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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL MUSACCHIO, :

Petitioner : No. 14-1095

v. :

UNITED STATES. :

- - - - - x

Washington, D.C.

Monday, November 30, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

ERIK S. JAFFE, ESQ., Washington, D.C.; on behalf of Petitioner.

ROMAN MARTINEZ, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ERIK S. JAFFE, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	ROMAN MARTINEZ, ESQ.	
7	On behalf of the Respondent	29
8	REBUTTAL ARGUMENT OF	
9	ERIK S. JAFFE, ESQ.	
10	On behalf of the Petitioner	60
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 14-1095, Musacchio v.
5 United States.

6 Mr. Jaffe.

7 ORAL ARGUMENT OF ERIK S. JAFFE

8 ON BEHALF OF THE PETITIONER

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

11 This case presents two questions concerning
12 the consequences of the failure to object or raise an
13 issue at trial.

14 On the question of whether jury instructions
15 not objected to by the government become the baseline
16 for measuring the sufficiency of the evidence at later
17 stages in the case, the critical point here is that only
18 the jury can determine that a defendant is guilty. And
19 if a jury does so under a particular framework, it
20 should be evaluated under that framework. And if it
21 cannot sustain that verdict on the reasons it used in
22 its own deliberations, that verdict is not rational.

23 In --

24 JUSTICE SCALIA: Well, there -- there's --
25 there's no doubt in this case, is there, that the jury

1 found beyond a reasonable doubt that the defendant had
2 committed a crime set forth in the indictment?

3 MR. JAFFE: Your Honor, I think that is not
4 entirely correct. There is no doubt there was
5 sufficient evidence that they could have done that.
6 Whether they did that is --

7 JUSTICE SCALIA: They -- they had to.

8 MR. JAFFE: -- a different matter.

9 JUSTICE SCALIA: They had to find that, plus
10 something else, isn't -- wasn't that --

11 MR. JAFFE: So --

12 JUSTICE SCALIA: -- that the issue?

13 MR. JAFFE: It was the issue.

14 JUSTICE SCALIA: So if -- if they came in
15 and said both are true, the first has to -- has to have
16 been true.

17 MR. JAFFE: In the Fifth Circuit, we pointed
18 out that there was the potential for confusion the way
19 "and" could have been misread by them as "or," and they
20 would not have necessarily had unanimity on -- on which
21 elements of the "and" added up.

22 JUSTICE SCALIA: I didn't read that as being
23 a part of your case here.

24 MR. JAFFE: It is only so indirectly. So we
25 raised this as plain error, and we lost that because we

1 couldn't demonstrate prejudice because there was some
2 uncertainty.

3 Our point in this Court is that, if the
4 government wants to ignore or have a court disregard the
5 instructions, it would then be its burden to prove
6 harmlessness, and that same uncertainty about unanimity
7 would then read down to our benefit.

8 JUSTICE SCALIA: Well -- well, the -- the
9 "or" would have been accurate, wouldn't it have?

10 MR. JAFFE: Well, the "or" would have been
11 accurate, but would have required a unanimity
12 instruction to be clear which of the "ors" they agreed
13 on. If six thought it was "exceeding" and six thought
14 it was "unauthorized," that is a -- not a valid verdict.

15 JUSTICE SOTOMAYOR: On the basis of the
16 argument in this case, I didn't think there was any
17 argument that the government tried this case solely on
18 the theory that he encourage others to exceed their
19 authority.

20 MR. JAFFE: I think --

21 JUSTICE SOTOMAYOR: That's how they argued
22 the case. That's how it was indicted. So why isn't it
23 harmless error?

24 MR. JAFFE: Well, because the evidence is
25 not sufficient to actually support that conclusion. The

1 government certainly argued that.

2 JUSTICE SOTOMAYOR: It's not sufficient to
3 support the conclusion that he exceeded authority.

4 MR. JAFFE: Yes.

5 JUSTICE SOTOMAYOR: But it is more than
6 sufficient, if not the only theory they could have
7 convicted on, was that they -- that he had encouraged
8 others to exceed their authority.

9 MR. JAFFE: No. I -- I -- I disagree, Your
10 Honor. We argue that what he encouraged others to do,
11 if one accepts all those facts as true, still would not
12 constitute exceeding authority.

13 That the government's --

14 JUSTICE ALITO: Could I ask you -- I'm
15 sorry.

16 MR. JAFFE: Yes.

17 JUSTICE ALITO: You wanted to finish that.

18 MR. JAFFE: I was saying the government's
19 theory about what is and is not exceeding authority is
20 somewhat confused in this case as it was confused in the
21 presentation at the trial level; and therefore, it
22 wouldn't have been clear that that evidence would have
23 been sufficient to show conspiracy to exceed.

24 JUSTICE ALITO: It doesn't seem clear to me
25 that these two theories are actually separate. They --

1 they -- when Congress enacts a criminal statute, it
2 often adds a lot of synonyms. So, you know, in the --
3 in a theft statute, whoever embezzles, steals, or
4 unlawfully and willfully extracts or converts,
5 et cetera, they're not necessarily all distinct. And I
6 don't really see a difference between making
7 unauthorized access and exceeding authorized access.

8 Let's take the first, making unauthorized
9 access. Let's say somebody has access to some -- an
10 employee here in the building has access to -- lawful
11 access, proper access to some records. If that employee
12 at night sneaks into some other place in the building
13 and starts looking through files, that person is making
14 unauthorized access.

15 And in the other situation, exceeding
16 authorized access, let's say a person doesn't have
17 any -- any access to any files in the court, but sneaks
18 in and looks at those files. That person had zero
19 authorized access and, therefore, exceeded authorized
20 access.

21 I just think these are -- it seems to me,
22 reading them, they're two ways of saying the same thing.
23 So the issue that's presented here may not -- the issue
24 that you've asked us to decide may not actually be
25 presented by the facts of this case.

1 MR. JAFFE: Your Honor, that question is
2 actually not before this Court. The government does not
3 dispute that exceeding and unauthorized are discrete and
4 independent means of accomplishing a crime. The Ninth
5 Circuit has held that they are discrete. Even the Fifth
6 Circuit agreed that they're discrete. It just disagrees
7 as to what the content of those two separate elements
8 are.

9 But for this Court's purposes, you need not
10 ever go there. We've invited that in a footnote in our
11 brief. You declined the invitation, which is entirely
12 your prerogative, but that is an issue that will have to
13 be briefed.

14 I agree with you, it is not the clearest of
15 statutes, but suffice it to say, the way this issue has
16 been brought to this Court, it has been assumed by the
17 Fifth Circuit, assumed by the government, and I believe
18 assumed by the Ninth Circuit that they are discrete and
19 independent elements that would be separately and
20 distinctly proven.

21 JUSTICE KAGAN: If I could go back to your
22 main argument. You seem to be suggesting that the
23 inquiry that we should be undertaking really focuses on
24 this jury and how this jury made its decision. But I
25 had thought that some of our prior cases, in particular,

1 Jackson, suggests that that's not the correct inquiry.
2 That the correct inquiry really is -- is as to a
3 hypothetical jury, any jury. And so your focus on,
4 well, the way that these instructions might have
5 affected this particular jury just really isn't the
6 right one at all.

7 MR. JAFFE: I partially agree with you, Your
8 Honor. It is not that we are asking what the
9 individuals on the jury thought or what their literal
10 thought process was in the jury room; but it is, indeed,
11 could any jury in the position of this jury, with the
12 facts this jury received, with the instructions this
13 jury received, could possibly have come to this
14 conclusion?

15 And our point is no rational jury facing the
16 facts and instructions this jury faced could have
17 convicted on the exceeding portion of the charge.

18 JUSTICE GINSBURG: But they convicted on the
19 first portion and that was enough.

20 MR. JAFFE: They convicted on a combined --

21 JUSTICE GINSBURG: They found, beyond a
22 reasonable doubt, intentionally accessing a computer
23 without authorization, period. And they were told they
24 had to find that unanimously. So what -- what else is
25 there?

1 MR. JAFFE: It is not clear they understood
2 that because the unanimity instruction did not
3 distinguish between unauthorized access and exceeding
4 authorized access.

5 JUSTICE SCALIA: That -- that -- that's what
6 your case comes down to: Failure to instruct the jury
7 that they had to be unanimous as to both?

8 MR. JAFFE: No, that is what our objection
9 to the government's harmlessness argument comes down to,
10 which is the government cannot resolve the uncertainty
11 in the jury room.

12 JUSTICE SCALIA: It isn't a harmlessness
13 argument. It -- it's an argument that the jury was told
14 you can convict if A plus B. They came back and said,
15 beyond a reasonable doubt, A plus B, he's guilty.

16 And now you come and say, well, you know, he
17 really wasn't guilty on B. There wasn't enough
18 evidence.

19 That's okay. He's still guilty on A.

20 MR. JAFFE: Let me give you --

21 JUSTICE SCALIA: I -- I just don't see how
22 you get around that.

23 MR. JAFFE: I'll give an example that may
24 help clarify it: In murder charges, it is typically
25 charged that one knowingly and intentionally killed a

1 person. If the government fails to prove intentionally
2 but had sufficient evidence for knowingly, you cannot
3 support a murder conviction because they proved
4 manslaughter unless it was specifically charged as a
5 separate instruction to the jury. You can't just save
6 it because yes, of course, they found manslaughter by
7 implication.

8 JUSTICE KENNEDY: But that's not this case.
9 What you -- you -- what you have hypothesized is an
10 erroneous instruction that -- or -- or a -- a -- a
11 failure to find what was necessary. There's no failure
12 to find what was necessary here, so your hypo doesn't
13 work.

14 MR. JAFFE: Well, the "what was necessary"
15 sort of begs the question a bit on necessary to whom.
16 To the jury, it was necessary to find both. And they
17 only, at best, could have found one. We do not concede
18 that they did find one accurately, because there is --

19 JUSTICE KENNEDY: I can see that your
20 argument might work in some cases if the jury was
21 confused, if -- if this meant that it took their
22 attention away from a critical element. But I -- I
23 don't see that that's a possibility here, even assuming
24 that Justice Alito's comments, which I think have
25 considerable merit, are inapplicable, but you -- that

1 they're quite different.

2 MR. JAFFE: Well, as I said, I believe
3 Justice Alito's comments are a fair issue to be
4 litigated, and it could be litigated on remand if this
5 case goes back. It's not presented here.

6 As to whether the jury was confused, we
7 certainly argue the jury was confused. We couldn't meet
8 our burden of prejudice, but our point is the government
9 couldn't meet its burden of showing that didn't happen
10 either. That's the Olano situation, where right in the
11 middle where there is confusion, neither side can --

12 JUSTICE BREYER: That sounds like what
13 you're saying -- I don't understand the point. What
14 Justice Alito said seems right. It's charged. You have
15 to find A and B. Therefore, they must have found A.
16 The indictment, superseding indictment charged A. The
17 statute says A. Okay? So we know they found A.

18 Now, what's the problem?

19 MR. JAFFE: Well --

20 JUSTICE BREYER: The problem seems to have
21 been that they were also charged that they had to find
22 B. Fine. They made a mistake.

23 Did you object? No.

24 Was it harmless? It doesn't seem to me how
25 it -- how could it have been harmful.

1 I mean, I -- I think your problem is the
2 problem with the extra B in the jury instruction. And
3 so I would look to see what's your objection to B? Did
4 you object? No. Then it must have been plain error.
5 Well, it was -- it was erroneous, but was it harmful?

6 Now, that I could understand, but you're
7 arguing something else, and it is the something else
8 that I don't understand.

9 MR. JAFFE: Sure. We -- we are not arguing
10 that it was erroneous or harmful to include that. We
11 are arguing that it is binding. We are defending the
12 jury instruction; not rejecting it. It is the
13 government seeking to reject the jury instruction; and
14 therefore, we think it is incumbent upon the government,
15 if they want to analyze the verdict on grounds different
16 than the instruction, to prove that doing so --

17 JUSTICE BREYER: Is there anybody -- well --
18 well, I don't see the theory of it. The jury is
19 instructed. You -- he is guilty of murder if he killed
20 someone, da-da-da, and he had -- and he was looking at
21 the ceiling. Okay? Doesn't make any sense.

22 Okay. That was wrong.

23 So now you're saying if the judge makes a
24 mistake there, nobody objects, he says the wrong thing,
25 and he was looking at the ceiling, you have to let the

1 guy go because -- although he didn't hurt anybody, no
2 harm, you still have to let him go. And I just need the
3 "why."

4 MR. JAFFE: Sure. So the "why," I think,
5 comes from Jackson v. Virginia. So let's say they said
6 -- and he was --

7 JUSTICE BREYER: It was not a case involving
8 a jury instruction.

9 MR. JAFFE: It was a case involving
10 sufficiency of the evidence --

11 JUSTICE BREYER: To show that the charge
12 met -- the charge -- the evidence proved the crime on
13 either the statute or the indictment.

14 MR. JAFFE: But the reasons behind Jackson
15 explain that we are looking to whether or not the jury
16 could have rationally reached that conclusion. And the
17 reason we do so is to enforce the presumption of
18 innocence and to enforce the reasonable doubt
19 instruction.

20 So if a jury instructed erroneously that the
21 person needed to be wearing a green hat, had zero
22 evidence that that person was wearing a green hat, yet
23 found that they were wearing a green hat anyway, there
24 is a problem in that verdict, and we know there's a
25 problem in that verdict. No rational jury could find

1 that a fellow with a red hat was wearing a green hat.

2 JUSTICE SOTOMAYOR: My problem is that I
3 don't know that it's rational to say that a jury in --
4 that sufficiency of the evidence has to do with what was
5 charged as -- what was charged to the jury as opposed to
6 what was laid out in the statute and/or in the
7 indictment.

8 If it's sufficient under both, what you're
9 trying to say now is it may be sufficient under both.
10 You're conceding it is. You're conceding it is a
11 possibility the jury found what was charged in the
12 indictment, but the government now has added an element
13 to the crime.

14 MR. JAFFE: Absolutely. So the -- the fact
15 that that --

16 JUSTICE SOTOMAYOR: Do you have any case
17 where we've held that or anything close to it?

18 MR. JAFFE: This Court, no.

19 JUSTICE SOTOMAYOR: Have you had any case
20 discussing sufficiency of the evidence where we look to
21 the jury instruction as opposed to the statute and the
22 indictment?

23 MR. JAFFE: I'm not aware of one where that
24 has come up. However, in the circuits, every circuit to
25 consider the issue, as a general rule, accepts this

1 so-called law-of-the-case doctrine.

2 JUSTICE ALITO: Suppose that there's a --
3 that there's a two-count indictment and there's plenty
4 of evidence to convict on Count I and zero evidence, not
5 one scintilla of evidence, on Count II, and the jury
6 convicts on both counts; so the -- defendant is entitled
7 to a judgment of acquittal on Count II.

8 But you seem to be saying in that situation,
9 the court would say, this is a crazy jury. This is an
10 irrational jury because their verdict on Count II is
11 totally ridiculous; and therefore, the defendant is
12 entitled to judgment of acquittal on Count I as well,
13 despite the fact that there's plenty of evidence on
14 Count I.

15 Is that what you're saying?

16 MR. JAFFE: Not entirely. It is certainly a
17 reasonable conclusion from the implications of Jackson
18 v. Virginia. However --

19 JUSTICE ALITO: Well, what's different --
20 what's the difference between that and the argument you
21 just made?

22 MR. JAFFE: This Court has treated separate
23 counts as significant and distinct -- the Smith case,
24 for example, that the government cites. And given
25 that -- I'm not sure that's the right answer in an

1 abstract term, but given that, I believe the same thing
2 would be true where the jury made a terrible decision on
3 one count and an acceptable decision on another count,
4 that you wouldn't cross, in fact, from one count to the
5 other.

6 I could see the argument perfectly well, if
7 this Court were inclined to go there, that yes, a jury
8 that went that off the rails on one count is
9 questionable on everything it did. And one might well
10 question under the Jackson rationale whether or not they
11 properly applied the presumption of innocence and the
12 reasonable doubt standards.

13 JUSTICE ALITO: That -- that would be
14 revolutionary holding.

15 MR. JAFFE: It would. But I'm not asking
16 this Court to make --

17 JUSTICE ALITO: But, now, I don't see a
18 difference, other than a purely formal difference,
19 between that situation and what you're -- what you're
20 arguing.

21 MR. JAFFE: At some level, there is a
22 certain formality to it, but that is Smith. And Smith
23 made that formal distinction, I believe, to cabin the
24 implications of Jackson. And if, at the end of the day,
25 Jackson makes a good point, but one doesn't want to

1 extend it to its furthest logical reaches, that's
2 reasonable. But within a count --

3 JUSTICE SCALIA: Of course, this --

4 MR. JAFFE: Yes.

5 JUSTICE SCALIA: -- this case is even -- is
6 even worse than the hypothetical that Justice Alito
7 posits in that -- in his hypothetical, Count II was a
8 real count. In this case, the equivalent of Count II in
9 the hypothetical was not real at all. It was a
10 misinstruction which you did not object to.

11 MR. JAFFE: It was not our burden to object.

12 But the reason it's not worse is --

13 JUSTICE GINSBURG: You didn't object because
14 it was favorable to your client. I mean, it's always
15 better to -- if you have two than just one.

16 MR. JAFFE: We didn't object because we were
17 confused. The trial counsel was actually confused and
18 thought this was a case about both, as the government
19 itself sort of acknowledges towards the end of trial
20 where they -- where trial counsel makes a motion,
21 assuming both were in play, and the government
22 understands that trial counsel was confused.

23 JUSTICE GINSBURG: Didn't the -- didn't the
24 government correct the indictment so it would be "or"
25 not "and"?

1 MR. JAFFE: They corrected the formal
2 portion of the charge, but all of the allegations, the
3 means, the mechanisms of the conspiracy, the particular
4 facts charged as being supporting acts, all of that
5 included, continued to include "exceeding," just as the
6 prior indictment had.

7 And so, understandably or not, there was
8 some confusion both on the part of counsel, I believe on
9 the part of the court, potentially on the part of the
10 government that continued to argue "exceeding" even
11 through its closing.

12 CHIEF JUSTICE ROBERTS: Counsel, I'd like to
13 hear your argument on the statute of limitations
14 question at this point.

15 MR. JAFFE: Yes, Your Honor.

16 On the statute of limitations, both parties
17 agree that it is inevitable that a court will review a
18 forfeited limitations bar. Whether it comes at habeas
19 or sooner is really the only question before this Court
20 because the government concedes that it can be raised as
21 an ineffective assistance-of-counsel claim if it is a
22 meritorious limitations bar.

23 Our point is, doing it sooner, doing it on
24 direct appeal, doing it while you still have counsel, so
25 take -- in -- in point-of-counsel cases, is the better

1 and more efficient way of doing that.

2 JUSTICE SCALIA: That's a -- that's a --
3 that's a rule that will have application in a lot of
4 other situations. You're saying whenever an error can
5 be raised on habeas, we -- we should accord -- no matter
6 that it's been waived, no matter what else exists, we
7 should allow that point to be raised in initial review.

8 MR. JAFFE: No, Your Honor, that is not what
9 we are saying.

10 JUSTICE SCALIA: Well, why -- why wouldn't
11 it? I mean --

12 MR. JAFFE: Several reasons.

13 JUSTICE SCALIA: Why doesn't it follow?

14 MR. JAFFE: Because that's --

15 JUSTICE SCALIA: That's your argument:
16 Since it can be raised in habeas, why not do it now?

17 MR. JAFFE: Because statutes of limitations
18 can be distinguished from those other types of
19 arguments. The habeas argument is merely a reason not
20 to wait.

21 But it can be cabined -- our point can be
22 cabined to limitations issues for several reasons. If
23 you look at the habeas cases we cite at the tail end of
24 our blue brief, one, it is taking it for granted that
25 the failure to raise a meritorious statute of

1 limitations argument is indeed ineffective assistance.

2 JUSTICE GINSBURG: So you are, Mr. Jaffe, at
3 least saying, in every statute of limitations case,
4 whenever a statute of limitations is involved in every
5 case, the defendant can raise it for the first time on
6 appeal, every statute of limitations.

7 MR. JAFFE: Yes, though the theory under
8 which that would happen might be different. So in some
9 instances, it would be as a plain-error question; in
10 other instances, it might be on a stronger theory.

11 But yes, that is basically our point, with
12 one exception.

13 CHIEF JUSTICE ROBERTS: Maybe you should
14 take the exception out.

15 JUSTICE SOTOMAYOR: The court below --

16 MR. JAFFE: Yes.

17 JUSTICE SOTOMAYOR: The court below --

18 CHIEF JUSTICE ROBERTS: Maybe you should --

19 MR. JAFFE: Yes.

20 JUSTICE SOTOMAYOR: -- is by waiver. I --

21 MR. JAFFE: The --

22 CHIEF JUSTICE ROBERTS: You -- you just get
23 your exception out and then answer --

24 MR. JAFFE: The exception would be in the --
25 the example of the Powell case, where the burden to

1 prove withdrawal was actually on the defendant and not
2 the burden of proof complies with state of limitations
3 on the government. The shifting in burdens of proof in
4 that case might be an -- an exception to the general
5 statement I gave Justice Ginsburg.

6 I'm sorry.

7 JUSTICE SOTOMAYOR: I'd like to get to the
8 substance of your argument, but as I understand your
9 argument, this wasn't a waiver which the court found
10 below. You're arguing it's a forfeiture.

11 MR. JAFFE: Correct.

12 JUSTICE SOTOMAYOR: Forfeiture because it
13 was unintentionally done.

14 MR. JAFFE: Correct.

15 JUSTICE SOTOMAYOR: And so you are going
16 under plain error.

17 MR. JAFFE: Plain error is the -- the -- the
18 narrowest and easiest of the theories.

19 JUSTICE SOTOMAYOR: All right.

20 MR. JAFFE: You have to call up --

21 JUSTICE SOTOMAYOR: So you're saying when
22 there is plain error, when there isn't an intentional --
23 you don't disagree with the government that there are
24 intentional waivers that you can't raise on appeal of
25 the statute of limitations. We've gotten a few of them

1 here.

2 MR. JAFFE: For purposes of our case, we
3 would be perfectly content to accept that. Some of our
4 theories, in fact, would be broader. This Court need
5 not reach those broader theories --

6 JUSTICE SOTOMAYOR: All right.

7 MR. JAFFE: -- to vote in our favor.

8 JUSTICE SOTOMAYOR: So let's assume this is
9 under plain error. Now let's go to what -- what made
10 this plain. Okay?

11 We have a bunch of cases that say that this
12 is a statute of limitations as opposed to a
13 jurisdictional bar. Why would it be plain that this is
14 jurisdictional?

15 MR. JAFFE: You need -- if you're under
16 plain error, one need not conclude it as jurisdictional.
17 One simply needs to conclude that the government has
18 failed to bring the suit within the time required by a
19 statute.

20 On its face, the date of the indictment
21 compared to the date of the alleged crime is very
22 simple, very plain. It's more than five years. The
23 government may well have a defense -- relation back,
24 whatever their defense is -- and they can raise that.
25 But on its face --

1 JUSTICE SOTOMAYOR: I'm sorry. I --

2 MR. JAFFE: -- it's plain.

3 JUSTICE SOTOMAYOR: -- I -- I -- I'm having
4 a very hard time accepting that argument. If we say
5 that it -- it wasn't plain, that this was a
6 claim-processing rule --

7 MR. JAFFE: I believe there are two separate
8 lines of cases that are getting conflated.

9 Plain error could involve any error. It
10 need not be jurisdictional. It can simply be contrary
11 to statute, which is a non jurisdictional, merely a
12 substantive statute like the statute of limitations.

13 The jurisdictional argument is a different
14 and separate reason that need not infect -- or be
15 decided in order to resolve plain error. The error here
16 is simply the statute says you must bring it in
17 five years. They brought it in seven. That's error.
18 We failed to raise it, but that's the very purpose of
19 the plain-error rule, is to make up for mistakes of
20 counsel who failed to raise things they should have
21 otherwise raised, and so one gets to raise it as plain
22 error. That's --

23 CHIEF JUSTICE ROBERTS: Your -- your -- your
24 argument really does -- this is true of all
25 jurisdictional defenses, but I think it's particularly

1 problematic here, which is it encourages gamesmanship.
2 I mean, if you have what you think is an arguable
3 statute-of-limitations argument, you know, take your
4 chance at trial, and if you win, fine, but if you lose,
5 then raise this statute-of-limitations argument.

6 MR. JAFFE: I guess what I'd say is that no
7 sane lawyer would do that because they subject
8 themselves to claims of malpractice, they subject
9 themselves to the higher standards of plain-error
10 review. At the end of the day --

11 CHIEF JUSTICE ROBERTS: What's malpractice?
12 It sounds like a -- a good practice to me for his
13 client.

14 MR. JAFFE: Well, in subject on appeal to
15 the higher standards of plain-error review is still a
16 negative. If they end up losing and there was some
17 chance they could have won had they brought it timely,
18 that lawyer has now sent a man to jail based on not
19 merely a mistake, but an intentional decision.

20 JUSTICE GINSBURG: It's not true of your
21 jurisdictional categorization if it's jurisdictional and
22 it's not plain error --

23 MR. JAFFE: That's true.

24 JUSTICE GINSBURG: And your jurisdictional
25 argument surprised me because you cite a line of cases

1 that were meant to cabin the use of jurisdiction.

2 MR. JAFFE: Correct.

3 JUSTICE GINSBURG: The distinction between
4 claim processing and jurisdictional was to cut back on
5 exorbitant use of jurisdiction, and you just seemed to
6 switch it.

7 MR. JAFFE: I start with the case of
8 *Bowles v. Russell*, and merely point out that, on pretty
9 much every single ground in that case and those that
10 follow, this statute is stronger and more clearly a
11 limitation of the court's power.

12 JUSTICE GINSBURG: I thought *Bowles* went on
13 that the court had held that before, and so it was going
14 to adhere to its prior ruling.

15 MR. JAFFE: That was some of what *Bowles*
16 went on, but it gave many other reasons, as did the
17 follow-on cases. And if one looks at the wording of the
18 statute, one may not try or punish is a continuing
19 prohibition. It is not merely you can't prosecute,
20 which might just be thought to apply to the prosecutor.
21 This is a -- a restriction on the court.

22 JUSTICE GINSBURG: But again, you would be
23 making all statutes of limitations, quote,
24 "jurisdictional."

25 MR. JAFFE: No, we would not, Your Honor.

1 We would look --

2 JUSTICE GINSBURG: Which might that be?

3 MR. JAFFE: -- at the wording.

4 JUSTICE GINSBURG: Yes.

5 MR. JAFFE: Because -- because I believe the
6 wording of this statute is, in fact, unusually strong,
7 particularly with the "except as otherwise expressly
8 provided by law," meaning you cannot avoid it by
9 implication. It is such a strongly worded statute.
10 Others might not be that way at all, and one would not
11 extend this to differently worded limitations, period.

12 JUSTICE KAGAN: I -- I would have -- the --
13 the most recent case that we had, which was Wong, makes
14 clear the statute of -- of limitations generally are not
15 jurisdictional, and I would think suggests that you
16 really have to have language saying it is jurisdictional
17 to overcome that presumption. In other words, just a
18 strong-sounding statute of limitations wouldn't cut it
19 according to Wong. That's the way I would read that.

20 MR. JAFFE: I would read those cases as
21 dealing with civil situations as opposed to criminal
22 situations, where the limitations period is generally
23 thought of as a period of repose, not as a substantive
24 limit on the government's power. And that's the Toussie
25 case, as well as Benes, which followed that.

1 I would also point out that the -- the
2 clarity of Congress's language goes to, are you limiting
3 the court, as opposed to merely requiring bringing the
4 claim within a certain period of time, but without
5 specifying the consequence of failure.

6 Here, the language is so expressly directed
7 to the court's power, and it does indeed specify the
8 consequences of failure: You may not try or punish any
9 person.

10 JUSTICE KAGAN: But are you saying that we
11 should adopt a different interpretive rule in the
12 criminal context? Is that what I understood you to say?

13 MR. JAFFE: I'm saying that you already
14 have. That this Court views criminal statutes of
15 limitations more strictly. It views them as different
16 from civil statutes of limitations that is viewed as a
17 limit on the government's power rather than merely a
18 limit on a litigant's remedies. And that that's
19 already -- that's Toussie. And I believe Benes
20 discusses that at further depth.

21 But you need not reach jurisdiction. I
22 believe the easiest way to reach the -- to deal with
23 this case is on the Wood and Valiniff cases, where you
24 have already held that a limitations period cannot be
25 forfeited, only waived, and that's in the habeas

1 context, admittedly. The -- the sides are flipped. But
2 where the government in the habeas context inadvertently
3 fails to raise a limitations period, it is still allowed
4 to bring that up on appeal. The court, on appeal, is
5 allowed to raise that sua sponte.

6 I think this case is stronger, once again,
7 on every score than Day. And, consequently, if Day is
8 good law, this case is almost a fortiori the same
9 result.

10 And one need not give it any further
11 analysis than that, that if the government has to
12 affirmatively waive a limitations objection to a habeas
13 petition, then Petitioner, who has so much more at
14 stake, should have to affirmatively waive a limitations
15 objection to indictment.

16 If I may, I'd like to reserve the remainder
17 of my time.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Martinez.

20 ORAL ARGUMENT OF ROMAN MARTINEZ

21 ON BEHALF OF THE RESPONDENT

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

24 Petitioner is wrong that the sufficiency of
25 the evidence must be measured against an extra element

1 in an obviously erroneous jury instruction. That rule
2 is not consistent with the purpose of sufficiency
3 review, it contradicts how this Court has treated the
4 same issue in civil cases, and its whole purpose and
5 effect is to give guilty defendants windfall acquittals.

6 JUSTICE GINSBURG: If it was obviously
7 wrong, why did the government the first time, in the
8 original indictment, charge "and"?

9 MR. MARTINEZ: I -- it -- it was obviously
10 wrong to include the -- the -- the exceeding authorized
11 access component to the case at the jury instruction
12 stage after the superseding indictments had already made
13 clear that the case was about a conspiracy to commit
14 unauthorized access.

15 And I think my -- my friend on the other
16 side pointed out that -- that -- that Petitioner's
17 counsel was confused as to what the case was about at
18 that stage, but if you look at what Petitioner said the
19 case was about when he was briefing this case in the
20 Fifth Circuit, he made very, very clear that, in
21 Petitioner's view, the government had abandoned the
22 conspiracy to commit exceeding authorized access, and it
23 had abandoned that with its superseding indictments, and
24 it had abandoned that by the fact that, when we proposed
25 three different sets of jury instructions as to the

1 conspiracy count, the -- the instructions that we
2 proposed were limited to a conspiracy to commit
3 unauthorized access.

4 Petitioner's other counsel, Mr. Kendall,
5 during his oral argument in the Fifth Circuit, over and
6 over again -- at the beginning of his argument, in the
7 middle of his argument, end of his argument --
8 emphasized that the government had tried this case as a
9 "unauthorized access case from start to finish."

10 JUSTICE GINSBURG: Why didn't the government
11 ask the judge to correct his charge when the judge made
12 the mistake of saying "and"?

13 MR. MARTINEZ: I -- Your Honor, I -- I don't
14 know why we didn't do that. I think obviously the --
15 it -- it would be better for -- for all of us if -- if
16 we had -- if we had noticed the -- the change that was
17 made.

18 I will say that the change was made at the
19 last minute. The -- the parties had had a charging
20 conference the day before when the erroneous language
21 was not at issue. Petitioner had never asked for the
22 "exceeding authorized access" language to be included in
23 the instruction.

24 We had proposed three different sets of jury
25 instructions that didn't include that language. It was

1 a mistake on our part, and we suffered the consequences
2 of the mistake in the sense that, at that point, the
3 jury was charged incorrectly. But if the jury had
4 acquitted Mr. Musacchio based on its view that there was
5 insufficient evidence with respect to the extra element,
6 under this Court's decision in Evans, we wouldn't have
7 been able to -- to appeal that. That -- that would have
8 been the end of the case.

9 JUSTICE ALITO: Well, why was the
10 instruction erroneous? You concede that these two
11 methods of violating the statute are discrete? They're
12 not just different ways of describing the same thing?

13 MR. MARTINEZ: We do think that they are
14 discrete, and we think that's consistent with our -- our
15 sort of general reading of the statute and with the way
16 the courts have -- have addressed it. I think they're
17 very closely related.

18 I think what -- we agree with what -- what
19 Petitioner said in his petition at page 4, which was
20 that -- that these are essentially two different ways of
21 committing the same crime.

22 JUSTICE ALITO: Well, suppose you had an
23 indictment charging someone with exceeding authorized
24 access and there was a factual dispute about, let's say,
25 the date on which the employee's employment ended, so

1 therefore, the date on which any authorized access that
2 the employee had to records of the employer ended, you
3 would say that, if you did not succeed in proving beyond
4 a reasonable doubt that, as of the date when the access
5 was obtained, the employee had ceased to be employed,
6 that that employee would be entitled to a judgment of
7 acquittal? That seems rather odd.

8 MR. MARTINEZ: Justice Alito, I don't -- I
9 don't want to resist a broader reading of the statute,
10 but I -- I would only say that -- that the statute
11 defines the term "exceeding authorized access" in a
12 way -- this is at page 11-A of our statutory appendix.
13 It said, "The term" -- it says, "The term 'exceeds
14 authorized access' means to access a computer with
15 authorization and then to use such access to obtain or
16 alter information in the computer that the accessor is
17 not entitled so to obtain."

18 So if there were a circumstance in which
19 there was no authorization in the first place to -- to
20 access the computer, I think we would be in trouble.
21 But we would, of course, have the other -- the other way
22 of -- of proving that the statute had been violated,
23 which was the unauthorized access charge.

24 And that's why in this case, I think, there
25 was no dispute and there was no confusion whatsoever

1 that a conspiracy to commit unauthorized access was
2 alleged. There was overwhelming evidence that
3 Petitioner hasn't challenged on that point, and there
4 were, of course, two substantive convictions that --
5 Counts II and III of the indictment -- which had to do
6 with -- with unauthorized access.

7 JUSTICE ALITO: Well, couldn't there not be
8 --

9 JUSTICE KENNEDY: I understand -- I
10 understand your argument about, in effect, that this was
11 harmless error but -- something at page 20 of your
12 brief. You would like us to write in an opinion -- on
13 the very first line of page 20 -- even if courts should
14 generally look to jury instructions when assessing the
15 sufficiency of the evidence which they should not -- you
16 want us to write that in an opinion? It seems to me
17 that would surprise many, many lawyers.

18 MR. MARTINEZ: We --

19 JUSTICE KENNEDY: First thing --

20 MR. MARTINEZ: -- we would --

21 JUSTICE KENNEDY: -- we look at --

22 MR. MARTINEZ: -- that you don't have to do
23 that.

24 JUSTICE KENNEDY: -- when we -- the first
25 thing we look at in a sufficiency question is, well,

1 what are the instructions? So you want to say, oh,
2 well, don't look at instructions?

3 MR. MARTINEZ: Well, I think -- I think,
4 Your Honor, in -- in the -- the vast majority of cases,
5 the instructions are going to correctly reflect the --
6 the State statute that's being charged.

7 JUSTICE KENNEDY: But -- but you -- but you
8 say that we shouldn't look to jury instructions when
9 assessing the deficiency of the evidence. I -- I -- I
10 think that's an astounding proposition.

11 MR. MARTINEZ: I -- I don't think it's
12 astounding at all, Your Honor, and I think that's
13 expressly what the Court said in the Jackson case. If
14 you look at the footnote 16 of Jackson, the Court said
15 that, when conducting the sufficiency analysis, that --
16 that the -- the analysis should be conducted with,
17 "explicit reference to the substantive elements of the
18 criminal offense as defined by State law."

19 JUSTICE KAGAN: That suggests that you
20 wouldn't even look to the indictment. That you would
21 just look to the statute.

22 MR. MARTINEZ: I think you would have to
23 look to the statute, but the indictment would tell you
24 which statute is being -- is being charged.

25 JUSTICE KENNEDY: Well, it's -- it's,

1 frankly, a style point rather than a substantive point.
2 But it -- it -- it does seem to me that we should not
3 put that in the opinion.

4 MR. MARTINEZ: Well, I think that you
5 shouldn't put that into the opinion. I -- I would agree
6 on that -- with you on that because I think that -- I
7 think that, on our first argument, what you should
8 clarify and you should -- you can apply the same rule,
9 essentially, that the Court has applied in the civil
10 context when you've recognized that -- that jury
11 instructions and sufficiency review are essentially
12 on -- on two different tracks.

13 And when the -- the issue in the case is an
14 instructional error, then I think it's fair to look to
15 what the parties said about the instructional error.
16 But if the error is sufficiency and there is -- there is
17 no dispute -- if the issue is sufficiency, then I think
18 the place to look would be the -- the elements of the
19 crime as defined by the statute. I think that's what
20 Jackson says, and I think that's what the Court
21 essentially held in -- in the civil context in these
22 cases --

23 JUSTICE KAGAN: So Mr. Martinez, just --

24 MR. MARTINEZ: -- like Praprotnik and Boyle.

25 JUSTICE KAGAN: I'm sorry. Just going back

1 to this question of whether it's the statute or the
2 indictment, you think you just look to the indictment to
3 tell you which statutes to look to, but if the
4 indictment would, let's say, add an extra element, that
5 doesn't matter? You should -- you should look to the
6 statute in the --

7 MR. MARTINEZ: Yes.

8 JUSTICE KAGAN: -- in the same way that
9 you're suggesting here we shouldn't look to the
10 instructions?

11 MR. MARTINEZ: I -- I think what the -- the
12 purpose of the indictment is to give the defendant
13 notice of the -- the crime with which he is charged.
14 But a lot of times, as the Court well knows, the
15 indictment is going to be a lengthy document that
16 contains a lot of allegations, a lot of different facts.
17 And what this Court has made clear is that, just because
18 the indictment says something happened at a certain time
19 or -- or in the narrative of a description of the
20 offense it includes some information, that doesn't mean
21 that the government is required to prove everything
22 that's identified there.

23 JUSTICE KAGAN: But -- but I guess I -- it
24 is -- that does seem a little bit troubling to me just
25 because of the function of an indictment is providing

1 notice, that if the indictment gets the statute wrong,
2 that -- that the government should be stuck with that
3 because that's what -- you know, that's what the
4 defendant now thinks is the charge.

5 MR. MARTINEZ: I -- I think that, in a case
6 like -- and I -- it may be that -- that in a different
7 case where -- I would have to see the indictment
8 that they -- you're hypothesizing, Justice Kagan. But
9 in a case like this, where the indictment says this is
10 the statutory offense and -- and -- and it -- and it
11 identifies the statutory code provision and it says
12 "unauthorized access," so it makes clear that the
13 conspiracy being alleged here is the unauthorized access
14 branch of a 1030(a)(2) violation.

15 I think that -- that shows you what the --
16 you know, that points to the law that needs to be
17 applied.

18 JUSTICE GINSBURG: I thought that the
19 government agreed that, if the charge in the indictment
20 was "and," A "and" B, the government would have to prove
21 A and B -- if that was what the indictment charged.

22 MR. MARTINEZ: I think if the -- if the
23 indictment had said that the conspiracy here was to
24 do -- was -- was to do A and B, the normal rule is that
25 if the -- that charge says "A and B," the government

1 could nonetheless prove the conspiracy theory under A or
2 B, and then the jury instructions could -- could so
3 specify.

4 And so I think -- I -- I think that's --
5 that's fairly well-established that the government can
6 charge in the conjunctive in that sense.

7 But I think what's important for this case
8 is that the -- the indictment in this case was very
9 specific. It changed from the original indictment,
10 which had the -- alleged the broader conspiracy to -- to
11 both commit unauthorized access and to exceed authorized
12 access, and it went to a narrower conspiracy that just
13 charged unauthorized access.

14 And that's why Petitioner's counsel said
15 repeatedly in his briefs and at oral argument on appeal,
16 this was an unauthorized access case from start to
17 finish.

18 CHIEF JUSTICE ROBERTS: Counsel, you can --
19 you can imagine cases, can't you, where the instruction
20 on an additional element could cause prejudice to the
21 defendant?

22 MR. MARTINEZ: I -- I think you -- one could
23 imagine such a case. And I think that the proper --

24 CHIEF JUSTICE ROBERTS: Try, just for an
25 example, if the additional element would cause the

1 reasonable jury to focus on particular evidence,
2 particularly damning evidence that they might otherwise
3 not have highlighted in their discussion.

4 MR. MARTINEZ: Mr. Chief Justice, I think --
5 in a case like, I think the -- the proper way to analyze
6 that case would be the way you would analyze any case
7 where the -- the root error is an instructional error.
8 And -- and you would look to that, and if you thought it
9 was prejudicial, you might remand the case or -- or
10 vacate the conviction but allow for a new trial.

11 But that's not what Petitioner is asking
12 for. What he is asking for is an acquittal, despite the
13 fact that the jury found with respect to all of the
14 actual elements of the crime. There was sufficient
15 evidence as to those actual elements.

16 And I think the other point to add is -- is
17 that this is not a case -- this particular case does not
18 involve the kind of confusion that you're hypothesizing.

19 Petitioner argued this -- a confusion theory
20 in the court of appeals, and the court of appeals -- and
21 this is at page A-10 of the Petition Appendix -- the
22 court of appeals expressly rejected the theory. The
23 court of appeals said that -- that if, you know, the --
24 the only error here was the erroneous jury instruction,
25 and if that jury instruction had any effect in this

1 case, it worked only to the benefit of the defendant.

2 I mean, Petitioner here really got a trial
3 that was -- that was biased in his favor, which is very
4 unusual for -- for -- for a defendant. And what he's
5 trying to do is -- is piggyback off of a trial that was
6 biased in his favor and nonetheless, you know, sort of
7 piggyback on that error and get -- get a -- an appeal
8 that's -- that's in his favor.

9 JUSTICE SOTOMAYOR: Let -- let -- let me --
10 I've been trying to break this down.

11 Let's assume that this had been charged as
12 "or."

13 MR. MARTINEZ: In -- in the jury
14 instruction?

15 JUSTICE SOTOMAYOR: In the jury instruction.

16 MR. MARTINEZ: Yes.

17 JUSTICE SOTOMAYOR: And you concede there
18 was no evidence of the second prong of the "exceeding
19 authorized." How would we look at the case then? It's
20 not A plus B, and we know they had to have found A and
21 B, and if they were wrong on B, they still found A.

22 MR. MARTINEZ: Just --

23 JUSTICE SOTOMAYOR: This is -- we're not
24 sure which they did, A or B.

25 MR. MARTINEZ: Right. And I just want to be

1 clear. I --

2 JUSTICE SOTOMAYOR: And B is not actionable,
3 let's just say, or there's insufficient --

4 MR. MARTINEZ: By assumption, if we assume
5 and -- and that -- we are -- we do not concede that we
6 think there is overwhelming evidence of both A and B.
7 But if you were to assume that there were not evidence
8 of the extra -- of the extra element, I think then the
9 question would be whether there was some sort of
10 unanimity instruction that would have been required to
11 specify which particular theory.

12 It's not this case and, you know --

13 JUSTICE SOTOMAYOR: But that's interesting
14 because I -- I -- I'm not sure that that's true.

15 MR. MARTINEZ: Well, I think in -- I -- I
16 think in this case because of the fact that A and B are
17 two different ways of committing the same crime, you
18 would not need an -- a unanimity instruction. But I --
19 I think -- I take it that Petitioner would have a
20 different view of that, and that would pose a -- a legal
21 question that obviously the parties could brief in an
22 appropriate case. It would be a slightly more
23 complicated --

24 JUSTICE SOTOMAYOR: My hypothetical was that
25 B is not statutorily proper.

1 MR. MARTINEZ: Oh, that B is not a --

2 JUSTICE SOTOMAYOR: Yes.

3 MR. MARTINEZ: -- not a proper at all.

4 Well, in that case, I think that -- that --
5 that that would posit harder questions for the
6 government, because there, I think, there would be
7 some -- there could potentially be confusion that it's
8 possible that the jury might have convicted on -- on a
9 theory that's not legally viable.

10 So just to -- to go back, Your Honors, I
11 think that the purpose of sufficiency review, both
12 from -- from Jackson and the due process origins of --
13 of sufficiency review, that they make clear the jury
14 instructions are distinct. This Court's decisions in
15 Praprotnik and Boyle make clear that forfeiture in the
16 context of jury instructions doesn't carry over into the
17 sufficiency context.

18 And I think the practical point is very
19 significant here, which is that his rule is only going
20 to have an effect in cases where a jury has found the
21 defendant guilty as to all the actual elements of the
22 crime, where there's sufficient evidence as to all the
23 actual elements of the crime, and where there's no
24 confusion.

25 And so we think this -- this is a rule

1 that's designed to produce -- designed to produce
2 windfall acquittals.

3 JUSTICE KAGAN: Suppose you took a converse
4 case where the instructions favored the government and
5 the defendant didn't object, is convicted, then brings a
6 sufficiency claim. Do you again say it really is
7 measured as against the statute? It has nothing to do
8 with the instructions?

9 MR. MARTINEZ: Yes. We think that if -- if
10 there had been an obvious clerical error in -- in the
11 defendant's favor and he had made all the right
12 arguments at trial about sufficiency and -- and -- we
13 don't think that the -- the error on the -- on the
14 instructional point would carry over into -- into the
15 sufficiency-of-the-evidence review. So we have a
16 neutral rule that really applies equally to both sides.

17 If there are no more questions as to the
18 first question presented, perhaps I can turn to the
19 statute-of-limitations issue.

20 JUSTICE SCALIA: You know, I -- I have a --
21 sort of a threshold question on that. Your -- your
22 friend says that he really doesn't have to demonstrate
23 that the statute here is jurisdictional because, even if
24 it's not jurisdictional, he wins anyway.

25 Do -- do you agree with that?

1 I don't know what the plain error is if
2 it's -- if it's not jurisdictional.

3 MR. MARTINEZ: We don't think there is a
4 plain error, partly because it's not jurisdictional and
5 partly for other reasons.

6 Maybe I could step back and just give --
7 give the Court my understanding of how I understand the
8 arguments that he's making.

9 I think he's got basically three distinct
10 arguments. The first is -- is that it's jurisdictional,
11 which would mean that it's not waivable, that the court
12 always has a duty to -- to raise it at any time.

13 The second argument --

14 JUSTICE SCALIA: In which case there would
15 be plain error.

16 MR. MARTINEZ: In which case, I think -- I
17 think what --

18 JUSTICE SCALIA: In -- in which case the --
19 the -- the trial court's failure to raise it would be
20 error.

21 MR. MARTINEZ: I -- I think it would be
22 error, but I think what Petitioner would say is that he
23 doesn't have to satisfy the plain-error rule because, if
24 it's a jurisdictional, then it can be raised --

25 JUSTICE SCALIA: That's true.

1 MR. MARTINEZ: -- and must be raised at any
2 time.

3 JUSTICE SCALIA: That's true.

4 MR. MARTINEZ: So I think his second
5 argument is that he -- he can get de novo review even if
6 it's not jurisdictional if he raises it for the first
7 time on appeal.

8 And I think his third argument is he has --
9 he can get plain-error review.

10 We think each of these arguments is wrong.

11 First of all, with respect to the
12 jurisdictional point, this Court has said for over 140
13 years that the statute of limitations is a matter of
14 defense that the defendant has the burden of introducing
15 into the case. That's completely contradictory to the
16 idea that the statute of limitations is jurisdictional,
17 which would mean that the government, as the -- the --
18 the party invoking the jurisdiction of the court, would
19 have the burden of establishing compliance with the
20 statute of limitations.

21 JUSTICE SOTOMAYOR: How do you deal with his
22 argument that we should -- if, in a civil case, we make
23 a presumption that a statute of limitations is a
24 claim-processing rule?

25 In a criminal case, we should have the

1 opposite presumption because of, A, the rule of lenity
2 and, B, because it is on the -- a question of the power
3 of the government.

4 MR. MARTINEZ: I don't think -- I don't
5 think you should have that presumption. I think that --
6 that this Court -- the ship has already sailed to some
7 extent because this Court -- again, for -- for 140
8 years, from Cook through Biddinger to this Court's
9 decision in Smith just a few terms ago -- has said
10 that -- that the statute of limitations is a matter of
11 defense that has to be introduced into the case by the
12 defendant.

13 And I think if -- if Petitioner's primary
14 argument, his jurisdictional argument were accepted,
15 that rule would go out the window, and what would be
16 required is that the government and the Court would have
17 to establish and raise the jurisdictional -- would --
18 would have to establish the statute of limitations was
19 not violated in every case.

20 JUSTICE ALITO: Why shouldn't the rule in
21 this context be the same as the rule for timely filing a
22 Federal habeas petition?

23 MR. MARTINEZ: Well, I think that -- for --
24 for a couple reasons, the most important of which is
25 that Rule 52(b) governs this case where Rule 52(b) does

1 not directly govern the filing of a -- of a habeas
2 petition.

3 And so Rule 52(b) makes clear that the --
4 the exclusive means by which a criminal defendant can
5 obtain appellate review of a -- of a claimed error where
6 they didn't object below is by satisfying the four-prong
7 Olano standard. And in the habeas context, that rule
8 doesn't apply.

9 If you look at the Court's analysis in one
10 of the habeas cases, which was drawn on by the other,
11 the Day v. McDonough case, the Court emphasized that its
12 holding was valid there because, in part, there was no
13 rule to the contrary. Here you have a rule to the
14 contrary.

15 I think the second point that could be made
16 on those -- on that -- on this front is that the habeas
17 context is special. And I think the Court's decisions
18 in both Day and in Wood v. Milyard really emphasize that
19 what's driving those cases is a desire to have a rule
20 that -- that takes account of the habeas context, the
21 desire to have finality with respect to criminal
22 convictions, and the desire to harmonize the rule that
23 applies to statute of limitations with the rules that
24 apply to other threshold barriers to habeas relief.

25 JUSTICE ALITO: You think that the State's

1 interest in the habeas context in finality and comity is
2 stronger than the defendant's interest in a direct
3 criminal appeal in requiring that the charge be filed on
4 time where what's at stake is -- is a criminal
5 conviction?

6 MR. MARTINEZ: I think that -- that -- I
7 think that criminal defendants are obviously going to
8 have an interest in raising arguments that they think
9 are meritorious when they didn't raise it below. I do
10 think that there's a very significant legal difference
11 in that those types of policy concerns don't really --
12 are not really applicable in -- when you're talking
13 about a direct appeal because Rule 52(b) sort of blocks
14 that.

15 And I also think that the -- the reasoning
16 of cases like Day and Wood really does turn on the fact
17 that you had a statute of limitations rule and you had a
18 bunch of other rules governing sort of threshold
19 barriers to habeas relief. Rules about procedural
20 default, rules about exhaustion, rules about
21 retroactivity. And what the COURT said in both of those
22 cases is that it's trying to harmonize those rules. And
23 the court --

24 JUSTICE ALITO: But -- but just take a
25 situation where, under the habeas rule, it would be

1 proper for the -- the district court to raise the
2 statute-of-limitations defense on its own motion. Why
3 would that not fit within the plain-error rule?

4 MR. MARTINEZ: I think that -- that, for it
5 to fit within the plain-error rule, and so we would be
6 shifting, I think, to Rule 52(b), you would -- the
7 defendant would need to show that there's both an error
8 and that the error is obvious. And as Justice Scalia
9 was hinting at, perhaps, with his question earlier, we
10 don't think there is an error here. The statute of
11 limitations is an affirmative defense; and therefore,
12 the burden is on the defendant to raise that issue.

13 In -- in the Cook case, the Court made clear
14 that, if there's an indictment that alleges a -- a crime
15 that's outside the statute of limitations, that
16 indictment is nonetheless not necessarily or inherently
17 flawed unless the statute-of-limitations defense is
18 raised and -- and subsequently litigated.

19 JUSTICE SCALIA: It still in all doesn't
20 make any sense to say we're going to let him off on
21 habeas because of inadequate assistance of counsel who
22 failed to raise the statute of limitations and yet he
23 cannot raise that point on appeal --

24 MR. MARTINEZ: I --

25 JUSTICE SCALIA: -- on direct appeal. Make

1 him go through -- why? Why -- why make the society
2 incur more expense, make him probably languish in jail
3 when he's going to -- going to get out on habeas? Why
4 not decide that statute-of-limitations thing in the
5 direct appeal?

6 MR. MARTINEZ: Well, I think -- I think --

7 JUSTICE SCALIA: Bear in mind I dissented in
8 both Day and Wood, so --

9 MR. MARTINEZ: As I recall, Your Honor, I
10 think -- I think there's a -- there's a couple of
11 reasons. The strongest is that the difference in the
12 habeas context is that the record can be developed.
13 When you're looking at a case on Rule 52(b), this Court
14 has always treated review under 52(b) as being limited
15 to the existing record, whereas in habeas case, the
16 record can be developed.

17 And that's very important in two fundamental
18 ways. First, it's important to know why the defense was
19 not raised by the defendant at the appropriate time.
20 The -- the defendant is going to have -- and including
21 in this case, could have a very strategic reason for not
22 raising the defense during the trial.

23 And I can get into that in -- in -- in this
24 particular case if the Court is interested.

25 In the second -- so that's one reason why

1 it's important to have a record. And the second reason
2 is the government has to have the ability to -- to
3 introduce evidence if it wants to rebut or establish
4 compliance with the statute-of-limitations defense.

5 That's what this Court said in Cook. In
6 Cook the whole point of the case was that it's unfair
7 to -- to allow for a -- a -- a indictment to be
8 dismissed on a demurer because that would deprive the
9 government of its right to reply and give evidence to
10 establish compliance with the statute of limitations
11 once the defense is raised.

12 So on -- on direct review, the record would
13 be frozen and you wouldn't be able to look out outside
14 the record, whereas on habeas you would be able to look
15 outside the record.

16 And in addition, I think the -- it's very
17 important to -- to sort of look at the theoretical basis
18 for the -- the error and -- and -- and recognize that it
19 doesn't satisfy Rule 52(b) in the way that that rule
20 has -- has traditionally been thought about.

21 First of all, Rule 52(b) is generally about
22 things that the trial judge is supposed to notice on his
23 own. And what this Court has said about statute of
24 limitations, including in the Day case, is that the
25 trial court doesn't have an obligation to serve as

1 the -- the co-counsel or the paralegal for -- for the
2 defendant. It doesn't have an obligation to go
3 searching through the record and finding potential
4 defenses for the defendant. Rather, that's something
5 that the defendant himself has an obligation to do.

6 JUSTICE ALITO: Suppose the court of appeals
7 in -- in a direct appeal sees that the statute of
8 limitations for a particular offense is six years and
9 the indictment was filed 25 years after the event. Can
10 the court of appeals say to the government, look at
11 this. It looks like it's too late. Do you have any
12 explanation for this? And the government says, well,
13 no, doesn't -- we can't think of anything.

14 MR. MARTINEZ: I -- I think that the --
15 the -- the better way is to wait until habeas to -- to
16 correct that. And the reason for that is that
17 Rule 52(b) is limited to the existing record. And as
18 Your Honor, you know, made clear in your hypothetical,
19 the only way you can figure out that there's an error in
20 that case is by looking outside of the existing record
21 and asking the government, well, what's your
22 explanation? What evidence do you have? What would you
23 have done differently if this had been raised before?

24 JUSTICE KAGAN: Well, that might be true
25 sometimes, but it doesn't seem as though that's the

1 ordinary case. I mean, why would you have -- you
2 could -- you can make an exception for cases in which
3 there really -- the government has -- is able to come in
4 and say, we really need to develop the record. But
5 where that's not true, why wouldn't you decide this as
6 quickly as you could?

7 MR. MARTINEZ: I think I appreciate the --
8 I -- the sort of practical concern embedded in that
9 question. I think as a formal matter you would still
10 need to be looking outside the record.

11 JUSTICE BREYER: Why formal? I mean, we've
12 been through this many times. It comes up in all kinds
13 of instances. People are always alleging -- not always
14 but often allege that their counsel was inadequate.
15 Sometimes it would be possible to know that on direct
16 appeal, but in the mine run of cases, you want to find
17 out from the counsel why he did it.

18 MR. MARTINEZ: Right.

19 JUSTICE BREYER: And therefore I think every
20 circuit -- I don't know what this Court has said -- has
21 said that you raise IAC claims in collateral
22 proceedings.

23 Now, if we start making exceptions from
24 that, you're going to get a jurisprudence of when the
25 exception comes up --

1 MR. MARTINEZ: I think --

2 JUSTICE BREYER: -- and when it doesn't and
3 how clear does it have to be, and then we'll just add
4 further delay because I guess if I were a court of
5 appeals judge and I saw some obvious mistake, I would
6 say, go file it tomorrow.

7 MR. MARTINEZ: Right. And I -- and I think
8 that's the better way to handle this because the
9 alternative is to -- to -- because we see some cases
10 that look like they'd be pretty easy to decide, is to
11 say, well, let's -- let's erode what would otherwise be
12 pretty hard-and-fast rules about how Rule 52(b) is
13 supposed to operate.

14 Again, we don't think there is an error
15 under Rule 52(b) because this isn't something that the
16 trial judge is supposed to figure out on his own. We
17 don't think that an error is plain on the record because
18 the record itself is not sufficient in and of itself to
19 show that there is an error. And so we think that if
20 you have a rule that sometimes you should bring in on
21 plain error, sometimes you should bring in in habeas,
22 it's going to create a lot of confusion both for courts
23 and for litigants. You're going to be litigating about
24 when the exception applies, when the exception doesn't
25 apply.

1 And I think the key thing that --

2 JUSTICE GINSBURG: Of course -- of course,
3 if there was a -- a strong statute-of-limitations bar,
4 isn't it likely that the trial judge would suggest to
5 defense counsel, don't you want to raise a -- a
6 limitations defense?

7 MR. MARTINEZ: I think that's very, very
8 likely that the trial court might do that. I -- we
9 would think that, because there are sometimes strategic
10 reasons for not raising the defense, you know, the --
11 the trial judge should do it in a way that it doesn't
12 interfere with those strategic concerns.

13 We don't think that there is a problem if
14 the judge does it that way, but we certainly don't think
15 there's an obligation, and we don't think it's an error
16 if the judge doesn't do that.

17 CHIEF JUSTICE ROBERTS: What type of
18 strategic reason are you talking about?

19 MR. MARTINEZ: Well, I think there -- there
20 could be a couple of them. In this case, for example,
21 the -- the original indictment was undoubtedly filed
22 within the limitations period. Now that indictment was
23 superseded. But if the defendant had raised in a
24 pretrial motion a motion saying, you know, that the
25 superseded indictment's out of time because it doesn't

1 relate back and he had won, the effect of that would
2 have been just to resurrect the original indictment
3 which had never been dismissed.

4 And so if he had actually raised this before
5 trial and he had succeeded on his statute-of-limitations
6 challenge to the superseding indictment, we would have
7 just been back in the world where the original
8 indictment applied. And, as the Court has noted, the
9 original indictment was somewhat broader than -- than
10 the superseding indictment.

11 And so that might have been a good reason.

12 In another case, the -- there may be
13 circumstances in which a defendant's
14 statute-of-limitations defense will be in contradiction
15 to his defense of innocence. You know, it's one thing
16 to say, I was in Hawaii when the crime was committed,
17 and it's another thing to say, I committed the crime on
18 January 1st and not on, you know, March 15th.

19 And so there may -- you know, the defendant
20 might -- might look at those arguments and decide he's
21 going to pick the -- the stronger horse, and he might
22 decide he doesn't want to raise the
23 statute-of-limitations defense for that reason.

24 JUSTICE SOTOMAYOR: Could you summarize for
25 me your position on three arguments he made.

1 MR. MARTINEZ: Sure.

2 JUSTICE SOTOMAYOR: I -- I know the
3 jurisdictional one.

4 MR. MARTINEZ: Yes.

5 JUSTICE SOTOMAYOR: But then there's the --

6 MR. MARTINEZ: So --

7 JUSTICE SOTOMAYOR: -- the other two.

8 MR. MARTINEZ: So -- so on -- on his claim
9 for de novo review on appeal, we think that's
10 inconsistent with Rule 52(b), and we think that that
11 misreads Wood and Day, the habeas cases, because those
12 are really about the habeas context.

13 He makes another argument about Nguyen. We
14 don't think Nguyen is a -- a kind of all-season pass
15 for -- for ignoring Rule 52(b).

16 And then, finally, with respect to plain
17 error, we think there are two overriding arguments. The
18 first one is that we don't think there is an error here.
19 For there to be an error, we think the statute of
20 limitations would need to be something that the -- the
21 trial court is supposed to have an obligation to sort
22 out. We don't think the trial court has that obligation
23 because this Court's cases say that -- that the statute
24 of limitations is an affirmative defense that has to be
25 raised by the defendant.

1 Even if you disagree with us on that, we
2 think that -- that Cook makes clear that, whenever a
3 statute-of-limitations defense is raised in a case, the
4 government has to have the opportunity to reply and give
5 evidence. And what that means is that, if the defense
6 is not raised, that the government has not even had the
7 opportunity to explain what evidence it would have
8 brought in, what that means is that the record as it
9 stands, the existing record, is not sufficient to
10 diagnose an error because you would have to essentially
11 finishing out, well, could the government have
12 responded? You know, would they have argued that --
13 that there was tolling of the statute of limitations?
14 Would they have introduced a different set of evidence?
15 You would have to, essentially, reimagine how the trial
16 would have gone if -- if the defense has been raised at
17 the appropriate time.

18 And if you're trying to reimagine that,
19 that's another way of saying the error is not plain on
20 the --

21 JUSTICE SOTOMAYOR: So what would you argue
22 if this was brought up on habeas?

23 MR. MARTINEZ: On habeas?

24 JUSTICE SOTOMAYOR: Let's assume counsel
25 comes in and says, I just didn't notice it.

1 MR. MARTINEZ: In this particular case, Your
2 Honor?

3 JUSTICE SOTOMAYOR: Yes. And -- and it's
4 very clear -- and the evidence was super clear that this
5 was past the statute of limitations.

6 I don't want to get into the facts of this
7 case.

8 MR. MARTINEZ: Well, I -- I -- I think -- I
9 think -- in some cases, I think it would be fair for --
10 for the parties to litigate why the defense wasn't
11 raised. So if there -- if it looked like there may have
12 been a strategic reason, such as there may have been in
13 this case, then the parties could litigate that.

14 I think as well, if there were -- if there
15 were no dispute about the merits, then I think that
16 would be a case in which a habeas relief may well be
17 appropriate if -- if the party -- if the defendant could
18 establish the requirements of ineffective assistance of
19 counsel.

20 We ask the Court to defer.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Four minutes, Mr. Jaffe.

23 REBUTTAL ARGUMENT OF ERIK S. JAFFE

24 ON BEHALF OF THE PETITIONER

25 MR. JAFFE: On the issue of whether or not

1 the jury instructions are binding, several points:

2 First of all, the confusion persists to this
3 day. Just as Justice Alito is pointing out that it's
4 very difficult to see the difference between
5 unauthorized and exceeding authorized access, that too
6 would have infected the jury. We could not prove it
7 sufficiently to show prejudice, but they cannot prove it
8 sufficiently to show harmlessness or inevitability of a
9 conviction had you not so instructed them.

10 Second of all, I believe that Jackson v.
11 Virginia talks from a jury-centric perspective. The
12 issue is not the statute. The issue is whether a
13 rational jury could have done what they did. And that
14 only works if you look at the instructions. It does not
15 work if you look at some hypothetical statute that they
16 didn't think they were applying. They thought they were
17 doing something different.

18 Third, their objection that we -- we
19 acknowledged that this was only about unauthorized
20 access is curious because he cites the appellate stuff
21 where there was new counsel, yet his own side's briefs
22 at the trial level recognized that trial counsel was
23 confused.

24 Yes, after that confusion was resolved
25 post-verdict, we argued. Okay. The government

1 abandoned it. That's fine. We absolutely argued that.

2 But at trial the harm was already done.

3 They confused themselves, they confused the jury, and
4 apparently confused the judge.

5 Third, it seems to me that the phrase
6 "unauthorized access" is not actually even in the
7 statute, which just goes to my point that there would be
8 confusion as to access without authorization and access
9 exceeding authorization. Both could have theoretically
10 been part of the rubric of unauthorized access. Neither
11 would be authorized there.

12 The -- moving onto the -- well, I guess the
13 last thing I'd say is every court to consider the
14 question, if this had been in the original indictment
15 where it also said "and" and in the jury instructions,
16 every court to consider this issue, including the Fifth
17 Circuit below, including the First Circuit, would have
18 held the government to it.

19 I don't think the government denies that.
20 They just say if it's in the indictment alone they can
21 do either/or. But if it's in the indictment and in the
22 instructions, they concede that the so-called law of the
23 case is binding.

24 The easy way for this Court to --

25 JUSTICE GINSBURG: The law of the

1 case you -- you are -- you are asserting that, if there
2 is a mistake but it's the law of the case, that applies
3 on appeal. As -- and I thought that law of the case
4 applied to the same court, different stages of
5 litigation, not that a -- a court of appeals has to
6 perpetuate a trial court error.

7 MR. JAFFE: Law of the case is a terrible
8 name. We unfortunately didn't come up with it. The
9 government -- we both agree that it's not an accurate
10 descriptor. It's just the phrase that's been used in
11 all the cases. At the end of the day, the issue is are
12 the instructions binding at the sufficiency stage
13 whatever court you're in? That's really the issue. The
14 law-of-the-case cases don't apply because they're
15 misnamed.

16 Turning to the statute of limitations, what
17 I'd say is this: There is error when something is
18 contrary to law whether or not it was the judge's
19 obligation to raise that. The Apprendi -- the
20 post-Apprendi cases are the best examples of this. The
21 judge is applying pre-Apprendi law. It did not make a
22 mistake. We're not expected to anticipate Apprendi.
23 Yet on appeal those cases were considered erroneous
24 because this Court adopted Apprendi.

25 Again, it is not about whether you made an

1 objection or whether the Court should have thought of it
2 themselves. It is about the merits of the result, and
3 in this instance, we claim the statute of limitations
4 was violated. That is the error regardless of who
5 needed to raise it.

6 Talking about raising the issue: Again,
7 calling the statute of limitations the affirmative
8 defense is a little misleading. It is not an
9 affirmative defense. One has to plead it. One -- but
10 the government has to actually prove that they satisfy
11 it. It is a hybrid kind of creature, and Cook and those
12 cases deal with pleading because they wanted the
13 government to have the opportunity to respond.

14 We do not disagree. The government should
15 have the opportunity to respond, and in the First
16 Circuit, the Seventh Circuit, and the Sixth Circuit, if
17 there is some need for evidentiary submissions, they
18 just remand it. Get it done more quickly with the court
19 that actually heard the case, which makes a lot more
20 sense than waiting till habeas.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 The case is submitted.

23 MR. JAFFE: Thank you.

24 (Whereupon, at 11:06 a.m., the case in the
25 above-entitled matter was submitted.)

<u>A</u>				
A-10 40:21	18:19	37:16	36:9 38:17	31:21
a.m 1:13 3:2	acquittal 16:7	allege 54:14	57:8 63:4	asking 9:8 17:15
64:24	16:12 33:7	alleged 23:21	applies 44:16	40:11,12 53:21
abandoned	40:12	34:2 38:13	48:23 55:24	asserting 63:1
30:21,23,24	acquittals 30:5	39:10	63:2	assessing 34:14
62:1	44:2	alleges 50:14	apply 26:20 36:8	35:9
ability 52:2	acquitted 32:4	alleging 54:13	48:8,24 55:25	assistance 21:1
able 32:7 52:13	actionable 42:2	allow 20:7 40:10	63:14	50:21 60:18
52:14 54:3	acts 19:4	52:7	applying 61:16	assistance-of-c...
above-entitled	actual 40:14,15	allowed 29:3,5	63:21	19:21
1:11 64:25	43:21,23	alter 33:16	appreciate 54:7	Assistant 1:17
absolutely 15:14	add 37:4 40:16	alternative 55:9	Apprendi 63:19	assume 23:8
62:1	55:3	analysis 29:11	63:22,24	41:11 42:4,7
abstract 17:1	added 4:21	35:15,16 48:9	appropriate	59:24
accept 23:3	15:12	analyze 13:15	42:22 51:19	assumed 8:16,17
acceptable 17:3	addition 52:16	40:5,6	59:17 60:17	8:18
accepted 47:14	additional 39:20	and/or 15:6	arguable 25:2	assuming 11:23
accepting 24:4	39:25	answer 16:25	argue 6:10 12:7	18:21
accepts 6:11	addressed 32:16	21:23	19:10 59:21	assumption 42:4
15:25	adds 7:2	anticipate 63:22	argued 5:21 6:1	astounding
access 7:7,7,9,9	adhere 26:14	anybody 13:17	40:19 59:12	35:10,12
7:10,11,11,14	admittedly 29:1	14:1	61:25 62:1	attention 11:22
7:16,17,19,20	adopt 28:11	anyway 14:23	arguing 13:7,9	authority 5:19
10:3,4 30:11	adopted 63:24	44:24	13:11 17:20	6:3,8,12,19
30:14,22 31:3	affirmative	apparently 62:4	22:10	authorization
31:9,22 32:24	50:11 58:24	appeal 19:24	argument 1:12	9:23 33:15,19
33:1,4,11,14	64:7,9	21:6 22:24	2:2,5,8 3:3,7	62:8,9
33:14,15,20,23	affirmatively	25:14 29:4,4	5:16,17 8:22	authorized 7:7
34:1,6 38:12	29:12,14	32:7 39:15	10:9,13,13	7:16,19,19
38:13 39:11,12	ago 47:9	41:7 46:7 49:3	11:20 16:20	10:4 30:10,22
39:13,16 61:5	agree 8:14 9:7	49:13 50:23,25	17:6 19:13	31:22 32:23
61:20 62:6,8,8	19:17 32:18	51:5 53:7	20:15,19 21:1	33:1,11,14
62:10	36:5 44:25	54:16 58:9	22:8,9 24:4,13	39:11 41:19
accessing 9:22	63:9	63:3,23	24:24 25:3,5	61:5 62:11
accessor 33:16	agreed 5:12 8:6	appeals 40:20	25:25 29:20	avoid 27:8
accomplishing	38:19	40:20,22,23	31:5,6,7,7	aware 15:23
8:4	Alito 6:14,17,24	53:6,10 55:5	34:10 36:7	
accord 20:5	12:14 16:2,19	63:5	39:15 45:13	<u>B</u>
account 48:20	17:13,17 18:6	APPEARAN...	46:5,8,22	B 10:14,15,17
accurate 5:9,11	32:9,22 33:8	1:14	47:14,14 58:13	12:15,22 13:2
63:9	34:7 47:20	appellate 48:5	60:23	13:3 38:20,21
accurately 11:18	48:25 49:24	61:20	arguments	38:24,25 39:2
acknowledged	53:6 61:3	appendix 33:12	20:19 44:12	41:20,21,21,24
61:19	Alito's 11:24	40:21	45:8,10 46:10	42:2,6,16,25
acknowledges	12:3	applicable 49:12	49:8 57:20,25	43:1 47:2
	all-season 58:14	application 20:3	58:17	back 8:21 10:14
	allegations 19:2	applied 17:11	asked 7:24	12:5 23:23

<p>26:4 36:25 43:10 45:6 57:1,7 bar 19:18,22 23:13 56:3 barriers 48:24 49:19 based 25:18 32:4 baseline 3:15 basically 21:11 45:9 basis 5:15 52:17 Bear 51:7 beginning 31:6 begs 11:15 behalf 1:15,19 2:4,7,10 3:8 29:21 60:24 believe 8:17 12:2 17:1,23 19:8 24:7 27:5 28:19,22 61:10 benefit 5:7 41:1 Benes 27:25 28:19 best 11:17 63:20 better 18:15 19:25 31:15 53:15 55:8 beyond 4:1 9:21 10:15 33:3 biased 41:3,6 Biddinger 47:8 binding 13:11 61:1 62:23 63:12 bit 11:15 37:24 blocks 49:13 blue 20:24 Bowles 26:8,12 26:15 Boyle 36:24 43:15 branch 38:14 break 41:10 BREYER 12:12</p>	<p>12:20 13:17 14:7,11 54:11 54:19 55:2 brief 8:11 20:24 34:12 42:21 briefed 8:13 briefing 30:19 briefs 39:15 61:21 bring 23:18 24:16 29:4 55:20,21 bringing 28:3 brings 44:5 broader 23:4,5 33:9 39:10 57:9 brought 8:16 24:17 25:17 59:8,22 building 7:10,12 bunch 23:11 49:18 burden 5:5 12:8 12:9 18:11 21:25 22:2 46:14,19 50:12 burdens 22:3</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 3:1 cabin 17:23 26:1 cabined 20:21 20:22 call 22:20 calling 64:7 carry 43:16 44:14 case 3:4,11,17 3:25 4:23 5:16 5:17,22 6:20 7:25 10:6 11:8 12:5 14:7,9 15:16,19 16:23 18:5,8,18 21:3 21:5,25 22:4 23:2 26:7,9</p>	<p>27:13,25 28:23 29:6,8 30:11 30:13,17,19,19 31:8,9 32:8 33:24 35:13 36:13 38:5,7,9 39:7,8,16,23 40:5,6,6,9,17 40:17 41:1,19 42:12,16,22 43:4 44:4 45:14,16,18 46:15,22,25 47:11,19,25 48:11 50:13 51:13,15,21,24 52:6,24 53:20 54:1 56:20 57:12 59:3 60:1,7,13,16 62:23 63:1,2,3 63:7 64:19,22 64:24 cases 8:25 11:20 19:25 20:23 23:11 24:8 25:25 26:17 27:20 28:23 30:4 35:4 36:22 39:19 43:20 48:10,19 49:16,22 54:2 54:16 55:9 58:11,23 60:9 63:11,14,20,23 64:12 categorization 25:21 cause 39:20,25 ceased 33:5 ceiling 13:21,25 certain 17:22 28:4 37:18 certainly 6:1 12:7 16:16 56:14 cetera 7:5</p>	<p>challenge 57:6 challenged 34:3 chance 25:4,17 change 31:16,18 changed 39:9 charge 9:17 14:11,12 19:2 30:8 31:11 33:23 38:4,19 38:25 39:6 49:3 charged 10:25 11:4 12:14,16 12:21 15:5,5 15:11 19:4 32:3 35:6,24 37:13 38:21 39:13 41:11 charges 10:24 charging 31:19 32:23 Chief 3:3,9 19:12 21:13,18 21:22 24:23 25:11 29:18,22 39:18,24 40:4 56:17 60:21 64:21 circuit 4:17 8:5 8:6,17,18 15:24 30:20 31:5 54:20 62:17,17 64:16 64:16,16 circuits 15:24 circumstance 33:18 circumstances 57:13 cite 20:23 25:25 cites 16:24 61:20 civil 27:21 28:16 30:4 36:9,21 46:22 claim 19:21 26:4 28:4 44:6 58:8 64:3</p>	<p>claim-processi... 24:6 46:24 claimed 48:5 claims 25:8 54:21 clarify 10:24 36:8 clarity 28:2 clear 5:12 6:22 6:24 10:1 27:14 30:13,20 37:17 38:12 42:1 43:13,15 48:3 50:13 53:18 55:3 59:2 60:4,4 clearest 8:14 clearly 26:10 clerical 44:10 client 18:14 25:13 close 15:17 closely 32:17 closing 19:11 co-counsel 53:1 code 38:11 collateral 54:21 combined 9:20 come 9:13 10:16 15:24 54:3 63:8 comes 10:6,9 14:5 19:18 54:12,25 59:25 comity 49:1 comments 11:24 12:3 commit 30:13,22 31:2 34:1 39:11 committed 4:2 57:16,17 committing 32:21 42:17 compared 23:21 completely 46:15</p>
--	---	---	---	--

compliance 46:19 52:4,10	consequently 29:7	convicts 16:6	51:24 52:5,23	58:11 61:3
complicated 42:23	consider 15:25 62:13,16	Cook 47:8 50:13	52:25 53:6,10	63:11
complies 22:2	considerable 11:25	52:5,6 59:2	54:20 55:4	de 46:5 58:9
component 30:11	considered 63:23	64:11	56:8 57:8	deal 28:22 46:21
computer 9:22 33:14,16,20	consistent 30:2 32:14	correct 4:4 9:1,2 18:24 22:11,14	58:21,22 60:20	64:12
concede 11:17 32:10 41:17	conspiracy 6:23 19:3 30:13,22	26:2 31:11	62:13,16,24	dealing 27:21
42:5 62:22	31:1,2 34:1	53:16	63:4,5,6,13,24	decide 7:24 51:4
concedes 19:20	38:13,23 39:1	corrected 19:1	64:1,18	54:5 55:10
conceding 15:10 15:10	39:10,12	correctly 35:5	court's 8:9	57:20,22
concern 54:8	constitute 6:12	counsel 18:17,20	26:11 28:7	decided 24:15
concerning 3:11	contains 37:16	18:22 19:8,12	32:6 43:14	decision 8:24
concerns 49:11	content 8:7 23:3	19:24 24:20	45:19 47:8	17:2,3 25:19
56:12	context 28:12	29:18 30:17	48:9,17 58:23	32:6 47:9
conclude 23:16 23:17	29:1,2 36:10	31:4 39:14,18	courts 32:16	decisions 43:14
conclusion 5:25 6:3 9:14 14:16	36:21 43:16,17	50:21 54:14,17	34:13 55:22	48:17
16:17	47:21 48:7,17	56:5 59:24	crazy 16:9	declined 8:11
conducted 35:16	48:20 49:1	60:19,21 61:21	create 55:22	default 49:20
conducting 35:15	51:12 58:12	61:22 64:21	creature 64:11	defendant 3:18
conference 31:20	continued 19:5 19:10	count 16:4,5,7	crime 4:2 8:4	4:1 16:6,11
conflated 24:8	continuing 26:18	16:10,12,14	14:12 15:13	21:5 22:1
confused 6:20 6:20 11:21	contradiction 57:14	17:3,3,4,8 18:2	23:21 32:21	37:12 38:4
12:6,7 18:17	contradictory 46:15	18:7,8,8 31:1	36:19 37:13	39:21 41:1,4
18:17,22 30:17	contradicts 30:3	counts 16:6,23	40:14 42:17	43:21 44:5
61:23 62:3,3,4	contrary 24:10 48:13,14 63:18	34:5	43:22,23 50:14	46:14 47:12
confusion 4:18	converse 44:3	couple 47:24	57:16,17	48:4 50:7,12
12:11 19:8	converts 7:4	51:10 56:20	criminal 7:1	51:19,20 53:2
33:25 40:18,19	convict 10:14 16:4	course 11:6 18:3	27:21 28:12,14	53:4,5 56:23
43:7,24 55:22	convicted 6:7 9:17,18,20	33:21 34:4	35:18 46:25	57:19 58:25
61:2,24 62:8	43:8 44:5	56:2,2	48:4,21 49:3,4	60:17
Congress 7:1	conviction 11:3 40:10 49:5	court 1:1,12 3:10 5:3,4 7:17	49:7	defendant's
Congress's 28:2	61:9	8:2,16 15:18	critical 3:17	44:11 49:2
conjunctive 39:6	convictions 34:4 48:22	16:9,22 17:7	11:22	57:13
consequence 28:5		17:16 19:9,17	cross 17:4	defendants 30:5
consequences 3:12 28:8 32:1		19:19 21:15,17	curious 61:20	49:7
		22:9 23:4	cut 26:4 27:18	defending 13:11
		26:13,21 28:3		defense 23:23,24
		28:14 29:4,23	D	46:14 47:11
		30:3 35:13,14	D 3:1	50:2,11,17
		36:9,20 37:14	D.C 1:8,15,18	51:18,22 52:4
		37:17 40:20,20	da-da-da 13:20	52:11 56:5,6
		40:22,23 45:7	damning 40:2	56:10 57:14,15
		45:11 46:12,18	date 23:20,21	57:23 58:24
		47:6,7,16	32:25 33:1,4	59:3,5,16
		48:11 49:21,23	day 17:24 25:10	60:10 64:8,9
		50:1,13 51:13	29:7,7 31:20	defenses 24:25
			48:11,18 49:16	53:4
			51:8 52:24	defer 60:20

deficiency 35:9	51:5 52:12	easiest 22:18	erode 55:11	53:22 59:5,7
defined 35:18	53:7 54:15	28:22	erroneous 11:10	59:14 60:4
36:19	directed 28:6	easy 55:10 62:24	13:5,10 30:1	evidentiary
defines 33:11	directly 48:1	effect 30:5 34:10	31:20 32:10	64:17
delay 55:4	disagree 6:9	40:25 43:20	40:24 63:23	example 10:23
deliberations	22:23 59:1	57:1	erroneously	16:24 21:25
3:22	64:14	efficient 20:1	14:20	39:25 56:20
demonstrate 5:1	disagrees 8:6	either 12:10	error 4:25 5:23	examples 63:20
44:22	discrete 8:3,5,6	14:13	13:4 20:4	exceed 5:18 6:8
demurer 52:8	8:18 32:11,14	either/or 62:21	22:16,17,22	6:23 39:11
denies 62:19	discusses 28:20	element 11:22	23:9,16 24:9,9	exceeded 6:3
Department	discussing 15:20	15:12 29:25	24:15,15,17,22	7:19
1:18	discussion 40:3	32:5 37:4	25:22 34:11	exceeding 5:13
deprive 52:8	dismissed 52:8	39:20,25 42:8	36:14,15,16	6:12,19 7:7,15
depth 28:20	57:3	elements 4:21	40:7,7,24 41:7	8:3 9:17 10:3
describing 32:12	dispute 8:3	8:7,19 35:17	44:10,13 45:1	19:5,10 30:10
description	32:24 33:25	36:18 40:14,15	45:4,15,20,22	30:22 31:22
37:19	36:17 60:15	43:21,23	48:5 50:7,8,10	32:23 33:11
descriptor 63:10	disregard 5:4	embedded 54:8	52:18 53:19	41:18 61:5
designed 44:1,1	dissented 51:7	embezzles 7:3	55:14,17,19,21	62:9
desire 48:19,21	distinct 7:5	emphasize 48:18	56:15 58:17,18	exceeds 33:13
48:22	16:23 43:14	emphasized	58:19 59:10,19	exception 21:12
despite 16:13	45:9	31:8 48:11	63:6,17 64:4	21:14,23,24
40:12	distinction	employed 33:5	ESQ 1:15,17 2:3	22:4 54:2,25
determine 3:18	17:23 26:3	employee 7:10	2:6,9	55:24,24
develop 54:4	distinctly 8:20	7:11 33:2,5,6	essentially 32:20	exceptions 54:23
developed 51:12	distinguish 10:3	employee's	36:9,11,21	exclusive 48:4
51:16	distinguished	32:25	59:10,15	exhaustion
diagnose 59:10	20:18	employer 33:2	establish 47:17	49:20
difference 7:6	district 50:1	employment	47:18 52:3,10	existing 51:15
16:20 17:18,18	doctrine 16:1	32:25	60:18	53:17,20 59:9
49:10 51:11	document 37:15	enacts 7:1	establishing	exists 20:6
61:4	doing 13:16	encourage 5:18	46:19	exorbitant 26:5
different 4:8	19:23,23,24	encouraged 6:7	et 7:5	expected 63:22
12:1 13:15	20:1 61:17	6:10	evaluated 3:20	expense 51:2
16:19 21:8	doubt 3:25 4:1,4	encourages 25:1	Evans 32:6	explain 14:15
24:13 28:11,15	9:22 10:15	ended 32:25	event 53:9	59:7
30:25 31:24	14:18 17:12	33:2	evidence 3:16	explanation
32:12,20 36:12	33:4	enforce 14:17,18	4:5 5:24 6:22	53:12,22
37:16 38:6	drawn 48:10	entirely 4:4 8:11	10:18 11:2	explicit 35:17
42:17,20 59:14	driving 48:19	16:16	14:10,12,22	expressly 27:7
61:17 63:4	due 43:12	entitled 16:6,12	15:4,20 16:4,4	28:6 35:13
differently	duty 45:12	33:6,17	16:5,13 29:25	40:22
27:11 53:23		equally 44:16	32:5 34:2,15	extend 18:1
difficult 61:4	E	equivalent 18:8	35:9 40:1,2,15	27:11
direct 19:24	E 2:1 3:1,1	ERIK 1:15 2:3,9	41:18 42:6,7	extent 47:7
49:2,13 50:25	earlier 50:9	3:7 60:23	43:22 52:3,9	extra 13:2 29:25

32:5 37:4 42:8 42:8 extracts 7:4	54:16 finding 53:3 fine 12:22 25:4 62:1 finish 6:17 31:9 39:17 finishing 59:11 first 3:4 4:15 7:8 9:19 21:5 30:7 33:19 34:13,19 34:24 36:7 44:18 45:10 46:6,11 51:18 52:21 58:18 61:2 62:17 64:15 fit 50:3,5 five 23:22 24:17 flawed 50:17 flipped 29:1 focus 9:3 40:1 focuses 8:23 follow 20:13 26:10 follow-on 26:17 followed 27:25 footnote 8:10 35:14 forfeited 19:18 28:25 forfeiture 22:10 22:12 43:15 formal 17:18,23 19:1 54:9,11 formality 17:22 forth 4:2 fortiori 29:8 found 4:1 9:21 11:6,17 12:15 12:17 14:23 15:11 22:9 40:13 41:20,21 43:20 Four 60:22 four-prong 48:6 framework 3:19 3:20	frankly 36:1 friend 30:15 44:22 front 48:16 frozen 52:13 function 37:25 fundamental 51:17 further 28:20 29:10 55:4 furthest 18:1	frankly 36:1 friend 30:15 44:22 front 48:16 frozen 52:13 function 37:25 fundamental 51:17 further 28:20 29:10 55:4 furthest 18:1	51:20 54:24 55:22,23 57:21 good 17:25 25:12 29:8 57:11 gotten 22:25 govern 48:1 governing 49:18 government 3:15 5:4,17 6:1 8:2,17 10:10 11:1 12:8 13:13,14 15:12 16:24 18:18,21 18:24 19:10,20 22:3,23 23:17 23:23 29:2,11 30:7,21 31:8 31:10 37:21 38:2,19,20,25 39:5 43:6 44:4 46:17 47:3,16 52:2,9 53:10 53:12,21 54:3 59:4,6,11 61:25 62:18,19 63:9 64:10,13 64:14 government's 6:13,18 10:9 27:24 28:17 governs 47:25 granted 20:24 green 14:21,22 14:23 15:1 ground 26:9 grounds 13:15 guess 25:6 37:23 55:4 62:12 guilty 3:18 10:15,17,19 13:19 30:5 43:21 guy 14:1	20:5,16,19,23 28:25 29:2,12 47:22 48:1,7 48:10,16,20,24 49:1,19,25 50:21 51:3,12 51:15 52:14 53:15 55:21 58:11,12 59:22 59:23 60:16 64:20 handle 55:8 happen 12:9 21:8 happened 37:18 hard 24:4 hard-and-fast 55:12 harder 43:5 harm 14:2 62:2 harmful 12:25 13:5,10 harmless 5:23 12:24 34:11 harmlessness 5:6 10:9,12 61:8 harmonize 48:22 49:22 hat 14:21,22,23 15:1,1 Hawaii 57:16 hear 3:3 19:13 heard 64:19 held 8:5 15:17 26:13 28:24 36:21 62:18 help 10:24 higher 25:9,15 highlighted 40:3 hinting 50:9 holding 17:14 48:12 Honor 4:3 6:10 8:1 9:8 19:15 20:8 26:25 31:13 35:4,12
		G			
		G 3:1 gamesmanship 25:1 general 1:18 15:25 22:4 32:15 generally 27:14 27:22 34:14 52:21 getting 24:8 Ginsburg 9:18 9:21 18:13,23 21:2 22:5 25:20,24 26:3 26:12,22 27:2 27:4 30:6 31:10 38:18 56:2 62:25 give 10:20,23 29:10 30:5 37:12 45:6,7 52:9 59:4 given 16:24 17:1 go 8:10,21 14:1 14:2 17:7 23:9 43:10 47:15 51:1 53:2 55:6 goes 12:5 28:2 62:7 going 22:15 26:13 35:5 36:25 37:15 43:19 49:7 50:20 51:3,3	G 3:1 gamesmanship 25:1 general 1:18 15:25 22:4 32:15 generally 27:14 27:22 34:14 52:21 getting 24:8 Ginsburg 9:18 9:21 18:13,23 21:2 22:5 25:20,24 26:3 26:12,22 27:2 27:4 30:6 31:10 38:18 56:2 62:25 give 10:20,23 29:10 30:5 37:12 45:6,7 52:9 59:4 given 16:24 17:1 go 8:10,21 14:1 14:2 17:7 23:9 43:10 47:15 51:1 53:2 55:6 goes 12:5 28:2 62:7 going 22:15 26:13 35:5 36:25 37:15 43:19 49:7 50:20 51:3,3		
			H		
			habeas 19:18		

<p>51:9 53:18 60:2 Honors 43:10 horse 57:21 hurt 14:1 hybrid 64:11 hypo 11:12 hypothesized 11:9 hypothesizing 38:8 40:18 hypothetical 9:3 18:6,7,9 42:24 53:18 61:15</p> <hr/> <p style="text-align: center;">I</p> <p>IAC 54:21 idea 46:16 identified 37:22 identifies 38:11 ignore 5:4 ignoring 58:15 II 16:5,7,10 18:7 18:8 34:5 III 34:5 imagine 39:19 39:23 implication 11:7 27:9 implications 16:17 17:24 important 39:7 47:24 51:17,18 52:1,17 inadequate 50:21 54:14 inadvertently 29:2 inapplicable 11:25 inclined 17:7 include 13:10 19:5 30:10 31:25 included 19:5 31:22 includes 37:20</p>	<p>including 51:20 52:24 62:16,17 inconsistent 58:10 incorrectly 32:3 incumbent 13:14 incur 51:2 independent 8:4 8:19 indicted 5:22 indictment 4:2 12:16,16 14:13 15:7,12,22 16:3 18:24 19:6 23:20 29:15 30:8 32:23 34:5 35:20,23 37:2 37:2,4,12,15 37:18,25 38:1 38:7,9,19,21 38:23 39:8,9 50:14,16 52:7 53:9 56:21,22 57:2,6,8,9,10 62:14,20,21 indictment's 56:25 indictments 30:12,23 indirectly 4:24 individuals 9:9 ineffective 19:21 21:1 60:18 inevitability 61:8 inevitable 19:17 infect 24:14 infected 61:6 information 33:16 37:20 inherently 50:16 initial 20:7 innocence 14:18 17:11 57:15 inquiry 8:23 9:1</p>	<p>9:2 instance 64:3 instances 21:9 21:10 54:13 instruct 10:6 instructed 13:19 14:20 61:9 instruction 5:12 10:2 11:5,10 13:2,12,13,16 14:8,19 15:21 30:1,11 31:23 32:10 39:19 40:24,25 41:14 41:15 42:10,18 instructional 36:14,15 40:7 44:14 instructions 3:14 5:5 9:4,12 9:16 30:25 31:1,25 34:14 35:1,2,5,8 36:11 37:10 39:2 43:14,16 44:4,8 61:1,14 62:15,22 63:12 insufficient 32:5 42:3 intentional 22:22,24 25:19 intentionally 9:22 10:25 11:1 interest 49:1,2,8 interested 51:24 interesting 42:13 interfere 56:12 interpretive 28:11 introduce 52:3 introduced 47:11 59:14 introducing 46:14 invitation 8:11</p>	<p>invited 8:10 invoking 46:18 involve 24:9 40:18 involved 21:4 involving 14:7,9 irrational 16:10 issue 3:13 4:12 4:13 7:23,23 8:12,15 12:3 15:25 30:4 31:21 36:13,17 44:19 50:12 60:25 61:12,12 62:16 63:11,13 64:6 issues 20:22</p> <hr/> <p style="text-align: center;">J</p> <p>Jackson 9:1 14:5,14 16:17 17:10,24,25 35:13,14 36:20 43:12 61:10 Jaffe 1:15 2:3,9 3:6,7,9 4:3,8 4:11,13,17,24 5:10,20,24 6:4 6:9,16,18 8:1 9:7,20 10:1,8 10:20,23 11:14 12:2,19 13:9 14:4,9,14 15:14,18,23 16:16,22 17:15 17:21 18:4,11 18:16 19:1,15 20:8,12,14,17 21:2,7,16,19 21:21,24 22:11 22:14,17,20 23:2,7,15 24:2 24:7 25:6,14 25:23 26:2,7 26:15,25 27:3 27:5,20 28:13 60:22,23,25</p>	<p>63:7 64:23 jail 25:18 51:2 January 57:18 judge 13:23 31:11,11 52:22 55:5,16 56:4 56:11,14,16 62:4 63:21 judge's 63:18 judgment 16:7 16:12 33:6 jurisdiction 26:1 26:5 28:21 46:18 jurisdictional 23:13,14,16 24:10,11,13,25 25:21,21,24 26:4,24 27:15 27:16 44:23,24 45:2,4,10,24 46:6,12,16 47:14,17 58:3 jurisprudence 54:24 jury 3:14,18,19 3:25 8:24,24 9:3,3,5,9,10,11 9:11,12,13,15 9:16 10:6,11 10:13 11:5,16 11:20 12:6,7 13:2,12,13,18 14:8,15,20,25 15:3,5,11,21 16:5,9,10 17:2 17:7 30:1,11 30:25 31:24 32:3,3 34:14 35:8 36:10 39:2 40:1,13 40:24,25 41:13 41:15 43:8,13 43:16,20 61:1 61:6,13 62:3 62:15 jury-centric</p>
--	--	---	---	---

<p>61:11 Justice 1:18 3:3 3:9,24 4:7,9,12 4:14,22 5:8,15 5:21 6:2,5,14 6:17,24 8:21 9:18,21 10:5 10:12,21 11:8 11:19,24 12:3 12:12,14,20 13:17 14:7,11 15:2,16,19 16:2,19 17:13 17:17 18:3,5,6 18:13,23 19:12 20:2,10,13,15 21:2,13,15,17 21:18,20,22 22:5,7,12,15 22:19,21 23:6 23:8 24:1,3,23 25:11,20,24 26:3,12,22 27:2,4,12 28:10 29:18,22 30:6 31:10 32:9,22 33:8 34:7,9,19,21 34:24 35:7,19 35:25 36:23,25 37:8,23 38:8 38:18 39:18,24 40:4 41:9,15 41:17,23 42:2 42:13,24 43:2 44:3,20 45:14 45:18,25 46:3 46:21 47:20 48:25 49:24 50:8,19,25 51:7 53:6,24 54:11,19 55:2 56:2,17 57:24 58:2,5,7 59:21 59:24 60:3,21 61:3 62:25 64:21</p>	<hr/> <p>K</p> <hr/> <p>Kagan 8:21 27:12 28:10 35:19 36:23,25 37:8,23 38:8 44:3 53:24 Kendall 31:4 KENNEDY 11:8,19 34:9 34:19,21,24 35:7,25 key 56:1 killed 10:25 13:19 kind 40:18 58:14 64:11 kinds 54:12 know 7:2 10:16 12:17 14:24 15:3 25:3 31:14 38:3,16 40:23 41:6,20 42:12 44:20 45:1 51:18 53:18 54:15,20 56:10,24 57:15 57:18,19 58:2 59:12 knowingly 10:25 11:2 knows 37:14</p> <hr/> <p>L</p> <hr/> <p>laid 15:6 language 27:16 28:2,6 31:20 31:22,25 languish 51:2 late 53:11 law 27:8 29:8 35:18 38:16 62:22,25 63:2 63:3,7,18,21 law-of-the-case 16:1 63:14 lawful 7:10 lawyer 25:7,18</p>	<p>lawyers 34:17 legal 42:20 49:10 legally 43:9 lengthy 37:15 lenity 47:1 let's 7:8,9,16 14:5 23:8,9 32:24 37:4 41:11 42:3 55:11,11 59:24 level 6:21 17:21 61:22 limit 27:24 28:17,18 limitation 26:11 limitations 19:13,16,18,22 20:17,22 21:1 21:3,4,6 22:2 22:25 23:12 24:12 26:23 27:11,14,18,22 28:15,16,24 29:3,12,14 46:13,16,20,23 47:10,18 48:23 49:17 50:11,15 50:22 52:10,24 53:8 56:6,22 58:20,24 59:13 60:5 63:16 64:3,7 limited 31:2 51:14 53:17 limiting 28:2 line 25:25 34:13 lines 24:8 literal 9:9 litigant's 28:18 litigants 55:23 litigate 60:10,13 litigated 12:4,4 50:18 litigating 55:23 litigation 63:5 little 37:24 64:8</p>	<p>logical 18:1 look 13:3 15:20 20:23 27:1 30:18 34:14,21 34:25 35:2,8 35:14,20,21,23 36:14,18 37:2 37:3,5,9 40:8 41:19 48:9 52:13,14,17 53:10 55:10 57:20 61:14,15 looked 60:11 looking 7:13 13:20,25 14:15 51:13 53:20 54:10 looks 7:18 26:17 53:11 lose 25:4 losing 25:16 lost 4:25 lot 7:2 20:3 37:14,16,16 55:22 64:19</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>main 8:22 majority 35:4 making 7:6,8,13 26:23 45:8 54:23 malpractice 25:8,11 man 25:18 manslaughter 11:4,6 March 57:18 Martinez 1:17 2:6 29:19,20 29:22 30:9 31:13 32:13 33:8 34:18,20 34:22 35:3,11 35:22 36:4,23 36:24 37:7,11 38:5,22 39:22</p>	<p>40:4 41:13,16 41:22,25 42:4 42:15 43:1,3 44:9 45:3,16 45:21 46:1,4 47:4,23 49:6 50:4,24 51:6,9 53:14 54:7,18 55:1,7 56:7,19 58:1,4,6,8 59:23 60:1,8 matter 1:11 4:8 20:5,6 37:5 46:13 47:10 54:9 64:25 McDonough 48:11 mean 13:1 18:14 20:11 25:2 37:20 41:2 45:11 46:17 54:1,11 meaning 27:8 means 8:4 19:3 33:14 48:4 59:5,8 meant 11:21 26:1 measured 29:25 44:7 measuring 3:16 mechanisms 19:3 meet 12:7,9 merely 20:19 24:11 25:19 26:8,19 28:3 28:17 merit 11:25 meritorious 19:22 20:25 49:9 merits 60:15 64:2 met 14:12 methods 32:11 MICHAEL 1:3</p>
---	--	---	---	---

middle 12:11 31:7	38:16	oh 35:1 43:1	8:25 9:5 19:3	36:18
Milyard 48:18	negative 25:16	okay 10:19	40:1,17 42:11	plain 4:25 13:4
mind 51:7	neither 12:11 62:10	12:17 13:21,22	51:24 53:8	22:16,17,22
mine 54:16	neutral 44:16	23:10 61:25	60:1	23:9,10,13,16
minute 31:19	never 31:21 57:3	Olano 12:10	particularly	23:22 24:2,5,9
minutes 60:22	new 40:10 61:21	48:7	24:25 27:7	24:15,21 25:22
misinstruction	Nguyen 58:13	once 29:6 52:11	40:2	45:1,4,15
18:10	58:14	operate 55:13	parties 19:16	55:17,21 58:16
misleading 64:8	night 7:12	opinion 34:12	31:19 36:15	59:19
misnamed 63:15	Ninth 8:4,18	34:16 36:3,5	42:21 60:10,13	plain-error 21:9
misread 4:19	non 24:11	opportunity	partly 45:4,5	24:19 25:9,15
misreads 58:11	normal 38:24	59:4,7 64:13	party 46:18	45:23 46:9
mistake 12:22	noted 57:8	64:15	60:17	50:3,5
13:24 25:19	notice 37:13	opposed 15:5,21	pass 58:14	play 18:21
31:12 32:1,2	38:1 52:22	23:12 27:21	People 54:13	plead 64:9
55:5 63:2,22	59:25	28:3	perfectly 17:6	pleading 64:12
mistakes 24:19	noticed 31:16	opposite 47:1	23:3	please 3:10
Monday 1:9	November 1:9	oral 1:11 2:2,5	period 9:23	29:23
morning 3:4	novo 46:5 58:9	3:7 29:20 31:5	27:11,22,23	plenty 16:3,13
motion 18:20		39:15	28:4,24 29:3	plus 4:9 10:14
50:2 56:24,24	O	order 24:15	56:22	10:15 41:20
moving 62:12	O 2:1 3:1	ordinary 54:1	perpetuate 63:6	point 3:17 5:3
murder 10:24	object 3:12	original 30:8	persists 61:2	9:15 12:8,13
11:3 13:19	12:23 13:4	39:9 56:21	person 7:13,16	17:25 19:14,23
Musacchio 1:3	18:10,11,13,16	57:2,7,9 62:14	7:18 11:1	20:7,21 21:11
3:4 32:4	44:5 48:6	origins 43:12	14:21,22 28:9	26:8 28:1 32:2
	objected 3:15	ors 5:12	perspective	34:3 36:1,1
N	objection 10:8	outside 50:15	61:11	40:16 43:18
N 2:1,1 3:1	13:3 29:12,15	52:13,15 53:20	petition 29:13	44:14 46:12
name 63:8	61:18 64:1	54:10	32:19 40:21	48:15 50:23
narrative 37:19	objects 13:24	overcome 27:17	47:22 48:2	52:6 62:7
narrower 39:12	obligation 52:25	overriding	Petitioner 1:4,16	point-of-counsel
narrowest 22:18	53:2,5 56:15	58:17	2:4,10 3:8	19:25
necessarily 4:20	58:21,22 63:19	overwhelming	29:13,24 30:18	pointed 4:17
7:5 50:16	obtain 33:15,17	34:2 42:6	31:21 32:19	30:16
necessary 11:11	48:5		34:3 40:11,19	pointing 61:3
11:12,14,15,16	obtained 33:5	P	41:2 42:19	points 38:16
need 8:9 14:2	obvious 44:10	P 3:1	45:22 60:24	61:1
23:4,15,16	50:8 55:5	page 2:2 32:19	Petitioner's	policy 49:11
24:10,14 28:21	obviously 30:1,6	33:12 34:11,13	30:16,21 31:4	portion 9:17,19
29:10 42:18	30:9 31:14	40:21	39:14 47:13	19:2
50:7 54:4,10	42:21 49:7	paralegal 53:1	phrase 62:5	pose 42:20
58:20 64:17	odd 33:7	part 4:23 19:8,9	63:10	posit 43:5
needed 14:21	offense 35:18	19:9 32:1	pick 57:21	position 9:11
64:5	37:20 38:10	48:12 62:10	piggyback 41:5	57:25
needs 23:17	53:8	partially 9:7	41:7	posits 18:7
		particular 3:19	place 7:12 33:19	possibility 11:23

<p>15:11 possible 43:8 54:15 possibly 9:13 post-Apprendi 63:20 post-verdict 61:25 potential 4:18 53:3 potentially 19:9 43:7 Powell 21:25 power 26:11 27:24 28:7,17 47:2 practical 43:18 54:8 practice 25:12 Praprotnik 36:24 43:15 pre-Apprendi 63:21 prejudice 5:1 12:8 39:20 61:7 prejudicial 40:9 prerogative 8:12 presentation 6:21 presented 7:23 7:25 12:5 44:18 presents 3:11 presumption 14:17 17:11 27:17 46:23 47:1,5 pretrial 56:24 pretty 26:8 55:10,12 primary 47:13 prior 8:25 19:6 26:14 probably 51:2 problem 12:18 12:20 13:1,2</p>	<p>14:24,25 15:2 56:13 problematic 25:1 procedural 49:19 proceedings 54:22 process 9:10 43:12 processing 26:4 produce 44:1,1 prohibition 26:19 prong 41:18 proof 22:2,3 proper 7:11 39:23 40:5 42:25 43:3 50:1 properly 17:11 proposed 30:24 31:2,24 proposition 35:10 prosecute 26:19 prosecutor 26:20 prove 5:5 11:1 13:16 22:1 37:21 38:20 39:1 61:6,7 64:10 proved 11:3 14:12 proven 8:20 provided 27:8 providing 37:25 proving 33:3,22 provision 38:11 punish 26:18 28:8 purely 17:18 purpose 24:18 30:2,4 37:12 43:11 purposes 8:9</p>	<p>23:2 put 36:3,5</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>question 3:14 8:1 11:15 17:10 19:14,19 21:9 34:25 37:1 42:9,21 44:18,21 47:2 50:9 54:9 62:14 questionable 17:9 questions 3:11 43:5 44:17 quickly 54:6 64:18 quite 12:1 quote 26:23</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 rails 17:8 raise 3:12 20:25 21:5 22:24 23:24 24:18,20 24:21 25:5 29:3,5 45:12 45:19 47:17 49:9 50:1,12 50:22,23 54:21 56:5 57:22 63:19 64:5 raised 4:25 19:20 20:5,7 20:16 24:21 45:24 46:1 50:18 51:19 52:11 53:23 56:23 57:4 58:25 59:3,6 59:16 60:11 raises 46:6 raising 49:8 51:22 56:10 64:6</p>	<p>rational 3:22 9:15 14:25 15:3 61:13 rationale 17:10 rationaly 14:16 reach 23:5 28:21 28:22 reached 14:16 reaches 18:1 read 4:22 5:7 27:19,20 reading 7:22 32:15 33:9 real 18:8,9 really 7:6 8:23 9:2,5 10:17 19:19 24:24 27:16 41:2 44:6,16,22 48:18 49:11,12 49:16 54:3,4 58:12 63:13 reason 14:17 18:12 20:19 24:14 51:21,25 52:1 53:16 56:18 57:11,23 60:12 reasonable 4:1 9:22 10:15 14:18 16:17 17:12 18:2 33:4 40:1 reasoning 49:15 reasons 3:21 14:14 20:12,22 26:16 45:5 47:24 51:11 56:10 rebut 52:3 REBUTTAL 2:8 60:23 recall 51:9 received 9:12,13 recognize 52:18 recognized 36:10 61:22</p>	<p>record 51:12,15 51:16 52:1,12 52:14,15 53:3 53:17,20 54:4 54:10 55:17,18 59:8,9 records 7:11 33:2 red 15:1 reference 35:17 reflect 35:5 regardless 64:4 reimagine 59:15 59:18 reject 13:13 rejected 40:22 rejecting 13:12 relate 57:1 related 32:17 relation 23:23 relief 48:24 49:19 60:16 remainder 29:16 remand 12:4 40:9 64:18 remedies 28:18 repeatedly 39:15 reply 52:9 59:4 repose 27:23 required 5:11 23:18 37:21 42:10 47:16 requirements 60:18 requiring 28:3 49:3 reserve 29:16 resist 33:9 resolve 10:10 24:15 resolved 61:24 respect 32:5 40:13 46:11 48:21 58:16 respond 64:13</p>
---	--	--	---	--

<p>64:15 responded 59:12 Respondent 1:19 2:7 29:21 restriction 26:21 result 29:9 64:2 resurrect 57:2 retroactivity 49:21 review 19:17 20:7 25:10,15 30:3 36:11 43:11,13 44:15 46:5,9 48:5 51:14 52:12 58:9 revolutionary 17:14 ridiculous 16:11 right 9:6 12:10 12:14 16:25 22:19 23:6 41:25 44:11 52:9 54:18 55:7 ROBERTS 3:3 19:12 21:13,18 21:22 24:23 25:11 29:18 39:18,24 56:17 60:21 64:21 ROMAN 1:17 2:6 29:20 room 9:10 10:11 root 40:7 rubric 62:10 rule 15:25 20:3 24:6,19 28:11 30:1 36:8 38:24 43:19,25 44:16 45:23 46:24 47:1,15 47:20,21,25,25 48:3,7,13,13 48:19,22 49:13 49:17,25 50:3 50:5,6 51:13</p>	<p>52:19,19,21 53:17 55:12,15 55:20 58:10,15 rules 48:23 49:18,19,20,20 49:22 55:12 ruling 26:14 run 54:16 Russell 26:8</p> <hr/> <p style="text-align: center;">S</p> <p>S 1:15 2:1,3,9 3:1,7 60:23 sailed 47:6 sane 25:7 satisfy 45:23 52:19 64:10 satisfying 48:6 save 11:5 saw 55:5 saying 6:18 7:22 12:13 13:23 16:8,15 20:4,9 21:3 22:21 27:16 28:10,13 31:12 56:24 59:19 says 12:17 13:24 24:16 33:13 36:20 37:18 38:9,11,25 44:22 53:12 59:25 Scalia 3:24 4:7,9 4:12,14,22 5:8 10:5,12,21 18:3,5 20:2,10 20:13,15 44:20 45:14,18,25 46:3 50:8,19 50:25 51:7 scintilla 16:5 score 29:7 searching 53:3 second 41:18 45:13 46:4 48:15 51:25</p>	<p>52:1 61:10 see 7:6 10:21 11:19,23 13:3 13:18 17:6,17 38:7 55:9 61:4 seeking 13:13 sees 53:7 sense 13:21 32:2 39:6 50:20 64:20 sent 25:18 separate 6:25 8:7 11:5 16:22 24:7,14 separately 8:19 serve 52:25 set 4:2 59:14 sets 30:25 31:24 seven 24:17 Seventh 64:16 shifting 22:3 50:6 ship 47:6 show 6:23 14:11 50:7 55:19 61:7,8 showing 12:9 shows 38:15 side 12:11 30:16 side's 61:21 sides 29:1 44:16 significant 16:23 43:19 49:10 simple 23:22 simply 23:17 24:10,16 single 26:9 situation 7:15 12:10 16:8 17:19 49:25 situations 20:4 27:21,22 six 5:13,13 53:8 Sixth 64:16 slightly 42:22 Smith 16:23</p>	<p>17:22,22 47:9 sneaks 7:12,17 so-called 16:1 62:22 society 51:1 solely 5:17 Solicitor 1:17 somebody 7:9 somewhat 6:20 57:9 sooner 19:19,23 sorry 6:15 22:6 24:1 36:25 sort 11:15 18:19 32:15 41:6 42:9 44:21 49:13,18 52:17 54:8 58:21 SOTOMAYOR 5:15,21 6:2,5 15:2,16,19 21:15,17,20 22:7,12,15,19 22:21 23:6,8 24:1,3 41:9,15 41:17,23 42:2 42:13,24 43:2 46:21 57:24 58:2,5,7 59:21 59:24 60:3 sounds 12:12 25:12 special 48:17 specific 39:9 specifically 11:4 specify 28:7 39:3 42:11 specifying 28:5 sponte 29:5 stage 30:12,18 63:12 stages 3:17 63:4 stake 29:14 49:4 standard 48:7 standards 17:12 25:9,15 stands 59:9</p>	<p>start 26:7 31:9 39:16 54:23 starts 7:13 state 22:2 35:6 35:18 State's 48:25 statement 22:5 States 1:1,6,12 3:5 statute 7:1,3 12:17 14:13 15:6,21 19:13 19:16 20:25 21:3,4,6 22:25 23:12,19 24:11 24:12,12,16 26:10,18 27:6 27:9,14,18 32:11,15 33:9 33:10,22 35:6 35:21,23,24 36:19 37:1,6 38:1 44:7,23 46:13,16,20,23 47:10,18 48:23 49:17 50:10,15 50:22 52:10,23 53:7 58:19,23 59:13 60:5 61:12,15 62:7 63:16 64:3,7 statute-of-limi... 25:3,5 44:19 50:2,17 51:4 52:4 56:3 57:5 57:14,23 59:3 statutes 8:15 20:17 26:23 28:14,16 37:3 statutorily 42:25 statutory 33:12 38:10,11 steals 7:3 step 45:6 strategic 51:21 56:9,12,18 60:12</p>
---	--	--	---	---

<p>strictly 28:15 strong 27:6 56:3 strong-soundi... 27:18 stronger 21:10 26:10 29:6 49:2 57:21 strongest 51:11 strongly 27:9 stuck 38:2 stuff 61:20 style 36:1 sua 29:5 subject 25:7,8 25:14 submissions 64:17 submitted 64:22 64:25 subsequently 50:18 substance 22:8 substantive 24:12 27:23 34:4 35:17 36:1 succeed 33:3 succeeded 57:5 suffered 32:1 suffice 8:15 sufficiency 3:16 14:10 15:4,20 29:24 30:2 34:15,25 35:15 36:11,16,17 43:11,13,17 44:6,12 63:12 sufficiency-of-... 44:15 sufficient 4:5 5:25 6:2,6,23 11:2 15:8,9 40:14 43:22 55:18 59:9 sufficiently 61:7 61:8 suggest 56:4</p>	<p>suggesting 8:22 37:9 suggests 9:1 27:15 35:19 suit 23:18 summarize 57:24 super 60:4 superseded 56:23,25 superseding 12:16 30:12,23 57:6,10 support 5:25 6:3 11:3 supporting 19:4 suppose 16:2 32:22 44:3 53:6 supposed 52:22 55:13,16 58:21 Supreme 1:1,12 sure 13:9 14:4 16:25 41:24 42:14 58:1 surprise 34:17 surprised 25:25 sustain 3:21 switch 26:6 synonyms 7:2</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 tail 20:23 take 7:8 19:25 21:14 25:3 42:19 49:24 takes 48:20 talking 49:12 56:18 64:6 talks 61:11 tell 35:23 37:3 term 17:1 33:11 33:13,13 terms 47:9 terrible 17:2 63:7</p>	<p>Thank 29:18 60:21 64:21,23 theft 7:3 theoretical 52:17 theoretically 62:9 theories 6:25 22:18 23:4,5 theory 5:18 6:6 6:19 13:18 21:7,10 39:1 40:19,22 42:11 43:9 they'd 55:10 thing 7:22 13:24 17:1 32:12 34:19,25 51:4 56:1 57:15,17 62:13 things 24:20 52:22 think 4:3 5:16 5:20 7:21 11:24 13:1,14 14:4 24:25 25:2 27:15 29:6 30:15 31:14 32:13,14 32:16,18 33:20 33:24 35:3,3 35:10,11,12,22 36:4,6,7,14,17 36:19,20 37:2 37:11 38:5,15 38:22 39:4,4,7 39:22,23 40:4 40:5,16 42:6,8 42:15,16,19 43:4,6,11,18 43:25 44:9,13 45:3,9,16,17 45:21,22 46:4 46:8,10 47:4,5 47:5,13,23 48:15,17,25 49:6,7,8,10,15</p>	<p>50:4,6,10 51:6 51:6,10,10 52:16 53:13,14 54:7,9,19 55:1 55:7,14,17,19 56:1,7,9,13,14 56:15,19 58:9 58:10,14,17,18 58:19,22 59:2 60:8,9,9,14,15 61:16 62:19 thinks 38:4 third 46:8 61:18 62:5 thought 5:13,13 8:25 9:9,10 18:18 26:12,20 27:23 38:18 40:8 52:20 61:16 63:3 64:1 three 30:25 31:24 45:9 57:25 threshold 44:21 48:24 49:18 till 64:20 time 21:5 23:18 24:4 28:4 29:17 30:7 37:18 45:12 46:2,7 49:4 51:19 56:25 59:17 timely 25:17 47:21 times 37:14 54:12 told 9:23 10:13 tolling 59:13 tomorrow 55:6 totally 16:11 Toussie 27:24 28:19 tracks 36:12 traditionally 52:20</p>	<p>treated 16:22 30:3 51:14 trial 3:13 6:21 18:17,19,20,22 25:4 40:10 41:2,5 44:12 45:19 51:22 52:22,25 55:16 56:4,8,11 57:5 58:21,22 59:15 61:22,22 62:2 63:6 tried 5:17 31:8 trouble 33:20 troubling 37:24 true 4:15,16 6:11 17:2 24:24 25:20,23 42:14 45:25 46:3 53:24 54:5 try 26:18 28:8 39:24 trying 15:9 41:5 41:10 49:22 59:18 turn 44:18 49:16 Turning 63:16 two 3:11 6:25 7:22 8:7 18:15 24:7 32:10,20 34:4 36:12 42:17 51:17 58:7,17 two-count 16:3 type 56:17 types 20:18 49:11 typically 10:24</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>unanimity 4:20 5:6,11 10:2 42:10,18 unanimous 10:7 unanimously 9:24</p>
--	---	---	--	---

unauthorized 5:14 7:7,8,14 8:3 10:3 30:14 31:3,9 33:23 34:1,6 38:12 38:13 39:11,13 39:16 61:5,19 62:6,10	5:14 13:15 14:24,25 16:10	ways 7:22 32:12 32:20 42:17 51:18	46:10	<hr/> 6 <hr/>
uncertainty 5:2 5:6 10:10	viable 43:9	we'll 3:3 55:3	<hr/> X <hr/>	60 2:10
understand 12:13 13:6,8 22:8 34:9,10 45:7	view 30:21 32:4 42:20	we're 41:23 50:20 63:22	<hr/> Y <hr/>	
understandably 19:7	viewed 28:16	we've 8:10 15:17 22:25 54:11	years 23:22 24:17 46:13 47:8 53:8,9	
understanding 45:7	views 28:14,15	wearing 14:21 14:22,23 15:1	<hr/> Z <hr/>	
understands 18:22	violated 33:22 47:19 64:4	well-established 39:5	zero 7:18 14:21 16:4	
understood 10:1 28:12	violating 32:11	went 17:8 26:12 26:16 39:12	<hr/> 0 <hr/>	
undertaking 8:23	violation 38:14	whatsoever 33:25	<hr/> 1 <hr/>	
undoubtedly 56:21	Virginia 14:5 16:18 61:11	willfully 7:4	10:05 1:13 3:2	
unfair 52:6	vote 23:7	win 25:4	1030(a)(2) 38:14	
unfortunately 63:8	<hr/> W <hr/>	windfall 30:5 44:2	11-A 33:12	
unintentionally 22:13	wait 20:20 53:15	window 47:15	11:06 64:24	
United 1:1,6,12 3:5	waiting 64:20	wins 44:24	14-1095 1:4 3:4	
unlawfully 7:4	waivable 45:11	withdrawal 22:1	140 46:12 47:7	
unusual 41:4	waive 29:12,14	won 25:17 57:1	15th 57:18	
unusually 27:6	waived 20:6 28:25	Wong 27:13,19	16 35:14	
use 26:1,5 33:15	waiver 21:20 22:9	Wood 28:23 48:18 49:16	1st 57:18	
<hr/> V <hr/>	waivers 22:24	48:18 49:16	<hr/> 2 <hr/>	
v 1:5 3:4 14:5 16:18 26:8 48:11,18 61:10	want 13:15 17:25 33:9	51:8 58:11	20 34:11,13	
vacate 40:10	34:16 35:1	worded 27:9,11	2015 1:9	
valid 5:14 48:12	41:25 54:16	wording 26:17 27:3,6	25 53:9	
Valiniff 28:23	56:5 57:22	words 27:17	29 2:7	
vast 35:4	60:6	work 11:13,20 61:15	<hr/> 3 <hr/>	
verdict 3:21,22	wanted 6:17 64:12	worked 41:1	3 2:4	
	wants 5:4 52:3	works 61:14	30 1:9	
	Washington 1:8 1:15,18	world 57:7	<hr/> 4 <hr/>	
	wasn't 4:10 10:17,17 22:9	worse 18:6,12	4 32:19	
	24:5 60:10	wouldn't 5:9 6:22 17:4	<hr/> 5 <hr/>	
	way 4:18 8:15 9:4 20:1 27:10	20:10 27:18	52(b) 47:25,25	
	27:19 28:22	32:6 35:20	48:3 49:13	
	32:15 33:12,21	52:13 54:5	50:6 51:13,14	
	37:8 40:5,6	write 34:12,16	52:19,21 53:17	
	52:19 53:15,19	wrong 13:22,24	55:12,15 58:10	
	55:8 56:11,14	29:24 30:7,10	58:15	
	59:19 62:24	38:1 41:21		