

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   ROBERT MITCHELL JENNINGS,                                 :

4           Petitioner   :

5           v.   :   No. 13-7211

6   WILLIAM STEPHENS,   :

7   DIRECTOR, TEXAS   :

8   DEPARTMENT OF CRIMINAL   :

9   JUSTICE, CORRECTIONAL   :

10   INSTITUTIONS DIVISION.   :

11   - - - - - x

12                         Washington, D.C.

13                         Wednesday, October 15, 2014

14

15           The above-entitled matter came on for oral

16   argument before the Supreme Court of the United States

17   at 11:04 a.m.

18   APPEARANCES:

19   RANDOLPH L. SCHAFFER, JR., ESQ., Houston, Tex; on behalf

20   of Petitioner.

21   ANDREW S. OLDHAM, ESQ., Deputy Solicitor General,

22   Austin, Tex.; on behalf of Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	RANDOLPH L. SCHAFFER, JR., ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	ANDREW S. OLDHAM, ESQ.	
7	On behalf of the Respondent	29
8	REBUTTAL ARGUMENT OF	
9	RANDOLPH L. SCHAFFER, JR., ESQ.	
10	On behalf of the Petitioner	54
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 13-7211, Jennings v. Stephens.  
5 Mr. Schaffer.

6 ORAL ARGUMENT OF MR. RANDOLPH SCHAFFER, JR.

7 ON BEHALF OF THE PETITIONER

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

10 Ninety years ago, this Court held in  
11 American Railway that an appellee need not cross-appeal  
12 to raise an argument in support of the judgment that  
13 does not seek to enlarge his rights. Petitioner, who  
14 prevailed on an ineffective assistance of counsel claim  
15 in the district court, did not have to cross-appeal here  
16 for two reasons.

17 First, he did not seek more relief than the  
18 new punishment hearing granted to him in this -- in the  
19 judgment.

20 Second, he raised an argument that the  
21 district court rejected as an alternate basis to affirm  
22 the judgment, and if he did not need to cross-appeal, he  
23 did not need a COA.

24 We made --

25 JUSTICE SOTOMAYOR: I'm sorry. He -- I

1 don't know if this is a new argument or a new issue.  
2 And the reason I raise that is when the judgment issued  
3 here by the district court, it specified two errors that  
4 had occurred and basically told the State court, fix  
5 those two or you have to release the defendant.

6 Let's assume they fixed those two, and then  
7 could you come back and say release him anyway because  
8 they didn't fix the third that I lost on?

9 MR. SCHAFFER: No, not under those  
10 circumstances.

11 JUSTICE SOTOMAYOR: So how is it not more  
12 relief?

13 MR. SCHAFFER: I beg your pardon?

14 JUSTICE SOTOMAYOR: How is it not more  
15 relief or different relief?

16 MR. SCHAFFER: Because the single error is  
17 that he was denied the effective assistance of counsel.  
18 That is a single claim, and it was based on three  
19 allegations of deficient performance.

20 JUSTICE SCALIA: Well, now, wait a minute.  
21 I -- you know, I have -- we -- we don't evaluate whether  
22 you had good counsel or bad counsel. You may have  
23 Clarence Darrow and still be denied effective assistance  
24 of counsel if Clarence Darrow makes one mistake. I  
25 mean, when -- when we find that there has been

1 ineffective assistance of counsel, I think that means  
2 counsel failed to do one thing that he should have done.  
3 But there's -- there's no such general finding that  
4 counsel was -- was, in gross, ineffective.

5       You're -- you're -- you're describing it as  
6 though -- as though that's what the finding is. That --  
7 that's not what we hold when we find ineffective  
8 assistance of counsel. We find that this particular  
9 counsel made this mistake. That's it.

10       MR. SCHAFFER:           Well, let's take that a step  
11 further. What the Court does to analyze an IAC claim is  
12 to first isolate the errors of counsel. It could be  
13 one; it could be a hundred. It doesn't matter. You  
14 accumulate them and consider them together to determine  
15 prejudice.

16       If the deficiencies in performance  
17 constitute sufficient prejudice to undermine confidence  
18 in the verdict, then counsel was constitutionally  
19 ineffective, not because of A, B, C, or D, but because  
20 the totality of his representation did not meet the  
21 constitutional standard.

22       So it's not a matter of fixing any  
23 particular error of counsel. And that's where I believe  
24 the -- the State's position is a little awry because a  
25 Federal court judgment in a habeas case is different

1     than a direct appeal judgment.  On a direct appeal  
2     judgment, the -- the court tells the district court,  
3     We're sending the case back to you, do A, B, C, and D or  
4     don't do X, Y, and Z.

5             A Federal habeas judgment is a lawsuit  
6     against the warden having to do with the body of the  
7     prisoner.  The Federal court doesn't have authority to  
8     tell the State to do or not do any particular thing.  
9     The effect of the Federal court judgment is to basically  
10    say release the prisoner unless within, in our case, 120  
11    days you resentence him to life or you give a new  
12    punishment hearing.

13            JUSTICE ALITO:            Would your argument be the  
14    same if all of the claims in this case were not  
15    ineffective assistance of counsel claims?  Let's take an  
16    example that's in the briefs --

17            MR. SCHAFFER:            Sure.

18            JUSTICE ALITO: -- where there's  
19    ineffective assistance -- of -- there's a ineffective  
20    assistance of counsel claim and there's a coerced  
21    confession claim.  And so the -- the petitioner wins on  
22    the ineffective assistance of counsel claim, loses in  
23    the district court on the coerced confession claim.  The  
24    judgment is that he's entitled to resentencing or, let's  
25    say, it's resentencing due to the ineffective assistance

1 of counsel, but there will be not be the opportunity to  
2 introduce -- to exclude the coerced confession. So would  
3 you -- does your argument apply in that situation as  
4 well?

5 MR. SCHAFFER: Assuming the coerced  
6 confession involves the punishment phase as opposed to  
7 the guilt/innocence phase.

8 JUSTICE ALITO: The same phase, yes.

9 MR. SCHAFFER: Okay. I think that's a  
10 situation where the State has a decent argument that  
11 because it's a different claim, that would perhaps  
12 entitle you to more relief under the judgment, that is,  
13 not just a new punishment hearing, but a new punishment  
14 hearing without the unconstitutional confession, that on  
15 the state of the law today, I would file a cross-appeal  
16 and move for a COA on a separate claim because I think  
17 that would be Pfeiffer, Alexander, El Paso Natural Gas,  
18 where you're seeking to modify the judgment and obtain  
19 more relief than it would be American Railway.

20 JUSTICE ALITO: If you say that --

21 JUSTICE SCALIA: Well, why do you -- go  
22 ahead. Sorry.

23 JUSTICE ALITO: Well, if I -- yeah, just a  
24 follow-up on that. If you say that, could not the same  
25 situation arise with respect to different ineffective

1 assistance of counsel claims?

2 Let's say that in this case, you won on your  
3 Spisak claim, things that were said during the closing.  
4 You lost on the Wiggins claim. Let's say the Wiggins  
5 claim was that there was money available from the  
6 court -- from the State to hire experts, but the  
7 attorney didn't apply for the money, didn't do an  
8 investigation, that was ineffective assistance of  
9 counsel. So if you win on the -- on the Spisak claim,  
10 you'll -- you'll get a new sentencing hearing,  
11 presumably, free from the errors in the closing, but you  
12 won't get the opportunity to -- to go back and do the  
13 time or the money to -- to do the investigation.

14 MR. SCHAFFER: I would respectfully disagree  
15 with that. Because if you get a new sentencing hearing,  
16 you get to do whatever you want to do at the new  
17 sentencing hearing. And for our purposes, if you now  
18 know for -- in Federal court that the lawyer didn't  
19 investigate mental history and discover X, Y, and Z, you  
20 now know it.

21 JUSTICE ALITO: But on -- on remand, they --  
22 they say, well, that -- you lost that claim.

23 MR. SCHAFFER: No. It --

24 JUSTICE ALITO: You lost it, so there's  
25 no -- there's no need for more money. There's no need



1 for more time. Let's do it over with what -- you know,  
2 with a -- with a proper closing.

3 MR. SCHAFFER: And that's the thing. The  
4 Federal habeas judgment cannot direct the State court  
5 what to do or not do at a retrial. All it can do is  
6 tell them we're releasing this person unless the  
7 constitutional error is fixed.

8 JUSTICE SCALIA: Well, that's not true.  
9 It -- it can tell them what to do. The -- the basis on  
10 which the conviction was set aside cannot be repeated by  
11 the State court. You're -- you're saying that the State  
12 court can -- is -- is free to make the same mistake  
13 again?

14 MR. SCHAFFER: Well, it's actually not me  
15 saying. It's this Court's opinions have said that on a  
16 Federal habeas judgment does not decide what a State  
17 court may do or not do on remand. We just direct them  
18 to fix the constitutional error. We don't tell them how  
19 to do it.

20 JUSTICE SCALIA: But -- but -- but once you  
21 say we direct them to fix the constitutional error, that  
22 is something that they have to do on remand, isn't it?

23 MR. SCHAFFER: Or -- or the Federal court  
24 will release the prisoner.

25 JUSTICE SCALIA: Fix that constitutional

1 error.

2 MR. SCHAFFER: Correct.

3 JUSTICE SCALIA: But this other  
4 constitutional error, which we didn't rule on in the  
5 habeas thing, they don't have to fix. It's up to them.

6 MR. SCHAFFER: But let's remember, in an IAC  
7 claim, it's different than a freestanding admission or  
8 exclusion of evidence claim because a Federal court  
9 habeas judgment cannot -- for example, in this case, the  
10 State says, we sought to enlarge our rights under the  
11 judgment by asking the Federal court to order the State  
12 to fix any closing argument error and require a new  
13 trial free of this error.

14 We didn't ask that. We could not have asked  
15 that. A Federal court cannot order a State court to fix  
16 any error of defense counsel or tell defense counsel how  
17 to try the case, what to offer, what not to offer, what  
18 arguments to make. All the Court can do is provide a  
19 remedy for the petitioner if he does not have effective  
20 counsel at the retrial.

21 CHIEF JUSTICE ROBERTS: And that remedy is a  
22 new -- a new trial.

23 MR. SCHAFFER: Or a new punishment.

24 CHIEF JUSTICE ROBERTS: What if -- what  
25 if -- what if one claim is the ineffective assistance

1 and the other claim is a violation of the confrontation  
2 clause?

3 MR. SCHAFFER: Separate.

4 CHIEF JUSTICE ROBERTS: And you -- and  
5 you -- when -- when you go back, they can repeat the  
6 error or they can choose not to call their witness,  
7 either way. And it would seem to me that if you didn't  
8 file a cross-appeal, that the Federal court decision  
9 would be an advisory opinion on the confrontation  
10 clause.

11 MR. SCHAFFER: And so in that circumstance,  
12 if you were seeking additional relief, i.e., keep out  
13 the non --

14 CHIEF JUSTICE ROBERTS: Right.

15 MR. SCHAFFER: -- constitutional admission  
16 of evidence, then in that situation, I would file a  
17 cross-appeal and move for a COA because I would be  
18 seeking to enlarge my rights under the judgment.

19 The judgment that we got here didn't really  
20 give us anything more than the Constitution gives any  
21 citizen the day that he walks into a courtroom, which is  
22 the right to a trial with the effective assistance of  
23 counsel.

24 JUSTICE SCALIA: No, no, no, no. The -- the  
25 right to a trial that did not have this -- this failure

1 of counsel, this particular failure. You're not  
2 entitled to -- to competent counsel. You're -- you're  
3 entitled to counsel who doesn't make a mistake. He  
4 could be the dumbest counsel around so long as he  
5 doesn't make a mistake. And he could be the smartest  
6 around, and if he does make a mistake, that's  
7 ineffective assistance of counsel.

8 MR. SCHAFFER: Respectfully, it's not by  
9 itself. The mistakes may be mistakes, but unless the  
10 totality of those mistakes constitute sufficient  
11 prejudice to undermine confidence in the verdict --

12 JUSTICE BREYER: But was that an issue here?  
13 I mean, I -- I -- looking at the blue brief and the --  
14 and the red brief, it seemed to me that the issues here  
15 have turned on a mistake, how many mistakes are there.  
16 It wasn't a question of prejudice. That is, the lower  
17 court said, even if you're -- if you're right -- and  
18 they thought you were right --

19 MR. SCHAFFER: Correct.

20 JUSTICE BREYER: -- that these two errors in  
21 failing to investigate the background created prejudice.

22 So I don't think there was an argument on  
23 appeal about whether there was enough prejudice. It was  
24 a question of was this a mistake.

25 Am I right or not?

1           MR. SCHAFFER:           Well, my position on appeal  
2 was I'm --

3           JUSTICE BREYER:           No, I know. I'm just  
4 saying was there an argument about that? Did they  
5 disagree about that?

6           MR. SCHAFFER:           I think the State certainly  
7 disagreed with --

8           JUSTICE BREYER:           Did they -- and they argued  
9 that before the court.

10          MR. SCHAFFER:           They -- they disagreed --

11          JUSTICE BREYER:           They said even if their --  
12 they said the issue before the -- the Fifth Circuit is  
13 whether all together these three things amount to  
14 prejudice because our view of the State's view was, all  
15 right, even if there were errors here, it didn't amount  
16 to prejudice?

17          MR. SCHAFFER:           What they basically said is  
18 that the district court didn't defer to the State court  
19 findings and conclusions regarding those matters.

20          So -- but let's -- let's play the State's  
21 argument out to its logical conclusion.

22          Under their theory, let's assume the same  
23 thing happened to the district court. We win on  
24 A and B, we lose on C, and they say we're not going to  
25 appeal. Go back to State court, we'll give you a trial,

1 and you can introduce the evidence of alleged mental  
2 deficits and disadvantaged background. We'll give you a  
3 chance to save your guy's life by laying it all out to a  
4 jury and letting them decide.

5 And I say, nope, I'm going to appeal the  
6 closing argument to the circuit. And so I file a notice  
7 of appeal and move for a COA. And the district court --  
8 let's see how that would play out. The district judge  
9 would say, did you read my opinion? You won. Why do  
10 you need a COA? Why do you want to take this up? And I  
11 would say, Judge, because I need an order for you to  
12 tell me that I cannot argue to a jury that I would agree  
13 with the death sentence. I need that order to keep me  
14 from doing that. And the judge would say: You are out  
15 of your mind; COA denied.

16 I would appeal to the circuit. The State  
17 would take the exact opposite position they are taking  
18 here. They would say this is a frivolous appeal, he  
19 got all the relief he wanted in the judgment, which is a  
20 new punishment hearing, he doesn't have the right to  
21 appeal this, this is an example of death row inmates  
22 abusing the system and filing frivolous appeals to delay  
23 things.

24 JUSTICE ALITO: The predicate of the  
25 argument is that again that ineffective assistance of

1 counsel claims are different. You wouldn't think that it  
2 was crazy in the situation where you've got the ineffective  
3 assistance of counsel claim and the coerced confession  
4 claim. You win on the ineffective assistance of counsel  
5 claim, they don't reach the coerced confession claim or  
6 the confrontation clause claim. It wouldn't be crazy  
7 for you to appeal the loss on either of those things  
8 because if you don't get relief on that then you are  
9 going to have the same thing when you go back, right?

10 MR. SCHAFFER: That's right. And in that  
11 situation I would be seeking to enlarge my rights under  
12 the judgment by having evidence excluded at a retrial  
13 that's beyond the scope of the judgment. In this case  
14 the judgment gave me everything I wanted. There is not  
15 a word in that judgment that's adverse to me. There's  
16 not a thing I could have asked for.

17 JUSTICE GINSBURG: The argument is that what  
18 the judgment was is the relief that you got is a new  
19 sentencing hearing shorn of the particular errors the  
20 district court found and those particular errors did not  
21 relate to the Spisak or closing argument. So you are  
22 trying to say we had a judgment, we won, and ordinarily a  
23 judgment winner can appeal if they won and if there is an  
24 argument that was made on which the judgment won or  
25 lost, that is not preclusive because he didn't have a

1 chance to appeal. A judgment winner can't appeal. But  
2 this is peculiar because the -- there were -- the -- the  
3 order is you are entitled to a new trial shorn of these  
4 particular errors. The court of appeals says they are  
5 not errors. And then you want to bring up another  
6 error.

7 MR. SCHAFFER: Well, I want to -- let's --  
8 let's break down the way IAC is analyzed. The issue in  
9 this case was, was Petitioner -- denied the effective  
10 assistance of counsel at the punishment phase. In the  
11 vernacular, we made an IAC claim. We made -- an IAC  
12 claim, this Court said in Strickland, has two  
13 components: Deficient performance and prejudice. We  
14 made three arguments in support of deficient  
15 performance. We won two; we lost one.  
16 We won the claim. We got the new punishment  
17 hearing. So at the new punishment hearing -- let's  
18 assume we got one, and I was -- it doesn't mean I would  
19 have to put on the evidence of mental health history and  
20 disadvantaged background. I could make a strategic  
21 decision based on the landscape of the retrial what to  
22 use or not use. So the Federal court order would give  
23 the Petitioner a new punishment hearing, but it would  
24 not dictate to me what evidence I had to put on, what  
25 arguments I had to make, nor could the State or the



1 trial court compel me to do or not do anything. It  
2 could only provide a remedy if I didn't do it correctly.

3 JUSTICE SCALIA: But if you fail to put  
4 on the same evidence which the court of appeals had said  
5 the failure to produce constituted ineffective  
6 performance of counsel, if you do the same thing again,  
7 why wouldn't be that ineffective assistance of counsel?

8 MR. SCHAFFER: Well, it might or might not  
9 depending on how the case was retried. What if, for  
10 example, on the mental -- let's just take an example:  
11 The mental health history. Okay. The State went out  
12 and got a doctor to controvert the opinions of our  
13 doctors. What if I decided at the retrial, you know, I  
14 think that getting into this mental health history would  
15 create more harm than good based on what the State's  
16 doctor is going to say. I'm not going to put that on,  
17 I'm just going to go with the disadvantaged background  
18 and argue that they haven't proven future dangerousness  
19 because he's got no history of violence when he is  
20 incarcerated. I could make that strategic decision. If  
21 somebody wanted to come along later and grade my papers,  
22 they could, and they could say it was thumbs up or  
23 thumbs down as the case may be.

24 Let's examine the State's argument --

25 JUSTICE BREYER: Now, you couldn't put -- if

1 all things otherwise were the same, you couldn't do what  
2 the lawyer did here without being ineffective  
3 assistance. That's what -- isn't that their holding,  
4 the holding of the district court? The district court  
5 says the lawyer in these circumstances did not give  
6 effective assistance as to two things. So of course  
7 things could change in the new trial, and then you could  
8 act differently, but if they didn't change, you would  
9 have to do -- act -- what the district court said,  
10 wouldn't you?

11 MR. SCHAFFER: I would agree with regard to  
12 the evidence of disadvantaged background, because that  
13 is written in stone. That doesn't change.

14 JUSTICE BREYER: All right. Now, once that  
15 is so, there is nothing in the order that would, things  
16 being identical, stop the prosecutor from making  
17 precisely the same remarks that you are challenging.

18 MR. SCHAFFER: Well, but see, it wasn't the  
19 prosecutor.

20 JUSTICE BREYER: Is that --

21 MR. SCHAFFER: It wasn't the prosecutor that  
22 made the argument. It was the defense --

23 JUSTICE BREYER: All right, fine. Whatever  
24 the third error is --

25 MR. SCHAFFER: Right.

1 JUSTICE BREYER: -- there is nothing in the  
2 order that would prevent the lawyer from doing precisely  
3 the same thing. There is something in the order that  
4 would prevent you from doing the same first two things,  
5 other things being precisely equal.

6 MR. SCHAFFER: If I may, let's look at the  
7 mental health history for a moment. The mental health  
8 history was not even known by the trial lawyer. Okay?  
9 So if he was ineffective, he was ineffective based on a  
10 Wiggins failure to investigate type of situation.

11 That's a different question. Let's assume  
12 he had investigated and he found the same things that I  
13 found during habeas, and he decided not to put it  
14 on. Then it would be a strategic decision which he  
15 would have to defend. And so that's where we come back,  
16 because that evidence was never known --

17 JUSTICE GINSBURG: But why are we talking  
18 about the claim on which you lost on appeal? You are  
19 not going to get a chance to go back with disadvantaged,  
20 with mental health, because you lost on those on appeal.

21 MR. SCHAFFER: I don't think --

22 JUSTICE GINSBURG: I thought the Wiggins  
23 claims were rejected on appeal.

24 MR. SCHAFFER: They were. But let's play  
25 this -- let's assume that we get merits review on the

1 closing argument. And remember, it's not a claim, in my  
2 view. It's an argument in support of a claim. And I  
3 think that the key portion of the government's --

4 JUSTICE GINSBURG: May I just clarify it?

5 MR. SCHAFFER: Sure.

6 JUSTICE GINSBURG: Everything that you are  
7 arguing rides on our treating ineffective assistance of  
8 counsel as one claim rather than ineffective assistance  
9 of counsel, confrontation clause, some other violation.  
10 If we don't buy your argument that ineffective  
11 assistance of counsel is one monolithic claim and we  
12 think the division between what they -- what they're  
13 calling Wiggins error and the -- those --

14 MR. SCHAFFER: The two Spisak claims.

15 JUSTICE GINSBURG: -- you would lose.

16 MR. SCHAFFER: I disagree. I don't think  
17 you even need to reach the issue of is IAC one claim or  
18 not. It's here because they've split my claim into  
19 thirds by saying I made three claims instead of one. I  
20 can still win under a pure interpretation of American  
21 Railway because I am not seeking greater relief than  
22 what I got in the judgment, which is a new punishment  
23 hearing.

24 JUSTICE KENNEDY: Would -- would you agree  
25 that to include all of the counsel's errors it's

1 important to show the substantiality of the error?

2 MR. SCHAFFER: That's what I did in the  
3 Fifth Circuit, was say, look --

4 JUSTICE KENNEDY: All right. Would you  
5 agree that that goes to show how substantial the  
6 incompetence was?

7 MR. SCHAFFER: The combined effect  
8 relates --

9 JUSTICE KENNEDY: Yes.

10 MR. SCHAFFER: -- to the prejudice --

11 JUSTICE KENNEDY: All right.

12 MR. SCHAFFER: -- inquiry, but of course one  
13 alone can be sufficiently prejudicial.

14 JUSTICE KENNEDY: With that in mind, I want  
15 to turn to the COA statute.

16 MR. SCHAFFER: Sure.

17 JUSTICE KENNEDY: Let's assume that we  
18 accept your argument that you did not have to file a  
19 separate notice of appeal.

20 MR. SCHAFFER: Okay.

21 JUSTICE KENNEDY: Does that mean that you  
22 automatically comply with the COA? Because the COA  
23 statute says that a certificate of appeal --  
24 appealability must show that the applicant has made a  
25 substantial showing. And you've conceded that all

1 aspects of the incompetence of counsel go to  
2 substantiality, so why is it that you have complied with  
3 the COA statute?

4 MR. SCHAFFER: Well, I haven't complied --

5 JUSTICE KENNEDY: And the under -- and the  
6 overlying question is once you -- if you were to  
7 convince us that no notice of appeal was required, does  
8 it automatically follow that you are not required to  
9 have a COA?

10 MR. SCHAFFER: I think that's the key issue.  
11 The rule I propose, that I think is based on the statute  
12 and the -- and the text of the rules, is if you need to  
13 cross-appeal, you need a COA. If you do not need to  
14 cross-appeal, you don't need a COA. And let me give you  
15 two -- let me hit the government's arguments head-on,  
16 and I think this is key.

17 They say the COA requirement should be read  
18 into the statute or adopted as a matter of Federal  
19 common law. That is a tacit acknowledgment that the  
20 statute does not require a COA for the non-appealing  
21 petitioner appellee. In their brief, they do not rely  
22 on the text of 2253(c) or the associated rules,  
23 FRAP 22(b), or Habeas Rule 11(a). They want you all  
24 to -- the Court to read that into the statute. And that  
25 is not appropriate where the text is clear, where

1 Congress --

2 JUSTICE GINSBURG: Are you saying that the  
3 COA statute itself says you need a COA to appeal from  
4 the final order and you don't want to appeal from the  
5 final order because you like the final order?

6 MR. SCHAFFER: Well, correct -- in part  
7 correct. 2253(c) says a COA is required for an appeal  
8 to be taken to the court of appeals. Now, we know that  
9 doesn't apply to the government for two reasons. First,  
10 under (c)(2) a governmental entity could never show the  
11 denial of a Federal constitutional right. Secondly,  
12 under FRAP 22(b)(3) the government is expressly  
13 excluded. So if it doesn't apply to the government, who  
14 does it apply to? Who did Congress intend for 2253(c)  
15 to apply to?

16 The answer is clear. Petitioner-appellants  
17 who take the appeal, or petitioner-appellees who take a  
18 cross-appeal.

19 JUSTICE BREYER: So why wouldn't you have to  
20 take a cross-appeal?

21 MR. SCHAFFER: Because, well, I -- that gets  
22 us back to where we were --

23 JUSTICE BREYER: It's the same problem,  
24 isn't it? I mean, do you help yourself by saying, okay,  
25 we need to cross-appeal, it only applies there, because

1 then we get into exactly the same argument, whether you  
2 need a cross-appeal.

3 MR. SCHAFFER: Well, I'd say I don't need to  
4 cross-appeal because I'm not seeking to enlarge my  
5 rights in the judgment.

6 JUSTICE BREYER: Well, yes, you are, because  
7 then --

8 MR. SCHAFFER: -- and IAC is a single claim.

9 JUSTICE BREYER: -- we're back to the same  
10 argument. What?

11 MR. SCHAFFER: IAC is a single claim, and  
12 I --

13 JUSTICE SOTOMAYOR: Let's assume that we  
14 disagree with you that you needed a cross-appeal. Could  
15 you answer or didn't -- or agree with you, you didn't  
16 need a cross-appeal.

17 MR. SCHAFFER: Okay.

18 JUSTICE SOTOMAYOR: Answer Justice Kennedy's  
19 question of why you don't need the COA.

20 MR. SCHAFFER: Sure.

21 JUSTICE SOTOMAYOR: Because a cross-appeal  
22 doesn't have to make a substantial showing of -- of a  
23 denial of a constitutional right.

24 MR. SCHAFFER: A cross-appeal is just a  
25 piece of paper that you file. It doesn't have to show



1 anything. It just says I want to appeal. It's the  
2 COA --

3 JUSTICE SOTOMAYOR: Exactly. So why are the  
4 two tied together, in your mind?

5 MR. SCHAFFER: Well, because I think when  
6 you read 2253(c) it's clear it applies only to the  
7 petitioner appellant who lost, obviously, on everything  
8 below or the petitioner appellee who lost on a separate  
9 claim that he's now desiring to appeal. And -- and this  
10 is kind of, I think, obvious to me if you look at habeas  
11 Rule 11(a), which says that, "The district court must  
12 issue or deny a COA when it enters a final order adverse  
13 to the applicant." The applicant is the party taking  
14 the appeal.

15 Here the district court did not enter a  
16 final order adverse to me, and I didn't take the appeal.  
17 So you don't reach that part of 11(a) that says if a COA  
18 is required, it has to specify the issue or issues that  
19 satisfy the showing of the denial of the Federal  
20 constitutional right.

21 JUSTICE ALITO: Do you agree that a  
22 petitioner who has to take a cross-appeal, because the  
23 petitioner wants to enlarge the judgment, does not have  
24 to get a certificate of appealability?

25 MR. SCHAFFER: Do I agree that he does or

1 does not?

2 JUSTICE ALITO: Does not.

3 MR. SCHAFFER: No.

4 JUSTICE ALITO: He has to.

5 MR. SCHAFFER: I think if you take a  
6 cross-appeal, you need a COA.

7 And here's -- here's the other thing and I  
8 do want to hit this. The government -- the State says  
9 the COA should be required as a matter of policy to  
10 screen frivolous appeals, and indeed, that's the most  
11 attractive argument they make because what court doesn't  
12 want to screen frivolous appeals.

13 I want you to bear in mind, please, that  
14 there's only a few cases each year in which the  
15 petitioner prevails in the district court under the  
16 daunting AEDPA standard of review and the State appeals,  
17 the information we received off of the public databases  
18 that we were able to check. And so I put an asterisk  
19 next to this, is that in 2013, there were 18 cases in  
20 the Federal circuits that have our scenario where the  
21 petitioner won and the State took the appeal. So that's  
22 less than 2 per -- per circuit. That's a speck of sand  
23 on the beach of cases.

24 Where a petitioner prevails in the district  
25 court under the AEDPA standard of review, that appeal is

1 not a frivolous appeal. The appellate court is going to  
2 have to spend its time on it. It's serious, especially  
3 in a death penalty case. And the briefing rules, the  
4 page limits, the fact that the petitioner would have an  
5 incentive to protect his judgment and focus his efforts  
6 on the claim he won would certainly discourage people  
7 from doing what the government says, which is to raise  
8 100 frivolous arguments in response.

9 If that were to happen in this speck of sand  
10 number of cases in the appellate courts, I'm totally  
11 confident that the circuit courts can dispose of  
12 frivolous arguments in a sentence, a footnote or a  
13 paragraph like that.

14 Before I reserve the rest of my time for  
15 rebuttal, I want you -- I don't know whether this Court  
16 appreciates irony, but I suspect that you do, and I  
17 consider it ironic that the State is basically trying to  
18 scare this Court into reading a COA requirement into the  
19 statute for a petitioner appellee under the guise of the  
20 appellate courts being inundated with 100 frivolous  
21 arguments by prevailing petitioners in a case where the  
22 prevailing petitioner raised exactly one argument, and  
23 it comprised 3 pages out of a 53-page brief in which the  
24 first 50 pages sought to protect the judgment.

25 A final thought. If this Court were to rule

1 in our favor, I don't see there being any seismic shift  
2 in the Federal habeas landscape. This case, in the  
3 great scheme of things, is a blip on the Federal habeas  
4 radar. But if you accept the State's position and rule  
5 in their favor, in my judgment, the Court would have to  
6 find that ineffective assistance of counsel constitutes  
7 separate claims based on the number of allegations of  
8 deficient performance and that cannot be harmonized with  
9 Strickland.

10 Under the State's theory, there would be no  
11 circumstances, there would be no case in which the  
12 petitioner appellee did not need to cross-appeal and  
13 obtain the COA. Viewing this in context and boiling it  
14 down to the bottom line, I filed one IAC claim. I had  
15 one child, and I named him Strickland. The State cannot  
16 come back now and tell you that I had triplets and their  
17 names are Wiggins I, Wiggins II and Spisak.

18 JUSTICE ALITO: In other contexts, however,  
19 IAC is not a unitary concept, is it? I don't want to  
20 take up your rebuttal time, but in other contexts like  
21 repetitive litigation or exhaustion, IAC is not a  
22 unitary concept.

23 MR. SCHAFFER: Well --

24 JUSTICE ALITO: Talk about it on rebuttal if  
25 you --

1           MR. SCHAFER:           I don't want to get too far  
2   into that, but it's a totally different situation there,  
3   because those cases, Trevino and so forth, they're based  
4   on principles -- principles of federalism and comity.  
5   It's not a lack of jurisdiction. It's that the Court  
6   can decide to excuse some procedural default based on  
7   cause and prejudice. In our case, it's a pure question  
8   of appellate court jurisdiction. Does the court of  
9   appeals have jurisdiction to rule on an argument in  
10   support of ineffective assistance where I've already won  
11   on the claim? All I'm asking them to do is consider the  
12   argument as an alternate basis to affirm the judgment of  
13   the district court.

14           And for that reason, this Court should  
15   reverse the judgment of the Fifth Circuit and remand for  
16   consideration of the closing argument on the merits.

17           Thank you.           I will save the rest of my time  
18   for rebuttal.

19           CHIEF JUSTICE ROBERTS:           Thank you,  
20   counselor.

21           Mr. Oldham.

22           ORAL ARGUMENT OF ANDREW S. OLDHAM

23           ON BEHALF OF THE RESPONDENT

24           MR. OLDHAM:           Mr. Chief Justice, and may it  
25   please the Court:

1           It's now common ground that Petitioner would  
2   need to cross-appeal to add some conditions to a  
3   conditional release order issued by the district court.  
4   The only question in this case now is whether the  
5   particular condition requested by this particular  
6   Petitioner was necessary or sufficient to add to the  
7   conditional release order, and we think that it was. We  
8   think that this particular condition, the Spisak error,  
9   was a meaningful condition and it necessitated a  
10   cross-appeal for two reasons.

11           First, if Petitioner had cross-appealed and  
12   prevailed on the Spisak claim, the State would have been  
13   obligated to fix that error, to cure that error upon  
14   pain of immediate release of the prisoner. And that is  
15   a dramatically form -- dramatically expanded form of  
16   relief that would necessitate a cross-appeal.

17           CHIEF JUSTICE ROBERTS:           How would you do  
18   that? How would you cure the Spisak error?

19           MR. OLDHAM:           Well, there are many ways that  
20   the State and the defense and -- I'm sorry, I should say  
21   the prosecution and the defense and the State court  
22   could cure the Spisak error. It starts with the  
23   enunciation of the standard from the Federal district  
24   court as to exactly what the Sixth Amendment requires of  
25   a closing argument, which then guides both the --

1 CHIEF JUSTICE ROBERTS: Well, the Spisak  
2 error is something that the lawyer said in closing  
3 argument.

4 You're going to have a new trial, right?  
5 Well, presumably, I mean, the lawyer may say the same  
6 thing or the new lawyer may say the exact same thing or  
7 he may not. It seems to me that it's a fairly academic  
8 dispute as to whether or not you have a separate claim  
9 once you have the relief of a new trial.

10 MR. OLDHAM: Well, we don't think it's an  
11 academic claim with respect to adding the condition that  
12 requires a certain level of constitutional performance  
13 for the defense counsel --

14 CHIEF JUSTICE ROBERTS: There's always --  
15 you always have the same level of constitutional  
16 performance. This is only going to come up as a  
17 particular problem if for some reason the lawyer says  
18 exactly the same thing in closing as the prior lawyer  
19 did. And I don't anticipate that happening.

20 MR. OLDHAM: Well, this actually happens in  
21 ineffective assistance of counsel claims in other  
22 contexts where the State court has the power, for  
23 example, to conduct a colloquy with the defense lawyer  
24 to probe what the judgment is that has informed the  
25 defense lawyer's representation, what the defense lawyer

1 has done, what the defense lawyer plans to do. And, of  
2 course, the State has the ability to object and move for  
3 curative instructions if the error recurs.

4 But the fundamental -- the really important  
5 point is that if the error recurs or if the State fails  
6 to fix it, the remedy is immediate release, which we  
7 should all agree is a dramatically expanded form of --  
8 of relief, which would necessitate a cross-appeal.

9 JUSTICE SCALIA: Mr. Oldham, some of my  
10 questions to -- to your opposing counsel suggest that  
11 ineffective assistance of counsel is mistake by mistake.  
12 That there are here three claims of ineffective  
13 assistance, not just one. Maybe that's so.

14 What do you do with this case where the --  
15 the trial court finds two instances of ineffective  
16 assistance, the State agrees that those two are valid.  
17 But appeals on the ground that it was harmless error,  
18 that the cumulative effect of those two mistakes was not  
19 enough to change the outcome of the trial.

20 The defendant, on the other hand, wants to  
21 raise the issue that there was, indeed, a third instance  
22 of ineffective assistance, and then if you combined all  
23 three, there would have been sufficient harm to enable  
24 setting aside the verdict.

25 What do you do with that case? There --



1    there the three separate instances have sort of been  
2    combined into one where -- where the issue is the  
3    harmful effect.

4           MR. OLDHAM:           The answer, Justice Scalia,  
5    would turn on the particularities of the third error of  
6    the hypothetical. That is, if the third error was  
7    sufficient to push it across the line of the Sixth  
8    Amendment in the deficient performance standard, then  
9    that would be the contours of the ineffective assistance  
10   of counsel claim.

11          JUSTICE SCALIA:       Okay. So you would allow  
12   that one to be -- to be raised without a cross-appeal.

13          MR. OLDHAM:           But it would --

14          JUSTICE SCALIA:       So long as it -- it  
15   would -- or at least so long as it's argued that that  
16   would produce the incremental effect of reversing the  
17   judgment.

18          MR. OLDHAM:           Yes. We agree with the  
19   Clarence Darrow hypothetical from the top half of the  
20   argument, which is that you measure the constitutional  
21   error based on where the lawyer's performance  
22   transgresses the balance of the Sixth Amendment. And so  
23   if in the hypothetical, if that happened to have  
24   been on the third error, then that would be the contours  
25   of the ineffectiveness claim.

1           To return to the Chief Justice's --

2           JUSTICE BREYER:           Before you leave that, I  
3   thought that your opposing counsel said that did happen  
4   here. It was -- you did raise a question of -- of  
5   whether there was enough prejudice and, therefore, they  
6   were entitled to bring in the third as showing that even  
7   if the first two weren't sufficient, the third made up  
8   for it.

9           MR. OLDHAM:           Justice Breyer, we disagree  
10   with that characterization of what happened in the court  
11   below. What happened in the court below and in the  
12   District Court was that petitioner raised three  
13   allegations of deficiency. This is how he characterized  
14   it in his own certiorari petition to this Court. Three  
15   allegations of deficiency, each of which standing alone  
16   both transgressed the bounds of the Sixth Amendment and  
17   was a prejudicial error.

18          We fought back on two because the District  
19   Court had granted two, and those were reversed in the  
20   Fifth Circuit. He raised a third independent error and  
21   if he wants to add that third independent error to the  
22   conditional release order, that is he wants the State to  
23   be held responsible and a constitutional error imputed  
24   to the State sufficient to command his immediate release  
25   upon failing to fix it at the second trial --

1 JUSTICE SCALIA: The first two were thrown  
2 out on the grounds that there was no error; right?

3 MR. OLDHAM: That's correct.

4 JUSTICE SCALIA: Not on the ground that the  
5 effect was not harmful enough to warrant setting aside  
6 the judgment.

7 MR. OLDHAM: That's correct. They were  
8 under -- that's correct. And although the State did  
9 brief it --

10 JUSTICE SOTOMAYOR: Counsel, what do you do  
11 with the COA? I mean, however we rule, we may be  
12 creating headaches. Okay.

13 So petitioner wins on two and he loses on  
14 the third issue, the -- the closing summation.

15 Does he have to then go for the COA? He  
16 can't wait for you to appeal and then make that  
17 decision, can he?

18 MR. OLDHAM: Well, under our view and under  
19 the hypothetical given on the top side of the argument  
20 he could cross-appeal and that actually -- and of course  
21 would have to get a COA. But this is actually --

22 JUSTICE GINSBURG: Cross-appeal when there's  
23 no appeal?

24 MR. OLDHAM: He could have -- he could have  
25 taken the first appeal.

1 JUSTICE GINSBURG: He could not have taken  
2 an appeal. Only the State could take an appeal; right?

3 MR. OLDHAM: Our view is that on this  
4 particular judgment he could have taken the first  
5 appeal. And that's incredibly important because it  
6 would give him an additional protection if there was a  
7 second trial. In particular, if he could get a Federal  
8 court to say the Sixth Amendment demands this level of  
9 competence --

10 JUSTICE GINSBURG: Where does the statute or  
11 the rule talk about somebody who loses on a particular  
12 claim but wins the judgment, I thought -- I'm looking at  
13 the order. The order is on page 33 of the appendix and  
14 it doesn't say anything about Spisak or about -- what  
15 was the other one -- Wiggins. It just says the order is  
16 three choices, release him from custody or give him a  
17 new sentencing hearing or sentence him to a term in  
18 prison. That's it. That's the order that we're  
19 reviewing --

20 MR. OLDHAM: That's correct,  
21 Justice Ginsburg, but it must be read in the context of  
22 the entire opinion. As we pointed out in footnote 6 of  
23 the red brief, this Court and other Federal courts often  
24 write their conditional release orders differently. To  
25 say, for example, as Judge Pollack did in the Lamb case,

1    these particular errors have to be fixed.  And everyone  
2    seems to agree that if the judgment said these  
3    particular errors have to be fixed, he could have taken  
4    the first appeal or he could take a cross-appeal.

5           JUSTICE BREYER:           If he could take his first  
6    appeal, how does it work?  That is, it seems to me that  
7    I've seen lots of petitions in habeas where an  
8    incarcerated person will bring up 40 arguments.  Now,  
9    suppose that he loses on 39 and he wins on one and he  
10   gets his new trial, and the court -- the prosecution  
11   says fine, we'll go ahead, we'll give you the new trial.  
12   Is the lawyer then supposed to appeal his 39 losses?

13          MR. OLDHAM:           Well, as a practical matter,  
14   the notice of appeal deadline would be far in advance of  
15   the retrial decision.

16          JUSTICE BREYER:           No, no.  You said he could  
17   take the first appeal.  So before the new trial goes on  
18   he says, I think I'll take the first appeal on the other  
19   39 that I lost on.  Can he do that?

20          MR. OLDHAM:           Absolutely.  And for --

21          JUSTICE BREYER:           Well, then a lot of people,  
22   you know, I'm not saying they're badly motivated,  
23   they're in prison, they might think this sort of  
24   interesting, I might lose at trial, let's just see if I  
25   can't find a few other grounds here.

1           MR. OLDHAM:           Well, it's obviously not a lot  
2 of people. It's --

3           JUSTICE BREYER:           I've never heard of that.  
4 Have you found examples where that's happened?

5           MR. OLDHAM:           Well, as the petitioner points  
6 out, there's only 18 of these cases in the Court of  
7 Appeals from last year, but a great example --

8           JUSTICE BREYER:           Wait. Have you found many,  
9 one, cases where a petitioner won in the District Court,  
10 there is no State appeal, but he did lose on other  
11 grounds and he decided to take a first appeal on several  
12 of those other grounds?

13          MR. OLDHAM:           I'm unaware of any but I --  
14 only because the State often appeals --

15          CHIEF JUSTICE ROBERTS:           Well, the reason  
16 there might not be any, I mean, any decision by the  
17 Federal court in that situation would be, I think, a  
18 purely advisory opinion. Let's say he loses on a  
19 confrontation clause claim, he wins on inadequate  
20 assistance of counsel. He takes the appeal. If I'm the  
21 judge on appeal I say, well, in the new trial, they may  
22 not call the witness that you said shouldn't have been  
23 called and you want me to issue an advisory opinion just  
24 in case they do. I don't see how he can do that.

25          MR. OLDHAM:           Well, it wouldn't be an

1 advisory opinion in this sense. It would say that what  
2 happened in the previous trial transgressed the  
3 confrontation clause or the Sixth Amendment, depending  
4 on which case -- which claimant lost below and it would  
5 give him a very valuable procedural protection at the  
6 second trial.

7 JUSTICE SCALIA: No. It's superfluous in  
8 the sense that it is unnecessary to the judgment. He  
9 got the judgment, he won it. The trial was set aside.  
10 The conviction was set aside, he got a new trial. And  
11 he's saying, oh, there are additional reasons why I  
12 should have gotten a new trial. I'm not going to listen  
13 to that. That's absurd. You got what you wanted. Now  
14 go away.

15 (Laughter.)

16 MR. OLDHAM: That -- Justice Scalia, our  
17 view of the conditional release order is significantly  
18 weightier than that. What we think a conditional  
19 release order is and what we think that this Court's  
20 habeas cases demand is that a conditional release order  
21 is a Federal court's order on a constitutional claim  
22 that says the State must release, that is the actual  
23 quintessential habeas remedy, or fix these errors.  
24 Never does the conditional release order say, you get a  
25 new trial.

1 JUSTICE SOTOMAYOR: But let's -- you may  
2 be -- this one did, said release -- give him a new  
3 hearing or release him.

4 But-I'm taking-- I do want you to answer  
5 my COA question, okay, because what you're saying is  
6 exactly what Justice Scalia is worried about, which is,  
7 is he going to go present the COA and are we going to  
8 even entertain it since he won his release? But if he  
9 -- does he have to get a COA?

10 But more importantly, what happens when  
11 there's a new hearing? Those two mistakes are not  
12 repeated but a new one is introduced and the old one is  
13 repeated.

14 Are you saying he can't appeal again?

15 MR. OLDHAM: No.

16 JUSTICE SOTOMAYOR: On the old one or the  
17 new one?

18 MR. OLDHAM: Our rule is actually much more  
19 -- much more protective of the prisoner than that.  
20 Because if the old error is recommitted he gets  
21 immediate release. And that's the --

22 JUSTICE SOTOMAYOR: No, that's -- you're  
23 saying he only gets immediate release if it's the old  
24 error that the judge found on the first habeas.

25 MR. OLDHAM: That's right.



1 JUSTICE SOTOMAYOR: But let's assume that  
2 the second error is -- the third error is committed and  
3 even a new one is committed that wasn't a part of the  
4 first function, can he appeal?

5 MR. OLDHAM: Of course. Of course. And he  
6 has -- yes, he has a new judgment. He can challenge the  
7 new judgment. The only question is how much relief  
8 affords to him. Because he agrees with us, to go back  
9 to Justice Scalia's example, he agrees with us that he  
10 could --

11 JUSTICE GINSBURG: Can we go back to basics.  
12 Isn't it true that a judgment winner does not have to  
13 appeal an issue on which he lost but he is -- if he's  
14 content with the judgment, he can present arguments that  
15 would entitle him to relief. He can assert defensively.  
16 A judgment winner doesn't have to appeal, doesn't have  
17 to cross-appeal. That is the general rule; right?

18 MR. OLDHAM: Yes, we agree. The only  
19 question is whether he's a judgment winner and we  
20 pointed out many examples where people can be prevailing  
21 parties in the sense that the judgment imposes no  
22 liability on them but they can nonetheless appeal and we  
23 would submit that this is one of them, and it's  
24 precisely because he wants the additional protection.

25 To go back to Justice Scalia's example,

1 everyone agrees that if the petitioner wins on one claim  
2 but he wants to raise a coerced confession claim he can  
3 file a first appeal or a cross-appeal.

4 JUSTICE KAGAN: Mr. Oldham, suppose it were he  
5 just had two Wiggins claims. One was the lawyer  
6 didn't find the psychological report and the other was  
7 the lawyer failed to put on my mother as a character  
8 witness. He loses one, he wins the other. Does he have  
9 to take a cross-appeal on that?

10 MR. OLDHAM: He has to take a cross-appeal  
11 if he wants the one he lost on added to the conditional  
12 release order. That is, he wants the protection that  
13 the Federal court would provide against that error being  
14 either recommitted or failing -- the State failing to  
15 fix it.

16 CHIEF JUSTICE ROBERTS: But they -- you keep  
17 talking about the conditional release order. It doesn't  
18 say anything about what the State must do, what errors  
19 it must correct, it's on page 35, it just says give him  
20 a new sentencing hearing or sentence him to a term of  
21 imprisonment. It doesn't say, because of this, because  
22 of that, because of this.

23 MR. OLDHAM: And that's absolutely correct.  
24 But we -- it seems like both sides agree that it could  
25 have said exactly what the opinion says. That is, I

1 found two errors here, I have not found an error on the  
2 third ground and therefore, it could have been  
3 incorporated in the text, as they often do.

4 As I say, footnote 6 of the red brief  
5 collects a series of the ways that Federal courts phrase  
6 them, and it would be a bizarre cross-appeal that would  
7 turn on the particular phraseology of the conditional  
8 release order when everyone agrees that the meaning of  
9 it is the same.

10 JUSTICE KENNEDY: Let -- let me just ask you  
11 this question about COAs. Let's just take a case --  
12 there's no cross-appeal or anything. The prisoner  
13 alleges in -- inadequate assistance of counsel, and he  
14 loses. He files a COA. He says, my counsel was  
15 inadequate because there were two Wiggins errors, he did  
16 not -- two Wiggins errors. That is what he says in the  
17 COA.

18 The COA is granted. Now he files his brief.  
19 Can he allege a Spisak error as well?

20 MR. OLDHAM: As far as I know, no court in  
21 the United States -- no circuit court in the United  
22 States would allow him to do that because of 2253(c)(3).

23 JUSTICE KENNEDY: So -- so can he -- so in  
24 other words, in a COA, you have to list every error that  
25 counsel made and at -- at -- on -- on pain of not being

1       able to argue that in your brief?

2               MR. OLDHAM:               Yes, Your Honor. That is what  
3       2253(c)(3) says, issue-by-issue specification. And  
4       every court of appeals in the United States agrees, even  
5       the Seventh Circuit, that would seem to -- would say all  
6       three of the errors that you hypothesize would be the  
7       same. Even in the Seventh Circuit, you would have to  
8       get a certificate of appealability in that circumstance.

9               JUSTICE GINSBURG:               But that's -- (c)(3)  
10       comes after (c)(1). And (c)(1) says you need a COA to  
11       appeal from the final order. And so if you don't need a  
12       COA to appeal from the final order, you go on and appeal  
13       from the final order. The final order is fine. You  
14       would never get to (c)(3).

15               (C)(3) says if you need a COA, then you will  
16       indicate which specific issues. But it doesn't --  
17       (c)(3) doesn't tell you when you need a COA. (C)(1)(A)  
18       tells you that.

19               MR. OLDHAM:               That's correct, Justice  
20       Ginsburg. And (c)(1), as it's currently written,  
21       predated even AEDPA. And even before AEDPA, that is in  
22       1986, the Second Circuit interpreted (c)(1) as it is  
23       currently written to require prisoners, when they are  
24       the appellees, to nonetheless get COAs.

25               And as we sit here today, 6 out the 8 --

1 JUSTICE GINSBURG: Where does that -- where  
2 does that come from in the statute? I mean, the statute  
3 says you need the COA to appeal from the final order in  
4 a habeas proceeding. Well -- in the final order. I  
5 don't want an appeal from the final order. It's good.

6 MR. OLDHAM: So the pre-AEDPA standard was  
7 the certificate of probable cause standard, which courts  
8 of appeal, starting with the Roman decision in 1986,  
9 required prisoners to satisfy the issue -- the -- the  
10 CPC requirement even as the appellee. And as we sit  
11 here today, 6 out of the 8 courts of appeals would  
12 require the Petitioner in this case to get a certificate  
13 of appealability.

14 JUSTICE BREYER: All right. Suppose the --  
15 isn't it --

16 JUSTICE GINSBURG: In fact, you get it from  
17 the language of the statute, which says you need a  
18 certificate to appeal from the final order.

19 MR. OLDHAM: Well, Justice Ginsburg, as this  
20 Court has said twice in both the Miller-El and in Slack,  
21 the language of this statute, 2253(c), imposes a list of  
22 necessary but not sufficient conditions. And it is  
23 entirely within the provenance of the courts of appeals,  
24 to deal with these issues on a regular basis, to  
25 interpret that language to also apply to a prisoner who

1 is the appellee, who wants to raise an issue for the  
2 court of appeal's consideration, both because that's the  
3 purpose of the statute and because it was the pre-AEDPA  
4 standard upon which the statute was enacted.

5 And so if I might just return to the Chief  
6 Justice's hypothetical about the potential for something  
7 not happening again. This is -- it's much more  
8 significant than simply that. If you think about the  
9 quintessential error that could never recur, it would  
10 be, for example, a Brady violation, that is, the  
11 withholding of exculpatory evidence. Once it's in the  
12 possession of the defendant, how could it ever recur?

13 But it's in precisely that circumstance that  
14 one of the most powerful exhibitions of a conditional  
15 release order has worked out because in the -- in the  
16 Wolf v. Clark case, the Fourth Circuit, the Commonwealth  
17 of Virginia received a Brady remedy, that is, it -- it  
18 had its conviction vacated because the -- the particular  
19 evidence had not been turned over to the defense.

20 Now, that error, that particular error could  
21 never be recommitted, but the Commonwealth violated the  
22 spirit and the intention of that conditional release  
23 order by interviewing the jailhouse informant that gave  
24 the evidence, threatening him with perjury, and  
25 convincing him not to testify at the second trial.

1           And in that circumstance, because the  
2           conditional release order -- which was phrased  
3           materially identically to ours, by the way -- the  
4           phraseology did not mention Brady, but because he had  
5           the power of a Federal conditional release order,  
6           instead of having to sit through another trial, instead  
7           of having to have the Brady evidence excluded, he was  
8           able to go back to the Federal district court that  
9           issued the original conditional order and --

10           CHIEF JUSTICE ROBERTS:           Oh, sure. I mean,  
11           there may be situations in which the State or the  
12           ineffective counsel, they do repeat the error, or they  
13           may not.

14           MR. OLDHAM:           Well, this one couldn't have  
15           been repeated. It was, by definition, not repeatable.  
16           But it was because the State failed to fix it. See,  
17           it's actually a significantly greater obligation on the  
18           State than not -- than simply not doing the same thing  
19           over again. Right?

20           JUSTICE BREYER:           Thinking here to the -- the  
21           Criminal Justice Foundation filed a brief, and -- and as  
22           I read it, I thought, well, the point -- the point of  
23           this is don't make it too complicated. So they say,  
24           well, let's just consider what Estelle says, you  
25           Can't be deprived of-- you have to make a substantial

1 showing of the denial of a Federal right.

2 So they're saying the Federal right here  
3 that we're deprived of is a Sixth Amendment right to --  
4 to counsel, period.

5 There are a lot of different bases for it.  
6 There are a lot of different things that happen, but  
7 that's the single ground or right or, in this case,  
8 issue doesn't change the word of -- that it used to  
9 mean. So call it this one thing. It's so simple, and  
10 at that point, let the court of appeals deal with it.

11 As soon as we try to separate different  
12 bases for saying that this was a deprivation of the  
13 right to counsel, we are going to produce a pretty good  
14 nightmare because they shade into each other often.  
15 They're related in a variety of ways. They may be or  
16 may not be related through the prejudice problem. And  
17 lawyers will start wondering when they have to file a  
18 court cross-appeal, and we will create a -- a mess.

19 So that's the basic argument, I think, of  
20 this brief, and it is one of the arguments that they're  
21 trying to make.

22 Now, what is your simple, clear answer to  
23 that?

24 MR. OLDHAM: The current rule in 6 out of  
25 the 8 Courts of Appeals is not a nightmare. And the



1 current rule reads issue in 2253(c)(3) to mean issue,  
2 not to mean a single claim. And so the nightmare that's  
3 predicted or the -- the pragmatic solution isn't in want  
4 of a problem in the sense that this is the -- the rule  
5 that we have advanced on the certificate of  
6 appealability is the majority rule. And as far as --

7 JUSTICE SOTOMAYOR: But isn't that a rule  
8 that was set up, as Justice Ginsburg said, only when the  
9 petitioner hasn't won. But here, there's a judgment for  
10 resentencing. As the Chief Justice indicates, the error  
11 may or may not -- the third error may or may not be  
12 repeated. So go back to that point, which is if you're  
13 a successful litigant, do you even have a right to try  
14 to go get a COA?

15 MR. OLDHAM: So the rule that I'm providing,  
16 the 6 out of 8, is in the circumstance where the  
17 prisoner won and wants to, nonetheless, raise additional  
18 issues. So it's exactly this case.

19 And the simple fact of recurrence is both  
20 a -- a difficult rule to predict ex-ante as the Wolf  
21 case would illustrate, but it's also -- would give short  
22 shrift to ineffective assistance of counsel claims  
23 because --

24 JUSTICE GINSBURG: Why doesn't this fit --  
25 why doesn't this case just fit what is the standard rule

1       that a party who's content with the judgment doesn't  
2       have to cross-appeal to preserve arguments that enabled  
3       him to retain the benefits of the judgment? That's the  
4       standard rule.

5               MR. OLDHAM:               Justice Ginsburg, it fits  
6       within that rule. It just begs the question of what the  
7       judgment is. And in our -- in our view, the judgment  
8       entitles him to -- to -- to either release or to a  
9       resentencing under particular terms. And if he wants to  
10      change the terms of the resentencing, he's attacking the  
11      judgment and expanding his relief.

12             We all agree that he would be attacking the  
13      judgment and expanding his relief if he wanted to add  
14      coerced confession. Our view is that ineffective  
15      assistance of counsel is not a second class right. It  
16      is not one that can be subordinated to a coerced  
17      confession claim, and that for the exact same reasons  
18      that the coerced confession claim may come up, may not  
19      come up, may be difficult to understand ex-ante, the  
20      practical significance of it may be difficult to discern  
21      ex-ante, he still has to cross-appeal in both  
22      circumstances. Yes, he conceded in the top --

23             JUSTICE KAGAN:            But if I understand the  
24      implications -- this goes back to, I guess, the  
25      hypothetical I asked before. Now I have 5 Wiggins

1       claims.    You didn't put on my mother, and you didn't put  
2       on my brother, and you didn't put on my sister, you  
3       didn't put on my uncle, you didn't put on my aunt, and  
4       the court says, you know, we think your brother and your  
5       mother really did have something to say, we're not so  
6       sure about the others.

7           Do you think I have to cross-appeal on my  
8       aunt and my sister and my uncle, and not only did you  
9       think I have to cross-appeal, but you think that if I  
10      had won and the State had not taken an appeal, I would  
11      have had to appeal myself?

12           MR. OLDHAM:               Well, two things, Justice  
13      Kagan.   One is that on -- on that particular  
14      hypothetical, I would suggest that there's just one  
15      Wiggins claim, and that is failure to call family to  
16      testify.   And so there is sort of a tension in how we  
17      conceive of the claim in this case and it's --

18           JUSTICE KAGAN:            Well, you know, I could do  
19      another hypothetical --

20           MR. OLDHAM:               Sure.

21           JUSTICE KAGAN:            -- failure to call family,  
22      failure to call the psychiatrist, failure to find the  
23      psychiatric report --

24           MR. OLDHAM:               Sure.

25           JUSTICE KAGAN:            -- failure to go investigate

1 my mental background.

2 MR. OLDHAM: Absolutely. And our position  
3 is, yes, it's not that you have to cross-appeal, it's  
4 that you can cross-appeal, right, in the sense that you  
5 could, if you wanted to go back and have a second trial  
6 without having the ones that you lost protected by the  
7 Federal Constitution, then you can. But if you want to  
8 have a conditional release order that commands the State  
9 to fix those particular errors upon pain of immediately  
10 releasing you, our rule allows you to cross-appeal,  
11 whereas their rule does not.

12 JUSTICE SOTOMAYOR: So do you need a COA,  
13 too?

14 MR. OLDHAM: Yes. Yes, Your Honor. You  
15 would always need a certificate of appealability.

16 JUSTICE SOTOMAYOR: How do you do that?  
17 If -- take Justice Kagan's example. You've won, and you  
18 want to -- you're -- you're willing to forego unless  
19 there's an appeal by you. Now I'm going to  
20 cross-appeal. Now I need a COA, too, before I know what  
21 you're doing?

22 MR. OLDHAM: Well, the prisoner -- it's  
23 common ground that if the prisoner appeals on the top or  
24 the bottom the prisoner needs a certificate of  
25 appealability. And our position is that the particular

1 rules that we're offering here offer protection to  
2 prisoners in the sense that -- and it offers protections  
3 to the State as well, right? It lets everyone know before  
4 we have to go back and have another trial about the mother  
5 or the sister or the cousin or the psychiatric report  
6 what the rules of the Sixth Amendment game are. It  
7 allows the prisoner to know that if the State doesn't  
8 fix that error he gets to go free and it allows the  
9 State to make a decision as to perhaps not even  
10 conducting a trial again.

11 We've offered this example in the briefs,  
12 it's been -- and it's unrebutted in the reply that  
13 depending on what the particular conditions are, the  
14 State may forego and commute to a term of years, which  
15 is the ultimate benefit to the prisoner. And so it's  
16 incredibly important to give a prisoner the right to  
17 cross-appeal in that circumstance. And if he wants  
18 the court of appeals to address that issue he has to  
19 cross-appeal because it would be expanding that relief  
20 by adding a condition on a conditional release order  
21 that the State must obey or fix or otherwise let him go  
22 immediately.

23 If there are no further questions.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Schaffer, two minutes left.

1 REBUTTAL ARGUMENT OF RANDOLPH L. SCHAFFER, JR.

2 ON BEHALF OF THE PETITIONER

3 MR. SCHAFFER: I'm a -- as the Court can  
4 probably tell, I'm a fairly simple-minded person, and  
5 when I looked at this and said is there anything I need  
6 to do to get this closing argument in front of the  
7 circuit in response to the State's appeal, I said:  
8 Well, no; I won on ineffective assistance of counsel.  
9 I'm just making another argument in support of the  
10 judgment as to why there was prejudice, end of story.  
11 That's the extent of my thought.

12 The bulk of these Federal habeas cases, as  
13 I'm sure the Court knows, 90 percent or more are pro se  
14 State court prisoners trying to navigate the treacherous  
15 AEDPA waters without any help at all. And it's tough  
16 enough to win on the merits. To create the procedural  
17 nightmare of even getting into the ballpark that the  
18 State would have you create is like throwing out the  
19 baby with the bath water. The simple thing is we want  
20 to make it easy for the courts to acquire jurisdiction.

21 JUSTICE SOTOMAYOR: The only way you can win  
22 this, according to you, is if we rule IAC claims are one  
23 claim?

24 MR. SCHAFFER: No. I can also win, Justice  
25 Sotomayor, on the basis that, even if IAC is multiple

1 claims, I did not seek to enlarge my rights under the  
2 judgment. And it goes back to the State's position --

3 JUSTICE SOTOMAYOR: So when is it that you  
4 have to cross-appeal?

5 MR. SCHAFFER: If I want to enlarge my  
6 rights. For example, if I win on punishment phase IAC  
7 and I lose on guilt phase whatever and I want more than  
8 a new punishment hearing, I would have to cross-appeal  
9 obviously in that situation.

10 JUSTICE SCALIA: Well, you answered no, but  
11 then your explanation produces yes. You're saying you  
12 don't have to cross-appeal because you won on an  
13 ineffective assistance of counsel claim; right? There  
14 is one, you know, omnibus ineffective assistance of  
15 counsel claim. You won on that; right?

16 MR. SCHAFFER: Correct.

17 JUSTICE SCALIA: So your answer to Justice  
18 Sotomayor should have been the opposite of what it was.  
19 If you said yes, you should have said no. If you said no,  
20 you should of said yes.

21 MR. SCHAFFER: I do that all the time. But  
22 my understanding was she was asking me when would you  
23 need to cross-appeal, and I was saying the scenario in  
24 which you would. This is not one of them.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 The case is submitted.

3 (Whereupon, at 12:01 p.m., the case in the

4 above-entitled matter was submitted.)

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A				
<b>ability</b> 32:2 <b>able</b> 26:18 44:1 47:8 <b>aboveentitled</b> 1:15 56:4 <b>absolutely</b> 37:20 42:23 52:2 <b>absurd</b> 39:13 <b>abusing</b> 14:22 <b>academic</b> 31:7,11 <b>accept</b> 21:18 28:4 <b>accumulate</b> 5:14 <b>acknowledgment</b> 22:19 <b>acquire</b> 54:20 <b>act</b> 18:8,9 <b>actual</b> 39:22 <b>add</b> 30:2,6 34:21 50:13 <b>added</b> 42:11 <b>adding</b> 31:11 53:20 <b>additional</b> 11:12 36:6 39:11 41:24 49:17 <b>address</b> 53:18 <b>admission</b> 10:7 11:15 <b>adopted</b> 22:18 <b>advance</b> 37:14 <b>advanced</b> 49:5 <b>adverse</b> 15:15 25:12,16 <b>advisory</b> 11:9 38:18,23 39:1 <b>aedpa</b> 26:16,25 44:21,21 54:15 <b>affirm</b> 3:21 29:12 <b>affords</b> 41:8 <b>ago</b> 3:10 <b>agree</b> 14:12 18:11 20:24 21:5 24:15 25:21,25 32:7 33:18 37:2 41:18 42:24 50:12 <b>agrees</b> 32:16 41:8,9	42:1 43:8 44:4 <b>ahead</b> 7:22 37:11 <b>alexander</b> 7:17 <b>alito</b> 6:13,18 7:8,20 7:23 8:21,24 14:24 25:21 26:2 26:4 28:18,24 <b>allegations</b> 4:19 28:7 34:13,15 <b>allege</b> 43:19 <b>alleged</b> 14:1 <b>alleges</b> 43:13 <b>allow</b> 33:11 43:22 <b>allows</b> 52:10 53:7,8 <b>alternate</b> 3:21 29:12 <b>amendment</b> 30:24 33:8,22 34:16 36:8 39:3 48:3 53:6 <b>american</b> 3:11 7:19 20:20 <b>amount</b> 13:13,15 <b>analyze</b> 5:11 <b>analyzed</b> 16:8 <b>andrew</b> 1:21 2:6 29:22 <b>answer</b> 23:16 24:15 24:18 33:4 40:4 48:22 55:17 <b>answered</b> 55:10 <b>anticipate</b> 31:19 <b>anyway</b> 4:7 <b>appeal</b> 6:1,1 12:23 13:1,25 14:5,7,16 14:18,21 15:7,23 16:1,1 19:18,20 19:23 21:19,23 22:7 23:3,4,7,17 25:1,9,14,16 26:21,25 27:1 35:16,23,25 36:2 36:2,5 37:4,6,12 37:14,17,18 38:10 38:11,20,21 40:14 41:4,13,16,22	42:3 44:11,12,12 45:3,5,8,18 51:10 51:11 52:19 54:7 <b>appealability</b> 21:24 25:24 44:8 45:13 49:6 52:15,25 <b>appeals</b> 14:22 16:4 17:4 23:8 26:10 26:12,16 29:9 32:17 38:7,14 44:4 45:11,23 46:2 48:10,25 52:23 53:18 <b>appearances</b> 1:18 <b>appellant</b> 25:7 <b>appellate</b> 27:1,10 27:20 29:8 <b>appellee</b> 3:11 22:21 25:8 27:19 28:12 45:10 46:1 <b>appellees</b> 44:24 <b>appendix</b> 36:13 <b>applicant</b> 21:24 25:13,13 <b>applies</b> 23:25 25:6 <b>apply</b> 7:3 8:7 23:9 23:13,14,15 45:25 <b>appreciates</b> 27:16 <b>appropriate</b> 22:25 <b>argue</b> 14:12 17:18 44:1 <b>argued</b> 13:8 33:15 <b>arguing</b> 20:7 <b>argument</b> 1:16 2:2 2:5,8 3:4,6,12,20 4:1 6:13 7:3,10 10:12 12:22 13:4 13:21 14:6,25 15:17,21,24 17:24 18:22 20:1,2,10 21:18 24:1,10 26:11 27:22 29:9 29:12,16,22 30:25 31:3 33:20 35:19 48:19 54:1,6,9 <b>arguments</b> 10:18	16:14,25 22:15 27:8,12,21 37:8 41:14 48:20 50:2 <b>aside</b> 9:10 32:24 35:5 39:9,10 <b>asked</b> 10:14 15:16 50:25 <b>asking</b> 10:11 29:11 55:22 <b>aspects</b> 22:1 <b>assert</b> 41:15 <b>assistance</b> 3:14 4:17,23 5:1,8 6:15 6:19,20,22,25 8:1 8:8 10:25 11:22 12:7 14:25 15:3,4 16:10 17:7 18:3,6 20:7,8,11 28:6 29:10 31:21 32:11 32:13,16,22 33:9 38:20 43:13 49:22 50:15 54:8 55:13 55:14 <b>associated</b> 22:22 <b>assume</b> 4:6 13:22 16:18 19:11,25 21:17 24:13 41:1 <b>assuming</b> 7:5 <b>asterisk</b> 26:18 <b>attacking</b> 50:10,12 <b>attorney</b> 8:7 <b>attractive</b> 26:11 <b>aunt</b> 51:3,8 <b>austin</b> 1:22 <b>authority</b> 6:7 <b>automatically</b> 21:22 22:8 <b>available</b> 8:5 <b>awry</b> 5:24 <hr/> <b>B</b> <hr/> <b>b</b> 5:19 6:3 13:24 22:23 23:12 <b>baby</b> 54:19 <b>back</b> 4:7 6:3 8:12 11:5 13:25 15:9	19:15,19 23:22 24:9 28:16 34:18 41:8,11,25 47:8 49:12 50:24 52:5 53:4 55:2 <b>background</b> 12:21 14:2 16:20 17:17 18:12 52:1 <b>bad</b> 4:22 <b>badly</b> 37:22 <b>balance</b> 33:22 <b>ballpark</b> 54:17 <b>based</b> 4:18 16:21 17:15 19:9 22:11 28:7 29:3,6 33:21 <b>bases</b> 48:5,12 <b>basic</b> 48:19 <b>basically</b> 4:4 6:9 13:17 27:17 <b>basics</b> 41:11 <b>basis</b> 3:21 9:9 29:12 45:24 54:25 <b>bath</b> 54:19 <b>beach</b> 26:23 <b>bear</b> 26:13 <b>beg</b> 4:13 <b>begs</b> 50:6 <b>behalf</b> 1:19,22 2:4 2:7,10 3:7 29:23 54:2 <b>believe</b> 5:23 <b>benefit</b> 53:15 <b>benefits</b> 50:3 <b>beyond</b> 15:13 <b>bizarre</b> 43:6 <b>blip</b> 28:3 <b>blue</b> 12:13 <b>body</b> 6:6 <b>boiling</b> 28:13 <b>bottom</b> 28:14 52:24 <b>bounds</b> 34:16 <b>brady</b> 46:10,17 47:4,7 <b>break</b> 16:8 <b>breyer</b> 12:12,20 13:3,8,11 17:25

18:14,20,23 19:1 23:19,23 24:6,9 34:2,9 37:5,16,21 38:3,8 45:14 47:20 <b>brief</b> 12:13,14 22:21 27:23 35:9 36:23 43:4,18 44:1 47:21 48:20 <b>briefing</b> 27:3 <b>briefs</b> 6:16 53:11 <b>bring</b> 16:5 34:6 37:8 <b>brother</b> 51:2,4 <b>bulk</b> 54:12 <b>buy</b> 20:10	<b>certainly</b> 13:6 27:6 <b>certificate</b> 21:23 25:24 44:8 45:7 45:12,18 49:5 52:15,24 <b>certiorari</b> 34:14 <b>challenge</b> 41:6 <b>challenging</b> 18:17 <b>chance</b> 14:3 16:1 19:19 <b>change</b> 18:7,8,13 32:19 48:8 50:10 <b>character</b> 42:7 <b>characterization</b> 34:10 <b>characterized</b> 34:13 <b>check</b> 26:18 <b>chief</b> 3:3,8 10:21,24 11:4,14 29:19,24 30:17 31:1,14 34:1 38:15 42:16 46:5 47:10 49:10 53:24 56:1 <b>child</b> 28:15 <b>choices</b> 36:16 <b>choose</b> 11:6 <b>circuit</b> 13:12 14:6 14:16 21:3 26:22 27:11 29:15 34:20 43:21 44:5,7,22 46:16 54:7 <b>circuits</b> 26:20 <b>circumstance</b> 11:11 44:8 46:13 47:1 49:16 53:17 <b>circumstances</b> 4:10 18:5 28:11 50:22 <b>citizen</b> 11:21 <b>claim</b> 3:14 4:18 5:11 6:20,21,22 6:23 7:11,16 8:3,4 8:5,9,22 10:7,8,25 11:1 15:3,4,5,5,6 16:11,12,16 19:18 20:1,2,8,11,17,18	24:8,11 25:9 27:6 28:14 29:11 30:12 31:8,11 33:10,25 36:12 38:19 39:21 42:1,2 49:2 50:17 50:18 51:15,17 54:23 55:13,15 <b>claimant</b> 39:4 <b>claims</b> 6:14,15 8:1 15:1 19:23 20:14 20:19 28:7 31:21 32:12 42:5 49:22 51:1 54:22 55:1 <b>clarence</b> 4:23,24 33:19 <b>clarify</b> 20:4 <b>clark</b> 46:16 <b>class</b> 50:15 <b>clause</b> 11:2,10 15:6 20:9 38:19 39:3 <b>clear</b> 22:25 23:16 25:6 48:22 <b>closing</b> 8:3,11 9:2 10:12 14:6 15:21 20:1 29:16 30:25 31:2,18 35:14 54:6 <b>coa</b> 3:23 7:16 11:17 14:7,10,15 21:15 21:22,22 22:3,9 22:13,14,17,20 23:3,3,7 24:19 25:2,12,17 26:6,9 27:18 28:13 35:11 35:15,21 40:5,7,9 43:14,17,18,24 44:10,12,15,17 45:3 49:14 52:12 52:20 <b>coas</b> 43:11 44:24 <b>coerced</b> 6:20,23 7:2 7:5 15:3,5 42:2 50:14,16,18 <b>collects</b> 43:5 <b>colloquy</b> 31:23 <b>combined</b> 21:7	32:22 33:2 <b>come</b> 4:7 17:21 19:15 28:16 31:16 45:2 50:18,19 <b>comes</b> 44:10 <b>comity</b> 29:4 <b>command</b> 34:24 <b>commands</b> 52:8 <b>committed</b> 41:2,3 <b>common</b> 22:19 30:1 52:23 <b>commonwealth</b> 46:16,21 <b>commute</b> 53:14 <b>compel</b> 17:1 <b>competence</b> 36:9 <b>competent</b> 12:2 <b>complicated</b> 47:23 <b>complied</b> 22:2,4 <b>comply</b> 21:22 <b>components</b> 16:13 <b>comprised</b> 27:23 <b>conceded</b> 21:25 50:22 <b>conceive</b> 51:17 <b>concept</b> 28:19,22 <b>conclusion</b> 13:21 <b>conclusions</b> 13:19 <b>condition</b> 30:5,8,9 31:11 53:20 <b>conditional</b> 30:3,7 34:22 36:24 39:17 39:18,20,24 42:11 42:17 43:7 46:14 46:22 47:2,5,9 52:8 53:20 <b>conditions</b> 30:2 45:22 53:13 <b>conduct</b> 31:23 <b>conducting</b> 53:10 <b>confession</b> 6:21,23 7:2,6,14 15:3,5 42:2 50:14,17,18 <b>confidence</b> 5:17 12:11 <b>confident</b> 27:11	<b>confrontation</b> 11:1 11:9 15:6 20:9 38:19 39:3 <b>congress</b> 23:1,14 <b>consider</b> 5:14 27:17 29:11 47:24 <b>consideration</b> 29:16 46:2 <b>constitute</b> 5:17 12:10 <b>constituted</b> 17:5 <b>constitutes</b> 28:6 <b>constitution</b> 11:20 52:7 <b>constitutional</b> 5:21 9:7,18,21,25 10:4 11:15 23:11 24:23 25:20 31:12,15 33:20 34:23 39:21 <b>constitutionally</b> 5:18 <b>content</b> 41:14 50:1 <b>context</b> 28:13 36:21 <b>contexts</b> 28:18,20 31:22 <b>contours</b> 33:9,24 <b>controvert</b> 17:12 <b>conviction</b> 9:10 39:10 46:18 <b>convince</b> 22:7 <b>convincing</b> 46:25 <b>correct</b> 10:2 12:19 23:6,7 35:3,7,8 36:20 42:19,23 44:19 55:16 <b>correctional</b> 1:9 <b>correctly</b> 17:2 <b>couldnt</b> 17:25 18:1 47:14 <b>counsel</b> 3:14 4:17 4:22,22,24 5:1,2,4 5:8,9,12,18,23 6:15,20,22 7:1 8:1 8:9 10:16,16,20 11:23 12:1,2,3,4,7 15:1,3,4 16:10
---	---	---	--	---

17:6,7 20:8,9,11 22:1 28:6 31:13 31:21 32:10,11 33:10 34:3 35:10 38:20 43:13,14,25 47:12 48:4,13 49:22 50:15 53:24 54:8 55:13,15 56:1 <b>counselor</b> 29:20 <b>counsels</b> 20:25 <b>course</b> 18:6 21:12 32:2 35:20 41:5,5 <b>court</b> 1:1,16 3:9,10 3:15,21 4:3,4 5:11 5:25 6:2,2,7,9,23 8:6,18 9:4,11,12 9:17,23 10:8,11 10:15,15,18 11:8 12:17 13:9,18,18 13:23,25 14:7 15:20 16:4,12,22 17:1,4 18:4,4,9 22:24 23:8 25:11 25:15 26:11,15,25 27:1,15,18,25 28:5 29:5,8,8,13 29:14,25 30:3,21 30:24 31:22 32:15 34:10,11,12,14,19 36:8,23 37:10 38:6,9,17 42:13 43:20,21 44:4 45:20 46:2 47:8 48:10,18 51:4 53:18 54:3,13,14 <b>courtroom</b> 11:21 <b>courts</b> 9:15 27:10 27:11,20 36:23 39:19,21 43:5 45:7,11,23 48:25 54:20 <b>cousin</b> 53:5 <b>cpc</b> 45:10 <b>crazy</b> 15:2,6 <b>create</b> 17:15 48:18	54:16,18 <b>created</b> 12:21 <b>creating</b> 35:12 <b>criminal</b> 1:8 47:21 <b>crossappeal</b> 3:11 3:15,22 7:15 11:8 11:17 22:13,14 23:18,20,25 24:2 24:4,14,16,21,24 25:22 26:6 28:12 30:2,10,16 32:8 33:12 35:20,22 37:4 41:17 42:3,9 42:10 43:6,12 48:18 50:2,21 51:7,9 52:3,4,10 52:20 53:17,19 55:4,8,12,23 <b>crossappealed</b> 30:11 <b>cumulative</b> 32:18 <b>curative</b> 32:3 <b>cure</b> 30:13,18,22 <b>current</b> 48:24 49:1 <b>currently</b> 44:20,23 <b>custody</b> 36:16 <hr/> <b>D</b> <b>d</b> 1:12 3:1 5:19 6:3 <b>dangerousness</b> 17:18 <b>darrow</b> 4:23,24 33:19 <b>databases</b> 26:17 <b>daunting</b> 26:16 <b>day</b> 11:21 <b>days</b> 6:11 <b>deadline</b> 37:14 <b>deal</b> 45:24 48:10 <b>death</b> 14:13,21 27:3 <b>decent</b> 7:10 <b>decide</b> 9:16 14:4 29:6 <b>decided</b> 17:13 19:13 38:11	<b>decision</b> 11:8 16:21 17:20 19:14 35:17 37:15 38:16 45:8 53:9 <b>default</b> 29:6 <b>defend</b> 19:15 <b>defendant</b> 4:5 32:20 46:12 <b>defense</b> 10:16,16 18:22 30:20,21 31:13,23,25,25 32:1 46:19 <b>defensively</b> 41:15 <b>defer</b> 13:18 <b>deficiencies</b> 5:16 <b>deficiency</b> 34:13,15 <b>deficient</b> 4:19 16:13,14 28:8 33:8 <b>deficits</b> 14:2 <b>definition</b> 47:15 <b>delay</b> 14:22 <b>demand</b> 39:20 <b>demands</b> 36:8 <b>denial</b> 23:11 24:23 25:19 48:1 <b>denied</b> 4:17,23 14:15 16:9 <b>deny</b> 25:12 <b>department</b> 1:8 <b>depending</b> 17:9 39:3 53:13 <b>deprivation</b> 48:12 <b>deprived</b> 47:25 48:3 <b>deputy</b> 1:21 <b>describing</b> 5:5 <b>desiring</b> 25:9 <b>determine</b> 5:14 <b>dictate</b> 16:24 <b>didnt</b> 4:8 8:7,7,18 10:4,14 11:7,19 13:15,18 15:25 17:2 18:8 24:15 24:15 25:16 42:6 51:1,1,2,3,3	<b>different</b> 4:15 5:25 7:11,25 10:7 15:1 19:11 29:2 48:5,6 48:11 <b>differently</b> 18:8 36:24 <b>difficult</b> 49:20 50:19,20 <b>direct</b> 6:1,1 9:4,17 9:21 <b>director</b> 1:7 <b>disadvantaged</b> 14:2 16:20 17:17 18:12 19:19 <b>disagree</b> 8:14 13:5 20:16 24:14 34:9 <b>disagreed</b> 13:7,10 <b>discern</b> 50:20 <b>discourage</b> 27:6 <b>discover</b> 8:19 <b>dispose</b> 27:11 <b>dispute</b> 31:8 <b>district</b> 3:15,21 4:3 6:2,23 13:18,23 14:7,8 15:20 18:4 18:4,9 25:11,15 26:15,24 29:13 30:3,23 34:12,18 38:9 47:8 <b>division</b> 1:10 20:12 <b>doctor</b> 17:12,16 <b>doctors</b> 17:13 <b>doesnt</b> 5:13 6:7 12:3,5 14:20 16:18 18:13 23:9 23:13 24:22,25 26:11 36:14 41:16 41:16 42:17,21 44:16,17 48:8 49:24,25 50:1 53:7 <b>doing</b> 14:14 19:2,4 27:7 47:18 52:21 <b>dont</b> 4:1,21 6:4 9:18 10:5 12:22 15:5,8 19:21	20:10,16 22:14 23:4 24:3,19 25:17 27:15 28:1 28:19 29:1 31:10 31:19 38:24 44:11 45:5 47:23 55:12 <b>dramatically</b> 30:15 30:15 32:7 <b>due</b> 6:25 <b>dumbest</b> 12:4 <hr/> <b>E</b> <b>e</b> 2:1 3:1,1 11:12 <b>easy</b> 54:20 <b>effect</b> 6:9 21:7 32:18 33:3,16 35:5 <b>effective</b> 4:17,23 10:19 11:22 16:9 18:6 <b>efforts</b> 27:5 <b>either</b> 11:7 15:7 42:14 50:8 <b>el</b> 7:17 <b>enable</b> 32:23 <b>enabled</b> 50:2 <b>enacted</b> 46:4 <b>enlarge</b> 3:13 10:10 11:18 15:11 24:4 25:23 55:1,5 <b>enter</b> 25:15 <b>enters</b> 25:12 <b>entertain</b> 40:8 <b>entire</b> 36:22 <b>entirely</b> 45:23 <b>entitle</b> 7:12 41:15 <b>entitled</b> 6:24 12:2,3 16:3 34:6 <b>entitles</b> 50:8 <b>entity</b> 23:10 <b>enunciation</b> 30:23 <b>equal</b> 19:5 <b>error</b> 4:16 5:23 9:7 9:18,21 10:1,4,12 10:13,16 11:6 16:6 18:24 20:13
--	--	---	---	---

21:1 30:8,13,13 30:18,22 31:2 32:3,5,17 33:5,6 33:21,24 34:17,20 34:21,23 35:2 40:20,24 41:2,2 42:13 43:1,19,24 46:9,20,20 47:12 49:10,11 53:8 <b>errors</b> 4:3 5:12 8:11 12:20 13:15 15:19,20 16:4,5 20:25 37:1,3 39:23 42:18 43:1 43:15,16 44:6 52:9 <b>especially</b> 27:2 <b>esq</b> 1:19,21 2:3,6,9 <b>estelle</b> 47:24 <b>evaluate</b> 4:21 <b>evidence</b> 10:8 11:16 14:1 15:12 16:19,24 17:4 18:12 19:16 46:11 46:19,24 47:7 <b>exact</b> 14:17 31:6 50:17 <b>exactly</b> 24:1 25:3 27:22 30:24 31:18 40:6 42:25 49:18 <b>examine</b> 17:24 <b>example</b> 6:16 10:9 14:21 17:10,10 31:23 36:25 38:7 41:9,25 46:10 52:17 53:11 55:6 <b>examples</b> 38:4 41:20 <b>exante</b> 49:20 50:19 50:21 <b>exclude</b> 7:2 <b>excluded</b> 15:12 23:13 47:7 <b>exclusion</b> 10:8 <b>exculpatory</b> 46:11 <b>excuse</b> 29:6	<b>exhaustion</b> 28:21 <b>exhibitions</b> 46:14 <b>expanded</b> 30:15 32:7 <b>expanding</b> 50:11 50:13 53:19 <b>experts</b> 8:6 <b>explanation</b> 55:11 <b>expressly</b> 23:12 <b>extent</b> 54:11 <hr/> <b>F</b> <hr/> <b>fact</b> 27:4 45:16 49:19 <b>fail</b> 17:3 <b>failed</b> 5:2 42:7 47:16 <b>failing</b> 12:21 34:25 42:14,14 <b>fails</b> 32:5 <b>failure</b> 11:25 12:1 17:5 19:10 51:15 51:21,22,22,25 <b>fairly</b> 31:7 54:4 <b>family</b> 51:15,21 <b>far</b> 29:1 37:14 43:20 49:6 <b>favor</b> 28:1,5 <b>federal</b> 5:25 6:5,7,9 8:18 9:4,16,23 10:8,11,15 11:8 16:22 22:18 23:11 25:19 26:20 28:2 28:3 30:23 36:7 36:23 38:17 39:21 42:13 43:5 47:5,8 48:1,2 52:7 54:12 <b>federalism</b> 29:4 <b>fifth</b> 13:12 21:3 29:15 34:20 <b>file</b> 7:15 11:8,16 14:6 21:18 24:25 42:3 48:17 <b>filed</b> 28:14 47:21 <b>files</b> 43:14,18 <b>filing</b> 14:22	<b>final</b> 23:4,5,5 25:12 25:16 27:25 44:11 44:12,13,13 45:3 45:4,5,18 <b>find</b> 4:25 5:7,8 28:6 37:25 42:6 51:22 <b>finding</b> 5:3,6 <b>findings</b> 13:19 <b>finds</b> 32:15 <b>fine</b> 18:23 37:11 44:13 <b>first</b> 3:17 5:12 19:4 23:9 27:24 30:11 34:7 35:1,25 36:4 37:4,5,17,18 38:11 40:24 41:4 42:3 <b>fit</b> 49:24,25 <b>fits</b> 50:5 <b>fix</b> 4:4,8 9:18,21,25 10:5,12,15 30:13 32:6 34:25 39:23 42:15 47:16 52:9 53:8,21 <b>fixed</b> 4:6 9:7 37:1,3 <b>fixing</b> 5:22 <b>focus</b> 27:5 <b>follow</b> 22:8 <b>followup</b> 7:24 <b>footnote</b> 27:12 36:22 43:4 <b>forego</b> 52:18 53:14 <b>form</b> 30:15,15 32:7 <b>forth</b> 29:3 <b>fought</b> 34:18 <b>found</b> 15:20 19:12 19:13 38:4,8 40:24 43:1,1 <b>foundation</b> 47:21 <b>fourth</b> 46:16 <b>frap</b> 22:23 23:12 <b>free</b> 8:11 9:12 10:13 53:8 <b>freestanding</b> 10:7 <b>frivolous</b> 14:18,22 26:10,12 27:1,8	27:12,20 <b>front</b> 54:6 <b>function</b> 41:4 <b>fundamental</b> 32:4 <b>further</b> 5:11 53:23 <b>future</b> 17:18 <hr/> <b>G</b> <hr/> <b>g</b> 3:1 <b>game</b> 53:6 <b>gas</b> 7:17 <b>general</b> 1:21 5:3 41:17 <b>getting</b> 17:14 54:17 <b>ginsburg</b> 15:17 19:17,22 20:4,6 20:15 23:2 35:22 36:1,10,21 41:11 44:9,20 45:1,16 45:19 49:8,24 50:5 <b>give</b> 6:11 11:20 13:25 14:2 16:22 18:5 22:14 36:6 36:16 37:11 39:5 40:2 42:19 49:21 53:16 <b>given</b> 35:19 <b>gives</b> 11:20 <b>go</b> 7:21 8:12 11:5 13:25 15:9 17:17 19:19 22:1 35:15 37:11 39:14 40:7 41:8,11,25 44:12 47:8 49:12,14 51:25 52:5 53:4,8 53:21 <b>goes</b> 21:5 37:17 50:24 55:2 <b>going</b> 13:24 14:5 15:9 17:16,16,17 19:19 27:1 31:4 31:16 39:12 40:7 40:7 48:13 52:19 <b>good</b> 4:22 17:15 45:5 48:13	<b>gotten</b> 39:12 <b>government</b> 23:9 23:12,13 26:8 27:7 <b>governmental</b> 23:10 <b>governments</b> 20:3 22:15 <b>grade</b> 17:21 <b>granted</b> 3:18 34:19 43:18 <b>great</b> 28:3 38:7 <b>greater</b> 20:21 47:17 <b>gross</b> 5:4 <b>ground</b> 30:1 32:17 35:4 43:2 48:7 52:23 <b>grounds</b> 35:2 37:25 38:11,12 <b>guess</b> 50:24 <b>guides</b> 30:25 <b>guilt</b> 7:7 55:7 <b>guise</b> 27:19 <b>guys</b> 14:3 <hr/> <b>H</b> <hr/> <b>habeas</b> 5:25 6:5 9:4 9:16 10:5,9 19:13 22:23 25:10 28:2 28:3 37:7 39:20 39:23 40:24 45:4 54:12 <b>half</b> 33:19 <b>hand</b> 32:20 <b>happen</b> 27:9 34:3 48:6 <b>happened</b> 13:23 33:23 34:10,11 38:4 39:2 <b>happening</b> 31:19 46:7 <b>happens</b> 31:20 40:10 <b>harm</b> 17:15 32:23 <b>harmful</b> 33:3 35:5 <b>harmless</b> 32:17
--	---	---	---	--

<b>harmonized</b> 28:8 <b>hasnt</b> 49:9 <b>havent</b> 17:18 22:4 <b>headaches</b> 35:12 <b>headon</b> 22:15 <b>health</b> 16:19 17:11 17:14 19:7,7,20 <b>hear</b> 3:3 <b>heard</b> 38:3 <b>hearing</b> 3:18 6:12 7:13,14 8:10,15 8:17 14:20 15:19 16:17,17,23 20:23 36:17 40:3,11 42:20 55:8 <b>held</b> 3:10 34:23 <b>help</b> 23:24 54:15 <b>heres</b> 26:7,7 <b>hes</b> 6:24 17:19 25:9 39:11 41:13,19 50:10 <b>hire</b> 8:6 <b>history</b> 8:19 16:19 17:11,14,19 19:7 19:8 <b>hit</b> 22:15 26:8 <b>hold</b> 5:7 <b>holding</b> 18:3,4 <b>honor</b> 44:2 52:14 <b>houston</b> 1:19 <b>hundred</b> 5:13 <b>hypothesize</b> 44:6 <b>hypothetical</b> 33:6 33:19,23 35:19 46:6 50:25 51:14 51:19 <hr/> <b>I</b> <b>iac</b> 5:11 10:6 16:8 16:11,11 20:17 24:8,11 28:14,19 28:21 54:22,25 55:6 <b>id</b> 24:3 <b>identical</b> 18:16 <b>identically</b> 47:3	<b>ii</b> 28:17 <b>ill</b> 37:18 <b>illustrate</b> 49:21 <b>im</b> 3:25 13:2,3 14:5 17:16,17 24:4 27:10 29:11 30:20 36:12 37:22 38:13 38:20 39:12 49:15 52:19 54:3,4,9,13 <b>immediate</b> 30:14 32:6 34:24 40:21 40:23 <b>immediately</b> 52:9 53:22 <b>implications</b> 50:24 <b>important</b> 21:1 32:4 36:5 53:16 <b>importantly</b> 40:10 <b>imposes</b> 41:21 45:21 <b>imprisonment</b> 42:21 <b>imputed</b> 34:23 <b>inadequate</b> 38:19 43:13,15 <b>incarcerated</b> 17:20 37:8 <b>incentive</b> 27:5 <b>include</b> 20:25 <b>incompetence</b> 21:6 22:1 <b>incorporated</b> 43:3 <b>incredibly</b> 36:5 53:16 <b>incremental</b> 33:16 <b>independent</b> 34:20 34:21 <b>indicate</b> 44:16 <b>indicates</b> 49:10 <b>ineffective</b> 3:14 5:1 5:4,7,19 6:15,19 6:19,22,25 7:25 8:8 10:25 12:7 14:25 15:2,4 17:5 17:7 18:2 19:9,9 20:7,8,10 28:6	29:10 31:21 32:11 32:12,15,22 33:9 47:12 49:22 50:14 54:8 55:13,14 <b>ineffectiveness</b> 33:25 <b>informant</b> 46:23 <b>information</b> 26:17 <b>informed</b> 31:24 <b>inmates</b> 14:21 <b>innocence</b> 7:7 <b>inquiry</b> 21:12 <b>instance</b> 32:21 <b>instances</b> 32:15 33:1 <b>institutions</b> 1:10 <b>instructions</b> 32:3 <b>intend</b> 23:14 <b>intention</b> 46:22 <b>interesting</b> 37:24 <b>interpret</b> 45:25 <b>interpretation</b> 20:20 <b>interpreted</b> 44:22 <b>interviewing</b> 46:23 <b>introduce</b> 7:2 14:1 <b>introduced</b> 40:12 <b>inundated</b> 27:20 <b>investigate</b> 8:19 12:21 19:10 51:25 <b>investigated</b> 19:12 <b>investigation</b> 8:8 8:13 <b>involves</b> 7:6 <b>ironic</b> 27:17 <b>irony</b> 27:16 <b>isnt</b> 9:22 18:3 23:24 41:12 45:15 49:3 49:7 <b>isolate</b> 5:12 <b>issue</b> 4:1 12:12 13:12 16:8 20:17 22:10 25:12,18 32:21 33:2 35:14 38:23 41:13 45:9 46:1 48:8 49:1,1	53:18 <b>issuebyissue</b> 44:3 <b>issued</b> 4:2 30:3 47:9 <b>issues</b> 12:14 25:18 44:16 45:24 49:18 <b>ive</b> 29:10 37:7 38:3 <hr/> <b>J</b> <b>jailhouse</b> 46:23 <b>jennings</b> 1:3 3:4 <b>jr</b> 1:19 2:3,9 3:6 54:1 <b>judge</b> 14:8,11,14 36:25 38:21 40:24 <b>judgment</b> 3:12,19 3:22 4:2 5:25 6:1 6:2,5,9,24 7:12,18 9:4,16 10:9,11 11:18,19 14:19 15:12,13,14,15,18 15:22,23,24 16:1 20:22 24:5 25:23 27:5,24 28:5 29:12,15 31:24 33:17 35:6 36:4 36:12 37:2 39:8,9 41:6,7,12,14,16 41:19,21 49:9 50:1,3,7,7,11,13 54:10 55:2 <b>jurisdiction</b> 29:5,8 29:9 54:20 <b>jury</b> 14:4,12 <b>justice</b> 1:9 3:3,8,25 4:11,14,20 6:13 6:18 7:8,20,21,23 8:21,24 9:8,20,25 10:3,21,24 11:4 11:14,24 12:12,20 13:3,8,11 14:24 15:17 17:3,25 18:14,20,23 19:1 19:17,22 20:4,6 20:15,24 21:4,9 21:11,14,17,21	22:5 23:2,19,23 24:6,9,13,18,18 24:21 25:3,21 26:2,4 28:18,24 29:19,24 30:17 31:1,14 32:9 33:4 33:11,14 34:2,9 35:1,4,10,22 36:1 36:10,21 37:5,16 37:21 38:3,8,15 39:7,16 40:1,6,16 40:22 41:1,9,11 41:25 42:4,16 43:10,23 44:9,19 45:1,14,16,19 47:10,20,21 49:7 49:8,10,24 50:5 50:23 51:12,18,21 51:25 52:12,16,17 53:24 54:21,24 55:3,10,17,17 56:1 <b>justices</b> 34:1 46:6 <hr/> <b>K</b> <b>kagan</b> 42:4 50:23 51:13,18,21,25 <b>kagans</b> 52:17 <b>keep</b> 11:12 14:13 42:16 <b>kennedy</b> 20:24 21:4 21:9,11,14,17,21 22:5 43:10,23 <b>kennedys</b> 24:18 <b>key</b> 20:3 22:10,16 <b>kind</b> 25:10 <b>know</b> 4:1,21 8:18 8:20 9:1 13:3 17:13 23:8 27:15 37:22 43:20 51:4 51:18 52:20 53:3 53:7 55:14 <b>known</b> 19:8,16 <b>knows</b> 54:13 <hr/> <b>L</b>
--	---	---	--	---

<b>l</b> 1:19 2:3,9 54:1 <b>lack</b> 29:5 <b>lamb</b> 36:25 <b>landscape</b> 16:21 28:2 <b>language</b> 45:17,21 45:25 <b>laughter</b> 39:15 <b>law</b> 7:15 22:19 <b>lawsuit</b> 6:5 <b>lawyer</b> 8:18 18:2,5 19:2,8 31:2,5,6,17 31:18,23,25 32:1 37:12 42:5,7 <b>lawyers</b> 31:25 33:21 48:17 <b>laying</b> 14:3 <b>leave</b> 34:2 <b>left</b> 53:25 <b>letting</b> 14:4 <b>level</b> 31:12,15 36:8 <b>liability</b> 41:22 <b>life</b> 6:11 14:3 <b>limits</b> 27:4 <b>line</b> 28:14 33:7 <b>list</b> 43:24 45:21 <b>listen</b> 39:12 <b>litigant</b> 49:13 <b>litigation</b> 28:21 <b>little</b> 5:24 <b>logical</b> 13:21 <b>long</b> 12:4 33:14,15 <b>look</b> 19:6 21:3 25:10 <b>looked</b> 54:5 <b>looking</b> 12:13 36:12 <b>lose</b> 13:24 20:15 37:24 38:10 55:7 <b>loses</b> 6:22 35:13 36:11 37:9 38:18 42:8 43:14 <b>loss</b> 15:7 <b>losses</b> 37:12 <b>lost</b> 4:8 8:4,22,24 15:25 16:15 19:18	19:20 25:7,8 37:19 39:4 41:13 42:11 52:6 <b>lot</b> 37:21 38:1 48:5 48:6 <b>lots</b> 37:7 <b>lower</b> 12:16 <hr/> <b>M</b> <hr/> <b>m</b> 1:17 3:2 40:4 56:3 <b>majority</b> 49:6 <b>making</b> 18:16 54:9 <b>materially</b> 47:3 <b>matter</b> 1:15 5:13,22 22:18 26:9 37:13 56:4 <b>matters</b> 13:19 <b>mean</b> 4:25 12:13 16:18 21:21 23:24 31:5 35:11 38:16 45:2 47:10 48:9 49:1,2 <b>meaning</b> 43:8 <b>meaningful</b> 30:9 <b>means</b> 5:1 <b>measure</b> 33:20 <b>meet</b> 5:20 <b>mental</b> 8:19 14:1 16:19 17:10,11,14 19:7,7,20 52:1 <b>mention</b> 47:4 <b>merits</b> 19:25 29:16 54:16 <b>mess</b> 48:18 <b>millere</b> 45:20 <b>mind</b> 14:15 21:14 25:4 26:13 <b>minute</b> 4:20 <b>minutes</b> 53:25 <b>mistake</b> 4:24 5:9 9:12 12:3,5,6,15 12:24 32:11,11 <b>mistakes</b> 12:9,9,10 12:15 32:18 40:11 <b>mitchell</b> 1:3	<b>modify</b> 7:18 <b>moment</b> 19:7 <b>money</b> 8:5,7,13,25 <b>monolithic</b> 20:11 <b>mother</b> 42:7 51:1,5 53:4 <b>motivated</b> 37:22 <b>move</b> 7:16 11:17 14:7 32:2 <b>multiple</b> 54:25 <hr/> <b>N</b> <hr/> <b>n</b> 2:1,1 3:1 <b>named</b> 28:15 <b>names</b> 28:17 <b>natural</b> 7:17 <b>navigate</b> 54:14 <b>necessary</b> 30:6 45:22 <b>necessitate</b> 30:16 32:8 <b>necessitated</b> 30:9 <b>need</b> 3:11,22,23 8:25,25 14:10,11 14:13 20:17 22:12 22:13,13,14 23:3 23:25 24:2,3,16 24:19 26:6 28:12 30:2 44:10,11,15 44:17 45:3,17 52:12,15,20 54:5 55:23 <b>needed</b> 24:14 <b>needs</b> 52:24 <b>never</b> 19:16 23:10 38:3 39:24 44:14 46:9,21 <b>new</b> 3:18 4:1,1 6:11 7:13,13 8:10,15 8:16 10:12,22,22 10:23 14:20 15:18 16:3,16,17,23 18:7 20:22 31:4,6 31:9 36:17 37:10 37:11,17 38:21 39:10,12,25 40:2	40:11,12,17 41:3 41:6,7 42:20 55:8 <b>nightmare</b> 48:14 48:25 49:2 54:17 <b>ninety</b> 3:10 <b>non</b> 11:13 <b>nonappealing</b> 22:20 <b>nope</b> 14:5 <b>notice</b> 14:6 21:19 22:7 37:14 <b>number</b> 27:10 28:7 <hr/> <b>O</b> <hr/> <b>o</b> 2:1 3:1 <b>obey</b> 53:21 <b>object</b> 32:2 <b>obligated</b> 30:13 <b>obligation</b> 47:17 <b>obtain</b> 7:18 28:13 <b>obvious</b> 25:10 <b>obviously</b> 25:7 38:1 55:9 <b>occurred</b> 4:4 <b>october</b> 1:13 <b>offer</b> 10:17,17 53:1 <b>offered</b> 53:11 <b>offering</b> 53:1 <b>offers</b> 53:2 <b>oh</b> 39:11 47:10 <b>okay</b> 7:9 17:11 19:8 21:20 23:24 24:17 33:11 35:12 40:5 <b>old</b> 40:12,16,20,23 <b>oldham</b> 1:21 2:6 29:21,22,24 30:19 31:10,20 32:9 33:4,13,18 34:9 35:3,7,18,24 36:3 36:20 37:13,20 38:1,5,13,25 39:16 40:15,18,25 41:5,18 42:4,10 42:23 43:20 44:2 44:19 45:6,19 47:14 48:24 49:15	50:5 51:12,20,24 52:2,14,22 <b>omnibus</b> 55:14 <b>once</b> 9:20 18:14 22:6 31:9 46:11 <b>ones</b> 52:6 <b>opinion</b> 11:9 14:9 36:22 38:18,23 39:1 42:25 <b>opinions</b> 9:15 17:12 <b>opportunity</b> 7:1 8:12 <b>opposed</b> 7:6 <b>opposing</b> 32:10 34:3 <b>opposite</b> 14:17 55:18 <b>oral</b> 1:15 2:2,5 3:6 29:22 <b>order</b> 10:11,15 14:11,13 16:3,22 18:15 19:2,3 23:4 23:5,5 25:12,16 30:3,7 34:22 36:13,13,15,18 39:17,19,20,21,24 42:12,17 43:8 44:11,12,13,13 45:3,4,5,18 46:15 46:23 47:2,5,9 52:8 53:20 <b>orders</b> 36:24 <b>ordinarily</b> 15:22 <b>original</b> 47:9 <b>outcome</b> 32:19 <b>overlying</b> 22:6 <hr/> <b>P</b> <hr/> <b>p</b> 3:1 56:3 <b>page</b> 2:2 27:4 36:13 42:19 <b>pages</b> 27:23,24 <b>pain</b> 30:14 43:25 52:9 <b>paper</b> 24:25
---	--	--	--	---

<p><b>papers</b> 17:21</p> <p><b>paragraph</b> 27:13</p> <p><b>pardon</b> 4:13</p> <p><b>part</b> 23:6 25:17 41:3</p> <p><b>particular</b> 5:8,23 6:8 12:1 15:19,20 16:4 30:5,5,8 31:17 36:4,7,11 37:1,3 43:7 46:18 46:20 50:9 51:13 52:9,25 53:13</p> <p><b>particularities</b> 33:5</p> <p><b>parties</b> 41:21</p> <p><b>party</b> 25:13 50:1</p> <p><b>paso</b> 7:17</p> <p><b>peculiar</b> 16:2</p> <p><b>penalty</b> 27:3</p> <p><b>people</b> 27:6 37:21 38:2 41:20</p> <p><b>percent</b> 54:13</p> <p><b>performance</b> 4:19 5:16 16:13,15 17:6 28:8 31:12 31:16 33:8,21</p> <p><b>period</b> 48:4</p> <p><b>perjury</b> 46:24</p> <p><b>person</b> 9:6 37:8 54:4</p> <p><b>petition</b> 34:14</p> <p><b>petitioner</b> 1:4,20 2:4,10 3:7,13 6:21 10:19 16:9,23 22:21 25:7,8,22 25:23 26:15,21,24 27:4,19,22 28:12 30:1,6,11 34:12 35:13 38:5,9 42:1 45:12 49:9 54:2</p> <p><b>petitionerappella...</b> 23:16</p> <p><b>petitionerappellees</b> 23:17</p> <p><b>petitioners</b> 27:21</p> <p><b>petitions</b> 37:7</p> <p><b>pfeiffer</b> 7:17</p>	<p><b>phase</b> 7:6,7,8 16:10 55:6,7</p> <p><b>phrase</b> 43:5</p> <p><b>phrased</b> 47:2</p> <p><b>phraseology</b> 43:7 47:4</p> <p><b>piece</b> 24:25</p> <p><b>plans</b> 32:1</p> <p><b>play</b> 13:20 14:8 19:24</p> <p><b>please</b> 3:9 26:13 29:25</p> <p><b>point</b> 32:5 47:22,22 48:10 49:12</p> <p><b>pointed</b> 36:22 41:20</p> <p><b>points</b> 38:5</p> <p><b>policy</b> 26:9</p> <p><b>pollack</b> 36:25</p> <p><b>portion</b> 20:3</p> <p><b>position</b> 5:24 13:1 14:17 28:4 52:2 52:25 55:2</p> <p><b>possession</b> 46:12</p> <p><b>potential</b> 46:6</p> <p><b>power</b> 31:22 47:5</p> <p><b>powerful</b> 46:14</p> <p><b>practical</b> 37:13 50:20</p> <p><b>pragmatic</b> 49:3</p> <p><b>preaedpa</b> 45:6 46:3</p> <p><b>precisely</b> 18:17 19:2,5 41:24 46:13</p> <p><b>preclusive</b> 15:25</p> <p><b>predated</b> 44:21</p> <p><b>predicate</b> 14:24</p> <p><b>predict</b> 49:20</p> <p><b>predicted</b> 49:3</p> <p><b>prejudice</b> 5:15,17 12:11,16,21,23 13:14,16 16:13 21:10 29:7 34:5 48:16 54:10</p> <p><b>prejudicial</b> 21:13 34:17</p>	<p><b>present</b> 40:7 41:14</p> <p><b>preserve</b> 50:2</p> <p><b>presumably</b> 8:11 31:5</p> <p><b>pretty</b> 48:13</p> <p><b>prevailed</b> 3:14 30:12</p> <p><b>prevailing</b> 27:21,22 41:20</p> <p><b>prevails</b> 26:15,24</p> <p><b>prevent</b> 19:2,4</p> <p><b>previous</b> 39:2</p> <p><b>principles</b> 29:4,4</p> <p><b>prior</b> 31:18</p> <p><b>prison</b> 36:18 37:23</p> <p><b>prisoner</b> 6:7,10 9:24 30:14 40:19 43:12 45:25 49:17 52:22,23,24 53:7 53:15,16</p> <p><b>prisoners</b> 44:23 45:9 53:2 54:14</p> <p><b>pro</b> 54:13</p> <p><b>probable</b> 45:7</p> <p><b>probably</b> 54:4</p> <p><b>probe</b> 31:24</p> <p><b>problem</b> 23:23 31:17 48:16 49:4</p> <p><b>procedural</b> 29:6 39:5 54:16</p> <p><b>proceeding</b> 45:4</p> <p><b>produce</b> 17:5 33:16 48:13</p> <p><b>produces</b> 55:11</p> <p><b>proper</b> 9:2</p> <p><b>propose</b> 22:11</p> <p><b>prosecution</b> 30:21 37:10</p> <p><b>prosecutor</b> 18:16 18:19,21</p> <p><b>protect</b> 27:5,24</p> <p><b>protected</b> 52:6</p> <p><b>protection</b> 36:6 39:5 41:24 42:12 53:1</p> <p><b>protections</b> 53:2</p>	<p><b>protective</b> 40:19</p> <p><b>proven</b> 17:18</p> <p><b>provenance</b> 45:23</p> <p><b>provide</b> 10:18 17:2 42:13</p> <p><b>providing</b> 49:15</p> <p><b>psychiatric</b> 51:23 53:5</p> <p><b>psychiatrist</b> 51:22</p> <p><b>psychological</b> 42:6</p> <p><b>public</b> 26:17</p> <p><b>punishment</b> 3:18 6:12 7:6,13,13 10:23 14:20 16:10 16:16,17,23 20:22 55:6,8</p> <p><b>pure</b> 20:20 29:7</p> <p><b>purely</b> 38:18</p> <p><b>purpose</b> 46:3</p> <p><b>purposes</b> 8:17</p> <p><b>push</b> 33:7</p> <p><b>put</b> 16:19,24 17:3 17:16,25 19:13 26:18 42:7 51:1,1 51:2,3,3</p>	<p>33:12 34:12,20</p> <p><b>randolph</b> 1:19 2:3 2:9 3:6 54:1</p> <p><b>reach</b> 15:5 20:17 25:17</p> <p><b>read</b> 14:9 22:17,24 25:6 36:21 47:22</p> <p><b>reading</b> 27:18</p> <p><b>reads</b> 49:1</p> <p><b>really</b> 11:19 32:4 51:5</p> <p><b>reason</b> 4:2 29:14 31:17 38:15</p> <p><b>reasons</b> 3:16 23:9 30:10 39:11 50:17</p> <p><b>rebuttal</b> 2:8 27:15 28:20,24 29:18 54:1</p> <p><b>received</b> 26:17 46:17</p> <p><b>recommitted</b> 40:20 42:14 46:21</p> <p><b>recur</b> 46:9,12</p> <p><b>recurrence</b> 49:19</p> <p><b>recurs</b> 32:3,5</p> <p><b>red</b> 12:14 36:23 43:4</p> <p><b>regard</b> 18:11</p> <p><b>regarding</b> 13:19</p> <p><b>regular</b> 45:24</p> <p><b>rejected</b> 3:21 19:23</p> <p><b>relate</b> 15:21</p> <p><b>related</b> 48:15,16</p> <p><b>relates</b> 21:8</p> <p><b>release</b> 4:5,7 6:10 9:24 30:3,7,14 32:6 34:22,24 36:16,24 39:17,19 39:20,22,24 40:2 40:3,8,21,23 42:12,17 43:8 46:15,22 47:2,5 50:8 52:8 53:20</p> <p><b>releasing</b> 9:6 52:10</p> <p><b>relief</b> 3:17 4:12,15 4:15 7:12,19</p>
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11:12 14:19 15:8 15:18 20:21 30:16 31:9 32:8 41:7,15 50:11,13 53:19 <b>rely</b> 22:21 <b>remand</b> 8:21 9:17 9:22 29:15 <b>remarks</b> 18:17 <b>remedy</b> 10:19,21 17:2 32:6 39:23 46:17 <b>remember</b> 10:6 20:1 <b>repeat</b> 11:5 47:12 <b>repeatable</b> 47:15 <b>repeated</b> 9:10 40:12,13 47:15 49:12 <b>repetitive</b> 28:21 <b>reply</b> 53:12 <b>report</b> 42:6 51:23 53:5 <b>representation</b> 5:20 31:25 <b>requested</b> 30:5 <b>require</b> 10:12 22:20 44:23 45:12 <b>required</b> 22:7,8 23:7 25:18 26:9 45:9 <b>requirement</b> 22:17 27:18 45:10 <b>requires</b> 30:24 31:12 <b>resentence</b> 6:11 <b>resentencing</b> 6:24 6:25 49:10 50:9 50:10 <b>reserve</b> 27:14 <b>respect</b> 7:25 31:11 <b>respectfully</b> 8:14 12:8 <b>respondent</b> 1:22 2:7 29:23 <b>response</b> 27:8 54:7 <b>responsible</b> 34:23	<b>rest</b> 27:14 29:17 <b>retain</b> 50:3 <b>retiral</b> 9:5 10:20 15:12 16:21 17:13 37:15 <b>retried</b> 17:9 <b>return</b> 34:1 46:5 <b>reverse</b> 29:15 <b>reversed</b> 34:19 <b>reversing</b> 33:16 <b>review</b> 19:25 26:16 26:25 <b>reviewing</b> 36:19 <b>rides</b> 20:7 <b>right</b> 11:14,22,25 12:17,18,25 13:15 14:20 15:9,10 18:14,23,25 21:4 21:11 23:11 24:23 25:20 31:4 35:2 36:2 40:25 41:17 45:14 47:19 48:1 48:2,3,7,13 49:13 50:15 52:4 53:3 53:16 55:13,15 <b>rights</b> 3:13 10:10 11:18 15:11 24:5 55:1,6 <b>robert</b> 1:3 <b>roberts</b> 3:3 10:21 10:24 11:4,14 29:19 30:17 31:1 31:14 38:15 42:16 47:10 53:24 56:1 <b>roman</b> 45:8 <b>row</b> 14:21 <b>rule</b> 10:4 22:11,23 25:11 27:25 28:4 29:9 35:11 36:11 40:18 41:17 48:24 49:1,4,6,7,15,20 49:25 50:4,6 52:10,11 54:22 <b>rules</b> 22:12,22 27:3 53:1,6	<b>S</b> <b>s</b> 1:21 2:1,6 3:1 29:22 <b>sand</b> 26:22 27:9 <b>satisfy</b> 25:19 45:9 <b>save</b> 14:3 29:17 <b>saying</b> 9:11,15 13:4 20:19 23:2,24 37:22 39:11 40:5 40:14,23 48:2,12 55:11,23 <b>says</b> 10:10 16:4 18:5 21:23 23:3,7 25:1,11,17 26:8 27:7 31:17 36:15 37:11,18 39:22 42:19,25 43:14,16 44:3,10,15 45:3 45:17 47:24 51:4 <b>scalia</b> 4:20 7:21 9:8 9:20,25 10:3 11:24 17:3 32:9 33:4,11,14 35:1,4 39:7,16 40:6 55:10,17 <b>scalias</b> 41:9,25 <b>scare</b> 27:18 <b>scenario</b> 26:20 55:23 <b>schaffer</b> 1:19 2:3,9 3:5,6,8 4:9,13,16 5:10 6:17 7:5,9 8:14,23 9:3,14,23 10:2,6,23 11:3,11 11:15 12:8,19 13:1,6,10,17 15:10 16:7 17:8 18:11,18,21,25 19:6,21,24 20:5 20:14,16 21:2,7 21:10,12,16,20 22:4,10 23:6,21 24:3,8,11,17,20 24:24 25:5,25 26:3,5 28:23 29:1 53:25 54:1,3,24	55:5,16,21 <b>scheme</b> 28:3 <b>scope</b> 15:13 <b>screen</b> 26:10,12 <b>se</b> 54:13 <b>second</b> 3:20 34:25 36:7 39:6 41:2 44:22 46:25 50:15 52:5 <b>secondly</b> 23:11 <b>see</b> 14:8 18:18 28:1 37:24 38:24 47:16 <b>seek</b> 3:13,17 55:1 <b>seeking</b> 7:18 11:12 11:18 15:11 20:21 24:4 <b>seen</b> 37:7 <b>seismic</b> 28:1 <b>sending</b> 6:3 <b>sense</b> 39:1,8 41:21 49:4 52:4 53:2 <b>sentence</b> 14:13 27:12 36:17 42:20 <b>sentencing</b> 8:10,15 8:17 15:19 36:17 42:20 <b>separate</b> 7:16 11:3 21:19 25:8 28:7 31:8 33:1 48:11 <b>series</b> 43:5 <b>serious</b> 27:2 <b>set</b> 9:10 39:9,10 49:8 <b>setting</b> 32:24 35:5 <b>seventh</b> 44:5,7 <b>shade</b> 48:14 <b>shift</b> 28:1 <b>shorn</b> 15:19 16:3 <b>short</b> 49:21 <b>shouldnt</b> 38:22 <b>show</b> 21:1,5,24 23:10 24:25 <b>showing</b> 21:25 24:22 25:19 34:6 48:1 <b>shrift</b> 49:22	<b>side</b> 35:19 <b>sides</b> 42:24 <b>significance</b> 50:20 <b>significant</b> 46:8 <b>significantly</b> 39:17 47:17 <b>simple</b> 48:9,22 49:19 54:19 <b>simpleminded</b> 54:4 <b>simply</b> 46:8 47:18 <b>single</b> 4:16,18 24:8 24:11 48:7 49:2 <b>sister</b> 51:2,8 53:5 <b>sit</b> 44:25 45:10 47:6 <b>situation</b> 7:3,10,25 11:16 15:2,11 19:10 29:2 38:17 55:9 <b>situations</b> 47:11 <b>sixth</b> 30:24 33:7,22 34:16 36:8 39:3 48:3 53:6 <b>slack</b> 45:20 <b>smartest</b> 12:5 <b>solicitor</b> 1:21 <b>solution</b> 49:3 <b>somebody</b> 17:21 36:11 <b>soon</b> 48:11 <b>sorry</b> 3:25 7:22 30:20 <b>sort</b> 33:1 37:23 51:16 <b>sotomayor</b> 3:25 4:11,14 24:13,18 24:21 25:3 35:10 40:1,16,22 41:1 49:7 52:12,16 54:21,25 55:3,18 <b>sought</b> 10:10 27:24 <b>specific</b> 44:16 <b>specification</b> 44:3 <b>specified</b> 4:3 <b>specify</b> 25:18 <b>speck</b> 26:22 27:9 <b>spend</b> 27:2
---	---	--	---	---



<b>spirit</b> 46:22 <b>spisak</b> 8:3,9 15:21 20:14 28:17 30:8 30:12,18,22 31:1 36:14 43:19 <b>split</b> 20:18 <b>standard</b> 5:21 26:16,25 30:23 33:8 45:6,7 46:4 49:25 50:4 <b>standing</b> 34:15 <b>start</b> 48:17 <b>starting</b> 45:8 <b>starts</b> 30:22 <b>state</b> 4:4 6:8 7:10 7:15 8:6 9:4,11,11 9:16 10:10,11,15 13:6,18,25 14:16 16:25 17:11 26:8 26:16,21 27:17 28:15 30:12,20,21 31:22 32:2,5,16 34:22,24 35:8 36:2 38:10,14 39:22 42:14,18 47:11,16,18 51:10 52:8 53:3,7,9,14 53:21 54:14,18 <b>states</b> 1:1,16 5:24 13:14,20 17:15,24 28:4,10 43:21,22 44:4 54:7 55:2 <b>statute</b> 21:15,23 22:3,11,18,20,24 23:3 27:19 36:10 45:2,2,17,21 46:3 46:4 <b>step</b> 5:10 <b>stephens</b> 1:6 3:4 <b>stone</b> 18:13 <b>stop</b> 18:16 <b>story</b> 54:10 <b>strategic</b> 16:20 17:20 19:14 <b>strickland</b> 16:12 28:9,15	<b>submit</b> 41:23 <b>submitted</b> 56:2,4 <b>subordinated</b> 50:16 <b>substantial</b> 21:5,25 24:22 47:25 <b>substantiality</b> 21:1 22:2 <b>successful</b> 49:13 <b>sufficient</b> 5:17 12:10 30:6 32:23 33:7 34:7,24 45:22 <b>sufficiently</b> 21:13 <b>suggest</b> 32:10 51:14 <b>summation</b> 35:14 <b>superfluous</b> 39:7 <b>support</b> 3:12 16:14 20:2 29:10 54:9 <b>suppose</b> 37:9 42:4 45:14 <b>supposed</b> 37:12 <b>supreme</b> 1:1,16 <b>sure</b> 6:17 20:5 21:16 24:20 47:10 51:6,20,24 54:13 <b>suspect</b> 27:16 <b>system</b> 14:22	44:17 54:4 <b>tells</b> 6:2 44:18 <b>tension</b> 51:16 <b>term</b> 36:17 42:20 53:14 <b>terms</b> 50:9,10 <b>testify</b> 46:25 51:16 <b>tex</b> 1:19,22 <b>texas</b> 1:7 <b>text</b> 22:12,22,25 43:3 <b>thank</b> 29:17,19 53:24 55:25 56:1 <b>thats</b> 5:6,7,9,23 6:16 7:9 9:3,8 12:6 15:10,13,15 18:3 19:11,15 21:2 22:10 26:10 26:21,22 32:13 35:3,7,8 36:5,18 36:18,20 38:4 39:13 40:21,22,25 42:23 44:9,19 46:2 48:7,19 49:2 50:3 54:11 <b>theory</b> 13:22 28:10 <b>theres</b> 5:3,3 6:18,19 6:20 8:24,25,25 15:15 26:14 31:14 35:22 38:6 40:11 43:12 49:9 51:14 52:19 <b>theyre</b> 20:12 29:3 37:22,23 48:2,15 48:20 <b>theyve</b> 20:18 <b>thing</b> 5:2 6:8 9:3 10:5 13:23 15:9 15:16 17:6 19:3 26:7 31:6,6,18 47:18 48:9 54:19 <b>things</b> 8:3 13:13 14:23 15:7 18:1,6 18:7,15 19:4,5,12 28:3 48:6 51:12 <b>think</b> 5:1 7:9,16	12:22 13:6 15:1 17:14 19:21 20:3 20:12,16 22:10,11 22:16 25:5,10 26:5 30:7,8 31:10 37:18,23 38:17 39:18,19 46:8 48:19 51:4,7,9,9 <b>thinking</b> 47:20 <b>third</b> 4:8 18:24 32:21 33:5,6,24 34:6,7,20,21 35:14 41:2 43:2 49:11 <b>thirds</b> 20:19 <b>thought</b> 12:18 19:22 27:25 34:3 36:12 47:22 54:11 <b>threatening</b> 46:24 <b>three</b> 4:18 13:13 16:14 20:19 32:12 32:23 33:1 34:12 34:14 36:16 44:6 <b>throwing</b> 54:18 <b>thrown</b> 35:1 <b>thumbs</b> 17:22,23 <b>tied</b> 25:4 <b>time</b> 8:13 9:1 27:2 27:14 28:20 29:17 55:21 <b>today</b> 7:15 44:25 45:11 <b>told</b> 4:4 <b>top</b> 33:19 35:19 50:22 52:23 <b>totality</b> 5:20 12:10 <b>totally</b> 27:10 29:2 <b>tough</b> 54:15 <b>transgressed</b> 34:16 39:2 <b>transgresses</b> 33:22 <b>treacherous</b> 54:14 <b>treating</b> 20:7 <b>trevino</b> 29:3 <b>trial</b> 10:13,22 11:22 11:25 13:25 16:3	17:1 18:7 19:8 31:4,9 32:15,19 34:25 36:7 37:10 37:11,17,24 38:21 39:2,6,9,10,12,25 46:25 47:6 52:5 53:4,10 <b>triplets</b> 28:16 <b>true</b> 9:8 41:12 <b>try</b> 10:17 48:11 49:13 <b>trying</b> 15:22 27:17 48:21 54:14 <b>turn</b> 21:15 33:5 43:7 <b>turned</b> 12:15 46:19 <b>twice</b> 45:20 <b>two</b> 3:16 4:3,5,6 12:20 16:12,15 18:6 19:4 20:14 22:15 23:9 25:4 30:10 32:15,16,18 34:7,18,19 35:1 35:13 40:11 42:5 43:1,15,16 51:12 53:25 <b>type</b> 19:10
<b>T</b>				
<b>t</b> 2:1,1 47:25 <b>tacit</b> 22:19 <b>take</b> 5:10 6:15 14:10,17 17:10 23:17,17,20 25:16 25:22 26:5 28:20 36:2 37:4,5,17,18 38:11 42:9,10 43:11 52:17 <b>taken</b> 23:8 35:25 36:1,4 37:3 51:10 <b>takes</b> 38:20 <b>talk</b> 28:24 36:11 <b>talking</b> 19:17 42:17 <b>tell</b> 6:8 9:6,9,18 10:16 14:12 28:16				
<b>U</b>				
<b>ultimate</b> 53:15 <b>unaware</b> 38:13 <b>uncle</b> 51:3,8 <b>unconstitutional</b> 7:14 <b>undermine</b> 5:17 12:11 <b>understand</b> 50:19 50:23 <b>understanding</b> 55:22 <b>unitary</b> 28:19,22 <b>united</b> 1:1,16 43:21 43:21 44:4 <b>unnecessary</b> 39:8 <b>unrebutted</b> 53:12 <b>use</b> 16:22,22				

<b>V</b>	54:21	44:23	<b>3</b>
<b>v</b> 1:5 3:4 46:16	<b>ways</b> 30:19 43:5	<b>X</b>	<b>3</b> 2:4 23:12 27:23
<b>vacated</b> 46:18	48:15	<b>x</b> 1:2,11 6:4 8:19	43:22 44:3,9,14
<b>valid</b> 32:16	<b>wednesday</b> 1:13	<b>Y</b>	44:15,17 49:1
<b>valuable</b> 39:5	<b>weightier</b> 39:18	<b>y</b> 6:4 8:19	<b>33</b> 36:13
<b>variety</b> 48:15	<b>went</b> 17:11	<b>yeah</b> 7:23	<b>35</b> 42:19
<b>verdict</b> 5:18 12:11	<b>weve</b> 53:11	<b>year</b> 26:14 38:7	<b>39</b> 37:9,12,19
32:24	<b>whos</b> 50:1	<b>years</b> 3:10 53:14	<b>4</b>
<b>vernacular</b> 16:11	<b>wiggins</b> 8:4,4 19:10	<b>youll</b> 8:10,10	<b>40</b> 37:8
<b>view</b> 13:14,14 20:2	19:22 20:13 28:17	<b>youre</b> 5:5,5,5 7:18	<b>5</b>
35:18 36:3 39:17	28:17 36:15 42:5	9:11,11 12:1,2,2	<b>5</b> 50:25
50:7,14	43:15,16 50:25	12:17,17 31:4	<b>50</b> 27:24
<b>viewing</b> 28:13	51:15	40:5,22 49:12	<b>53page</b> 27:23
<b>violated</b> 46:21	<b>william</b> 1:6	52:18,18,21 55:11	<b>54</b> 2:10
<b>violation</b> 11:1 20:9	<b>willing</b> 52:18	<b>youve</b> 15:2 21:25	<b>6</b>
46:10	<b>win</b> 8:9 13:23 15:4	52:17	<b>6</b> 36:22 43:4 44:25
<b>violence</b> 17:19	20:20 54:16,21,24	<b>Z</b>	45:11 48:24 49:16
<b>virginia</b> 46:17	55:6	<b>z</b> 6:4 8:19	<b>7</b>
<b>W</b>	<b>winner</b> 15:23 16:1	<b>0</b>	<b>8</b>
<b>wait</b> 4:20 35:16	41:12,16,19	<b>01</b> 56:3	<b>8</b> 44:25 45:11 48:25
38:8	<b>wins</b> 6:21 35:13	<b>04</b> 1:17 3:2	49:16
<b>walks</b> 11:21	36:12 37:9 38:19	<b>1</b>	<b>9</b>
<b>want</b> 8:16 14:10	42:1,8	<b>1</b> 44:10,10,17,20,22	<b>90</b> 54:13
16:5,7 21:14	<b>withholding</b> 46:11	<b>100</b> 27:8,20	
22:23 23:4 25:1	<b>witness</b> 11:6 38:22	<b>11</b> 1:17 3:2 22:23	
26:8,12,13 27:15	42:8	25:11,17	
28:19 29:1 38:23	<b>wolf</b> 46:16 49:20	<b>12</b> 56:3	
40:4 45:5 49:3	<b>won</b> 8:2 14:9 15:22	<b>120</b> 6:10	
52:7,18 54:19	15:23,24 16:15,16	<b>137211</b> 1:5 3:4	
55:5,7	26:21 27:6 29:10	<b>15</b> 1:13	
<b>wanted</b> 14:19 15:14	38:9 39:9 40:8	<b>18</b> 26:19 38:6	
17:21 39:13 50:13	49:9,17 51:10	<b>1986</b> 44:22 45:8	
52:5	52:17 54:8 55:12		
<b>wants</b> 25:23 32:20	55:15	<b>2</b>	
34:21,22 41:24	<b>wondering</b> 48:17	<b>2</b> 23:10 26:22	
42:2,11,12 46:1	<b>wont</b> 8:12	<b>2013</b> 26:19	
49:17 50:9 53:17	<b>word</b> 15:15 48:8	<b>2014</b> 1:13	
<b>warden</b> 6:6	<b>words</b> 43:24	<b>22</b> 22:23 23:12	
<b>warrant</b> 35:5	<b>work</b> 37:6	<b>2253</b> 22:22 23:7,14	
<b>washington</b> 1:12	<b>worked</b> 46:15	25:6 43:22 44:3	
<b>wasnt</b> 12:16 18:18	<b>worried</b> 40:6	45:21 49:1	
18:21 41:3	<b>wouldnt</b> 15:1,6	<b>29</b> 2:7	
<b>water</b> 54:19	17:7 18:10 23:19		
<b>waters</b> 54:15	38:25		
<b>way</b> 11:7 16:8 47:3	<b>write</b> 36:24		
	<b>written</b> 18:13 44:20		