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IN THE SUPREME COURT OF THE UNITED STATES

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TERRY MICHAEL HONEYCUTT, :

Petitioner : No. 16-142

v. :

UNITED STATES, :

Respondent. :

- - - - - x

Washington, D.C.

Wednesday, March 29, 2017

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

APPEARANCES:

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

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

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

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

(11:10 a.m.)

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

Mr. Unikowsky.

ORAL ARGUMENT OF ADAM G. UNIKOWSKY

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. UNIKOWSKY: Well --

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

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

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

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

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

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

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

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

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

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

11 MR. UNIKOWSKY: Yes.

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

15 MR. UNIKOWSKY: So --

16 JUSTICE SOTOMAYOR: The language is very
17 similar.

18 MR. UNIKOWSKY: Yes. So --

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

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

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

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

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

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

1 practical matter?

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

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

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

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

25 JUSTICE ALITO: And what do you do in the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 and adopted it had conspiracy in mind?

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

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

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

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

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

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

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

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

18 ORAL ARGUMENT OF BRIAN H. FLETCHER

19 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 JUSTICE BREYER: Where --

4 JUSTICE GINSBURG: So what is --

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

8 MR. FLETCHER: Correct.

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

13 MR. FLETCHER: Correct.

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

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

4 MR. FLETCHER: I think in two ways:

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

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

17 MR. FLETCHER: Justice Breyer --

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

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

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

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

11 MR. FLETCHER: Yes.

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

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

25 CHIEF JUSTICE ROBERTS: Well --

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

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

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

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

17 MR. FLETCHER: Yes.

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

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

24 CHIEF JUSTICE ROBERTS: Sure.

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

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

10 JUSTICE SOTOMAYOR: Mr. --

11 MR. FLETCHER: -- in personam liability.

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

16 MR. FLETCHER: Yeah.

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

20 MR. FLETCHER: Yes.

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

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

5 MR. FLETCHER: Someone --

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

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

21 JUSTICE SOTOMAYOR: Well --

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

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

1 she is involved in.

2 MR. FLETCHER: And -- and --

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

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

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

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

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

17 MR. FLETCHER: Yes.

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

21 MR. FLETCHER: Yes.

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

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

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

3 JUSTICE SOTOMAYOR: In what --

4 MR. FLETCHER: -- from that.

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

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

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

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

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

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

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

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

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

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

1 cause of action.

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

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

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

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

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

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

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

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

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

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

21 MR. FLETCHER: Uh-huh.

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

1 have to show that?

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

5 JUSTICE KAGAN: In that proceeding.

6 MR. FLETCHER: Right.

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

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

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

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

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

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

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

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

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

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

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

24 JUSTICE KAGAN: Which one?

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

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

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

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

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

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

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

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

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

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

13 MR. FLETCHER: Uh-huh. Yeah.

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

17 MR. FLETCHER: Yes.

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

1 of the under --

2 MR. FLETCHER: Yes.

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

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

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

22 JUSTICE BREYER: Why not?

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

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

2 JUSTICE BREYER: Uh-huh.

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

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

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

16 JUSTICE BREYER: Okay.

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

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

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

3 Now --

4 MR. FLETCHER: Yes.

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

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

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

16 MR. FLETCHER: Of the defendant.

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

20 MR. FLETCHER: That's correct.

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

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

1 and sometimes you seem to say no.

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

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

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

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

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

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

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

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

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

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

5 The other point I want to make is --

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

8 MR. FLETCHER: Oh, no.

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

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

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

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

1 dissipate the proceeds under (p)?

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

6 JUSTICE KENNEDY: But it --

7 JUSTICE KAGAN: But there is nothing --

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

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

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

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

24 CHIEF JUSTICE ROBERTS: You have --

25 MR. FLETCHER: -- to recover the proceeds

1 from him.

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

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

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

16 MR. FLETCHER: Correct. Yes.

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

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

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

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

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

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

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

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

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

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Unikowsky, 15 minutes.

17 REBUTTAL ARGUMENT OF ADAM G. UNIKOWSKY

18 ON BEHALF OF THE PETITIONER

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

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

25 So first, in terms of how this case was

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

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

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

1 under which it prevailed in the Sixth Circuit.

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

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

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

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

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

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

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

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

13 And --

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

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

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

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

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

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

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

1 was in rem.

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

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

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

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

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

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

1 before.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 And I also think that unlike the

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

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

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

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

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

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

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

25 If there's no further questions from the

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

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 The case is submitted.

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

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

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

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

<p>40:16 44:9 51:19 56:5 58:20,23 59:8 diligence 38:2 53:14 direct 12:15 directed 5:9 directly 17:13 18:7 23:15,16 26:12 32:12 37:13 disagree 19:20 36:25 37:1 48:24 55:7 disagreeing 31:6 disagreement 21:25 discern 4:16 discussed 27:22 52:9 discussion 49:4 dissipate 24:25 47:1 dissipated 13:3 21:19,24 22:4 24:5 35:25 43:17 47:14 dissipation 8:1 8:13,21 9:10 24:12 48:21 54:25 distinction 5:19 18:11 distinguish 10:25 distribute 27:4 distributed 12:9 district 16:6,19 38:9,12,13 39:7 diverge 15:22 divide 11:21 divided 11:21 docket 38:14 Document 38:13 doing 7:14 15:9 16:7 17:15</p>	<p>52:19 53:25 54:1 58:14 dollars 29:18,19 29:23,25,25,25 30:8,10 40:10 54:6 door 7:5 9:20 draw 26:3 drawing 26:3 drawn 5:19 drives 22:16 dropped 21:8 drove 40:8 drug 11:17 13:15,15 20:6 21:18 22:18 23:9 29:23 30:6,17,25 31:14 38:20 43:5 drugs 20:6 29:19 50:5 due 53:14 duffel 20:7,9 21:1,2,9,15 23:18 43:6 duffle 20:24</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>e 2:1 3:1,1 29:3 40:4,24 44:23 earlier 24:9 54:15 easier 11:5 14:6 education 18:3 effects 60:15 Eighth 52:19 either 9:5 10:3 14:17 38:23 41:3 48:3 element 14:2,4 else's 14:25 emphasize 26:25 32:21 34:2 38:3 emphatic 40:21 employ 56:22</p>	<p>employee 33:11 43:23 enabling 52:14 enacted 6:25 28:8 33:5 43:14 58:16 59:6,7 60:13 encompasses 17:15,18 ended 46:1 endorse 32:25 engage 19:17 English 26:14 enjoy 33:4 50:3 enterprise 4:6 6:4,4 11:7 13:15 17:6 29:24 45:23 enterprises 6:1 17:3 entire 3:13 12:21 50:7 entitled 20:20 21:23 22:3 entitlement 41:22 53:5 enumerated 7:12 enumerates 4:1 equal 38:19 equivalent 25:16 25:18 error 16:4,10 ESQ 1:16,18 2:3 2:6,9 essentially 6:19 14:3,12 51:20 establish 51:4,8 53:21,22 et 39:20 everybody 5:17 evidence 13:18 62:21 exact 4:23 57:20 exactly 27:2 44:21 56:11 60:19</p>	<p>example 17:24 18:1 43:5 examples 45:9 exclusive 42:2 52:5 53:10 excuse 51:13 exercise 38:2 exhaustive 25:25 26:1 exist 35:12 existed 32:7 58:18 expansion 57:24 expect 60:19 expend 53:6 explain 19:3,21 21:13 30:12 32:17 40:23 42:10 explained 44:5 expose 8:6 extend 30:20 extent 15:22 extrastatutory 46:13 extremely 55:9</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fact 4:12,24 5:20 6:20,24 15:23 16:9 17:21 27:9 30:7 56:8 57:2,3,5 62:10 facts 9:13 18:13 29:22 39:2 53:22 fairly 46:2 faith 16:8 faithfully 5:10 falls 23:14 familiar 19:2 far 4:15 9:17 61:19 fault 19:25 favor 10:20 15:19 16:23 Federal 33:22</p>	<p>62:3 feels 5:20 16:9 fees 43:22 44:18 Ferrari 22:19 23:9,14 Ferrari's 23:12 fiction 19:9,18 figure 13:20 filed 16:3 44:10 finally 62:18 financial 31:13 find 21:14 36:8 41:19,21 42:6 43:18 fines 14:17,21 finish 28:3 first 7:23 10:5 13:8 26:7 35:22 37:16 50:25 52:11 53:13 55:2 62:23 five 22:6,12 37:7 37:19 40:6,15 48:22 fixes 41:21 Fletcher 1:18 2:6 18:17,18 18:20 19:20 21:5,12 22:7 23:1,12 24:1 24:17 25:8,13 26:4,17,24 27:11,20 28:1 28:5,17,22,25 29:11,16,20 30:5,11,22 31:2,5,13,17 31:21,25 32:4 32:8,13 33:7 33:21 34:16,22 35:7,13,21 36:2,6,10,23 37:9,17,23,25 38:7 39:13,17 40:2,20,23 41:3,14,17</p>
---	--	--	---	--

42:4,8,16,20 43:2 44:1,19 46:6,8,20 47:2 47:10,16,25 48:9,16,23 flows 17:23 focus 3:25 19:18 46:15 59:22 focused 19:15 47:3,4 55:5 focuses 56:10 follow 41:25 59:21 following 42:6 force 62:24 foreseeable 21:12 30:15 49:21 50:13 forfeit 6:6,23 9:16 17:5 21:11 22:8 23:13,20 26:11 33:2 37:9,18 51:16 52:12,23 57:16 forfeitable 20:3 20:5,8,11,13 21:16 28:6 29:2 37:14 41:19 43:8 53:2 forfeited 23:20 46:20 48:10 51:9 57:8,9 forfeits 6:3 forfeiture 4:2 5:17 6:5,14,17 6:22 7:6,13,16 9:4,10 10:1,5,7 10:13 11:9 13:22,25 14:9 14:11,13 15:12 20:15 27:12,14 27:19,22 28:7 28:8 30:16 31:19,24 33:19 35:1 37:13	38:12,18 41:22 43:19 45:6,17 50:12 51:8,21 52:6,8,16 53:5 53:7,10,23 54:4 55:25 56:7,11,14 57:5,25 59:7 59:19 61:2,5 forfeitures 58:24 forget 33:19 57:14 form 5:22 17:4,7 59:11 60:23 forms 62:14 forth 4:18 found 16:23 40:7 foundation 19:2 Fourth 44:9,10 44:13 framed 16:25 free 33:17 freezes 13:11 58:25 frequently 8:1 friend 20:1 43:12 44:8 45:3,9 61:23 front 37:5 frustrating 8:23 full 18:8 20:7,9 23:18 41:15 43:6 60:17 62:24 fully 16:5 functions 41:18 fundamental 18:11 58:17 funds 44:3,3 45:25 further 18:14 30:20 62:25 furtherance 8:5 8:17,20 18:25 54:22,25	G	G 1:16 2:3,9 3:1 3:6 50:17 gambles 8:4 garden 21:20 general 1:19 9:9 generally 30:24 33:9 getting 18:6,7 21:9 31:22 48:3 57:14,15 GINSBURG 15:16 16:15 25:4 33:6 43:20 give 26:2 31:15 given 12:16 gives 25:10 45:10 go 7:17 13:18 27:9 28:1 33:7 33:17 35:15 36:7,22 38:24 38:24 43:20,21 45:10 goal 60:10 61:11 goes 8:3 33:11 going 11:24,24 13:13 22:11,17 28:5,20 30:13 32:11 36:14 49:25 52:20,23 53:1,1 54:5 58:12 good 10:22 16:8 60:4 gotten 19:22 39:12 govern 35:11 governing 10:1 government 3:12 4:15,23 5:10,19,20 6:19 7:12,24 9:5,8,11,15,19 10:6,25 11:13	11:19 12:17 14:3,5,12 15:9 15:19 16:4,7,9 17:8 20:12,15 21:23 22:3,8 22:10,11 23:13 23:17,19 24:5 24:7 25:1 29:8 31:16 33:11,14 33:17 36:3,15 37:12 38:9,16 38:18 41:19,20 43:9,24 44:2,9 45:25 47:19,20 47:20,22 49:2 49:10,16 51:1 51:5 52:5,12 52:15,22 53:12 53:12,21 54:5 54:12 55:3,12 55:17,21 56:9 56:22 59:5,12 59:14 60:22 61:18 62:15,19 government's 3:16 4:11,19 4:20 5:3,5,13 6:8,15 7:3,4 9:23 12:3,20 13:23 15:21,25 29:5 36:14 41:22 44:5 51:18,22 53:6 55:6 57:5 58:14 59:3 great 31:8 45:21 greater 31:18 32:11 guess 10:24 39:21 guy 21:3,8 47:22 48:3,4,13 58:25 guys 20:5	half 35:5 hands 22:9 41:3 happen 12:16 61:13 happened 9:14 30:10 33:24 happens 13:7 21:10 39:10 54:12 happy 22:1 hard 14:5 harder 13:23 harsh 60:15,18 hasher 60:23 hear 3:3 heard 7:3 52:3 held 17:22 30:16 32:15 34:5 39:6 50:7 hid 39:20 52:24 hidden 6:10 43:17 hide 54:7 hire 40:15,16,19 historical 10:6 55:10 history 3:15 26:21 27:10,13 27:15,16 54:1 hold 3:13 43:18 holding 48:3 home 20:10 33:17 honestly 42:25 Honeycutt 1:3 3:4 Honor 7:23 11:4 12:19 16:18 31:7 56:17 hook 33:13 hornbook 55:17 55:18 hornbooks 55:20,22,25 house 22:10 hundred 30:10 40:10
		H	H 1:18 2:6 18:18		

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

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

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

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

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

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

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