

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - x

3 BLAINE LAFLEUR, :

4 Petitioner :

5 v. : No. 10-209

6 ANTHONY COOPER. :

7 - - - - - x

8 Washington, D.C.

9 Monday, October 31, 2011

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:03 a.m.

14 APPEARANCES:

15 JOHN J. BURSCH, ESQ., Solicitor General, Lansing,
16 Michigan; on behalf of Petitioner.

17 WILLIAM M. JAY, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.;
19 for United States, as amicus curiae, supporting
20 Petitioner.

21 VALERIE R. NEWMAN, ESQ., Assistant Defender, Detroit,
22 Michigan; appointed by this Court, on behalf of
23 Respondent.

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	JOHN J. BURSCH, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	WILLIAM M. JAY, ESQ.	
7	On behalf of the United States,	
8	as amicus curiae, supporting the Petitioner	18
9	ORAL ARGUMENT OF	
10	VALERIE R. NEWMAN, ESQ.	
11	On behalf of the Respondent	28
12	REBUTTAL ARGUMENT OF	
13	JOHN J. BURSCH, ESQ.	
14	On behalf of the Petitioner	58
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 this morning in Case 10-209, Lafler v. Cooper.

5 Mr. Bursch.

6 ORAL ARGUMENT OF JOHN J. BURSCH

7 ON BEHALF OF THE PETITIONER

8 MR. BURSCH: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 There are three points that I would like to
11 press this morning regarding deficient plea advice.
12 First, this Court has consistently limited the effective
13 assistance right to ensuring the reliability of the
14 proceedings where a defendant is adjudicated guilty and
15 sentenced. Mere outcome is not the Strickland prejudice
16 standard.

17 Second, when asserting an ineffective
18 assistance claim, the defendant --

19 JUSTICE KAGAN: Could I -- can I stop you on
20 the first? You say mere outcome is not enough,
21 reliability of the proceedings. How does that fit with
22 Kimmelman, where we said it, the right to effective
23 assistance, does attach to suppression hearings,
24 obviously where evidence would not make the proceedings
25 more reliable?

1 MR. BURSCH: Justice Kagan, even in
2 Kimmelman, the Court remanded back to the lower courts
3 to determine whether there was prejudice, and the
4 obvious implication was that if there was no prejudice
5 on the fairness of the adjudicatory proceeding itself,
6 there would be no Sixth Amendment violation.

7 The second point that I wanted to press this
8 morning was that when asserting an ineffective
9 assistance claim, a defendant must show deprivation of a
10 substantive or procedural right, and this Court has
11 already held that a defendant has no right to a plea
12 bargain.

13 Third, every possible remedy for deficient
14 plea advice creates intractable problems
15 demonstrating the right --

16 JUSTICE SOTOMAYOR: Counsel, isn't there a
17 right to make a critical decision on whether to accept
18 or reject a plea bargain, once offered? There's no
19 right to demand one or to keep it, but isn't there a
20 right to make that kind of critical decision?

21 MR. BURSCH: Justice Sotomayor, the -- the
22 not guilty plea is an assertion of the defendant's
23 constitutional rights. It's invoking the right to trial
24 that the Sixth Amendment contemplates. And so this
25 situation is really more like Fretwell. It's not a

1 decision that you have, for example, whether to have a
2 jury or not to have a jury, or whether to have this
3 attorney appointed for your counsel or not, because in
4 each of those cases you have an underlying substantive
5 or procedural constitutional right; and you have no
6 right to a plea. And so this fork in the road is really
7 an illusory one, because you have no right to choose the
8 other side of the fork.

9 JUSTICE KENNEDY: Suppose this were a death
10 -- a death case, and roughly the same facts, failure --
11 failure to communicate. And that leaves me just one
12 other question based on your opening remarks. We can
13 think about adjudication as having a constitutional
14 violation, injury, and remedy. Are you saying that
15 there was a violation in the abstract here but no
16 injury, or was there a violation and an injury but just
17 no remedy?

18 MR. BURSCH: I'm saying --

19 JUSTICE KENNEDY: So if you could do all of
20 that, including the death penalty, I --

21 MR. BURSCH: Yes, I'm saying that there's no
22 violation, because in order to prove a Sixth Amendment
23 violation, you have to demonstrate unreliability of the
24 adjudicatory process. I'm also saying that there's no
25 reasonable remedy, and I'll talk about that in a minute.

1 With respect to the death penalty in
2 particular, I would refer this Court right back to the
3 Fretwell decision, because there, too, defendant and his
4 counsel had an opportunity to raise a Collins objection
5 that would have changed the sentence to avoid the death
6 penalty in that case. Collins obviously was overruled
7 before habeas process, and this Court held that the
8 defendant could not use the vehicle of an ineffective
9 assistance claim to regain that lost opportunity because
10 he had no constitutional right in it. And so, really
11 the remedy -- I'm sorry. The severity of the sentence
12 doesn't enter the analysis once you've established that
13 there has been no violation.

14 JUSTICE GINSBURG: When you say no violation,
15 you don't mean that there was no ineffective assistance
16 of counsel? I thought that was conceded, that there was
17 ineffective assistance.

18 MR. BURSCH: That's correct, Justice
19 Ginsburg. We have conceded for purposes of argument
20 that there was ineffective assistance. But Strickland
21 is a two-part test, and even after you get past the
22 deficiency prong, there's still the question of whether
23 this casts some doubt on the reliability of the
24 proceedings.

25 JUSTICE KAGAN: Well, I thought that the

1 second part of the test asked about harm. And here the
2 person is sitting in prison for three times as long as
3 he would have been sitting in prison had he had
4 effective assistance of counsel at the plea bargaining
5 stage. So, why doesn't that just meet the requirements
6 of Strickland, both deficiency and prejudice?

7 MR. BURSCH: Well, that's actually the best
8 argument that the Respondent has in this case. And the
9 reason --

10 JUSTICE KAGAN: Sounds like a good argument.

11 (Laughter.)

12 MR. BURSCH: Well, the reason why it's wrong
13 is because this Court has been very careful to define
14 what that harm is. Specifically, the word was "outcome"
15 in Cronin and Strickland. If you --

16 JUSTICE KAGAN: And outcome -- there is a
17 different outcome here. He's sitting in prison for
18 three times as long. That's a different outcome.

19 MR. BURSCH: Yes, but the Court went on to
20 define "outcome" to mean reliability of the adjudicatory
21 process. In fact, specifically, the language was
22 whether absent the deficiency, the defendant -- I'm
23 sorry. Absent the deficiency, the factfinder would have
24 had a reasonable doubt respecting guilt. And what we
25 have here is a situation where everyone acknowledges --

1 JUSTICE KAGAN: Well, take the sentencing
2 cases. The sentencing cases, the determination of guilt
3 is over, and the question is, is this person sitting in
4 jail for 1 day longer because his counsel was
5 ineffective? And if he is, we would find prejudice
6 there. So, why isn't the same thing true here?

7 MR. BURSCH: Well, I don't believe it's quite
8 that simple. If there was some legal error, you know,
9 an error to which he had a constitutional right, then
10 certainly what you said is exactly true. But if you're
11 talking about more or less days because of, for example,
12 a judge thinking that the -- the difference between
13 crack and cocaine sentences was not appropriate or other
14 things that are really up to the discretion of the trial
15 court judge, Strickland says absolutely those things are
16 not Sixth Amendment violations.

17 JUSTICE KAGAN: Well, I guess I don't
18 understand that answer, because that answer seems to
19 suggest that the -- that the assistance being provided
20 was not ineffective. But here, as Justice Ginsburg
21 notes, you've conceded that the assistance is
22 ineffective. That assistance has led to a much, much,
23 much longer sentence. You know, as opposed to some of
24 the sentencing cases suggest that 24 hours is enough,
25 this is 10 years or something. And, you know, that

1 should be the end of the game, no?

2 MR. BURSCH: Well, let's try another
3 sentencing hypothetical, where it's clear that there was
4 deficient performance. Say that there's a local trial
5 court judge and everyone knows that he has a certain
6 predilection that if you like the local sports team,
7 he's going to give you a break. If the attorney comes
8 in and he does not press the argument that this
9 convicted defendant likes the local sports team, he gets
10 a higher sentence, that's still not a Sixth Amendment
11 violation.

12 Really, once you shift to sentencing, the
13 question is, were you legally entitled to the result?
14 And simply because he failed to appeal to the right
15 discretionary tendencies of the trial court doesn't
16 really make a difference. Here we're talking,
17 obviously, about the guilt phase, and it's much easier
18 here because it says clearly in Strickland and Cronin
19 and Kimmelman and many, many other cases that that
20 outcome difference, the harm difference, has to be
21 reliability of the process itself. It's a process --

22 JUSTICE SCALIA: You acknowledge, though,
23 that it's ineffective assistance of counsel if you're --
24 well, no, I guess you haven't acknowledged. Let me ask
25 you: Have you provided ineffective assistance of

1 counsel if you are a lousy bargainer? You're just no
2 good at the -- you know, at -- I don't know -- the game
3 of bargaining. And so, you do a bad job in bargaining
4 down the sentence, I mean a notoriously bad job. Is
5 that ineffective assistance of counsel?

6 MR. BURSCH: Under the Court's first prong of
7 Strickland, you would have to look at whatever the
8 standards of professional practice were, and depending
9 how lousy the bargainer was, it could or could not be
10 deficient. But the important thing is if it didn't have
11 any effect on the subsequent trial and sentencing, then
12 it would not be a Sixth Amendment violation.

13 JUSTICE SCALIA: Well, I don't even agree
14 with the first part. I don't think our legal process
15 is -- is a bargaining game. Shouldn't be.

16 MR. BURSCH: Well, we could agree with that.
17 Bargaining is not what this is about, and that's why
18 this Court has held in Weatherford and other cases that
19 there is no right to the plea bargain itself. And
20 that's really the second --

21 JUSTICE SOTOMAYOR: You can -- you can agree
22 with that when 95 percent of the criminal cases are
23 disposed of by way of bargaining?

24 MR. BURSCH: Because in the 95 percent of
25 cases that are disposed of that way, this Court has

1 already held in Padilla and Hill that there is a
2 constitutional right to have effective counsel when
3 you're accepting that plea. And the difference is when
4 you're accepting a plea, you're being convicted. That
5 is the conviction. And this Court frequently
6 establishes different tests when you're waiving a right,
7 for example the right to go to trial, versus invoking a
8 right, going to trial.

9 JUSTICE SOTOMAYOR: How can you talk about
10 the reliability of a process or its fairness when you
11 have an attorney who has fundamentally misgauged the
12 law? How can a trial be fair when the attorney is going
13 into a trial thinking his client can't be convicted
14 because the shots fired hit below the waist?

15 MR. BURSCH: Because --

16 JUSTICE SOTOMAYOR: So, how can that kind of
17 trial ever be fair?

18 MR. BURSCH: Because there's no evidence
19 here, not even a contention, that his belief had any
20 impact whatsoever on the fairness of the trial
21 proceeding. And this Court has drawn a bright-line rule
22 at trial. You know, if you look at the preliminary
23 hearing, if there's attorney error there, deficiency --

24 JUSTICE KENNEDY: Well, but you skipped over
25 a step. I think we do assume that the deficient advice

1 led to the -- the determination to plead not guilty.

2 MR. BURSCH: Right. Again -- but that fork
3 in the road is not one to which he has a substantive
4 procedural right.

5 JUSTICE KENNEDY: Well, but that's the
6 question -- that's the question we're confronting. So,
7 I think --

8 MR. BURSCH: Well, I --

9 JUSTICE KENNEDY: -- your answer was a
10 little too facile on that point.

11 MR. BURSCH: I think --

12 JUSTICE KENNEDY: We have to assume there's
13 ineffective assistance of counsel in advising the client
14 the nature of the charge for the -- so that the client
15 can make up his mind whether to plead guilty or not
16 guilty.

17 MR. BURSCH: Right.

18 JUSTICE KENNEDY: We have to assume that in
19 this case, correct?

20 MR. BURSCH: Correct, we are assuming that.
21 But what I would submit respectfully is that the plea
22 stage isn't any different than a preliminary hearing or
23 a line-up or a suppression hearing, where if there was
24 some deficient attorney conduct, this Court would still
25 then look to see whether it had an adverse impact on the

1 adjudication of guilt.

2 JUSTICE GINSBURG: Suppose the defective
3 advice causes the defendant to enter a plea that he
4 would not have entered if he had been properly advised.
5 Can he get relief?

6 MR. BURSCH: Absolutely. Under Hill and
7 Padilla, this Court has said when you give up your right
8 to trial, that's a very different situation and that
9 there is a remedy for that. And --

10 JUSTICE GINSBURG: So, explain why defective
11 advice causing a plea, that qualifies, but defective
12 advice causing defendant to turn down a plea --

13 MR. BURSCH: It's just --

14 JUSTICE GINSBURG: -- does not?

15 MR. BURSCH: It's just like the difference
16 between deciding to proceed with counsel, in which case
17 there's -- there's no barrier to entry, or deciding to
18 proceed without counsel, giving up the constitutional
19 right.

20 JUSTICE SCALIA: No, the difference -- that's
21 not the difference at all. It seems to me the
22 difference is when you plead guilty you deprive yourself
23 of the 24-karat test of fairness, which is trial by jury
24 before nine people who have to find you guilty beyond a
25 reasonable doubt. When you plead guilty, you give up

1 that.

2 When you don't plead guilty, you get what is
3 the best thing in our legal system. You can't do any
4 better than that.

5 MR. BURSCH: Justice Scalia, you said it much
6 more artfully, but that's exactly the point I was trying
7 to make with Justice Ginsburg, that when you invoke your
8 constitutional right, your right to have an attorney, to
9 go to a trial, to have a jury, we don't set up barriers
10 to entry. It's only when you give up those rights.

11 JUSTICE KAGAN: I take it, then, Mr. Bursch,
12 you would have the same answer if the State had never
13 provided counsel at all. So long as -- if the plea
14 negotiations were all done between the prosecutor and
15 the individual defendant, and the -- and the State
16 refused to provide the individual defendant with
17 counsel, but so long as the person in the end decided,
18 oh, I don't like this plea, I'll go to trial, then it's
19 all fine and dandy under the Sixth Amendment?

20 MR. BURSCH: That would be our position,
21 because that's consistent with this Court's holding in
22 Coleman and Wade and Kimmelman, that --

23 JUSTICE KENNEDY: And that would also be your
24 position in a capital case?

25 MR. BURSCH: Yes. Under Fretwell, this Court

1 held definitively that so long as the reliability of the
2 adjudicatory process and sentence were intact, that the
3 deficient advice didn't affect it, that the severity of
4 the punishment was not legally relevant.

5 JUSTICE SCALIA: So, your position is you're
6 entitled to effective assistance of counsel before you
7 plead guilty, but you're not entitled to effective
8 assistance of counsel in evaluating plea offers?

9 MR. BURSCH: I would say it slightly
10 different --

11 JUSTICE SCALIA: All right.

12 MR. BURSCH: -- that you are entitled to
13 effective counsel at every critical stage; however, it
14 is not a Sixth Amendment violation unless it casts doubt
15 on the reliability of the adjudication of guilt.

16 JUSTICE KENNEDY: That gets back to my
17 question: Is it a violation in the abstract then, of
18 *damnum absque injuria*?

19 MR. BURSCH: I'm sorry.

20 JUSTICE KENNEDY: Damage without injury.

21 MR. BURSCH: No, because under the *Strickland*
22 and *Cronic* cases, there is no damage, there's no Sixth
23 Amendment violation, unless you can prove the prejudice.

24 JUSTICE ALITO: I mean, all of this is
25 theoretically interesting, and it may be that capital

1 cases are sui generis here. But I thought the heart of
2 your argument was that there just is no way to
3 unscramble the eggs in this situation; there is no --
4 and that was your third point, and I understood it.

5 MR. BURSCH: Correct.

6 JUSTICE ALITO: There is no remedy that can
7 put the parties back into the position where they would
8 have been had the error regarding the legal issue not
9 occurred.

10 MR. BURSCH: That's exactly right. And let's
11 talk about the two remedies that are most frequently
12 bandied about in the circuit courts. The first is to
13 order a new trial. And to us, it makes no sense to
14 order a second trial after you've already had a first
15 error-free trial.

16 In addition, you think about these habeas
17 cases; if you're issuing a habeas writ and vacating a
18 sentence 8 or 9 years after the fact, like you are here,
19 essentially you're releasing the defendant, because
20 witnesses will die, they'll move away, memories will be
21 sparse. And so, that's the natural effect of that.

22 And in Cooper's brief, he doesn't even
23 advocate for a second trial; he asks for specific
24 performance. The problem with that is there you're
25 infringing on the prosecutor's discretion, which is

1 sacred, to say what his plea offer is going to be. And
2 circumstances have changed once a trial has taken place.

3 CHIEF JUSTICE ROBERTS: Well, "sacred" is a
4 little strong, don't you think? I mean, it is a -- to
5 some extent, unfair to the prosecutor because he knows
6 already he's got a guilty verdict in his pocket, and he
7 has to go back. But why is it so terribly difficult to
8 tell the defendant he has a right to accept that offer
9 if he wants, but then go through the normal process,
10 which is it has to be approved by a judge and all that
11 stuff? I don't see what's terribly difficult about
12 that.

13 MR. BURSCH: We contend it violates the
14 separation of powers. But you bring up an important
15 point because circumstances have changed in two
16 respects. The first is that you learn more information.
17 So, here, for example, the prosecutor learned that not
18 only did Mr. Cooper shoot Kali Mundy, but he did it
19 while she was screaming and running away from him.
20 That's a changed circumstance. He might not give the
21 same plea. Even more so in Frye, where they learned
22 that he was picked for another criminal violation after
23 the plea was given, and the prosecutor testified that he
24 would have taken the plea back when he knew that.

25 But the bigger changed circumstance is the

1 trial itself, because the prosecutor has now gone
2 through the risk of having an acquittal. He has also
3 put, for example, the 8-year-old sexual abuse defendant
4 on the stand, something he tried to avoid with the plea
5 offer. And it truly is an egg that cannot be
6 unscrambled.

7 And unless there are further questions, I
8 will reserve of the balance of my time.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Jay.

11 ORAL ARGUMENT OF WILLIAM M. JAY

12 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

13 SUPPORTING THE PETITIONER

14 MR. JAY: Mr. Chief Justice, and may it
15 please the Court:

16 Petitioner's convictions and sentence are
17 reliable because the proceedings that produced them were
18 reliable. And to collaterally attack his convictions or
19 his sentence based on allegedly ineffective assistance
20 of counsel, he has to show that the ineffective
21 assistance of counsel prejudiced him. As this Court's
22 Strickland cases have used that term, that means he has
23 to show that a reviewing court should lack confidence in
24 the proceeding that produced the convictions or the
25 sentence.

1 JUSTICE BREYER: Well, you -- first, there's
2 nothing about this in the Sixth Amendment, is there? I
3 mean, the text of the Sixth Amendment talks about
4 criminal prosecutions requiring the assistance of
5 counsel for defense, period.

6 MR. JAY: The Sixth Amendment requires the
7 assistance of --

8 JUSTICE BREYER: Okay. So, there's nothing
9 in the Sixth Amendment that has these qualifications. I
10 haven't seen anything in any case which was other than
11 case specific. That is, this issue hasn't been decided
12 before, not to my knowledge. The language can be taken
13 out of those cases, as you've very properly done. And
14 so, there's nothing that I could find in the cases.
15 Nothing in the Sixth Amendment itself. In 95 percent of
16 the cases, they do plead guilty. And what's the problem
17 about ordering the prosecution to simply repeat the
18 offer he gave before?

19 Well, I mean, I don't really see if there --
20 and prejudice? What if a person's been executed? If he
21 had gotten the -- if he had gotten the plea offer, he
22 would have pled guilty for 50 years in jail, okay?
23 That's my imaginary case. I can think of one where
24 there's prejudice. He's dead. All right? So, what's
25 the answer in my imaginary case, if it's not in the

1 amendment, not in -- not a holding, et cetera?

2 MR. JAY: Well, I think that -- let me
3 address that capital hypothetical that has come up
4 several times. And I think that it's instructive,
5 Justice Breyer, to look at this Court's Strickland cases
6 and look at what remedy they order when there has been
7 ineffective assistance that shakes the reviewing court's
8 confidence in the proceeding that produced it. They
9 order a new proceeding. They don't order a specific
10 sentence. That's why the outcome has never been the --
11 the yardstick by which ineffective assistance of --

12 JUSTICE BREYER: I don't want to -- I want to
13 stop you there because I don't understand it. The
14 suggestion is -- I'm not taking this case; I'm making up
15 a hypothetical since we're discussing it really based on
16 the next case. The defendant never heard the offer,
17 never heard it. It is crystal clear that if he'd heard
18 it, he would have accepted it. Okay? I'm trying to
19 separate out difficulties of this case, which strikes me
20 as difficult because of the facts, from the principle.
21 And what I want you to do is to tell me why I shouldn't
22 accept the principle, and then we can worry about what's
23 a clear case.

24 MR. JAY: But I think the principle,
25 Justice Breyer, is that you look at what the -- you look

1 at what it is the Court's being asked to set aside.

2 JUSTICE BREYER: Death. Let's say death.

3 MR. JAY: Right. So, in this case, you look
4 at the death sentence. How was that death sentence
5 produced? If the defendant can show, for example, that
6 he got bad advice about the plea --

7 JUSTICE BREYER: He shows that never did he
8 ever become aware, because his lawyer was sleeping and
9 moved on vacation and never told him about the plea
10 offer. That's my hypothetical.

11 MR. JAY: I think that's actually an easier
12 hypothetical than the bad advice because you could show
13 that if the lawyer then gets -- stands up and does a
14 bang-up job at trial, right -- the defendant is
15 convicted of capital murder. The defendant can't show
16 any prejudicial effect on the trial. That means that no
17 other lawyer doing a better job could have gotten the --
18 could even show a reasonable probability that a
19 different verdict would ensue.

20 JUSTICE ALITO: No, the Court has said --

21 MR. JAY: That defendant has a reliable
22 capital murder conviction.

23 JUSTICE ALITO: The Court has said that death
24 is different. And did you think it is inconceivable
25 that there could be a different rule for capital cases,

1 such as a rule requiring that, in a capital case, any
2 offer of a noncapital sentence as part of a plea bargain
3 actually be waived by the defendant in court so that
4 this doesn't come up? This is not a capital case.

5 MR. JAY: This is not a capital case, and I
6 think that it certainly --

7 JUSTICE BREYER: All right. If you don't
8 want to do the capital case? I'm still trying to get to
9 the principle.

10 MR. JAY: I'm happy to do the capital case,
11 Justice Breyer.

12 JUSTICE BREYER: I'll change my hypothetical
13 and say all that happened was that this perfect trial,
14 because of mandatory sentencing rules, led him to prison
15 for 50 years, as compared with a plea bargain which
16 would have given him 2 years. Now, he is in prison for
17 48 years more, and I consider that that's at least
18 harmful to him. So, where the amendment doesn't speak
19 of it, where the misbehavior of the lawyer is crystal
20 clear, where it's 48 years more in prison, what is it
21 that bars what seems to me obvious that an inadequate
22 assistance of counsel, remedial through a specific
23 decree saying reinstitute the offer, led to enormous
24 unfairness and prejudice?

25 MR. JAY: Two points, Justice Breyer. I'm --

1 and I want to make sure that I get out my answer to your
2 capital hypothetical, because you don't look just at
3 whether the sentence that resulted was worse than the
4 sentence that could have resulted. If that were the
5 case, Fretwell would have come out the other way.
6 That's death if -- with no objection made, life sentence
7 if the objection had been made. So, it's not an
8 outcome -- it's not a narrow comparison of outcomes.
9 What you look at is how the sentence was produced. Is
10 this defendant entitled, had this -- to a lesser
11 sentence?

12 Is this -- had this defendant had a better
13 lawyer at sentencing, is there even a reasonable
14 probability that the -- that that lawyer, through a
15 different strategy for identifying a legal error --

16 JUSTICE SCALIA: Mr. Jay, you disagree with
17 the assertion that Justice Breyer made that this was
18 unfair. This man deserved to get the sentence he got,
19 didn't he? He had a full and fair trial. A jury of 12
20 people, finding him guilty beyond a reasonable doubt,
21 determined that he deserved that sentence. How could it
22 be unfair to give him the sentence that he deserved?

23 MR. BURSCH: Yes, that's correct. In every
24 case --

25 JUSTICE BREYER: The lists are legion where

1 people don't get the sentence that they deserve because,
2 for example, the lawyer was inadequate. I mean --

3 MR. JAY: And in those cases, Justice Breyer,
4 you show that the lawyer had a bad strategy at
5 sentencing. That may well have been the same bad
6 strategy that led the lawyer to recommend a not guilty
7 plea. Let's go to trial on my crazy strategy. If he
8 can show that and he can show that a better lawyer with
9 a better strategy would produce a different result, then
10 the Sixth Amendment entitles that person to a new
11 proceeding. The Sixth Amendment never entitles the
12 person to have a court order a particular sentence.

13 And you can't use the prosecutor's offer
14 made at a different time as the benchmark and say, well,
15 the prosecutor was okay with it at this other time;
16 therefore, the prosecution must be forced to live with
17 it now. And that's because a plea offer rests on a
18 number of considerations: the need to obtain the
19 defendant's cooperation in other cases; the desire to
20 spare the witnesses and the victim the burdens of trial;
21 and, frankly, to avoid the risk of an acquittal. And
22 the prosecution in this case and in cases like this one,
23 where there has been a reliable conviction and reliable
24 sentencing, the prosecution has already incurred all of
25 those burdens. So, to look at the 51-month minimum

1 offer that was made 8 years ago and have that be the
2 benchmark simply is not something that this Court has
3 ever done in its Strickland cases. And I think that
4 it's revealing about the Respondent's --

5 JUSTICE KAGAN: Mr. Jay, you don't contest
6 that plea bargaining is a critical phase, entitling
7 somebody to a lawyer and to an effective lawyer, do you?

8 MR. BURSCH: We don't -- we don't think --
9 that's not part of our argument here.

10 JUSTICE KAGAN: Yes, because we've said that
11 many times; isn't that right?

12 MR. BURSCH: Well, the Court -- let me be
13 precise, Justice Kagan, because there are two things
14 that the Court can be talking about. There's the --
15 there's the -- the interaction between the State and the
16 defendant, and that's where the Court has customarily
17 used language like "critical stage," a confrontation
18 between the defendant and the prosecution.

19 That's not what we have here. This is about
20 private advice between the lawyer and the client, and
21 we're not contesting that he has a right to have that
22 advice be effective.

23 JUSTICE KAGAN: What we have recognized,
24 right, is that plea bargaining is a critical phase
25 because about 98 percent of the action of the criminal

1 justice system occurs in plea bargaining. And to
2 deprive somebody of a lawyer at that stage of the
3 process, where 98 percent of the action occurs, is
4 inconsistent with the Sixth Amendment. That's what
5 we've said. Isn't that right?

6 MR. BURSCH: Well, I don't think the Court
7 has faced up -- faced this particular situation, Justice
8 Kagan.

9 JUSTICE KAGAN: So, it's not a critical
10 phase. It's only a critical phase depending on the
11 outcome of what happens at that phase?

12 MR. JAY: We are -- we are assuming that --
13 that Mr. Cooper in this case had a right to receive
14 effective advice about whether to enter this plea. But
15 we're -- our position is that he wasn't prejudiced
16 because what --

17 JUSTICE KAGAN: Has -- have you ever seen a
18 critical phase before in our Sixth Amendment
19 jurisprudence where the right to a lawyer depends upon
20 what has -- what happens during that critical phase,
21 where if one outcome results, there is no Sixth
22 Amendment right, but if another outcome results there
23 is?

24 MR. JAY: Well, again, we don't think this is
25 in any way crucial to deciding this case, but

1 Scott v. Illinois, Justice Kagan, is an example of that.

2 JUSTICE SCALIA: Mr. Jay, couldn't --
3 couldn't it be said that what our cases hold is that
4 pleading guilty is a critical phase? Would that be
5 enough to explain our cases?

6 MR. JAY: It certainly is correct that
7 pleading -- that a guilty plea hearing, where the
8 defendant --

9 JUSTICE KENNEDY: Well, it's correct, but is
10 it enough? Do you want us to write an opinion that plea
11 negotiations are not a critical stage of the criminal
12 process unless at the end of the day a guilty plea
13 results?

14 MR. JAY: That's not at all what we're
15 asking, Justice Kennedy.

16 JUSTICE KENNEDY: Okay. So, we --

17 MR. JAY: What we are asking -- I'm sorry.

18 JUSTICE KENNEDY: Justice Kagan and I want to
19 know what your test is.

20 MR. JAY: Our test to resolve this case is to
21 look at what it is that the habeas petitioner is
22 challenging. He's challenging conviction and his
23 sentence. In the conviction, he was found guilty by a
24 jury. He now says, page 14a of the red brief, that he
25 is guilty and he wishes he had pleaded guilty sooner.

1 No basis for challenging the conviction.

2 May I finish the thought on the sentence?

3 CHIEF JUSTICE ROBERTS: Sure.

4 MR. JAY: And -- on this sentence, he was
5 sentenced in accordance with law. He had effective
6 representation at sentencing, and he got the sentence
7 that corresponds to the counts of conviction. What he
8 wants is to reinstate a deal that was in the
9 prosecution's discretion to offer once upon a time.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 MR. JAY: Thank you, Mr. Chief Justice.

12 CHIEF JUSTICE ROBERTS: Ms. Newman.

13 ORAL ARGUMENT OF VALERIE R. NEWMAN

14 ON BEHALF OF THE RESPONDENT

15 MS. NEWMAN: Thank you, Mr. Chief Justice,
16 and may it please the Court:

17 It is uncontroverted here that Anthony Cooper
18 received incompetent advice from his counsel. It is
19 uncontroverted here that, as a result of that
20 incompetent advice, Mr. Cooper is serving between 100
21 and 134 months of extra time of imprisonment.

22 JUSTICE GINSBURG: I think that's not -- that
23 he got ineffective assistance, yes, that's not
24 controverted. But that he would have gotten the 51
25 months or 68 is certainly controverted because of two

1 interventions. The prosecutor can say: No deal; I'm
2 withdrawing it, even after an initial acceptance. And
3 the judge can say: I think 51 to 68 is entirely
4 improper for what this man did.

5 MS. NEWMAN: Those are both true, Justice
6 Ginsburg -- Justice Ginsburg, but, however, the
7 Strickland test requires a reasonable probability of a
8 different result. And on this record, we have no
9 reasonable probability -- we have no reason to expect
10 that that's not exactly what would have happened.

11 JUSTICE ALITO: The relief that you want is
12 specific performance of the plea bargain.

13 MS. NEWMAN: Correct.

14 JUSTICE ALITO: Isn't that correct?

15 What if it had come to light or come to the
16 prosecutor's attention during this intervening time that
17 your client had committed four or five other shootings?
18 Would you still be entitled to specific performance?

19 MS. NEWMAN: Yes. We evaluate the case, and
20 the Strickland analysis is an imperfect -- the
21 Strickland remedy is an imperfect remedy. It has always
22 been an imperfect remedy. It will always be an
23 imperfect remedy.

24 JUSTICE KENNEDY: What -- what is the judge
25 supposed to do? Let's say the remedy is it goes back

1 before the judge. We're trying to unwind the clock or
2 whatever the metaphor is. Does the judge have to
3 prescind all knowledge of what he learned in the trial?

4 MS. NEWMAN: Well, this Court has stated
5 numerous times that it presumes a conscientious
6 decisionmaker, and a conscientious decisionmaker would
7 put --

8 JUSTICE KENNEDY: Well, I'm asking what --
9 I'm a conscientious decisionmaker, and I'm asking for
10 your advice on what I should do.

11 MS. NEWMAN: That you would --

12 JUSTICE KENNEDY: I know the details of this
13 crime, which were more horrific than I would have
14 expected, because I've heard them at the trial. Do I
15 just somehow forget about that, prescind that?

16 MS. NEWMAN: You would evaluate the case as
17 you would have evaluated it at the time of the
18 proceedings.

19 JUSTICE KENNEDY: So, the answer is "yes."
20 I -- I ignore everything that I learned during the
21 trial.

22 MS. NEWMAN: Yes, because the deficient --
23 you evaluate things at the point of the deficient
24 performance. And at the point of the deficient
25 performance, the judge had a certain amount of

1 information before him, the prosecutor had a certain
2 amount of information before him, and the defense
3 attorney had a certain amount of information before him.

4 JUSTICE ALITO: I mean, that's pretty
5 incredible. It doesn't matter what the defendant has
6 done in the -- has been discovered to have done in the
7 interim? Committed 5 murders, 10 murders?

8 MS. NEWMAN: Well, in that case --

9 JUSTICE ALITO: Wipe it out of your mind; you
10 get -- you get the plea bargain that was offered at an
11 early point in -- in the investigation of the case?

12 MS. NEWMAN: Yes, because what happens in
13 ineffective assistance of counsel claims is the State
14 has to bear the burden of the unconstitutionality. And
15 so, that is a price that this Court has said the State
16 will bear when there is -- when there's a constitutional
17 violation, because there is no perfect --

18 JUSTICE GINSBURG: How can the judge -- the
19 judge -- he knows what the plea -- let's say he knows
20 what the plea bargain was, but he also knows that for
21 one of the crimes, felon in possession, that alone, the
22 sentencing range is 81 to 135. So, without any --
23 considering anything that happened at trial, the judge
24 knows that the plea bargain was for less than if the man
25 had been charged with -- only with a felon in

1 possession.

2 MS. NEWMAN: Yes, that's accurate.

3 JUSTICE GINSBURG: So, it -- it seems most
4 unlikely that a judge would have accepted the plea
5 bargain for 51 to 68 for the crimes that were charged.

6 MS. NEWMAN: No, I would disagree with that.
7 This -- in this Court -- and I can represent to the
8 Court, in my practice before this Court, which I have
9 practiced before this Court for many, many years, this
10 plea bargain was an ordinary plea bargain. This was not
11 anything extraordinary. It was very run of the mill.
12 It was -- it was a run-of-the-mill case --

13 JUSTICE GINSBURG: That may be, but is it not
14 true that the sentence range was 81 to 135 for a felon
15 in possession?

16 MS. NEWMAN: I did not -- typically, you only
17 score out the guidelines for the most serious offense.
18 So, the guidelines may have been high for the felon in
19 possession offense, but, however, the judge -- in
20 fashioning the remedy, you're not going to -- this Court
21 would not take discretion away from the judge. So, in
22 fashioning the remedy, in adopting the remedy of the
23 Sixth Circuit if this Court were to do that, this case
24 would go back before this same judge if he's still on
25 the bench, and it would be -- would put people back --

1 Mr. Cooper would accept the plea, but the judge retains
2 sentencing discretion.

3 JUSTICE BREYER: It wouldn't be a problem.
4 The problem with Justice Alito's hypothetical, I take
5 it, is what the order would say is that the prosecution
6 has to, for a reasonable time, extend the same offer.
7 And then if it's accepted, you go to the judge. The
8 judge doesn't have to accept the plea.

9 MS. NEWMAN: Right. You can't find --

10 JUSTICE BREYER: You can't make him do that.
11 But I have a bigger problem with this case, which is --
12 which I may be the only one to have. But as I've looked
13 at it, I don't see ineffective assistance of counsel
14 within the AEDPA meaning. That is, you have two courts
15 in the State which have said this is not ineffective.
16 And as I look at it, it's somewhat ambiguous at best.
17 And we have the Sixth Circuit saying it is. Well, I
18 know both sides agree, but I mean, both sides couldn't
19 make us decide a case by saying there's a murder when in
20 fact it's not.

21 I mean -- so, what am I supposed to do about
22 that? I find this a tough case. I've read the record,
23 and in my own opinion at this moment, perhaps no one
24 else's, there is no ineffective assistance of counsel
25 such that the Sixth Circuit could set that aside -- a

1 contrary finding of the State court.

2 What do I do?

3 JUSTICE SOTOMAYOR: If Justice Breyer permits
4 me to add an addendum to give the reasons why I might
5 agree with him or a way of viewing this, as I read the
6 lower court's decisions, they said there wasn't
7 ineffectiveness because he was just trying to get a
8 better deal.

9 And I think that, translating what he said,
10 the very reasonable view by the court was the prosecutor
11 may think of a lesser charge, because if this guy really
12 wanted to kill this woman, he would have hit her head or
13 her chest, but he aimed low. So, he was really just
14 angry and shooting enough so that if he hit her, okay,
15 if she died, okay. But he really didn't have that
16 heinous intent to execute, you know, a gunshot to the
17 brain. And so, he was hoping to negotiate something
18 better. If that's -- Justice Breyer is shaking his
19 head. If that in fact -- if this is an AEDPA case, and
20 we have to give deference to the State courts, doesn't
21 that resolve this case?

22 MS. NEWMAN: No.

23 JUSTICE SOTOMAYOR: We have to give
24 deference to their finding.

25 MS. NEWMAN: You do have to give deference

1 to their finding. There's no question under AEDPA
2 there's -- there's deference. And there's actually no
3 question there's sort of a doubly deferential review,
4 given the Strickland analysis. However, the State
5 courts did not decide this case on Sixth Amendment
6 grounds. So, there is nothing to give deference to.
7 The State courts decided this, and the trial court said
8 Mr. Cooper made his own choices. That's not an
9 ineffective assistance of counsel analysis.

10 The court of appeals in Michigan also did
11 not engage in a Sixth Amendment analysis. They adopted
12 the trial court and said that Mr. Cooper made his own
13 choices. So, there is -- and this claim was raised
14 specifically on Sixth Amendment grounds from the very
15 beginning of the appeal until it reached this Court.
16 So, there is no AEDPA deference to give to the State
17 courts' decisions. There is no question as well that it
18 was ineffective assistance, because the State court
19 record does not bear out that Mr. McClain was trying to
20 get a better deal. The State court --

21 CHIEF JUSTICE ROBERTS: You said -- you said
22 earlier that the district court, the trial court judge,
23 still retains discretion as to whether or not to approve
24 the plea bargain, right, whether to accept it?

25 MS. NEWMAN: The sentencing.

1 CHIEF JUSTICE ROBERTS: Yes -- well, which is
2 it, the bargain or the sentence? It includes the
3 sentence, correct?

4 MS. NEWMAN: It's a sentence recommendation,
5 and under Michigan law, the judge cannot --

6 CHIEF JUSTICE ROBERTS: He has discretion --
7 he has discretion.

8 MS. NEWMAN: Correct.

9 CHIEF JUSTICE ROBERTS: So, is he allowed to
10 take into consideration all that's happened before, not
11 just with respect to guilt or innocence or the result of
12 the trial, but in imposing the sentence or approving it?

13 MS. NEWMAN: Well, he can take into account
14 anything that he could have taken into account in the
15 first place. But in this case --

16 CHIEF JUSTICE ROBERTS: But nothing that he
17 learned at trial, I take it.

18 MS. NEWMAN: I would argue no. I mean,
19 certainly this Court's set of parameters --

20 JUSTICE SCALIA: What if he turns -- what if
21 he turns it down, Ms. Newman? He says, no, I can't
22 accept this. What happens then? You have a new --

23 MS. NEWMAN: I would say that's not an
24 option -- oh, I'm sorry. For the judge --

25 JUSTICE SCALIA: Yeah, the judge. It goes

1 back to the judge. We agree with you, and we send it
2 back to the judge. We reinstate the offer, okay? He
3 accepts the offer. It goes to the judge, and the judge
4 says: No, this is outrageous. I'm not going to approve
5 this plea bargain.

6 What happens then?

7 MS. NEWMAN: Well, in that case, the case
8 would proceed under Michigan law. In that case, the
9 judge would say --

10 JUSTICE SCALIA: We would have a new trial;
11 is that it?

12 MS. NEWMAN: No. I don't -- I think it would
13 be perfectly acceptable to say a new trial is not -- not
14 an appropriate remedy in this case, because he had a
15 trial.

16 JUSTICE SCALIA: Okay. So, if the judge
17 turns it down, then the prior trial is valid; is that
18 right?

19 MS. NEWMAN: It would depend on the reasons
20 why the judge would turn it down.

21 JUSTICE SCALIA: He turned it down because --

22 MS. NEWMAN: It would have to be a legitimate
23 reason under a State law; otherwise, there would --

24 JUSTICE SCALIA. Yes. Yes, then the prior
25 trial is okay?

1 MS. NEWMAN: It's not that it's okay, but I
2 think under imperfect circumstances, it's the result
3 that we're seeking.

4 JUSTICE BREYER: Well, why? Why? I mean,
5 why wouldn't the remedy be, as -- judging what you said
6 before, is an order saying to the prosecution
7 re-institute the plea bargain and give him whatever, a
8 week or whatever it is? Now, we imagine the defendant
9 says I accept. So, then they go to the judge, just as
10 they would have before.

11 MS. NEWMAN: Right.

12 JUSTICE BREYER: And the judge has the
13 freedom to accept that or to reject it.

14 MS. NEWMAN: Correct.

15 JUSTICE BREYER: If he rejects it, there is
16 no plea agreement. Now the defendant must plead. He
17 can plead guilty or not guilty. And whatever flows from
18 that, flows from it.

19 MS. NEWMAN: That's a -- also a perfectly
20 acceptable remedy. I think the purpose -- the reason --

21 JUSTICE SCALIA: Wait. Both can't be
22 perfect. Either he has another trial, although he's
23 just been found guilty by a jury of 12 with an entirely
24 fair proceeding, or else he doesn't have a new trial.
25 Which is it?

1 JUSTICE BREYER: He does. He does. His
2 suggestion is perfect, but mine is more perfect.

3 (Laughter.)

4 MS. NEWMAN: Okay. The --

5 JUSTICE BREYER: You could do it. You don't
6 have to -- you would -- he's right, you would have to,
7 under my suggestion, have a new trial, even though there
8 was a trial that took place 2 years ago or whatever it
9 is, correct?

10 MS. NEWMAN: Correct.

11 JUSTICE BREYER: But that isn't the end of
12 the argument.

13 CHIEF JUSTICE ROBERTS: So, if you're the
14 defense counsel, the best thing for you to do is not
15 communicate any plea offer you get, and then if your
16 client is found guilty, then you can go back and say,
17 oh, by the way, I didn't tell you about this, and he
18 gets a whole new trial.

19 MS. NEWMAN: No. The -- the bar on habeas --
20 well, the bar on Strickland, even not on habeas, is a
21 very high bar, as this Court said in Padilla. And it's
22 not a bar that can often be met. And so, you have to
23 show under a Strickland analysis deficient performance
24 and prejudice. So --

25 JUSTICE ALITO: Well, I don't know if that's

1 going to be so --

2 CHIEF JUSTICE ROBERTS: A deficient
3 performance --

4 JUSTICE ALITO: I don't know that that's
5 going to be so hard to show. Do you think it's feasible
6 to draw a distinction between this case, where there was
7 arguably inaccurate legal advice, and the case in which
8 the defense attorney simply makes a terribly mistaken
9 calculation about the chances of a favorable verdict at
10 trial? A favorable plea bargain is offered, caps the
11 guy's possible sentence at, let's say, 3 years. The
12 defense attorney says: We've got a great shot at an
13 acquittal. Let's go to trial. I'm going to rip the
14 prosecution's witnesses apart.

15 The trial turns out to be a disaster.
16 Convicted on all counts, 25 years. Do you think that
17 it's impossible for the rule that you want us to adopt
18 here to be applied in that situation as well?

19 MS. NEWMAN: I think it would be much more
20 difficult, because this Court on habeas review and State
21 courts on non-habeas review are very deferential to
22 strategic decisions. Almost anything that qualifies --

23 JUSTICE KENNEDY: Well, you say that. But,
24 as an administrative matter, I think we have to have
25 some concern that these plea negotiations and

1 discussions are in myriad circumstances. The defense
2 attorney is by the water cooler; the prosecutor walks by
3 and says I'm thinking of offering you a good bargain in
4 the Jones case. He knows he's going to have that
5 prosecutor in court the next day and really beat him.
6 He thinks he's going to soften him up. So, he doesn't
7 communicate it to the client, and the prosecutor later
8 says withdrawn.

9 We're going to have inquiries post hoc on
10 all of these negotiations and discussions. And it seems
11 to me that, absent some other rule, which I don't think
12 we have the authority to impose, that all plea offers
13 must be in writing and be stated with specificity, that
14 if -- what you're proposing is simply unworkable.

15 MS. NEWMAN: I disagree, Your Honor. We've
16 had Hill -- we've had Strickland and Hill jurisprudence
17 for three decades. There's -- there was a floodgates
18 argument when Hill was decided, that we're going to have
19 all these people that the -- and we've had, since
20 McMann v. Richardson, this Court saying plea bargaining
21 is a critical stage, and --

22 JUSTICE KAGAN: And most of the circuits
23 follow your rule; isn't that right?

24 MS. NEWMAN: Right. We already have
25 unanimity --

1 JUSTICE KAGAN: And the floodgates have not
2 opened.

3 MS. NEWMAN: I'm sorry.

4 JUSTICE KAGAN: Go ahead.

5 MS. NEWMAN: Yes, we have unanimity in the
6 Federal circuits, and we have -- almost every State that
7 has addressed this issue has addressed it in the same
8 manner. And so --

9 JUSTICE GINSBURG: What is the unanimity on
10 the remedy? Here, the court said that the writ shall be
11 granted conditioned on the State taking action to offer
12 the 51-to-85-month plea. So, that doesn't bind the
13 judge, but it does bind the prosecutor.

14 MS. NEWMAN: Correct.

15 JUSTICE GINSBURG: And it removes the
16 possibility of the prosecutor saying, I would have
17 withdrawn that initial offer.

18 MS. NEWMAN: Correct.

19 JUSTICE GINSBURG: So, the prosecutor -- the
20 remedy is -- is that the remedy that's uniform? That
21 the prosecutor has no discretion, only the judge does?

22 MS. NEWMAN: Well, the remedies vary. When I
23 said "unanimity," I didn't mean every -- every court in
24 every circuit does -- handles this exactly the same way.
25 Unanimity in the sense that every Federal circuit and

1 almost every State that has addressed this issue, and
2 they've addressed this issue for over 30 years, has
3 found that there is an -- there is a cognizable Sixth
4 Amendment violation that can be remedied on appeal.

5 JUSTICE KAGAN: And perhaps the lack of
6 unanimity on the remedy question is appropriate. I
7 mean, people have been trying to suggest different
8 remedies. But perhaps one way to deal with the remedy
9 question is to recognize that these cases present very
10 different factual circumstances, that there are a lot of
11 variation in them, and to give a substantial amount of
12 discretion to the lower courts to work out what the best
13 remedy is, consistent with that factual variation.

14 MS. NEWMAN: Absolutely. And it's the same
15 thing the courts have been doing, again, since
16 Strickland and Hill were decided.

17 JUSTICE SCALIA: Like what? What factual
18 variation do you think justifies a categorically
19 different remedy? I mean, it seems to me some of the
20 remedies are good and some are bad.

21 MS. NEWMAN: Correct.

22 JUSTICE SCALIA: What factual -- I mean, give
23 me an example of the different remedies and how a
24 certain fact situation could make one okay and the other
25 not okay.

1 MS. NEWMAN: Well, even in the two cases
2 before the Court today -- I mean, in Mr. Frye's, case he
3 accepted a plea, and the State court ordered a new trial
4 as the remedy for the -- for the ineffective assistance
5 of counsel violation. In my case and Mr. Cooper's
6 case --

7 JUSTICE SCALIA: Right. And why was that
8 okay there?

9 MS. NEWMAN: -- rejected -- pardon?

10 JUSTICE SCALIA: Why was that okay there?
11 What -- what factual circumstances made that okay there?

12 MS. NEWMAN: Well, that just -- I don't know
13 that the factual circumstances make it okay, but it was
14 the remedy that the State -- I'm not sure I understand
15 your question. It was a remedy that the State ordered,
16 and, in this case, it's just the remedy that was ordered
17 by the Federal court was the remedy --

18 JUSTICE ALITO: You have a situation where
19 the -- where the defendant turns down -- where a plea is
20 turned down and the defendant goes to trial. Are there
21 any facts in -- any facts that would make any remedy
22 other than specific performance the correct remedy in
23 that situation?

24 MS. NEWMAN: These cases are so
25 fact-specific, Your Honor, I don't want to evade the

1 question about a hypothetical, but there's -- every case
2 is so fact-specific that I think there's -- the
3 possibility exists that a -- that the remedy would --

4 JUSTICE ALITO: You recommend -- you
5 recommend specific performance as the remedy for your
6 case, and I agree with you that is -- if there is to be
7 a remedy, it's the only remedy that makes a -- any
8 modicum of sense. The remedy of giving a new trial when
9 the person has already had a fair trial makes zero
10 sense.

11 MS. NEWMAN: That's correct.

12 JUSTICE ALITO: So, what I'm looking for is
13 any situation in which -- you said leave it to the
14 discretion of the trial judge. But what is -- what
15 discretion is there? What remedy in that situation
16 other than specific performance would be an
17 appropriate -- would remedy what you claim to have been
18 the violation?

19 MS. NEWMAN: Well, in Mr. Cooper's case, I
20 think the -- the remedy in the Sixth Circuit is the only
21 appropriate remedy that -- that puts every -- that is
22 narrowly tailored to the Sixth Amendment violation, and
23 that's what this Court has said.

24 I mean, this Court has given direction to
25 the courts, to the lower courts, that you just narrowly

1 tailor the remedy to fit the situation, because there's
2 so many factual discrepancies --

3 JUSTICE BREYER: Well, what's wrong -- let me
4 go back because I'm now becoming convinced -- I'm trying
5 out what Justice Scalia suggested. Maybe that does work
6 better. What -- what you'd say is, first, throw the
7 defendant out, unless you are convinced that not only is
8 there ineffective assistance, but also it would have
9 made a difference; he would have accepted the plea
10 bargain.

11 MS. NEWMAN: Correct.

12 JUSTICE BREYER: So, now they have to hold
13 the plea bargain open. They then do it. They then go
14 to the judge, like any plea bargain. Ninety percent of
15 the time the judge will say fine, and that's the end of
16 it.

17 MS. NEWMAN: Correct.

18 JUSTICE BREYER: But should the judge decide
19 that this is a case where he would reject a plea bargain
20 for any one of a variety of reasons, then our assumption
21 was wrong, and we reinstate the previous trial. Now,
22 the -- just say it's over? You were tried, you were
23 convicted, that's the end of it.

24 Now, what's wrong with that as a remedy? I
25 mean, what's -- why is that -- why does that muck up the

1 criminal justice system in some way?

2 That's, I think, pretty much what
3 Justice Scalia suggested, and I -- and I am now trying
4 that out, because the more I think about it, the more I
5 think maybe that's okay.

6 MS. NEWMAN: Well, I -- I believe it is what
7 he suggested. And I --

8 JUSTICE SCALIA: Don't -- don't blame it on
9 me. I don't --

10 (Laughter.)

11 JUSTICE SCALIA: I don't -- it's your
12 suggestion that we set aside a perfectly fair
13 conviction.

14 JUSTICE BREYER: Yes, but I --

15 JUSTICE SCALIA: This is just a hypothetical.
16 If you're going to set it aside --

17 MS. NEWMAN: Right.

18 JUSTICE SCALIA: -- I think you should put it
19 back in.

20 MS. NEWMAN: Well, again, right. It's going
21 to depend on what happens -- happens below, and that --
22 we don't -- I mean, the -- the concept here is one --

23 JUSTICE SOTOMAYOR: You're -- you are begging
24 the question.

25 MS. NEWMAN: Okay.

1 JUSTICE SOTOMAYOR: Okay? Because I think,
2 yes, Justice Breyer's first statement, you have to prove
3 the guy was going to take the plea, because there's no
4 sense in -- in giving him a remedy that he --

5 MS. NEWMAN: Right.

6 JUSTICE SOTOMAYOR: -- would have never
7 sought.

8 MS. NEWMAN: Absolutely.

9 JUSTICE SOTOMAYOR: All right? But it goes
10 back to, I think it was Justice Alito or Chief -- or the
11 Chief Justice's question, on what basis can the judge
12 reject the plea? You have said earlier that he has to
13 put aside any information he learned during the trial.
14 And that's really the nub of this case. What are the
15 grounds that you're proposing the judge can use to
16 reject the plea?

17 MS. NEWMAN: That -- any grounds that would
18 have existed in the original circumstances. So, if the
19 judge -- in -- in Michigan, there's a variety of reasons
20 why a judge can say I -- I'm not going to accept this
21 sentencing recommendation.

22 CHIEF JUSTICE ROBERTS: So, how are you ever
23 going to know that the defendant would have accepted the
24 plea agreement? Because by not accepting it, he's got a
25 chance of going scot-free. He's going to have a fair

1 trial, that's the assumption; and he may be acquitted.

2 So, how is a judge supposed to say -- I
3 mean, presumably the defendant will always say, I would
4 have taken that deal, because it's better. Well, how is
5 a judge supposed to go back and decide whether that's
6 true or not?

7 MS. NEWMAN: Well, always -- in large part,
8 it's not going to depend on the defendant; it's going to
9 -- in larger part it's going to depend on -- depend on
10 defense counsel --

11 CHIEF JUSTICE ROBERTS: Why?

12 MS. NEWMAN: -- in making that determination,
13 because Strickland always looks at strategy. I mean,
14 that -- that's the underlying --

15 JUSTICE KENNEDY: I think you can --

16 MS. NEWMAN: -- value of Strickland.

17 JUSTICE KENNEDY: -- answer the Chief
18 Justice's question. The Chief Justice said how are you
19 going to know -- you have to show prejudice.

20 MS. NEWMAN: Correct.

21 JUSTICE SCALIA: And there's no prejudice
22 unless he would have accepted the deal.

23 MS. NEWMAN: Right.

24 JUSTICE KENNEDY: How are you going to know
25 that he would have? Of course, he's always going to say

1 he that would have, but how is the trial judge going to
2 make a credibility determination on that -- on that
3 issue? I guess it's just a credibility determination.
4 I don't know how he's going to do it. I think you can
5 answer the Chief Justice's question yes or no.

6 MS. NEWMAN: I don't think I can --

7 CHIEF JUSTICE ROBERTS: How is the judge --

8 MS. NEWMAN: -- answer it yes or no.

9 CHIEF JUSTICE ROBERTS: How is the judge --
10 how is the judge ever going to know, be able to decide,
11 whether the defendant would have accepted the deal or
12 not?

13 MS. NEWMAN: The same way that the trial
14 courts decide any question of fact. In this case, we
15 had testimony from the trial attorney. The trial
16 attorney told the judge, I told him not to accept the
17 plea because he legally could not be convicted of the
18 charge. I mean, Mr. Cooper was --

19 CHIEF JUSTICE ROBERTS: It's the defendant's
20 choice; it's not the lawyer's choice. It's the
21 defendant's choice.

22 MS. NEWMAN: But he -- but he has a right to
23 the assistance -- to the effective assistance of counsel
24 in making that critical choice, and he didn't have the
25 effective assistance of counsel. He wrote -- Mr. Cooper

1 wrote letters to the judge --

2 CHIEF JUSTICE ROBERTS: That's the
3 ineffectiveness question. I understand that to be taken
4 out of the case by the concessions on the other side.
5 I'm talking about the prejudice question.

6 MS. NEWMAN: Correct.

7 CHIEF JUSTICE ROBERTS: How is a judge
8 supposed to know?

9 MS. NEWMAN: The judge looks at the record
10 before him. So, in this case, we had Mr. Cooper's
11 testimony --

12 CHIEF JUSTICE ROBERTS: People have
13 different -- some people are willing to take the chance.
14 Okay? Let's assume there's a 20 percent chance the
15 person will be found guilty.

16 Some people will say, I'm willing to take
17 that chance because I just don't want the chance of
18 going to jail; I'm willing to roll the dice. Other
19 people will say, no, that's too much.

20 Now, whether you want to go to jail may cut
21 one way or the other, but how is a judge supposed to
22 decide? Ask him, are you -- do you take chances?

23 MS. NEWMAN: No, by -- by looking at --
24 Mr. Chief Justice, by looking at the evidence in the
25 record before him. In this case, Mr. Cooper wrote --

1 CHIEF JUSTICE ROBERTS: So, the judge should
2 decide whether he would take the deal.

3 MS. NEWMAN: No --

4 CHIEF JUSTICE ROBERTS: Look at the evidence
5 before him and say, boy, I'd take that deal.

6 (Laughter.)

7 MS. NEWMAN: No, no, no, no. Mr. -- Mr.
8 Cooper wrote two letters to the judge saying, I want to
9 accept a plea. Mr. McClain, the trial attorney who
10 provided the incompetent advice, told the judge in a
11 postconviction hearing that Mr. Cooper wanted to take a
12 plea. I mean, there -- there is no -- it is beyond
13 question in this case.

14 JUSTICE ALITO: Do you think the length and
15 the complexity of the trial has any bearing on this?
16 This was a relatively short and simple trial. But let's
17 say a prosecutor offers a plea deal in a case in which
18 the trial is going to take 6 months and it's going to
19 cost -- and it's going to cost a million dollars, and if
20 they try that case, there are going to be other cases
21 that they won't be able to try. The plea is rejected,
22 the case is tried, and then afterwards the -- the remedy
23 is to -- to -- to reinstate this plea offer, which was
24 predicated on the relieving the prosecutor of the burden
25 of having to try that case.

1 MS. NEWMAN: Well, every plea bargain is
2 predicated on relieving the prosecution of having the
3 burden of -- of trying a case. I mean, the key here
4 is -- let's get back to what Strickland stands for, and
5 it's the unreliability or the unfairness of the
6 proceedings. It's not just an unreliability
7 determination.

8 So, in this case, Mr. Cooper had two
9 choices. He could take a certain plea with almost a
10 certain sentence or he could have really what was a
11 charade of a trial because his attorney told him you --
12 you can't be convicted of this offense; you will not be
13 convicted of this offense following a trial. You'll be
14 convicted of a lesser --

15 JUSTICE GINSBURG: You conceded -- you
16 conceded he had a fair trial.

17 JUSTICE KENNEDY: Right.

18 JUSTICE GINSBURG: That's not in the case.

19 JUSTICE KENNEDY: Right.

20 MS. NEWMAN: I didn't --

21 JUSTICE GINSBURG: It can't be a charade and
22 still be fair.

23 MS. NEWMAN: It's an unfairness of the entire
24 proceedings that were presented. All right? So,
25 there's no separate habeas claim with respect to the

1 trial, but the -- but reality is when you look at the
2 criminal -- when you look at the Sixth Amendment, it
3 talks about the criminal proceedings.

4 JUSTICE KENNEDY: You're saying it was unfair
5 to have a fair trial?

6 MS. NEWMAN: I'm saying it's unfair to go to
7 trial when your attorney tells you, you can't be
8 convicted.

9 JUSTICE KENNEDY: You're saying it's unfair
10 to have a fair trial; isn't that correct?

11 MS. NEWMAN: I'm --

12 JUSTICE KENNEDY: That has to be your
13 position.

14 JUSTICE SCALIA: Of course, it is.

15 MS. NEWMAN: I'm saying it's unfair to say
16 that the trial erases the unfairness when there was no
17 possibility but for a conviction at the end of the road.
18 So, this was a certain guilty plea or this was a long
19 guilty plea under the math of a trial.

20 CHIEF JUSTICE ROBERTS: But you can never say
21 that there's no possibility of acquittal. Juries can
22 decide not to convict no matter what the evidence.

23 MS. NEWMAN: There was no defense. I mean,
24 there was no possibility --

25 CHIEF JUSTICE ROBERTS: That's up to the

1 jury. It's not up to us ex ante to decide this guy is
2 definitely going to lose; so, let's not waste our time.
3 Juries -- I don't want to say often, but it's not --
4 it's certainly not inconceivable that a jury may decide
5 for whatever reason we are not going to convict this
6 guy. Right?

7 MS. NEWMAN: That's true, but in this case,
8 Mr. McClain told Mr. Cooper he would be convicted. I
9 mean, he assured him of conviction. He said: You will
10 be convicted at the end of the trial; you're just going
11 to be convicted of a lesser offense. The guidelines --

12 JUSTICE SOTOMAYOR: Counsel, what was the
13 defense at trial?

14 MS. NEWMAN: I'm sorry.

15 JUSTICE SOTOMAYOR: What was the defense at
16 trial?

17 MS. NEWMAN: There wasn't -- there was no
18 defense presented. There was no real defense presented
19 at trial because --

20 JUSTICE SOTOMAYOR: Did he deny having
21 committed the act of the shooting?

22 MS. NEWMAN: Never.

23 JUSTICE SOTOMAYOR: At trial?

24 MS. NEWMAN: No.

25 JUSTICE SOTOMAYOR: Is it the case that, in

1 most of the cases in which motions of this kind are
2 brought to trial, judges -- if there is a defense of
3 mistaken identity or of "I didn't do it," that judges
4 often find the defendant has not proven that they would
5 have taken the plea?

6 MS. NEWMAN: Sorry. I didn't hear the rest.

7 JUSTICE SOTOMAYOR: In most cases in which a
8 trial is had, where the defendant is pleading
9 misidentification or "I just didn't do this act," in
10 those cases, do most of the trial judges not permit or
11 don't find that the defendant has met their burden of
12 proving that he or she would have taken the plea?

13 MS. NEWMAN: I don't know that the cases bear
14 out that if you have a valid defense, it would be
15 harder. But I -- I would agree with that -- if that's a
16 hypothetical, that if you have a valid defense, it would
17 be a lot harder to be in this position of showing that
18 you would have taken the plea.

19 JUSTICE SOTOMAYOR: I thought in this case,
20 and you can correct me if I am wrong, that your client
21 told the attorney from the beginning: I did it; I want
22 to plea.

23 MS. NEWMAN: That's correct. There was never
24 -- there was no question in this case at any step, at
25 any stage of the proceedings, and there was no -- never,

1 never anything from the trial attorney other than
2 incompetent advice. He never --

3 CHIEF JUSTICE ROBERTS: Did you -- I mean --

4 MS. NEWMAN -- went to trial for an acquittal.
5 He went to trial because he believed legally his client
6 would be convicted of a lesser offense that would put
7 him in a better position than if he had accepted the
8 plea. That was the only reason.

9 CHIEF JUSTICE ROBERTS: You said there's -- I
10 want to make sure I understand your point. You said
11 there was no defense. Does that mean you didn't -- he
12 had a frivolous defense or that he literally didn't put
13 on a defense; just said, look, the State has to prove
14 the case and they haven't done it.

15 MS. NEWMAN: Well, he held the State to its
16 burden, and that is a defense. I mean, I...

17 CHIEF JUSTICE ROBERTS: Did he -- did he --

18 MS. NEWMAN: I'm not saying literally no --

19 CHIEF JUSTICE ROBERTS: Oh.

20 MS. NEWMAN: I'm not saying literally no
21 defense, and I apologize if that's the way it came
22 across, but no cognizable defense. It wasn't mistaken
23 identification or we didn't intend to hit her. I mean,
24 never contested the basic facts of that case.

25 CHIEF JUSTICE ROBERTS: That's something the

1 jury could have accepted, right? Even if it's not
2 legally true that if you shoot him -- at the -- the
3 person below the waist, that's not a defense, but I can
4 see a reasonable juror saying he probably didn't intend
5 to kill her. He shot her, you know, below the waist.
6 Maybe that is not such a bad strategy.

7 MS. NEWMAN: Except the defense counsel on
8 this record specifically said that he -- that he was not
9 running a strategy and hoping for that, that he told the
10 client legally that's the only thing that could happen
11 to him, so he was in a better position by going to
12 trial.

13 Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Mr. Bursch, 4 minutes.

16 REBUTTAL ARGUMENT OF JOHN J. BURSCH

17 ON BEHALF OF THE PETITIONER

18 MR. BURSCH: Thank you. I'd like to start at
19 the one point where I think all of us, including counsel
20 on both sides, agree, and that's that a second trial
21 after an error-free first trial doesn't make sense. And
22 that right there says a lot about Mr. Cooper's case,
23 because a Strickland remedy is typically a new trial.
24 And it's exceedingly strange that they're now saying
25 that I don't want a new trial. That demonstrates that

1 what they are claiming is not a Strickland violation.

2 I would like to address, Justice Breyer,
3 your suggestion that maybe you could have specific
4 performance of the plea; and if it's rejected, then the
5 trial result could simply be re-imposed. And the
6 question is: Well, what's the problem with that? And I
7 can tick off at least five.

8 First, as Justice Ginsburg pointed out, it
9 takes away the prosecutor's ability to withdraw the
10 plea, which he or she undeniably would have had the
11 right.

12 Second, as Justice Alito said, it ignores
13 that there's information that could be learned in the
14 interim. Mr. Cooper shot three or four other people.

15 Third, it ignores the fact that an
16 error-free trial has taken place. The prosecutor has
17 taken the risk of putting that 8-year-old sexual abuse
18 victim on the stand, and you cannot take that risk away.

19 Fourth, as I already mentioned, we've got
20 the separation of powers issue and prosecutorial
21 discretion.

22 Fifth, we're going to have intractable
23 problems. Say the offer was plead to A, we'll dismiss
24 B. He rejects it based on deficient advice. You go to
25 trial. He is convicted on A and acquitted on B. And

1 now we're going to try to enforce the plea on A? I
2 mean, that's almost a double jeopardy problem. So,
3 there's intractable problems.

4 The second point I want to make is about the
5 death situation. And that's one we take very seriously.
6 And, Justice Alito, it may be that in a death penalty
7 situation, there could be a due process right or some
8 other constitutional right that may mitigate in favor of
9 requiring something to be put on the record. But what's
10 clear is that, under this Court's existing precedent,
11 that is not a Strickland violation because the amount of
12 the sentence, whether it's death or 50 years, has
13 nothing to do with the reliability of the adjudicatory
14 proceeding and the sentence.

15 Finally, the last point that I want to make
16 is something else on which we can all agree. Mr. Cooper
17 is guilty of shooting Kali Mundy. He also got exactly
18 the sentence that the people prescribed for the crime
19 that committed. There is very little unfair about
20 holding him to that sentence. As Justice Kennedy said,
21 it's the position of Mr. Cooper that it is unfair to
22 have a fair trial. And from our perspective, that is
23 really the beginning and the end of this inquiry.

24 And unless you have any further questions --

25 JUSTICE KENNEDY: I have one, but it's more

1 appropriate, I think, for the Government of the United
2 States. Under the Federal rules, Rule 11, there has to
3 be a colloquy before a plea is entered. Do you think
4 the Federal rules and perhaps State rules should be
5 amended so that judges, trial judges, before imposing a
6 sentence inquire: Have there been plea offers; have
7 they all been communicated to the defendant?

8 Is that good practice?

9 MR. BURSCH: It could be good practice, but
10 it wouldn't have solved the problem here, because even
11 if they had put the fact of the plea on the record, the
12 problem was the alleged deficient advice that the lawyer
13 gave to the client in private. And so, that doesn't
14 solve the core problem. The core problem is that
15 they're trying to claim that it was unfair to have a
16 fair trial.

17 JUSTICE KENNEDY: Well, if they had -- if
18 plea offer had come out -- well, I don't know how it
19 would work. When you enter a not guilty plea, you enter
20 a not guilty plea.

21 MR. BURSCH: Right. You know, the judge,
22 under your theory then, would have had to inquire:
23 Well, what advice did your attorney give you with
24 respect to that? And then evaluate whether that advice
25 was good advice or bad advice. And I would respectfully

1 submit that that would not be a good policy to adopt by
2 rule.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Counsel.

5 MR. BURSCH: Thank you.

6 CHIEF JUSTICE ROBERTS: The case is
7 submitted.

8 (Whereupon, at 11:04 a.m., the case in the
9 above-entitled matter was submitted.)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

A				
ability 59:9	26:3 42:11	ahead 42:4	appeals 35:10	Assistant 1:17
able 50:10 52:21	add 34:4	aimed 34:13	APPEARAN...	1:21
above-entitled	addendum 34:4	Alito 15:24 16:6	1:14	assume 11:25
1:11 62:9	addition 16:16	21:20,23 29:11	applied 40:18	12:12,18 51:14
absent 7:22,23	address 20:3	29:14 31:4,9	appointed 1:22	assuming 12:20
41:11	59:2	39:25 40:4	5:3	26:12
absolutely 8:15	addressed 42:7	44:18 45:4,12	appropriate	assumption
13:6 43:14	42:7 43:1,2	48:10 52:14	8:13 37:14	46:20 49:1
48:8	adjudicated	59:12 60:6	43:6 45:17,21	assured 55:9
absque 15:18	3:14	Alito's 33:4	61:1	attach 3:23
abstract 5:15	adjudication	alleged 61:12	approve 35:23	attack 18:18
15:17	5:13 13:1	allegedly 18:19	37:4	attention 29:16
abuse 18:3	15:15	allowed 36:9	approved 17:10	attorney 5:3 9:7
59:17	adjudicatory	ambiguous	approving 36:12	11:11,12,23
accept 4:17 17:8	4:5 5:24 7:20	33:16	arguably 40:7	12:24 14:8
20:22 33:1,8	15:2 60:13	amended 61:5	argue 36:18	31:3 40:8,12
35:24 36:22	administrative	amendment 4:6	argument 1:12	41:2 50:15,16
38:9,13 48:20	40:24	4:24 5:22 8:16	2:2,5,9,12 3:3	52:9 53:11
50:16 52:9	adopt 40:17	9:10 10:12	3:6 6:19 7:8,10	54:7 56:21
acceptable	62:1	14:19 15:14,23	9:8 16:2 18:11	57:1 61:23
37:13 38:20	adopted 35:11	19:2,3,6,9,15	25:9 28:13	authority 41:12
acceptance 29:2	adopting 32:22	20:1 22:18	39:12 41:18	avoid 6:5 18:4
accepted 20:18	adverse 12:25	24:10,11 26:4	58:16	24:21
32:4 33:7 44:3	advice 3:11 4:14	26:18,22 35:5	artfully 14:6	aware 21:8
46:9 48:23	11:25 13:3,11	35:11,14 43:4	aside 21:1 33:25	a.m 1:13 3:2
49:22 50:11	13:12 15:3	45:22 54:2	47:12,16 48:13	62:8
57:7 58:1	21:6,12 25:20	amicus 1:19 2:8	asked 7:1 21:1	B
accepting 11:3,4	25:22 26:14	18:12	asking 27:15,17	B 59:24,25
48:24	28:18,20 30:10	amount 30:25	30:8,9	back 4:2 6:2
accepts 37:3	40:7 52:10	31:2,3 43:11	asks 16:23	15:16 16:7
account 36:13	57:2 59:24	60:11	asserting 3:17	17:7,24 29:25
36:14	61:12,23,24,25	analysis 6:12	4:8	32:24,25 37:1
accurate 32:2	61:25	29:20 35:4,9	assertion 4:22	37:2 39:16
acknowledge	advised 13:4	35:11 39:23	23:17	46:4 47:19
9:22	advising 12:13	angry 34:14	assistance 3:13	48:10 49:5
acknowledged	advocate 16:23	answer 8:18,18	3:18,23 4:9 6:9	53:4
9:24	AEDPA 33:14	12:9 14:12	6:15,17,20 7:4	bad 10:3,4 21:6
acknowledges	34:19 35:1,16	19:25 23:1	8:19,21,22	21:12 24:4,5
7:25	affect 15:3	30:19 49:17	9:23,25 10:5	43:20 58:6
acquittal 18:2	ago 25:1 39:8	50:5,8	12:13 15:6,8	61:25
24:21 40:13	agree 10:13,16	ante 55:1	18:19,21 19:4	balance 18:8
54:21 57:4	10:21 33:18	Anthony 1:6	19:7 20:7,11	bandied 16:12
acquitted 49:1	34:5 37:1 45:6	28:17	22:22 28:23	bang-up 21:14
59:25	56:15 58:20	apart 40:14	31:13 33:13,24	bar 39:19,20,21
act 55:21 56:9	60:16	apologize 57:21	35:9,18 44:4	39:22
action 25:25	agreement	appeal 9:14	46:8 50:23,23	bargain 4:12,18
	38:16 48:24	35:15 43:4	50:25	

10:19 22:2,15 29:12 31:10,20 31:24 32:5,10 32:10 35:24 36:2 37:5 38:7 40:10 41:3 46:10,13,14,19 53:1 bargainer 10:1 10:9 bargaining 7:4 10:3,3,15,17 10:23 25:6,24 26:1 41:20 barrier 13:17 barriers 14:9 bars 22:21 based 5:12 18:19 20:15 59:24 basic 57:24 basis 28:1 48:11 bear 31:14,16 35:19 56:13 bearing 52:15 beat 41:5 becoming 46:4 begging 47:23 beginning 35:15 56:21 60:23 behalf 1:16,22 2:4,7,11,14 3:7 18:12 28:14 58:17 belief 11:19 believe 8:7 47:6 believed 57:5 bench 32:25 benchmark 24:14 25:2 best 7:7 14:3 33:16 39:14 43:12 better 14:4 21:17 23:12 24:8,9 34:8,18 35:20 46:6	49:4 57:7 58:11 beyond 13:24 23:20 52:12 bigger 17:25 33:11 bind 42:12,13 BLAINE 1:3 blame 47:8 boy 52:5 brain 34:17 break 9:7 Breyer 19:1,8 20:5,12,25 21:2,7 22:7,11 22:12,25 23:17 23:25 24:3 33:3,10 34:3 34:18 38:4,12 38:15 39:1,5 39:11 46:3,12 46:18 47:14 59:2 Breyer's 48:2 brief 16:22 27:24 bright-line 11:21 bring 17:14 brought 56:2 burden 31:14 52:24 53:3 56:11 57:16 burdens 24:20 24:25 Bursch 1:15 2:3 2:13 3:5,6,8 4:1,21 5:18,21 6:18 7:7,12,19 8:7 9:2 10:6,16 10:24 11:15,18 12:2,8,11,17 12:20 13:6,13 13:15 14:5,11 14:20,25 15:9 15:12,19,21 16:5,10 17:13	23:23 25:8,12 26:6 58:15,16 58:18 61:9,21 62:5 <hr/> C <hr/> C 2:1 3:1 calculation 40:9 capital 14:24 15:25 20:3 21:15,22,25 22:1,4,5,8,10 23:2 caps 40:10 careful 7:13 case 3:4 5:10 6:6 7:8 12:19 13:16 14:24 19:10,11,23,25 20:14,16,19,23 21:3 22:1,4,5,8 22:10 23:5,24 24:22 26:13,25 27:20 29:19 30:16 31:8,11 32:12,23 33:11 33:19,22 34:19 34:21 35:5 36:15 37:7,7,8 37:14 40:6,7 41:4 44:2,5,6 44:16 45:1,6 45:19 46:19 48:14 50:14 51:4,10,25 52:13,17,20,22 52:25 53:3,8 53:18 55:7,25 56:19,24 57:14 57:24 58:22 62:6,8 cases 5:4 8:2,2 8:24 9:19 10:18,22,25 15:22 16:1,17 18:22 19:13,14 19:16 20:5	21:25 24:3,19 24:22 25:3 27:3,5 43:9 44:1,24 52:20 56:1,7,10,13 casts 6:23 15:14 categorically 43:18 causes 13:3 causing 13:11 13:12 certain 9:5 30:25 31:1,3 43:24 53:9,10 54:18 certainly 8:10 22:6 27:6 28:25 36:19 55:4 cetera 20:1 challenging 27:22,22 28:1 chance 48:25 51:13,14,17,17 chances 40:9 51:22 change 22:12 changed 6:5 17:2,15,20,25 charade 53:11 53:21 charge 12:14 34:11 50:18 charged 31:25 32:5 chest 34:13 Chief 3:3,8 17:3 18:9,14 28:3 28:10,11,12,15 35:21 36:1,6,9 36:16 39:13 40:2 48:10,11 48:22 49:11,17 49:18 50:5,7,9 50:19 51:2,7 51:12,24 52:1 52:4 54:20,25	57:3,9,17,19 57:25 58:14 62:3,6 choice 50:20,20 50:21,24 choices 35:8,13 53:9 choose 5:7 circuit 16:12 32:23 33:17,25 42:24,25 45:20 circuits 41:22 42:6 circumstance 17:20,25 circumstances 17:2,15 38:2 41:1 43:10 44:11,13 48:18 claim 3:18 4:9 6:9 35:13 45:17 53:25 61:15 claiming 59:1 claims 31:13 clear 9:3 20:17 20:23 22:20 60:10 clearly 9:18 client 11:13 12:13,14 25:20 29:17 39:16 41:7 56:20 57:5 58:10 61:13 clock 30:1 cocaine 8:13 cognizable 43:3 57:22 Coleman 14:22 collaterally 18:18 Collins 6:4,6 colloquy 61:3 come 20:3 22:4 23:5 29:15,15 61:18
--	--	---	---	---

comes 9:7	contemplates 4:24	29:13,14 36:3	39:21 40:20	15:22
committed 29:17 31:7	contend 17:13	36:8 38:14	41:5,20 42:10	damnum 15:18
55:21 60:19	contention 11:19	39:9,10 42:14	42:23 44:2,3	dandy 14:19
communicate 5:11 39:15	contest 25:5	42:18 43:21	44:17 45:23,24	day 8:4 27:12
41:7	contested 57:24	44:22 45:11	courts 4:2 16:12	41:5
communicated 61:7	contesting 25:21	46:11,17 49:20	33:14 34:20	days 8:11
compared 22:15	contrary 34:1	51:6 54:10	35:5,7,17	dead 19:24
comparison 23:8	controverted 28:24,25	56:20,23	40:21 43:12,15	deal 28:8 29:1
complexity 52:15	convict 54:22	corresponds 28:7	45:25,25 50:14	34:8 35:20
conceded 6:16	55:5	cost 52:19,19	court's 10:6	43:8 49:4,22
6:19 8:21	convicted 9:9	counsel 4:16 5:3	14:21 18:21	50:11 52:2,5
53:15,16	11:4,13 21:15	6:4,16 7:4 8:4	20:5,7 21:1	52:17
concept 47:22	40:16 46:23	9:23 10:1,5	34:6 36:19	death 5:9,10,20
concern 40:25	50:17 53:12,13	11:2 12:13	60:10	6:1,5 21:2,2,4
concessions 51:4	53:14 54:8	13:16,18 14:13	crack 8:13	21:4,23 23:6
conditioned 42:11	55:8,10,11	14:17 15:6,8	crazy 24:7	60:5,6,12
conduct 12:24	57:6 59:25	15:13 18:9,20	creates 4:14	decades 41:17
confidence 18:23 20:8	conviction 11:5	18:21 19:5	credibility 50:2	decide 33:19
confrontation 25:17	21:22 24:23	22:22 28:10,18	50:3	35:5 46:18
confronting 12:6	27:22,23 28:1	31:13 33:13,24	crime 30:13	49:5 50:10,14
conscientious 30:5,6,9	28:7 47:13	35:9 39:14	60:18	51:22 52:2
consider 22:17	54:17 55:9	44:5 49:10	crimes 31:21	54:22 55:1,4
consideration 36:10	convictions 18:16,18,24	50:23,25 55:12	32:5	decided 14:17
considerations 24:18	convinced 46:4	58:7,14,19	criminal 10:22	19:11 35:7
considering 31:23	46:7	62:3,4	17:22 19:4	41:18 43:16
consistent 14:21	cooler 41:2	counts 28:7	25:25 27:11	deciding 13:16
43:13	Cooper 1:6 3:4	40:16	47:1 54:2,3	13:17 26:25
consistently 3:12	17:18 26:13	course 49:25	critical 4:17,20	decision 4:17,20
constitutional 4:23 5:5,13	28:17,20 33:1	54:14	15:13 25:6,17	5:1 6:3
6:10 8:9 11:2	35:8,12 50:18	court 1:1,12,22	25:24 26:9,10	decisionmaker 30:6,6,9
13:18 14:8	50:25 51:25	3:9,12 4:2,10	26:18,20 27:4	decisions 34:6
31:16 60:8	52:8,11 53:8	6:2,7 7:13,19	27:11 41:21	35:17 40:22
	55:8 59:14	8:15 9:5,15	50:24	decree 22:23
	60:16,21	10:18,25 11:5	Cronic 7:15	defective 13:2
	cooperation 24:19	11:21 12:24	9:18 15:22	13:10,11
	Cooper's 16:22	13:7 14:25	crucial 26:25	defend 49:9
	44:5 45:19	18:15,23 21:20	crystal 20:17	defendant 3:14
	51:10 58:22	21:23 22:3	22:19	3:18 4:9,11 6:3
	core 61:14,14	24:12 25:2,12	curiae 1:19 2:8	6:8 7:22 9:9
	correct 6:18	25:14,16 26:6	18:12	13:3,12 14:15
	12:19,20 16:5	28:16 30:4	customarily 25:16	14:16 16:19
	23:23 27:6,9	31:15 32:7,8,8	cut 51:20	17:8 18:3
		32:9,20,23		20:16 21:5,14
		34:1,10 35:7	D	21:15,21 22:3
		35:10,12,15,18	D 3:1	23:10,12 25:16
		35:20,22,22	damage 15:20	25:18 27:8

31:5 38:8,16 44:19,20 46:7 48:23 49:3,8 50:11 56:4,8 56:11 61:7 defendant's 4:22 24:19 50:19,21 Defender 1:21 defense 19:5 31:2 39:14 40:8,12 41:1 49:10 54:23 55:13,15,18,18 56:2,14,16 57:11,12,13,16 57:21,22 58:3 58:7 deference 34:20 34:24,25 35:2 35:6,16 deferential 35:3 40:21 deficiency 6:22 7:6,22,23 11:23 deficient 3:11 4:13 9:4 10:10 11:25 12:24 15:3 30:22,23 30:24 39:23 40:2 59:24 61:12 define 7:13,20 definitely 55:2 definitively 15:1 demand 4:19 demonstrate 5:23 demonstrates 58:25 demonstrating 4:15 deny 55:20 Department 1:18 depend 37:19	47:21 49:8,9 depending 10:8 26:10 depends 26:19 deprivation 4:9 deprive 13:22 26:2 deserve 24:1 deserved 23:18 23:21,22 desire 24:19 details 30:12 determination 8:2 12:1 49:12 50:2,3 53:7 determine 4:3 determined 23:21 Detroit 1:21 dice 51:18 die 16:20 died 34:15 difference 8:12 9:16,20,20 11:3 13:15,20 13:21,22 46:9 different 7:17 7:18 11:6 12:22 13:8 15:10 21:19,24 21:25 23:15 24:9,14 29:8 43:7,10,19,23 51:13 difficult 17:7,11 20:20 40:20 difficulties 20:19 direction 45:24 disagree 23:16 32:6 41:15 disaster 40:15 discovered 31:6 discrepancies 46:2 discretion 8:14 16:25 28:9	32:21 33:2 35:23 36:6,7 42:21 43:12 45:14,15 59:21 discretionary 9:15 discussing 20:15 discussions 41:1 41:10 dismiss 59:23 disposed 10:23 10:25 distinction 40:6 district 35:22 doing 21:17 43:15 dollars 52:19 double 60:2 doubly 35:3 doubt 6:23 7:24 13:25 15:14 23:20 draw 40:6 drawn 11:21 due 60:7 D.C 1:8,18 <hr/> E E 2:1 3:1,1 earlier 35:22 48:12 early 31:11 easier 9:17 21:11 effect 10:11 16:21 21:16 effective 3:12,22 7:4 11:2 15:6,7 15:13 25:7,22 26:14 28:5 50:23,25 egg 18:5 eggs 16:3 Either 38:22 else's 33:24 enforce 60:1 engage 35:11	enormous 22:23 ensue 21:19 ensuring 3:13 enter 6:12 13:3 26:14 61:19,19 entered 13:4 61:3 entire 53:23 entirely 29:3 38:23 entitled 9:13 15:6,7,12 23:10 29:18 entitles 24:10,11 entitling 25:6 entry 13:17 14:10 erases 54:16 error 8:8,9 11:23 16:8 23:15 error-free 16:15 58:21 59:16 ESQ 1:15,17,21 2:3,6,10,13 essentially 16:19 established 6:12 establishes 11:6 et 20:1 evade 44:25 evaluate 29:19 30:16,23 61:24 evaluated 30:17 evaluating 15:8 evidence 3:24 11:18 51:24 52:4 54:22 ex 55:1 exactly 8:10 14:6 16:10 29:10 42:24 60:17 example 5:1 8:11 11:7 17:17 18:3 21:5 24:2 27:1 43:23	exceedingly 58:24 execute 34:16 executed 19:20 existed 48:18 existing 60:10 exists 45:3 expect 29:9 expected 30:14 explain 13:10 27:5 extend 33:6 extent 17:5 extra 28:21 extraordinary 32:11 <hr/> F faced 26:7,7 facile 12:10 fact 7:21 16:18 33:20 34:19 43:24 50:14 59:15 61:11 factfinder 7:23 facts 5:10 20:20 44:21,21 57:24 factual 43:10,13 43:17,22 44:11 44:13 46:2 fact-specific 44:25 45:2 failed 9:14 failure 5:10,11 fair 11:12,17 23:19 38:24 45:9 47:12 48:25 53:16,22 54:5,10 60:22 61:16 fairness 4:5 11:10,20 13:23 fashioning 32:20,22 favor 60:8 favorable 40:9 40:10
---	---	--	---	--

feasible 40:5	11:11	49:8,8,9,19,24	happen 58:10	23:2 33:4 45:1
Federal 42:6,25	further 18:7	49:25 50:1,4	happened 22:13	47:15 56:16
44:17 61:2,4	60:24	50:10 51:18	29:10 31:23	
felon 31:21,25		52:18,18,19,20	36:10	I
32:14,18	G	55:2,5,10	happens 26:11	identification
Fifth 59:22	G 3:1	58:11 59:22	26:20 31:12	57:23
Finally 60:15	game 9:1 10:2	60:1	36:22 37:6	identifying
find 8:5 13:24	10:15	good 7:10 10:2	47:21,21	23:15
19:14 33:9,22	General 1:15,18	41:3 43:20	happy 22:10	identity 56:3
56:4,11	generis 16:1	61:8,9,25 62:1	hard 40:5	ignore 30:20
finding 23:20	Ginsburg 6:14	gotten 19:21,21	harder 56:15,17	ignores 59:12,15
34:1,24 35:1	6:19 8:20 13:2	21:17 28:24	harm 7:1,14	Illinois 27:1
fine 14:19 46:15	13:10,14 14:7	Government	9:20	illusory 5:7
finish 28:2	28:22 29:6,6	61:1	harmful 22:18	imaginary 19:23
fired 11:14	31:18 32:3,13	granted 42:11	head 34:12,19	19:25
first 3:4,12,20	42:9,15,19	great 40:12	hear 3:3 56:6	imagine 38:8
10:6,14 16:12	53:15,18,21	grounds 35:6,14	heard 20:16,17	impact 11:20
16:14 17:16	59:8	48:15,17	20:17 30:14	12:25
19:1 36:15	give 9:7 13:7,25	guess 8:17 9:24	hearing 11:23	imperfect 29:20
46:6 48:2	14:10 17:20	50:3	12:22,23 27:7	29:21,22,23
58:21 59:8	23:22 34:4,20	guidelines 32:17	52:11	38:2
fit 3:21 46:1	34:23,25 35:6	32:18 55:11	hearings 3:23	implication 4:4
five 29:17 59:7	35:16 38:7	guilt 7:24 8:2	heart 16:1	important 10:10
floodgates 41:17	43:11,22 61:23	9:17 13:1	heinous 34:16	17:14
42:1	given 17:23	15:15 36:11	held 4:11 6:7	impose 41:12
flows 38:17,18	22:16 35:4	guilty 3:14 4:22	10:18 11:1	imposing 36:12
follow 41:23	45:24	12:1,15,16	15:1 57:15	61:5
following 53:13	giving 13:18	13:22,24,25	high 32:18 39:21	impossible
forced 24:16	45:8 48:4	14:2 15:7 17:6	higher 9:10	40:17
forget 30:15	go 11:7 14:9,18	19:16,22 23:20	Hill 11:1 13:6	imprisonment
fork 5:6,8 12:2	17:7,9 24:7	24:6 27:4,7,12	41:16,16,18	28:21
found 27:23	32:24 33:7	27:23,25,25	43:16	improper 29:4
38:23 39:16	38:9 39:16	38:17,17,23	hit 11:14 34:12	inaccurate 40:7
43:3 51:15	40:13 42:4	39:16 51:15	34:14 57:23	inadequate
four 29:17 59:14	46:4,13 49:5	54:18,19 60:17	hoc 41:9	22:21 24:2
Fourth 59:19	51:20 54:6	61:19,20	hold 27:3 46:12	includes 36:2
frankly 24:21	59:24	gunshot 34:16	holding 14:21	including 5:20
freedom 38:13	goes 29:25 36:25	guy 34:11 48:3	20:1 60:20	58:19
frequently 11:5	37:3 44:20	55:1,6	Honor 41:15	incompetent
16:11	48:9	guy's 40:11	44:25 58:13	28:18,20 52:10
Fretwell 4:25	going 9:7 11:8		hoping 34:17	57:2
6:3 14:25 23:5	11:12 17:1	H	58:9	inconceivable
frivolous 57:12	32:20 37:4	habeas 6:7	horrific 30:13	21:24 55:4
Frye 17:21	40:1,5,13 41:4	16:16,17 27:21	hours 8:24	inconsistent
Frye's 44:2	41:6,9,18	39:19,20 40:20	hypothetical 9:3	26:4
full 23:19	47:16,20 48:3	53:25	20:3,15 21:10	incredible 31:5
fundamentally	48:20,23,25,25	handles 42:24	21:12 22:12	incurred 24:24

individual 14:15 14:16	11:7	55:3	42:1,4,9,15,19	60:25 61:17
ineffective 3:17 4:8 6:8,15,17 6:20 8:5,20,22 9:23,25 10:5 12:13 18:19,20 20:7,11 28:23 31:13 33:13,15 33:24 35:9,18 44:4 46:8	issue 16:8 19:11 42:7 43:1,2 50:3 59:20 issuing 16:17	jurisprudence 26:19 41:16 juror 58:4 jury 5:2,2 13:23 14:9 23:19 27:24 38:23 55:1,4 58:1	43:5,17,22 44:7,10,18 45:4,12 46:3,5 46:12,18 47:1 47:3,8,11,14 47:15,18,23 48:1,2,6,9,10 48:22 49:11,15 49:17,18,21,24 50:7,9,19 51:2 51:7,12,24 52:1,4,14 53:15,17,18,19 53:21 54:4,9 54:12,14,20,25 55:12,15,20,23 55:25 56:7,19 57:3,9,17,19 57:25 58:14 59:2,8,12 60:6 60:20,25 61:17 62:3,6	key 53:3 kill 34:12 58:5 Kimmelman 3:22 4:2 9:19 14:22 kind 4:20 11:16 56:1 knew 17:24 know 8:8,23,25 10:2,2 11:22 27:19 30:12 33:18 34:16 39:25 40:4 44:12 48:23 49:19,24 50:4 50:10 51:8 56:13 58:5 61:18,21
ineffectiveness 34:7 51:3	J	justice 1:18 3:3 3:8,19 4:1,16 4:21 5:9,19 6:14,18,25 7:10,16 8:1,17 8:20 9:22 10:13,21 11:9 11:16,24 12:5 12:9,12,18 13:2,10,14,20 14:5,7,11,23 15:5,11,16,20 15:24 16:6 17:3 18:9,14 19:1,8 20:5,12 20:25 21:2,7 21:20,23 22:7 22:11,12,25 23:16,17,25 24:3 25:5,10 25:13,23 26:1 26:7,9,17 27:1 27:2,9,15,16 27:18,18 28:3 28:10,11,12,15 28:22 29:5,6 29:11,14,24 30:8,12,19 31:4,9,18 32:3 32:13 33:3,4 33:10 34:3,3 34:18,23 35:21 36:1,6,9,16,20 36:25 37:10,16 37:21,24 38:4 38:12,15,21 39:1,5,11,13 39:25 40:2,4 40:23 41:22	Justice's 48:11 49:18 50:5 justifies 43:18	knowledge 19:12 30:3 knows 9:5 17:5 31:19,19,20,24 41:4
information 17:16 31:1,2,3 48:13 59:13	Jail 8:4 19:22 51:18,20 Jay 1:17 2:6 18:10,11,14 19:6 20:2,24 21:3,11,21 22:5,10,25 23:16 24:3 25:5 26:12,24 27:2,6,14,17 27:20 28:4,11	jeopardy 60:2 job 10:3,4 21:14 21:17 JOHN 1:15 2:3 2:13 3:6 58:16 Jones 41:4 judge 8:12,15 9:5 17:10 29:3 29:24 30:1,2 30:25 31:18,19 31:23 32:4,19 32:21,24 33:1 33:7,8 35:22 36:5,24,25 37:1,2,3,3,9,16 37:20 38:9,12 42:13,21 45:14 46:14,15,18 48:11,15,19,20 49:2,5 50:1,7,9 50:10,16 51:1 51:7,9,21 52:1 52:8,10 61:21	Justice's 48:11 49:18 50:5 justifies 43:18	lack 18:23 43:5 Lafler 1:3 3:4 language 7:21 19:12 25:17 Lansing 1:15 large 49:7 larger 49:9 Laughter 7:11 39:3 47:10 52:6 law 11:12 28:5 36:5 37:8,23 lawyer 21:8,13 21:17 22:19 23:13,14 24:2 24:4,6,8 25:7,7 25:20 26:2,19 61:12 lawyer's 50:20 learn 17:16 learned 17:17
infringing 16:25	Jay 1:17 2:6 18:10,11,14 19:6 20:2,24 21:3,11,21 22:5,10,25 23:16 24:3 25:5 26:12,24 27:2,6,14,17 27:20 28:4,11	jeopardy 60:2 job 10:3,4 21:14 21:17 JOHN 1:15 2:3 2:13 3:6 58:16 Jones 41:4 judge 8:12,15 9:5 17:10 29:3 29:24 30:1,2 30:25 31:18,19 31:23 32:4,19 32:21,24 33:1 33:7,8 35:22 36:5,24,25 37:1,2,3,3,9,16 37:20 38:9,12 42:13,21 45:14 46:14,15,18 48:11,15,19,20 49:2,5 50:1,7,9 50:10,16 51:1 51:7,9,21 52:1 52:8,10 61:21	Justice's 48:11 49:18 50:5 justifies 43:18	lack 18:23 43:5 Lafler 1:3 3:4 language 7:21 19:12 25:17 Lansing 1:15 large 49:7 larger 49:9 Laughter 7:11 39:3 47:10 52:6 law 11:12 28:5 36:5 37:8,23 lawyer 21:8,13 21:17 22:19 23:13,14 24:2 24:4,6,8 25:7,7 25:20 26:2,19 61:12 lawyer's 50:20 learn 17:16 learned 17:17
initial 29:2 42:17	Jay 1:17 2:6 18:10,11,14 19:6 20:2,24 21:3,11,21 22:5,10,25 23:16 24:3 25:5 26:12,24 27:2,6,14,17 27:20 28:4,11	jeopardy 60:2 job 10:3,4 21:14 21:17 JOHN 1:15 2:3 2:13 3:6 58:16 Jones 41:4 judge 8:12,15 9:5 17:10 29:3 29:24 30:1,2 30:25 31:18,19 31:23 32:4,19 32:21,24 33:1 33:7,8 35:22 36:5,24,25 37:1,2,3,3,9,16 37:20 38:9,12 42:13,21 45:14 46:14,15,18 48:11,15,19,20 49:2,5 50:1,7,9 50:10,16 51:1 51:7,9,21 52:1 52:8,10 61:21	Justice's 48:11 49:18 50:5 justifies 43:18	lack 18:23 43:5 Lafler 1:3 3:4 language 7:21 19:12 25:17 Lansing 1:15 large 49:7 larger 49:9 Laughter 7:11 39:3 47:10 52:6 law 11:12 28:5 36:5 37:8,23 lawyer 21:8,13 21:17 22:19 23:13,14 24:2 24:4,6,8 25:7,7 25:20 26:2,19 61:12 lawyer's 50:20 learn 17:16 learned 17:17
injuria 15:18	Jay 1:17 2:6 18:10,11,14 19:6 20:2,24 21:3,11,21 22:5,10,25 23:16 24:3 25:5 26:12,24 27:2,6,14,17 27:20 28:4,11	jeopardy 60:2 job 10:3,4 21:14 21:17 JOHN 1:15 2:3 2:13 3:6 58:16 Jones 41:4 judge 8:12,15 9:5 17:10 29:3 29:24 30:1,2 30:25 31:18,19 31:23 32:4,19 32:21,24 33:1 33:7,8 35:22 36:5,24,25 37:1,2,3,3,9,16 37:20 38:9,12 42:13,21 45:14 46:14,15,18 48:11,15,19,20 49:2,5 50:1,7,9 50:10,16 51:1 51:7,9,21 52:1 52:8,10 61:21	Justice's 48:11 49:18 50:5 justifies 43:18	lack 18:23 43:5 Lafler 1:3 3:4 language 7:21 19:12 25:17 Lansing 1:15 large 49:7 larger 49:9 Laughter 7:11 39:3 47:10 52:6 law 11:12 28:5 36:5 37:8,23 lawyer 21:8,13 21:17 22:19 23:13,14 24:2 24:4,6,8 25:7,7 25:20 26:2,19 61:12 lawyer's 50:20 learn 17:16 learned 17:17
injury 5:14,16 5:16 15:20	Jay 1:17 2:6 18:10,11,14 19:6 20:2,24 21:3,11,21 22:5,10,25 23:16 24:3 25:5 26:12,24 27:2,6,14,17 27:20 28:4,11	jeopardy 60:2 job 10:3,4 21:14 21:17 JOHN 1:15 2:3 2:13 3:6 58:16 Jones 41:4 judge 8:12,15 9:5 17:10 29:3 29:24 30:1,2 30:25 31:18,19 31:23 32:4,19 32:21,24 33:1 33:7,8 35:22 36:5,24,25 37:1,2,3,3,9,16 37:20 38:9,12 42:13,21 45:14 46:14,15,18 48:11,15,19,20 49:2,5 50:1,7,9 50:10,16 51:1 51:7,9,21 52:1 52:8,10 61:21	Justice's 48:11 49:18 50:5 justifies 43:18	lack 18:23 43:5 Lafler 1:3 3:4 language 7:21 19:12 25:17 Lansing 1:15 large 49:7 larger 49:9 Laughter 7:11 39:3 47:10 52:6 law 11:12 28:5 36:5 37:8,23 lawyer 21:8,13 21:17 22:19 23:13,14 24:2 24:4,6,8 25:7,7 25:20 26:2,19 61:12 lawyer's 50:20 learn 17:16 learned 17:17
innocence 36:11	Jay 1:17 2:6 18:10,11,14 19:6 20:2,24 21:3,11,21 22:5,10,25 23:16 24:3 25:5 26:12,24 27:2,6,14,17 27:20 28:4,11	jeopardy 60:2 job 10:3,4 21:14 21:17 JOHN 1:15 2:3 2:13 3:6 58:16 Jones 41:4 judge 8:12,15 9:5 17:10 29:3 29:24 30:1,2 30:25 31:18,19 31:23 32:4,19 32:21,24 33:1 33:7,8 35:22 36:5,24,25 37:1,2,3,3,9,16 37:20 38:9,12 42:13,21 45:14 46:14,15,18 48:11,15,19,20 49:2,5 50:1,7,9 50:10,16 51:1 51:7,9,21 52:1 52:8,10 61:21	Justice's 48:11 49:18 50:5 justifies 43:18	lack 18:23 43:5 Lafler 1:3 3:4 language 7:21 19:12 25:17 Lansing 1:15 large 49:7 larger 49:9 Laughter 7:11 39:3 47:10 52:6 law 11:12 28:5 36:5 37:8,23 lawyer 21:8,13 21:17 22:19 23:13,14 24:2 24:4,6,8 25:7,7 25:20 26:2,19 61:12 lawyer's 50:20 learn 17:16 learned 17:17
inquire 61:6,22	Jay 1:17 2:6 18:10,11,14 19:6 20:2,24 21:3,11,21 22:5,10,25 23:16 24:3 25:5 26:12,24 27:2,6,14,17 27:20 28:4,11	jeopardy 60:2 job 10:3,4 21:14 21:17 JOHN 1:15 2:3 2:13 3:6 58:16 Jones 41:4 judge 8:12,15 9:5 17:10 29:3 29:24 30:1,2 30:25 31:18,19 31:23 32:4,19 32:21,24 33:1 33:7,8 35:22 36:5,24,25 37:1,2,3,3,9,16 37:20 38:9,12 42:13,21 45:14 46:14,15,18 48:11,15,19,20 49:2,5 50:1,7,9 50:10,16 51:1 51:7,9,21 52:1 52:8,10 61:21	Justice's 48:11 49:18 50:5 justifies 43:18	lack 18:23 43:5 Lafler 1:3 3:4 language 7:21 19:12 25:17 Lansing 1:15 large 49:7 larger 49:9 Laughter 7:11 39:3 47:10 52:6 law 11:12 28:5 36:5 37:8,23 lawyer 21:8,13 21:17 22:19 23:13,14 24:2 24:4,6,8 25:7,7 25:20 26:2,19 61:12 lawyer's 50:20 learn 17:16 learned 17:17
inquiries 41:9	Jay 1:17 2:6 18:10,11,14 19:6 20:2,24 21:3,11,21 22:5,10,25 23:16 24:3 25:5 26:12,24 27:2,6,14,17 27:20 28:4,11	jeopardy 60:2 job 10:3,4 21:14 21:17 JOHN 1:15 2:3 2:13 3:6 58:16 Jones 41:4 judge 8:12,15 9:5 17:10 29:3 29:24 30:1,2 30:25 31:18,19 31:23 32:4,19 32:21,24 33:1 33:7,8 35:22 36:5,24,25 37:1,2,3,3,9,16 37:20 38:9,12 42:13,21 45:14 46:14,15,18 48:11,15,19,20 49:2,5 50:1,7,9 50:10,16 51:1 51:7,9,21 52:1 52:8,10 61:21	Justice's 48:11 49:18 50:5 justifies 43:18	lack 18:23 43:5 Lafler 1:3 3:4 language 7:21 19:12 25:17 Lansing 1:15 large 49:7 larger 49:9 Laughter 7:11 39:3 47:10 52:6 law 11:12 28:5 36:5 37:8,23 lawyer 21:8,13 21:17 22:19 23:13,14 24:2 24:4,6,8 25:7,7 25:20 26:2,19 61:12 lawyer's 50:20 learn 17:16 learned 17:17
inquiry 60:23	Jay 1:17 2:6 18:10,11,14 19:6 20:2,24 21:3,11,21 22:5,10,25 23:16 24:3 25:5 26:12,24 27:2,6,14,17 27:20 28:4,11	jeopardy 60:2 job 10:3,4 21:14 21:17 JOHN 1:15 2:3 2:13 3:6 58:16 Jones 41:4 judge 8:12,15 9:5 17:10 29:3 29:24 30:1,2 30:25 31:18,19 31:23 32:4,19 32:21,24 33:1 33:7,8 35:22 36:5,24,25 37:1,2,3,3,9,16 37:20 38:9,12 42:13,21 45:14 46:14,15,18 48:11,15,19,20 49:2,5 50:1,7,9 50:10,16 51:1 51:7,9,21 52:1 52:8,10 61:21	Justice's 48:11 49:18 50:5 justifies 43:18	lack 18:23 43:5 Lafler 1:3 3:4 language 7:21 19:12 25:17 Lansing 1:15 large 49:7 larger 49:9 Laughter 7:11 39:3 47:10 52:6 law 11:12 28:5 36:5 37:8,23 lawyer 21:8,13 21:17 22:19 23:13,14 24:2 24:4,6,8 25:7,7 25:20 26:2,19 61:12 lawyer's 50:20 learn 17:16 learned 17:17
instructive 20:4	Jay 1:17 2:6 18:10,11,14 19:6 20:2,24 21:3,11,21 22:5,10,25 23:16 24:3 25:5 26:12,24 27:2,6,14,17 27:20 28:4,11	jeopardy 60:2 job 10:3,4 21:14 21:17 JOHN 1:15 2:3 2:13 3:6 58:16 Jones 41:4 judge 8:12,15 9:5 17:10 29:3 29:24 30:1,2 30:25 31:18,19 31:23 32:4,19 32:21,24 33:1 33:7,8 35:22 36:5,24,25 37:1,2,3,3,9,16 37:20 38:9,12 42:13,21 45:14 46:14,15,18 48:11,15,19,20 49:2,5 50:1,7,9 50:10,16 51:1 51:7,9,21 52:1 52:8,10 61:21	Justice's 48:11 49:18 50:5 justifies 43:18	lack 18:23 43:5 Lafler 1:3 3:4 language 7:21 19:12 25:17 Lansing 1:15 large 49:7 larger 49:9 Laughter 7:11 39:3 47:10 52:6 law 11:12 28:5 36:5 37:8,23 lawyer 21:8,13 21:17 22:19 23:13,14 24:2 24:4,6,8 25:7,7 25:20 26:2,19 61:12 lawyer's 50:20 learn 17:16 learned 17:17
intact 15:2	Jay 1:17 2:6 18:10,11,14 19:6 20:2,24 21:3,11,21 22:5,10,25 23:16 24:3 25:5 26:12,24 27:2,6,14,17 27:20 28:4,11	jeopardy 60:2 job 10:3,4 21:14 21:17 JOHN 1:15 2:3 2:13 3:6 58:16 Jones 41:4 judge 8:12,15 9:5 17:10 29:3 29:24 30:1,2 30:25 31:18,19 31:23 32:4,19 32:21,24 33:1 33:7,8 35:22 36:5,24,25 37:1,2,3,3,9,16 37:20 38:9,12 42:13,21 45:14 46:14,15,18 48:11,15,19,20 49:2,5 50:1,7,9 50:10,16 51:1 51:7,9,21 52:1 52:8,10 61:21	Justice's 48:11 49:18 50:5 justifies 43:18	lack 18:23 43:5 Lafler 1:3 3:4 language 7:21 19:12 25:17 Lansing 1:15 large 49:7 larger 49:9 Laughter 7:11 39:3 47:10 52:6 law 11:12 28:5 36:5 37:8,23 lawyer 21:8,13 21:17 22:19 23:13,14 24:2 24:4,6,8 25:7,7 25:20 26:2,19 61:12 lawyer's 50:20 learn 17:16 learned 17:17
intend 57:23 58:4	Jay 1:17 2:6 18:10,11,14 19:6 20:2,24 21:3,11,21 22:5,10,25 23:16 24:3 25:5 26:12,24 27:2,6,14,17 27:20 28:4,11	jeopardy 60:2 job 10:3,4 21:14 21:17 JOHN 1:15 2:3 2:13 3:6 58:16 Jones 41:4 judge 8:12,15 9:5 17:10 29:3 29:24 30:1,2 30:25 31:18,19 31:23 32:4,19 32:21,24 33:1 33:7,8 35:22 36:5,24,25 37:1,2,3,3,9,16 37:20 38:9,12 42:13,21 45:14 46:14,15,18 48:11,15,19,20 49:2,5 50:1,7,9 50:10,16 51:1 51:7,9,21 52:1 52:8,10 61:21	Justice's 48:11 49:18 50:5 justifies 43:18	lack 18:23 43:5 Lafler 1:3 3:4 language 7:21 19:12 25:17 Lansing 1:15 large 49:7 larger 49:9 Laughter 7:11 39:3 47:10 52:6 law 11:12 28:5 36:5 37:8,23 lawyer 21:8,13 21:17 22:19 23:13,14 24:2 24:4,6,8 25:7,7 25:20 26:2,19 61:12 lawyer's 50:20 learn 17:16 learned 17:17
intent 34:16	Jay 1:17 2:6 18:10,11,14 19:6 20:2,24 21:3,11,21 22:5,10,25 23:16 24:3 25:5 26:12,24 27:2,6,14,17 27:20 28:4,11	jeopardy 60:2 job 10:3,4 21:14 21:17 JOHN 1:15 2:3 2:13 3:6 58:16 Jones 41:4 judge 8:12,15 9:5 17:10 29:3 29:24 30:1,2 30:25 31:18,19 31:23 32:4,19 32:21,24 33:1 33:7,8 35:22 36:5,24,25 37:1,2,3,3,9,16 37:20 38:9,12 42:13,		

17:21 30:3,20 36:17 48:13 59:13 leave 45:13 leaves 5:11 led 8:22 12:1 22:14,23 24:6 legal 8:8 10:14 14:3 16:8 23:15 40:7 legally 9:13 15:4 50:17 57:5 58:2,10 legion 23:25 legitimate 37:22 length 52:14 lesser 23:10 34:11 53:14 55:11 57:6 letters 51:1 52:8 let's 9:2 16:10 21:2 24:7 29:25 31:19 40:11,13 51:14 52:16 53:4 55:2 life 23:6 light 29:15 likes 9:9 limited 3:12 line-up 12:23 lists 23:25 literally 57:12 57:18,20 little 12:10 17:4 60:19 live 24:16 local 9:4,6,9 long 7:2,18 14:13,17 15:1 54:18 longer 8:4,23 look 10:7 11:22 12:25 20:5,6 20:25,25 21:3 23:2,9 24:25 27:21 33:16	52:4 54:1,2 57:13 looked 33:12 looking 45:12 51:23,24 looks 49:13 51:9 lose 55:2 lost 6:9 lot 43:10 56:17 58:22 lousy 10:1,9 low 34:13 lower 4:2 34:6 43:12 45:25 <hr/> M <hr/> M 1:17 2:6 18:11 making 20:14 49:12 50:24 man 23:18 29:4 31:24 mandatory 22:14 manner 42:8 math 54:19 matter 1:11 31:5 40:24 54:22 62:9 McClain 35:19 52:9 55:8 McMann 41:20 mean 6:15 7:20 10:4 15:24 17:4 19:3,19 24:2 31:4 33:18,21 36:18 38:4 42:23 43:7,19,22 44:2 45:24 46:25 47:22 49:3,13 50:18 52:12 53:3 54:23 55:9 57:3,11,16,23 60:2 meaning 33:14	means 18:22 21:16 meet 7:5 memories 16:20 mentioned 59:19 mere 3:15,20 met 39:22 56:11 metaphor 30:2 Michigan 1:16 1:22 35:10 36:5 37:8 48:19 mill 32:11 million 52:19 mind 12:15 31:9 mine 39:2 minimum 24:25 minute 5:25 minutes 58:15 misbehavior 22:19 misgauged 11:11 misidentificati... 56:9 mistaken 40:8 56:3 57:22 mitigate 60:8 modicum 45:8 moment 33:23 Monday 1:9 months 28:21,25 52:18 morning 3:4,11 4:8 motions 56:1 move 16:20 moved 21:9 muck 46:25 Mundy 17:18 60:17 murder 21:15 21:22 33:19 murders 31:7,7 myriad 41:1	<hr/> N <hr/> N 2:1,1 3:1 narrow 23:8 narrowly 45:22 45:25 natural 16:21 nature 12:14 need 24:18 negotiate 34:17 negotiations 14:14 27:11 40:25 41:10 never 14:12 20:10,16,17 21:7,9 24:11 48:6 54:20 55:22 56:23,25 57:1,2,24 new 16:13 20:9 24:10 36:22 37:10,13 38:24 39:7,18 44:3 45:8 58:23,25 Newman 1:21 2:10 28:12,13 28:15 29:5,13 29:19 30:4,11 30:16,22 31:8 31:12 32:2,6 32:16 33:9 34:22,25 35:25 36:4,8,13,18 36:21,23 37:7 37:12,19,22 38:1,11,14,19 39:4,10,19 40:19 41:15,24 42:3,5,14,18 42:22 43:14,21 44:1,9,12,24 45:11,19 46:11 46:17 47:6,17 47:20,25 48:5 48:8,17 49:7 49:12,16,20,23 50:6,8,13,22 51:6,9,23 52:3	52:7 53:1,20 53:23 54:6,11 54:15,23 55:7 55:14,17,22,24 56:6,13,23 57:4,15,18,20 58:7 nine 13:24 Ninety 46:14 noncapital 22:2 non-habeas 40:21 normal 17:9 notes 8:21 notoriously 10:4 nub 48:14 number 24:18 numerous 30:5 <hr/> O <hr/> O 2:1 3:1 objection 6:4 23:6,7 obtain 24:18 obvious 4:4 22:21 obviously 3:24 6:6 9:17 occurred 16:9 occurs 26:1,3 October 1:9 offense 32:17,19 53:12,13 55:11 57:6 offer 17:1,8 18:5 19:18,21 20:16 21:10 22:2,23 24:13,17 25:1 28:9 33:6 37:2 37:3 39:15 42:11,17 52:23 59:23 61:18 offered 4:18 31:10 40:10 offering 41:3 offers 15:8 41:12 52:17
--	---	---	--	---

61:6 oh 14:18 36:24 39:17 57:19 okay 19:8,22 20:18 24:15 27:16 34:14,15 37:2,16,25 38:1 39:4 43:24,25 44:8 44:10,11,13 47:5,25 48:1 51:14 once 4:18 6:12 9:12 17:2 28:9 open 46:13 opened 42:2 opening 5:12 opinion 27:10 33:23 opportunity 6:4 6:9 opposed 8:23 option 36:24 oral 1:11 2:2,5,9 3:6 18:11 28:13 order 5:22 16:13 16:14 20:6,9,9 24:12 33:5 38:6 ordered 44:3,15 44:16 ordering 19:17 ordinary 32:10 original 48:18 outcome 3:15,20 7:14,16,17,18 7:20 9:20 20:10 23:8 26:11,21,22 outcomes 23:8 outrageous 37:4 overruled 6:6	13:7 39:21 page 2:2 27:24 parameters 36:19 pardon 44:9 part 7:1 10:14 22:2 25:9 49:7 49:9 particular 6:2 24:12 26:7 parties 16:7 penalty 5:20 6:1 6:6 60:6 people 13:24 23:20 24:1 32:25 41:19 43:7 51:12,13 51:16,19 59:14 60:18 percent 10:22 10:24 19:15 25:25 26:3 46:14 51:14 perfect 22:13 31:17 38:22 39:2,2 perfectly 37:13 38:19 47:12 performance 9:4 16:24 29:12,18 30:24 30:25 39:23 40:3 44:22 45:5,16 59:4 period 19:5 permit 56:10 permits 34:3 person 7:2 8:3 14:17 24:10,12 45:9 51:15 58:3 person's 19:20 perspective 60:22 petitioner 1:4,16 1:20 2:4,8,14 3:7 18:13	27:21 58:17 Petitioner's 18:16 phase 9:17 25:6 25:24 26:10,10 26:11,18,20 27:4 picked 17:22 place 17:2 36:15 39:8 59:16 plea 3:11 4:11 4:14,18,22 5:6 7:4 10:19 11:3 11:4 12:21 13:3,11,12 14:13,18 15:8 17:1,21,23,24 18:4 19:21 21:6,9 22:2,15 24:7,17 25:6 25:24 26:1,14 27:7,10,12 29:12 31:10,19 31:20,24 32:4 32:10,10 33:1 33:8 35:24 37:5 38:7,16 39:15 40:10,25 41:12,20 42:12 44:3,19 46:9 46:13,14,19 48:3,12,16,24 50:17 52:9,12 52:17,21,23 53:1,9 54:18 54:19 56:5,12 56:18,22 57:8 59:4,10 60:1 61:3,6,11,18 61:19,20 plead 12:1,15 13:22,25 14:2 15:7 19:16 38:16,17 59:23 pleaded 27:25 pleading 27:4,7 56:8	please 3:9 18:15 28:16 pled 19:22 pocket 17:6 point 4:7 12:10 14:6 16:4 17:15 30:23,24 31:11 57:10 58:19 60:4,15 pointed 59:8 points 3:10 22:25 policy 62:1 position 14:20 14:24 15:5 16:7 26:15 54:13 56:17 57:7 58:11 60:21 possession 31:21 32:1,15,19 possibility 42:16 45:3 54:17,21 54:24 possible 4:13 40:11 post 41:9 postconviction 52:11 powers 17:14 59:20 practice 10:8 32:8 61:8,9 practiced 32:9 precedent 60:10 precise 25:13 predicated 52:24 53:2 predilection 9:6 prejudice 3:15 4:3,4 7:6 8:5 15:23 19:20,24 22:24 39:24 49:19,21 51:5 prejudiced 18:21 26:15 prejudicial	21:16 preliminary 11:22 12:22 prescind 30:3,15 prescribed 60:18 present 43:9 presented 53:24 55:18,18 press 3:11 4:7 9:8 presumably 49:3 presumes 30:5 pretty 31:4 47:2 previous 46:21 price 31:15 principle 20:20 20:22,24 22:9 prior 37:17,24 prison 7:2,3,17 22:14,16,20 private 25:20 61:13 probability 21:18 23:14 29:7,9 probably 58:4 problem 16:24 19:16 33:3,4 33:11 59:6 60:2 61:10,12 61:14,14 problems 4:14 59:23 60:3 procedural 4:10 5:5 12:4 proceed 13:16 13:18 37:8 proceeding 4:5 11:21 18:24 20:8,9 24:11 38:24 60:14 proceedings 3:14,21,24 6:24 18:17 30:18 53:6,24
<hr/> P <hr/> P 3:1 Padilla 11:1				

54:3 56:25 process 5:24 6:7 7:21 9:21,21 10:14 11:10 15:2 17:9 26:3 27:12 60:7 produce 24:9 produced 18:17 18:24 20:8 21:5 23:9 professional 10:8 prong 6:22 10:6 properly 13:4 19:13 proposing 41:14 48:15 prosecution 19:17 24:16,22 24:24 25:18 33:5 38:6 53:2 prosecutions 19:4 prosecution's 28:9 40:14 prosecutor 14:14 17:5,17 17:23 18:1 24:15 29:1 31:1 34:10 41:2,5,7 42:13 42:16,19,21 52:17,24 59:16 prosecutorial 59:20 prosecutor's 16:25 24:13 29:16 59:9 prove 5:22 15:23 48:2 57:13 proven 56:4 provide 14:16 provided 8:19 9:25 14:13 52:10 proving 56:12	punishment 15:4 purpose 38:20 purposes 6:19 put 16:7 18:3 30:7 32:25 47:18 48:13 57:6,12 60:9 61:11 puts 45:21 putting 59:17 <hr/> Q qualifications 19:9 qualifies 13:11 40:22 question 5:12 6:22 8:3 9:13 12:6,6 15:17 35:1,3,17 43:6 43:9 44:15 45:1 47:24 48:11 49:18 50:5,14 51:3,5 52:13 56:24 59:6 questions 18:7 60:24 quite 8:7 <hr/> R R 1:21 2:10 3:1 28:13 raise 6:4 raised 35:13 range 31:22 32:14 reached 35:15 read 33:22 34:5 real 55:18 reality 54:1 really 4:25 5:6 6:10 8:14 9:12 9:16 10:20 19:19 20:15 34:11,13,15	41:5 48:14 53:10 60:23 reason 7:9,12 29:9 37:23 38:20 55:5 57:8 reasonable 5:25 7:24 13:25 21:18 23:13,20 29:7,9 33:6 34:10 58:4 reasons 34:4 37:19 46:20 48:19 REBUTTAL 2:12 58:16 receive 26:13 received 28:18 recognize 43:9 recognized 25:23 recommend 24:6 45:4,5 recommendat... 36:4 48:21 record 29:8 33:22 35:19 51:9,25 58:8 60:9 61:11 red 27:24 refer 6:2 refused 14:16 regain 6:9 regarding 3:11 16:8 reinstate 28:8 37:2 46:21 52:23 reinstitute 22:23 reject 4:18 38:13 46:19 48:12,16 rejected 44:9 52:21 59:4 rejects 38:15 59:24 relatively 52:16	releasing 16:19 relevant 15:4 reliability 3:13 3:21 6:23 7:20 9:21 11:10 15:1,15 60:13 reliable 3:25 18:17,18 21:21 24:23,23 relief 13:5 29:11 relieving 52:24 53:2 remanded 4:2 remarks 5:12 remedial 22:22 remedied 43:4 remedies 16:11 42:22 43:8,20 43:23 remedy 4:13 5:14,17,25 6:11 13:9 16:6 20:6 29:21,21 29:22,23,25 32:20,22,22 37:14 38:5,20 42:10,20,20 43:6,8,13,19 44:4,14,15,16 44:17,21,22 45:3,5,7,7,8,15 45:17,20,21 46:1,24 48:4 52:22 58:23 removes 42:15 repeat 19:17 represent 32:7 representation 28:6 requirements 7:5 requires 19:6 29:7 requiring 19:4 22:1 60:9 reserve 18:8 resolve 27:20	34:21 respect 6:1 36:11 53:25 61:24 respectfully 12:21 61:25 respecting 7:24 respects 17:16 Respondent 1:23 2:11 7:8 28:14 Respondent's 25:4 rest 56:6 rests 24:17 result 9:13 24:9 28:19 29:8 36:11 38:2 59:5 resulted 23:3,4 results 26:21,22 27:13 retains 33:1 35:23 revealing 25:4 review 35:3 40:20,21 reviewing 18:23 20:7 re-imposed 59:5 re-institute 38:7 Richardson 41:20 right 3:13,22 4:10,11,15,17 4:19,20,23 5:5 5:6,7 6:2,10 8:9 9:14 10:19 11:2,6,7,8 12:2 12:4,17 13:7 13:19 14:8,8 15:11 16:10 17:8 19:24 21:3,14 22:7 25:11,21,24 26:5,13,19,22 33:9 35:24
---	--	--	--	---

37:18 38:11 39:6 41:23,24 44:7 47:17,20 48:5,9 49:23 50:22 53:17,19 53:24 55:6 58:1,22 59:11 60:7,8 61:21 rights 4:23 14:10 rip 40:13 risk 18:2 24:21 59:17,18 road 5:6 12:3 54:17 ROBERTS 3:3 17:3 18:9 28:3 28:10,12 35:21 36:1,6,9,16 39:13 40:2 48:22 49:11 50:7,9,19 51:2 51:7,12 52:1,4 54:20,25 57:3 57:9,17,19,25 58:14 62:3,6 roll 51:18 roughly 5:10 rule 11:21 21:25 22:1 40:17 41:11,23 61:2 62:2 rules 22:14 61:2 61:4,4 run 32:11 running 17:19 58:9 run-of-the-mill 32:12	52:8 54:4,6,9 54:15 57:18,20 58:4,24 says 8:15 9:18 27:24 36:21 37:4 38:9 40:12 41:3,8 58:22 Scalia 9:22 10:13 13:20 14:5 15:5,11 23:16 27:2 36:20,25 37:10 37:16,21,24 38:21 43:17,22 44:7,10 46:5 47:3,8,11,15 47:18 49:21 54:14 score 32:17 Scott 27:1 scot-free 48:25 screaming 17:19 second 3:17 4:7 7:1 10:20 16:14,23 58:20 59:12 60:4 see 12:25 17:11 19:19 33:13 58:4 seeking 38:3 seen 19:10 26:17 send 37:1 sense 16:13 42:25 45:8,10 48:4 58:21 sentence 6:5,11 8:23 9:10 10:4 15:2 16:18 18:16,19,25 20:10 21:4,4 22:2 23:3,4,6,9 23:11,18,21,22 24:1,12 27:23 28:2,4,6 32:14 36:2,3,4,12 40:11 53:10	60:12,14,18,20 61:6 sentenced 3:15 28:5 sentences 8:13 sentencing 8:1,2 8:24 9:3,12 10:11 22:14 23:13 24:5,24 28:6 31:22 33:2 35:25 48:21 separate 20:19 53:25 separation 17:14 59:20 serious 32:17 seriously 60:5 serving 28:20 set 14:9 21:1 33:25 36:19 47:12,16 severity 6:11 15:3 sexual 18:3 59:17 shakes 20:7 shaking 34:18 shift 9:12 shoot 17:18 58:2 shooting 34:14 55:21 60:17 shootings 29:17 short 52:16 shot 40:12 58:5 59:14 shots 11:14 show 4:9 18:20 18:23 21:5,12 21:15,18 24:4 24:8,8 39:23 40:5 49:19 showing 56:17 shows 21:7 side 5:8 51:4 sides 33:18,18 58:20	simple 8:8 52:16 simply 9:14 19:17 25:2 40:8 41:14 59:5 sitting 7:2,3,17 8:3 situation 4:25 7:25 13:8 16:3 26:7 40:18 43:24 44:18,23 45:13,15 46:1 60:5,7 Sixth 4:6,24 5:22 8:16 9:10 10:12 14:19 15:14,22 19:2 19:3,6,9,15 24:10,11 26:4 26:18,21 32:23 33:17,25 35:5 35:11,14 43:3 45:20,22 54:2 skipped 11:24 sleeping 21:8 slightly 15:9 soften 41:6 Solicitor 1:15,17 solve 61:14 solved 61:10 somebody 25:7 26:2 somewhat 33:16 sooner 27:25 sorry 6:11 7:23 15:19 27:17 36:24 42:3 55:14 56:6 sort 35:3 Sotomayor 4:16 4:21 10:21 11:9,16 34:3 34:23 47:23 48:1,6,9 55:12 55:15,20,23,25 56:7,19 sought 48:7	Sounds 7:10 spare 24:20 sparse 16:21 speak 22:18 specific 16:23 19:11 20:9 22:22 29:12,18 44:22 45:5,16 59:3 specifically 7:14 7:21 35:14 58:8 specificity 41:13 sports 9:6,9 stage 7:5 12:22 15:13 25:17 26:2 27:11 41:21 56:25 stand 18:4 59:18 standard 3:16 standards 10:8 stands 21:13 53:4 start 58:18 State 14:12,15 25:15 31:13,15 33:15 34:1,20 35:4,7,16,18 35:20 37:23 40:20 42:6,11 43:1 44:3,14 44:15 57:13,15 61:4 stated 30:4 41:13 statement 48:2 States 1:1,12,19 2:7 18:12 61:2 step 11:25 56:24 stop 3:19 20:13 strange 58:24 strategic 40:22 strategy 23:15 24:4,6,7,9 49:13 58:6,9 Strickland 3:15 6:20 7:6,15
--	---	---	--	---

S

S 2:1 3:1
sacred 17:1,3
saying 5:14,18
5:21,24 22:23
33:17,19 38:6
41:20 42:16

8:15 9:18 10:7 15:21 18:22 20:5 25:3 29:7 29:20,21 35:4 39:20,23 41:16 43:16 49:13,16 53:4 58:23 59:1 60:11 strikes 20:19 strong 17:4 stuff 17:11 submit 12:21 62:1 submitted 62:7 62:9 subsequent 10:11 substantial 43:11 substantive 4:10 5:4 12:3 suggest 8:19,24 43:7 suggested 46:5 47:3,7 suggestion 20:14 39:2,7 47:12 59:3 sui 16:1 supporting 1:19 2:8 18:13 Suppose 5:9 13:2 supposed 29:25 33:21 49:2,5 51:8,21 suppression 3:23 12:23 Supreme 1:1,12 sure 23:1 28:3 44:14 57:10 system 14:3 26:1 47:1	tailored 45:22 take 8:1 14:11 32:21 33:4 36:10,13,17 48:3 51:13,16 51:22 52:2,5 52:11,18 53:9 59:18 60:5 taken 17:2,24 19:12 36:14 49:4 51:3 56:5 56:12,18 59:16 59:17 takes 59:9 talk 5:25 11:9 16:11 talking 8:11 9:16 25:14 51:5 talks 19:3 54:3 team 9:6,9 tell 17:8 20:21 39:17 tells 54:7 tendencies 9:15 term 18:22 terribly 17:7,11 40:8 test 6:21 7:1 13:23 27:19,20 29:7 testified 17:23 testimony 50:15 51:11 tests 11:6 text 19:3 Thank 3:8 18:9 28:10,11,15 58:13,14,18 62:3,5 theoretically 15:25 theory 61:22 thing 8:6 10:10 14:3 39:14 43:15 58:10 things 8:14,15	25:13 30:23 think 5:13 10:14 11:25 12:7,11 16:16 17:4 19:23 20:2,4 20:24 21:11,24 22:6 25:3,8 26:6,24 28:22 29:3 34:9,11 37:12 38:2,20 40:5,16,19,24 41:11 43:18 45:2,20 47:2,4 47:5,18 48:1 48:10 49:15 50:4,6 52:14 58:19 61:1,3 thinking 8:12 11:13 41:3 thinks 41:6 third 4:13 16:4 59:15 thought 6:16,25 16:1 28:2 56:19 three 3:10 7:2 7:18 41:17 59:14 throw 46:6 tick 59:7 time 18:8 24:14 24:15 28:9,21 29:16 30:17 33:6 46:15 55:2 times 7:2,18 20:4 25:11 30:5 today 44:2 told 21:9 50:16 50:16 52:10 53:11 55:8 56:21 58:9 tough 33:22 translating 34:9 trial 4:23 8:14 9:4,15 10:11	11:7,8,12,13 11:17,20,22 13:8,23 14:9 14:18 16:13,14 16:15,23 17:2 18:1 21:14,16 22:13 23:19 24:7,20 30:3 30:14,21 31:23 35:7,12,22 36:12,17 37:10 37:13,15,17,25 38:22,24 39:7 39:8,18 40:10 40:13,15 44:3 44:20 45:8,9 45:14 46:21 48:13 49:1 50:1,13,15,15 52:9,15,16,18 53:11,13,16 54:1,5,7,10,16 54:19 55:10,13 55:16,19,23 56:2,8,10 57:1 57:4,5 58:12 58:20,21,23,25 59:5,16,25 60:22 61:5,16 tried 18:4 46:22 52:22 true 8:6,10 29:5 32:14 49:6 55:7 58:2 truly 18:5 try 9:2 52:20,21 52:25 60:1 trying 14:6 20:18 22:8 30:1 34:7 35:19 43:7 46:4 47:3 53:3 61:15 turn 13:12 37:20 turned 37:21 44:20 turns 36:20,21	37:17 40:15 44:19 two 16:11 17:15 22:25 25:13 28:25 33:14 44:1 52:8 53:8 two-part 6:21 typically 32:16 58:23
<hr/>				
U				
<hr/>				
unanimity 41:25 42:5,9,23,25 43:6 unconstitutio... 31:14 uncontroverted 28:17,19 undeniably 59:10 underlying 5:4 49:14 understand 8:18 20:13 44:14 51:3 57:10 understood 16:4 unfair 17:5 23:18,22 54:4 54:6,9,15 60:19,21 61:15 unfairness 22:24 53:5,23 54:16 uniform 42:20 United 1:1,12,19 2:7 18:12 61:1 unreliability 5:23 53:5,6 unscramble 16:3 unscrambled 18:6 unwind 30:1 unworkable 41:14 use 6:8 24:13 48:15				

V	44:25 51:17,20 52:8 55:3 56:21 57:10 58:25 60:4,15 wanted 4:7 34:12 52:11 wants 17:9 28:8 Washington 1:8 1:18 wasn't 26:15 34:6 55:17 57:22 waste 55:2 water 41:2 way 10:23,25 16:2 23:5 26:25 34:5 39:17 42:24 43:8 47:1 50:13 51:21 57:21 Weatherford 10:18 week 38:8 went 7:19 57:4,5 we'll 3:3 59:23 we're 9:16 12:6 20:15 25:21 26:15 27:14 30:1 38:3 41:9 41:18 59:22 60:1 we've 25:10 26:5 40:12 41:15,16 41:19 59:19 whatsoever 11:20 WILLIAM 1:17 2:6 18:11 willing 51:13,16 51:18 Wipe 31:9 wishes 27:25 withdraw 59:9 withdrawing 29:2 withdrawn 41:8	42:17 witnesses 16:20 24:20 40:14 woman 34:12 word 7:14 work 43:12 46:5 61:19 worry 20:22 worse 23:3 wouldn't 33:3 38:5 61:10 writ 16:17 42:10 write 27:10 writing 41:13 wrong 7:12 46:3 46:21,24 56:20 wrote 50:25 51:1,25 52:8	2 2 22:16 39:8 20 51:14 2011 1:9 24 8:24 24-karat 13:23 25 40:16 28 2:11
v 1:5 3:4 27:1 41:20 vacating 16:17 vacation 21:9 VALERIE 1:21 2:10 28:13 valid 37:17 56:14,16 value 49:16 variation 43:11 43:13,18 variety 46:20 48:19 vary 42:22 vehicle 6:8 verdict 17:6 21:19 40:9 versus 11:7 victim 24:20 59:18 view 34:10 viewing 34:5 violates 17:13 violation 4:6 5:14,15,16,22 5:23 6:13,14 9:11 10:12 15:14,17,23 17:22 31:17 43:4 44:5 45:18,22 59:1 60:11 violations 8:16	X x 1:2,7	3 3 2:4 40:11 30 43:2 31 1:9	
W	Y yardstick 20:11 Yeah 36:25 years 8:25 16:18 19:22 22:15,16 22:17,20 25:1 32:9 39:8 40:11,16 43:2 60:12	4 4 58:15 48 22:17,20	
Wade 14:22 waist 11:14 58:3 58:5 Wait 38:21 waived 22:3 waiving 11:6 walks 41:2 want 20:12,12 20:21 22:8 23:1 27:10,18 29:11 40:17	Z zero 45:9	5 5 31:7 50 19:22 22:15 60:12 51 28:24 29:3 32:5 51-month 24:25 51-to-85-month 42:12 58 2:14	
	1 1 8:4 10 8:25 31:7 10-209 1:5 3:4 10:03 1:13 3:2 100 28:20 11 61:2 11:04 62:8 12 23:19 38:23 134 28:21 135 31:22 32:14 14a 27:24 18 2:8	6 6 52:18 68 28:25 29:3 32:5	
		8 8 16:18 25:1 8-year-old 18:3 59:17 81 31:22 32:14	
		9 9 16:18 95 10:22,24 19:15 98 25:25 26:3	