statute.

8                   In terms of background principle, so we  
9    already talk about forfeiture, how there's no background  
10   principle of -- of joint-and-several liability in  
11   forfeiture.  I think the same is true with sentencing,  
12   because the government is essentially saying that a  
13   forfeiture, which is by statute a component of a  
14   sentence, is joint-and-several in the sense that one  
15   person's payment will decrease another person's payment,  
16   and that's just never the way sentencing has worked,  
17   either in criminal sentences or fines.

18                   So we point out that Walter and Daniel  
19   Pinkerton, it's true that they were substantively liable  
20   for crimes committed by their co-conspirator, but had  
21   individual fines and individual sentences.  And that's  
22   just part of the traditional principle of sentencing,  
23   that it's tied to an individual's culpability.  So it  
24   doesn't make sense that one person's payment would be  
25   reduced based on someone else's plea agreement, because

1 that's not tied to his own personal culpability.

2           So in that sense, joint-and-several  
3 liability is inconsistent with background principles,  
4 too. And I think the overarching point is this really  
5 isn't the application of background principles. And I  
6 think that's the deeper point in this case. Because  
7 this joint-and-several liability issue has never come  
8 up, ever, in the context of conspiracy law.

9           So what the government is doing is saying  
10 that it thinks it makes sense as a matter of policy to  
11 apply those background principles from very different  
12 contexts to forfeiture law, but altered in different  
13 ways. So there's joint-and-several liability; it  
14 applies to some sections but not others, and that is  
15 just not the way the Court has read criminal statutes.

16           JUSTICE GINSBURG: It does have a number of  
17 courts -- courts of appeals on its side, doesn't it?

18           MR. UNIKOWSKY: That is certainly true, and  
19 the split does favor the government, we agree. But  
20 there's a lot of different ways we point out in our  
21 reply brief where the government's positions in this  
22 case actually diverge to some extent from lower courts.

23           And in fact, just one very recent  
24 development I would raise to the Court's attention. We  
25 point out on page 8 of reply brief that the government's

1 position is -- in this brief is inconsistent with its  
2 position in a pending case in the court of appeals. So  
3 after I filed my reply brief a couple days ago, the  
4 government actually went ahead and confessed error in  
5 that appeal, even though it's fully briefed and argued,  
6 and I believe had won in the district court.

7           So I commend the government for doing that.  
8 I -- I truly believe it acted in the utmost good faith.  
9 And my point is that the fact the government feels  
10 compelled to confess error days before a Supreme Court  
11 argument in the court of appeals is in some tension, in  
12 my view, with this view that there's this stable body of  
13 law that the Court should just be ratifying. I think  
14 that's just not --

15           JUSTICE GINSBURG: Is there any -- any  
16 circuit case on the other side, other than the D.C.  
17 Circuit case?

18           MR. UNIKOWSKY: No, Your Honor. There's a  
19 district court opinion by Judge Thapar called Solomon  
20 which we quote in our brief, which we think is quite  
21 persuasive, at least on the reasoning. But no, there's  
22 no other court of appeals decision other than  
23 Cano-Flores, which is found in favor of our position.

24           JUSTICE ALITO: Is there -- is there any  
25 indication in the text of 853 that those who framed that



1 and adopted it had conspiracy in mind?

2 MR. UNIKOWSKY: I think so, yes. I mean,  
3 Section 853(a)(3) is about criminal enterprises, and --  
4 which is a form of conspiracy. And that subsection  
5 states that you only forfeit your share of the criminal  
6 enterprise. So I think that at least as to that  
7 subsection, Congress did have at least one form of  
8 conspiracy in mind. And the government agrees that  
9 under that provision, joint-and-several liability does  
10 not apply.

11 JUSTICE KAGAN: This is a -- a bit off  
12 topic, but the statute refers to proceeds that the  
13 person obtained directly or indirectly.

14 Do you have a view as to what that  
15 "indirectly" is doing there and what it encompasses?

16 MR. UNIKOWSKY: Yeah. So, for instance, I  
17 think this case is a perfect illustration of what it  
18 encompasses. So petitioner's brother did not personally  
19 obtain it. I think the ownership interest was through  
20 the corporation that he owned and controlled. And in  
21 fact, there's been several court of appeals cases in  
22 which people have held to have indirectly obtained money  
23 when it flows to a corporation that ultimately are  
24 controlling the money. So that's one example of  
25 indirectly obtained.

1           Another example would be if, say, you know,  
2 petitioner said, well, I want to pay for my -- my son's  
3 college or my daughter's college education, and someone  
4 says, okay, well, I'll pay towards that rather than pay  
5 to you. That might be indirectly obtained in the sense  
6 of getting the benefit of the money without actually  
7 getting it directly.

8           So I can't claim to provide a full text on  
9 any of -- all the situations in which someone could have  
10 indirectly obtained something, but I think the  
11 fundamental distinction in this case is between  
12 indirectly obtaining and just not obtaining it, which we  
13 think is the facts of this case.

14           If there are no further questions, I'd like  
15 to reserve my time.

16           CHIEF JUSTICE ROBERTS: Thank you, counsel.  
17 Mr. Fletcher.

18           ORAL ARGUMENT OF BRIAN H. FLETCHER

19           ON BEHALF OF THE RESPONDENT

20           MR. FLETCHER: Thank you, Mr. Chief Justice,  
21 and may it please the Court:

22           The law treats conspiracy as a partnership  
23 in crime, and for that reason it has long been the rule  
24 that the acts of every member of the conspiracy in  
25 furtherance of the common plan are attributed to every

1 other member of the conspiracy. And that's obviously  
2 the foundation for the familiar Pinkerton rule of  
3 substantive criminal liability, that as we explain in  
4 our brief, that same insight, the attribution of the  
5 acts of one conspirator to all of the other  
6 co-conspirators, also controls the law's treatment of  
7 conspirators in various other contexts.

8 CHIEF JUSTICE ROBERTS: Well, that,  
9 Pinkerton, it -- it's based on a fiction, right? I  
10 mean -- I mean, the defendant may not have been there  
11 when the acts committed; somebody else may have done it,  
12 but because he's a conspirator, you treat it as if he  
13 had done that.

14 I'm not sure that that theory works when  
15 you're talking about a more focused statute here, where  
16 you tamper only the tainted property. And I'm not quite  
17 sure that that works, because as soon as you engage in  
18 a -- that fiction, it takes the focus tainted  
19 requirement away.

20 MR. FLETCHER: So I -- I -- I disagree,  
21 Mr. Chief Justice. And I'd like to explain, because I  
22 think this has gotten confused, this broader issue of  
23 tainted versus untainted property and how that maps onto  
24 our view of conspiracy liability. I think the reply  
25 brief confuses our position on that, and I don't fault

1 my -- my friend for that, but I'd just like to lay out  
2 our -- our understanding how it works.

3           Section 853(a)(1) makes the forfeitable  
4 proceeds the tainted property or tainted proceeds the  
5 forfeitable property. So if you have two guys who sell  
6 a bunch of drugs, they do a drug deal and they get a  
7 duffel bag full of cash, the proceeds -- the property  
8 constituting the proceeds that's forfeitable under  
9 (a)(1) is the duffel bag full of cash. And if the  
10 police catch them on way back home after the  
11 transaction, those specific proceeds are forfeitable.  
12 And that's what the government has to seize, and that's  
13 what's forfeitable under 853(a)(1).

14           And in that circumstance, I didn't say they  
15 are both liable for the forfeiture. The government  
16 doesn't have to prove which of them is responsible for  
17 the cash. But it doesn't make sense to talk about that  
18 in terms of joint-and-several liability, because  
19 joint-and-several liability is a concept in law that  
20 comes into play only when a person is entitled to  
21 recover some sum of money and it can collect that sum  
22 from anyone.

23           CHIEF JUSTICE ROBERTS: If -- if they both  
24 have -- was carrying it, they both have the duffel bag  
25 and all that, and you say, well, they are both liable

1 for what's in the duffel bag. But then one of them  
2 takes the duffel bag and, you know, buys a car with it.  
3 And your theory is the other guy is responsible for the  
4 value of the car.

5 MR. FLETCHER: Right. But very often  
6 when --

7 CHIEF JUSTICE ROBERTS: And your theory also  
8 is if the other guy, you know, just dropped the person  
9 off, had nothing to do with getting the duffel bag or  
10 whatever, the same thing happens. He's still  
11 responsible to forfeit the value of the car.

12 MR. FLETCHER: If it's foreseeable to him,  
13 yes. And -- and let me explain why I think that makes  
14 sense. It's because if you find -- if you're in the  
15 situation where you still have the duffel bag, you still  
16 have the traceable proceeds, that's what's forfeitable.  
17 If you're not in that situation anymore, if, as is  
18 usually the case by the time drug defendants or RICO  
19 defendants are caught, it's been dissipated, it's been  
20 commingled, it's somehow unavailable, that's the garden  
21 variety, typical case.

22 Everyone agrees that in that circumstance,  
23 the government is entitled to recover the value of the  
24 proceeds that have been dissipated. And there's some  
25 disagreement about why that is and how that works, and

1 I'm -- I'm happy to talk about that. But I think for  
2 purposes of the question presented in this case,  
3 everyone agrees that the government is entitled to get  
4 that value of the dissipated proceeds.

5 JUSTICE KAGAN: So do you have to show one  
6 of these five preconditions in (p)?

7 MR. FLETCHER: To invoke (p), (p) is a  
8 procedure that allows the government to for -- forfeit  
9 specific substitute assets in a defendant's hands, a car  
10 or a house, something like that. If the government is  
11 going to invoke (p), the government has to show what the  
12 one of those five preconditions for (p) has been  
13 satisfied.

14 CHIEF JUSTICE ROBERTS: As to one person,  
15 though, not to the other. In other words, if we have --  
16 if the chauffeur who drives the -- the kingpin around  
17 and therefore is going to be a co -- a co-conspirator.  
18 And the kingpin does, you know gets the drug money,  
19 decides to buy a Ferrari with it, then sells it. And he  
20 has the cash.

21 But you can get that cash from the  
22 chauffeur. You don't have to trace it to him somehow.  
23 Because he's a co-conspirator in Pinkerton, he is  
24 considered to have obtained what anybody else had  
25 obtained.

1                   MR. FLETCHER: That's correct. If you were  
2 in a situation where the traceable proceeds aren't  
3 available, then you're in a joint-and-several liability  
4 situation --

5                   CHIEF JUSTICE ROBERTS: Listen, I wonder why  
6 you call them traceable. I -- oh, I think your theory  
7 applies even if there -- you don't have to show that  
8 they're traceable. I mean, if you can show they're  
9 traceable, he used the drug money to buy the Ferrari,  
10 are you saying that then the co-conspirators, the  
11 chauffeur, is not liable for those proceeds?

12                   MR. FLETCHER: If the Ferrari's wouldn't --  
13 if the government has the ability to forfeit the --  
14 Ferrari still falls under subsection 853(a)(1) it's  
15 property -- any proceeds the person obtained directly or  
16 directly or indirectly and that property derived from  
17 the proceeds. If the government can actually show the  
18 duffel bag full of cash was converted into a specific  
19 car, and that car's available for the government and can  
20 be forfeited that's subject to forfeit --

21                   JUSTICE KENNEDY: But -- but it's odd that  
22 you use P, which would apply to substitute property --  
23 you apply it even though this particular defendant or  
24 the particular person did nothing himself to place the  
25 proceeds beyond the reach of -- of the court.

1                   MR. FLETCHER: That's right. And I think  
2 the reason why we would do that when (p) comes into  
3 play, and I want to get back to an answer to Justice  
4 Kagan's question -- we don't think only way the  
5 government can recover this -- value of dissipated  
6 proceeds is by invoking P, but when (p) does come into  
7 play and when the government is seeking to rely on that,  
8 it relies on the same principles of attribution that the  
9 Chief Justice's question suggested earlier, that your  
10 liable as a member of a conspiracy, not only through  
11 your co-conspirators act in obtaining the proceeds, but  
12 also for any act dissipation of those proceeds.

13                   JUSTICE KAGAN: So in other words you're  
14 saying, the defendant in (p) is the same as the person  
15 in A and both includes co-conspirators as well as the  
16 actual defendant or person?

17                   MR. FLETCHER: I think we agree with the  
18 result. I just quibbled at the reasoning a little bit.  
19 The person described as the defendant before the court,  
20 is the person for the court, under Pinkerton principles  
21 though that persons' is responsible for it. The act of  
22 co-contributors are attributed to him as a matter of  
23 law. And we think that's true under A1, for the act of  
24 obtaining property. We think that's is also true when  
25 his co-conspirators dissipate the property or take other



1 action that makes it impossible for the government to  
2 trails.

3 JUSTICE BREYER: Where --

4 JUSTICE GINSBURG: So what is --

5 JUSTICE BREYER: Where does it say that? I  
6 mean -- I didn't take that point -- you're saying the  
7 word "property" in A1 is the tainted property.

8 MR. FLETCHER: Correct.

9 JUSTICE BREYER: Okay. And so the defendant  
10 is liable for the tainted property. And then (p) gives  
11 him circumstances where he's liable for other than the  
12 tainted property. All right.

13 MR. FLETCHER: Correct.

14 JUSTICE BREYER: And it doesn't say in A1  
15 that a person who doesn't have the tainted property is  
16 liable in an equivalent amount. It doesn't say in (p)  
17 that outside those circumstances the person is liable  
18 for an equivalent amount. It doesn't say in common law  
19 where you had to proceed against in rem the property,  
20 and there was no way to get the money from a person who  
21 didn't actually have it because you had to have the  
22 property itself in the proceeding. So there's no common  
23 law source. It doesn't say it in P. It doesn't say it  
24 in A, and indeed congress, said when they passed this  
25 that these are exhaustive, we want -- we're not adding

1 to anything, we're trying to make it exhaustive. So  
2 just where in the statute does it give you the authority  
3 to draw the conclusion that you're drawing?

4 MR. FLETCHER: I think in two ways:

5 Both of them rely on background principles  
6 of conspiracy liability, but they do so in slightly  
7 different ways. And so the first one is just to read  
8 the text of subsection (a) in light of the background  
9 principle of conspiracy liability that informs Pinkerton  
10 and everything else. So when it says, a person liable  
11 to forfeit any property constituting or derived from any  
12 proceeds the person obtained directly or indirectly.

13 JUSTICE BREYER: Here the person didn't  
14 obtain it in any odd common English thing until you're  
15 saying -- that word "obtained" means is property he  
16 didn't obtain.

17 MR. FLETCHER: Justice Breyer --

18 JUSTICE BREYER: Co-conspirators came and  
19 you say let's look to the common law and the common law  
20 made that argument impossible because if you look to the  
21 history of it as I said you had to have the property  
22 itself in an in rem proceeding, so that's why I asked  
23 the question.

24 MR. FLETCHER: I -- I understand the  
25 question, but emphasize every single application of the

1 Pinkerton principle to a substantive crime is atextual  
2 and would be subject to exactly the same criticism. So  
3 in a closely related context here, 21 U.S.C. 841(a)  
4 makes it unlawful for any person to distribute a  
5 controlled substance, and subsection (b) says any person  
6 who violates subsection (a) can be sentenced. And yet  
7 all of the time the term was undisputed.

8 JUSTICE BREYER: Oh yeah, that's why I  
9 mentioned the fact -- if -- if you go back into the  
10 history.

11 MR. FLETCHER: Yes.

12 JUSTICE BREYER: -- of the forfeiture, it's  
13 quite different from that. The history of the  
14 forfeiture was you had to have the property itself and  
15 certainly if we're looking to history and tradition,  
16 history and tradition are the one thing when you're  
17 talking about criminal liability and it seems to me,  
18 which is why I asked, quite the opposite. When you're  
19 talking about forfeiture.

20 MR. FLETCHER: So the tradition that you're  
21 reforming to is a long tradition of civil in rem  
22 forfeiture that this Court has discussed in many  
23 opinions, and I think the statute before you today is  
24 very self-conscious departure from that.

25 CHIEF JUSTICE ROBERTS: Well --

1 MR. FLETCHER: Both in terms of making, go  
2 ahead --

3 CHIEF JUSTICE ROBERTS: I'm sorry, finish  
4 your answer.

5 MR. FLETCHER: I was just going to say, in  
6 two ways both in the terms of what's forfeitable,  
7 proceeds forfeiture was new in 1970 and criminal and  
8 pursuant forfeiture was also new when it was enacted in  
9 RICO statutes.

10 CHIEF JUSTICE ROBERTS: I understand the  
11 idea you argued this is not in rem, but when you -- as  
12 soon as you say, but we're only after the tainted  
13 property, it kind of sounds like you're in rem under  
14 another label. In other words, you're sticking with  
15 this piece of property, just as if you were proceeding  
16 in an action against --

17 MR. FLETCHER: Yes.

18 CHIEF JUSTICE ROBERTS: -- in rem against  
19 the property. So I -- I don't see how you can say it's  
20 not -- not in rem, but we're only going after the  
21 tainted property.

22 MR. FLETCHER: I --I understand that tension  
23 Chief Justice.

24 CHIEF JUSTICE ROBERTS: Sure.

25 MR. FLETCHER: I think that it's baked into

1 the statute. The statute describes property that's  
2 forfeitable, and this Court knows from Luis, there are  
3 provisions 853C and E that talk about restraining a  
4 tainted property before trial. And I want to talk about  
5 the relation back of the government's title on tainted  
6 property. But the statute also clear when that tainted  
7 property isn't available, it hasn't been successfully  
8 restrained, the government recover the value of it and  
9 it becomes --

10 JUSTICE SOTOMAYOR: Mr. --

11 MR. FLETCHER: -- in personam liability.

12 JUSTICE SOTOMAYOR: I'm having trouble with  
13 just one component of your argument, many, but one that  
14 for the moment, which is the one that led the -- the one  
15 court who's against --

16 MR. FLETCHER: Yeah.

17 JUSTICE SOTOMAYOR: -- on this this issue  
18 was the courier who receives 50 dollars a week or 50  
19 dollars a trip to deliver drugs.

20 MR. FLETCHER: Yes.

21 JUSTICE SOTOMAYOR: Under your theory that  
22 courier who on everyone facts doesn't see more than 50  
23 dollars of whatever the profit is of this drug  
24 enterprise, that courier is responsible for a million  
25 dollars, 2 million dollars, 3 million dollars criminal

1 conspiracy because he took an undisputedly small part.  
2 Now, assume what logic in -- in rem theory would ever  
3 make a person who's never obtaining that money, those  
4 proceeds responsible for the larger sum?

5 MR. FLETCHER: Someone --

6 JUSTICE SOTOMAYOR: Why should the drug  
7 dealer, who in fact got all of the money, minus 50  
8 dollars, why should he be off-the-hook for even a penny  
9 less than what he put in his pocket because the courier  
10 happened to have a hundred dollars saved?

11 MR. FLETCHER: So I want to start with the  
12 courier and explain that the limits of the courier's  
13 liability are going to be the scope of the Pinkerton  
14 principle the scope of the conspiracy that he agreed to  
15 join, and the proceeds that were reasonably foreseeable  
16 to him. And so he can't be held liable for forfeiture  
17 from -- from proceeds of a drug transaction under our  
18 theory unless under Pinkerton, he could be convicted and  
19 sent to jail for the act of carrying out the  
20 transaction. It -- it doesn't extend an inch further --

21 JUSTICE SOTOMAYOR: Well --

22 MR. FLETCHER: -- than Pinkerton liability  
23 does.

24 JUSTICE SOTOMAYOR: That's generally what a  
25 courier is responsible for that -- the drug deals he or

1 she is involved in.

2 MR. FLETCHER: And -- and --

3 JUSTICE SOTOMAYOR: And for those that are  
4 reasonably within the scope of the conspiracy.

5 MR. FLETCHER: And -- and the only point  
6 that I'm making, and I don't think it's disagreeing with  
7 anything that Your Honor has said, is just -- that we  
8 don't think it's a great leap to say that once you're in  
9 a conspiracy that has consequences for your liability  
10 one of them is that you can be convicted for the crimes.

11 JUSTICE SOTOMAYOR: You'll serve a lot of  
12 years in jail.

13 MR. FLETCHER: And this is a financial  
14 penalty that attaches to drug --

15 JUSTICE SOTOMAYOR: But why does that give  
16 you, assuming you're a victim, the government.

17 MR. FLETCHER: Yes.

18 JUSTICE SOTOMAYOR: Greater rights against  
19 that one individual as opposed to what forfeiture tends  
20 to mean against the proceeds of the crime.

21 MR. FLETCHER: Yes.

22 JUSTICE SOTOMAYOR: You're getting a remedy  
23 that's literally unheard of in the background principles  
24 of forfeiture.

25 MR. FLETCHER: I -- I agree with you unheard

1 of mostly in the in rem context, but this is in personam  
2 liability that's very different --

3 JUSTICE SOTOMAYOR: In what --

4 MR. FLETCHER: -- from that.

5 JUSTICE SOTOMAYOR: In what other setting  
6 other than in RICO and 853? In what other setting of  
7 law has a similar concept ever existed?

8 MR. FLETCHER: So, it depends on what you  
9 mean by similar concept of law. I --

10 JUSTICE SOTOMAYOR: Concept where you're  
11 going to be personally liable for something greater than  
12 what you directly obtained.

13 MR. FLETCHER: So I think one is the  
14 restitution context, we point out that the criminal  
15 defendants are held jointly and severally liable to pay  
16 restitution to victims, that's now specifically  
17 authorized by statute as we explain in our brief.

18 Courts of appeals applied the same  
19 background principles we're invoking here to reach that  
20 result even before that.

21 I also want to emphasize, Justice Sotomayor,  
22 that some of your question and some -- I think a lot of  
23 the appeal of Mr. Unikowsky's argument comes from the --  
24 that the alternative to the rule that we're asking you  
25 to endorse that's prevailed in nine circuits for, in



1 some cases decades, is a scheme in which the only thing  
2 that a courier or a conspirator is required to forfeit  
3 are the proceeds that he actually has or that he somehow  
4 got to enjoy for himself, and that is not the law.

5 That's not the -- the statute has not been enacted --

6 JUSTICE GINSBURG: May -- may I,  
7 Mr. Fletcher, go back to your saying now this is in  
8 personam no longer in rem, but in -- in personam  
9 generally, it would be a right of contribution. And I  
10 take it under your theory, suppose the brother who was  
11 merely the employee of the shop, as the government goes  
12 after that brother for the \$269,000, and so the brother  
13 who owns the store is now off the hook. The brother  
14 that the government went after would have no right of  
15 contribution. He would just be stuck with the whole  
16 thing, even though the one who obtained the proceeds  
17 is -- is -- can -- can go home free if the government  
18 decides to make a bargain with that -- with that  
19 defendant and say we'll forget the forfeiture in your  
20 case.

21 MR. FLETCHER: You're correct that there's  
22 no right of Federal contribution. I think it's possible  
23 that someone could seek contribution under State law.  
24 I'm not aware of any case where that's happened, and --  
25 and I don't know that any State would recognize such a

1 cause of action.

2 But I just want to emphasize I -- I don't  
3 think that's a anomalous result, because as we point out  
4 in our brief, the traditional rule was that tort --  
5 tortfeasors who are held jointly and severally liable  
6 did not have a right of contribution if they committed  
7 an intentional tort. And here it's joint-and-several  
8 liability arising out of a criminal act, knowing  
9 participation in a criminal conspiracy.

10 JUSTICE KENNEDY: Of course, under your  
11 theory, if it worked the other way around, if they went  
12 after the brother that did get the money and took it, he  
13 would then, under your theory, have a right of  
14 contribution against the brother who got nothing.  
15 That's -- that's your theory.

16 MR. FLETCHER: No. Our theory is that there  
17 isn't -- I'm saying I agree, there isn't a right of  
18 contribution, that it's joint-and-several liability.

19 JUSTICE KENNEDY: But suppose it's under  
20 State law. Under your theory it would be contribution,  
21 I would assume.

22 MR. FLETCHER: If -- if a State law would  
23 recognize a right to contribution under these  
24 circumstances, then the -- the scope of it would be up  
25 to State law. I suppose someone made to pay the

1 forfeiture judgment could seek contribution from the  
2 person who --

3 JUSTICE KENNEDY: If they applied your  
4 precedent, the -- the brother who got nothing would  
5 still have to pay half. That's your -- that's your  
6 theory.

7 MR. FLETCHER: I -- I don't know what  
8 principles if -- as I said, I'm not aware of any State  
9 law that has actually recognized this, I'm not  
10 suggesting that they would, I just wanted to complete  
11 what source of law might govern the question if it did  
12 exist. I don't know what principles they would apply.

13 JUSTICE KAGAN: Mr. Fletcher, can I just ask  
14 you -- and I'm sorry, I'm sure it's -- I'm just not  
15 understanding it, but if I could just ask you to go  
16 through the mechanics of this.

17 So there are two co-conspirators. They come  
18 away with one bag of money. Conspirator A takes it, but  
19 you have Conspirator B before you. He has not taken the  
20 money.

21 MR. FLETCHER: Uh-huh.

22 JUSTICE KAGAN: Now, do you first have to  
23 show that Conspirator A's money because -- is that -- do  
24 you have to show that it's unavailable? Do you have to  
25 show that Conspirator A has dissipated it or do you not

1 have to show that?

2 MR. FLETCHER: I think we have to show that  
3 it's unavailable to the government in that proceeding,  
4 so if --

5 JUSTICE KAGAN: In that proceeding.

6 MR. FLETCHER: Right.

7 JUSTICE KAGAN: If they -- if you could go  
8 after Conspirator A, you could find it, he just put it  
9 in a bank account, but that's irrelevant.

10 MR. FLETCHER: I mean, that -- yes. And  
11 most of the time people who are -- this comes up in  
12 cases where defendants are prosecuted together, and so  
13 the -- the question is if any of them have it, the  
14 government's going to have it available to the  
15 government.

16 JUSTICE KAGAN: So really you're only saying  
17 it has to be unavailable as to Conspirator B. You do  
18 not have to prove that it's unavailable as to  
19 Conspirator A. You could know that it's in  
20 Conspirator A's bank account, it doesn't matter. As  
21 long as you can't get it through Conspirator B, you can  
22 go after B for -- for substitute assets.

23 MR. FLETCHER: I think that's right. Though  
24 I want to be candid, I'm not aware of a case that  
25 addresses the question. You could disagree with me

1 about that and not disagree with me about what the  
2 rule ought to be.

3 JUSTICE KAGAN: Okay. So then let's --  
4 let's leave that to -- let's bracket that. Then as to  
5 B, who you do have in front of you, you started by  
6 talking a little bit about this -- this (p) section. Do  
7 you have to prove that one of these five preconditions  
8 in (p) is satisfied?

9 MR. FLETCHER: In order to forfeit  
10 substitute property under (p), and -- and -- before you  
11 continue, I just want to put on the table that our view  
12 is the government doesn't have to invoke (p). It can  
13 also obtain a forfeiture money judgment if the directly  
14 forfeitable property isn't available.

15 JUSTICE KAGAN: Okay. I'm curious about  
16 that, but first let's talk about (b) -- (p).

17 MR. FLETCHER: Sure. Yes. If -- if you're  
18 trying to forfeit substitute assets under (p), (p) has  
19 requirements; you have to show that one of five of them  
20 is -- is satisfied.

21 JUSTICE KAGAN: And have -- have you shown  
22 that in this case?

23 MR. FLETCHER: I believe that we have, yes.

24 JUSTICE KAGAN: Which one?

25 MR. FLETCHER: I believe that we've shown, I

1 think, a number of them. Cannot be located upon the  
2 exercise of -- of diligence and has been commingled.

3 And I -- I want -- I just want to emphasize  
4 because --

5 JUSTICE KAGAN: And when you say that you've  
6 shown that, what do you mean?

7 MR. FLETCHER: What I mean is that in --  
8 this is the -- the understanding which the case was  
9 litigated in district court. The government came in and  
10 sought a money judgment and there was no mystery about  
11 what the rules were. I want to quote to you from the  
12 defendant's forfeiture memorandum in the district court.  
13 It appears as Document Number 107 on the district court  
14 docket, and this is on page 2 quoting from a Sixth  
15 Circuit decision.

16 And it says: "Where the government is  
17 unable to recover the actual property that is subject to  
18 forfeiture, the government can seek a money judgment for  
19 an amount equal to the value of the property that  
20 constitutes the proceeds of the drug violation."

21 Now, Petitioner could have argued that the  
22 prerequisites for seeking a money judgment weren't  
23 satisfied, either because we can't get money judgments  
24 and have to go through (p), or if we do have to go  
25 through (p), that we hadn't satisfied those

1 prerequisites. We could have made the showing; I think  
2 we could have on these facts, but Petitioner didn't make  
3 those arguments.

4 The only argument that Petitioner made  
5 that's relevant to the question presented here is that  
6 he couldn't be held jointly and severally liable on a  
7 money judgment. That's the argument that the district  
8 court adopted --

9 JUSTICE BREYER: But in both of these in  
10 your answers, I take it, it happens to say, and we  
11 have -- we're trying B. And A is around, but we're  
12 trying B who's gotten nothing.

13 MR. FLETCHER: Uh-huh. Yeah.

14 JUSTICE BREYER: Now, it says you can use  
15 853(p) if the property described in subsection (a), as a  
16 result of any act or omission of the defendant.

17 MR. FLETCHER: Yes.

18 JUSTICE BREYER: Now, it wasn't the act or  
19 omission of the defendant. It was A who mixed the  
20 money, who hid it, who went to Mexico, et cetera. But  
21 you're saying you still can get it from B. And I guess  
22 your reasoning is somehow these words, am I right, in  
23 (a), "Any property constituted or derived from any  
24 proceeds the person obtained," okay, you say that  
25 includes money that his co-conspirator obtained because

1 of the under --

2 MR. FLETCHER: Yes.

3 JUSTICE BREYER: Okay. If that's so, I just  
4 want to be sure. When we get to -- when we get to (e),  
5 which is called protective orders, I suppose on your  
6 theory that we have five people in a conspiracy, two,  
7 three are couriers, you know, they were found somewhere  
8 on a beach and they drove a truck and they have nothing,  
9 or they only each have about a thousand -- no, not  
10 nothing, but a hundred thousand dollars, and then we  
11 have A and B, who were the leaders and they have about  
12 10 million.

13 So on your theory of protective orders, you  
14 issue a protective order against all their assets, all  
15 five, and they can't hire lawyers, a matter which is a  
16 different issue, I understand, they can't hire lawyers.  
17 They may have to pay, even though the money is way over  
18 there with A and B. I mean, it does bother me that they  
19 can't even hire lawyers on your theory.

20 MR. FLETCHER: The -- but I want to be  
21 emphatic, that's not the result of our theory.

22 JUSTICE BREYER: Why not?

23 MR. FLETCHER: Because, as we explain in our  
24 brief on pages 35 and 36, subsection (c) and (e), which  
25 deal with pretrial restraints and relation back are



1 limited to the property described in subsection (a) --

2 JUSTICE BREYER: Uh-huh.

3 MR. FLETCHER: -- in the hands of either a  
4 particular defendant in a nonconspiracy case or when  
5 you're dealing with conspirators, that is our position  
6 is specific tainted property.

7 JUSTICE BREYER: All right. Now, suddenly  
8 it seems to me we've switched meaning here, because now  
9 we're talking about the bag of money. Now, does the  
10 word "property" -- the bag of money in A, mean the bag  
11 of money and not the substitute in B's bank account,  
12 which has never seen the light of day in any crime, or  
13 doesn't it?

14 MR. FLETCHER: I think the specific property  
15 described in A is the bag full of money.

16 JUSTICE BREYER: Okay.

17 MR. FLETCHER: But A in the statute serves  
18 two functions. It describes that specific property.  
19 That property is forfeitable if the government can find  
20 it. But if, as is usually the case, the government  
21 can't find it, that property fixes the amount of the  
22 government's entitlement to recover forfeiture --

23 JUSTICE BREYER: And you're able to do that  
24 under what statute? You see, everything until you said  
25 ah, you see the last clauses here, I could follow in a

1 statute. A statute that Congress said this is pretty  
2 exclusive.

3 Now --

4 MR. FLETCHER: Yes.

5 JUSTICE BREYER: -- it's only the things  
6 following that qualification that I can't find in any  
7 statute.

8 MR. FLETCHER: So one way that we can  
9 definitely do that is through the substitute assets  
10 provision in Section 853(p). As we explain, we think  
11 you can apply the same principles of attributed  
12 liability to a co-conspirator's act of dealing in cash  
13 or laundering proceeds or otherwise --

14 JUSTICE BREYER: But (p) unfortunately says  
15 because of an act or omission --

16 MR. FLETCHER: Of the defendant.

17 JUSTICE BREYER: -- of the defendant, and  
18 then it adds, if act or omission of the defendant in, I  
19 think, respect to property described in (a).

20 MR. FLETCHER: That's correct.

21 JUSTICE BREYER: All right. Now, is -- is  
22 this mysterious bank account which never saw the light  
23 of day within (a) or isn't it?

24 Now, it sounds to me, and I'm not -- it does  
25 honestly sound that way, sometimes you seem to say yes

1 and sometimes you seem to say no.

2 MR. FLETCHER: Justice Breyer, I -- I  
3 apologize if I'm not being clear. I think our view is  
4 that if the -- the -- let's take it back to the very  
5 simple example where it's a drug deal that's done and  
6 the proceeds are a duffel bag full of cash. That's the  
7 property described in (a). That's the property that's  
8 forfeitable under (a). But if, as is usually the case,  
9 that property is gone and not available, the government  
10 can recover its value. One way that it can to do that  
11 is through (p). Another way that it can do that is, as  
12 my friend mentioned, (p) didn't come into the statute  
13 until later, it came in in 1986. The original statute  
14 was enacted in 1984. And under the original statute,  
15 defendants made the argument, because the property  
16 described in (a) are the traceable proceeds, if I've  
17 hidden the proceeds, if I've dissipated them, if you  
18 can't find them when you convict them, you can't hold me  
19 liable for a forfeiture.

20 JUSTICE GINSBURG: Can you go over? Can you  
21 go over the -- Justice Breyer brought up the question of  
22 counsel fees. So let's take our shopkeeping --  
23 shopkeeper employee. He says: Yeah, I have \$60,000,  
24 but if I pay it over to the government I won't have a  
25 cent left to pay my lawyer.

1           MR. FLETCHER: So in a pretrial world, the  
2 government can't stop him from using -- pay -- using his  
3 funds to pay for a lawyer if those funds are untainted.  
4 Section 853(e) is the provision that allows pretrial  
5 restraints. We explained it's the government's position  
6 that that does not apply to untainted assets.

7           That was the position of the majority of the  
8 courts of appeal, but as my friend pointed out, the  
9 Fourth Circuit had a different rule. The government  
10 filed a brief in a case in the Fourth Circuit that took  
11 a position that was consistent with circuit precedent  
12 but inconsistent with the position we took in our brief  
13 here, and we've now withdrawn that and asked Fourth  
14 Circuit to remand.

15           CHIEF JUSTICE ROBERTS: So in terms of  
16 the -- I don't mean to interrupt, but the substitution  
17 principle doesn't apply with respect to assets that you  
18 can seize that are needed for counsel fees?

19           MR. FLETCHER: The substitution principle  
20 doesn't apply because -- that's -- that's right,  
21 exactly. The courts can address the issue, and we're  
22 conceding that this is the right reading of the statute,  
23 is that (p) describes substitute assets, (e) refers only  
24 to property that's described in subsection (a), and  
25 that's the specific tainted proceeds.

1           I -- I want to come back, if I could -- to,  
2 Justice Kagan, you've asked questions about indirectly  
3 to my friend, and I actually think that's another way  
4 to -- it's the other way to read the statute to get to  
5 our result, which is that everyone agrees that this  
6 statute requires the forfeiture of proceeds that a  
7 defendant does not obtain personally, that he obtains  
8 indirectly.

9           And some of the examples that my friend  
10 gives are, if the proceeds go to a closely-held  
11 corporation or to a lawful partnership or something like  
12 that. And our view -- and this is reflected in the  
13 courts of appeals' decisions -- is they were  
14 particularly odd to depart from the traditional  
15 principle that one member of a conspiracy is liable for  
16 the acts of the other members of the conspiracy in a  
17 context in which the statute invites forfeiture of  
18 proceeds that a person doesn't obtain personally.

19           Because the law regards a conspiracy as a  
20 partnership where all members are partners and act as  
21 each other's agents. And we don't think it's any great  
22 leap to say, as the court of appeals have done,  
23 indirectly obtain proceeds when the criminal enterprise  
24 of which you are a part obtains those proceeds, and the  
25 government doesn't have to show how the funds traced

1 through the conspiracy and who actually ended up with  
2 how much, because you're all fairly regarded as  
3 indirectly obtaining the proceeds that were obtained by  
4 the conspiracy as a whole.

5 The other point I want to make is --

6 JUSTICE KAGAN: Mr. Fletcher, if I could,  
7 I'm awfully sorry --

8 MR. FLETCHER: Oh, no.

9 JUSTICE KAGAN: -- but let's just take  
10 the -- the -- the case where there are these two  
11 conspirators and one takes the cash and it's in his  
12 basement. But the other one is the one before you,  
13 right? And let's put aside the extrastatutory money  
14 judgments, since I don't understand really how that  
15 works, so let's just focus on (p). All right?

16 Now, do you -- you said you don't have to --  
17 you don't have to show that it's really unavailable.  
18 You just have to show that it's unavailable as to the  
19 conspirator before you.

20 MR. FLETCHER: Unavailable to be forfeited  
21 in the proceeding before the court. Yes.

22 JUSTICE KAGAN: Yeah. And then how do you  
23 show that these (p) conditions have been met as to that  
24 particular person? In other words, he never had the  
25 proceeds, so which acts could he have taken that

1     dissipate the proceeds under (p)?

2                   MR. FLETCHER:   Because the (p) conditions  
3     aren't focused so much on the -- on the person; they're  
4     focused on rendering the property unavailable.  So the  
5     question is --

6                   JUSTICE KENNEDY:  But it --

7                   JUSTICE KAGAN:  But there is nothing --

8                   JUSTICE KENNEDY:  But it begins by saying  
9     act or omission of the defendant.

10                  MR. FLETCHER:  Correct.  Yes.  But our view  
11     is that the defendant is accountable for the acts of his  
12     co-conspirators --

13                  JUSTICE KAGAN:  But you just said that the  
14     other conspirator might not have dissipated them at all.  
15     They're sitting in his basement.

16                  MR. FLETCHER:  So I think, in that case,  
17     Justice Kagan, I think our view would be we could make  
18     the showing under (p) that they are unavailable to the  
19     government, because in this case, presumably, the  
20     government -- the government doesn't know that they're  
21     sitting in the other conspirator's basement, because if  
22     the government did, they'd be prosecuting that guy and  
23     attempting --

24                  CHIEF JUSTICE ROBERTS:  You have --

25                  MR. FLETCHER:  -- to recover the proceeds

1 from him.

2 CHIEF JUSTICE ROBERTS: You have your choice  
3 of getting the money either from the guy who is holding  
4 it in the basement, or from the other guy. Right? You  
5 can choose. It's not -- it's not a precondition for you  
6 recovering from the, whatever it is, the chauffeur, the  
7 bag man, to show that the money is not available from  
8 the kingpin.

9 MR. FLETCHER: The question is, is it  
10 available to be forfeited in the -- in the proceeding in  
11 court.

12 CHIEF JUSTICE ROBERTS: And if it's only a  
13 proceeding against the one guy, you can get the money  
14 from him, even though the money is sitting in a bag in  
15 the kingpin's basement.

16 MR. FLETCHER: Correct. Yes.

17 But I -- I just -- I want to be clear --

18 JUSTICE KAGAN: And even though you can't  
19 show that -- this is why I keep on coming back to the  
20 preconditions of (p). You really can't show a  
21 particular act or omission that led to the dissipation  
22 of the assets in these particular five ways.

23 MR. FLETCHER: Well, if that's the case,  
24 Justice Kagan, you might disagree with me about how to  
25 read (p), and if you read (p) that way in the



1 hypothetical you just described, then that defendant  
2 would have an argument the government couldn't invoke  
3 (p) as to him.

4           But I really think a lot of the discussion  
5 that we've had about how (p) works and how money  
6 judgments works are really ancillary. They inform the  
7 question presented, to be sure, but they are not the  
8 question presented. The question, as this case has been  
9 litigated and as it comes to the Court, there's no  
10 question that the government can get a money judgment.  
11 There's no question that it can proceed through  
12 substitute assets if it can invoke (p).

13           The question is who has liability for the  
14 amount, and the rule that was reflected in the decision  
15 below and the rule that we think is correct is that when  
16 the government is in that decision where the traceable  
17 proceeds are gone and it's trying to recover the value  
18 of the proceeds, how is that liability allocated amongst  
19 the conspirators. And we think, in accordance with  
20 traditional principles of conspiracy liability, the  
21 correct measure is the amount that was foreseeable to  
22 each conspirator.

23           Because the alternative -- and this gets  
24 back to the point I made to Justice Sotomayor, or was  
25 starting to about couriers -- is that you're going to be

1 sticking people with liability based on the amount of  
2 money that they touched. It's not just the amount of  
3 money they got to enjoy or spend or ultimately keep;  
4 it's the amount of money they obtained. And so when a  
5 person sells drugs, he obtains the whole proceeds of the  
6 transaction and then passes it along to somebody else,  
7 he can be held liable for that entire amount even though  
8 he didn't keep all that much of it.

9 That's reflected in the Casey case which we  
10 cite in our brief, and also in Judge Boudeen's opinion  
11 in Hurley. And we think a system that instead makes  
12 forfeiture liability depend on the amount that was  
13 foreseeable to the defendant is a more sensible way to  
14 allocate the monetary penalty in Section 853.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Unikowsky, 15 minutes.

17 REBUTTAL ARGUMENT OF ADAM G. UNIKOWSKY

18 ON BEHALF OF THE PETITIONER

19 MR. UNIKOWSKY: Thank you, Mr. Chief  
20 Justice.

21 I'd like to begin by responding to counsel's  
22 comments about how this case was litigated below, and  
23 then I'd like to say a few words about the textual  
24 arguments as well as the background principles.

25 So first, in terms of how this case was

1 litigated below, the way the government has litigated  
2 this case throughout was its theory that Section  
3 853(a)(1), and specifically the word "obtain," was  
4 enough to establish joint-and-several liability. So  
5 what the government has said is that it uses the word  
6 "obtained," and that simply means that that imputes  
7 everyone in the conspiracy and that's enough to  
8 establish Petitioner's liability for forfeiture of any  
9 amount that was not actually forfeited from Petitioner's  
10 brother.

11 And so we have always taken the position,  
12 consistently through that litigation -- throughout this  
13 litigation, excuse me, that that's the wrong reading of  
14 Section 853(a)(1). The correct reading is that  
15 "obtained" refers to assets that you actually got. And  
16 you can't forfeit tainted assets unless you have them,  
17 and so it doesn't apply to untainted assets.

18 So the government's position in this Court  
19 is completely different from the positions it took  
20 below. It's essentially conceding that under Section  
21 853(a)(1) itself, forfeiture is unavailable except as  
22 against the tainted assets. So the government's  
23 arguments that it seems to have -- that we waived  
24 something below is just completely incorrect. It's just  
25 abandoned the very theory under which it obtained -- or

1 under which it prevailed in the Sixth Circuit.

2 So then we get to the issues about 853(p)  
3 and the money judgments, and I think I heard counsel say  
4 in his presentation that Section 853(p) does not provide  
5 the exclusive methods for the government to obtain a  
6 forfeiture against tainted assets. I think that's a  
7 reference to the argument in their brief regarding the  
8 rules of criminal procedure, and that there's forfeiture  
9 money judgments discussed in Rule 32.2, and that is just  
10 clearly wrong.

11 First, the rule itself -- itself says that  
12 the government can only forfeit assets that are  
13 available by statute.

14 Second of all, the rules enabling that would  
15 just obviously prevent the government from -- in  
16 requiring forfeiture that is not authorized by statute  
17 through a rule of criminal procedure. I think it's  
18 pretty clear what this rule of criminal procedure is  
19 doing, and we cite an Eighth Circuit case that says what  
20 we're going to say right now, which is to say it says  
21 that it's a procedural mechanism of implementing the  
22 substitute property provision. So the government can  
23 say: Okay, we're going to forfeit your substitute  
24 property, whether you spent the money or you hid the  
25 money. Maybe you don't have money right now, but the

1 money that is going to come in is going to be property  
2 that -- substitute property that's forfeitable.

3           So that is a classic purpose of a rule of  
4 criminal procedure. It's a procedural rule to implement  
5 a statutory entitlement to forfeiture under 853(p). It  
6 does not expend the government's ability to obtain  
7 forfeiture through this joint-and-several liability  
8 system.

9           So when one looks at Section 853(p) and sees  
10 the exclusive method of obtaining forfeiture against  
11 untainted assets, that's the criteria in Section 853(p),  
12 the government doesn't meet them. The government said  
13 for the first time in oral argument in this Court that  
14 in it couldn't locate through due diligence and maybe  
15 this was commingled, it never made his arguments in his  
16 briefs, never made his arguments below, and it also  
17 never even argued it in its oral presentation that it's  
18 Petitioner themselves -- himself that did those things,  
19 or that his co-conspirator's actions can be attributed  
20 to Petitioner for purposes of Section 853(p). And so  
21 the government really has never tried to establish, and  
22 cannot possibly establish on the facts of this case,  
23 that it can obtain forfeiture under Section 853(p).

24           And just taking a step back, I think it's  
25 pretty clear what Section 853(p) is doing. What that's

1 doing, and the legislative history confirms this and the  
2 text itself confirms this, is that it's saying that if  
3 you obtain a tainted asset and you thwart the  
4 forfeiture, you can't get away with it because the  
5 government is going to come after substitute assets. So  
6 if you -- you collect a million dollars in tainted  
7 property and you hide it offshore or you spend it in Las  
8 Vegas or something, that doesn't mean you can get away  
9 with it. That's why the statute says because of an act  
10 of the defendant to render unavailable the property that  
11 is described in (a) that's the tainted property, if that  
12 happens the government can seek substitute property.

13 And --

14 CHIEF JUSTICE ROBERTS: But it seems to me  
15 that just another -- a reiteration of your earlier  
16 argument. I mean, of the defendant in (a) and of the  
17 defendant here, but under Pinkerton, the defendant  
18 includes the co-conspirators.

19 MR. UNIKOWSKY: But I -- again, I push back  
20 against that because I think that's only true -- the  
21 Pinkerton principle itself says that actions are  
22 attributable only in furtherance of the conspiracy, and  
23 so I -- I --

24 JUSTICE KAGAN: Well, what if the  
25 dissipation was in furtherance of the conspiracy? Put

1 the -- the cases that you're talking about aside.

2 MR. UNIKOWSKY: So, first of all, I don't  
3 think that the government shows that, but at least that  
4 would be some theoretical textual argument, remember,  
5 that's focused only on (p) rather than (a), which has  
6 been the government's theory throughout.

7 I would still disagree that  
8 joint-and-several liability is authorized because I just  
9 think there's extremely powerful textual, structural,  
10 and historical indications that it's just not authorized  
11 in the statute. For instance, the comparison with  
12 (a) (2) and (a) (3), which the government doesn't respond  
13 to. The background principles, which they just don't  
14 work at all. So -- and I'd like to turn to those. I  
15 just don't think Pinkerton has any application in the  
16 context of the statute period.

17 The government talks a lot about hornbook  
18 law, and hornbook law attributing activities to  
19 co-conspirators. But I think it's important to  
20 recognize that those old hornbooks would never have  
21 recognized the principle that the government is  
22 advocating here, because the hornbooks would have talked  
23 about sentencing and though no content -- no  
24 joint-and-several liability under any circumstances, and  
25 those hornbooks would have talked about forfeiture which

1 was in rem.

2 Now, it's true that it's in personam rather  
3 than in rem now, but there's a -- that -- that's a  
4 procedural difference in how the money is collected,  
5 which is a -- different from saying that there's a  
6 difference in what money is collected. In other words,  
7 the object of the forfeiture is the same, even the way  
8 in which it's collected has changed. And, in fact, the  
9 government confirms this when it -- it actually concedes  
10 that 853(a)(1) only focuses on the tainted property,  
11 exactly like in the in rem forfeiture regime. So I --  
12 I --

13 JUSTICE ALITO: Well, I don't know how much  
14 you can get out of the in rem forfeiture caselaw since  
15 this isn't in rem. You couldn't have joint-and-several  
16 liability in an in rem proceeding.

17 MR. UNIKOWSKY: That is true, Your Honor.

18 JUSTICE ALITO: So I -- I -- what's the  
19 relevance of that?

20 MR. UNIKOWSKY: The relevance is that the --  
21 the background principle, these ancient principles that  
22 the government tries to employ --

23 JUSTICE ALITO: No, wait. You have ancient  
24 principles of -- of in rem. But this is not in rem.  
25 This was a radical change from what -- what occurred



1 before.

2 MR. UNIKOWSKY: Right. But the fact that  
3 it's in personam versus in rem doesn't change the fact  
4 that it's the tainted property that's the object of the  
5 forfeiture, which is, in fact, the government's  
6 concession. It says (a)(1) is an in personam statute.  
7 It's part of a criminal judgment. It's not a separate  
8 civil proceeding. But the thing that's forfeited is the  
9 same thing that had always been forfeited, which is the  
10 tainted assets. So I don't think the procedural change  
11 affects the structure of our argument.

12 JUSTICE BREYER: I thought the argument was  
13 there simply to say there isn't an old tradition of  
14 getting B, who's in the basement, and I -- and I forget  
15 where they all are at this point. Getting the courier  
16 to forfeit his own money which isn't in the bag. Okay?  
17 There is an ancient tradition of what they're trying to  
18 do. That was the point of the in rem proceeding, wasn't  
19 it?

20 MR. UNIKOWSKY: That is the exact point  
21 we're making, Justice Breyer.

22 JUSTICE BREYER: And Congress said it -- it  
23 not -- we do not intend in their report any significant  
24 expansion of the scope of property subject to  
25 forfeiture, or that's your point.

1                   MR. UNIKOWSKY: That -- that is indeed our  
2 point, Justice Breyer. Thank you for articulating it  
3 better than I did.

4                   JUSTICE BREYER: Oh, I'm not -- not saying  
5 that.

6                   MR. UNIKOWSKY: I -- I think that -- that  
7 the -- there's a broader point here, which is that, in  
8 criminal -- in the interpretation of criminal statutes,  
9 I think the Court should be careful of how it uses  
10 background principles. And I think it's one thing to  
11 say that, for instance, the word "conspire" has always  
12 meant something and therefore we're going to interpret  
13 the word "conspire" the same way. But that is really  
14 not what the government's doing here. It's -- it's  
15 saying that in 1984 -- or actually 1986, when Congress  
16 enacted the substitute property provision, the law  
17 changed in this very fundamental way to permit  
18 joint-and-several liability which had never existed.  
19 But, actually, their new joint-and-several liability  
20 system is -- is -- is quite different from old  
21 applications of Pinkerton.

22                   For instance, it applies only to (a)(1) and  
23 not to (a)(2) and (a)(3), and there's different types of  
24 forfeitures for everyone in the conspiracy. For the --  
25 the guy who actually obtains it, there's asset freezes

1 in line with third-party transfers and not for others.  
2 So it seems to me that there's very significant  
3 modifications in the government's rule than the  
4 tradition Pinkerton rule.

5 So the government is saying that silently  
6 Congress enacted -- without saying anything in the  
7 statute, Congress enacted this very new forfeiture  
8 regime, which is similar in some ways and different in  
9 other ways from Pinkerton has -- as it had traditionally  
10 been applied, and I just don't think the Court reads  
11 criminal statutes that way. That's just a classic form  
12 of common law criminal liability. The government is  
13 saying well, here's these concepts from other contexts,  
14 let's modify them in various ways that the government  
15 thinks makes sense. We don't really have to look at the  
16 statutory text because unavailability just makes sense  
17 as a criterion, even if Congress never said it, and  
18 therefore we have this system of -- of joint-and-several  
19 forfeiture liability, and the Court just doesn't do that  
20 when it reads criminal statutes. We'd certainly ask the  
21 Court to just follow the text literally.

22 I -- I'd like to focus on two other  
23 arguments made by my colleague. One about restitution  
24 and one about contribution. So in terms of restitution,  
25 I actually think that the comparison to restitution is

1 quite a strong argument for us, because that's a  
2 situation in which joint-and-several liability makes  
3 perfect sense and is also authorized by statute. And  
4 those are two good reasons that we have  
5 joint-and-several liability in that context.

6 Joint-and-several liability works in terms  
7 of the purposes of the law when it's compensatory. In  
8 other words, money from one person and money from  
9 another person are treated interchangeably because the  
10 goal is to compensate a victim and the victim doesn't  
11 care where the money comes from. And that is the case  
12 in restitution. That's why it's hardly surprising that  
13 Congress has enacted a joint-and-several liability  
14 system, while also being careful to say that the Court  
15 can mitigate the harsh effects of the joint-and-several  
16 liability as applied to a particular defendant, by  
17 saying well, you don't have to require full  
18 joint-and-several liability if it's too harsh.

19 So that's exactly what one would expect  
20 based on the background principles and the text provides  
21 it. And here, Congress did not say that, it used the  
22 word "obtained," but the government seeks to conflict a  
23 much harsher form of joint-and-several liability which I  
24 think is -- is quite incongruous.

25 And I also think that unlike the

1 compensatory context, we haven't talked much about the  
2 purposes of -- of forfeiture, but they are totally  
3 inconsistent with joint-and-several liability. The  
4 Court has articulated remedial and punitive purposes for  
5 forfeiture, but not -- none -- neither of those two  
6 types of purposes have anything to do with  
7 joint-and-several liability. The remedial purposes of  
8 taking the money away from the person who got it are not  
9 supported, whereas we see in this case, the -- the  
10 person who got the money keeps some of the money, and  
11 the punitive purposes -- I mean, the goal of punishment  
12 is to retract the person's culpability, that doesn't  
13 happen when the amount Petitioner has to pay is tied to  
14 what his brother paid in his plea agreement. That's not  
15 a rational method of assessing culpability.

16 On the issue of contribution, so this notion  
17 of State law contribution is an issue that the  
18 government doesn't raise in its brief and I'm not aware  
19 of any precedent or law that would support that. As far  
20 as I've been aware, until oral argument in this case,  
21 right of contribution isn't available --

22 CHIEF JUSTICE ROBERTS: I didn't under --  
23 understand the argument there was. I think your friend  
24 was just pointing out that if there were an available  
25 remedy, it would be under State law.

1                   MR. UNIKOWSKY: Okay. Well, then I -- I  
2 agree with that, that's true. And I -- I certainly  
3 agree with my colleague as well that there's no Federal  
4 right of -- of contribution at all.

5                   I think that's quite important. Counsel  
6 says that actually that doesn't matter because under the  
7 common law, you couldn't have contribution in  
8 intentional tort cases anyway. I think, though, that's  
9 not persuasive for a number of reasons. One is that I  
10 think the common law is not so clear and, in fact,  
11 modern restatements of the common law have an  
12 alternative rule.

13                   Second of all, the common law rule as  
14 applied to vicarious forms of liability, which is sort  
15 of what the government is seeking here, actually  
16 wouldn't add contribution. We cite some authority for  
17 that in our brief.

18                   And, finally, in the Paroline case itself,  
19 the government itself rejected that argument in its  
20 brief and asked that the Court, and the Court said that  
21 the absence of contribution remedy is evidence that  
22 Congress didn't intend joint-and-several liability in  
23 the first place, and we think that argument applies with  
24 full force in this case.

25                   If there's no further questions from the

1 Court, we'd ask the Court to reverse the judgment.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 The case is submitted.

4 (Whereupon, at 12:07 p.m., the case in the  
5 above-entitled matter was submitted.)

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<b>A's</b> 35:23 36:20	<b>adds</b> 42:18	24:3 28:4	43:15 49:2	54:22
<b>a.m</b> 1:14 3:2	<b>admit</b> 10:22	<b>answers</b> 39:10	50:17 52:7	<b>attributed</b> 8:13
<b>A1</b> 24:23 25:7	<b>admitted</b> 6:19	<b>anybody</b> 22:24	53:13 54:16	18:25 24:22
25:14	<b>adopted</b> 17:1	<b>anymore</b> 21:17	55:4 57:11,12	42:11 53:19
<b>abandoned</b>	39:8	<b>anyway</b> 62:8	60:1 61:20,23	<b>attributing</b>
51:25	<b>advocating</b>	<b>apologize</b> 43:3	62:19,23	55:18
<b>ability</b> 23:13	55:22	<b>appeal</b> 16:5	<b>arguments</b> 39:3	<b>attribution</b> 8:16
53:6	<b>affect</b> 10:13	32:23 44:8	50:24 51:23	19:4 24:8
<b>able</b> 41:23	<b>agents</b> 45:21	<b>appeals</b> 15:17	53:15,16 59:23	<b>authority</b> 8:9
<b>above-entitled</b>	<b>ago</b> 4:23 16:3	16:2,11,22	<b>arising</b> 34:8	26:2 62:16
1:12 63:5	<b>agree</b> 6:15 12:16	17:21 32:18	<b>articulated</b> 61:4	<b>authorized</b> 5:24
<b>absence</b> 62:21	15:19 24:17	45:22	<b>articulating</b>	32:17 52:16
<b>account</b> 9:18	31:25 34:17	<b>appeals'</b> 45:13	58:2	55:8,10 60:3
36:9,20 41:11	62:2,3	<b>APPEARAN...</b>	<b>aside</b> 46:13 55:1	<b>available</b> 23:3
42:22	<b>agreed</b> 9:15	1:15	<b>asked</b> 26:22	23:19 29:7
<b>accountable</b>	30:14	<b>appears</b> 38:13	27:18 44:13	36:14 37:14
47:11	<b>agreement</b>	<b>application</b> 15:5	45:2 62:20	43:9 48:7,10
<b>acknowledge</b>	14:25 61:14	26:25 55:15	<b>asking</b> 14:3	52:13 61:21,24
11:3	<b>agrees</b> 10:6 17:8	<b>applications</b>	32:24	<b>aware</b> 33:24
<b>act</b> 7:10 8:17,21	21:22 22:3	58:21	<b>aspect</b> 11:10	35:8 36:24
9:2,9 24:11,12	45:5	<b>applied</b> 32:18	<b>assessing</b> 61:15	61:18,20
24:21,23 30:19	<b>ah</b> 41:25	35:3 59:10	<b>asset</b> 7:17 13:4	<b>awfully</b> 46:7
34:8 39:16,18	<b>ahead</b> 16:4 28:2	60:16 62:14	13:11 54:3	
42:12,15,18	<b>ALITO</b> 11:16	<b>applies</b> 4:13	58:25	<b>B</b>
45:20 47:9	12:25 13:13	15:14 23:7	<b>assets</b> 6:14,17,22	<b>b</b> 27:5 35:19
48:21 54:9	16:24 56:13,18	58:22 62:23	6:25 7:6,18 8:1	36:17,21,22
<b>acted</b> 16:8	56:23	<b>apply</b> 3:22 4:10	8:12,21,24	37:5,16 39:11
<b>action</b> 25:1	<b>allegedly</b> 13:19	4:14,25 5:11	9:17,18 14:1	39:12,21 40:11
28:16 34:1	<b>allocate</b> 50:14	11:12,12 15:11	22:9 36:22	40:18 57:14
<b>actions</b> 53:19	<b>allocated</b> 49:18	17:10 23:22,23	37:18 40:14	<b>B's</b> 41:11
54:21	<b>allows</b> 12:12	35:12 42:11	42:9 44:6,17	<b>back</b> 4:18 20:10
<b>activities</b> 55:18	22:8 44:4	44:6,17,20	44:23 48:22	24:3 27:9 29:5
<b>activity</b> 4:3	<b>altered</b> 15:12	51:17	49:12 51:15,16	33:7 40:25
<b>acts</b> 18:24 19:5	<b>alternative</b>	<b>applying</b> 5:10	51:17,22 52:6	43:4 45:1
19:11 45:16	32:24 49:23	<b>area</b> 12:4	52:12 53:11	48:19 49:24
46:25 47:11	62:12	<b>areas</b> 10:3	54:5 57:10	53:24 54:19
<b>actual</b> 24:16	<b>amount</b> 3:14	<b>argue</b> 5:20	<b>Assistant</b> 1:18	<b>background</b>
38:17	11:19 25:16,18	<b>argued</b> 16:5	34:21	3:20,21 5:11
<b>ADAM</b> 1:16 2:3	38:19 41:21	28:11 38:21	<b>assume</b> 30:2	9:24,25 10:2
2:9 3:6 50:17	49:14,21 50:1	53:17	34:21	11:10 14:8,9
<b>add</b> 62:16	50:2,4,7,12	<b>argument</b> 1:13	<b>assuming</b> 31:16	15:3,5,11 26:5
<b>adding</b> 25:25	51:9 61:13	2:2,5,8 3:3,6	<b>atextual</b> 27:1	26:8 31:23
<b>address</b> 44:21	<b>ancient</b> 56:21,23	3:24 5:1 6:11	<b>attaches</b> 31:14	32:19 50:24
<b>addresses</b> 4:4,5	57:17	7:24 11:11	<b>attempting</b>	55:13 56:21
36:25	<b>ancillary</b> 49:6	16:11 18:18	47:23	58:10 60:20
	<b>anomalous</b> 34:3	26:20 29:13	<b>attention</b> 15:24	<b>bag</b> 20:7,9,24
	<b>answer</b> 7:20	32:23 39:4,7	<b>attributable</b> 8:2	21:1,2,9,15
			9:11 10:3 12:6	



<p>23:18 35:18 41:9,10,10,15 43:6 48:7,14 57:16 <b>baked</b> 28:25 <b>bank</b> 9:18 36:9 36:20 41:11 42:22 <b>bargain</b> 33:18 <b>based</b> 3:19 7:9 14:25 19:9 50:1 60:20 <b>basement</b> 46:12 47:15,21 48:4 48:15 57:14 <b>basis</b> 4:15 7:7 <b>beach</b> 40:8 <b>begins</b> 47:8 <b>behalf</b> 1:16,20 2:4,7,10 3:7 18:19 50:18 <b>believe</b> 16:6,8 37:23,25 <b>benefit</b> 18:6 <b>better</b> 58:3 <b>beyond</b> 23:25 <b>bit</b> 17:11 24:18 37:6 <b>body</b> 16:12 <b>boils</b> 3:16 <b>bother</b> 40:18 <b>Boudeen's</b> 50:10 <b>bracket</b> 37:4 <b>Breyer</b> 25:3,5,9 25:14 26:13,17 26:18 27:8,12 39:9,14,18 40:3,22 41:2,7 41:16,23 42:5 42:14,17,21 43:2,21 57:12 57:21,22 58:2 58:4 <b>BRIAN</b> 1:18 2:6 18:18 <b>brief</b> 4:7,11 5:2 6:15 7:3,24</p>	<p>15:21,25 16:1 16:3,20 19:4 19:25 32:17 34:4 40:24 44:10,12 50:10 52:7 61:18 62:17,20 <b>briefed</b> 16:5 <b>briefs</b> 53:16 <b>broader</b> 19:22 58:7 <b>brother</b> 3:10 9:16 17:18 33:10,12,12,13 34:12,14 35:4 51:10 61:14 <b>brought</b> 43:21 <b>bunch</b> 12:7 13:11 20:6 <b>buy</b> 22:19 23:9 <b>buys</b> 12:10,10 21:2</p> <hr/> <p style="text-align: center;"><b>C</b></p> <p><b>c</b> 2:1 3:1 40:24 <b>call</b> 23:6 <b>called</b> 16:19 40:5 <b>candid</b> 36:24 <b>Cano-Flores</b> 16:23 <b>car</b> 5:16 12:11 12:13 21:2,4 21:11 22:9 23:19 <b>car's</b> 23:19 <b>care</b> 60:11 <b>careful</b> 58:9 60:14 <b>carrying</b> 20:24 30:19 <b>case</b> 3:4 4:22 9:13 11:1,1,18 11:18 12:21 15:6,22 16:2 16:16,17 17:17 18:11,13 21:18</p>	<p>21:21 22:2 33:20,24 36:24 37:22 38:8 41:4,20 43:8 44:10 46:10 47:16,19 48:23 49:8 50:9,22 50:25 51:2 52:19 53:22 60:11 61:9,20 62:18,24 63:3 63:4 <b>caselaw</b> 56:14 <b>cases</b> 13:22 14:4 17:21 33:1 36:12 55:1 62:8 <b>Casey</b> 50:9 <b>cash</b> 11:25 20:7 20:9,17 22:20 22:21 23:18 42:12 43:6 46:11 <b>catch</b> 20:10 <b>categories</b> 4:1 5:8 <b>category</b> 13:22 <b>caught</b> 21:19 <b>cause</b> 9:7 34:1 <b>cent</b> 43:25 <b>certain</b> 11:19 14:1 <b>certainly</b> 15:18 27:15 59:20 62:2 <b>cetera</b> 39:20 <b>change</b> 5:3 56:25 57:3,10 <b>changed</b> 4:20,22 56:8 58:17 <b>chauffeur</b> 22:16 22:22 23:11 48:6 <b>check</b> 11:24 12:15 <b>Chief</b> 3:3,8 7:19 8:8,11,19</p>	<p>18:16,20 19:8 19:21 20:23 21:7 22:14 23:5 24:9 27:25 28:3,10 28:18,23,24 44:15 47:24 48:2,12 50:15 50:19 54:14 61:22 63:2 <b>choice</b> 48:2 <b>choose</b> 48:5 <b>circuit</b> 4:22,25 16:16,17 38:15 44:9,10,11,14 52:1,19 <b>circuits</b> 32:25 <b>circumstance</b> 20:14 21:22 <b>circumstances</b> 25:11,17 34:24 55:24 <b>cite</b> 50:10 52:19 62:16 <b>civil</b> 27:21 57:8 <b>claim</b> 18:8 <b>claims</b> 9:20 <b>classic</b> 53:3 59:11 <b>clauses</b> 41:25 <b>clear</b> 13:5 29:6 43:3 48:17 52:18 53:25 62:10 <b>clearly</b> 52:10 <b>closely</b> 27:3 <b>closely-held</b> 45:10 <b>co-conspirator</b> 3:19 8:14 12:23 14:20 22:17,23 39:25 <b>co-conspirator's</b> 42:12 53:19 <b>co-conspirators</b> 4:13 7:22 8:2 9:11 19:6</p>	<p>23:10 24:11,15 24:25 26:18 35:17 47:12 54:18 55:19 <b>co-contributors</b> 24:22 <b>colleague</b> 59:23 62:3 <b>collect</b> 20:21 54:6 <b>collected</b> 56:4,6 56:8 <b>college</b> 18:3,3 <b>come</b> 10:25 11:14 13:13 15:7 24:6 35:17 43:12 45:1 53:1 54:5 <b>comes</b> 12:8 20:20 24:2 32:23 36:11 49:9 60:11 <b>coming</b> 48:19 <b>commend</b> 16:7 <b>comments</b> 50:22 <b>commingled</b> 21:20 38:2 53:15 <b>committed</b> 14:20 19:11 34:6 <b>common</b> 5:23 18:25 25:18,22 26:14,19,19 59:12 62:7,10 62:11,13 <b>comparison</b> 55:11 59:25 <b>compelled</b> 5:20 16:10 <b>compensate</b> 60:10 <b>compensatory</b> 60:7 61:1 <b>complete</b> 35:10 <b>completed</b> 8:4 <b>completely</b></p>
---	--	--	---	---

<p>51:19,24  <b>component</b>                      14:13 29:13  <b>concedes</b> 56:9  <b>conceding</b> 44:22                      51:20  <b>concept</b> 10:7                      11:6 20:19                      32:7,9,10  <b>concepts</b> 59:13  <b>concession</b> 57:6  <b>conclusion</b> 26:3  <b>conditions</b> 46:23                      47:2  <b>confess</b> 16:10  <b>confessed</b> 16:4  <b>confirms</b> 54:1,2                      56:9  <b>conflict</b> 60:22  <b>confused</b> 19:22  <b>confuses</b> 19:25  <b>congress</b> 17:7                      25:24 42:1                      57:22 58:15                      59:6,7,17                      60:13,21 62:22  <b>consequences</b>                      31:9  <b>considered</b>                      22:24  <b>consistent</b> 44:11  <b>consistently</b>                      51:12  <b>conspiracy</b> 3:20                      5:16 6:9 8:5,17                      8:20,23 11:18                      11:20,22 12:5                      12:6,8 13:2                      15:8 17:1,4,8                      18:22,24 19:1                      19:24 24:10                      26:6,9 30:1,14                      31:4,9 34:9                      40:6 45:15,16                      45:19 46:1,4                      49:20 51:7                      54:22,25 58:24</p>	<p><b>conspiracy-sp...</b>                      6:5  <b>conspirator</b>                      12:10,22 19:5                      19:12 33:2                      35:18,19,23,25                      36:8,17,19,20                      36:21 46:19                      47:14 49:22  <b>conspirator's</b>                      47:21  <b>conspirators</b> 8:6                      19:7 41:5                      46:11 49:19  <b>conspire</b> 58:11                      58:13  <b>constituted</b>                      39:23  <b>constitutes</b>                      38:20  <b>constituting</b>                      20:8 26:11  <b>construe</b> 14:7  <b>content</b> 55:23  <b>context</b> 15:8                      27:3 32:1,14                      45:17 55:16                      60:5 61:1  <b>contexts</b> 15:12                      19:7 59:13  <b>continue</b> 37:11  <b>contradicts</b> 3:14  <b>contrary</b> 8:6  <b>contribution</b>                      33:9,15,22,23                      34:6,14,18,20                      34:23 35:1                      59:24 61:16,17                      61:21 62:4,7                      62:16,21  <b>controlled</b> 17:20                      27:5  <b>controlling</b>                      17:24  <b>controls</b> 19:6  <b>conversely</b> 5:10  <b>converted</b> 23:18</p>	<p><b>convict</b> 43:18  <b>convicted</b> 30:18                      31:10  <b>corporation</b>                      17:20,23 45:11  <b>correct</b> 23:1                      25:8,13 33:21                      42:20 47:10                      48:16 49:15,21                      51:14  <b>counsel</b> 18:16                      43:22 44:18                      50:15 52:3                      62:5 63:2  <b>counsel's</b> 50:21  <b>couple</b> 16:3  <b>courier</b> 29:18,22                      29:24 30:9,12                      30:25 33:2                      57:15  <b>courier's</b> 30:12  <b>couriers</b> 40:7                      49:25  <b>course</b> 34:10  <b>court</b> 1:1,13 3:9                      7:8,17 8:18                      12:13 14:7                      15:15 16:2,6                      16:10,11,13,19                      16:22 17:21                      18:21 23:25                      24:19,20 27:22                      29:2,15 38:9                      38:12,13 39:8                      45:22 46:21                      48:11 49:9                      51:18 53:13                      58:9 59:10,19                      59:21 60:14                      61:4 62:20,20                      63:1,1  <b>Court's</b> 15:24  <b>courts</b> 15:17,17                      15:22 32:18                      44:8,21 45:13  <b>crime</b> 4:4 8:4                      18:23 27:1</p>	<p>31:20 41:12  <b>crimes</b> 14:20                      31:10  <b>criminal</b> 4:2,6                      5:23 6:1,2,4                      14:17 15:15                      17:3,5 19:3                      27:17 28:7                      29:25 32:14                      34:8,9 45:23                      52:8,17,18                      53:4 57:7 58:8                      58:8 59:11,12                      59:20  <b>criminal's</b> 4:5  <b>criteria</b> 53:11  <b>criterion</b> 59:17  <b>criticism</b> 27:2  <b>culpability</b>                      14:23 15:1                      61:12,15  <b>curious</b> 37:15</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>d</b> 3:1 12:18  <b>D.C</b> 1:9,16,19                      16:16  <b>Daniel</b> 14:18  <b>daughter's</b> 18:3  <b>day</b> 12:9 41:12                      42:23  <b>days</b> 16:3,10  <b>deal</b> 9:15 20:6                      40:25 43:5  <b>dealer</b> 30:7  <b>dealing</b> 41:5                      42:12  <b>deals</b> 30:25  <b>decades</b> 33:1  <b>decides</b> 22:19                      33:18  <b>decision</b> 16:22                      38:15 49:14,16  <b>decisions</b> 45:13  <b>decrease</b> 14:15  <b>deemed</b> 3:18  <b>deeper</b> 15:6</p>	<p><b>defendant</b> 6:3                      7:10,15,21 9:3                      9:5,6 19:10                      23:23 24:14,16                      24:19 25:9                      33:19 39:16,19                      41:4 42:16,17                      42:18 45:7                      47:9,11 49:1                      50:13 54:10,16                      54:17,17 60:16  <b>defendant's</b>                      7:17 22:9                      38:12  <b>defendants</b>                      21:18,19 32:15                      36:12 43:15  <b>defined</b> 11:7  <b>definitely</b> 42:9  <b>deliver</b> 29:19  <b>deny</b> 13:21  <b>depart</b> 45:14  <b>Department</b>                      1:19  <b>departure</b> 27:24  <b>depend</b> 50:12  <b>depends</b> 32:8  <b>deposition</b> 13:14  <b>depositions</b>                      13:11  <b>derived</b> 23:16                      26:11 39:23  <b>described</b> 7:11                      13:2 24:19                      39:15 41:1,15                      42:19 43:7,16                      44:24 49:1                      54:11  <b>describes</b> 29:1                      41:18 44:23  <b>determine</b> 13:9  <b>development</b>                      15:24  <b>difference</b> 10:24                      56:4,6  <b>different</b> 15:11                      15:12,20 26:7</p>
--	--	---	---	--

<p>40:16 44:9 51:19 56:5 58:20,23 59:8 <b>diligence</b> 38:2 53:14 <b>direct</b> 12:15 <b>directed</b> 5:9 <b>directly</b> 17:13 18:7 23:15,16 26:12 32:12 37:13 <b>disagree</b> 19:20 36:25 37:1 48:24 55:7 <b>disagreeing</b> 31:6 <b>disagreement</b> 21:25 <b>discern</b> 4:16 <b>discussed</b> 27:22 52:9 <b>discussion</b> 49:4 <b>dissipate</b> 24:25 47:1 <b>dissipated</b> 13:3 21:19,24 22:4 24:5 35:25 43:17 47:14 <b>dissipation</b> 8:1 8:13,21 9:10 24:12 48:21 54:25 <b>distinction</b> 5:19 18:11 <b>distinguish</b> 10:25 <b>distribute</b> 27:4 <b>distributed</b> 12:9 <b>district</b> 16:6,19 38:9,12,13 39:7 <b>diverge</b> 15:22 <b>divide</b> 11:21 <b>divided</b> 11:21 <b>docket</b> 38:14 <b>Document</b> 38:13 <b>doing</b> 7:14 15:9 16:7 17:15</p>	<p>52:19 53:25 54:1 58:14 <b>dollars</b> 29:18,19 29:23,25,25,25 30:8,10 40:10 54:6 <b>door</b> 7:5 9:20 <b>draw</b> 26:3 <b>drawing</b> 26:3 <b>drawn</b> 5:19 <b>drives</b> 22:16 <b>dropped</b> 21:8 <b>drove</b> 40:8 <b>drug</b> 11:17 13:15,15 20:6 21:18 22:18 23:9 29:23 30:6,17,25 31:14 38:20 43:5 <b>drugs</b> 20:6 29:19 50:5 <b>due</b> 53:14 <b>duffel</b> 20:7,9 21:1,2,9,15 23:18 43:6 <b>duffle</b> 20:24</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>e</b> 2:1 3:1,1 29:3 40:4,24 44:23 <b>earlier</b> 24:9 54:15 <b>easier</b> 11:5 14:6 <b>education</b> 18:3 <b>effects</b> 60:15 <b>Eighth</b> 52:19 <b>either</b> 9:5 10:3 14:17 38:23 41:3 48:3 <b>element</b> 14:2,4 <b>else's</b> 14:25 <b>emphasize</b> 26:25 32:21 34:2 38:3 <b>emphatic</b> 40:21 <b>employ</b> 56:22</p>	<p><b>employee</b> 33:11 43:23 <b>enabling</b> 52:14 <b>enacted</b> 6:25 28:8 33:5 43:14 58:16 59:6,7 60:13 <b>encompasses</b> 17:15,18 <b>ended</b> 46:1 <b>endorse</b> 32:25 <b>engage</b> 19:17 <b>English</b> 26:14 <b>enjoy</b> 33:4 50:3 <b>enterprise</b> 4:6 6:4,4 11:7 13:15 17:6 29:24 45:23 <b>enterprises</b> 6:1 17:3 <b>entire</b> 3:13 12:21 50:7 <b>entitled</b> 20:20 21:23 22:3 <b>entitlement</b> 41:22 53:5 <b>enumerated</b> 7:12 <b>enumerates</b> 4:1 <b>equal</b> 38:19 <b>equivalent</b> 25:16 25:18 <b>error</b> 16:4,10 <b>ESQ</b> 1:16,18 2:3 2:6,9 <b>essentially</b> 6:19 14:3,12 51:20 <b>establish</b> 51:4,8 53:21,22 <b>et</b> 39:20 <b>everybody</b> 5:17 <b>evidence</b> 13:18 62:21 <b>exact</b> 4:23 57:20 <b>exactly</b> 27:2 44:21 56:11 60:19</p>	<p><b>example</b> 17:24 18:1 43:5 <b>examples</b> 45:9 <b>exclusive</b> 42:2 52:5 53:10 <b>excuse</b> 51:13 <b>exercise</b> 38:2 <b>exhaustive</b> 25:25 26:1 <b>exist</b> 35:12 <b>existed</b> 32:7 58:18 <b>expansion</b> 57:24 <b>expect</b> 60:19 <b>expend</b> 53:6 <b>explain</b> 19:3,21 21:13 30:12 32:17 40:23 42:10 <b>explained</b> 44:5 <b>expose</b> 8:6 <b>extend</b> 30:20 <b>extent</b> 15:22 <b>extrastatutory</b> 46:13 <b>extremely</b> 55:9</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>fact</b> 4:12,24 5:20 6:20,24 15:23 16:9 17:21 27:9 30:7 56:8 57:2,3,5 62:10 <b>facts</b> 9:13 18:13 29:22 39:2 53:22 <b>fairly</b> 46:2 <b>faith</b> 16:8 <b>faithfully</b> 5:10 <b>falls</b> 23:14 <b>familiar</b> 19:2 <b>far</b> 4:15 9:17 61:19 <b>fault</b> 19:25 <b>favor</b> 10:20 15:19 16:23 <b>Federal</b> 33:22</p>	<p>62:3 <b>feels</b> 5:20 16:9 <b>fees</b> 43:22 44:18 <b>Ferrari</b> 22:19 23:9,14 <b>Ferrari's</b> 23:12 <b>fiction</b> 19:9,18 <b>figure</b> 13:20 <b>filed</b> 16:3 44:10 <b>finally</b> 62:18 <b>financial</b> 31:13 <b>find</b> 21:14 36:8 41:19,21 42:6 43:18 <b>fines</b> 14:17,21 <b>finish</b> 28:3 <b>first</b> 7:23 10:5 13:8 26:7 35:22 37:16 50:25 52:11 53:13 55:2 62:23 <b>five</b> 22:6,12 37:7 37:19 40:6,15 48:22 <b>fixes</b> 41:21 <b>Fletcher</b> 1:18 2:6 18:17,18 18:20 19:20 21:5,12 22:7 23:1,12 24:1 24:17 25:8,13 26:4,17,24 27:11,20 28:1 28:5,17,22,25 29:11,16,20 30:5,11,22 31:2,5,13,17 31:21,25 32:4 32:8,13 33:7 33:21 34:16,22 35:7,13,21 36:2,6,10,23 37:9,17,23,25 38:7 39:13,17 40:2,20,23 41:3,14,17</p>
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42:4,8,16,20 43:2 44:1,19 46:6,8,20 47:2 47:10,16,25 48:9,16,23 <b>flows</b> 17:23 <b>focus</b> 3:25 19:18 46:15 59:22 <b>focused</b> 19:15 47:3,4 55:5 <b>focuses</b> 56:10 <b>follow</b> 41:25 59:21 <b>following</b> 42:6 <b>force</b> 62:24 <b>foreseeable</b> 21:12 30:15 49:21 50:13 <b>forfeit</b> 6:6,23 9:16 17:5 21:11 22:8 23:13,20 26:11 33:2 37:9,18 51:16 52:12,23 57:16 <b>forfeitable</b> 20:3 20:5,8,11,13 21:16 28:6 29:2 37:14 41:19 43:8 53:2 <b>forfeited</b> 23:20 46:20 48:10 51:9 57:8,9 <b>forfeits</b> 6:3 <b>forfeiture</b> 4:2 5:17 6:5,14,17 6:22 7:6,13,16 9:4,10 10:1,5,7 10:13 11:9 13:22,25 14:9 14:11,13 15:12 20:15 27:12,14 27:19,22 28:7 28:8 30:16 31:19,24 33:19 35:1 37:13	38:12,18 41:22 43:19 45:6,17 50:12 51:8,21 52:6,8,16 53:5 53:7,10,23 54:4 55:25 56:7,11,14 57:5,25 59:7 59:19 61:2,5 <b>forfeitures</b> 58:24 <b>forget</b> 33:19 57:14 <b>form</b> 5:22 17:4,7 59:11 60:23 <b>forms</b> 62:14 <b>forth</b> 4:18 <b>found</b> 16:23 40:7 <b>foundation</b> 19:2 <b>Fourth</b> 44:9,10 44:13 <b>framed</b> 16:25 <b>free</b> 33:17 <b>freezes</b> 13:11 58:25 <b>frequently</b> 8:1 <b>friend</b> 20:1 43:12 44:8 45:3,9 61:23 <b>front</b> 37:5 <b>frustrating</b> 8:23 <b>full</b> 18:8 20:7,9 23:18 41:15 43:6 60:17 62:24 <b>fully</b> 16:5 <b>functions</b> 41:18 <b>fundamental</b> 18:11 58:17 <b>funds</b> 44:3,3 45:25 <b>further</b> 18:14 30:20 62:25 <b>furtherance</b> 8:5 8:17,20 18:25 54:22,25	<b>G</b>	<b>G</b> 1:16 2:3,9 3:1 3:6 50:17 <b>gambles</b> 8:4 <b>garden</b> 21:20 <b>general</b> 1:19 9:9 <b>generally</b> 30:24 33:9 <b>getting</b> 18:6,7 21:9 31:22 48:3 57:14,15 <b>GINSBURG</b> 15:16 16:15 25:4 33:6 43:20 <b>give</b> 26:2 31:15 <b>given</b> 12:16 <b>gives</b> 25:10 45:10 <b>go</b> 7:17 13:18 27:9 28:1 33:7 33:17 35:15 36:7,22 38:24 38:24 43:20,21 45:10 <b>goal</b> 60:10 61:11 <b>goes</b> 8:3 33:11 <b>going</b> 11:24,24 13:13 22:11,17 28:5,20 30:13 32:11 36:14 49:25 52:20,23 53:1,1 54:5 58:12 <b>good</b> 10:22 16:8 60:4 <b>gotten</b> 19:22 39:12 <b>govern</b> 35:11 <b>governing</b> 10:1 <b>government</b> 3:12 4:15,23 5:10,19,20 6:19 7:12,24 9:5,8,11,15,19 10:6,25 11:13	11:19 12:17 14:3,5,12 15:9 15:19 16:4,7,9 17:8 20:12,15 21:23 22:3,8 22:10,11 23:13 23:17,19 24:5 24:7 25:1 29:8 31:16 33:11,14 33:17 36:3,15 37:12 38:9,16 38:18 41:19,20 43:9,24 44:2,9 45:25 47:19,20 47:20,22 49:2 49:10,16 51:1 51:5 52:5,12 52:15,22 53:12 53:12,21 54:5 54:12 55:3,12 55:17,21 56:9 56:22 59:5,12 59:14 60:22 61:18 62:15,19 <b>government's</b> 3:16 4:11,19 4:20 5:3,5,13 6:8,15 7:3,4 9:23 12:3,20 13:23 15:21,25 29:5 36:14 41:22 44:5 51:18,22 53:6 55:6 57:5 58:14 59:3 <b>great</b> 31:8 45:21 <b>greater</b> 31:18 32:11 <b>guess</b> 10:24 39:21 <b>guy</b> 21:3,8 47:22 48:3,4,13 58:25 <b>guys</b> 20:5	<b>half</b> 35:5 <b>hands</b> 22:9 41:3 <b>happen</b> 12:16 61:13 <b>happened</b> 9:14 30:10 33:24 <b>happens</b> 13:7 21:10 39:10 54:12 <b>happy</b> 22:1 <b>hard</b> 14:5 <b>harder</b> 13:23 <b>harsh</b> 60:15,18 <b>hasher</b> 60:23 <b>hear</b> 3:3 <b>heard</b> 7:3 52:3 <b>held</b> 17:22 30:16 32:15 34:5 39:6 50:7 <b>hid</b> 39:20 52:24 <b>hidden</b> 6:10 43:17 <b>hide</b> 54:7 <b>hire</b> 40:15,16,19 <b>historical</b> 10:6 55:10 <b>history</b> 3:15 26:21 27:10,13 27:15,16 54:1 <b>hold</b> 3:13 43:18 <b>holding</b> 48:3 <b>home</b> 20:10 33:17 <b>honestly</b> 42:25 <b>Honeycutt</b> 1:3 3:4 <b>Honor</b> 7:23 11:4 12:19 16:18 31:7 56:17 <b>hook</b> 33:13 <b>hornbook</b> 55:17 55:18 <b>hornbooks</b> 55:20,22,25 <b>house</b> 22:10 <b>hundred</b> 30:10 40:10
		<b>H</b>	<b>H</b> 1:18 2:6 18:18		

<p><b>Hurley</b> 50:11  <b>hypothetical</b>                  49:1</p> <hr/> <p style="text-align: center;"><b>I</b></p> <p><b>idea</b> 28:11  <b>Identical</b> 5:15  <b>identification</b>                  8:24  <b>identified</b> 13:5  <b>illegal</b> 4:3  <b>illustration</b>                  17:17  <b>implement</b> 53:4  <b>implementing</b>                  52:21  <b>important</b> 55:19                  62:5  <b>imposes</b> 9:1  <b>impossible</b> 25:1                  26:20  <b>imputes</b> 51:6  <b>inch</b> 30:20  <b>includes</b> 8:16                  24:15 39:25                  54:18  <b>incongruous</b>                  60:24  <b>inconsistent</b>                  3:21 6:8 9:24                  15:3 16:1                  44:12 61:3  <b>incorrect</b> 51:24  <b>indication</b> 16:25  <b>indications</b>                  55:10  <b>indirectly</b> 17:13                  17:15,22,25                  18:5,10,12                  23:16 26:12                  45:2,8,23 46:3  <b>individual</b> 14:21                  14:21 31:19  <b>individual's</b>                  14:23  <b>inference</b> 4:10  <b>inform</b> 49:6</p>	<p><b>informs</b> 26:9  <b>insight</b> 19:4  <b>instance</b> 17:16                  55:11 58:11,22  <b>instrumentalit...</b>                  4:4  <b>intend</b> 57:23                  62:22  <b>intentional</b> 34:7                  62:8  <b>interchangeably</b>                  60:9  <b>interest</b> 4:5 6:3                  6:3,7 17:19  <b>interpret</b> 58:12  <b>interpretation</b>                  58:8  <b>interrupt</b> 44:16  <b>invites</b> 45:17  <b>invoke</b> 12:18                  22:7,11 37:12                  49:2,12  <b>invoking</b> 24:6                  32:19  <b>involved</b> 31:1  <b>irrelevant</b> 36:9  <b>issue</b> 4:2 8:21                  11:13 15:7                  19:22 29:17                  40:14,16 44:21                  61:16,17  <b>issues</b> 52:2</p> <hr/> <p style="text-align: center;"><b>J</b></p> <p><b>jail</b> 30:19 31:12  <b>join</b> 30:15  <b>joint-and-seve...</b>                  4:8,12,25 6:18                  6:21 7:1,5 9:21                  10:4,8 11:6                  12:22 14:10,14                  15:2,7,13 17:9                  20:18,19 23:3                  34:7,18 51:4                  53:7 55:8,24                  56:15 58:18,19                  59:18 60:2,5,6</p>	<p>60:13,15,18,23                  61:3,7 62:22  <b>jointly</b> 3:13                  32:15 34:5                  39:6  <b>Judge</b> 16:19                  50:10  <b>judgment</b> 35:1                  37:13 38:10,18                  38:22 39:7                  49:10 57:7                  63:1  <b>judgments</b>                  38:23 46:14                  49:6 52:3,9  <b>judicial</b> 14:3  <b>Justice</b> 1:19 3:3                  3:8 4:17 7:19                  8:8,11,19 10:9                  10:12,16,19                  11:5,16 12:17                  12:25 13:13                  15:16 16:15,24                  17:11 18:16,20                  19:8,21 20:23                  21:7 22:5,14                  23:5,21 24:3                  24:13 25:3,4,5                  25:9,14 26:13                  26:17,18 27:8                  27:12,25 28:3                  28:10,18,23,24                  29:10,12,17,21                  30:6,21,24                  31:3,11,15,18                  31:22 32:3,5                  32:10,21 33:6                  34:10,19 35:3                  35:13,22 36:5                  36:7,16 37:3                  37:15,21,24                  38:5 39:9,14                  39:18 40:3,22                  41:2,7,16,23                  42:5,14,17,21                  43:2,20,21                  44:15 45:2</p>	<p>46:6,9,22 47:6                  47:7,8,13,17                  47:24 48:2,12                  48:18,24 49:24                  50:15,20 54:14                  54:24 56:13,18                  56:23 57:12,21                  57:22 58:2,4                  61:22 63:2  <b>Justice's</b> 24:9</p> <hr/> <p style="text-align: center;"><b>K</b></p> <p><b>Kagan</b> 4:17                  17:11 22:5                  24:13 35:13,22                  36:5,7,16 37:3                  37:15,21,24                  38:5 45:2 46:6                  46:9,22 47:7                  47:13,17 48:18                  48:24 54:24  <b>Kagan's</b> 24:4  <b>keep</b> 48:19 50:3                  50:8  <b>keeps</b> 61:10  <b>KENNEDY</b>                  12:17 23:21                  34:10,19 35:3                  47:6,8  <b>kind</b> 28:13  <b>kingpin</b> 22:16                  22:18 48:8  <b>kingpin's</b> 48:15  <b>know</b> 8:22 9:17                  11:1 12:14                  13:14 18:1                  21:2,8 22:18                  33:25 35:7,12                  36:19 40:7                  47:20 56:13  <b>knowing</b> 34:8  <b>knows</b> 29:2</p> <hr/> <p style="text-align: center;"><b>L</b></p> <p><b>label</b> 28:14  <b>language</b> 10:16                  10:22 11:3,9</p>	<p><b>larger</b> 30:4  <b>Las</b> 8:3 54:7  <b>laundering</b>                  42:13  <b>law</b> 3:20 5:23                  15:8,12 16:13                  18:22 20:19                  24:23 25:18,23                  26:19,19 32:7                  32:9 33:4,23                  34:20,22,25                  35:9,11 45:19                  55:18,18 58:16                  59:12 60:7                  61:17,19,25                  62:7,10,11,13  <b>law's</b> 19:6  <b>lawful</b> 45:11  <b>lawyer</b> 43:25                  44:3  <b>lawyers</b> 40:15                  40:16,19  <b>lay</b> 20:1  <b>leaders</b> 40:11  <b>leap</b> 31:8 45:22  <b>leave</b> 37:4  <b>led</b> 29:14 48:21  <b>left</b> 43:25  <b>legislative</b> 54:1  <b>let's</b> 26:19 37:3                  37:4,4,16 43:4                  43:22 46:9,13                  46:15 59:14  <b>liability</b> 4:8,12                  4:25 5:17,23                  6:9,18,21 7:2,6                  8:7 9:21 10:4,8                  12:22 14:10                  15:3,7,13 17:9                  19:3,24 20:18                  20:19 23:3                  26:6,9 27:17                  29:11 30:13,22                  31:9 32:2 34:8                  34:18 42:12                  49:13,18,20                  50:1,12 51:4,8</p>
--	--	---	--	--

53:7 55:8,24 56:16 58:18,19 59:12,19 60:2 60:5,6,13,16 60:18,23 61:3 61:7 62:14,22 <b>liable</b> 3:13 14:19 20:15,25 23:11 24:10 25:10,11 25:16,17 26:10 30:16 32:11,15 34:5 39:6 43:19 45:15 50:7 <b>light</b> 26:8 41:12 42:22 <b>likelihood</b> 10:22 <b>limited</b> 41:1 <b>limits</b> 30:12 <b>line</b> 59:1 <b>Listen</b> 23:5 <b>lists</b> 5:7 <b>literally</b> 31:23 59:21 <b>litigated</b> 38:9 49:9 50:22 51:1,1 <b>litigation</b> 51:12 51:13 <b>little</b> 24:18 37:6 <b>locate</b> 53:14 <b>located</b> 38:1 <b>logic</b> 30:2 <b>long</b> 18:23 27:21 36:21 <b>longer</b> 33:8 <b>look</b> 26:19,20 59:15 <b>looking</b> 8:20 27:15 <b>looks</b> 53:9 <b>lost</b> 11:1 <b>lot</b> 4:8 13:3,6,6 15:20 31:11 32:22 49:4 55:17 <b>lower</b> 15:22	<b>Luis</b> 29:2 <hr/> <b>M</b> <b>majority</b> 44:7 <b>making</b> 28:1 31:6 57:21 <b>man</b> 48:7 <b>maps</b> 19:23 <b>March</b> 1:10 <b>matter</b> 1:12 11:17 12:1 15:10 24:22 36:20 40:15 62:6 63:5 <b>mean</b> 5:5,13 10:20,22 11:23 14:1 17:2 19:10,10 23:8 25:6 31:20 32:9 36:10 38:6,7 40:18 41:10 44:16 54:8,16 61:11 <b>meaning</b> 41:8 <b>means</b> 6:18 26:15 51:6 <b>meant</b> 58:12 <b>measure</b> 49:21 <b>mechanics</b> 35:16 <b>mechanism</b> 52:21 <b>meet</b> 53:12 <b>member</b> 18:24 19:1 24:10 45:15 <b>members</b> 11:22 13:2 45:16,20 <b>memorandum</b> 38:12 <b>mentioned</b> 27:9 43:12 <b>merely</b> 33:11 <b>met</b> 14:1 46:23 <b>method</b> 53:10 61:15 <b>methods</b> 52:5 <b>Mexico</b> 39:20	<b>MICHAEL</b> 1:3 <b>mid-level</b> 13:15 <b>million</b> 29:24,25 29:25 40:12 54:6 <b>mind</b> 17:1,8 <b>minus</b> 30:7 <b>minutes</b> 50:16 <b>mitigate</b> 60:15 <b>mixed</b> 39:19 <b>modern</b> 62:11 <b>modifications</b> 59:3 <b>modify</b> 59:14 <b>moment</b> 29:14 <b>monetary</b> 50:14 <b>money</b> 3:18 11:19 12:5,8 12:15,23,24 13:3,6,7,18,19 17:22,24 18:6 20:21 22:18 23:9 25:20 30:3,7 34:12 35:18,20,23 37:13 38:10,18 38:22,23 39:7 39:20,25 40:17 41:9,10,11,15 46:13 48:3,7 48:13,14 49:5 49:10 50:2,3,4 52:3,9,24,25 52:25 53:1 56:4,6 57:16 60:8,8,11 61:8 61:10,10 <b>mysterious</b> 42:22 <b>mystery</b> 38:10 <hr/> <b>N</b> <b>N</b> 2:1,1 3:1 <b>nearly</b> 3:10 <b>necessarily</b> 9:8 <b>need</b> 8:12,22 <b>needed</b> 44:18	<b>neither</b> 10:2 61:5 <b>never</b> 14:16 15:7 30:3 41:12 42:22 46:24 53:15,16,17,21 55:20 58:18 59:17 <b>new</b> 4:18 7:2 12:10 28:7,8 58:19 59:7 <b>nine</b> 32:25 <b>nonconspiracy</b> 41:4 <b>notion</b> 61:16 <b>number</b> 10:1,2 15:16 38:1,13 62:9 <hr/> <b>O</b> <b>O</b> 2:1 3:1 <b>object</b> 56:7 57:4 <b>obtain</b> 3:18 9:4 17:19 26:14,16 37:13 45:7,18 45:23 51:3 52:5 53:6,23 54:3 <b>obtained</b> 3:10 3:12,18 4:3 6:7 12:23,23 13:10 14:2,4 17:13 17:22,25 18:5 18:10 22:24,25 23:15 26:12,15 32:12 33:16 39:24,25 46:3 50:4 51:6,15 51:25 60:22 <b>obtaining</b> 14:5 18:12,12 24:11 24:24 30:3 46:3 53:10 <b>obtains</b> 5:14 6:20,23 45:7 45:24 50:5 58:25	<b>obvious</b> 7:14 <b>obviously</b> 14:4 19:1 52:15 <b>occurred</b> 56:25 <b>odd</b> 23:21 26:14 45:14 <b>off-the-hook</b> 30:8 <b>offshore</b> 54:7 <b>oh</b> 13:13 23:6 27:8 46:8 58:4 <b>okay</b> 18:4 25:9 37:3,15 39:24 40:3 41:16 52:23 57:16 62:1 <b>old</b> 4:19 55:20 57:13 58:20 <b>omission</b> 7:10 9:3 39:16,19 42:15,18 47:9 48:21 <b>once</b> 31:8 <b>ones</b> 10:1 <b>opened</b> 9:20 <b>opening</b> 4:7 <b>opens</b> 7:5 <b>opinion</b> 16:19 50:10 <b>opinions</b> 27:23 <b>opposed</b> 31:19 <b>opposite</b> 4:24 27:18 <b>oral</b> 1:12 2:2,5 3:6 18:18 53:13,17 61:20 <b>order</b> 37:9 40:14 <b>orders</b> 40:5,13 <b>original</b> 43:13 43:14 <b>other's</b> 45:21 <b>ought</b> 37:2 <b>outside</b> 25:17 <b>overarching</b> 15:4 <b>owned</b> 17:20 <b>ownership</b> 5:6,9
--	---	--	---	---

<p>17:19 owns 33:13</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>p</b> 3:1 22:6,7,7,11 22:12 23:22 24:2,6,6,14 25:10,16,23 37:6,8,10,12 37:16,18,18 38:24,25 42:14 43:11,12 44:23 46:15,23 47:1 47:2,18 48:20 48:25,25 49:3 49:5,12 55:5</p> <p><b>p.m</b> 63:4</p> <p><b>page</b> 2:2 15:25 38:14</p> <p><b>pages</b> 40:24</p> <p><b>paid</b> 61:14</p> <p><b>parcel</b> 13:24</p> <p><b>Paroline</b> 62:18</p> <p><b>part</b> 4:19 13:24 14:22 30:1 45:24 57:7</p> <p><b>participation</b> 34:9</p> <p><b>particular</b> 6:1 23:23,24 41:4 46:24 48:21,22 60:16</p> <p><b>particularly</b> 45:14</p> <p><b>partners</b> 45:20</p> <p><b>partnership</b> 18:22 45:11,20</p> <p><b>passed</b> 25:24</p> <p><b>passes</b> 50:6</p> <p><b>pay</b> 18:2,4,4 32:15 34:25 35:5 40:17 43:24,25 44:2 44:3 61:13</p> <p><b>payment</b> 14:15 14:15,24</p> <p><b>penalty</b> 31:14</p>	<p>50:14</p> <p><b>pending</b> 16:2</p> <p><b>penny</b> 30:8</p> <p><b>people</b> 17:22 36:11 40:6 50:1</p> <p><b>perfect</b> 17:17 60:3</p> <p><b>period</b> 11:20 55:16</p> <p><b>permit</b> 58:17</p> <p><b>person</b> 5:14,16 6:6,20,22 8:3 13:10,15,18 17:13 20:20 21:8 22:14 23:15,24 24:14 24:16,19,20 25:15,17,20 26:10,12,13 27:4,5 30:3 35:2 39:24 45:18 46:24 47:3 50:5 60:8 60:9 61:8,10</p> <p><b>person's</b> 14:15 14:15,24 61:12</p> <p><b>personal</b> 15:1</p> <p><b>personally</b> 17:18 32:11 45:7,18</p> <p><b>personam</b> 29:11 32:1 33:8,8 56:2 57:3,6</p> <p><b>persons'</b> 24:21</p> <p><b>persuaded</b> 4:24</p> <p><b>persuasive</b> 16:21 62:9</p> <p><b>petitioner</b> 1:4,17 2:4,10 3:7,12 3:17 18:2 38:21 39:2,4 50:18 53:18,20 61:13</p> <p><b>petitioner's</b> 3:10 17:18 51:8,9</p> <p><b>piece</b> 28:15</p> <p><b>Pinkerton</b> 6:10</p>	<p>7:20 8:2,11,15 14:19 19:2,9 22:23 24:20 26:9 27:1 30:13,18,22 54:17,21 55:15 58:21 59:4,9</p> <p><b>place</b> 13:19 23:24 62:23</p> <p><b>plan</b> 18:25</p> <p><b>play</b> 20:20 24:3 24:7</p> <p><b>plea</b> 9:15 14:25 61:14</p> <p><b>please</b> 3:9 18:21</p> <p><b>pocket</b> 30:9</p> <p><b>point</b> 9:13 14:18 15:4,6,20,25 16:9 25:6 31:5 32:14 34:3 46:5 49:24 57:15,18,20,25 58:2,7</p> <p><b>pointed</b> 4:7 44:8</p> <p><b>pointing</b> 61:24</p> <p><b>Polar</b> 3:11</p> <p><b>police</b> 20:10</p> <p><b>policy</b> 15:10</p> <p><b>position</b> 3:14,16 4:14,24 5:3 16:1,2,23 19:25 41:5 44:5,7,11,12 51:11,18</p> <p><b>positions</b> 15:21 51:19</p> <p><b>possible</b> 33:22</p> <p><b>possibly</b> 53:22</p> <p><b>powerful</b> 13:9 55:9</p> <p><b>practical</b> 10:9 11:17 12:1</p> <p><b>practice</b> 12:7</p> <p><b>precedent</b> 35:4 44:11 61:19</p> <p><b>precondition</b> 48:5</p>	<p><b>preconditions</b> 22:6,12 37:7 48:20</p> <p><b>prerequisite</b> 9:4</p> <p><b>prerequisites</b> 38:22 39:1</p> <p><b>presentation</b> 52:4 53:17</p> <p><b>presented</b> 22:2 39:5 49:7,8</p> <p><b>presumably</b> 11:21 47:19</p> <p><b>presume</b> 12:13</p> <p><b>presumption</b> 12:4,12</p> <p><b>pretrial</b> 40:25 44:1,4</p> <p><b>pretty</b> 10:21 42:1 52:18 53:25</p> <p><b>prevail</b> 11:15</p> <p><b>prevailed</b> 32:25 52:1</p> <p><b>prevent</b> 52:15</p> <p><b>principle</b> 14:8 14:10,22 26:9 27:1 30:14 44:17,19 45:15 54:21 55:21 56:21</p> <p><b>principles</b> 3:20 3:21 5:11 9:24 9:25 10:3 15:3 15:5,11 24:8 24:20 26:5 31:23 32:19 35:8,12 42:11 49:20 50:24 55:13 56:21,24 58:10 60:20</p> <p><b>probably</b> 11:14 13:22</p> <p><b>problems</b> 12:4</p> <p><b>procedural</b> 52:21 53:4 56:4 57:10</p> <p><b>procedure</b> 22:8</p>	<p>52:8,17,18 53:4</p> <p><b>proceed</b> 25:19 49:11</p> <p><b>proceeding</b> 25:22 26:22 28:15 36:3,5 46:21 48:10,13 56:16 57:8,18</p> <p><b>proceeds</b> 3:11 4:3 8:4 17:12 20:4,4,7,8,11 21:16,24 22:4 23:2,11,15,17 23:25 24:6,11 24:12 26:12 28:7 30:4,15 30:17 31:20 33:3,16 38:20 39:24 42:13 43:6,16,17 44:25 45:6,10 45:18,23,24 46:3,25 47:1 47:25 49:17,18 50:5</p> <p><b>profit</b> 29:23</p> <p><b>proof</b> 12:15</p> <p><b>property</b> 4:1 5:8 7:10 9:7 13:25 19:16,23 20:4 20:5,7 23:15 23:16,22 24:24 24:25 25:7,7 25:10,12,15,19 25:22 26:11,15 26:21 27:14 28:13,15,19,21 29:1,4,6,7 37:10,14 38:17 38:19 39:15,23 41:1,6,10,14 41:18,19,21 42:19 43:7,7,9 43:15 44:24 47:4 52:22,24 53:1,2 54:7,10</p>
---	--	---	--	---

54:11,12 56:10 57:4,24 58:16 <b>proposition</b> 8:9 <b>prosecuted</b> 36:12 <b>prosecuting</b> 47:22 <b>protective</b> 40:5 40:13,14 <b>prove</b> 9:12,19 11:6,19 14:5 20:16 36:18 37:7 <b>proved</b> 9:12 <b>provide</b> 18:8 52:4 <b>provides</b> 60:20 <b>provision</b> 6:25 7:7 11:9 17:9 42:10 44:4 52:22 58:16 <b>provisions</b> 29:3 <b>punishment</b> 61:11 <b>punitive</b> 61:4,11 <b>pure</b> 3:11 12:21 <b>purpose</b> 3:15 53:3 <b>purposes</b> 22:2 53:20 60:7 61:2,4,6,7,11 <b>pursuance</b> 8:23 <b>pursuant</b> 28:8 <b>push</b> 54:19 <b>put</b> 5:1 30:9 36:8 37:11 46:13 54:25	49:8,8,10,11 49:13 <b>questions</b> 18:14 45:2 62:25 <b>quibbled</b> 24:18 <b>quite</b> 16:20 19:16 27:13,18 58:20 60:1,24 62:5 <b>quote</b> 4:22 16:20 38:11 <b>quoting</b> 38:14	<b>receives</b> 29:18 <b>recognize</b> 33:25 34:23 55:20 <b>recognized</b> 35:9 55:21 <b>reconcile</b> 5:4 <b>record</b> 12:20 <b>records</b> 12:9 <b>recover</b> 20:21 21:23 24:5 29:8 38:17 41:22 43:10 47:25 49:17 <b>recovering</b> 48:6 <b>reduced</b> 14:25 <b>reference</b> 52:7 <b>refers</b> 17:12 44:23 51:15 <b>reflected</b> 45:12 49:14 50:9 <b>reforming</b> 27:21 <b>regarded</b> 46:2 <b>regarding</b> 52:7 <b>regards</b> 45:19 <b>regime</b> 56:11 59:8 <b>reiteration</b> 54:15 <b>rejected</b> 62:19 <b>related</b> 27:3 <b>relation</b> 29:5 40:25 <b>relevance</b> 56:19 56:20 <b>relevant</b> 9:25 10:6 39:5 <b>relies</b> 24:8 <b>rely</b> 24:7 26:5 <b>rem</b> 10:7 25:19 26:22 27:21 28:11,13,18,20 30:2 32:1 33:8 56:1,3,11,14 56:15,16,24,24 57:3,18 <b>remand</b> 44:14 <b>remedial</b> 61:4,7	<b>remedy</b> 31:22 61:25 62:21 <b>remember</b> 55:4 <b>render</b> 54:10 <b>rendering</b> 47:4 <b>repeal</b> 14:2,3 <b>reply</b> 15:21,25 16:3 19:24 <b>report</b> 57:23 <b>require</b> 5:15 60:17 <b>required</b> 5:23 33:2 <b>requirement</b> 8:16 9:2 19:19 <b>requirements</b> 9:20 37:19 <b>requires</b> 6:6,17 8:16 13:25 45:6 <b>requiring</b> 52:16 <b>reserve</b> 18:15 <b>respect</b> 42:19 44:17 <b>respond</b> 55:12 <b>Respondent</b> 1:7 1:20 2:7 18:19 <b>responding</b> 50:21 <b>responsible</b> 20:16 21:3,11 24:21 29:24 30:4,25 <b>rest</b> 6:12 <b>restatements</b> 62:11 <b>restitution</b> 32:14 32:16 59:23,24 59:25 60:12 <b>restrained</b> 29:8 <b>restraining</b> 29:3 <b>restraints</b> 40:25 44:5 <b>result</b> 24:18 32:20 34:3 39:16 40:21 45:5	<b>retract</b> 61:12 <b>reverse</b> 63:1 <b>RICO</b> 10:13,20 11:5,6,11 21:18 28:9 32:6 <b>right</b> 19:9 21:5 24:1 25:12 33:9,14,22 34:6,13,17,23 36:6,23 39:22 41:7 42:21 44:20,22 46:13 46:15 48:4 52:20,25 57:2 61:21 62:4 <b>rights</b> 31:18 <b>ROBERTS</b> 3:3 7:19 8:8,11,19 18:16 19:8 20:23 21:7 22:14 23:5 27:25 28:3,10 28:18,24 44:15 47:24 48:2,12 50:15 54:14 61:22 63:2 <b>rule</b> 6:10 10:19 11:17 13:23,24 18:23 19:2 32:24 34:4 37:2 44:9 49:14,15 52:9 52:11,17,18 53:3,4 59:3,4 62:12,13 <b>rules</b> 38:11 52:8 52:14 <b>ruling</b> 10:13
<b>Q</b> <b>qualification</b> 42:6 <b>question</b> 10:10 22:2 24:4,9 26:23,25 32:22 35:11 36:13,25 39:5 43:21 47:5 48:9 49:7	<b>R</b> <b>R</b> 3:1 <b>racketeering</b> 11:18 <b>radical</b> 56:25 <b>raise</b> 15:24 61:18 <b>ratifying</b> 16:13 <b>rational</b> 61:15 <b>reach</b> 8:12 23:25 32:19 <b>read</b> 7:9 15:15 26:7 45:4 48:25,25 <b>reading</b> 44:22 51:13,14 <b>reads</b> 59:10,20 <b>really</b> 4:8,15 5:22 6:13 15:4 36:16 46:14,17 48:20 49:4,6 53:21 58:13 59:15 <b>reason</b> 9:22 18:23 24:2 <b>reasonably</b> 30:15 31:4 <b>reasoning</b> 5:15 16:21 24:18 39:22 <b>reasons</b> 5:1 7:12 60:4 62:9 <b>REBUTTAL</b> 2:8 50:17	<b>recovered</b> 48:6 <b>reduced</b> 14:25 <b>reference</b> 52:7 <b>refers</b> 17:12 44:23 51:15 <b>reflected</b> 45:12 49:14 50:9 <b>reforming</b> 27:21 <b>regarded</b> 46:2 <b>regarding</b> 52:7 <b>regards</b> 45:19 <b>regime</b> 56:11 59:8 <b>reiteration</b> 54:15 <b>rejected</b> 62:19 <b>related</b> 27:3 <b>relation</b> 29:5 40:25 <b>relevance</b> 56:19 56:20 <b>relevant</b> 9:25 10:6 39:5 <b>relies</b> 24:8 <b>rely</b> 24:7 26:5 <b>rem</b> 10:7 25:19 26:22 27:21 28:11,13,18,20 30:2 32:1 33:8 56:1,3,11,14 56:15,16,24,24 57:3,18 <b>remand</b> 44:14 <b>remedial</b> 61:4,7	<b>remedy</b> 31:22 61:25 62:21 <b>remember</b> 55:4 <b>render</b> 54:10 <b>rendering</b> 47:4 <b>repeal</b> 14:2,3 <b>reply</b> 15:21,25 16:3 19:24 <b>report</b> 57:23 <b>require</b> 5:15 60:17 <b>required</b> 5:23 33:2 <b>requirement</b> 8:16 9:2 19:19 <b>requirements</b> 9:20 37:19 <b>requires</b> 6:6,17 8:16 13:25 45:6 <b>requiring</b> 52:16 <b>reserve</b> 18:15 <b>respect</b> 42:19 44:17 <b>respond</b> 55:12 <b>Respondent</b> 1:7 1:20 2:7 18:19 <b>responding</b> 50:21 <b>responsible</b> 20:16 21:3,11 24:21 29:24 30:4,25 <b>rest</b> 6:12 <b>restatements</b> 62:11 <b>restitution</b> 32:14 32:16 59:23,24 59:25 60:12 <b>restrained</b> 29:8 <b>restraining</b> 29:3 <b>restraints</b> 40:25 44:5 <b>result</b> 24:18 32:20 34:3 39:16 40:21 45:5	<b>retract</b> 61:12 <b>reverse</b> 63:1 <b>RICO</b> 10:13,20 11:5,6,11 21:18 28:9 32:6 <b>right</b> 19:9 21:5 24:1 25:12 33:9,14,22 34:6,13,17,23 36:6,23 39:22 41:7 42:21 44:20,22 46:13 46:15 48:4 52:20,25 57:2 61:21 62:4 <b>rights</b> 31:18 <b>ROBERTS</b> 3:3 7:19 8:8,11,19 18:16 19:8 20:23 21:7 22:14 23:5 27:25 28:3,10 28:18,24 44:15 47:24 48:2,12 50:15 54:14 61:22 63:2 <b>rule</b> 6:10 10:19 11:17 13:23,24 18:23 19:2 32:24 34:4 37:2 44:9 49:14,15 52:9 52:11,17,18 53:3,4 59:3,4 62:12,13 <b>rules</b> 38:11 52:8 52:14 <b>ruling</b> 10:13
			<b>S</b> <b>S</b> 2:1 3:1 <b>sales</b> 3:11 <b>satisfied</b> 22:13 37:8,20 38:23 38:25 <b>saved</b> 30:10	



<p><b>saw</b> 42:22  <b>saying</b> 7:15  14:12 15:9  23:10 24:14  25:6 26:15  33:7 34:17  36:16 39:21  47:8 54:2 56:5  58:4,15 59:5,6  59:13 60:17  <b>says</b> 6:2,9 7:9  9:3 18:4 26:10  27:5 38:16  39:14 42:14  43:23 52:11,19  52:20 54:9,21  57:6 62:6  <b>scheme</b> 33:1  <b>scope</b> 30:13,14  31:4 34:24  57:24  <b>Second</b> 52:14  62:13  <b>section</b> 3:15,22  3:25 4:1 6:12  6:13,16,24 7:9  7:11 9:1 12:3  12:12 13:9  17:3 20:3 37:6  42:10 44:4  50:14 51:2,14  51:20 52:4  53:9,11,20,23  53:25  <b>sections</b> 15:14  <b>see</b> 28:19 29:22  41:24,25 61:9  <b>seek</b> 7:13 33:23  35:1 38:18  54:12  <b>seeking</b> 24:7  38:22 62:15  <b>seeks</b> 3:12 60:22  <b>seen</b> 41:12  <b>sees</b> 53:9  <b>seize</b> 20:12  44:18</p>	<p><b>self-conscious</b>  27:24  <b>sell</b> 20:5  <b>sells</b> 22:19 50:5  <b>sense</b> 4:9 14:14  14:24 15:2,10  18:5 20:17  21:14 59:15,16  60:3  <b>sensible</b> 50:13  <b>sent</b> 30:19  <b>sentence</b> 14:14  <b>sentenced</b> 27:6  <b>sentences</b> 14:17  14:21  <b>sentencing</b> 10:2  14:11,16,22  55:23  <b>separate</b> 7:6  57:7  <b>series</b> 7:12  <b>serve</b> 31:11  <b>serves</b> 41:17  <b>setting</b> 32:5,6  <b>severally</b> 3:13  32:15 34:5  39:6  <b>share</b> 17:5  <b>shop</b> 33:11  <b>shopkeeper</b>  43:23  <b>shopkeeping</b>  43:22  <b>show</b> 9:5,9  11:23 22:5,11  23:7,8,17  35:23,24,25  36:1,2 37:19  45:25 46:17,18  46:23 48:7,19  48:20  <b>showing</b> 9:14  39:1 47:18  <b>shown</b> 9:8 37:21  37:25 38:6  <b>shows</b> 5:22 55:3  <b>side</b> 15:17 16:16</p>	<p><b>significant</b>  57:23 59:2  <b>silently</b> 59:5  <b>similar</b> 10:17,23  11:3,10 13:1  32:7,9 59:8  <b>simple</b> 43:5  <b>simply</b> 51:6  57:13  <b>single</b> 26:25  <b>sitting</b> 47:15,21  48:14  <b>situation</b> 13:1  21:15,17 23:2  23:4 60:2  <b>situations</b> 18:9  <b>Sixth</b> 38:14 52:1  <b>slightly</b> 26:6  <b>small</b> 30:1  <b>Solicitor</b> 1:18  <b>Solomon</b> 16:19  <b>solves</b> 12:3  <b>somebody</b> 13:14  19:11 50:6  <b>somewhat</b> 4:11  <b>son's</b> 18:2  <b>soon</b> 19:17  28:12  <b>sorry</b> 28:3 35:14  46:7  <b>sort</b> 62:14  <b>Sotomayor</b> 10:9  10:12,16,19  11:5 29:10,12  29:17,21 30:6  30:21,24 31:3  31:11,15,18,22  32:3,5,10,21  49:24  <b>sought</b> 38:10  <b>sound</b> 42:25  <b>sounds</b> 28:13  42:24  <b>source</b> 12:6  25:23 35:11  <b>specific</b> 12:9  20:11 22:9</p>	<p>23:18 41:6,14  41:18 44:25  <b>specifically</b> 6:2  9:2 11:13  32:16 51:3  <b>spend</b> 50:3 54:7  <b>spent</b> 13:3,6,18  13:19,20 52:24  <b>split</b> 15:19  <b>stable</b> 16:12  <b>start</b> 30:11  <b>started</b> 37:5  <b>starting</b> 49:25  <b>State</b> 33:23,25  34:20,22,25  35:8 61:17,25  <b>states</b> 1:1,6,13  3:4 4:11 17:5  <b>statute</b> 5:4,7 6:2  6:6 10:13,20  13:25 14:7,13  17:12 19:15  26:2 27:23  29:1,1,6 32:17  33:5 41:17,24  42:1,1,7 43:12  43:13,14 44:22  45:4,6,17  52:13,16 54:9  55:11,16 57:6  59:7 60:3  <b>statutes</b> 15:15  28:9 58:8  59:11,20  <b>statutory</b> 7:8  53:5 59:16  <b>step</b> 53:24  <b>sticking</b> 28:14  50:1  <b>stop</b> 44:2  <b>store</b> 33:13  <b>strong</b> 60:1  <b>structural</b> 10:24  11:11 55:9  <b>structure</b> 3:14  3:25 57:11  <b>stuck</b> 33:15</p>	<p><b>studied</b> 10:23  11:12  <b>subject</b> 4:2 6:22  12:14 23:20  27:2 38:17  57:24  <b>submitted</b> 63:3  63:5  <b>subsection</b> 17:4  17:7 23:14  26:8 27:5,6  39:15 40:24  41:1 44:24  <b>subsections</b> 5:12  <b>subset</b> 9:16  <b>substance</b> 27:5  <b>substantive</b> 19:3  27:1  <b>substantively</b>  14:19  <b>substitute</b> 6:25  7:6,13,18 8:12  9:10 22:9  23:22 36:22  37:10,18 41:11  42:9 44:23  49:12 52:22,23  53:2 54:5,12  58:16  <b>substitution</b>  8:22 44:16,19  <b>substrate</b> 14:1  <b>successfully</b>  29:7  <b>suddenly</b> 41:7  <b>suggested</b> 24:9  <b>suggesting</b> 35:10  <b>sum</b> 20:21,21  30:4  <b>support</b> 10:3  61:19  <b>supported</b> 61:9  <b>supports</b> 4:9  6:13  <b>suppose</b> 7:19 8:3  12:7 33:10  34:19,25 40:5</p>
---	---	---	---	--

<b>supposed</b> 3:19	41:9 55:1	13:8,24 14:6	<b>tortfeasors</b> 34:5	59:22 60:4
<b>Supreme</b> 1:1,13	<b>talks</b> 55:17	14:11 15:4,6	<b>totally</b> 6:7 61:2	61:5
16:10	<b>tamper</b> 19:16	16:13,20 17:2	<b>touched</b> 50:2	<b>types</b> 58:23 61:6
<b>sure</b> 11:2,13	<b>tends</b> 31:19	17:6,17,19	<b>trace</b> 22:22	<b>typical</b> 21:21
19:14,17 28:24	<b>tension</b> 16:11	18:10,13 19:22	<b>traceable</b> 21:16	<b>typically</b> 12:16
35:14 37:17	28:22	19:24 21:13	23:2,6,8,9	
40:4 49:7	<b>term</b> 27:7	22:1 23:6 24:1	43:16 49:16	<b>U</b>
<b>surprising</b> 60:12	<b>terms</b> 3:23 14:8	24:4,17,23,24	<b>traced</b> 45:25	<b>U.S.C</b> 27:3
<b>surprisingly</b>	20:18 28:1,6	26:4 27:23	<b>tradition</b> 10:6	<b>Uh-huh</b> 35:21
4:11 6:16	44:15 50:25	28:25 31:6,8	27:15,16,20,21	39:13 41:2
<b>switched</b> 41:8	59:24 60:6	32:13,22 33:22	57:13,17 59:4	<b>ultimately</b> 17:23
<b>system</b> 50:11	<b>TERRY</b> 1:3	34:3 36:2,23	<b>traditional</b>	50:3
53:8 58:20	<b>text</b> 3:14,22 5:24	38:1 39:1	14:22 34:4	<b>unable</b> 38:17
59:18 60:14	7:8 9:1 16:25	41:14 42:10,19	45:14 49:20	<b>unavailability</b>
<b>T</b>	18:8 26:8 54:2	43:3 45:3,21	<b>traditionally</b>	9:14 59:16
	59:16,21 60:20	47:16,17 49:4	59:9	<b>unavailable</b>
<b>T</b> 2:1,1	<b>textual</b> 3:24	49:15,19 50:11	<b>trails</b> 25:2	7:11 9:7 21:20
<b>table</b> 37:11	4:15 11:11	52:3,6,17	<b>transaction</b>	35:24 36:3,17
<b>tainted</b> 6:14,17	50:23 55:4,9	53:24 54:20	20:11 30:17,20	36:18 46:17,18
6:21 7:16 8:21	<b>Thank</b> 18:16,20	55:3,9,15,19	50:6	46:20 47:4,18
8:24 9:17	50:15,19 58:2	57:10 58:6,9	<b>transfers</b> 59:1	51:21 54:10
12:13,15 13:25	63:2	58:10 59:10,25	<b>treat</b> 19:12	<b>understand</b> 5:18
19:16,18,23	<b>Thapar</b> 16:19	60:24,25 61:23	<b>treated</b> 60:9	26:24 28:10,22
20:4,4 25:7,10	<b>theoretical</b> 55:4	62:5,8,10,23	<b>treatment</b> 19:6	40:16 46:14
25:12,15 28:12	<b>theory</b> 3:17 4:19	<b>thinks</b> 15:10	<b>treats</b> 18:22	61:23
28:21 29:4,5,6	4:20 5:5,13 6:8	59:15	<b>trial</b> 29:4	<b>understanding</b>
41:6 44:25	7:2,4 9:23	<b>Third</b> 4:22,24	<b>tried</b> 9:19 53:21	20:2 35:15
51:16,22 52:6	11:14 12:21	<b>third-party</b> 59:1	<b>tries</b> 56:22	38:8
54:3,6,11	19:14 21:3,7	<b>thought</b> 57:12	<b>triggers</b> 9:9	<b>undisputed</b> 27:7
56:10 57:4,10	23:6 29:21	<b>thousand</b> 40:9	<b>trip</b> 29:19	<b>undisputedly</b>
<b>take</b> 13:10,14	30:2,18 33:10	40:10	<b>trouble</b> 29:12	30:1
24:25 25:6	34:11,13,15,16	<b>three</b> 4:1 5:8	<b>truck</b> 40:8	<b>undo</b> 10:20
33:10 39:10	34:20 35:6	40:7	<b>true</b> 11:2,8	<b>unfortunately</b>
43:4,22 46:9	40:6,13,19,21	<b>thwart</b> 7:16 54:3	13:21 14:11,19	42:14
<b>taken</b> 11:20	51:2,25 55:6	<b>tied</b> 5:6 14:23	15:18 24:23,24	<b>unheard</b> 31:23
35:19 46:25	<b>they'd</b> 47:22	15:1 61:13	54:20 56:2,17	31:25
51:11	<b>thing</b> 4:21 5:21	<b>time</b> 6:24 7:1	62:2	<b>Unikowsky</b> 1:16
<b>takes</b> 19:18 21:2	21:10 26:14	11:20 14:6	<b>truly</b> 16:8	2:3,9 3:5,6,8
35:18 46:11	27:16 33:1,16	18:15 21:18	<b>try</b> 12:18 13:19	4:21 7:23 8:10
<b>talk</b> 14:9 20:17	57:8,9 58:10	27:7 36:11	<b>trying</b> 26:1	8:15,25 10:11
22:1 29:3,4	<b>things</b> 13:12	53:13	37:18 39:11,12	10:15,18,21
37:16	42:5 53:18	<b>title</b> 29:5	49:17 57:17	11:8 12:2,19
<b>talked</b> 55:22,25	<b>think</b> 4:23 5:22	<b>today</b> 11:15	<b>turn</b> 55:14	13:8,17 15:18
61:1	6:7 7:13,25	27:23	<b>two</b> 4:23 10:2	16:18 17:2,16
<b>talking</b> 6:14	8:15,18 9:1,5	<b>tools</b> 13:9	20:5 26:4 28:6	50:16,17,19
7:21,21 19:15	9:12,22,25	<b>topic</b> 17:12	35:17 40:6	54:19 55:2
27:17,19 37:6	10:5,21 12:2	<b>tort</b> 34:4,7 62:8	41:18 46:10	56:17,20 57:2

<p>57:20 58:1,6 62:1 <b>Unikowsky's</b> 32:23 <b>United</b> 1:1,6,13 3:4 <b>unlawful</b> 27:4 <b>untainted</b> 19:23 44:3,6 51:17 53:11 <b>use</b> 23:22 39:14 <b>uses</b> 5:16 51:5 58:9 <b>usually</b> 21:18 41:20 43:8 <b>utmost</b> 16:8</p> <hr/> <p style="text-align: center;"><b>V</b></p> <p><b>v</b> 1:5 3:4 <b>value</b> 6:4 21:4 21:11,23 22:4 24:5 29:8 38:19 43:10 49:17 <b>variety</b> 21:21 <b>various</b> 19:7 59:14 <b>Vegas</b> 8:3 54:8 <b>versus</b> 19:23 57:3 <b>vicarious</b> 62:14 <b>victim</b> 31:16 60:10,10 <b>victims</b> 32:16 <b>view</b> 4:12 6:13 6:16 16:12,12 17:14 19:24 37:11 43:3 45:12 47:10,17 <b>violates</b> 27:6 <b>violation</b> 38:20</p> <hr/> <p style="text-align: center;"><b>W</b></p> <p><b>wait</b> 56:23 <b>waived</b> 51:23 <b>Walter</b> 14:18 <b>want</b> 5:25 18:2</p>	<p>24:3 25:25 29:4 30:11 32:21 34:2 36:24 37:11 38:3,3,11 40:4 40:20 45:1 46:5 48:17 <b>wanted</b> 35:10 <b>Washington</b> 1:9 1:16,19 <b>wasn't</b> 39:18 57:18 <b>way</b> 10:25 11:22 12:7 13:3 14:7 14:16 15:15 20:10 24:4 25:20 34:11 40:17 42:8,25 43:10,11 45:3 45:4 48:25 50:13 51:1 56:7 58:13,17 59:11 <b>ways</b> 15:13,20 26:4,7 28:6 48:22 59:8,9 59:14 <b>we'll</b> 3:3 33:19 <b>we're</b> 8:20 25:25 26:1 27:15 28:12,20 32:19 32:24 39:11,11 41:9 44:21 52:20,23 57:21 58:12 <b>we've</b> 37:25 41:8 44:13 49:5 <b>Wednesday</b> 1:10 <b>week</b> 13:16 29:18 <b>went</b> 16:4 33:14 34:11 39:20 <b>weren't</b> 38:22 <b>whatsoever</b> 7:8 <b>winning</b> 14:6 <b>withdrawn</b> 44:13</p>	<p><b>won</b> 16:6 <b>wonder</b> 23:5 <b>word</b> 5:25 25:7 26:15 41:10 51:3,5 58:11 58:13 60:22 <b>words</b> 22:15 24:13 28:14 39:22 46:24 50:23 56:6 60:8 <b>work</b> 7:25 9:23 11:16,17,25 12:7 55:14 <b>worked</b> 14:16 34:11 <b>works</b> 19:14,17 20:2 21:25 46:15 49:5,6 60:6 <b>world</b> 44:1 <b>wouldn't</b> 8:13 23:12 62:16 <b>wrong</b> 51:13 52:10</p> <hr/> <p style="text-align: center;"><b>X</b></p> <p><b>x</b> 1:2,8</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <p><b>yacht</b> 12:10 13:4 <b>yeah</b> 4:21 17:16 27:8 29:16 39:13 43:23 46:22 <b>years</b> 4:23 31:12</p> <hr/> <p style="text-align: center;"><b>Z</b></p> <hr/> <p style="text-align: center;"><b>0</b></p> <hr/> <p style="text-align: center;"><b>1</b></p> <p><b>1</b> 4:10,13 5:6,9 5:15,21 6:9 20:9 57:6 58:22 <b>10</b> 40:12 <b>107</b> 38:13</p>	<p><b>11:10</b> 1:14 3:2 <b>12:07</b> 63:4 <b>15</b> 50:16 <b>16-142</b> 1:4 3:4 <b>18</b> 2:7 <b>1963</b> 10:14 <b>1970</b> 28:7 <b>1984</b> 43:14 58:15 <b>1986</b> 43:13 58:15</p> <hr/> <p style="text-align: center;"><b>2</b></p> <p><b>2</b> 4:14 5:1,5,8,18 5:21 29:25 38:14 55:12 58:23 <b>2017</b> 1:10 <b>21</b> 27:3 <b>269,000</b> 33:12 <b>270,000</b> 3:11 <b>29</b> 1:10</p> <hr/> <p style="text-align: center;"><b>3</b></p> <p><b>3</b> 2:4 4:9,14 5:5 5:8,22,25 29:25 55:12 58:23 <b>32.2</b> 52:9 <b>35</b> 40:24 <b>36</b> 40:24</p> <hr/> <p style="text-align: center;"><b>4</b></p> <hr/> <p style="text-align: center;"><b>5</b></p> <p><b>50</b> 2:10 29:18,18 29:22 30:7</p> <hr/> <p style="text-align: center;"><b>6</b></p> <p><b>60,000</b> 43:23</p> <hr/> <p style="text-align: center;"><b>7</b></p> <hr/> <p style="text-align: center;"><b>8</b></p> <p><b>8</b> 15:25 <b>841(a)</b> 27:3 <b>853</b> 3:15,22 5:12 6:12,24 13:9</p>	<p>16:25 32:6 50:14 <b>853(a)</b> 3:25 4:1 <b>853(a)(1)</b> 4:2 6:13,17 7:11 20:3,13 23:14 51:3,14,21 56:10 <b>853(a)(2)</b> 4:4,9 <b>853(a)(3)</b> 4:5 17:3 <b>853(d)</b> 12:3,12 <b>853(e)</b> 44:4 <b>853(p)</b> 7:7,9 9:1 9:3 39:15 42:10 52:2,4 53:5,9,11,20 53:23,25 <b>853C</b> 29:3</p> <hr/> <p style="text-align: center;"><b>9</b></p>
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