



1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	WILLIAM B. COLLINS, ESQ.	
4	On behalf of the Petitioner	3
5	JEFFREY FISHER, ESQ.	
6	On behalf of the Respondent	24
7	REBUTTAL ARGUMENT OF	
8	WILLIAM B. COLLINS, ESQ.	
9	On behalf of the Petitioner	52
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first today in Case 07-772, Waddington v. Sarausad.

5 Mr. Collins.

6 ORAL ARGUMENT OF WILLIAM B. COLLINS

7 ON BEHALF OF THE PETITIONER

8 MR. COLLINS: Mr. Chief Justice, and may it  
9 please the Court:

10 This case comes before the Court under the  
11 deferential standard of review of the Antiterrorism and  
12 Effective Death Penalty Act. The Ninth Circuit decision  
13 should be reversed because the Washington court's  
14 adjudication of this matter was not objectively  
15 unreasonable. The Washington court concluded that the  
16 instruction at issue properly informed the jury of the  
17 elements of accomplice liability, and the prosecutor's  
18 argument informed the jury that it could only convict  
19 Sarausad if he acted with knowledge he was facilitating  
20 the commission of a homicide.

21 The court also concluded that the trial  
22 judge did not abuse his discretion in directing the jury  
23 to reread the relevant instructions instead of giving  
24 the supplemental instruction proposed by Sarausad. The  
25 decision below was not an unreasonable application of

1 clearly established Federal law.

2 CHIEF JUSTICE ROBERTS: But you think it was  
3 right?

4 MR. COLLINS: I do think it was right, Your  
5 Honor, but I also believe that it was not objectively  
6 unreasonable, which is the standard before this Court.  
7 Turning to the PRP court's adjudication, the --

8 JUSTICE KENNEDY: First, is there some  
9 constitutional minimum? Let's assume direct review. Is  
10 there some constitutional minimum requirement for  
11 scienter with reference to an accomplice?

12 MR. COLLINS: I believe there is, Your  
13 Honor.

14 JUSTICE KENNEDY: What is it?

15 MR. COLLINS: You have to have knowledge  
16 that you're facilitating -- you have to act and you have  
17 to have knowledge, both those two points.

18 JUSTICE KENNEDY: Is that the same -- is  
19 that the same as purpose?

20 MR. COLLINS: I think it is, Your Honor. I  
21 think the model -- I think the Model Penal Code refers  
22 -- uses the term "purpose" as opposed to "knowledge,"  
23 but I don't think --

24 JUSTICE KENNEDY: Well, but you don't take  
25 the position, do you, or do you, that Washington law

1 conforms to the Model Penal Code? I thought the Model  
2 Penal Code was much more defendant-friendly than you're  
3 stating.

4 MR. COLLINS: I believe that's correct, Your  
5 Honor.

6 JUSTICE KENNEDY: So you're -- would --  
7 would you say that the trial court in Washington states  
8 law correctly if it says that being accomplice you have  
9 to have a purpose to facilitate the commission of the  
10 crime?

11 MR. COLLINS: I believe that you would have  
12 to have -- you have to knowingly facilitate the crime,  
13 Your Honor. That's the --

14 JUSTICE KENNEDY: But you agree there is a  
15 difference in "knowing" and "purpose"?

16 MR. COLLINS: I'm not sure there is much of  
17 a difference, Your Honor. Frankly, I haven't thought  
18 about that question, but I think you have to have that  
19 mental component. You have to either have purpose or  
20 you have to do it with knowledge.

21 JUSTICE GINSBURG: But the question is  
22 knowledge of what. And I thought it is now recognized  
23 that in this State you have to know not just that a  
24 crime -- you have to know in this case of the potential  
25 for a homicide.

1 MR. COLLINS: That's right, Justice  
2 Ginsburg. You have to know -- you have to act with  
3 knowledge that you are facilitating a homicide.

4 JUSTICE SCALIA: Why just a homicide? What  
5 was -- what was the indictment here? What was he tried  
6 for?

7 MR. COLLINS: First degree -- a number of  
8 counts, Your Honor. First degree murder, second degree  
9 murder, attempted first degree murder, first degree  
10 assault with a deadly weapon, because there was one  
11 death and two people were shot -- wounded and then there  
12 was --

13 JUSTICE SCALIA: Why wouldn't assault with a  
14 deadly weapon suffice or, alternatively, why would you  
15 have to know that it was first degree murder or second  
16 degree murder? I don't know how you get from the text  
17 of the Washington statute that all you have to know is  
18 that it was a homicide?

19 MR. COLLINS: Because the statute refers to  
20 "the crime," so you have to have knowledge that you're  
21 facilitating a homicide, but you don't have to have  
22 shared --

23 JUSTICE SCALIA: But -- but he wasn't  
24 prosecuted for homicide. I mean, the crimes are much  
25 more specific --

1 MR. COLLINS: Well --

2 JUSTICE SCALIA: -- first degree murder,  
3 second degree murder.

4 MR. COLLINS: In Washington, you have to  
5 have knowledge of the general crime that is homicide,  
6 but you don't have to have the same knowledge as to  
7 principle; therefore, you don't have to have knowledge  
8 of premeditation. You just have to have knowledge that  
9 you're going to commit the general -- the general crime.

10 JUSTICE SCALIA: How does that appear from  
11 the statute? If I read the statute, I would have  
12 thought that you have to have knowledge that he was --  
13 would negligent homicide suffice?

14 MR. COLLINS: You could be convicted of  
15 manslaughter as an accomplice if you had knowledge of a  
16 homicide. You have to have general knowledge of the  
17 crime.

18 Let me give you another example. In the  
19 Davis case, for example, this was a robbery case, and  
20 the defendants agreed to do a robbery, but the person  
21 who went into the store had a gun. The accomplice  
22 didn't know that he had a gun, but still he was  
23 convicted of armed robbery because he had a general  
24 knowledge that robbery was going to be committed. On  
25 the other hand, if the principal had shot the store

1 owner, the defendant would not be an accomplice to  
2 murder if his only knowledge was that he was  
3 facilitating the crime of robbery.

4               So you have to have knowledge that you're  
5 facilitating the general crime charged. In this case  
6 crimes charged were various kinds of homicides, first  
7 degree murder, attempted murder. And in this case, the  
8 record is very clear that the prosecutor argued that  
9 Mr. Sarausad acted with knowledge that he was  
10 facilitating a homicide. Therefore, the PRP court's  
11 adjudication of that point is not objectively  
12 unreasonable under the AEDPA standard.

13               JUSTICE GINSBURG: This is -- the  
14 prosecutor's charge -- the prosecutor's charge was just  
15 filled with the suggestion that as long as it was a  
16 crime, that was sufficient. I don't find that what  
17 you've said is an accurate description of the charge --

18               MR. COLLINS: Your Honor --

19               JUSTICE GINSBURG: -- of the prosecutor's  
20 summation.

21               MR. COLLINS: Your Honor, the prosecutor  
22 continually talked about the fact that they were going  
23 there for the shooting. For example, in the -- the  
24 joint appendix, the brown brief on page 123, the  
25 prosecutor tells the jury when they rode down to Ballard



1 High School the last time, "I say they knew what they  
2 were up to. Fists didn't work. Pushing didn't work.  
3 Shouting insults didn't work. Shooting was going to  
4 work. In for a dime, in for a dollar."

5 JUSTICE SOUTER: Yes, but isn't the problem  
6 on your side of the case that there was another "in for  
7 a dime, in for a dollar" argument and that was the  
8 hypothetical holding the hands behind the back while  
9 some third party slugged the victim? And on that  
10 hypothetical, there was no reference to a definite  
11 crime. In that hypothetical the victim was killed, and  
12 under that hypothetical, there was no reference to the  
13 crime, i.e., homicide, and so it seems to me that the  
14 prosecutor's arguments, the dime-dollar arguments, went  
15 both ways.

16 MR. COLLINS: I disagree, Your Honor. When  
17 the prosecutor used the hypothetical, and in fact on  
18 page 123 that I just quoted you, the prosecutor talks  
19 about, in fact uses that dime for a dollar hypothetical,  
20 and then immediately tells the jury that Mr. Sarausad  
21 acted with knowledge that there was going to be a  
22 homicide. They went --

23 JUSTICE SOUTER: Sure, in that case. But  
24 there was another one in which the prosecutor didn't do  
25 that.

1                   MR. COLLINS: I'm sorry. Are you talking  
2 about a different case, a case other than this, Justice  
3 Souter?

4                   JUSTICE SOUTER: I did -- maybe I dreamed  
5 this. I thought the prosecutor also gave as a dime for  
6 a dollar example the example of the individual, the  
7 accomplice who holds a victim's hands while a third  
8 party slugs the victim and in fact kills the victim.  
9 And I thought in that hypothetical argument the  
10 prosecutor was saying that the -- that the accomplice  
11 was an accomplice to homicide, even though he didn't  
12 know at the time the assault started that homicide was  
13 intended or would result.

14                  JUSTICE KENNEDY: It's toward the bottom of  
15 page 123. And I have the same, I have the same, just  
16 tieing onto Justice Souter's question, on the same  
17 subject. It seems to me that that hypothetical is not  
18 necessarily correct.

19                  MR. COLLINS: The court, the PRP Court of  
20 Appeals said that that hypothetical is problematic.

21                  JUSTICE GINSBURG: What about the  
22 instruction that follows the hypothetical, first the  
23 statement that the person gets assaulted, gets killed,  
24 in for a dime, in for a dollar? The law in the State of  
25 Washington says if you're in for a dime you're in for a

1 dollar; if you're there or even if you're not there and  
2 you're helping in some fashion to bring about this  
3 crime, you are just as guilty, in some fashion. And  
4 that was tied in to the person who thought he was  
5 assisting in assault and it turns out that the victim  
6 got killed.

7 MR. COLLINS: Justice Ginsburg, the  
8 hypothetical may be problematic, but you have to  
9 consider --

10 JUSTICE GINSBURG: But what about the  
11 statement I just read, that the law of the State is you  
12 don't even have to be there if you're helping in some  
13 fashion.

14 JUSTICE SCALIA: Where is that? Is that in  
15 the charge to the jury?

16 JUSTICE GINSBURG: Yes. It's in the same  
17 paragraph, the paragraph with the example of the  
18 accomplice who is --

19 JUSTICE SCALIA: It's not in the court's  
20 charges.

21 JUSTICE GINSBURG: No. This is in the  
22 summation.

23 MR. COLLINS: Justice Ginsburg, the  
24 prosecutor's argument responds to the argument made by  
25 Sarausad's counsel that you had to have shared intent,

1     that Mr. Sarausad had to have the same intent as the  
2     principal. They do use the hypothetical about holding  
3     the arms, but as soon as they finish the hypothetical  
4     the court -- the prosecutor identifies what happened  
5     here, which is that the intention was to facilitate a  
6     homicide, and you have to take the argument as a whole  
7     just looking at the hypothetical.

8             JUSTICE SOUTER: Well, if you take the  
9     argument as a whole you've got at best an ambiguous  
10    argument. You've got an argument that points to a "the  
11    crime" interpretation and you've got an argument part of  
12    which points to an "any crime" interpretation, and to  
13    the extent that your case may ultimately turn on the  
14    significance of the prosecutor's argument, it seems to  
15    me that the benefit of the doubt goes to the defendant.

16            MR. COLLINS: Well, of course, Your Honor,  
17    in this case my argument doesn't have to turn on that.  
18    The question is whether this is an unreasonable  
19    application and looking at the whole argument that the  
20    prosecutor made, whenever the prosecutor used "dime for  
21    a dollar" or that hypothetical, the prosecutor tied that  
22    to shooting. Mr. Sarausad was going to --

23            JUSTICE SOUTER: Maybe I'm beating a dead  
24    horse, but it seems to me that what we've brought in our  
25    questions from the bench is that that is not correct.

1 In one instance the prosecutor clearly tied it to  
2 shooting. If that's all we had before us we wouldn't  
3 have an argument. But in the other iteration of the  
4 dime-dollar argument, the prosecutor didn't tie it to  
5 shooting.

6 MR. COLLINS: Your Honor, I believe the  
7 prosecutor always tied it to shooting, and moreover  
8 that's the way the defense counsel argued the case.

9 JUSTICE BREYER: Can you help me with this?  
10 Suppose I'm a trial judge and I instruct the jury in a  
11 technical matter, an important but technical matter, and  
12 when they have questions about it I say read the  
13 instruction. Suppose I'm right as far as the  
14 instruction goes. But say the prosecutor gets everybody  
15 mixed up. Now, I guess if the prosecutor gets people  
16 mixed up enough, that could become a due process  
17 violation. But I suspect that it has to be quite a lot  
18 of mix-up, that intuitively is what I suspect. Are  
19 there any cases I should look at, one that would tell me  
20 how mixed up the prosecutor has to get everybody before  
21 it's a due process violation?

22 MR. COLLINS: Well, Your Honor, *Brown v.*  
23 *Payton*, which involved the Factor K in how you consider  
24 mitigating evidence in the --

25 JUSTICE BREYER: In *Brown*, in that case did

1 they find that he did get them too mixed up or he  
2 didn't?

3 MR. COLLINS: He didn't get them too mixed  
4 up so.

5 JUSTICE BREYER: He did not. So unless in  
6 this case the prosecutor got everybody more mixed up  
7 than in the Brown case, we should just reverse.

8 MR. COLLINS: Exactly. Particularly --

9 JUSTICE GINSBURG: What about the appellate  
10 court? I mean, the first time around the appellate  
11 court was as mixed up, more so perhaps, than the  
12 prosecutor.

13 MR. COLLINS: Well, Your Honor --

14 JUSTICE GINSBURG: Because the appellate  
15 court the first time got it wrong and it thought it was  
16 enough that the defendant knew that a crime was likely  
17 to be committed, not the crime, crime specified in the  
18 indictment, not -- not murder one, attempted murder, et  
19 cetera, just a crime. And the second time around that  
20 appellate court said, yeah, we got it wrong, now we know  
21 we got it wrong because there has been an intervening  
22 decision of the State's supreme court clarifying it.

23 But what the prosecutor said, at least as I  
24 read it, more than once is exactly what the intermediate  
25 appellate court said the first time around: Said he

1 didn't have to know that there was going to be a  
2 shooting.

3 MR. COLLINS: Your Honor, the intermediate  
4 appellate court did get it wrong the first time around.  
5 But I think you have to consider the context, Your  
6 Honor. The legal issue before the appellate court the  
7 first time on accomplice liability was Mr. Sarausad's  
8 claim that there had to be a shared intent, that is to  
9 say you didn't have to know the crime. You had to have  
10 --

11 JUSTICE GINSBURG: They say, the court  
12 itself said: We got it wrong. We said go away  
13 appellant because you knew that a crime was likely to be  
14 committed.

15 MR. COLLINS: Your Honor, I think you have  
16 to consider the context of the case. The argument that  
17 the court of appeals was considering on direct review  
18 was not the argument here. The question, the point that  
19 you're looking at where the court said that it was not  
20 necessary to prove shooting, the issue before the court  
21 was Mr. Sarausad's claim that he was merely present,  
22 that he didn't do anything. And the court of appeals  
23 responded by saying no, there is evidence that you may  
24 have known of the fight, you may have known of the  
25 shooting. And then in what I would characterize as an

1     aside, the court said the State doesn't have to prove  
2     shooting, but there is evidence of shooting.

3                 JUSTICE SCALIA: Did -- hadn't other  
4     Washington State courts made a similar error in their  
5     interpretation of the Washington statutes?

6                 MR. COLLINS: A few, a few court of appeals  
7     decisions did misstate the standard, Justice Scalia,  
8     that's correct.

9                 JUSTICE SCALIA: And the same -- and hadn't  
10    the prosecutors in Washington in misstating the standard  
11    the same way and using "In for a dime, in for a dollar"  
12    to mean precisely the wrong thing, namely that even if  
13    you were in for beating him up that's enough for holding  
14    you liable for homicide?

15                MR. COLLINS: Some prosecutors made that  
16    argument, Justice Scalia.

17                JUSTICE SCALIA: Including this one in an  
18    earlier case.

19                MR. COLLINS: That's right. But in Boyde  
20    this Court pointed out that the fact that prosecutors in  
21    other cases made improper arguments -- in Boyde  
22    prosecutors were arguing about Factor K didn't allow  
23    consideration of mitigation evidence.

24                JUSTICE SCALIA: The only reason I raise it  
25    is, is to show that this jury was obviously perplexed on



1 the point. It asked for further instructions three  
2 times on this precise point, what did -- did he have to  
3 know. And all the trial judge did was say read, you  
4 know, read my instructions, which essentially recited  
5 the statute. And what all of what you've just  
6 acknowledged shows is that reading the statute doesn't  
7 help a whole lot. It doesn't clarify. It doesn't, it  
8 doesn't correct any misimpression that the prosecutor  
9 could have created.

10 MR. COLLINS: Justice Scalia, with respect,  
11 I disagree that the same question was asked three times.  
12 In fact, if you look at the progression of the  
13 questions, you can see the progress of the  
14 deliberations. The first question asks about intent  
15 with regard to the two convict instructions 11 and 12.

16 JUSTICE SCALIA: Let's look at -- where is  
17 that?

18 MR. COLLINS: That would be at JA 131 and  
19 132.

20 JUSTICE SCALIA: In the white?

21 MR. COLLINS: I'm sorry. The brown joint  
22 appendix 131, 132. And see "Request Clarification on  
23 Instruction Nos. 11 and 12, Intent." Now, 11 and 12 are  
24 the two "convict" instructions for first degree murder  
25 for Mr. Recuenco and Mr. Sarausad. The next questions

1 that were asked -- this is on page 135 of the same  
2 document -- they ask about Instruction No. 17.

3 JUSTICE STEVENS: Excuse me. Let's go back  
4 to 131 for a minute. I thought that applied to the  
5 "accomplice" instruction.

6 MR. COLLINS: The trial court directed the  
7 --

8 JUSTICE STEVENS: That's a question  
9 specifically applied to the defendant only for the  
10 defendant or his accomplice.

11 MR. COLLINS: They asked about "accomplice,"  
12 but the -- this was not a question about the meaning of  
13 "accomplice liability." This question is different than  
14 the third question.

15 CHIEF JUSTICE ROBERTS: It doesn't -- your  
16 point is that it doesn't go to the "aiding" issue.

17 MR. COLLINS: Exactly, Your Honor.

18 JUSTICE SOUTER: Well, excuse me. "Intent"  
19 is broad enough to go to the DA issue, isn't it?

20 MR. COLLINS: This question really goes to  
21 if you look --

22 JUSTICE SOUTER: What's the answer to my  
23 question? I mean "the" and "a" are references to what  
24 the accomplice had in mind at the time of acting.  
25 That's an intent issue.

1 MR. COLLINS: Your Honor -- it is an intent  
2 question, Your Honor. But the question, if you look at  
3 Instruction No. 12, which is on page -- page -- on page  
4 9 of the brown book, this talks about the fact that in  
5 paragraph 2, that the defendant or his accomplice acted  
6 with intent to cause the death of another person. So  
7 the question was: Did both -- do you have to have the  
8 same intent as -- does the accomplice have to have the  
9 same intent as the principal?

10 JUSTICE GINSBURG: Maybe so. Let's go to  
11 the third question, when the jury asks: "When a person  
12 willingly participates in a group activity, is that  
13 person an accomplice to any crime committed by anyone in  
14 the group?"

15 MR. COLLINS: Yes, Your Honor.

16 JUSTICE GINSBURG: How could the jury better  
17 express its puzzlement? It wanted to know, if someone  
18 participates in a group, but did not -- that that person  
19 is -- is an accomplice to any crime by anyone?

20 MR. COLLINS: And that, Justice Ginsburg --  
21 and that's the first time that the jury asked that  
22 question. The trial court referred them to the  
23 accomplice liability instruction and the knowledge --  
24 and the knowledge instruction and --

25 JUSTICE GINSBURG: And the -- the counsel

1 for the defense says, tell them no.

2 MR. COLLINS: And that would have been  
3 wrong, Your Honor. If -- if the trial judge -- there  
4 are two things wrong with that -- wrong, Your Honor.

5 First of all, it would not have been accurate because  
6 you don't know what the group activity is, and you don't  
7 know what the knowledge is. If the knowledge of the  
8 group activity was going back to the school to  
9 facilitate a crime --

10 JUSTICE GINSBURG: It says "a group  
11 activity." When a person willingly participates in "a  
12 group activity," is that person an accomplice to any  
13 crime committed by anyone in the group? I don't think  
14 there is any ambiguity in that question.

15 MR. COLLINS: With respect, Your Honor, I  
16 think you have to know what the group activity is. More  
17 -- but the important point is: The jury got the answer  
18 to the question and --

19 JUSTICE GINSBURG: They didn't get an  
20 answer. They were told to read an instruction that they  
21 had been told three times to read and obviously didn't  
22 understand.

23 MR. COLLINS: Your Honor, I think in the  
24 Weeks case this Court has held that it's proper to tell  
25 a jury to reread instructions. They are not required to

1 give a supplemental instruction.

2 JUSTICE GINSBURG: But we already know that  
3 many people, prosecutors, justices, misunderstood this  
4 "a crime." Was it "a crime," or "any crime." Or "the  
5 crime"?

6 So I think you can't avoid the confusing  
7 nature of the statute and the charge, which repeated the  
8 statute. It doesn't get clarified until the Washington  
9 Supreme Court says it means "the crime," not "a crime,"  
10 and not "any crime."

11 MR. COLLINS: Your Honor, we are not arguing  
12 that there couldn't be some ambiguity, but what we are  
13 saying is that the adjudication by the PRP court was not  
14 objectively unreasonable. Because when you look at the  
15 instructions as a whole and the argument as a whole and  
16 the evidence as a whole, the PRP court's decision is not  
17 objectively unreasonable.

18 JUSTICE SOUTER: Well, isn't -- isn't the  
19 argument for objective unreasonableness, number one, to  
20 begin with, what you just stated. Of course, there is  
21 some ambiguity there. I'll be candid to say that if I  
22 were stating it myself, I would say there is more than  
23 some ambiguity here. It seems to be, if not misleading,  
24 at least incapable of informing a jury of exactly what  
25 the law is.

1           Number two, the -- the second point in the  
2   argument is, the jury comes back repeatedly, and  
3   although, as you point out, it is -- it may well be a  
4   proper answer to a jury request for clarification to  
5   say, go back and read the instruction; the answer is  
6   there. When it has been demonstrated by repeated jury  
7   questions that they are just not getting it, that they  
8   still have perplexity, the court has got to do something  
9   more than just say, oh, go back and do it again.

10           And number three, in this situation in which  
11   there is ambiguity, there is a demonstration of jury  
12   confusion. There is an argument by the prosecutor  
13   which, in fact, is a two-part argument or a two-example  
14   argument and it cuts both ways, isn't it objectively  
15   reasonable to say under those circumstances that there  
16   was an inadequate instruction to the jury in -- in the  
17   correct Washington law?

18           MR. COLLINS: I would say no, Your Honor.

19           JUSTICE SOUTER: Then -- then what would it  
20   take?

21           JUDGE SCALIA: You -- you know, you are  
22   taking on more of a burden than you have to. And you  
23   could say, yes, it would be reasonable to say that, but  
24   it would also be reasonable to say -- to say otherwise,  
25   right?

1                   MR. COLLINS: It's not objectively  
2 unreasonable.

3                   JUSTICE SCALIA: It's not objectively  
4 unreasonable to say the opposite.

5                   MR. COLLINS: Exactly, Your Honor.

6                   JUSTICE SOUTER: The -- the "opposite" in  
7 this case would mean that the jury was properly  
8 instructed and was in a position adequately to  
9 understand Washington law correctly? That's the --  
10 that's the opposite position.

11                  MR. COLLINS: There is no question that in a  
12 number of --

13                  JUSTICE SOUTER: I want to know what you  
14 mean. That's what you mean by the "opposite position"?

15                  MR. COLLINS: I mean the "opposite position"  
16 is it's possible that if you are --

17                  JUSTICE SOUTER: Would you -- you are saying  
18 you want -- why don't you answer my question? My  
19 question is: I think you're telling me that it would be  
20 objectively reasonable to say that on the scenario I  
21 just laid out the jury probably understood Washington  
22 law correctly.

23                  MR. COLLINS: And I would say I think that's  
24 correct, Your Honor.

25                  CHIEF JUSTICE ROBERTS: But even, again, I

1 think you are taking on too high a burden. You don't  
2 have to show that the jury properly understood it. You  
3 don't even have to show that it's reasonable.  
4 You have to show the opposite -- or your friend has to  
5 show the opposite, that there is no way that the jury  
6 could have understood this correctly or applied the  
7 correct constitutional law. That is, if there is a way,  
8 then it's -- it's not objectively unreasonable.

9 MR. COLLINS: That's exactly right, Chief  
10 Justice Roberts.

11 JUSTICE SOUTER: And that way would be the  
12 way we just set out, wasn't it: That the jury, if -- if  
13 -- if, in fact, it's objectively reasonable to conclude  
14 that the jury did understand Washington law correctly on  
15 those circumstances, then -- then the -- the Respondent  
16 here cannot win in -- in his collateral attack?

17 MR. COLLINS: We would say he cannot win  
18 because the decision of the Washington court was not  
19 objectively unreasonable.

20 I'd like to reserve the rest of my time.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
22 Mr. Fisher.

23 ORAL ARGUMENT OF JEFFREY FISHER

24 ON BEHALF OF THE RESPONDENT

25 MR. FISHER: Mr. Chief Justice, and may it



1 please the Court:

2           The State is here today making what we think  
3 is a rather extraordinary argument. It's arguing that  
4 there is no reasonable likelihood that the jury in this  
5 case interpreted the accomplice liability charge in the  
6 same manner that the State itself urged the jury to  
7 interpret it; that the State urged the Washington Court  
8 of Appeals to interpret it on direct review in this case  
9 and in many other cases, and how the Washington Court of  
10 Appeals in fact interpreted it.

11           CHIEF JUSTICE ROBERTS: Well -- but is that  
12 the standard? You said there is -- they are saying that  
13 it's not reasonably likely, but that's not the standard.  
14 They have -- you have to show that it's objectively  
15 unreasonable to show that the -- to assume that the  
16 State got it correct.

17           MR. FISHER: That's right, Your Honor. So  
18 there is a constitutional violation, and then our  
19 burden, which we believe we can carry on the  
20 extraordinary record in this case, is to show that a  
21 court, the Washington Court of Appeals, could not have  
22 reasonably concluded that there was a reasonable  
23 likelihood the jury understood the charge in this case.

24           JUSTICE ALITO: When I read the opinion of  
25 the Washington Court of Appeals, it does not seem to me

1     that what they are doing is providing a literal  
2     interpretation of the jury instruction, as I think we  
3     have to presume the jury did when they got that  
4     instruction.

5                 Washington Court of Appeals is interpreting  
6     Washington law. And they may be influenced by  
7     Washington case law, which is what they cite. They  
8     don't -- they quote the instruction but they don't say  
9     "the crime" means "a crime". That's how we interpret  
10    the language of the instruction.

11                So there is an overlay of Washington case  
12    law, principles of accomplice liability that inform this  
13    instruction. So I don't know that you can -- it's  
14    reasonable to argue that because they misinterpreted  
15    Washington law, they were misinterpreting the literal  
16    language of the jury instruction.

17                MR. FISHER: Well, Justice Alito, we think  
18    it is fair to say that, because in the Washington Court  
19    of Appeals decision, they start by laying out the  
20    statutory language of Washington accomplice liability.  
21    And remember, the jury instruction in this case simply  
22    tracks that language. That's, in fact, one of the  
23    State's argument.

24                Now, our response to that argument is, just  
25    as you said, Justice Alito, when a State supreme court,

1 as the Washington court later did in this case, steps in  
2 and applies a gloss to that language and interprets it,  
3 as this Court has said many times, it's as though that  
4 language is written into the statute.

5 JUSTICE KENNEDY: The gloss that the  
6 Washington Supreme Court ended up with was exactly the  
7 same as the instruction that was, that the judge gave in  
8 this case -- to be as a -- the trial judge, whatever the  
9 state of the law was, got it right.

10 MR. FISHER: Got it right insofar as  
11 regurgitated the language of the statute. But the  
12 Washington law that would apply to this case -- and I  
13 think there is an agreement on this, Justice Kennedy, is  
14 that Mr. Sarausad has to know that he was promoting or  
15 facilitating a homicide. That's what he has to know.  
16 That's theory one of the State's --

17 JUSTICE BREYER: That's exactly what the  
18 instruction said. My problem is, I guess different  
19 people, I understand, can read the same words and come  
20 to different conclusions. But I have read the  
21 instruction and the statute, probably over a dozen times  
22 by now, and I can't find the slightest ambiguity.

23 It seems to be absolutely clear. What it  
24 says is you're instructed that a person is guilty -- I  
25 would say what crime is the jury considering -- of a

1 crime. Namely, second-degree murder crime, if it is  
2 committed by another person for which he is legally  
3 accountable.

4 Then it says you're an accomplice -- an  
5 accomplice -- it says a person is an accomplice with  
6 certain knowledge when he aids another person in  
7 planning or committing a crime; the crime, second-degree  
8 murder.

9 What is the problem?

10 MR. FISHER: The problem, Your Honor, is it  
11 starts with this Court recognized him void. Juries are  
12 lay people, and they understand things in terms of  
13 common sense.

14 JUSTICE BREYER: That's a different  
15 argument. I want to know first -- in my mind in two  
16 different categories. Category one: Is there an  
17 ambiguity in this instruction? And my answer so far,  
18 which is what I was asking you, is zero. Why not?

19 And then the second question is, could the  
20 prosecution get people so mixed up about something, a  
21 typical thing like this, that it would violate due  
22 process? That's why I asked the question before. And I  
23 said, obviously the answer is sometimes they could.

24 And then the question is, did they here?  
25 And what he referred me to was Brown, which I've looked

1 at, in which I said the prosecutorial and problem in  
2 that case did not rise to a federal due process  
3 question. So, I guess -- though it's only one person --  
4 you would have to convince me that this is somehow worse  
5 prosecutorial conduct than existed in Brown.

6

7 MR. FISHER: Let me take your question in  
8 two steps, Justice Breyer.

9 JUSTICE BREYER: All my questions from the  
10 whole case.

11 MR. FISHER: Thank you. First I want to  
12 emphasize we are not alleging prosecutorial misconduct  
13 in this case in any way. The problem is --

14 JUSTICE BREYER: No. But what I mean by  
15 that is that the prosecution would have had to have  
16 gotten the jury more mixed up than -- I was using  
17 shorthand for that --

18 MR. FISHER: Right.

19 JUSTICE BREYER: -- more mixed up than they  
20 did in Brown, where I thought it was pretty bad.

21 MR. FISHER: That's right. Let me -- all I  
22 meant to say was the prevailing view in the State at the  
23 time of this trial was that any crime was sufficient,  
24 and so that's why the prosecutor was entitled to make  
25 that argument.

1           Let me take your question in two steps,  
2   first the ambiguity in the language. As the Washington  
3   courts themselves and as the States themselves argue at  
4   page 38 and 39 of the appendix of our red brief, you can  
5   interpret the language in the statute, when you get to  
6   words "the crime", to mean one of two things:

7           One, it could mean as you said, Justice  
8   Breyer, that the particular crime the principal  
9   committed; or it could mean one could understand it to  
10   mean simply the principal's criminal conduct. And in  
11   Washington --

12           JUSTICE BREYER: In my -- it it doesn't mean  
13   either. It means jury you are instructed that the  
14   person is guilty of a crime -- in other words, the jury  
15   is sitting there and they are asked the question: Is  
16   the person guilty of second-degree murder?

17           Now they are to apply the instruction. A  
18   person is guilty of second-degree murder if da, da, da,  
19   da. And when it gets to "the crime", it is referring to  
20   second-degree murder. I don't know how -- anything else  
21   it could be referring to.

22           MR. FISHER: Well, maybe the best that I can  
23   do, Justice Breyer, is refer you to empirical evidence  
24   from the State itself, from the State of Washington, and  
25   if you need one further thing to look at, I commend to

1 you the Supreme Court decision of the Supreme Court of  
2 Colorado that cited in the actual brief -- there was  
3 language exactly like this that comes to a textual  
4 analysis and comes to the conclusion.

5 JUSTICE BREYER: You're convincing me that  
6 different people can reach different conclusions. What  
7 I'd like you to say is something that would change my  
8 mind on my initial conclusion that there is no  
9 ambiguity. I think you could say something like that,  
10 because as you quite rightly point out, other people  
11 have reached other conclusions.

12 MR. FISHER: Because the articles "a" and  
13 "the" are simply not definite enough. And you can read  
14 the words "the crime" to simply mean criminal conduct.

15 Now, let me talk about the prosecutor's  
16 argument.

17 CHIEF JUSTICE ROBERTS: You might be able to  
18 and you might -- as I understood you to say earlier, you  
19 could read it one way or you could say it another way.  
20 And if that's the case, it's hard to say that reading it  
21 one way is objectively unreasonable when the State court  
22 reads it that way.

23 MR. FISHER: I think if that's all we had,  
24 Mr. Chief Justice, you would be exactly right. So let  
25 me turn now --

1 CHIEF JUSTICE ROBERTS: So it is not  
2 objectively unreasonable for the State to instruct  
3 jurors as they did? If that's all you had, then that  
4 would be the point.

5 MR. FISHER: Right. Right. Because the  
6 test that this Court has repeated many times is whether  
7 there is a reasonable likelihood that this jury  
8 misapplied the instruction.

9 Now, let me turn to the prosecutor's  
10 argument, because there was a lot of discussion about  
11 that in the first half an hour.

12 There is two places in the joint appendix  
13 that you might want to pay attention to, and I think we  
14 might have been referring to two different places  
15 earlier. In joint appendix page 38, the prosecutor  
16 makes her opening argument and says -- and uses the  
17 assault analogy of holding somebody's arms behind their  
18 back. And she tells the jury this is -- as Justice  
19 Ginsburg was reading -- this is the law of the State of  
20 Washington.

21 And again, in direct rebuttal at page 123 of  
22 the joint appendix, the prosecutor again says very  
23 specifically -- specifically to the jury, let me talk to  
24 you about the accomplice liability instruction.

25 JUSTICE KENNEDY: Was there an objection?



1                   MR. FISHER: There were objections both  
2 before and after.

3                   JUSTICE KENNEDY: The objection was based on  
4 the defense proffer of an instruction which was, namely,  
5 close to the model penal code that says you have to have  
6 the same -- is anterior principle, and that's not  
7 necessarily the law in every state.

8                   So the defense bears some responsibility for  
9 not -- for -- number one, it didn't have a coherent  
10 theory either.

11                  MR. FISHER: There were times where  
12 Mr. Sarausad's counsel, you're right, did ask for a  
13 little more than he was entitled to. But Mr. Reyes'  
14 counsel made objections directly on point, which  
15 Mr. Sarausad joined, and as Justice Ginsburg noted  
16 earlier, when the jury comes back with the third  
17 question that is precisely on point, it's precisely the  
18 question on which that whole entire case turns -- and I  
19 might add there would be no reason for the jury to ask  
20 that third question, what kind of knowledge is required  
21 in this case, if they had decided, as the State argues,  
22 that Mr. Sarausad knew a homicide was going to be  
23 committed.

24                  CHIEF JUSTICE ROBERTS: I don't think that  
25 your reading of question three is definitive. I think

1     it's like the instruction, the jury could read it one of  
2     two ways. If you look at question three, the issue  
3     could be whether others could have had an intent, in  
4     other words, others in the group, not simply -- it  
5     doesn't show that the accomplice doesn't have to have  
6     the requisite intent.

7                 MR. FISHER: Well, we think it's pretty  
8     clear, Mr. Chief Justice. I think the more important  
9     sentence may be the one that precedes that question,  
10    which is the jury tells the court, after seven days of  
11    deliberations: We are having difficulty agreeing on the  
12    legal definition and concept of accomplice.

13                Now, that is the question -- and let me  
14    return to the prosecutor's argument --

15                CHIEF JUSTICE ROBERTS: That's not the  
16    question. There are a number of areas, and I think the  
17    first two questions point in the opposite direction.  
18    They do not say we don't know whether it's "the crime"  
19    or "a crime". Their questions, neither one, two or  
20    three focus on that.

21                It's a more general question that we could  
22    read the opposite way. Perhaps you can read it the way  
23    you are, even though it doesn't say is it "the crime" or  
24    "a crime".

25                But there again, I think it's incorrect to

1 say it's quite clear that the question -- and certainly  
2 not questions one and two, I mean question three is your  
3 strongest one -- but it's still not clear that they are  
4 focusing on the "the/a" issue.

5 MR. FISHER: Well, I think the best we can  
6 do, because we have to make reasonable inferences from  
7 the record and he we can't go back and ask the jurors  
8 what we thought, is we have to make, as the court has  
9 done many times, reasonable inferences as to what they  
10 are doing. And I think the fairest reading of this  
11 record, even if it's not absolutely clear, is that the  
12 jury was honing in progressively on the central issue in  
13 this case, and that was Mr. Sarausad's mens rea.

14 JUSTICE BREYER: So, then, what I take is  
15 authoritative on that are two sentences from the  
16 Washington Supreme Court opinion, though people -- other  
17 judges have been all over the lot. The first sentence  
18 it says: The trial court correctly instructed the jury  
19 that it could convict Mr. Sarausad of murder -- they  
20 mean second-degree murder -- as an accomplice only if it  
21 found he knowingly aided in commission of "the crime"  
22 charged, which was second-degree murder. That's their  
23 interpretation, which I could understand.

24 Then the second thing is, it does not offend  
25 the principles of accomplice liability to hold

1 responsible one who knowingly aids such conduct; namely,  
2 conduct that creates a substantial risk of death when  
3 the substantial risk of death results in actual death.

4 So that would seem to be hornbook law. If  
5 you engage in conduct that might well cause substantial  
6 or -- substantial risk of death and you know it, you  
7 know, you know you're engaging in this conduct, that's  
8 the Washington view, that's it. You've had it.

9 And here they go on to say that he knew  
10 there was plenty of evidence that he knew that he was  
11 engaged in a drive-by shooting. And then to put every  
12 dot on every "I", they say a drive-by shooting does run  
13 a substantial risk of death. Okay.

14 Now that's what I read and at that point, I  
15 said I'll ask you that, because then I can hear the best  
16 answer.

17 MR. FISHER: Your Honor, we are not  
18 challenging -- or this Court does not have authorities  
19 the sufficiency of the evidence in this case, so there  
20 might be enough evidence in the record for the jury to  
21 have found that. But the question is, did the jury find  
22 that? And we can't know from the instructions given in  
23 light of the arguments made to the jury by the  
24 prosecutor and the jury's own questions trying to sort  
25 through them, this case -- whether the jury actually

1 found that. And so if the State wanted -- this goes  
2 again to the prosecutor's argument.

3 There is two things that I think we might be  
4 conflating improperly here. There is the first question  
5 of what the prosecutor argued to the jury Washington law  
6 meant. And I suggest to you if you look at JA 38 and JA  
7 123, there is no doubt what the prosecutor was arguing  
8 to the jury Washington law meant. It meant as she said,  
9 "in or a dime, in for a dollar." If you hold somebody's  
10 arms behind their back thinking that an assault is going  
11 to occur and the person dies, you can be found guilty of  
12 murder.

13 JUSTICE KENNEDY: No objection from defense  
14 counsel.

15 MR. FISHER: Both before and after, Justice  
16 Kennedy.

17 But I would add that another reason the  
18 defense counsel may not have interposed yet another  
19 objection at that instance was because that was the  
20 prevailing view of Washington law at the time.

21 JUSTICE ALITO: Could I ask you this  
22 question about the jury's question where they say we are  
23 having difficulty agreeing on a legal definition and  
24 concept of accomplice; when a person willingly  
25 participates in a group activity, is that person an

1 accomplice to any crime committed by anyone in the  
2 group?

3 Suppose that the judge had answered that  
4 question by saying a person who participates in group  
5 activity is guilty of the crime of second degree murder  
6 if the person acts with knowledge that his or her  
7 conduct will promote or facilitate the commission of the  
8 crime of second degree murder. Would you have a case if  
9 that answer was given?

10 MR. FISHER: I don't think so, Justice  
11 Alito. That would have cleared up the ambiguity in the  
12 case.

13 JUSTICE ALITO: That's almost a direct quote  
14 from the instruction that was given.

15 MR. FISHER: No, it's not because what you  
16 did is you inserted the name of the crime in there.

17 JUSTICE ALITO: I put in crime of second  
18 degree murder rather than the crime.

19 MR. FISHER: That's exactly what defendants  
20 even still in the State of Washington are asking courts  
21 to do in the --

22 JUSTICE ALITO: That poses a difference  
23 enough to make A, a constitutional violation and B, make  
24 it unreasonable for the Washington Court of Appeals to  
25 say that there was no constitutional violation?

1                   MR. FISHER: Yes, under the particular  
2     circumstances in this case, because the jury expressed  
3     confusion. So we know the jury was confused. We know  
4     the only reason they would have asked that is if they  
5     had not found the facts the State alleges, at least at  
6     that point, that Mr. Sarausad knew a murder was going to  
7     occur, and also because we know the prosecutor argued  
8     the exact opposite to them. They were actually asking  
9     the question -- another way to put it, I think which is  
10    a fair characterization is, is what the prosecutor told  
11    us correct? That --

12                  JUSTICE BREYER: The prosecutor, I mean I  
13    thought, though I'm not -- this really is ambiguous, I  
14    think, but if you do hold somebody's arms behind his  
15    back and punch him in the stomach, that does perhaps --  
16    at least might run -- I can see a person saying that  
17    that runs a substantial risk of death. I mean Houdini  
18    died that way, apparently. So maybe hitting somebody in  
19    the stomach does create a substantial risk of death. Do  
20    you know anything about -- one way or the other on that?

21                  MR. FISHER: I'm sorry, Justice Breyer. You  
22    need more than that in this case. Second degree murder  
23    is intentional. So --

24                  JUSTICE BREYER: They intentionally hit  
25    somebody in the stomach, you say, knowing all about --

1                   MR. FISHER: Intentionally killing is what  
2 the State says.

3                   JUSTICE BREYER: I realize that but what the  
4 State supreme court holds. I think correctly, that if  
5 the person conscious of the risk knows that a particular  
6 individual is engaging in certain conduct for whom he is  
7 responsible, he is -- he is guilty of the -- if the  
8 event that you know there is a substantial risk of comes  
9 about. I would be amazed that a State would say the  
10 contrary.

11                  JUSTICE KENNEDY: And your answer to Justice  
12 Breyer incorporated the -- the principle that the  
13 defense counsel had been arguing for from the outset of  
14 this case, that you must have the same scienter as the  
15 principal, and that's not necessarily the law.

16                  MR. FISHER: I think that --

17                  JUSTICE KENNEDY: It can go on in some  
18 States but not -- it doesn't have to be the law as I  
19 understand it.

20                  MR. FISHER: The defendant didn't have to  
21 have premeditation, Justice Kennedy. I think the best  
22 answer I can give and I -- is that we agree with the  
23 State on this. We agree with what the State said at  
24 page 31 of its brief, that it had to prove that  
25 Mr. Sarausad knew he was aiding or facilitating a



1 homicide. That he knew, and it was argued to this case,  
2 Justice -- as it was argued to the jury, Justice Breyer,  
3 the defense agreed that if Mr. Sarausad knew there was a  
4 gun in his car, or if he knew that the fellows were  
5 planning on killing somebody, that he could have been  
6 found guilty.

7 That was the very -- that was the central  
8 issue in this case; and when the State stands up and  
9 says the prosecutor argued -- didn't make -- didn't make  
10 a misleading argument, what they are talking about are  
11 the prosecutor's arguments on the facts. After telling  
12 the jury had is what Washington law is, the prosecutor  
13 argued in various ways that Mr. Sarausad knew that a  
14 fight was going to happen, or -- or that a gun was --

15 JUSTICE BREYER: Washington -- in the State  
16 of Washington you think the law is that if Joe Jones  
17 helps Dead Eye Dick shoot his gun right at somebody's  
18 leg and then accidental -- then, you know, he doesn't  
19 aim quite right, the guy dies; then it's a good defense  
20 to say well, I knew he was Dead Eye Dick. I thought  
21 he'd just hit him in the leg. I mean, that -- we know  
22 that isn't a good defense in Washington because the  
23 Supreme Court of Washington tells us that.

24 MR. FISHER: That's right. But I think you  
25 don't --

1 JUSTICE BREYER: What's the difference  
2 between that and punching him in the stomach?

3 MR. FISHER: Because when somebody is  
4 punched in the stomach there is no reasonable belief  
5 that the person is going to be put in grave risk of  
6 death. And so as I said, the issue of this case, that  
7 the whole entire case was about, and that the jury was  
8 demonstrably perplexed about, was what did Mr. Sarausad  
9 know.

10 And when the State says, well -- the  
11 prosecutor argued to the jury that he knew their  
12 shooting was going to happen or that he knew a gun was  
13 in the car, if the jury had believed that they could  
14 have come back with a guilty verdict in 30 minutes; but  
15 instead they asked a series of questions culminating in  
16 the one after seven days of deliberation which can only  
17 be interpreted as suggesting that we don't believe that  
18 Mr. Sarausad knew that the worst was going to happen  
19 here, and we are struggling to figure out what kind of  
20 verdict we have to render in light of that.

21 JUSTICE ALITO: With the jury -- was the  
22 jury told that the arguments of counsel are not the law,  
23 that I, the judge, will tell you what the law is?

24 MR. FISHER: I think a standard statement to  
25 that effect was made. But remember two things, Justice

1 Alito. First, the prosecutor herself kept telling the  
2 jury this is what the State of Washington law requires.  
3 And as this Court has recognized in other cases, the  
4 prosecutor isn't just any old lawyer standing in front  
5 of a jury. The prosecutor carries with her the  
6 imprimatur of the government; and so we think it's  
7 perfectly reasonable for the jury to have understood the  
8 prosecutor to be arguing this is what the law is, and at  
9 the very least to have created a question in their  
10 minds.

11 And if I contrast this case with Brown  
12 against Payton, because Justice Breyer has asked about  
13 that case and it is another case where the prosecutor  
14 made what this Court found was a misleading argument to  
15 the jury, there you have a very different situation.  
16 Not only do you have no jury questions at all coming in  
17 that case to demonstrate to the Court that the jury was  
18 in fact confused and likely to follow the prosecutor's  
19 advice, but you have a very different scenario in Brown,  
20 where this Court said that in light of the way that case  
21 was actually argued, the prosecutor was really making  
22 more of an argument on the facts, that these arguments  
23 the defendant has made shouldn't really be considered  
24 mitigating evidence in your deliberations; and as this  
25 Court said the jury must have taken it as a factual

1 argument because otherwise the whole mitigation hearing  
2 would have been totally unnecessary.

3 Now, under the -- under the facts of this  
4 case, the way this case was tried -- and again I want to  
5 emphasize that at the time this case was tried, the  
6 prosecutor had the better of the argument as to what  
7 Washington law is.

8 This case is only before you because it's  
9 the oddball case, and the only one I can think of that's  
10 like it is when this Court had in about 2000, or decided  
11 in 2001, called *Fiore v White*, when in Pennsylvania the  
12 State brought a prosecution and obtained a conviction  
13 for discharging hazardous waste without a permit, and  
14 then the Pennsylvania Supreme Court later said that not  
15 having a permit is required under the statute. It's not  
16 enough to prove to the jury that he so deviated from the  
17 permit that -- that no permit existed. And then this  
18 Court said once we know that clarification under State  
19 law, we look back and it's clear as day that the jury  
20 didn't find that element.

21 Now the only difference between that case  
22 and this case is that in *Fiore* it was absolutely certain  
23 the jury didn't find the element and the prosecution  
24 didn't argue otherwise. Here you have enough ambiguous  
25 evidence and ambiguity in the jury instructions that the

1 State was trying to backfill after it has lost the case  
2 in the Washington Supreme Court and say no, the jury in  
3 this case even though we told them they didn't have to  
4 find it, did go ahead and find it.

5 JUSTICE ALITO: But the only difference  
6 between that case, which I know very well, and this case  
7 is that in that case there was no issue about jury  
8 instructions.

9 MR. FISHER: Well, not directly.

10 JUSTICE ALITO: So what's the relevance of  
11 it?

12 MR. FISHER: Right. So, the relevance --

13 JUSTICE ALITO: Has to do with the  
14 retroactivity whether a State can -- whether  
15 Pennsylvania had changed the interpretation of its  
16 statute, or whether what they said it meant was what it  
17 always had meant.

18 MR. FISHER: That's right, Justice Alito and  
19 I know that you know that case. The -- you're right.  
20 So we are on all fours with Fiore in the sense that the  
21 later decision from the State Supreme Court applies  
22 retroactively, and in Fiore what you would have had, the  
23 court didn't need to talk about jury instructions,  
24 because I take it that the jury was instructed in Fiore  
25 that deviating substantially from a permit satisfies the

1 no-permit element of that defense, and so the jury was  
2 given there, simply an instruction that was simply  
3 wrong.

4 And here our contention is that the -- that  
5 the jury charge taken in light of the case was  
6 ambiguous, but that distinction doesn't matter because  
7 as this Court has said in *Boyde* and *Estelle* and many  
8 other cases, all you have to show is a reasonable  
9 likelihood that the jury misunderstood the charge.

10 Now we have to show an additional layer of  
11 unreasonableness because we are on habeas now and no  
12 longer on direct review, but for all the reasons that  
13 are apparent on the face of this record this is the  
14 extraordinary case.

15 JUSTICE STEVENS: Mr. Fisher, can I just ask  
16 you a question? Is it your view that the question that  
17 is troubling the jury was whether they had to find that  
18 the driver of the car knew that there was a gun in the  
19 car.

20 MR. FISHER: There's two ways to think about  
21 it. Yes, that could be one way to think about it. The  
22 other way that they might have been thinking about it  
23 was whether he knew that a murder was going to happen  
24 and that a killing was going to happen.

25 JUSTICE STEVENS: Assume proof of the gun in

1 the car was enough to prove --

2 MR. FISHER: That's the way the case was  
3 presented to the jury.

4 JUSTICE STEVENS: It wouldn't -- and that's  
5 what presumably may have taken a lot of time  
6 deliberating whether or not he knew there was a gun.

7 MR. FISHER: That's right, Justice Stevens.  
8 The defendant --

9 JUSTICE STEVENS: And in one theory it makes  
10 a difference; in another theory it doesn't.

11 MR. FISHER: Precisely. And the defense  
12 counsel -- the defense counsel admitted in argument that  
13 if you find he knew there was a gun in the car, then we  
14 lose. And, remember, the jury earlier -- we've talk  
15 about the three jury questions about what the law meant.  
16 Remember the jury earlier asked to have Mr. Sarausad's  
17 testimony reread back to them. So, again, every  
18 indication is you have a jury really trying very, very  
19 hard to do their job.

20 CHIEF JUSTICE ROBERTS: Counsel, AEDPA of  
21 course requires that this be an unreasonable application  
22 of clearly established Federal law. What is the clearly  
23 established Federal law that was unreasonably applied?

24 MR. FISHER: It's the rule that is stated --  
25 again, at page 32 of the State's brief with which we

1 agree -- that if there is a reasonable likelihood that  
2 the jury applied instructions so as to violate the  
3 Constitution, then that violates due process.

4 CHIEF JUSTICE ROBERTS: So that's  
5 articulated at a fairly general level.

6 MR. FISHER: That's right.

7 CHIEF JUSTICE ROBERTS: In Yarborough, we've  
8 said that the more general the rule, the more leeway  
9 courts have in reaching outcomes in a case-by-case  
10 determination. So you have a very general rule, and to  
11 find an unreasonable application, the court has broad  
12 leeway because it is a general rule. And you've already  
13 said that the instruction does not establish  
14 unreasonable application.

15 Given that, isn't it pertinent, although  
16 people have objected -- you've objected to the idea  
17 that, well, all they did was send them back with the  
18 instruction. So they sent them back with something that  
19 you said could be reasonably interpreted correctly. So  
20 why isn't that -- why doesn't that -- given the leeway  
21 the State court has because this is a general rule, why  
22 isn't that sufficient to refute the idea of unreasonable  
23 objective? Yes.

24 MR. FISHER: The State would have a better  
25 argument if nothing else had happened in this trial



1 other than simply the jury had been given that  
2 instruction, but our point is, and then this Court  
3 recognizes as much, I think, in Brown against Payton,  
4 that the prosecutor's arguments do matter. They are to  
5 be considered in the calculus. And this Court said in  
6 Estelle that instructions cannot be considered in  
7 isolation. They have to be considered in the totality  
8 of the way the case was tried.

9           And so my point, Mr. Chief Justice, is the  
10 reason why the State cannot show that the State court of  
11 appeals decision was reasonable is because it's not just  
12 the instruction that had perplexed the State and  
13 Washington courts over the years; it's the fact that the  
14 prosecutor asked the jury to adopt the wrong  
15 interpretation of the instruction and that the jury came  
16 back and told the court -- I think -- maybe it helps to  
17 think about the case this way: After seven days of  
18 deliberation -- now I understand that we can dispute a  
19 little bit what the jury was asking, but I think a fair  
20 statement is that after seven days of deliberation, the  
21 jury was telling the court at a minimum there's a  
22 reasonable likelihood we don't understand accomplice  
23 liability in this case and that we are going to find  
24 that as long as Sarausad was a member of this gang and  
25 willingly participated in gang activity, that that's

1 enough to hold him liable for accomplice murder. And  
2 that's what the State had argued alternatively, Your  
3 Honor.

4 So after seven days, there's no guesswork  
5 that's even required. We know the jury was confused and  
6 going down the wrong path. And so the only way the  
7 State can rescue that is to say that, upon being told to  
8 read the same charge that it been told to read three  
9 previous times, that suddenly the light bulb went off so  
10 dramatically that it reduced its confusion below the  
11 50/50 level. Now that's what this Court said in Brown  
12 against Payton. The reasonable likelihood test is below  
13 50/50.

14 So we think if you were the Washington Court  
15 of Appeals -- and I think this is another way to ask  
16 yourselves the question you have to decide in this case.  
17 If you were the Washington Court of Appeals on this  
18 record, would it be reasonable for you to say that this  
19 jury was not even reasonably likely to misunderstand the  
20 accomplice liability instruction in this case?

21 CHIEF JUSTICE ROBERTS: You've already said  
22 that the instruction doesn't get you there. And I just  
23 heard you say that, with respect to the questions, we  
24 can dispute what the jury was asking. So it's hard for  
25 me to see where you get the objectively unreasonableness

1 if you can read the instruction correctly, if it's -- if  
2 you can't tell what the jury was asking, you don't know  
3 that they were reflecting the confusion you have here.

4 So is all you're left with the prosecutor's statements?

5 MR. FISHER: Well, we have all three, but I  
6 don't want to give away too much. I think it is fair to  
7 say that the jury's third question is perfectly clear.  
8 I hedged a minute to be frank so that I could  
9 acknowledge the Court's earlier questions and get -- and  
10 get my statement out, but in all honesty, I think that  
11 the third jury question makes it clear that the jury is  
12 confused. But we have -- again, unlike Brown against  
13 Payton, unlike Weeks against Angelone, we have this  
14 amazing constellation of all these mutually --

15 JUSTICE BREYER: This argument -- I'm  
16 beginning to get your argument. The statement is -- the  
17 prosecutor never suggested Mr. Sarausad could be found  
18 guilty if he had no knowledge that a shooting was to  
19 occur. You're saying that's absolutely wrong. There's  
20 no support for that in the record. In fact what the  
21 prosecutor was arguing is that, even if a shooting  
22 didn't occur, he's still guilty because of other gang  
23 activity, and when we read the record, we find that's so  
24 wrong the statement in the supreme court opinion, that  
25 habeas was right. Is that the argument?

1           MR. FISHER: That's a fair characterization,  
2 Justice Breyer. If you look at the hypothetical that  
3 the State gives the jury as to what Washington law  
4 means, it is clear that's the argument they're making.  
5 On the facts they made alternative arguments.

6           CHIEF JUSTICE ROBERTS: Thank you, counsel.

7           MR. FISHER: Thank you very much.

8           CHIEF JUSTICE ROBERTS: Mr. Collins, you  
9 have four minutes.

10           REBUTTAL ARGUMENT OF WILLIAM B. COLLINS

11           ON BEHALF OF THE PETITIONER

12           MR. COLLINS: Thank you, Mr. Chief Justice.

13           I want to just focus for a moment on the  
14 third question because Respondent focuses on that. To  
15 begin with, you have to understand what was going on in  
16 this trial. There was deliberation for seven-plus days  
17 but it was a 10-day trial, I mean the jury heard  
18 testimony for 10 days. There were three defendants  
19 being tried together. Each defendant was being tried on  
20 five counts. It was a complicated trial. The fact that  
21 the deliberations took seven days is not extraordinary  
22 at all.

23           Mr. Sarausad assumes that the third question  
24 is directed at him. I suggest -- of course we don't  
25 know what was going on in the jury room, but I suggest

1 as likely an explanation is that question went to  
2 Mr. Reyes because Mr. Reyes was not driving, was sitting  
3 in the back seat. The question is, if you're just  
4 sitting in the back seat when your gang is going to do  
5 an activity, are you guilty? And they were told to  
6 reread the instruction. They did reread the  
7 instruction, and they deliberated. So the third  
8 question came on the seventh day of deliberation. After  
9 they got the answer to reread the instruction, they  
10 deliberated about 45 minutes. They took a break for the  
11 night. They came back, deliberated about another hour  
12 and a half, and then they pronounced their verdict,  
13 convicted Mr. Ronquillo of first degree murder,  
14 Mr. Sarausad of second degree murder. They hung on  
15 Mr. Reyes.

16 It seems to me that the third question does  
17 not -- is not some kind of a smoking gun. When you look  
18 at the trial --

19 JUSTICE GINSBURG: They didn't say anything  
20 at all about Mr. Reyes. They asked the question about  
21 an accomplice, a crime.

22 MR. COLLINS: Exactly right, Justice  
23 Ginsburg, but Mr. Sarausad assumes that that's a  
24 question about him. We suggest it's just as likely that  
25 it's a question about Mr. Reyes.

1 JUSTICE BREYER: But what he's saying, I  
2 think now, is if there was no gun in the car -- suppose  
3 the jury thinks there's no gun in the car, then he  
4 didn't even know there was going to be a shooting, but  
5 that the prosecutor in the context of the trial had  
6 given the jury the impression that they could convict  
7 this person even if the person did not know there was  
8 going to be a drive-by shooting.

9 And he's saying that the finding to the  
10 contrary, the statement to the contrary in the Supreme  
11 Court of Washington is wrong. When I look at that, I  
12 will find, he says, that the prosecutor gave the  
13 impression, as I just said, that even without a gun your  
14 involvement with this gang is enough to convict him of  
15 murder. What is your response to that? You know the  
16 record. I don't.

17 MR. COLLINS: My response, Your Honor, is  
18 you will not find that when you look through the record.  
19 The prosecutor -- and the PRP court stated the  
20 prosecutor never argued that if the only knowledge was  
21 some kind of a fight, that you could convict him,  
22 because the defendants in this case testified that they  
23 were going to go fight. And you never had the  
24 prosecutor saying: This is an easy case; I win. The  
25 defendants have all testified that they were going to go

1 fight. In for a dime, in for a dollar. If they were  
2 going to go fight, they're guilty. Never argued that.

3 You will not find that in the transcript or  
4 in the materials, Justice Breyer. What you will find is  
5 the prosecutor consistently arguing they knew they were  
6 going to facilitate a homicide, a shooting, a murder.  
7 And given that this is a case brought under AEDPA and  
8 the question is whether the PRP court's decision is an  
9 unreasonable application of Federal law, I don't think  
10 there's any doubt that it's not an unreasonable  
11 application, and, therefore, this Court should reverse  
12 the Ninth Circuit.

13 If there are no more questions.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 The case is submitted.

16 (Whereupon, at 11:03 a.m., the case in the  
17 above entitled matter was submitted.)

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<b>A</b>	21:13	28:17,23 36:16	21:11 25:3	<b>assaulted</b> 10:23
<b>able</b> 31:17	<b>admitted</b> 47:12	38:9 40:11,22	37:7 40:13	<b>assisting</b> 11:5
<b>above-entitled</b>	<b>adopt</b> 49:14	53:9	43:8 51:21	<b>assume</b> 4:9
1:14	<b>advice</b> 43:19	<b>answered</b> 38:3	55:5	25:15 46:25
<b>absolutely</b> 27:23	<b>AEDPA</b> 8:12	<b>anterior</b> 33:6	<b>argument</b> 1:15	<b>assumes</b> 52:23
35:11 44:22	47:20 55:7	<b>Antiterrorism</b>	2:2,7 3:3,6,18	53:23
51:19	<b>agree</b> 5:14 40:22	3:11	9:7 10:9 11:24	<b>attack</b> 24:16
<b>abuse</b> 3:22	40:23 48:1	<b>apparent</b> 46:13	11:24 12:6,9	<b>attempted</b> 6:9
<b>accidental</b> 41:18	<b>agreed</b> 7:20 41:3	<b>apparently</b>	12:10,10,11,14	8:7 14:18
<b>accomplice</b> 3:17	<b>agreeing</b> 34:11	39:18	12:17,19 13:3	<b>attention</b> 32:13
4:11 5:8 7:15	37:23	<b>appeals</b> 10:20	13:4 15:16,18	<b>authoritative</b>
7:21 8:1 10:7	<b>agreement</b>	15:17,22 16:6	16:16 21:15,19	35:15
10:10,11 11:18	27:13	25:8,10,21,25	22:2,12,13,14	<b>authorities</b>
15:7 18:5,10	<b>ahead</b> 45:4	26:5,19 38:24	24:23 25:3	36:18
18:11,13,24	<b>aided</b> 35:21	49:11 50:15,17	26:23,24 28:15	<b>avoid</b> 21:6
19:5,8,13,19	<b>aiding</b> 18:16	<b>appear</b> 7:10	29:25 31:16	<b>a.m</b> 1:16 3:2
19:23 20:12	40:25	<b>APPEARAN...</b>	32:10,16 34:14	55:16
25:5 26:12,20	<b>aids</b> 28:6 36:1	1:17	37:2 41:10	<b>B</b>
28:4,5,5 32:24	<b>aim</b> 41:19	<b>appellant</b> 15:13	43:14,22 44:1	<b>B</b> 1:18 2:3,8 3:6
34:5,12 35:20	<b>Alito</b> 25:24	<b>appellate</b> 14:9	44:6 47:12	38:23 52:10
35:25 37:24	26:17,25 37:21	14:10,14,20,25	48:25 51:15,16	<b>back</b> 9:8 18:3
38:1 49:22	38:11,13,17,22	15:4,6	51:25 52:4,10	20:8 22:2,5,9
50:1,20 53:21	42:21 43:1	<b>appendix</b> 8:24	<b>arguments</b> 9:14	32:18 33:16
<b>accountable</b>	45:5,10,13,18	17:22 30:4	9:14 16:21	35:7 37:10
28:3	<b>alleges</b> 39:5	32:12,15,22	36:23 41:11	39:15 42:14
<b>accurate</b> 8:17	<b>alleging</b> 29:12	<b>application</b> 3:25	42:22 43:22	44:19 47:17
20:5	<b>allow</b> 16:22	12:19 47:21	49:4 52:5	48:17,18 49:16
<b>acknowledge</b>	<b>alternative</b> 52:5	48:11,14 55:9	<b>armed</b> 7:23	53:3,4,11
51:9	<b>alternatively</b>	55:11	<b>arms</b> 12:3 32:17	<b>backfill</b> 45:1
<b>acknowledged</b>	6:14 50:2	<b>applied</b> 18:4,9	37:10 39:14	<b>bad</b> 29:20
17:6	<b>amazed</b> 40:9	24:6 47:23	<b>articles</b> 31:12	<b>Ballard</b> 8:25
<b>act</b> 3:12 4:16 6:2	<b>amazing</b> 51:14	48:2	<b>articulated</b> 48:5	<b>based</b> 33:3
<b>acted</b> 3:19 8:9	<b>ambiguity</b> 20:14	<b>applies</b> 27:2	<b>aside</b> 16:1	<b>bears</b> 33:8
9:21 19:5	21:12,21,23	45:21	<b>asked</b> 17:1,11	<b>beating</b> 12:23
<b>acting</b> 18:24	22:11 27:22	<b>apply</b> 27:12	18:1,11 19:21	16:13
<b>activity</b> 19:12	28:17 30:2	30:17	28:22 30:15	<b>beginning</b> 51:16
20:6,8,11,12	31:9 38:11	<b>areas</b> 34:16	39:4 42:15	<b>behalf</b> 1:19,20
20:16 37:25	44:25	<b>argue</b> 26:14	43:12 47:16	2:4,6,9 3:7
38:5 49:25	<b>ambiguous</b> 12:9	30:3 44:24	49:14 53:20	24:24 52:11
51:23 53:5	39:13 44:24	<b>argued</b> 8:8 13:8	<b>asking</b> 28:18	<b>belief</b> 42:4
<b>acts</b> 38:6	46:6	37:5 39:7 41:1	38:20 39:8	<b>believe</b> 4:5,12
<b>actual</b> 31:2 36:3	<b>analogy</b> 32:17	41:2,9,13	49:19 50:24	5:4,11 13:6
<b>add</b> 33:19 37:17	<b>analysis</b> 31:4	42:11 43:21	51:2	25:19 42:17
<b>additional</b> 46:10	<b>Angelone</b> 51:13	50:2 54:20	<b>asks</b> 17:14 19:11	<b>believed</b> 42:13
<b>adequately</b> 23:8	<b>answer</b> 18:22	55:2	<b>assault</b> 6:10,13	<b>bench</b> 12:25
<b>adjudication</b>	20:17,20 22:4	<b>argues</b> 33:21	10:12 11:5	<b>benefit</b> 12:15
3:14 4:7 8:11	22:5 23:18	<b>arguing</b> 16:22	32:17 37:10	



<b>best</b> 12:9 30:22 35:5 36:15 40:21	47:13 54:2,3	<b>changed</b> 45:15	<b>Collins</b> 1:18 2:3	<b>conclusion</b> 31:4
<b>better</b> 19:16	<b>carries</b> 43:5	<b>characterizati...</b>	2:8 3:5,6,8 4:4	31:8
44:6 48:24	<b>carry</b> 25:19	39:10 52:1	4:12,15,20 5:4	<b>conclusions</b>
<b>bit</b> 49:19	<b>case</b> 3:4,10 5:24	<b>characterize</b>	5:11,16 6:1,7	27:20 31:6,11
<b>book</b> 19:4	7:19,19 8:5,7	15:25	6:19 7:1,4,14	<b>conduct</b> 29:5
<b>bottom</b> 10:14	9:6,23 10:2,2	<b>charge</b> 8:14,14	8:18,21 9:16	30:10 31:14
<b>Boyde</b> 16:19,21	12:13,17 13:8	8:17 11:15	10:1,19 11:7	36:1,2,5,7 38:7
46:7	13:25 14:6,7	21:7 25:5,23	11:23 12:16	40:6
<b>break</b> 53:10	15:16 16:18	46:5,9 50:8	13:6,22 14:3,8	<b>conflating</b> 37:4
<b>Breyer</b> 13:9,25	20:24 23:7	<b>charged</b> 8:5,6	14:13 15:3,15	<b>conforms</b> 5:1
14:5 27:17	25:5,8,20,23	35:22	16:6,15,19	<b>confused</b> 39:3
28:14 29:8,9	26:7,11,21	<b>charges</b> 11:20	17:10,18,21	43:18 50:5
29:14,19 30:8	27:1,8,12 29:2	<b>Chief</b> 3:3,8 4:2	18:6,11,17,20	51:12
30:12,23 31:5	29:10,13 31:20	18:15 23:25	19:1,15,20	<b>confusing</b> 21:6
35:14 39:12,21	33:18,21 35:13	24:9,21,25	20:2,15,23	<b>confusion</b> 22:12
39:24 40:3,12	36:19,25 38:8	25:11 31:17,24	21:11 22:18	39:3 50:10
41:2,15 42:1	38:12 39:2,22	32:1 33:24	23:1,5,11,15	51:3
43:12 51:15	40:14 41:1,8	34:8,15 47:20	23:23 24:9,17	<b>conscious</b> 40:5
52:2 54:1 55:4	42:6,7 43:11	48:4,7 49:9	52:8,10,12	<b>consider</b> 11:9
<b>brief</b> 8:24 30:4	43:13,13,17,20	50:21 52:6,8	53:22 54:17	13:23 15:5,16
31:2 40:24	44:4,4,5,8,9,21	52:12 55:14	<b>Colorado</b> 31:2	<b>consideration</b>
47:25	44:22 45:1,3,6	<b>Circuit</b> 3:12	<b>come</b> 27:19	16:23
<b>bring</b> 11:2	45:6,7,19 46:5	55:12	42:14	<b>considered</b>
<b>broad</b> 18:19	46:14 47:2	<b>circumstances</b>	<b>comes</b> 3:10 22:2	43:23 49:5,6,7
48:11	49:8,17,23	22:15 24:15	31:3,4 33:16	<b>considering</b>
<b>brought</b> 12:24	50:16,20 54:22	39:2	40:8	15:17 27:25
44:12 55:7	54:24 55:7,15	<b>cite</b> 26:7	<b>coming</b> 43:16	<b>consistently</b>
<b>brown</b> 8:24	55:16	<b>cited</b> 31:2	<b>commend</b> 30:25	55:5
13:22,25 14:7	<b>cases</b> 13:19	<b>claim</b> 15:8,21	<b>commission</b>	<b>constellation</b>
17:21 19:4	16:21 25:9	<b>clarification</b>	3:20 5:9 35:21	51:14
28:25 29:5,20	43:3 46:8	17:22 22:4	38:7	<b>Constitution</b>
43:11,19 49:3	<b>case-by-case</b>	44:18	<b>commit</b> 7:9	48:3
50:11 51:12	48:9	<b>clarified</b> 21:8	<b>committed</b> 7:24	<b>constitutional</b>
<b>bulb</b> 50:9	<b>categories</b> 28:16	<b>clarify</b> 17:7	14:17 15:14	4:9,10 24:7
<b>burden</b> 22:22	<b>Category</b> 28:16	<b>clarifying</b> 14:22	19:13 20:13	25:18 38:23,25
24:1 25:19	<b>cause</b> 19:6 36:5	<b>clear</b> 8:8 27:23	28:2 30:9	<b>contention</b> 46:4
	<b>CENTER</b> 1:6	34:8 35:1,3,11	33:23 38:1	<b>context</b> 15:5,16
	<b>central</b> 35:12	44:19 51:7,11	<b>committing</b> 28:7	54:5
	41:7	52:4	<b>common</b> 28:13	<b>continually</b> 8:22
<b>C</b>	<b>certain</b> 28:6	<b>cleared</b> 38:11	<b>complicated</b>	<b>contrary</b> 40:10
<b>C</b> 2:1 3:1	40:6 44:22	<b>clearly</b> 4:1 13:1	52:20	54:10,10
<b>Cal</b> 1:20	<b>certainly</b> 35:1	47:22,22	<b>component</b> 5:19	<b>contrast</b> 43:11
<b>calculus</b> 49:5	<b>CESAR</b> 1:9	<b>close</b> 33:5	<b>concept</b> 34:12	<b>convict</b> 3:18
<b>called</b> 44:11	<b>cetera</b> 14:19	<b>code</b> 4:21 5:1,2	37:24	17:15,24 35:19
<b>candid</b> 21:21	<b>challenging</b>	33:5	<b>conclude</b> 24:13	54:6,14,21
<b>car</b> 41:4 42:13	36:18	<b>coherent</b> 33:9	<b>concluded</b> 3:15	<b>convicted</b> 7:14
46:18,19 47:1	<b>change</b> 31:7	<b>collateral</b> 24:16	3:21 25:22	7:23 53:13

<b>conviction</b> 44:12 <b>convince</b> 29:4 <b>convincing</b> 31:5 <b>correct</b> 5:4 10:18 12:25 16:8 17:8 22:17 23:24 24:7 25:16 39:11 <b>CORRECTI...</b> 1:5 <b>correctly</b> 5:8 23:9,22 24:6 24:14 35:18 40:4 48:19 51:1 <b>counsel</b> 11:25 13:8 19:25 24:21 33:12,14 37:14,18 40:13 42:22 47:12,12 47:20 52:6 55:14 <b>counts</b> 6:8 52:20 <b>course</b> 12:16 21:20 47:21 52:24 <b>court</b> 1:1,15 3:9 3:10,15,21 4:6 5:7 10:19,19 12:4 14:10,11 14:15,20,22,25 15:4,6,11,17 15:19,20,22 16:1,6,20 18:6 19:22 20:24 21:9,13 22:8 24:18 25:1,7,9 25:21,21,25 26:5,18,25 27:1,3,6 28:11 31:1,1,21 32:6 34:10 35:8,16 35:18 36:18 38:24 40:4 41:23 43:3,14 43:17,20,25	44:10,14,18 45:2,21,23 46:7 48:11,21 49:2,5,10,16 49:21 50:11,14 50:17 51:24 54:11,19 55:11 <b>courts</b> 16:4 30:3 38:20 48:9 49:13 <b>court's</b> 3:13 4:7 8:10 11:19 21:16 51:9 55:8 <b>create</b> 39:19 <b>created</b> 17:9 43:9 <b>creates</b> 36:2 <b>crime</b> 5:10,12 5:24 6:20 7:5,9 7:17 8:3,5,16 9:11,13 11:3 12:11,12 14:16 14:17,17,19 15:9,13 19:13 19:19 20:9,13 21:4,4,4,5,9,9 21:10 26:9,9 27:25 28:1,1,7 28:7 29:23 30:6,8,14,19 31:14 34:18,19 34:23,24 35:21 38:1,5,8,16,17 38:18 53:21 <b>crimes</b> 6:24 8:6 <b>criminal</b> 30:10 31:14 <b>culminating</b> 42:15 <b>cuts</b> 22:14	<b>day</b> 44:19 53:8 <b>days</b> 34:10 42:16 49:17,20 50:4 52:16,18 52:21 <b>dead</b> 12:23 41:17,20 <b>deadly</b> 6:10,14 <b>death</b> 3:12 6:11 19:6 36:2,3,3,6 36:13 39:17,19 42:6 <b>decide</b> 50:16 <b>decided</b> 33:21 44:10 <b>decision</b> 3:12,25 14:22 21:16 24:18 26:19 31:1 45:21 49:11 55:8 <b>decisions</b> 16:7 <b>defendant</b> 8:1 12:15 14:16 18:9,10 19:5 40:20 43:23 47:8 52:19 <b>defendants</b> 7:20 38:19 52:18 54:22,25 <b>defendant-frie...</b> 5:2 <b>defense</b> 13:8 20:1 33:4,8 37:13,18 40:13 41:3,19,22 46:1 47:11,12 <b>deferential</b> 3:11 <b>definite</b> 9:10 31:13 <b>definition</b> 34:12 37:23 <b>definitive</b> 33:25 <b>degree</b> 6:7,8,8,9 6:9,15,16 7:2,3 8:7 17:24 38:5 38:8,18 39:22 53:13,14	<b>deliberated</b> 53:7 53:10,11 <b>deliberating</b> 47:6 <b>deliberation</b> 42:16 49:18,20 52:16 53:8 <b>deliberations</b> 17:14 34:11 43:24 52:21 <b>demonstrably</b> 42:8 <b>demonstrate</b> 43:17 <b>demonstrated</b> 22:6 <b>demonstration</b> 22:11 <b>Deputy</b> 1:18 <b>description</b> 8:17 <b>determination</b> 48:10 <b>deviated</b> 44:16 <b>deviating</b> 45:25 <b>Dick</b> 41:17,20 <b>died</b> 39:18 <b>dies</b> 37:11 41:19 <b>difference</b> 5:15 5:17 38:22 42:1 44:21 45:5 47:10 <b>different</b> 10:2 18:13 27:18,20 28:14,16 31:6 31:6 32:14 43:15,19 <b>difficulty</b> 34:11 37:23 <b>dime</b> 9:4,7,19 10:5,24,25 12:20 16:11 37:9 55:1 <b>dime-dollar</b> 9:14 13:4 <b>direct</b> 4:9 15:17 25:8 32:21 38:13 46:12	<b>directed</b> 18:6 52:24 <b>directing</b> 3:22 <b>direction</b> 34:17 <b>directly</b> 33:14 45:9 <b>disagree</b> 9:16 17:11 <b>discharging</b> 44:13 <b>discretion</b> 3:22 <b>discussion</b> 32:10 <b>dispute</b> 49:18 50:24 <b>distinction</b> 46:6 <b>document</b> 18:2 <b>doing</b> 26:1 35:10 <b>dollar</b> 9:4,7,19 10:6,24 11:1 12:21 16:11 37:9 55:1 <b>dot</b> 36:12 <b>doubt</b> 12:15 37:7 55:10 <b>DOUG</b> 1:3 <b>dozen</b> 27:21 <b>dramatically</b> 50:10 <b>dreamed</b> 10:4 <b>driver</b> 46:18 <b>drive-by</b> 36:11 36:12 54:8 <b>driving</b> 53:2 <b>due</b> 13:16,21 28:21 29:2 48:3 <b>D.C</b> 1:11
<b>E</b>				
<b>E</b> 2:1 3:1,1 <b>earlier</b> 16:18 31:18 32:15 33:16 47:14,16 51:9 <b>easy</b> 54:24 <b>effect</b> 42:25 <b>Effective</b> 3:12				

<b>either</b> 5:19 30:13 33:10	53:1	<b>find</b> 8:16 14:1 27:22 36:21	<b>follow</b> 43:18	45:4 54:23,25
<b>element</b> 44:20	<b>express</b> 19:17	44:20,23 45:4	<b>follows</b> 10:22	55:2
44:23 46:1	<b>expressed</b> 39:2	45:4 46:17	<b>found</b> 35:21	<b>goes</b> 12:15 13:14
<b>elements</b> 3:17	<b>extent</b> 12:13	47:13 48:11	36:21 37:1,11	18:20 37:1
<b>emphasize</b>	<b>extraordinary</b>	49:23 51:23	39:5 41:6	<b>going</b> 7:9,24
29:12 44:5	25:3,20 46:14	54:12,18 55:3	43:14 51:17	8:22 9:3,21
<b>empirical</b> 30:23	52:21	55:4	<b>four</b> 52:9	12:22 15:1
<b>ended</b> 27:6	<b>Eye</b> 41:17,20	<b>finding</b> 54:9	<b>fours</b> 45:20	20:8 33:22
<b>engage</b> 36:5	<b>F</b>	<b>finish</b> 12:3	<b>frank</b> 51:8	37:10 39:6
<b>engaged</b> 36:11	<b>face</b> 46:13	<b>Fiore</b> 44:11,22	<b>Frankly</b> 5:17	41:14 42:5,12
<b>engaging</b> 36:7	<b>facilitate</b> 5:9,12	45:20,22,24	<b>friend</b> 24:4	42:18 46:23,24
40:6	12:5 20:9 38:7	<b>first</b> 3:4 4:8 6:7	<b>front</b> 43:4	49:23 50:6
<b>entire</b> 33:18	55:6	6:8,9,9,15 7:2	<b>further</b> 17:1	52:15,25 53:4
42:7	<b>facilitating</b> 3:19	8:6 10:22	30:25	54:4,8,23,25
<b>entitled</b> 29:24	4:16 6:3,21 8:3	14:10,15,25	<b>G</b>	55:2,6
33:13 55:17	8:5,10 27:15	15:4,7 17:14	<b>G</b> 3:1	<b>good</b> 41:19,22
<b>error</b> 16:4	40:25	17:24 19:21	<b>gang</b> 49:24,25	<b>gotten</b> 29:16
<b>ESQ</b> 1:18,20 2:3	<b>fact</b> 8:22 9:17,19	20:5 28:15	51:22 53:4	<b>government</b>
2:5,8	10:8 16:20	29:11 30:2	54:14	43:6
<b>essentially</b> 17:4	17:12 19:4	32:11 34:17	<b>general</b> 1:18 7:5	<b>grave</b> 42:5
<b>establish</b> 48:13	22:13 24:13	35:17 37:4	7:9,9,16,23 8:5	<b>group</b> 19:12,14
<b>established</b> 4:1	25:10 26:22	43:1 53:13	34:21 48:5,8	19:18 20:6,8
47:22,23	43:18 49:13	<b>Fisher</b> 1:20 2:5	48:10,12,21	20:10,12,13,16
<b>Estelle</b> 46:7 49:6	51:20 52:20	24:22,23,25	<b>getting</b> 22:7	34:4 37:25
<b>et</b> 14:18	<b>Factor</b> 13:23	25:17 26:17	<b>Ginsburg</b> 5:21	38:2,4
<b>event</b> 40:8	16:22	27:10 28:10	6:2 8:13,19	<b>guess</b> 13:15
<b>everybody</b>	<b>facts</b> 39:5 41:11	29:7,11,18,21	10:21 11:7,10	27:18 29:3
13:14,20 14:6	43:22 44:3	30:22 31:12,23	11:16,21,23	<b>guesswork</b> 50:4
<b>evidence</b> 13:24	52:5	32:5 33:1,11	14:9,14 15:11	<b>guilty</b> 11:3
15:23 16:2,23	<b>factual</b> 43:25	34:7 35:5	19:10,16,20,25	27:24 30:14,16
21:16 30:23	<b>fair</b> 26:18 39:10	36:17 37:15	20:10,19 21:2	30:18 37:11
36:10,19,20	49:19 51:6	38:10,15,19	32:19 33:15	38:5 40:7 41:6
43:24 44:25	52:1	39:1,21 40:1	53:19,23	42:14 51:18,22
<b>exact</b> 39:8	<b>fairest</b> 35:10	40:16,20 41:24	<b>give</b> 7:18 21:1	53:5 55:2
<b>exactly</b> 14:8,24	<b>fairly</b> 48:5	42:3,24 45:9	40:22 51:6	<b>gun</b> 7:21,22 41:4
18:17 21:24	<b>far</b> 13:13 28:17	45:12,18 46:15	<b>given</b> 36:22 38:9	41:14,17 42:12
23:5 24:9 27:6	<b>fashion</b> 11:2,3	46:20 47:2,7	38:14 46:2	46:18,25 47:6
27:17 31:3,24	11:13	47:11,24 48:6	48:15,20 49:1	47:13 53:17
38:19 53:22	<b>federal</b> 4:1 29:2	48:24 51:5	54:6 55:7	54:2,3,13
<b>example</b> 7:18,19	47:22,23 55:9	52:1,7	<b>gives</b> 52:3	<b>guy</b> 41:19
8:23 10:6,6	<b>fellows</b> 41:4	<b>Fists</b> 9:2	<b>giving</b> 3:23	<b>H</b>
11:17	<b>fight</b> 15:24	<b>five</b> 52:20	<b>gloss</b> 27:2,5	<b>habeas</b> 46:11
<b>excuse</b> 18:3,18	41:14 54:21,23	<b>focus</b> 34:20	<b>go</b> 15:12 18:3,16	51:25
<b>existed</b> 29:5	55:1,2	52:13	18:19 19:10	<b>half</b> 32:11 53:12
44:17	<b>figure</b> 42:19	<b>focuses</b> 52:14	22:5,9 35:7	<b>hand</b> 7:25
<b>explanation</b>	<b>filled</b> 8:15	<b>focusing</b> 35:4	36:9 40:17	<b>hands</b> 9:8 10:7

<b>happen</b> 41:14 42:12,18 46:23 46:24	28:10 36:17 50:3 54:17	<b>initial</b> 31:8	37:18	11:15 13:10
<b>happened</b> 12:4 48:25	<b>hornbook</b> 36:4	<b>inserted</b> 38:16	<b>interpret</b> 25:7,8 26:9 30:5	16:25 19:11,16
<b>hard</b> 31:20 47:19 50:24	<b>horse</b> 12:24	<b>insofar</b> 27:10	<b>interpretation</b> 12:11,12 16:5	19:21 20:17,25
<b>hazardous</b> 44:13	<b>Houdini</b> 39:17	<b>instance</b> 13:1 37:19	26:2 35:23 45:15 49:15	21:24 22:2,4,6
<b>hear</b> 3:3 36:15	<b>hour</b> 32:11 53:11	<b>instruct</b> 13:10 32:2	<b>interpreted</b> 25:5 25:10 42:17	22:11,16 23:7
<b>heard</b> 50:23 52:17	<b>hung</b> 53:14	<b>instructed</b> 23:8 27:24 30:13	48:19	23:21 24:2,5
<b>hearing</b> 44:1	<b>hypothetical</b> 9:8 9:10,11,12,17	35:18 45:24	<b>interpreting</b> 26:5	24:12,14 25:4
<b>hedged</b> 51:8	9:19 10:9,17	<b>instruction</b> 3:16 3:24 10:22	<b>interprets</b> 27:2	25:6,23 26:2,3
<b>held</b> 20:24	10:20,22 11:8	13:13,14 17:23	<b>intervening</b> 14:21	26:16,21 27:25
<b>help</b> 13:9 17:7	12:2,3,7,21 52:2	18:2,5 19:3,23	<b>intuitively</b> 13:18	29:16 30:13,14
<b>helping</b> 11:2,12	<hr/> <b>I</b> <hr/>	19:24 20:20	<b>involved</b> 13:23	32:7,18,23
<b>helps</b> 41:17 49:16	<b>idea</b> 48:16,22	21:1 22:5,16	<b>involvement</b> 54:14	33:16,19 34:1
<b>high</b> 9:1 24:1	<b>identifies</b> 12:4	26:2,4,8,10,13	<b>isolation</b> 49:7	34:10 35:12,18
<b>hit</b> 39:24 41:21	<b>immediately</b> 9:20	26:16,21 27:7	<b>issue</b> 3:16 15:6 15:20 18:16,19	36:20,21,23,25
<b>hitting</b> 39:18	<b>important</b> 13:11 20:17 34:8	27:18,21 28:17	18:25 34:2	37:5,8 39:2,3
<b>hold</b> 35:25 37:9 39:14 50:1	<b>impression</b> 54:6 54:13	30:17 32:8,24	35:4,12 41:8	41:2,12 42:7
<b>holding</b> 9:8 12:2 16:13 32:17	<b>imprimatur</b> 43:6	33:4 34:1	42:6 45:7	42:11,13,21,22
<b>holds</b> 10:7 40:4	<b>improper</b> 16:21	38:14 46:2	<b>iteration</b> 13:3	43:2,5,7,15,16
<b>homicide</b> 3:20 5:25 6:3,4,18	<b>improperly</b> 37:4	48:13,18 49:2	<b>i.e</b> 9:13	43:17,25 44:16
6:21,24 7:5,13	<b>inadequate</b> 22:16	49:12,15 50:20	<hr/> <b>J</b> <hr/>	44:19,23,25
7:16 8:10 9:13	<b>incapable</b> 21:24	50:22 51:1	<b>JA</b> 17:18 37:6,6	45:2,7,23,24
9:22 10:11,12	<b>Including</b> 16:17	53:6,7,9	<b>JEFFREY</b> 1:20 2:5 24:23	46:1,5,9,17
12:6 16:14	<b>incorporated</b> 40:12	<b>insults</b> 9:3	<b>job</b> 47:19	47:3,14,15,16
27:15 33:22	<b>incorrect</b> 34:25	<b>intended</b> 10:13	<b>Joe</b> 41:16	47:18 48:2
41:1 55:6	<b>indication</b> 47:18	<b>intent</b> 11:25 12:1 15:8	<b>joined</b> 33:15	49:1,14,15,19
<b>homicides</b> 8:6	<b>indictment</b> 6:5 14:18	17:14,23 18:18	<b>joint</b> 8:24 17:21 32:12,15,22	49:21 50:5,19
<b>honesty</b> 51:10	<b>individual</b> 10:6 40:6	18:25 19:1,6,8	<b>Jones</b> 41:16	50:24 51:2,11
<b>honing</b> 35:12	<b>inferences</b> 35:6 35:9	19:9 34:3,6	<b>judge</b> 3:22 13:10 17:3 20:3	51:11 52:3,17
<b>Honor</b> 4:5,13,20 5:5,13,17 6:8	<b>influenced</b> 26:6	<b>intention</b> 12:5	22:21 27:7,8	52:25 54:3,6
8:18,21 9:16	<b>inform</b> 26:12	<b>intentional</b> 39:23	38:3 42:23	<b>jury's</b> 36:24 37:22 51:7
12:16 13:6,22	<b>informed</b> 3:16 3:18	<b>intentionally</b> 39:24 40:1	<b>judges</b> 35:17	<b>Justice</b> 3:3,8 4:2 4:8,14,18,24
14:13 15:3,6	<b>informing</b> 21:24	<b>intermediate</b> 14:24 15:3	<b>Juries</b> 28:11	5:6,14,21 6:1,4
15:15 18:17		<b>interposed</b>	<b>jurors</b> 32:3 35:7	6:13,23 7:2,10
19:1,2,15 20:3			<b>jury</b> 3:16,18,22 8:25 9:20	8:13,19 9:5,23
20:4,15,23				10:2,4,14,16
21:11 22:18				10:21 11:7,10
23:5,24 25:17				11:14,16,19,21

20:10,19 21:2 21:18 22:19 23:3,6,13,17 23:25 24:10,11 24:21,25 25:11 25:24 26:17,25 27:5,13,17 28:14 29:8,9 29:14,19 30:7 30:12,23 31:5 31:17,24 32:1 32:18,25 33:3 33:15,24 34:8 34:15 35:14 37:13,15,21 38:10,13,17,22 39:12,21,24 40:3,11,11,17 40:21 41:2,2 41:15 42:1,21 42:25 43:12 45:5,10,13,18 46:15,25 47:4 47:7,9,20 48:4 48:7 49:9 50:21 51:15 52:2,6,8,12 53:19,22 54:1 55:4,14 <b>justices</b> 21:3	54:21 <b>kinds</b> 8:6 <b>knew</b> 9:1 14:16 15:13 33:22 36:9,10 39:6 40:25 41:1,3,4 41:13,20 42:11 42:12,18 46:18 46:23 47:6,13 55:5 <b>know</b> 5:23,24 6:2,15,16,17 7:22 10:12 14:20 15:1,9 17:3,4 19:17 20:6,7,16 21:2 22:21 23:13 26:13 27:14,15 28:15 30:20 34:18 36:6,7,7 36:22 39:3,3,7 39:20 40:8 41:18,21 42:9 44:18 45:6,19 45:19 50:5 51:2 52:25 54:4,7,15 <b>knowing</b> 5:15 39:25 <b>knowingly</b> 5:12 35:21 36:1 <b>knowledge</b> 3:19 4:15,17,22 5:20,22 6:3,20 7:5,6,7,8,12,15 7:16,24 8:2,4,9 9:21 19:23,24 20:7,7 28:6 33:20 38:6 51:18 54:20 <b>known</b> 15:24,24 <b>knows</b> 40:5	27:2,4,11 30:2 30:5 31:3 <b>law</b> 4:1,25 5:8 10:24 11:11 21:25 22:17 23:9,22 24:7 24:14 26:6,7 26:12,15 27:9 27:12 32:19 33:7 36:4 37:5 37:8,20 40:15 40:18 41:12,16 42:22,23 43:2 43:8 44:7,19 47:15,22,23 52:3 55:9 <b>lawyer</b> 43:4 <b>lay</b> 28:12 <b>layer</b> 46:10 <b>laying</b> 26:19 <b>leeway</b> 48:8,12 48:20 <b>left</b> 51:4 <b>leg</b> 41:18,21 <b>legal</b> 15:6 34:12 37:23 <b>legally</b> 28:2 <b>Let's</b> 4:9 17:16 18:3 19:10 <b>level</b> 48:5 50:11 <b>liability</b> 3:17 15:7 18:13 19:23 25:5 26:12,20 32:24 35:25 49:23 50:20 <b>liable</b> 16:14 50:1 <b>light</b> 36:23 42:20 43:20 46:5 50:9 <b>likelihood</b> 25:4 25:23 32:7 46:9 48:1 49:22 50:12 <b>literal</b> 26:1,15 <b>little</b> 33:13 49:19	<b>long</b> 8:15 49:24 <b>longer</b> 46:12 <b>look</b> 13:19 17:12 17:16 18:21 19:2 21:14 30:25 34:2 37:6 44:19 52:2 53:17 54:11,18 <b>looked</b> 28:25 <b>looking</b> 12:7,19 15:19 <b>lose</b> 47:14 <b>lost</b> 45:1 <b>lot</b> 13:17 17:7 32:10 35:17 47:5	28:15 31:8 <b>minds</b> 43:10 <b>minimum</b> 4:9,10 49:21 <b>minute</b> 18:4 51:8 <b>minutes</b> 42:14 52:9 53:10 <b>misapplied</b> 32:8 <b>misconduct</b> 29:12 <b>misimpression</b> 17:8 <b>misinterpreted</b> 26:14 <b>misinterpreting</b> 26:15 <b>misleading</b> 21:23 41:10 43:14 <b>misstate</b> 16:7 <b>misstating</b> 16:10 <b>misunderstand</b> 50:19 <b>misunderstood</b> 21:3 46:9 <b>mitigating</b> 13:24 43:24 <b>mitigation</b> 16:23 44:1 <b>mixed</b> 13:15,16 13:20 14:1,3,6 14:11 28:20 29:16,19 <b>mix-up</b> 13:18 <b>model</b> 4:21,21 5:1,1 33:5 <b>moment</b> 52:13 <b>murder</b> 6:8,9,9 6:15,16 7:2,3 8:2,7,7 14:18 14:18 17:24 28:1,8 30:16 30:18,20 35:19 35:20,22 37:12 38:5,8,18 39:6 39:22 46:23
<hr/> <b>K</b> <b>K</b> 13:23 16:22 <b>Kennedy</b> 4:8,14 4:18,24 5:6,14 10:14 27:5,13 32:25 33:3 37:13,16 40:11 40:17,21 <b>kept</b> 43:1 <b>killed</b> 9:11 10:23 11:6 <b>killing</b> 40:1 41:5 46:24 <b>kills</b> 10:8 <b>kind</b> 33:20 42:19 53:17	<hr/> <b>L</b> <b>laid</b> 23:21 <b>language</b> 26:10 26:16,20,22	<hr/> <b>M</b> <b>making</b> 25:2 43:21 52:4 <b>manner</b> 25:6 <b>manslaughter</b> 7:15 <b>materials</b> 55:4 <b>matter</b> 1:14 3:14 13:11,11 46:6 49:4 55:17 <b>mean</b> 6:24 14:10 16:12 18:23 23:7,14,14,15 29:14 30:6,7,9 30:10,12 31:14 35:2,20 39:12 39:17 41:21 52:17 <b>meaning</b> 18:12 <b>means</b> 21:9 26:9 30:13 52:4 <b>meant</b> 29:22 37:6,8,8 45:16 45:17 47:15 <b>member</b> 49:24 <b>mens</b> 35:13 <b>mental</b> 5:19 <b>merely</b> 15:21 <b>mind</b> 18:24		

50:1 53:13,14 54:15 55:6 <b>mutually</b> 51:14	<b>obviously</b> 16:25 20:21 28:23 <b>occur</b> 37:11 39:7 51:19,22 <b>October</b> 1:12 <b>oddball</b> 44:9 <b>offend</b> 35:24 <b>oh</b> 22:9 <b>Okay</b> 36:13 <b>old</b> 43:4 <b>Olympia</b> 1:19 <b>once</b> 14:24 44:18 <b>opening</b> 32:16 <b>opinion</b> 25:24 35:16 51:24 <b>opposed</b> 4:22 <b>opposite</b> 23:4,6 23:10,14,15 24:4,5 34:17 34:22 39:8 <b>oral</b> 1:14 2:2 3:6 24:23 <b>outcomes</b> 48:9 <b>outset</b> 40:13 <b>overlay</b> 26:11 <b>owner</b> 8:1	<b>party</b> 9:9 10:8 <b>path</b> 50:6 <b>pay</b> 32:13 <b>Payton</b> 13:23 43:12 49:3 50:12 51:13 <b>penal</b> 4:21 5:1,2 33:5 <b>Penalty</b> 3:12 <b>Pennsylvania</b> 44:11,14 45:15 <b>people</b> 6:11 13:15 21:3 27:19 28:12,20 31:6,10 35:16 48:16 <b>perfectly</b> 43:7 51:7 <b>permit</b> 44:13,15 44:17,17 45:25 <b>perplexed</b> 16:25 42:8 49:12 <b>perplexity</b> 22:8 <b>person</b> 7:20 10:23 11:4 19:6,11,13,18 20:11,12 27:24 28:2,5,6 29:3 30:14,16,18 37:11,24,25 38:4,6 39:16 40:5 42:5 54:7 54:7 <b>pertinent</b> 48:15 <b>Petitioner</b> 1:7 1:19 2:4,9 3:7 52:11 <b>places</b> 32:12,14 <b>planning</b> 28:7 41:5 <b>please</b> 3:9 25:1 <b>plenty</b> 36:10 <b>point</b> 8:11 15:18 17:1,2 18:16 20:17 22:1,3 31:10 32:4 33:14,17 34:17	36:14 39:6 49:2,9 <b>pointed</b> 16:20 <b>points</b> 4:17 12:10,12 <b>poses</b> 38:22 <b>position</b> 4:25 23:8,10,14,15 <b>possible</b> 23:16 <b>potential</b> 5:24 <b>precedes</b> 34:9 <b>precise</b> 17:2 <b>precisely</b> 16:12 33:17,17 47:11 <b>premediation</b> 7:8 <b>premedication</b> 40:21 <b>present</b> 15:21 <b>presented</b> 47:3 <b>presumably</b> 47:5 <b>presume</b> 26:3 <b>pretty</b> 29:20 34:7 <b>prevailing</b> 29:22 37:20 <b>previous</b> 50:9 <b>principal</b> 7:25 12:2 19:9 30:8 40:15 <b>principal's</b> 30:10 <b>principle</b> 7:7 33:6 40:12 <b>principles</b> 26:12 35:25 <b>probably</b> 23:21 27:21 <b>problem</b> 9:5 27:18 28:9,10 29:1,13 <b>problematic</b> 10:20 11:8 <b>process</b> 13:16,21 28:22 29:2 48:3	<b>proffer</b> 33:4 <b>progress</b> 17:13 <b>progression</b> 17:12 <b>progressively</b> 35:12 <b>promote</b> 38:7 <b>promoting</b> 27:14 <b>pronounced</b> 53:12 <b>proof</b> 46:25 <b>proper</b> 20:24 22:4 <b>properly</b> 3:16 23:7 24:2 <b>proposed</b> 3:24 <b>prosecuted</b> 6:24 <b>prosecution</b> 28:20 29:15 44:12,23 <b>prosecutor</b> 8:8 8:21,25 9:17 9:18,24 10:5 10:10 12:4,20 12:20,21 13:1 13:4,7,14,15 13:20 14:6,12 14:23 17:8 22:12 29:24 32:15,22 36:24 37:5,7 39:7,10 39:12 41:9,12 42:11 43:1,4,5 43:8,13,21 44:6 49:14 51:17,21 54:5 54:12,19,20,24 55:5 <b>prosecutorial</b> 29:1,5,12 <b>prosecutors</b> 16:10,15,20,22 21:3 <b>prosecutor's</b> 3:17 8:14,14 8:19 9:14	
<hr/> <b>N</b> <b>N</b> 2:1,1 3:1 <b>name</b> 38:16 <b>nature</b> 21:7 <b>necessarily</b> 10:18 33:7 40:15 <b>necessary</b> 15:20 <b>need</b> 30:25 39:22 45:23 <b>negligent</b> 7:13 <b>neither</b> 34:19 <b>never</b> 51:17 54:20,23 55:2 <b>night</b> 53:11 <b>Ninth</b> 3:12 55:12 <b>Nos</b> 17:23 <b>noted</b> 33:15 <b>no-permit</b> 46:1 <b>number</b> 6:7 21:19 22:1,10 23:12 33:9 34:16	<hr/> <b>P</b> <b>P</b> 3:1 <b>page</b> 2:2 8:24 9:18 10:15 18:1 19:3,3,3 30:4 32:15,21 40:24 47:25 <b>paragraph</b> 11:17,17 19:5 <b>part</b> 12:11 <b>participated</b> 49:25 <b>participates</b> 19:12,18 20:11 37:25 38:4 <b>particular</b> 30:8 39:1 40:5 <b>Particularly</b> 14:8	<hr/> <b>P</b> <b>P</b> 3:1 <b>page</b> 2:2 8:24 9:18 10:15 18:1 19:3,3,3 30:4 32:15,21 40:24 47:25 <b>paragraph</b> 11:17,17 19:5 <b>part</b> 12:11 <b>participated</b> 49:25 <b>participates</b> 19:12,18 20:11 37:25 38:4 <b>particular</b> 30:8 39:1 40:5 <b>Particularly</b> 14:8	<hr/> <b>O</b> <b>O</b> 2:1 3:1 <b>objected</b> 48:16 48:16 <b>objection</b> 32:25 33:3 37:13,19 <b>objections</b> 33:1 33:14 <b>objective</b> 21:19 48:23 <b>objectively</b> 3:14 4:5 8:11 21:14 21:17 22:14 23:1,3,20 24:8 24:13,19 25:14 31:21 32:2 50:25 <b>obtained</b> 44:12	<hr/> <b>O</b> <b>O</b> 2:1 3:1 <b>objected</b> 48:16 48:16 <b>objection</b> 32:25 33:3 37:13,19 <b>objections</b> 33:1 33:14 <b>objective</b> 21:19 48:23 <b>objectively</b> 3:14 4:5 8:11 21:14 21:17 22:14 23:1,3,20 24:8 24:13,19 25:14 31:21 32:2 50:25 <b>obtained</b> 44:12	<hr/> <b>O</b> <b>O</b> 2:1 3:1 <b>objected</b> 48:16 48:16 <b>objection</b> 32:25 33:3 37:13,19 <b>objections</b> 33:1 33:14 <b>objective</b> 21:19 48:23 <b>objectively</b> 3:14 4:5 8:11 21:14 21:17 22:14 23:1,3,20 24:8 24:13,19 25:14 31:21 32:2 50:25 <b>obtained</b> 44:12

11:24 12:14 31:15 32:9 34:14 37:2 41:11 43:18 49:4 51:4 <b>prove</b> 15:20 16:1 40:24 44:16 47:1 <b>providing</b> 26:1 <b>PRP</b> 4:7 8:10 10:19 21:13,16 54:19 55:8 <b>punch</b> 39:15 <b>punched</b> 42:4 <b>punching</b> 42:2 <b>purpose</b> 4:19,22 5:9,15,19 <b>Pushing</b> 9:2 <b>put</b> 36:11 38:17 39:9 42:5 <b>puzzlement</b> 19:17	22:7 29:9 34:17,19 35:2 36:24 42:15 43:16 47:15 50:23 51:9 55:13 <b>quite</b> 13:17 31:10 35:1 41:19 <b>quote</b> 26:8 38:13 <b>quoted</b> 9:18	25:13,22 48:19 50:19 <b>reasons</b> 46:12 <b>rebuttal</b> 2:7 32:21 52:10 <b>recited</b> 17:4 <b>recognized</b> 5:22 28:11 43:3 <b>recognizes</b> 49:3 <b>record</b> 8:8 25:20 35:7,11 36:20 46:13 50:18 51:20,23 54:16 54:18 <b>Recuenco</b> 17:25 <b>red</b> 30:4 <b>reduced</b> 50:10 <b>refer</b> 30:23 <b>reference</b> 4:11 9:10,12 <b>references</b> 18:23 <b>referred</b> 19:22 28:25 <b>referring</b> 30:19 30:21 32:14 <b>refers</b> 4:21 6:19 <b>reflecting</b> 51:3 <b>refute</b> 48:22 <b>regard</b> 17:15 <b>regurgitated</b> 27:11 <b>relevance</b> 45:10 45:12 <b>relevant</b> 3:23 <b>remember</b> 26:21 42:25 47:14,16 <b>render</b> 42:20 <b>repeated</b> 21:7 22:6 32:6 <b>repeatedly</b> 22:2 <b>request</b> 17:22 22:4 <b>required</b> 20:25 33:20 44:15 50:5 <b>requirement</b>	4:10 <b>requires</b> 43:2 47:21 <b>requisite</b> 34:6 <b>reread</b> 3:23 20:25 47:17 53:6,6,9 <b>rescue</b> 50:7 <b>reserve</b> 24:20 <b>respect</b> 17:10 20:15 50:23 <b>responded</b> 15:23 <b>Respondent</b> 1:21 2:6 24:15 24:24 52:14 <b>responds</b> 11:24 <b>response</b> 26:24 54:15,17 <b>responsibility</b> 33:8 <b>responsible</b> 36:1 40:7 <b>rest</b> 24:20 <b>result</b> 10:13 <b>results</b> 36:3 <b>retroactively</b> 45:22 <b>retroactivity</b> 45:14 <b>return</b> 34:14 <b>reverse</b> 14:7 55:11 <b>reversed</b> 3:13 <b>review</b> 3:11 4:9 15:17 25:8 46:12 <b>Reyes</b> 33:13 53:2,2,15,20 53:25 <b>right</b> 4:3,4 6:1 13:13 16:19 22:25 24:9 25:17 27:9,10 29:18,21 31:24 32:5,5 33:12 41:17,19,24	45:12,18,19 47:7 48:6 51:25 53:22 <b>rightly</b> 31:10 <b>rise</b> 29:2 <b>risk</b> 36:2,3,6,13 39:17,19 40:5 40:8 42:5 <b>robbery</b> 7:19,20 7:23,24 8:3 <b>Roberts</b> 3:3 4:2 18:15 23:25 24:10,21 25:11 31:17 32:1 33:24 34:15 47:20 48:4,7 50:21 52:6,8 55:14 <b>rode</b> 8:25 <b>Ronquillo</b> 53:13 <b>room</b> 52:25 <b>rule</b> 47:24 48:8 48:10,12,21 <b>run</b> 36:12 39:16 <b>runs</b> 39:17
<b>Q</b> <b>question</b> 5:18,21 10:16 12:18 15:18 17:11,14 18:8,12,13,14 18:20,23 19:2 19:2,7,11,22 20:14,18 23:11 23:18,19 28:19 28:22,24 29:3 29:7 30:1,15 33:17,18,20,25 34:2,9,13,16 34:21 35:1,2 36:21 37:4,22 37:22 38:4 39:9 43:9 46:16,16 50:16 51:7,11 52:14 52:23 53:1,3,8 53:16,20,24,25 55:8 <b>questions</b> 12:25 13:12 17:13,25	<b>R</b> <b>R</b> 3:1 <b>raise</b> 16:24 <b>rea</b> 35:13 <b>reach</b> 31:6 <b>reached</b> 31:11 <b>reaching</b> 48:9 <b>read</b> 7:11 11:11 13:12 14:24 17:3,4 20:20 20:21 22:5 25:24 27:19,20 31:13,19 34:1 34:22,22 36:14 50:8,8 51:1,23 <b>reading</b> 17:6 31:20 32:19 33:25 35:10 <b>reads</b> 31:22 <b>realize</b> 40:3 <b>really</b> 18:20 39:13 43:21,23 47:18 <b>reason</b> 16:24 33:19 37:17 39:4 49:10 <b>reasonable</b> 22:15,23,24 23:20 24:3,13 25:4,22 26:14 32:7 35:6,9 42:4 43:7 46:8 48:1 49:11,22 50:12,18 <b>reasonably</b>			<b>S</b> <b>S</b> 2:1 3:1 <b>Sarausad</b> 1:9 3:4,19,24 8:9 9:20 12:1,22 17:25 27:14 33:15,22 35:19 39:6 40:25 41:3,13 42:8 42:18 49:24 51:17 52:23 53:14,23 <b>Sarausad's</b> 11:25 15:7,21 33:12 35:13 47:16 <b>satisfies</b> 45:25 <b>saying</b> 10:10 15:23 21:13 23:17 25:12 38:4 39:16

51:19 54:1,9 54:24 <b>says</b> 5:8 10:25 20:1,10 21:9 27:24 28:4,5 32:16,22 33:5 35:18 40:2 41:9 42:10 54:12 <b>Scalia</b> 6:4,13,23 7:2,10 11:14 11:19 16:3,7,9 16:16,17,24 17:10,16,20 22:21 23:3 <b>scenario</b> 23:20 43:19 <b>school</b> 9:1 20:8 <b>scienter</b> 4:11 40:14 <b>seat</b> 53:3,4 <b>second</b> 6:8,15 7:3 14:19 22:1 28:19 35:24 38:5,8,17 39:22 53:14 <b>second-degree</b> 28:1,7 30:16 30:18,20 35:20 35:22 <b>see</b> 17:13,22 39:16 50:25 <b>send</b> 48:17 <b>sense</b> 28:13 45:20 <b>sent</b> 48:18 <b>sentence</b> 34:9 35:17 <b>sentences</b> 35:15 <b>series</b> 42:15 <b>set</b> 24:12 <b>seven</b> 34:10 42:16 49:17,20 50:4 52:21 <b>seventh</b> 53:8 <b>seven-plus</b> 52:16	<b>shared</b> 6:22 11:25 15:8 <b>shoot</b> 41:17 <b>shooting</b> 8:23 9:3 12:22 13:2 13:5,7 15:2,20 15:25 16:2,2 36:11,12 42:12 51:18,21 54:4 54:8 55:6 <b>shorthand</b> 29:17 <b>shot</b> 6:11 7:25 <b>Shouting</b> 9:3 <b>show</b> 16:25 24:2 24:3,4,5 25:14 25:15,20 34:5 46:8,10 49:10 <b>shows</b> 17:6 <b>side</b> 9:6 <b>significance</b> 12:14 <b>similar</b> 16:4 <b>simply</b> 26:21 30:10 31:13,14 34:4 46:2,2 49:1 <b>sitting</b> 30:15 53:2,4 <b>situation</b> 22:10 43:15 <b>slightest</b> 27:22 <b>slugged</b> 9:9 <b>slugs</b> 10:8 <b>smoking</b> 53:17 <b>Solicitor</b> 1:18 <b>somebody</b> 39:18 39:25 41:5 42:3 <b>somebody's</b> 32:17 37:9 39:14 41:17 <b>soon</b> 12:3 <b>sorry</b> 10:1 17:21 39:21 <b>sort</b> 36:24 <b>Souter</b> 9:5,23 10:3,4 12:8,23	18:18,22 21:18 22:19 23:6,13 23:17 24:11 <b>Souter's</b> 10:16 <b>specific</b> 6:25 <b>specifically</b> 18:9 32:23,23 <b>specified</b> 14:17 <b>standard</b> 3:11 4:6 8:12 16:7 16:10 25:12,13 42:24 <b>standing</b> 43:4 <b>stands</b> 41:8 <b>Stanford</b> 1:20 <b>start</b> 26:19 <b>started</b> 10:12 <b>starts</b> 28:11 <b>state</b> 5:23 10:24 11:11 16:1,4 25:2,6,7,16 26:25 27:9 29:22 30:24,24 31:21 32:2,19 33:7,21 37:1 38:20 39:5 40:2,4,9,23,23 41:8,15 42:10 43:2 44:12,18 45:1,14,21 48:21,24 49:10 49:10,12 50:2 50:7 52:3 <b>stated</b> 21:20 47:24 54:19 <b>statement</b> 10:23 11:11 42:24 49:20 51:10,16 51:24 54:10 <b>statements</b> 51:4 <b>states</b> 1:1,15 5:7 30:3 40:18 <b>State's</b> 14:22 26:23 27:16 47:25 <b>stating</b> 5:3 21:22 <b>statute</b> 6:17,19	7:11,11 17:5,6 21:7,8 27:4,11 27:21 30:5 44:15 45:16 <b>statutes</b> 16:5 <b>statutory</b> 26:20 <b>steps</b> 27:1 29:8 30:1 <b>Stevens</b> 18:3,8 46:15,25 47:4 47:7,9 <b>stomach</b> 39:15 39:19,25 42:2 42:4 <b>store</b> 7:21,25 <b>strongest</b> 35:3 <b>struggling</b> 42:19 <b>subject</b> 10:17 <b>submitted</b> 55:15 55:17 <b>substantial</b> 36:2 36:3,5,6,13 39:17,19 40:8 <b>substantially</b> 45:25 <b>suddenly</b> 50:9 <b>suffice</b> 6:14 7:13 <b>sufficiency</b> 36:19 <b>sufficient</b> 8:16 29:23 48:22 <b>suggest</b> 37:6 52:24,25 53:24 <b>suggested</b> 51:17 <b>suggesting</b> 42:17 <b>suggestion</b> 8:15 <b>summation</b> 8:20 11:22 <b>SUPERINTE...</b> 1:4 <b>supplemental</b> 3:24 21:1 <b>support</b> 51:20 <b>suppose</b> 13:10 13:13 38:3 54:2	<b>supreme</b> 1:1,15 14:22 21:9 26:25 27:6 31:1,1 35:16 40:4 41:23 44:14 45:2,21 51:24 54:10 <b>sure</b> 5:16 9:23 <b>suspect</b> 13:17,18 <hr/> <b>T</b> <hr/> <b>T</b> 2:1,1 <b>take</b> 4:24 12:6,8 22:20 29:7 30:1 35:14 45:24 <b>taken</b> 43:25 46:5 47:5 <b>talk</b> 31:15 32:23 45:23 47:14 <b>talked</b> 8:22 <b>talking</b> 10:1 41:10 <b>talks</b> 9:18 19:4 <b>technical</b> 13:11 13:11 <b>tell</b> 13:19 20:1 20:24 42:23 51:2 <b>telling</b> 23:19 41:11 43:1 49:21 <b>tells</b> 8:25 9:20 32:18 34:10 41:23 <b>term</b> 4:22 <b>terms</b> 28:12 <b>test</b> 32:6 50:12 <b>testified</b> 54:22 54:25 <b>testimony</b> 47:17 52:18 <b>text</b> 6:16 <b>textual</b> 31:3 <b>Thank</b> 24:21 29:11 52:6,7 52:12 55:14
--	--	---	--	---



<b>theory</b> 27:16 33:10 47:9,10	50:8 51:5 52:18	34:17,19 35:2 35:15 37:3	<b>verdict</b> 42:14,20 53:12	<b>way</b> 13:8 16:11 24:5,7,11,12
<b>the/a</b> 35:4	<b>tie</b> 13:4	42:25 46:20	<b>victim</b> 9:9,11 10:8,8 11:5	29:13 31:19,19
<b>thing</b> 16:12 28:21 30:25 35:24	<b>tied</b> 11:4 12:21 13:1,7	<b>two-example</b> 22:13	<b>victim's</b> 10:7	31:21,22 34:22
<b>things</b> 20:4 28:12 30:6 37:3 42:25	<b>tieing</b> 10:16	<b>two-part</b> 22:13	<b>view</b> 29:22 36:8 37:20 46:16	34:22 39:9,18 39:20 43:20
<b>think</b> 4:2,4,20 4:21,21,23 5:18 15:5,15 20:13,16,23 21:6 23:19,23 24:1 25:2 26:2 26:17 27:13 31:9,23 32:13 33:24,25 34:7 34:8,16,25 35:5,10 37:3 38:10 39:9,14 40:4,16,21 41:16,24 42:24 43:6 44:9 46:20,21 49:3 49:16,17,19 50:14,15 51:6 51:10 54:2 55:9	<b>time</b> 9:1 10:12 14:10,15,19,25 15:4,7 18:24 19:21 24:20 29:23 37:20 44:5 47:5	<b>typical</b> 28:21	<b>violate</b> 28:21 48:2	44:4 46:21,22 47:2 49:8,17 50:6,15
	<b>times</b> 17:2,11 20:21 27:3,21 32:6 33:11 35:9 50:9	<hr/> <b>U</b> <hr/>	<b>violates</b> 48:3	<b>ways</b> 9:15 22:14 34:2 41:13 46:20
	<b>today</b> 3:4 25:2	<b>ultimately</b> 12:13	<b>violation</b> 13:17 13:21 25:18 38:23,25	<b>weapon</b> 6:10,14
	<b>told</b> 20:20,21 39:10 42:22 45:3 49:16 50:7,8 53:5	<b>understand</b> 20:22 23:9 24:14 27:19 28:12 30:9 35:23 40:19 49:18,22 52:15	<b>void</b> 28:11	<b>Wednesday</b> 1:12
	<b>totality</b> 49:7	<b>understood</b> 23:21 24:2,6 25:23 31:18 43:7	<hr/> <b>W</b> <hr/>	<b>Weeks</b> 20:24 51:13
	<b>totally</b> 44:2	<b>United</b> 1:1,15	<b>Waddington</b> 1:3 3:4	<b>went</b> 7:21 9:14 9:22 50:9 53:1
	<b>tracks</b> 26:22	<b>unnecessary</b> 44:2	<b>want</b> 23:13,18 28:15 29:11 32:13 44:4 51:6 52:13	<b>We'll</b> 3:3
	<b>transcript</b> 55:3	<b>unreasonable</b> 3:15,25 4:6 8:12 12:18 21:14,17 23:2 23:4 24:8,19 25:15 31:21 32:2 38:24 47:21 48:11,14 48:22 55:9,10	<b>wanted</b> 19:17 37:1	<b>we've</b> 12:24 47:14 48:7
	<b>trial</b> 3:21 5:7 13:10 17:3 18:6 19:22 20:3 27:8 29:23 35:18 48:25 52:16,17 52:20 53:18 54:5	<b>unreasonable...</b> 21:19 46:11 50:25	<b>Wash</b> 1:19	<b>white</b> 17:20 44:11
	<b>tried</b> 6:5 44:4,5 49:8 52:19,19	<b>unreasonably</b> 47:23	<b>Washington</b> 1:5 1:11 3:13,15 4:25 5:7 6:17 7:4 10:25 16:4 16:5,10 21:8 22:17 23:9,21 24:14,18 25:7 25:9,21,25 26:5,6,7,11,15 26:18,20 27:1 27:6,12 30:2 30:11,24 32:20 35:16 36:8 37:5,8,20 38:20,24 41:12 41:15,16,22,23 43:2 44:7 45:2 49:13 50:14,17 52:3 54:11	<b>WILLIAM</b> 1:18 2:3,8 3:6 52:10
	<b>troubling</b> 46:17	<b>urged</b> 25:6,7	<b>wasn't</b> 6:23 24:12	<b>willingly</b> 19:12 20:11 37:24 49:25
	<b>trying</b> 36:24 45:1 47:18	<b>use</b> 12:2	<b>waste</b> 44:13	<b>win</b> 24:16,17 54:24
	<b>turn</b> 12:13,17 31:25 32:9	<b>uses</b> 4:22 9:19 32:16		<b>words</b> 27:19 30:6,14 31:14 34:4
	<b>Turning</b> 4:7	<hr/> <b>V</b> <hr/>		<b>work</b> 9:2,2,3,4 <b>worse</b> 29:4 <b>worst</b> 42:18
	<b>turns</b> 11:5 33:18	<b>v</b> 1:8 3:4 13:22 44:11		<b>wouldn't</b> 6:13 13:2 47:4
	<b>two</b> 4:17 6:11 17:15,24 20:4 22:1 28:15 29:8 30:1,6 32:12,14 34:2	<b>various</b> 8:6 41:13		<b>wounded</b> 6:11 <b>written</b> 27:4 <b>wrong</b> 14:15,20 14:21 15:4,12 16:12 20:3,4,4 46:3 49:14 50:6 51:19,24 54:11
<b>three</b> 17:1,11 20:21 22:10 33:25 34:2,20 35:2 47:15				

<b>X</b>	<b>4</b>			
<b>x</b> 1:2,10	<b>45</b> 53:10			
<b>Y</b>	<b>5</b>			
<b>Yarborough</b> 48:7	<b>50/50</b> 50:11,13 <b>52</b> 2:9			
<b>yeah</b> 14:20				
<b>years</b> 49:13	<b>9</b>			
<b>Z</b>	<b>9</b> 19:4			
<b>zero</b> 28:18				
<b>0</b>				
<b>07-772</b> 1:8 3:4				
<b>1</b>				
<b>10</b> 52:18				
<b>10-day</b> 52:17				
<b>10:03</b> 1:16 3:2				
<b>11</b> 17:15,23,23				
<b>11:03</b> 55:16				
<b>12</b> 17:15,23,23 19:3				
<b>123</b> 8:24 9:18 10:15 32:21 37:7				
<b>131</b> 17:18,22 18:4				
<b>132</b> 17:19,22				
<b>135</b> 18:1				
<b>15</b> 1:12				
<b>17</b> 18:2				
<b>2</b>				
<b>2</b> 19:5				
<b>2000</b> 44:10				
<b>2001</b> 44:11				
<b>2008</b> 1:12				
<b>24</b> 2:6				
<b>3</b>				
<b>3</b> 2:4				
<b>30</b> 42:14				
<b>31</b> 40:24				
<b>32</b> 47:25				
<b>38</b> 30:4 32:15 37:6				
<b>39</b> 30:4				