

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARK A. BRISCOE AND SHELDON A. :

4 CYPRESS, :

5 Petitioners : No. 07-11191

6 v. :

7 VIRGINIA :

8 - - - - -x

9 Washington, D.C.

10 Monday, January 11, 2010

11

12 The above-entitled matter came on for
13 oral argument before the Supreme Court of the United
14 States at 11:40 a.m.

15 APPEARANCES:

16 RICHARD D. FRIEDMAN, ESQ., Washington, D.C.; on behalf
17 of Petitioners.

18 STEPHEN R. McCULLOUGH, ESQ., Solicitor General,
19 Richmond, Virginia; on behalf of the Respondent.

20 LEONDRA R. KRUGER, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.;
22 on behalf of the United States, as amicus curiae,
23 supporting Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	RICHARD D. FRIEDMAN, ESQ.	
4	On behalf of the Petitioners	3
5	STEPHEN R. McCULLOUGH, ESQ.	
6	On behalf of Respondent	31
7	LEONDRA R. KRUGER, ESQ.	
8	On behalf of the United States, as amicus	
9	curiae, supporting the Respondent	49
10	REBUTTAL ARGUMENT OF	
11	RICHARD D. FRIEDMAN, ESQ.	
12	On behalf of the Petitioner	60
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 (11:40 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 07-11191, *Briscoe v. Virginia*.

5 Mr. Friedman.

6 ORAL ARGUMENT OF RICHARD D. FRIEDMAN

7 ON BEHALF OF THE PETITIONERS

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

10 We ask the Court in this case to take no new
11 ground beyond that established just last term in the
12 *Melendez-Diaz* case, but the stakes of this case are
13 high. If the Court were to reverse *Melendez-Diaz* and
14 hold that a State may impose on the defendant the
15 burden of calling a prosecution witness to the stand,
16 it would severely impair the confrontation right and
17 threaten a fundamental transformation in the way
18 Anglo-American trials have been conducted for hundreds
19 of years.

20 JUSTICE SOTOMAYOR: The State court has
21 interpreted their provision to give the defendant the
22 choice of subpoenaing the witness or asking the State
23 to bring in the witness. Why is that overruling
24 *Melendez-Diaz*?

25 MR. FRIEDMAN: Your Honor, the -- the State

1 courts, since the time of this case -- since the time
2 that these cases were tried, raised the possibility of
3 asking the -- that the defendant could ask the witness
4 to bring -- that the defendant could ask the
5 prosecution to bring in the witness. It doesn't
6 really change anything from a straight subpoena
7 statute in any -- in either event.

8 JUSTICE SOTOMAYOR: Well, how is that
9 different from a notice statute? If --

10 MR. FRIEDMAN: Okay.

11 JUSTICE SOTOMAYOR: If we take the statute
12 as the State supreme court has read it --

13 MR. FRIEDMAN: Right.

14 JUSTICE SOTOMAYOR: -- they say: In my
15 mind, it's a notice statute; tell the prosecutor you
16 either want them to call the witness or you subpoena
17 the witness. That's what the State court has told us.
18 Whether or not you had notice of that interpretation
19 is a separate question.

20 MR. FRIEDMAN: That --

21 JUSTICE SOTOMAYOR: Let's separate out the
22 two questions.

23 MR. FRIEDMAN: Okay, fine, fine. The -- the
24 two aspects that Melendez-Diaz said were wrong with
25 the subpoena statute are both present in this statute

1 even as interpreted by the -- by the State supreme
2 court. That is, nothing in Melendez-Diaz -- I'm
3 sorry, nothing in the Magruder case -- the opinion
4 here suggests that the prosecution would bear the
5 burden of calling the witness to the stand. I think
6 the Magruder case, the decision of the State supreme
7 court is very explicit and goes in accordance --

8 JUSTICE SOTOMAYOR: So that's our first
9 question --

10 MR. FRIEDMAN: That's --

11 JUSTICE SOTOMAYOR: Does the Confrontation
12 Clause require, not just the ability to
13 cross-examine --

14 MR. FRIEDMAN: That's right.

15 JUSTICE SOTOMAYOR: -- but an affirmative
16 obligation to place the witness on the stand?

17 MR. FRIEDMAN: That's correct. That's
18 correct.

19 JUSTICE SOTOMAYOR: Could I just ask you one
20 --

21 MR. FRIEDMAN: Yes. Sure.

22 JUSTICE SOTOMAYOR: Would swearing the
23 witness in and saying to the witness "Is this your
24 report?" and the witness saying "Yes" -- what would be
25 unconstitutional about that, given our case law that

1 says that any prior statements by a witness are
2 admissible once the witness is on the stand or
3 constitutionally admissible once they are on the
4 stand?

5 MR. FRIEDMAN: Right. Right. The cases
6 involve that were California v. Green and United
7 States v. Owens. In both cases, there were questions
8 asked of the witness about what happened. So I do
9 believe -- though it hasn't been resolved in this
10 Court, I do believe that the prosecution should go
11 beyond simply saying "Is this your" --

12 JUSTICE SOTOMAYOR: No, no, no. "Should" is
13 a different question than the one I asked.

14 MR. FRIEDMAN: No. I mean, I think the
15 Constitution -- I think constitutionally, the -- the
16 prosecution would be compelled at least to ask: What
17 is your recollection? Do you endorse this statement?
18 But even if that's not true --

19 JUSTICE SOTOMAYOR: Do you have anything
20 historically or in any case that would suggest that
21 that is a constitutional requirement? I mean, I do
22 accept that there is plenty that says you have a right
23 to be --

24 MR. FRIEDMAN: Right.

25 JUSTICE SOTOMAYOR: -- to confront the

1 witness.

2 MR. FRIEDMAN: Right.

3 JUSTICE SOTOMAYOR: But what would require
4 the prosecutor to actually do more than I just
5 suggested? "Is this your statement? Is this your lab
6 report?"

7 MR. FRIEDMAN: Your Honor, so far as I can
8 tell, it's hardly ever been tried, for the obvious
9 reason that if all the prosecution does is say, "Is
10 this it," and not ask a further question of the
11 witness --

12 JUSTICE SOTOMAYOR: It's not terribly
13 persuasive. I don't disagree with you.

14 MR. FRIEDMAN: Right. It -- well, that's --

15 JUSTICE SOTOMAYOR: It's a matter of trial
16 tactic, but I'm not talking about trial tactic.

17 MR. FRIEDMAN: Yes. Right. But I -- but
18 it's something that prosecutors don't try because they
19 would have to bear the -- the risk. So part of my
20 response is: Well, let them go ahead and try it if
21 they want to.

22 JUSTICE SCALIA: Bear what risk?

23 MR. FRIEDMAN: I'm sorry.

24 JUSTICE SCALIA: Bear what risk? What risk?
25 Bear what risk?

1 MR. FRIEDMAN: Bear -- bear the risk that
2 the -- that the witness has gotten on the stand and is
3 not even asked to recall. Bear the cost of putting a
4 witness on with no recollection.

5 JUSTICE SCALIA: Well, he says, "Is this
6 your lab report and do you stand by it?"

7 MR. FRIEDMAN: "And do you stand by it?" --
8 that's the critical point. That's going beyond the
9 hypothetical, as I understood it from Justice
10 Sotomayor.

11 JUSTICE SCALIA: Oh, I see. So -- okay.

12 MR. FRIEDMAN: But -- but --

13 JUSTICE SCALIA: Yes. I understood the
14 hypothetical to be -- to be otherwise, then.

15 MR. FRIEDMAN: But -- no, no. If it's "And
16 do you stand by it" --

17 JUSTICE SCALIA: Right.

18 MR. FRIEDMAN: -- then that's fine.

19 But I do know of a couple of cases involving
20 child witnesses where they don't ask -- they put the
21 witness on the stand, and they don't ask anything
22 about the events at issue. And in those cases
23 there's -- courts have held that that's -- that's not
24 acceptable. So --

25 JUSTICE SOTOMAYOR: Well, but -- so

1 what difference? That's because there's nothing in
2 evidence about the incident, correct?

3 MR. FRIEDMAN: Well, no. No, then they
4 presented a former statement by the child. So -- so I
5 do think that there is some justification --

6 JUSTICE SOTOMAYOR: And that was a --

7 MR. FRIEDMAN: Yes.

8 JUSTICE SOTOMAYOR: Those were found -- I
9 don't -- were those found as violations of the
10 Confrontation Clause?

11 MR. FRIEDMAN: Those are found to be
12 violations of the Confrontation Clause. The --

13 JUSTICE SOTOMAYOR: Or due process?

14 MR. FRIEDMAN: Confrontation Clause. State
15 v. Rohrich, which is cited in my brief on another
16 point, and Warren, an Illinois appellate case from, I
17 think, just last term.

18 JUSTICE ALITO: It's not clear to me what
19 your answer to these questions is. If all the
20 prosecution does is call the analyst on the stand and
21 admit -- have the analyst provide a foundation for the
22 admission of the report, let's say, pursuant to the
23 hearsay exception for recorded recollection, and does
24 nothing more, would there be a Confrontation Clause
25 problem?

1 MR. FRIEDMAN: And there's -- there's the
2 question, "Is this your report? Do you stand by it?"
3 Then -- then I don't think there is a Confrontation
4 Clause problem, because -- because the prosecution has
5 put the witness on the stand, has asked those
6 questions, and then the witness -- and --

7 JUSTICE ALITO: What's the difference
8 between that situation and the situation in which the
9 report is -- is admitted, subject to -- and the
10 analyst is available, and the defense can question the
11 analyst if the defense wishes to?

12 MR. FRIEDMAN: Well, I think -- I think the
13 difference is that once you ask the question -- "Do
14 you stand by it?" -- then the witness has testified
15 one way or another. And the prosecution, as I say,
16 bears the risk that the witness will not testify in
17 accordance with the prior statement. California --

18 JUSTICE SOTOMAYOR: On the past recollection
19 recorded, the witness doesn't stand by the statement.
20 The witness says: I made the statement, have no
21 current knowledge; I can't stand by it or not stand by
22 it.

23 MR. FRIEDMAN: That's right. I take
24 California v. Green at its word. California v. Green
25 says and Owen follows up and says that if the witness

1 does not testify in accordance with the prior
2 statement, then the defendant has had some of the --
3 has had considerable benefit of cross-examination
4 already. So -- so the prosecution has to -- has to
5 put the witness through that pace to make sure that
6 that happens. Beyond that --

7 JUSTICE SCALIA: I don't understand what you
8 just said. Want to say it again?

9 MR. FRIEDMAN: Yes. California v. Green
10 says that if the witness testifies inconsistently with
11 the prior statement, that the defendant has had the
12 benefit of cross-examination in showing the
13 inconsistency. So -- so Justice Alito asked me what's
14 the difference, and I'm saying a difference, one
15 difference is, that if the witness does not testify in
16 accordance with the prior statement, that's apparent
17 to -- that's apparent to the jury. There are also all
18 the practical differences that we emphasize.

19 JUSTICE SOTOMAYOR: You are asking us now to
20 state something that you admit is in really no
21 constitutional case or historical case, that says the
22 right to confrontation means that the witness has to
23 tell the story, and the form of telling that story has
24 to be a verbal recitation; it can't be past recorded
25 recollection because you just said they have to tell

1 the story. It can't be based on official documents or
2 anything else, because it has to be their story. Am I
3 hearing you wrong?

4 MR. FRIEDMAN: No, I don't believe so. I'm
5 saying that the -- that the witness has to take the
6 stand, has to -- has to testify live, viva voce, face
7 to face, in the time-honored phrases which have always
8 governed testimony in an Anglo-American trial. Then
9 the -- I think the witness has to at least be asked
10 what happened. If the witness says, I don't recall,
11 then the prior statement may be introduced. I'm not
12 --

13 JUSTICE BREYER: What is the --

14 MR. FRIEDMAN: I'm not asking the Court to
15 go beyond anything that has previously been said.

16 JUSTICE BREYER: What is the theory of this?
17 I understand in hearsay, which as we have just seen
18 demonstrated, is very complicated, filled with all
19 kinds of rules --

20 MR. FRIEDMAN: Right.

21 JUSTICE BREYER: -- some of which I may
22 recall and others of which I certainly don't.

23 (Laughter.)

24 MR. FRIEDMAN: Right.

25 JUSTICE BREYER: But the -- the

1 Confrontation Clause, I would have thought, would have
2 picked out the heart of that. So we have Sir Walter
3 Raleigh and Sir Walter Raleigh says, "Bring in
4 witnesses," which they wouldn't. So why shouldn't we
5 say what this clause is about is Sir Walter Raleigh?

6 MR. FRIEDMAN: Well, if --

7 JUSTICE BREYER: Bring in the witnesses.

8 Now, once you bring them in, the defendant can do what
9 he wants. He has had his chance to cross-examine
10 them. End of the matter, and leave the rest up to the
11 hearsay law.

12 MR. FRIEDMAN: I want to emphasize that the
13 Confrontation Clause is about a lot more -- there were
14 nearly 200 years of history between Walter Raleigh and
15 the Confrontation Clause, and what was established is
16 that in an Anglo-American trial witnesses give their
17 testimony live, face to face, and Melendez-Diaz
18 emphasized last term you can't prove the case via an
19 affidavit.

20 So -- so it's -- it's the fundamental
21 question that -- that Crawford establishes --
22 fundamental principle that Crawford establishes is
23 this is the way witnesses testify in our trials:
24 live, in front of the jury, subject to oath and then
25 cross-exam.

1 JUSTICE SOTOMAYOR: Why -- and -- I trust
2 the trial process, and much of your brief was talking
3 about that process --

4 MR. FRIEDMAN: Right.

5 JUSTICE SOTOMAYOR: -- and the fact that
6 it's much more effective when the witness tells their
7 story and you get a chance to cross-examine than if
8 you have to start from the platform of
9 cross-examination. Once a defendant makes it known
10 that a -- he's going to cross-examine a lab
11 technician, don't you think that in the vast majority
12 of cases the prosecutor is going to put that witness
13 on?

14 MR. FRIEDMAN: I --

15 JUSTICE SOTOMAYOR: And if he does or
16 doesn't, why shouldn't we leave it to the normal trial
17 strategy and practice to leave to that prosecutor the
18 burden of non-persuasion, which is what confrontation
19 was about?

20 MR. FRIEDMAN: Right. Yes.

21 JUSTICE SOTOMAYOR: Which is --

22 MR. FRIEDMAN: If -- if the prosecutor is
23 certain that the defendant is going to put the witness
24 on the stand, then -- then the prosecutor has some
25 reason to -- to put the witness on first. The problem

1 is that the -- the defunct Virginia statute puts the
2 burden on the defendant of bringing the witness in,
3 and the defense --

4 JUSTICE SOTOMAYOR: Well -- well, I was
5 starting from a different proposition than you did --

6 MR. FRIEDMAN: Right. I'm sorry -- but --

7 JUSTICE SOTOMAYOR: -- because I think
8 that's a question for your adversaries: How could you
9 have known --

10 MR. FRIEDMAN: Right.

11 JUSTICE SOTOMAYOR: -- that you should have
12 asked the State to bring that witness in?

13 But putting that aside --

14 MR. FRIEDMAN: But --

15 JUSTICE SOTOMAYOR: -- assume we are reading
16 it the way the Court has now.

17 MR. FRIEDMAN: Right. The -- the fact is
18 that under the Virginia statute, given -- and as
19 interpreted by the Commonwealth, too -- given that the
20 defendant has the burden of putting the witness on the
21 stand, defendants rarely exercise that right, because
22 it's a corrupted right, because it isn't nearly as
23 valuable, as I think Your Honor understands, as the
24 right to stand up and cross-examine a witness who has
25 actually just testified.

1 I don't think that the right given by the
2 Virginia statute is -- the former Virginia statute is
3 actually the right to cross-examine. It's not in form
4 cross-examination, and it's not in substance
5 cross-examination. It's a right to make the witness
6 the defendant's own, and that's the way -- that's the
7 way the statute is -- is worded.

8 JUSTICE GINSBURG: Mr. Friedman, one of the
9 problems that has been brought up is that this is an
10 inordinate expense, and you're wasting the time of the
11 analyst. Do you recognize any economy -- for example,
12 that the analyst could testify from the lab, have
13 video conferencing, and so the analyst, while the
14 prosecutor must call her, can testify from the lab
15 instead of coming down to the courthouse?

16 MR. FRIEDMAN: That -- that is a --
17 certainly a possibility, at least on consent of the
18 defendant, and some States, including my own State of
19 Michigan, has been experimenting with that. And I
20 think that's a plausible possibility.

21 Now, if the defendant were to insist on --
22 on live testimony, that is an open -- that's an open
23 question as to whether video testimony would be
24 acceptable. This Court some years ago refused to
25 transmit to Congress a proposed amendment to Federal

1 Rules of Criminal Procedure, and the majority in a
2 statement by Justice Scalia said there is a virtual
3 satisfaction of the confrontation right, not a real
4 satisfaction.

5 So the matter as to whether it could be done
6 without consent hasn't been satisfied -- hasn't been
7 determined. But certainly on consent it could, and in
8 many cases I believe the defendants -- that those
9 defendants who do want confrontation would be
10 perfectly willing to accept video.

11 But I do -- I do want to respond also to the
12 -- the premise. I -- I believe that sufficient data
13 is now available to show rather clearly that the
14 expense is not inordinate.

15 JUSTICE ALITO: How can you say that? We
16 have an amicus brief from 26 States plus the District
17 of Columbia arguing exactly the contrary.

18 MR. FRIEDMAN: Yes, I --

19 JUSTICE ALITO: They say that there is a
20 very substantial category of cases in which defendants
21 really have no interest whatsoever in contesting
22 either the nature or the quantity of drugs involved,
23 but they will refuse to stipulate to those things
24 simply for the purpose of putting a financial burden
25 on the prosecution, because they know, if they do

1 that, it may be helpful for them in getting a better
2 plea bargain, plus there is a certain risk that the
3 analyst will not show up, and they will get the
4 benefit of that.

5 MR. FRIEDMAN: So, Your Honor, I think that
6 what the -- the States' amicus brief shows is that
7 there are -- there are a lot of drug prosecutions, and
8 there are a lot of drug analyses, and then there is
9 this speculation about the type of gamesmanship that
10 you have mentioned. But if we look for hard data,
11 there is nothing supporting that.

12 So let's look at a couple of jurisdictions
13 that have perfectly valid notice-and-demand rules.
14 Ohio -- it's less than one appearance per lab analyst
15 per month. That is in the State lab. Less than one
16 appearance per month.

17 JUSTICE ALITO: If this is not a burden on
18 these 26 States plus the District of Columbia, why are
19 they bothering to make this argument? Just for
20 amusement?

21 MR. FRIEDMAN: I'm sure not for amusement.
22 I think there's a certain amount of solidarity. I'm
23 sure that they would rather not have whatever expense
24 there is. But, frankly, I think a large part is that
25 they recognize that the defunct Virginia statute is an

1 impairment to the confrontation right and makes it
2 harder for defendants. It makes -- it makes it less
3 likely that the confrontation right is going to -- is
4 going to be invoked.

5 Let's look at the District of Columbia. The
6 District of Columbia, it's about -- it's about a half
7 a person a year in extra expense caused by lab techs
8 having to come and testify.

9 That's -- that is not a large burden for the
10 District of Columbia, and in fact, the District of
11 Columbia -- the lab that services the District of
12 Columbia has gotten by with five fewer technicians
13 than it did before the change.

14 CHIEF JUSTICE ROBERTS: But I assume you've
15 picked the best example for you. D.C. is a small
16 place. You go to a big State, and the lab is not
17 always right next door.

18 MR. FRIEDMAN: Your Honor, I -- I'm just
19 little old me, and I just picked what I could get.
20 And, frankly, the example I picked was because the
21 Solicitor General's brief had data on the District of
22 Columbia, so I asked some more questions. That's why
23 I got -- that's why I got the District of Columbia.
24 Ohio -- I asked because they are a neighboring State,
25 and I was able to get some information.

1 JUSTICE BREYER: You could have -- you could
2 have hearsay that is not prepared for testimony.
3 There are all kinds of categories. And suppose, in
4 your case, this hearsay of business record or --

5 MR. FRIEDMAN: Right.

6 JUSTICE BREYER: And how often will you say:
7 I understand it's admissible, but I would like as well
8 to call the witness who prepared it. Will you do that
9 very often?

10 Suppose you learn that that witness is -- is
11 4,000 miles away, so you say, I'd like to call this
12 witness, and you know perfectly well that it's going
13 to be virtually impossible for that witness to be
14 produced. What happens?

15 MR. FRIEDMAN: We are talking about
16 non-testimonial hearsay?

17 JUSTICE BREYER: I'm trying to think of
18 something that's hearsay, and --

19 MR. FRIEDMAN: But --

20 JUSTICE BREYER: -- and what I'm trying to
21 figure out --

22 MR. FRIEDMAN: Yes.

23 JUSTICE BREYER: -- is will defense
24 attorneys, if they have the right under the
25 Constitution to insist that a lab technician be

1 present, in cases where they happen to know that lab
2 technician has left the job and is married and is
3 reliving in a distant State, say okay, let's call her.
4 And that way the prosecution really cannot present the
5 case except at inordinate expense.

6 And I'm concerned about that --

7 MR. FRIEDMAN: Right.

8 JUSTICE BREYER: -- but I don't see quite
9 how to deal with it, how much of a problem it is, and
10 the impact on this particular situation.

11 MR. FRIEDMAN: I -- I don't think it's a
12 significant problem, and I do want to say -- I didn't
13 -- I didn't select data. I just got -- presented the
14 data on the States that I had, and my own State of
15 Michigan --

16 JUSTICE SCALIA: Mr. Friedman, aren't there
17 States that have been proceeding this way even before
18 we came down with our opinion?

19 MR. FRIEDMAN: Absolutely, absolutely,
20 including my own State.

21 JUSTICE SCALIA: And which States are they?

22 MR. FRIEDMAN: They -- well, they include my
23 own State of Michigan; they include the State of New
24 York --

25 JUSTICE SCALIA: And they are not under

1 water, are they?

2 MR. FRIEDMAN: The problems of the State of
3 Michigan are not attributable to the use of this
4 procedure, no.

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: Your answer to
7 Justice Breyer has to be, of course, you would insist
8 that the person be called. It would be malpractice
9 for you not to.

10 MR. FRIEDMAN: It -- it is -- yes, but it's
11 not a significant problem, and one reason it's not a
12 significant problem is that the possibility of a
13 deposition is always --

14 JUSTICE BREYER: I don't know except
15 anecdotally, but Massachusetts seems to be having huge
16 problems, reported anecdotally, with the --

17 MR. FRIEDMAN: Not -- not according to --
18 not according to the chief of the -- chief trial
19 counsel, Suffolk -- the Suffolk district attorney's
20 office --

21 JUSTICE BREYER: Rouse -- is that --

22 MR. FRIEDMAN: Excuse me.

23 JUSTICE BREYER: The woman, Barbara --
24 Barbara Rouse?

25 MR. FRIEDMAN: In my reply brief on page 27,

1 I quote Patrick Hagan, who says -- who says: "The sky
2 has not fallen; we can do this very well."

3 JUSTICE BREYER: And then there are
4 conflicting reports in the newspapers, but I don't
5 know.

6 MR. FRIEDMAN: It's -- and, of course, there
7 can be an adjustment period, but -- but States can
8 adjust. I think the -- the simplest answer to your
9 question, Justice Breyer, is the use of depositions,
10 and I think prosecutors probably have been underusing
11 depositions. But -- but if a lab tech is about to
12 retire and that lab tech has done a test that is about
13 to be used, then take the deposition.

14 JUSTICE BREYER: What happens if the lab
15 is -- is divided into four or five parts and there is
16 several different machines and we have different
17 people at different times using these different
18 machines and performing different operations and each,
19 at the end, certifies that the red light was on or it
20 was this or it was that? Now, do we have to call all
21 those people?

22 MR. FRIEDMAN: No, I don't believe you have
23 to call all those people.

24 JUSTICE BREYER: Why not? Each of them --

25 MR. FRIEDMAN: I do believe that there has

1 to be --

2 JUSTICE BREYER: Each of them looked at a
3 special part. Each of them said --

4 MR. FRIEDMAN: Right.

5 JUSTICE BREYER: -- that it was this or
6 that, and in respect to each of those statements, it's
7 this or that. That is hearsay.

8 MR. FRIEDMAN: Right. The problem, of
9 course, isn't hearsay. The problem is -- the only
10 question is --

11 JUSTICE BREYER: No, no, it's no
12 confrontation because in this instance the hearsay
13 prevents the confrontation.

14 MR. FRIEDMAN: Right. The -- the
15 prosecution has to present the testimony of witnesses.
16 It has to present the testimony live. Depending on
17 how the lab is organized -- usually, labs can organize
18 so that only one person needs to -- needs to present.

19 In any event, of course, the State is
20 acknowledging that, if the defendant brings -- demands
21 they have to bring in the witnesses, that's not at
22 issue.

23 JUSTICE BREYER: Your answer to my question
24 is, if a laboratory is so organized so that six or
25 seven people perform different steps of the operation,

1 if it is organized in that way, all of them must be
2 brought?

3 MR. FRIEDMAN: I -- I don't believe so. I
4 believe --

5 JUSTICE BREYER: You don't believe so, but
6 you gave me an answer saying they did have to, so --
7 because you said they could organize differently. So
8 now explain to me why they don't.

9 MR. FRIEDMAN: But even if -- even if they
10 are organized in that way, for instance, if one person
11 observes all the -- all the procedures, that's
12 sufficient. Apart from that, as Melendez-Diaz
13 indicates, it's up to the -- it's up to the State to
14 decide what the evidence they are going to present is,
15 whether --

16 JUSTICE KENNEDY: Suppose one person doesn't
17 observe all the procedures. One person prepares the
18 sample, another person puts it on the paper, another
19 person reads the machine, another person calibrates
20 the machine.

21 MR. FRIEDMAN: Yes. Right. Well, I think
22 Melendez-Diaz indicates that it's up to the State to
23 determine what the -- the evidence that's going to be
24 presented, and there may be gaps. I do want to
25 emphasize that this is an issue that --

1 JUSTICE KENNEDY: No, no, no. The evidence
2 is presented, and the test comes out so -- positive,
3 so that the gun fires or that it's a drug or that it's
4 a DNA sample. Can the conclusion be presented by one
5 witness from the lab, when that witness did not
6 observe all of the procedures?

7 MR. FRIEDMAN: I think -- I think that there
8 probably has to be a witness who has observed the
9 procedures. If I am -- and that's an issue that will
10 be presented to the Court, we can be pretty certain.
11 I think that issue is entirely orthogonal to the issue
12 here because the Commonwealth is acknowledging --

13 CHIEF JUSTICE ROBERTS: I'm sorry. Entirely
14 what?

15 MR. FRIEDMAN: Orthogonal. Right angle.
16 Unrelated. Irrelevant.

17 CHIEF JUSTICE ROBERTS: Oh.

18 JUSTICE SCALIA: What was that adjective? I
19 like that.

20 MR. FRIEDMAN: Orthogonal.

21 JUSTICE SCALIA: Orthogonal?

22 MR. FRIEDMAN: Right, right.

23 JUSTICE SCALIA: Ooh.

24 (Laughter.)

25 JUSTICE KENNEDY: I knew this case presented

1 us a problem.

2 (Laughter.)

3 MR. FRIEDMAN: I should have -- I probably
4 should have said --

5 JUSTICE SCALIA: I think we should use that
6 in the opinion.

7 (Laughter.)

8 MR. FRIEDMAN: I thought -- I thought I had
9 seen it before.

10 CHIEF JUSTICE ROBERTS: Or the dissent.

11 (Laughter.)

12 MR. FRIEDMAN: That's a bit of -- a bit of
13 professorship creeping in, I suppose.

14 But the Commonwealth is acknowledging that
15 they have to bring in witnesses if the -- if the
16 defense demands, so this is another issue as to who
17 are -- who are the witnesses. And it's --

18 JUSTICE GINSBURG: But, in your view, it
19 wouldn't satisfy the Confrontation Clause if, say, the
20 supervisor shows up and said that this is -- this is
21 the way the analysts operate and describes the
22 procedures.

23 MR. FRIEDMAN: In my view, it wouldn't, but
24 if I'm wrong, it doesn't change this case whatsoever.
25 It does not change this case whatsoever. It has

1 nothing to do with the issue here. The issue here is
2 -- is the witnesses who are going to testify and how
3 much they -- they testify, and I want to --

4 JUSTICE BREYER: Well, the reason that I ask
5 is because floating in the back of my mind is -- is if
6 -- (a) does the Confrontation Clause apply?

7 MR. FRIEDMAN: Right.

8 JUSTICE BREYER: And if the answer to (a) is
9 yes, then are there different kinds of implementation
10 rules in different areas where there are other signs
11 of security, where there are other reasons for
12 thinking it's not bad testimony? That line is not
13 something that's necessarily workable, and -- but I
14 brought it up to try to think about it.

15 MR. FRIEDMAN: Yes. I think -- I think it's
16 an interesting question, and it's question 3 in the
17 evidence exam that I am just grading, in fact. But I
18 think that's an issue that the Court will have to
19 resolve.

20 And, as I say, my views are what they --
21 what they are, but if you reject my views on that, it
22 doesn't change this case whatsoever.

23 What I think is important to recognize is
24 how fundamental a transformation in the Anglo-American
25 trial is threatened if -- if the Court were to hold

1 that the prosecution can present an affidavit and
2 leave it to the defendant, if he dares, to put the
3 witness on the stand.

4 JUSTICE ALITO: Well, does that square with
5 where we started out? We have situation A, where the
6 prosecutor calls the lab analyst, and the lab analyst
7 says, this is my report, and I stand by it, period.
8 Now, it's up to the defense to cross-examine. That's
9 situation A.

10 Situation B is the report is admitted
11 without the analyst present, but the defense can then
12 -- without the analyst on the stand --

13 MR. FRIEDMAN: Right.

14 JUSTICE ALITO: But the defense can then
15 cross-examine the analyst.

16 MR. FRIEDMAN: I wouldn't call that
17 cross-exam --

18 JUSTICE ALITO: There's such a slight
19 difference between those two situations. Now, how is
20 that a fundamental transformation of the way
21 Anglo-American trials are conducted?

22 MR. FRIEDMAN: It's fundamental
23 transformation because the prosecution can present a
24 stack of affidavits, and they wouldn't even have to be
25 affidavits. They could just be signed -- they could

1 just be statements. It could present videotapes. It
2 could present audiotapes. It could craft those and
3 rehearse those behind the scene. It could present
4 those to the trial --

5 JUSTICE ALITO: No. Let's just not get
6 beyond the facts of this case, where all -- all that
7 we are dealing with is a -- an analyst's report
8 relating to the -- the nature of the substance that
9 was tested and, if it's a controlled substance, the
10 amount. That's it. It doesn't extend to anything
11 else, videotapes or anything more. There's such a
12 slight difference between those two situations.

13 MR. FRIEDMAN: I think there's an enormous
14 difference in -- in impact. It's an enormous impact,
15 as I've emphasized in my brief, because of the
16 impairment of the ability to examine.

17 I don't believe it's cross-examination. In
18 practice, it is -- if the defendant said, I don't want
19 to cross-examine, but I still insist that the witness
20 get up on the stand and let's see what the witness can
21 do -- and the Commonwealth makes no attempt to
22 distinguish between these witnesses and other
23 witnesses for what is -- what is satisfactory
24 confrontation. It says: This is good confrontation.
25 He could do it with all witnesses.

1 If the Court pleases, I will reserve the
2 balance of my time.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 Mr. Friedman.

5 MR. FRIEDMAN: Thank you.

6 CHIEF JUSTICE ROBERTS: Mr. McCullough.

7 ORAL ARGUMENT OF STEPHEN R. McCULLOUGH

8 ON BEHALF OF THE RESPONDENT

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

11 I think an appropriate place to start would
12 be how the Supreme Court of Virginia construed the
13 statute and get past that and into the confrontation
14 issue.

15 The first thing I would note there is that
16 the Petitioners simply have not challenged the
17 decision of the -- the interpretation of the Supreme
18 Court of Virginia that it placed on the statute. So I
19 think, to the extent that they are now, for the first
20 time in their reply brief, trying to raise a separate
21 due process issue, that the construction of the court
22 was so unreasonable that it violates due process, it's
23 far too late in the day to do that. So I think the
24 Court --

25 JUSTICE SOTOMAYOR: It goes -- that goes to

1 the waiver question.

2 MR. McCULLOUGH: Right.

3 JUSTICE SOTOMAYOR: How did they know at
4 trial that they were supposed to say to you: I don't
5 want a subpoena; you bring them in.

6 MR. McCULLOUGH: I think the -- the way the
7 Supreme Court of Virginia construed the statute is
8 perfectly sensible. What it says -- and the key
9 phrase is on page 2 of our brief -- that "no" --
10 excuse me -- "such witnesses shall be summoned and
11 appear at the cost of the Commonwealth." And unlike
12 some statutes that say the defendant shall subpoena or
13 shall summon -- for example, like the Idaho and the
14 North Dakota statutes that the Petitioners cite --
15 they are express in saying it has to be the defendant
16 who issues a summons. This just says "shall be
17 summoned."

18 In a criminal trial at the time these
19 Petitioners were being tried, there were two parties
20 that have the authority to issue summons. One was the
21 clerk of court; that is, a defendant would go to the
22 court and say: These are my witnesses; have them
23 produced for trial on this date. And the other was
24 the Commonwealth. So the statute simply doesn't say
25 it has to be the Commonwealth, it has to be the

1 defendant. It's silent. The Supreme Court of
2 Virginia has a long history of construing statutes in
3 a way that obviates a constitutional problem.

4 JUSTICE SOTOMAYOR: But you're -- you're
5 still begging the question. How -- they did what any
6 reasonable defendant would do and say: I object to
7 the admission of this lab report; I have a right under
8 the Confrontation Clause to have the -- the lab
9 technician here.

10 And the Commonwealth court said, no, you
11 don't.

12 MR. McCULLOUGH: Right.

13 JUSTICE SOTOMAYOR: And so did the court on
14 appeal.

15 How did they know that this was a notice-
16 and-demand statute as opposed to a subpoena statute?

17 MR. McCULLOUGH: I think it was incumbent on
18 counsel to raise the issue exactly like counsel for
19 the defendant did in the Grant case. And I think it's
20 noteworthy that in the Grant case the -- the motion
21 was filed well in advance of trial, on November 2nd,
22 2007, before the Supreme Court of Virginia ever
23 construed the statute in this fashion. And so the
24 fact that a statute may be susceptible to more than
25 one interpretation doesn't obviate the need for

1 counsel to take the steps that are necessary to
2 protect the right.

3 JUSTICE SOTOMAYOR: Could I ask you: If we
4 were to -- how do we articulate a rule, or do we need
5 to, that would take care of the fears of your
6 adversary that trials would become trials by
7 affidavit, that the -- that prosecutors will choose to
8 put all witnesses on -- by videotape, by affidavit, by
9 deposition, whatever mode they choose except bringing
10 them into court -- and forcing defendants then to call
11 the witnesses and do a what's -- what I call a
12 cold-cross?

13 What rule would we announce in this case --

14 MR. McCULLOUGH: I think --

15 JUSTICE SOTOMAYOR: -- that would avoid --
16 what constitutional construction of the Confrontation
17 Clause would we issue that would protect against that?

18 MR. McCULLOUGH: I think there are several
19 constitutional, legal, and practical considerations
20 that make this --

21 JUSTICE SOTOMAYOR: No, no. Forget the
22 practical. Talk about the legal, constitutional.

23 MR. McCULLOUGH: Right. Constitutionally,
24 there are two obstacles to a wholesale type of trial
25 system where the prosecution would simply present a

1 stack of affidavits.

2 The first of those is the Due Process
3 Clause, which -- for example, in these child witness
4 cases, what a number of courts have held is that it's
5 going to inflame the jury against the defendant if a
6 videotape is introduced and then the defendant is
7 called -- forced to call the witness to the stand.
8 And that's simply not the case with these types of
9 witness. So the Due Process Clause itself puts the
10 brakes on the type of wholesale at-trial --

11 JUSTICE SCALIA: They're trial witnesses.
12 Anything else?

13 MR. McCULLOUGH: Another is the fact that
14 under the Confrontation Clause, the cross-examination
15 has to be effective. And so if the prosecution on the
16 day of trial dumps a series of affidavits on the
17 defense, it's going to be pretty difficult for the
18 defense to be in a position to effectively
19 cross-examine.

20 JUSTICE SCALIA: No, just one or two. Just
21 one or two affidavits. Or it -- the court has a rule
22 you have to provide those affidavits several weeks
23 before trial. That would be okay?

24 MR. McCULLOUGH: I think, under the --

25 JUSTICE SCALIA: We'd have a whole

1 European-type trial, right? It would be trial by
2 affidavit.

3 MR. McCULLOUGH: Right. I don't think the
4 Confrontation Clause, in terms of what it's
5 historically intended to protect, blocks that
6 scenario.

7 I think the key to the Confrontation Clause,
8 what this Court has said for a long time, turning to
9 the history of the clause, is that it's designed to
10 protect the reliability of the government's evidence.
11 And the way it does that is by subjecting that to the
12 crucible of cross-examination, face to face, of live
13 witnesses. And this statute protects exactly that;
14 that is, the defendant says he wants the witness there
15 --

16 JUSTICE SCALIA: It does more than that. It
17 does more than that. It is the prosecution that has
18 had to place the witness on the stand. It has not
19 been up to the defense to say, oh, no, I object to
20 this affidavit, I would like you to bring -- no. The
21 prosecution has to bring in the witness. That has
22 been what the Confrontation Clause has meant.

23 MR. McCULLOUGH: We agree that we have to
24 produce the witness for court, but we see little
25 constitutional --

1 JUSTICE SCALIA: No, you don't agree with
2 that. You say you don't have to do it unless the
3 defendant objects and issue -- gets a subpoena issued.

4 MR. McCULLOUGH: Well, we agree that if the
5 defendant does provide the notice, as with the notice-
6 and-demand statute, that it -- that it's our burden to
7 make sure that witness is there. And if -- as the
8 statute provides, the witness has to be summoned and
9 appear.

10 So this statute has always been strictly
11 construed against the prosecution. If it fails to do
12 exactly what the statute requires, that cuts against
13 the prosecution. So the witness does have to appear.

14 JUSTICE SCALIA: How is that clear from the
15 statute?

16 MR. McCULLOUGH: I'm sorry.

17 JUSTICE SCALIA: How is that clear from the
18 statute? It just says that a subpoena shall issue.
19 What if a subpoena issues and nobody comes?

20 MR. McCULLOUGH: Right. And it -- the fact
21 that the prosecution -- excuse me, that the statute is
22 interpreted strictly against the prosecution comes
23 from several decades of jurisprudence from the Supreme
24 Court of Virginia, and we cite those cases on page 1
25 our brief.

1 JUSTICE SCALIA: A strict construction of
2 statutes in general, or a strict construction of this
3 provision?

4 MR. McCULLOUGH: This particular -- this
5 particular statutory scheme. For example, if the --
6 19.2-187, the statute that precedes this, says that it
7 has to be filed 7 days before the trial. And if it's
8 filed 6 days, forget it, you have to bring in a live
9 witness.

10 JUSTICE SCALIA: I'm talking about the
11 specific issue of the person subpoenaed not appearing.
12 Do you have a case?

13 MR. McCULLOUGH: No, I don't have a case --

14 JUSTICE SCALIA: So we don't really know.

15 MR. McCULLOUGH: -- but I -- but I think the
16 answer follows inexorably --

17 JUSTICE SCALIA: I don't know how -- how
18 strict construction gets you to the -- to the result
19 that when it is the defendant who has to take the
20 initiative to get the person brought in, if the person
21 doesn't show up, it's -- it doesn't fall on the
22 defendant; it falls on the prosecution. I don't see
23 how strict construction gets you there.

24 MR. McCULLOUGH: The -- the Grant case, for
25 example, which our Court of Appeals of Virginia said

1 was simply was an application of the holding in the
2 Magruder decision. There the defendant did -- well in
3 advance of trial, sent notice to the Commonwealth and
4 said, I want the witness there. The Commonwealth
5 didn't get the subpoena out. So that was the first
6 part of that, "shall be summoned." And the court of
7 appeals said you should never have allowed this in,
8 without the live witness being present.

9 And so what -- although Grant didn't address
10 the appear part, the same answer is true; that is, the
11 defendant says, I want the witness there; the
12 Commonwealth issues a summons, but the witness doesn't
13 appear. It's the same result.

14 JUSTICE BREYER: Well, I think that
15 underlying this is a fairly simple problem,
16 conceptually. Imagine we have Sir Walter Raleigh at
17 trial, and there's an affidavit for missing witness A
18 and witness B and witness C, and they are over in a
19 room somewhere, whether they were treated badly or
20 not, and they have written these pieces of paper. In
21 they come.

22 And Walter Raleigh says: "Bring me the
23 witness." Now, suppose they had trotted him out, and
24 he cross-examined him. Still, those pieces of paper
25 came in, and they weren't cross-examined. And so what

1 do we do about that? They weren't cross-examined, and
2 how did they get in here?

3 MR. McCULLOUGH: I think your question goes
4 to the very heart of why we have the Confrontation
5 Clause. It wasn't because of this formalistic order
6 of proof that our modern trials have. And -- and one
7 thing that makes this case conceptually difficult is
8 we are so accustomed to this clean order of
9 presentation -- that -- that that's how we have all
10 tried our cases, that's how we are used to seeing
11 them, but that's not the heart of the Confrontation
12 Clause.

13 The Confrontation Clause is because, for
14 example, the colonists were subject to anonymous --

15 JUSTICE BREYER: As I read this statute, it
16 does let in that piece of paper.

17 MR. McCULLOUGH: It does. But --

18 JUSTICE BREYER: And so why then, by
19 analogy, isn't the statute bad?

20 MR. McCULLOUGH: Well, because --

21 JUSTICE BREYER: If -- unless you -- unless
22 you have some special kind -- I mean, you'd have to
23 some special -- specially reliable evidence that sort
24 of fell within the Confrontation Clause but not
25 totally. And that's what I -- the more I think about

1 that, the harder that one is to do.

2 MR. McCULLOUGH: I think there are --

3 JUSTICE BREYER: So -- so --

4 MR. McCULLOUGH: There are characteristics,
5 of course, to this particular type of evidence that
6 were debated in this Court's Melendez-Diaz opinion
7 that make this procedure certainly more appropriate,
8 and one of those is, these -- what -- functionally
9 what you are doing when you have this witness on the
10 stand is either past recollection recorded or past
11 recollection refreshed, because they are doing
12 approximately 900 of these certificates a year. They
13 are largely fungible things like -- like crack cocaine
14 or powder cocaine. And so we're miles from the type
15 of scenario where --

16 JUSTICE BREYER: Well, to put my chips on
17 the table, which you probably understand, I thought
18 the reliability of this evidence in the mine run of
19 cases was such, and the distance from Sir Walter
20 Raleigh was sufficiently great, that it fell outside
21 the scope of the Confrontation Clause for those two
22 reasons, but mine was a dissenting opinion.

23 MR. McCULLOUGH: Right. I --

24 JUSTICE BREYER: So, therefore, what do I
25 do?

1 (Laughter.)

2 MR. McCULLOUGH: Well, I think, though, even
3 -- even going back to the very heart -- the historical
4 heart of this clause, the problems for these colonists
5 was anonymous accusers and absentee witnesses. That's
6 -- that's why -- they were enraged because of this
7 deeply unfair trial procedure. It wasn't because, for
8 example, a harbor master might be called in and
9 records of what ships came in for these colonists who
10 were in the vice admiralty courts, and some paper is
11 introduced about what ships came in, and then they get
12 an opportunity to cross-examine them before the
13 prosecution has asked any questions of the -- the
14 harbor master.

15 That's not the problem, that the
16 Confrontation -- Confrontation Clause --

17 JUSTICE SCALIA: Well, the problem you
18 describe, the hearsay rule would have solved that
19 alone, wouldn't it?

20 MR. McCULLOUGH: Well, that's one of the
21 practical --

22 JUSTICE SCALIA: So -- so what's left for
23 the Confrontation Clause to do?

24 MR. McCULLOUGH: Well, the Confrontation
25 Clause is designed to ensure -- the core of it -- and

1 we agree with this -- is what this Court has said for
2 a long time, a face-to-face encounter with a witness
3 who is cross-examined face to face, under oath.

4 JUSTICE GINSBURG: But it doesn't have to
5 happen in the prosecutor's case. In other words, the
6 prosecutor puts in the reports and rests. And the
7 defendant says, there wasn't sufficient evidence; I
8 move to dismiss the case. It couldn't be dismissed at
9 that point. The prosecutor would prove its case by
10 the affidavit alone.

11 MR. McCULLOUGH: Right. But first -- a
12 couple points in response.

13 First of all, the statute doesn't say at
14 what point the defendant gets to treat this witness as
15 an adverse witness. It just says the report comes in,
16 and then the defendant can call the witness as an
17 adverse witness. And the Supreme Court of Virginia
18 deliberately left the question of the order of proof
19 unresolved, because it viewed those things as a due
20 process issue. So I don't think it's axiomatic under
21 the statute, although it's possible, that the
22 defendant would conduct a cross-examination during his
23 case.

24 But -- but beyond that, the Confrontation
25 Clause isn't designed to constitutionalize Federal

1 Rule of Criminal Procedure 29 or a motion to strike.
2 The defendant could still -- in Virginia procedure,
3 it's a motion to strike. The defendant could still
4 make that motion at the close of all the evidence.

5 JUSTICE SCALIA: And it's still not clear --
6 not clear under the statute that if the witness
7 doesn't show up, it's the prosecution that bears the
8 burden.

9 MR. McCULLOUGH: No, I think that's very
10 clear.

11 JUSTICE SCALIA: Why is that clear?

12 MR. McCULLOUGH: Under both the plain
13 language of the statute and the way it's been
14 construed adversely to the Commonwealth. The plain
15 language of the statute is the witness shall be
16 summoned and appear. So there's a requirement of
17 appearance. And if the defendant asks the prosecutor
18 to summon the witness, the witness then has to appear.
19 And going -- and we cite some of these cases, again on
20 page 1 of our brief.

21 JUSTICE SCALIA: It doesn't say what the
22 consequence of his not appearing is. That the -- that
23 the written testimony is -- stands and is admitted,
24 without the opportunity to cross-examine the witness?

25 MR. McCULLOUGH: The consequence emerges

1 from this line of cases, Justice Scalia, that if the
2 -- the statute requires the witness to appear, and if
3 the Commonwealth doesn't do exactly what the statute
4 requires, a live witness -- or excuse me, the
5 certificate does not come in without the live witness.
6 Just like, if you don't -- the statute says file 7
7 days before court.

8 JUSTICE SCALIA: No, the prosecutor issues
9 the subpoena.

10 MR. McCULLOUGH: Right. And that would --

11 JUSTICE SCALIA: The witness does not show
12 up.

13 MR. McCULLOUGH: Right.

14 JUSTICE SCALIA: I'm not talking about fault
15 on the part of the prosecutor. I'm talking about the
16 fact that the witness has died, has fled the State, is
17 simply not available.

18 MR. McCULLOUGH: But I think the language
19 answers that. The witness has to appear. The statute
20 says shall be summoned, and the requirement is that
21 the witness appear. If the witness does not appear --

22 JUSTICE SCALIA: Of course, he is required
23 to appear. But what happens if he doesn't appear?

24 MR. McCULLOUGH: I'm sorry, but we seem to
25 be going in -- in circles. And I want to answer your

1 question.

2 JUSTICE SCALIA: No, we're not going in
3 circles at all. You -- you appeal to the language
4 that the witness shall appear as resolving what
5 happens when he doesn't, and it doesn't resolve that.
6 It just says he must appear. And if he doesn't appear,
7 what happens?

8 MR. McCULLOUGH: If he doesn't appear, the
9 Commonwealth has failed to do what the statute
10 requires, which is to make sure the witness appears.
11 And if the Commonwealth fails to do exactly what the
12 statute requires, it must -- it cannot rely on a piece
13 of paper.

14 JUSTICE SCALIA: Well, I don't see the
15 statute requiring that. It requires that of the
16 witness, he shall appear.

17 MR. McCULLOUGH: And -- I mean, to the
18 extent there's -- there's any question about that, I
19 don't think it's a matter that this Court should
20 resolve in the first instance. I think it would be a
21 matter of remand to the Supreme Court of Virginia to
22 determine what -- what the statute requires in that
23 instance.

24 Let me just spend a moment since we've
25 talked about the costs. Our experience in Virginia,

1 we -- of course, we've repealed this statute. This
2 Court signaled in Melendez-Diaz what a safe harbor
3 was, with notice and demand, and so we went there.

4 And what we have seen under our new statute
5 is rampant demands for the witness to appear, followed
6 by: Oh, well, he's here; I'll stipulate. Or no
7 questions of the witness. So our experience under
8 this old statute compared to our new one is that we
9 had far more -- or far less under our old statute of
10 this sort of tactical demands for confrontation.

11 JUSTICE SCALIA: How new is the new one?

12 MR. McCULLOUGH: It went into effect
13 August 21, 2009.

14 JUSTICE SCALIA: Okay. The -- the reply
15 brief of -- of the Petitioners mentions that -- that
16 the same thing, a spike occurred in other
17 jurisdictions after Melendez-Diaz, but then the spike
18 went down, after -- after 6 months or a short period.

19 MR. McCULLOUGH: The spike has plateaued
20 somewhat in Virginia, but we are still seeing
21 extensive gamesmanship. And I think --

22 JUSTICE SCALIA: What is peculiar about
23 Virginia that -- or what is peculiar about Michigan or
24 the other States that have this system and somehow are
25 able to live with it?

1 MR. McCULLOUGH: Well, I think --

2 JUSTICE SCALIA: Virginia criminals are
3 nastier; is that it?

4 (Laughter.)

5 MR. McCULLOUGH: No, I -- I think -- I -- I
6 don't know that -- that there's anything particularly
7 different about Virginia criminals. I will say that
8 this type of statute -- as this Court noted in
9 Melendez-Diaz, defense attorneys don't want to
10 necessarily antagonize the court and so on by making
11 these kinds of gamesmanship demands.

12 JUSTICE SCALIA: Right.

13 MR. McCULLOUGH: Well, a cross-examination-
14 focused statute like this one more blatantly exposes
15 that type of gamesmanship and, therefore, may have a
16 better deterrent value, as opposed to a garden variety
17 statute.

18 I do want to just say, really briefly, that
19 the practical concerns, even if they are not
20 constitutional concerns, are very important because
21 the prosecution always bears the burden of persuasion,
22 and a live witness is always more compelling than a
23 piece of paper.

24 And so the -- the practical realities of
25 this -- a trial by affidavit simply are not likely to

1 be there.

2 I see my time's expired. I thank the Court.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Ms. Kruger.

5 ORAL ARGUMENT OF LEONDRA R. KRUGER

6 ON BEHALF OF THE UNITED STATES,

7 AS AMICUS CURIAE,

8 SUPPORTING RESPONDENT

9 MS. KRUGER: Mr. Chief Justice, and may it
10 please the Court:

11 A State adequately safeguards the
12 confrontation right recognized in Melendez-Diaz when
13 it guarantees that it will, on the defendant's
14 request, bring the analyst into court for face-to-face
15 confrontation and cross-examination at trial.

16 JUSTICE SCALIA: That's not what we said in
17 Melendez-Diaz, unfortunately.

18 MS. KRUGER: Well, Melendez-Diaz --

19 JUSTICE SCALIA: We said the following:
20 "More fundamentally, the Confrontation Clause imposes
21 a burden on the prosecution to present its witnesses,
22 not on the defendant to bring those adverse witnesses
23 into court. Its value to the defendant is not
24 replaced by a system in which the prosecution presents
25 its evidence via ex parte affidavits and waits for the

1 defendant to subpoena the affiants, if he chooses."

2 So you are asking us to overrule that --
3 that statement?

4 MS. KRUGER: No, Justice Scalia, not at all.
5 We believe that a State complies with that very rule
6 from Melendez-Diaz when it ensures that the analyst is
7 present in court to submit to cross-examination, which
8 is the core of the confrontation right. This Court
9 affirmed in its decision --

10 JUSTICE SCALIA: He's present only if the
11 defendant asks for him, right?

12 MS. KRUGER: That's right, and that's --
13 that's because --

14 JUSTICE SCALIA: And that's exactly what
15 this addressed. It's not -- it's not replaced by a
16 system in which the prosecution presents its evidence
17 by -- and waits for the defendant to subpoena the
18 affiants if he chooses.

19 MS. KRUGER: This Court has recognized that
20 the confrontation right is designed to achieve a
21 particular purpose, and that is to ensure that the
22 government's evidence is subject to adversarial
23 testing at trial.

24 It is ultimately up to the defendant in
25 every case to decide, no matter how the prosecution

1 presents its evidence on direct, whether or not it
2 wants to confront the witness and submit that
3 witness's testimony to adversarial testing --

4 JUSTICE SCALIA: That may be. It's a
5 perfectly reasonable argument. I just object to your
6 saying that it doesn't contradict Melendez-Diaz.

7 MS. KRUGER: I think it would be surprising
8 to discover that Melendez-Diaz went quite so far.
9 This Court has never before recognized a dimension of
10 the Confrontation Clause that would govern the manner
11 in which the prosecution presents its evidence, except
12 for the rule that it affirmed it in Crawford, which is
13 that so long as the government ensures that the
14 witness is available for cross-examination at trial,
15 the Confrontation Clause places no constraints on the
16 government's use of prior testimony or statements.

17 JUSTICE BREYER: All right. So the
18 statement, the sentence in this opinion, that, in your
19 opinion, would have the effect of limiting
20 Melendez-Diaz without overruling it, what is that
21 statement?

22 MS. KRUGER: I think the statement is it
23 requires only that the Court reaffirm what it already
24 said in Crawford, in the context of the lab analyst
25 testimony at issue in this case, which is, again, when

1 the analyst is available for cross-examination at
2 trial, the government has complied with what the
3 Confrontation Clause demands.

4 It has provided a constitutionally
5 sufficient opportunity for the defendants to submit
6 that analyst's findings to adversarial testing --

7 JUSTICE SCALIA: And it just doesn't --
8 doesn't apply just to analysts, right? I mean, is
9 there anything peculiar about analysts? Would it not
10 exist for any other witness?

11 MS. KRUGER: Well, our principal submission
12 is that the Confrontation Clause provides, in every
13 case, an opportunity for effective cross-examination.

14 JUSTICE SCALIA: Okay.

15 MS. KRUGER: And there may be independent
16 constraints on the manner in which the prosecution
17 presents its evidence under the laws of evidence in
18 the jurisdiction because of the government's need to
19 satisfy its burden of proof and ensure a fundamentally
20 fair trial under the Due Process Clause.

21 To the extent that the Court --

22 JUSTICE SCALIA: I don't understand what --
23 is that a yes or a no?

24 MS. KRUGER: Well, it is to say that
25 Confrontation Clause is not what prohibits that

1 practice. What prohibits that practice are other
2 equally effective sources in the law --

3 JUSTICE SCALIA: Okay. So as far as the
4 Confrontation Clause is concerned, this would apply to
5 other witnesses as well?

6 MS. KRUGER: I think that that's right, but
7 even if the Court were to disagree with that
8 submission, this Court could rely on the kinds of
9 distinctions that it has drawn in other cases, like
10 Inadi or like White v. Illinois, which recognized that
11 there is a class of hearsay evidence that's not simply
12 a weaker substitute for live testimony at trial, that
13 has independent, probative significance that makes it
14 somewhat irrelevant whether or not the court --

15 JUSTICE SCALIA: Indicia of reliability --
16 you want us to go back to that? Is that --

17 (Laughter.)

18 MS. KRUGER: No, it's not a question of the
19 reliability. What Crawford did was replace a system
20 in which hearsay evidence and its admissibility was
21 dependent on reliability with one in which the
22 touchstone is an opportunity for cross-examination.

23 And it's precisely in response to that point
24 that Crawford, again, reaffirmed the rule that it
25 first announced in Green, that so long as the

1 out-of-court declarant is present at trial to explain
2 or defend his out-of-court statements, the
3 Confrontation Clause is satisfied.

4 JUSTICE BREYER: What if it doesn't quite
5 work, that the Confrontation Clause seems to be
6 expanding, just with the opportunity for
7 cross-examination creating all kinds of incursions
8 into areas where it's not necessary for fairness
9 purposes?

10 Then does it make sense to say -- hey,
11 unfortunately, to say that the only workable system is
12 that you have a system which has exactly the
13 confrontation point, but indicia of reliability do
14 have an impact as to what the implications of the
15 Confrontation Clause violation are, in terms of
16 practical trial necessity.

17 MS. KRUGER: But --

18 JUSTICE BREYER: Now, there we are,
19 accepting the warnings of the dissenters in Crawford.

20 (Laughter.)

21 MS. KRUGER: I don't think that the
22 touchstone of this Court's analysis need return to the
23 now discredited Ohio v. Roberts regime.

24 It's simply a practical point. To the
25 extent the Petitioners are arguing that their

1 opportunity to confront and to cross-examine is
2 constitutionally inadequate merely because the
3 prosecution hasn't guaranteed that it would call the
4 witness to the stand first, I think the court can take
5 due account of the fact that that is not necessarily
6 so.

7 JUSTICE BREYER: Well, what about Raleigh's
8 witnesses -- you know, the hypothetical I gave you,
9 for the heart of the matter, the heart of the matter,
10 and they stick it in their affidavits, and you say,
11 oh, don't worry, don't worry, you can cross-examine
12 them later in the trial.

13 MS. KRUGER: I think, to the extent that the
14 Court were otherwise inclined to invent a new body of
15 Confrontation Clause jurisprudence to govern the
16 manner in which the prosecution puts on its witnesses
17 and questions them, this isn't the appropriate case to
18 do it because, as we have seen from Petitioners'
19 submission earlier this morning, there is no
20 substantive difference from a defendant's
21 perspective --

22 JUSTICE SOTOMAYOR: Could you -- are you
23 suggesting or are you saying even a trial by affidavit
24 is okay under the Confrontation Clause? Is that your
25 position?

1 MS. KRUGER: Our principal submission is
2 that the Confrontation Clause allows the government to
3 rely on affidavits, so long as it bring the affiants
4 into court, so that the defendant can ask whatever
5 questions --

6 JUSTICE SOTOMAYOR: So you are absolutely
7 saying that, under the Confrontation Clause, trial by
8 affidavit of any witness would be okay.

9 MS. KRUGER: That is our principal --

10 JUSTICE SOTOMAYOR: So are you -- are you
11 then saying that there is some other constitutional
12 limit to that choice, outside of the Confrontation
13 Clause? And if you are, what would be that other
14 constitutional limit?

15 MS. KRUGER: We do think that there are
16 constitutional limits in the Due Process Clause, and
17 it's guaranteeing the right to --

18 JUSTICE SCALIA: Well, how many hundreds of
19 cases will it take to identify those limits under that
20 very clear Due Process Clause?

21 (Laughter.)

22 MS. KRUGER: Well, it's -- it's somewhat of
23 a difficult question to answer because this is not a
24 question that arises particularly frequently. The
25 laws of evidence, as a general matter, express a

1 strong preference for the prosecution to present its
2 evidence through live testimony --

3 JUSTICE SCALIA: Don't we want clear rules
4 for the presentation? Don't we want clear rules, not
5 gambling on what the Supreme Court will say about due
6 process?

7 MS. KRUGER: I think that it's difficult to
8 imagine that a new-found constitutional rule that
9 would require the prosecution to present its evidence
10 in a certain way in every case would lead to that sort
11 of clarity. It would, if anything, create --

12 JUSTICE STEVENS: Ms. Kruger, can I just ask
13 this question? I just want to be sure. Supposing you
14 have an eyewitness. Can you follow the same procedure
15 that you recommend for the scientific witness here --
16 and for an eyewitness?

17 MS. KRUGER: We think that you could, so
18 long as the defendant has an adequate opportunity to
19 cross-examine that eye witness about the testimonial
20 statement.

21 But even if you disagreed with that, we
22 think that the Court can take due account of the fact
23 that there is a significant difference between the
24 kind of testimony that an eyewitness provides and the
25 kind of testimony that a forensic analyst provides.

1 The forensic analyst's lab report is not
2 merely a weaker substitute for live testimony. It is,
3 in fact, I think, as we see by the relative
4 infrequency with which analysts were called into court
5 before Melendez-Diaz, something that has been seen to
6 have equal value, regardless of the manner in which
7 it's presented.

8 And, for that reason, we think that, in
9 order to decide this case, all this Court needs to
10 decide is that, in the context of forensic lab
11 analysts, what the Court said in Crawford still
12 stands, so long as the government presents the analyst
13 at trial for face-to-face confrontation and
14 cross-examination.

15 JUSTICE SCALIA: Why -- why do we have to
16 say anything in this case? Why is this case here
17 except as an opportunity to upset Melendez-Diaz?

18 MS. KRUGER: I think that --

19 JUSTICE SCALIA: This Virginia statute no
20 longer exists, does it? So we are pronouncing on the
21 validity of a Virginia statute that is now gone,
22 right? They have adopted a statute that complies
23 completely with Melendez-Diaz.

24 MS. KRUGER: That's true, and I think that
25 that's because Virginia was unwilling to stake the

1 validity of however many convictions in the interim
2 on the outcome of a case. But this --

3 JUSTICE SCALIA: I'm not criticizing
4 Virginia; I'm criticizing us for taking the case.

5 (Laughter.)

6 MS. KRUGER: I think that this -- this case
7 presents, I think, an important opportunity for the
8 Court to provide guidance to States that are currently
9 grappling with how to respond to the practical
10 problems that have been presented in the wake of
11 Melendez-Diaz.

12 JUSTICE SOTOMAYOR: So do we say to them,
13 contrary to what Melendez-Diaz is, that subpoena
14 statutes -- when you read the statute, it says the
15 defendant has to subpoena the witness. On its -- on
16 the face of this statute, without the Commonwealth
17 court's gloss on it --

18 MS. KRUGER: I don't mean to quibble,
19 Justice Sotomayor, but the statute does not in fact on
20 its face say the defendant must subpoena. It says the
21 witness shall be summoned. But I think to the extent
22 that you had any questions about whether or not the
23 Commonwealth's interpretation of that language were
24 correct, the appropriate course would be to remand to
25 the Virginia Supreme Court to allow them to address

1 that question of State law in the first instance.

2 JUSTICE SCALIA: That question of prior
3 State law, right?

4 MS. KRUGER: Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Friedman, you have 4 minutes left.

7 REBUTTAL ARGUMENT OF RICHARD D. FRIEDMAN

8 ON BEHALF OF THE PETITIONERS

9 MR. FRIEDMAN: Thank you, Mr. Chief Justice.

10 This is not a notice-and-demand statute. It
11 does not even provide notice to the defendant unless
12 he asks for it ahead of time. It doesn't give any
13 deadline as to when he should make a demand or take
14 any other action. It just says that -- and I invite
15 the Court's attention to the language of the
16 statute -- it says that the defendant may cause the
17 witness to be summoned.

18 There's no -- there's no deadline. It
19 doesn't put the burden of no-shows on the prosecution.
20 It's the defendant's witness, and it clearly doesn't
21 call -- it doesn't provide that the prosecution should
22 call the -- the witness. Virginia --

23 CHIEF JUSTICE ROBERTS: Well, the -- just
24 the first one, the no-notice problem, that's kind of
25 silly, isn't it? Because if you are being prosecuted

1 for 50 grams of crack cocaine, you can expect the
2 government is going to try to prove that.

3 MR. FRIEDMAN: That's likely, of course.
4 But the fact is Virginia knows how to write a good
5 notice-and-demand statute and has done it, and
6 contrast the -- the new statute, which gives 28 days
7 notice. It's -- it's very glaring. If Virginia
8 wanted to write a notice-and-demand statute before, it
9 could have.

10 Now, I think I can explain what's different
11 about Virginia. And what happened is after the --
12 after the defendants' -- after the defendants' trials
13 -- let me say, after the defendants' trials, the --
14 the prosecution is saying, you could have subpoenaed.
15 And they said this isn't testimony. Okay? They were
16 wrong on both of those counts.

17 After the defendants' trials, in a case
18 called Brooks, the -- the Virginia Court of Appeals
19 suggested that the defendant could ask the prosecution
20 to bring the witness in. Many defendants did that,
21 including Grant, the defendant on whom -- in the case
22 on whom the Commonwealth relies so heavily.

23 The prosecution ignored those requests. It
24 was still taking the view that this is not -- this is
25 not testimonial. Up until the moment that this Court

1 decided Melendez-Diaz, the Commonwealth in Virginia
2 in -- in Grant said, we don't have to bring the
3 witness in; the witness -- the defendant should
4 subpoena the witness if he wants.

5 No court has ever held -- no court has ever
6 held in Virginia that the prosecution bears the risk
7 of -- of no-shows.

8 Now, the Commonwealth and the United States
9 suggest: Oh, it's okay to -- to transform the way
10 trials are conducted by allowing the prosecution to
11 present affidavits because you can backfill with the
12 Due Process Clause. I think that goes against
13 decisions of this Court that say when there's a
14 specific right addressed to a particular situation, we
15 rely on that, not on the Due Process Clause.

16 JUSTICE ALITO: But I take it your position
17 is it wouldn't matter. If the -- if Virginia said
18 that the -- the Commonwealth bears the risk of a
19 no-show, that wouldn't make any difference?

20 MR. FRIEDMAN: That would -- that would not
21 be enough, no. It's enough -- it's enough --

22 JUSTICE ALITO: So we have to assume that
23 that's the case.

24 MR. FRIEDMAN: Well, that's -- that's one
25 problem. The no-show. But --

1 JUSTICE ALITO: Well, would you like us --

2 MR. FRIEDMAN: -- but there are two -- they
3 are both problems.

4 JUSTICE ALITO: Would you like us to grant,
5 vacate, and remand in this case and say because it's
6 unclear who has the risk of a no-show?

7 MR. FRIEDMAN: No, no, no, Your --

8 JUSTICE ALITO: And then Supreme Court of
9 Virginia on remand could decide whether in fact the --
10 the prosecution bore that risk?

11 MR. FRIEDMAN: No, Your Honor, because it's
12 sufficient that the statute is very clear and the
13 Commonwealth doesn't deny that it's the defendant's
14 burden under the statute to call the witness to the
15 stand. So whatever the no-show issue, however that
16 might stand under State law, what Melendez-Diaz called
17 the more fundamental problem, which is that the
18 statute imposes on the defense the burden of calling a
19 witness to the stand, is clearly provided for in this
20 statute. So there's no reason --

21 JUSTICE ALITO: Do you think Melendez-Diaz
22 addressed the question of the order of proof? Where
23 did it address that?

24 MR. FRIEDMAN: I don't think this is a
25 question of order of proof. This is a question of who

1 puts the witness on the stand. Melendez addressed
2 that very explicitly in part III-E and said that an
3 affidavit doesn't do, that the prosecution has to
4 present prosecution witnesses.

5 JUSTICE GINSBURG: So is the proper solution
6 to grant, vacate, and remand in light of
7 Melendez-Diaz?

8 MR. FRIEDMAN: May -- may I respond to that?

9 CHIEF JUSTICE ROBERTS: Yes.

10 MR. FRIEDMAN: Thank you.

11 Your Honor, I think that the -- the proper
12 response here is the Court has taken the case; there
13 is enough without any -- resolving any ambiguities of
14 the Virginia statute to say that the -- this procedure
15 is unconstitutional, because it imposes -- even
16 without worrying about the no-show point, it imposes
17 upon the defendant the burden of putting the witness
18 on the stand. Given that all these States and the
19 United States are contesting that this procedure is
20 acceptable, I think it's proper for the Court to say
21 right now that it -- that it is not.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 The case is submitted.

24 (Whereupon, at 12:41 p.m., the case in the
25 above-entitled matter was submitted.)

A	50:22 51:3 52:6	analyses 18:8	appearance 18:14,16 44:17	audiotapes 30:2
ability 5:12 30:16	adversaries 15:8	analysis 54:22	APPEARAN...	August 47:13
able 19:25 47:25	adversary 34:6	analyst 9:20,21	1:15	authority 32:20
above-entitled 1:12 64:25	adverse 43:15,17 49:22	10:10,11 16:11	appearing 38:11	available 10:10
absentee 42:5	adversely 44:14	16:12,13 18:3	44:22	17:13 45:17
absolutely 21:19	affiants 50:1,18	18:14 29:6,6,11	appears 46:10	51:14 52:1
21:19 56:6	56:3	29:12,15 49:14	appellate 9:16	avoid 34:15
accept 6:22 17:10	affidavit 13:19	50:6 51:24 52:1	application 39:1	axiomatic 43:20
acceptable 8:24	29:1 34:7,8	57:25 58:12	apply 28:6 52:8	a.m 1:14 3:2
16:24 64:20	36:2,20 39:17	analysts 27:21	53:4	B
accepting 54:19	43:10 48:25	52:8,9 58:4,11	appropriate	B 29:10 39:18
account 55:5	55:23 56:8 64:3	analyst's 30:7	31:11 41:7	back 28:5 42:3
57:22	affidavits 29:24	52:6 58:1	55:17 59:24	53:16
accusers 42:5	29:25 35:1,16	and-demand	approximately	backfill 62:11
accustomed 40:8	35:21,22 49:25	33:16 37:6	41:12	bad 28:12 40:19
achieve 50:20	55:10 56:3	anecdotally	areas 28:10 54:8	badly 39:19
acknowledging	62:11	22:15,16	arguing 17:17	balance 31:2
24:20 26:12	affirmative 5:15	angle 26:15	54:25	Barbara 22:23
27:14	affirmed 50:9	Anglo-Americ...	argument 1:13	22:24
action 60:14	51:12	3:18 12:8 13:16	2:2,10 3:3,6	bargain 18:2
address 39:9	ago 16:24	28:24 29:21	18:19 31:7 49:5	based 12:1
59:25 63:23	agree 36:23 37:1	announce 34:13	51:5 60:7	bear 5:4 7:19,22
addressed 50:15	37:4 43:1	announced	arises 56:24	7:24,25 8:1,1,3
62:14 63:22	ahead 7:20 60:12	53:25	articulate 34:4	bears 10:16 44:7
64:1	Alito 9:18 10:7	anonymous	aside 15:13	48:21 62:6,18
adequate 57:18	11:13 17:15,19	40:14 42:5	asked 6:8,13 8:3	begging 33:5
adequately 49:11	18:17 29:4,14	answer 9:19 22:6	10:5 11:13 12:9	behalf 1:16,19,22
adjective 26:18	29:18 30:5	23:8 24:23 25:6	15:12 19:22,24	2:4,6,8,12 3:7
adjust 23:8	62:16,22 63:1,4	28:8 38:16	42:13	31:8 49:6 60:8
adjustment 23:7	63:8,21	39:10 45:25	asking 3:22 4:3	believe 6:9,10
admiralty 42:10	allow 59:25	56:23	11:19 12:14	12:4 17:8,12
admissibility	allowed 39:7	answers 45:19	50:2	23:22,25 25:3,4
53:20	allowing 62:10	antagonize 48:10	asks 44:17 50:11	25:5 30:17 50:5
admissible 6:2,3	allows 56:2	Apart 25:12	60:12	benefit 11:3,12
20:7	ambiguities	apparent 11:16	aspects 4:24	18:4
admission 9:22	64:13	11:17	Assistant 1:20	best 19:15
33:7	amendment	appeal 33:14	assume 15:15	better 18:1 48:16
admit 9:21 11:20	16:25	46:3	19:14 62:22	beyond 3:11 6:11
admitted 10:9	amicus 1:22 2:8	appeals 38:25	attempt 30:21	8:8 11:6 12:15
29:10 44:23	17:16 18:6 49:7	39:7 61:18	attention 60:15	30:6 43:24
adopted 58:22	amount 18:22	appear 32:11	attorneys 20:24	big 19:16
advance 33:21	30:10	37:9,13 39:10	48:9	bit 27:12,12
39:3	amusement	39:13 44:16,18	attorney's 22:19	blatantly 48:14
adversarial	18:20,21	45:2,19,21,21	attributable 22:3	blocks 36:5
	analogy 40:19	45:23,23 46:4,6	at-trial 35:10	body 55:14
		46:6,8,16 47:5		

bore 63:10	C	cause 60:16	52:3,12,20,25	complies 50:5
bothering 18:19	C 2:1 3:1 39:18	caused 19:7	53:4 54:3,5,15	58:22
brakes 35:10	calibrates 25:19	certain 14:23	55:15,24 56:2,7	conceptually
Breyer 12:13,16	California 6:6	18:2,22 26:10	56:13,16,20	39:16 40:7
12:21,25 13:7	10:17,24,24	57:10	62:12,15	concerned 21:6
20:1,6,17,20,23	11:9	certainly 12:22	clean 40:8	53:4
21:8 22:7,14,21	call 4:16 9:20	16:17 17:7 41:7	clear 9:18 37:14	concerns 48:19
22:23 23:3,9,14	16:14 20:8,11	certificate 45:5	37:17 44:5,6,10	48:20
23:24 24:2,5,11	21:3 23:20,23	certificates	44:11 56:20	conclusion 26:4
24:23 25:5 28:4	29:16 34:10,11	41:12	57:3,4 63:12	conduct 43:22
28:8 39:14	35:7 43:16 55:3	certifies 23:19	clearly 17:13	conducted 3:18
40:15,18,21	60:21,22 63:14	challenged 31:16	60:20 63:19	29:21 62:10
41:16,24 51:17	called 22:8 35:7	chance 13:9 14:7	clerk 32:21	conferencing
54:4,18 55:7	42:8 58:4 61:18	change 4:6 19:13	close 44:4	16:13
BREYERE 41:3	63:16	27:24,25 28:22	cocaine 41:13,14	conflicting 23:4
brief 9:15 14:2	calling 3:15 5:5	characteristics	61:1	confront 6:25
17:16 18:6	63:18	41:4	cold-cross 34:12	51:2 55:1
19:21 22:25	calls 29:6	chief 3:3,8 19:14	colonists 40:14	confrontation
30:15 31:20	care 34:5	22:6,18,18	42:4,9	3:16 5:11 9:10
32:9 37:25	case 3:4,10,12,12	26:13,17 27:10	Columbia 17:17	9:12,14,24 10:3
44:20 47:15	4:1 5:3,6,25	31:3,6,9 49:3,9	18:18 19:5,6,10	11:22 13:1,13
briefly 48:18	6:20 9:16 11:21	60:5,9,23 64:9	19:11,12,22,23	13:15 14:18
bring 3:23 4:4,5	11:21 13:18	64:22	come 19:8 39:21	17:3,9 19:1,3
13:3,7,8 15:12	20:4 21:5 26:25	child 8:20 9:4	45:5	24:12,13 27:19
24:21 27:15	27:24,25 28:22	35:3	comes 26:2 37:19	28:6 30:24,24
32:5 36:20,21	30:6 33:19,20	chips 41:16	37:22 43:15	31:13 33:8
38:8 39:22	34:13 35:8	choice 3:22 56:12	coming 16:15	34:16 35:14
49:14,22 56:3	38:12,13,24	choose 34:7,9	Commonwealth	36:4,7,22 40:4
61:20 62:2	40:7 43:5,8,9	chooses 50:1,18	15:19 26:12	40:11,13,24
bringing 15:2	43:23 50:25	circles 45:25	27:14 30:21	41:21 42:16,16
34:9	51:25 52:13	46:3	32:11,24,25	42:23,24 43:24
brings 24:20	55:17 57:10	cite 32:14 37:24	33:10 39:3,4,12	47:10 49:12,15
Briscoe 1:3 3:4	58:9,16,16 59:2	44:19	44:14 45:3 46:9	49:20 50:8,20
Brooks 61:18	59:4,6 61:17,21	cited 9:15	46:11 59:16	51:10,15 52:3
brought 16:9	62:23 63:5	clarity 57:11	61:22 62:1,8,18	52:12,25 53:4
25:2 28:14	64:12,23,24	class 53:11	63:13	54:3,5,13,15
38:20	cases 4:2 6:5,7	clause 5:12 9:10	Commonwealt...	55:15,24 56:2,7
burden 3:15 5:5	8:19,22 14:12	9:12,14,24 10:4	59:23	56:12 58:13
14:18 15:2,20	17:8,20 21:1	13:1,5,13,15	compared 47:8	Congress 16:25
17:24 18:17	35:4 37:24	27:19 28:6 33:8	compelled 6:16	consent 16:17
19:9 37:6 44:8	40:10 41:19	34:17 35:3,9,14	compelling	17:6,7
48:21 49:21	44:19 45:1 53:9	36:4,7,9,22	48:22	consequence
52:19 60:19	56:19	40:5,12,13,24	completely 58:23	44:22,25
63:14,18 64:17	categories 20:3	41:21 42:4,16	complicated	considerable
business 20:4	category 17:20	42:23,25 43:25	12:18	11:3
		49:20 51:10,15	complied 52:2	considerations

34:19	24:9,19 41:5	critical 8:8	debated 41:6	deliberately
Constitution	45:22 47:1	criticizing 59:3,4	decades 37:23	43:18
6:15 20:25	59:24 61:3	cross-exam	decide 25:14	demand 47:3
constitutional	court 1:1,13 3:9	13:25 29:17	50:25 58:9,10	60:13
6:21 11:21 33:3	3:10,13,20 4:12	cross-examina...	63:9	demands 24:20
34:16,19,22	4:17 5:2,7 6:10	11:3,12 14:9	decided 62:1	27:16 47:5,10
36:25 48:20	12:14 15:16	16:4,5 30:17	decision 5:6	48:11 52:3
56:11,14,16	16:24 26:10	35:14 36:12	31:17 39:2 50:9	demonstrated
57:8	28:18,25 31:1	43:22 48:13	decisions 62:13	12:18
constitutional...	31:10,12,18,21	49:15 50:7	declarant 54:1	deny 63:13
43:25	31:24 32:7,21	51:14 52:1,13	deeply 42:7	Department
constitutionally	32:22 33:1,10	53:22 54:7	defend 54:2	1:21
6:3,15 34:23	33:13,22 34:10	58:14	defendant 3:14	dependent 53:21
52:4 55:2	35:21 36:8,24	cross-examine	3:21 4:3,4 11:2	Depending
constraints	37:24 38:25	5:13 13:9 14:7	11:11 13:8 14:9	24:16
51:15 52:16	39:6 43:1,17	14:10 15:24	14:23 15:2,20	deposition 22:13
construction	45:7 46:19,21	16:3 29:8,15	16:18,21 24:20	23:13 34:9
31:21 34:16	47:2 48:8,10	30:19 35:19	29:2 30:18	depositions 23:9
38:1,2,18,23	49:2,10,14,23	42:12 44:24	32:12,15,21	23:11
construed 31:12	50:7,8,19 51:9	55:1,11 57:19	33:1,6,19 35:5	describe 42:18
32:7 33:23	51:23 52:21	cross-examined	35:6 36:14 37:3	describes 27:21
37:11 44:14	53:7,8,14 55:4	39:24,25 40:1	37:5 38:19,22	designed 36:9
construing 33:2	55:14 56:4 57:5	43:3	39:2,11 43:7,14	42:25 43:25
contesting 17:21	57:22 58:4,9,11	crucible 36:12	43:16,22 44:2,3	50:20
64:19	59:8,25 61:18	curiae 1:22 2:9	44:17 49:22,23	determine 25:23
context 51:24	61:25 62:5,5,13	49:7	50:1,11,17,24	46:22
58:10	63:8 64:12,20	current 10:21	56:4 57:18	determined 17:7
contradict 51:6	courthouse	currently 59:8	59:15,20 60:11	deterrent 48:16
contrary 17:17	16:15	cuts 37:12	60:16 61:19,21	died 45:16
59:13	courts 4:1 8:23	CYPRESS 1:4	62:3 64:17	difference 9:1
contrast 61:6	35:4 42:10		defendants	10:7,13 11:14
controlled 30:9	court's 41:6	D	15:21 17:8,9,20	11:14,15 29:19
convictions 59:1	54:22 59:17	D 1:16 2:3,11 3:1	19:2 34:10 52:5	30:12,14 55:20
core 42:25 50:8	60:15	3:6 60:7	61:12,12,13,17	57:23 62:19
correct 5:17,18	crack 41:13 61:1	Dakota 32:14	61:20	differences
9:2 59:24	craft 30:2	dares 29:2	defendant's 16:6	11:18
corrupted 15:22	Crawford 13:21	data 17:12 18:10	49:13 55:20	different 4:9
cost 8:3 32:11	13:22 51:12,24	19:21 21:13,14	60:20 63:13	6:13 15:5 23:16
costs 46:25	53:19,24 54:19	date 32:23	defense 10:10,11	23:16,17,17,18
counsel 22:19	58:11	day 31:23 35:16	15:3 20:23	24:25 28:9,10
33:18,18 34:1	create 57:11	days 38:7,8 45:7	27:16 29:8,11	48:7 61:10
49:3 60:5 64:22	creating 54:7	61:6	29:14 35:17,18	differently 25:7
counts 61:16	creeping 27:13	deadline 60:13	36:19 48:9	difficult 35:17
couple 8:19	criminal 17:1	60:18	63:18	40:7 56:23 57:7
18:12 43:12	32:18 44:1	deal 21:9	defunct 15:1	dimension 51:9
course 22:7 23:6	criminals 48:2,7	dealing 30:7	18:25	direct 51:1

53:7	effectively 35:18	examine 30:16	fact 14:5 15:17	forced 35:7
disagreed 57:21	either 4:7,16	example 16:11	19:10 28:17	forcing 34:10
discover 51:8	17:22 41:10	19:15,20 32:13	33:24 35:13	forensic 57:25
discredited	emerges 44:25	35:3 38:5,25	37:20 45:16	58:1,10
54:23	emphasize 11:18	40:14 42:8	55:5 57:22 58:3	forget 34:21 38:8
dismiss 43:8	13:12 25:25	exception 9:23	59:19 61:4 63:9	form 11:23 16:3
dismissed 43:8	emphasized	excuse 22:22	facts 30:6	formalistic 40:5
dissent 27:10	13:18 30:15	32:10 37:21	failed 46:9	former 9:4 16:2
dissenters 54:19	encounter 43:2	45:4	fails 37:11 46:11	found 9:8,9,11
dissenting 41:22	endorse 6:17	exercise 15:21	fair 52:20	foundation 9:21
distance 41:19	enormous 30:13	exist 52:10	fairly 39:15	four 23:15
distant 21:3	30:14	exists 58:20	fairness 54:8	frankly 18:24
distinctions 53:9	enraged 42:6	expanding 54:6	fall 38:21	19:20
distinguish	ensure 42:25	expect 61:1	fallen 23:2	frequently 56:24
30:22	50:21 52:19	expense 16:10	falls 38:22	Friedman 1:16
district 17:16	ensures 50:6	17:14 18:23	far 7:7 31:23 47:9	2:3,11 3:5,6,8
18:18 19:5,6,10	51:13	19:7 21:5	47:9 51:8 53:3	3:25 4:10,13,20
19:10,11,21,23	entirely 26:11,13	experience 46:25	fashion 33:23	4:23 5:10,14,17
22:19	equal 58:6	47:7	fault 45:14	5:21 6:5,14,24
divided 23:15	equally 53:2	experimenting	fears 34:5	7:2,7,14,17,23
DNA 26:4	ESQ 1:16,18,20	16:19	Federal 16:25	8:1,7,12,15,18
documents 12:1	2:3,5,7,11	expired 49:2	43:25	9:3,7,11,14
doing 41:9,11	established 3:11	explain 25:8 54:1	fell 40:24 41:20	10:1,12,23 11:9
door 19:17	13:15	61:10	fewer 19:12	12:4,14,20,24
drawn 53:9	establishes	explicit 5:7	figure 20:21	13:6,12 14:4,14
drug 18:7,8 26:3	13:21,22	explicitly 64:2	file 45:6	14:20,22 15:6
drugs 17:22	European-type	exposes 48:14	filed 33:21 38:7,8	15:10,14,17
due 9:13 31:21	36:1	express 32:15	filled 12:18	16:8,16 17:18
31:22 35:2,9	event 4:7 24:19	56:25	financial 17:24	18:5,21 19:18
43:19 52:20	events 8:22	extend 30:10	findings 52:6	20:5,15,19,22
55:5 56:16,20	evidence 9:2	extensive 47:21	fine 4:23,23 8:18	21:7,11,16,19
57:5,22 62:12	25:14,23 26:1	extent 31:19	fires 26:3	21:22 22:2,10
62:15	28:17 36:10	46:18 52:21	first 5:8 14:25	22:17,22,25
dumps 35:16	40:23 41:5,18	54:25 55:13	31:15,19 35:2	23:6,22,25 24:4
D.C 1:9,16,21	43:7 44:4 49:25	59:21	39:5 43:11,13	24:8,14 25:3,9
19:15	50:16,22 51:1	extra 19:7	46:20 53:25	25:21 26:7,15
	51:11 52:17,17	eye 57:19	55:4 60:1,24	26:20,22 27:3,8
	53:11,20 56:25	eyewitness 57:14	five 19:12 23:15	27:12,23 28:7
	57:2,9	57:16,24	fled 45:16	28:15 29:13,16
	ex 49:25		floating 28:5	29:22 30:13
	exactly 17:17		focused 48:14	31:4,5 60:6,7,9
	33:18 36:13	F	follow 57:14	61:3 62:20,24
	37:12 45:3	face 12:6,7 13:17	followed 47:5	63:2,7,11,24
	46:11 50:14	13:17 36:12,12	following 49:19	64:8,10
	54:12	43:3,3 59:16,20	follows 10:25	front 13:24
	exam 28:17	face-to-face 43:2	38:16	functionally 41:8
		49:14 58:13		
E				
E 2:1 3:1,1				
earlier 55:19				
economy 16:11				
effect 47:12				
51:19				
effective 14:6				
35:15 52:13				
53:2				

fundamental 3:17 13:20,22 28:24 29:20,22 63:17	55:15 governed 12:8 government 51:13 52:2 56:2 58:12 61:2	24:7,9,12 42:18 53:11,20 heart 13:2 40:4 40:11 42:3,4 55:9,9	54:14 important 28:23 48:20 59:7 impose 3:14 imposes 49:20 63:18 64:15,16	33:25 59:23 interpreted 3:21 5:1 15:19 37:22
fundamentally 49:20 52:19 fungible 41:13 further 7:10	government's 36:10 50:22 51:16 52:18 grading 28:17 grams 61:1 grant 33:19,20 38:24 39:9 61:21 62:2 63:4 64:6	heavily 61:22 held 8:23 35:4 62:5,6 helpful 18:1 hey 54:10 high 3:13 historical 11:21 42:3 historically 6:20 36:5 history 13:14 33:2 36:9 hold 3:14 28:25 holding 39:1 Honor 3:25 7:7 15:23 18:5 19:18 60:4 63:11 64:11	impossible 20:13 inadequate 55:2 Inadi 53:10 incident 9:2 inclined 55:14 include 21:22,23 including 16:18 21:20 61:21 inconsistency 11:13 inconsistently 11:10 incumbent 33:17 incursions 54:7 independent 52:15 53:13 indicates 25:13 25:22 indicia 53:15 54:13 inexorably 38:16 inflame 35:5 information 19:25 infrequency 58:4 initiative 38:20 inordinate 16:10 17:14 21:5 insist 16:21 20:25 22:7 30:19 instance 24:12 25:10 46:20,23 60:1 intended 36:5 interest 17:21 interesting 28:16 interim 59:1 interpretation 4:18 31:17	introduced 12:11 35:6 42:11 invent 55:14 invite 60:14 invoked 19:4 involve 6:6 involved 17:22 involving 8:19 irrelevant 26:16 53:14 issue 8:22 24:22 25:25 26:9,11 26:11 27:16 28:1,1,18 31:14 31:21 32:20 33:18 34:17 37:3,18 38:11 43:20 51:25 63:15 issued 37:3 issues 32:16 37:19 39:12 45:8 it's 7:15 22:11 24:6 25:22 27:17 28:16 37:6 44:13 54:8 56:22 58:7 64:20 I'd 20:11 I'll 47:6 I'm 12:11,14 18:21,22 19:18
<hr/> G <hr/>	<hr/> H <hr/>	<hr/> I <hr/>		<hr/> J <hr/>
G 3:1 gambling 57:5 gamesmanship 18:9 47:21 48:11,15 gaps 25:24 garden 48:16 general 1:18,21 38:2 56:25 General's 19:21 getting 18:1 GINSBURG 16:8 27:18 43:4 64:5 give 3:21 13:16 60:12 given 5:25 15:18 15:19 16:1 64:18 gives 61:6 glaring 61:7 gloss 59:17 go 6:10 7:20 12:15 19:16 32:21 53:16 goes 5:7 31:25,25 40:3 62:12 going 8:8 14:10 14:12,23 19:3,4 20:12 25:14,23 28:2 35:5,17 42:3 44:19 45:25 46:2 61:2 good 30:24 61:4 gotten 8:2 19:12 govern 51:10	ground 3:11 guaranteed 55:3 guaranteeing 56:17 guarantees 49:13 guidance 59:8 gun 26:3 Hagan 23:1 half 19:6 happen 21:1 43:5 happened 6:8 12:10 61:11 happens 11:6 20:14 23:14 45:23 46:5,7 harbor 42:8,14 47:2 hard 18:10 harder 19:2 41:1 hear 3:3 hearing 12:3 hearsay 9:23 12:17 13:11 20:2,4,16,18	Idaho 32:13 identify 56:19 ignored 61:23 III-E 64:2 Illinois 9:16 53:10 imagine 39:16 57:8 impact 21:10 30:14,14 54:14 impair 3:16 impairment 19:1 30:16 implementation 28:9 implications	January 1:10 job 21:2 jurisdiction 52:18 jurisdictions 18:12 47:17 jurisprudence	

37:23 55:15 jury 11:17 13:24 35:5 Justice 1:21 3:3 3:8,20 4:8,11 4:14,21 5:8,11 5:15,19,22 6:12 6:19,25 7:3,12 7:15,22,24 8:5 8:9,11,13,17,25 9:6,8,13,18 10:7,18 11:7,13 11:19 12:13,16 12:21,25 13:7 14:1,5,15,21 15:4,7,11,15 16:8 17:2,15,19 18:17 19:14 20:1,6,17,20,23 21:8,16,21,25 22:6,7,14,21,23 23:3,9,14,24 24:2,5,11,23 25:5,16 26:1,13 26:17,18,21,23 26:25 27:5,10 27:18 28:4,8 29:4,14,18 30:5 31:3,6,9,25 32:3 33:4,13 34:3,15,21 35:11,20,25 36:16 37:1,14 37:17 38:1,10 38:14,17 39:14 40:15,18,21 41:3,16,24 42:17,22 43:4 44:5,11,21 45:1 45:8,11,14,22 46:2,14 47:11 47:14,22 48:2 48:12 49:3,9,16 49:19 50:4,10 50:14 51:4,17 52:7,14,22 53:3	53:15 54:4,18 55:7,22 56:6,10 56:18 57:3,12 58:15,19 59:3 59:12,19 60:2,5 60:9,23 62:16 62:22 63:1,4,8 63:21 64:5,9,22 justification 9:5 <hr/> K <hr/> KENNEDY 25:16 26:1,25 key 32:8 36:7 kind 40:22 57:24 57:25 60:24 kinds 12:19 20:3 28:9 48:11 53:8 54:7 knew 26:25 know 8:19 17:25 20:12 21:1 22:14 23:5 32:3 33:15 38:14,17 48:6 55:8 knowledge 10:21 known 14:9 15:9 knows 61:4 Kruger 1:20 2:7 49:4,5,9,18 50:4,12,19 51:7 51:22 52:11,15 52:24 53:6,18 54:17,21 55:13 56:1,9,15,22 57:7,12,17 58:18,24 59:6 59:18 60:4 <hr/> L <hr/> lab 7:5 8:6 14:10 16:12,14 18:14 18:15 19:7,11 19:16 20:25 21:1 23:11,12 23:14 24:17	26:5 29:6,6 33:7,8 51:24 58:1,10 laboratory 24:24 labs 24:17 language 44:13 44:15 45:18 46:3 59:23 60:15 large 18:24 19:9 largely 41:13 late 31:23 Laughter 12:23 22:5 26:24 27:2 27:7,11 42:1 48:4 53:17 54:20 56:21 59:5 law 5:25 13:11 53:2 60:1,3 63:16 laws 52:17 56:25 lead 57:10 learn 20:10 leave 13:10 14:16 14:17 29:2 left 21:2 42:22 43:18 60:6 legal 34:19,22 LEONDRA 1:20 2:7 49:5 let's 4:21 9:22 18:12 19:5 21:3 30:5,20 light 23:19 64:6 limit 56:12,14 limiting 51:19 limits 56:16,19 line 28:12 45:1 little 19:19 36:24 live 12:6 13:17 13:24 16:22 24:16 36:12 38:8 39:8 45:4 45:5 47:25 48:22 53:12	57:2 58:2 long 33:2 36:8 43:2 51:13 53:25 56:3 57:18 58:12 longer 58:20 look 18:10,12 19:5 looked 24:2 lot 13:13 18:7,8 <hr/> M <hr/> machine 25:19 25:20 machines 23:16 23:18 Magruder 5:3,6 39:2 majority 14:11 17:1 making 48:10 malpractice 22:8 manner 51:10 52:16 55:16 58:6 MARK 1:3 married 21:2 Massachusetts 22:15 master 42:8,14 matter 1:12 7:15 13:10 17:5 46:19,21 50:25 55:9,9 56:25 62:17 64:25 McCULLOU... 1:18 2:5 31:6,7 31:9 32:2,6 33:12,17 34:14 34:18,23 35:13 35:24 36:3,23 37:4,16,20 38:4 38:13,15,24 40:3,17,20 41:2 41:4,23 42:2,20 42:24 43:11	44:9,12,25 45:10,13,18,24 46:8,17 47:12 47:19 48:1,5,13 mean 6:14,21 40:22 46:17 52:8 59:18 means 11:22 meant 36:22 Melendez 64:1 Melendez-Diaz 3:12,13,24 4:24 5:2 13:17 25:12 25:22 41:6 47:2 47:17 48:9 49:12,17,18 50:6 51:6,8,20 58:5,17,23 59:11,13 62:1 63:16,21 64:7 mentioned 18:10 mentions 47:15 merely 55:2 58:2 Michigan 16:19 21:15,23 22:3 47:23 miles 20:11 41:14 mind 4:15 28:5 mine 41:18,22 minutes 60:6 missing 39:17 mode 34:9 modern 40:6 moment 46:24 61:25 Monday 1:10 month 18:15,16 months 47:18 morning 55:19 motion 33:20 44:1,3,4 move 43:8 <hr/> N <hr/> N 2:1,1 3:1
---	--	--	---	--

nastier 48:3	62:7	58:17 59:7	Patrick 23:1	pleases 31:1
nature 17:22	number 35:4	opposed 33:16	peculiar 47:22	plenty 6:22
30:8		48:16	47:23 52:9	plus 17:16 18:2
nearly 13:14	O	oral 1:13 2:2 3:6	people 23:17,21	18:18
15:22	O 2:1 3:1	31:7 49:5	23:23 24:25	point 8:8 9:16
necessarily	oath 13:24 43:3	order 40:5,8	perfectly 17:10	43:9,14 53:23
28:13 48:10	object 33:6 36:19	43:18 58:9	18:13 20:12	54:13,24 64:16
55:5	51:5	63:22,25	32:8 51:5	points 43:12
necessary 34:1	objects 37:3	organize 24:17	perform 24:25	position 35:18
54:8	obligation 5:16	25:7	performing	55:25 62:16
necessity 54:16	observe 25:17	organized 24:17	23:18	positive 26:2
need 33:25 34:4	26:6	24:24 25:1,10	period 23:7 29:7	possibility 4:2
52:18 54:22	observed 26:8	orthogonal 26:11	47:18	16:17,20 22:12
needs 24:18,18	observes 25:11	26:15,20,21	person 19:7 22:8	possible 43:21
58:9	obstacles 34:24	outcome 59:2	24:18 25:10,16	powder 41:14
neighboring	obviate 33:25	outside 41:20	25:17,18,19,19	practical 11:18
19:24	obviates 33:3	56:12	38:11,20,20	34:19,22 42:21
never 39:7 51:9	obvious 7:8	out-of-court 54:1	perspective	48:19,24 54:16
new 3:10 21:23	occurred 47:16	54:2	55:21	54:24 59:9
47:4,8,11,11	office 22:20	overrule 50:2	persuasion	practice 14:17
55:14 61:6	official 12:1	overruling 3:23	48:21	30:18 53:1,1
newspapers 23:4	oh 8:11 26:17	51:20	persuasive 7:13	precedes 38:6
new-found 57:8	36:19 47:6	Owen 10:25	Petitioner 2:12	precisely 53:23
non-persuasion	55:11 62:9	Owens 6:7	Petitioners 1:5	preference 57:1
14:18	Ohio 18:14 19:24		1:17 2:4 3:7	premise 17:12
non-testimonial	54:23	P	31:16 32:14,19	prepared 20:2,8
20:16	okay 4:10,23	P 3:1	47:15 54:25	prepares 25:17
normal 14:16	8:11 21:3 35:23	pace 11:5	55:18 60:8	present 4:25
North 32:14	47:14 52:14	page 2:2 22:25	phrase 32:9	21:1,4 24:15,16
note 31:15	53:3 55:24 56:8	32:9 37:24	phrases 12:7	24:18 25:14
noted 48:8	61:15 62:9	44:20	picked 13:2	29:1,11,23 30:1
noteworthy	old 19:19 47:8,9	paper 25:18	19:15,19,20	30:2,3 34:25
33:20	once 6:2,3 10:13	39:20,24 40:16	piece 40:16 46:12	39:8 49:21 50:7
notice 4:9,15,18	13:8 14:9	42:10 46:13	48:23	50:10 54:1 57:1
33:15 37:5,5	Ooh 26:23	48:23	pieces 39:20,24	57:9 62:11 64:4
39:3 47:3 60:11	open 16:22,22	part 7:19 18:24	place 5:16 19:16	presentation
61:7	operate 27:21	24:3 39:6,10	31:11 36:18	40:9 57:4
notice-and-de...	operation 24:25	45:15 64:2	placed 31:18	presented 9:4
18:13 60:10	operations 23:18	parte 49:25	places 51:15	21:13 25:24
61:5,8	opinion 5:3	particular 21:10	plain 44:12,14	26:2,4,10,25
November 33:21	21:18 27:6 41:6	38:4,5 41:5	plateaued 47:19	58:7 59:10
no-notice 60:24	41:22 51:18,19	50:21 62:14	platform 14:8	presents 49:24
no-show 62:19	opportunity	particularly 48:6	plausible 16:20	50:16 51:1,11
62:25 63:6,15	42:12 44:24	56:24	plea 18:2	52:17 58:12
64:16	52:5,13 53:22	parties 32:19	please 3:9 31:10	59:7
no-shows 60:19	54:6 55:1 57:18	parts 23:15	49:10	pretty 26:10

<p>35:17 prevents 24:13 previously 12:15 principal 52:11 56:1,9 principle 13:22 prior 6:1 10:17 11:1,11,16 12:11 51:16 60:2 probably 23:10 26:8 27:3 41:17 probative 53:13 problem 9:25 10:4 14:25 21:9 21:12 22:11,12 24:8,9 27:1 33:3 39:15 42:15,17 60:24 62:25 63:17 problems 16:9 22:2,16 42:4 59:10 63:3 procedure 17:1 22:4 41:7 42:7 44:1,2 57:14 64:14,19 procedures 25:11,17 26:6,9 27:22 proceeding 21:17 process 9:13 14:2,3 31:21,22 35:2,9 43:20 52:20 56:16,20 57:6 62:12,15 produce 36:24 produced 20:14 32:23 professorship 27:13 prohibits 52:25 53:1 pronouncing 58:20</p>	<p>proof 40:6 43:18 52:19 63:22,25 proper 64:5,11 64:20 proposed 16:25 proposition 15:5 prosecuted 60:25 prosecution 3:15 4:5 5:4 6:10,16 7:9 9:20 10:4 10:15 11:4 17:25 21:4 24:15 29:1,23 34:25 35:15 36:17,21 37:11 37:13,21,22 38:22 42:13 44:7 48:21 49:21,24 50:16 50:25 51:11 52:16 55:3,16 57:1,9 60:19,21 61:14,19,23 62:6,10 63:10 64:3,4 prosecutions 18:7 prosecutor 4:15 7:4 14:12,17,22 14:24 16:14 29:6 43:6,9 44:17 45:8,15 prosecutors 7:18 23:10 34:7 prosecutor's 43:5 protect 34:2,17 36:5,10 protects 36:13 prove 13:18 43:9 61:2 provide 9:21 35:22 37:5 59:8 60:11,21 provided 52:4</p>	<p>63:19 provides 37:8 52:12 57:24,25 provision 3:21 38:3 purpose 17:24 50:21 purposes 54:9 pursuant 9:22 put 8:20 10:5 11:5 14:12,23 14:25 29:2 34:8 41:16 60:19 puts 15:1 25:18 35:9 43:6 55:16 64:1 putting 8:3 15:13 15:20 17:24 64:17 p.m 64:24</p> <hr/> <p>Q</p> <p>quantity 17:22 question 4:19 5:9 6:13 7:10 10:2 10:10,13 13:21 15:8 16:23 23:9 24:10,23 28:16 28:16 32:1 33:5 40:3 43:18 46:1 46:18 53:18 56:23,24 57:13 60:1,2 63:22,25 63:25 questions 4:22 6:7 9:19 10:6 19:22 42:13 47:7 55:17 56:5 59:22 quibble 59:18 quite 21:8 51:8 54:4 quote 23:1</p> <hr/> <p>R</p> <p>R 1:18,20 2:5,7</p>	<p>3:1 31:7 49:5 raise 31:20 33:18 raised 4:2 Raleigh 13:3,3,5 13:14 39:16,22 41:20 Raleigh's 55:7 rampant 47:5 rarely 15:21 read 4:12 40:15 59:14 reading 15:15 reads 25:19 reaffirm 51:23 reaffirmed 53:24 real 17:3 realities 48:24 really 4:6 11:20 17:21 21:4 38:14 48:18 reason 7:9 14:25 22:11 28:4 58:8 63:20 reasonable 33:6 51:5 reasons 28:11 41:22 REBUTTAL 2:10 60:7 recall 8:3 12:10 12:22 recitation 11:24 recognize 16:11 18:25 28:23 recognized 49:12 50:19 51:9 53:10 recollection 6:17 8:4 9:23 10:18 11:25 41:10,11 recommend 57:15 record 20:4 recorded 9:23 10:19 11:24 41:10</p>	<p>records 42:9 red 23:19 refreshed 41:11 refuse 17:23 refused 16:24 regardless 58:6 regime 54:23 rehearse 30:3 reject 28:21 relating 30:8 relative 58:3 reliability 36:10 41:18 53:15,19 53:21 54:13 reliable 40:23 relies 61:22 reliving 21:3 rely 46:12 53:8 56:3 62:15 remand 46:21 59:24 63:5,9 64:6 repealed 47:1 replace 53:19 replaced 49:24 50:15 reply 22:25 31:20 47:14 report 5:24 7:6 8:6 9:22 10:2,9 29:7,10 30:7 33:7 43:15 58:1 reported 22:16 reports 23:4 43:6 request 49:14 requests 61:23 require 5:12 7:3 57:9 required 45:22 requirement 6:21 44:16 45:20 requires 37:12 45:2,4 46:10,12 46:15,22 51:23 requiring 46:15</p>
--	--	---	--	---

reserve 31:1	62:14 64:21	13:3 23:1,1	sent 39:3	19:21
resolve 28:19	risk 7:19,22,24	29:7 30:24 32:8	sentence 51:18	solidarity 18:22
46:5,20	7:24,25 8:1	32:16 36:14	separate 4:19,21	solution 64:5
resolved 6:9	10:16 18:2 62:6	37:18 38:6	31:20	solved 42:18
resolving 46:4	62:18 63:6,10	39:11,22 43:7	series 35:16	somewhat 47:20
64:13	Roberts 3:3	43:15 45:6,20	services 19:11	53:14 56:22
respect 24:6	19:14 22:6	46:6 59:14,20	seven 24:25	sorry 5:3 7:23
respond 17:11	26:13,17 27:10	60:14,16	severely 3:16	15:6 26:13
59:9 64:8	31:3,6 49:3	Scalia 7:22,24	SHELDON 1:3	37:16 45:24
Respondent 1:19	54:23 60:5,23	8:5,11,13,17	ships 42:9,11	sort 40:23 47:10
1:23 2:6,9 31:8	64:9,22	11:7 17:2 21:16	short 47:18	57:10
49:8	Rohrich 9:15	21:21,25 26:18	show 17:13 18:3	Sotomayor 3:20
response 7:20	room 39:19	26:21,23 27:5	38:21 44:7	4:8,11,14,21
43:12 53:23	Rouse 22:21,24	35:11,20,25	45:11	5:8,11,15,19,22
64:12	rule 34:4,13	36:16 37:1,14	showing 11:12	6:12,19,25 7:3
rest 13:10	35:21 42:18	37:17 38:1,10	shows 18:6 27:20	7:12,15 8:10,25
rests 43:6	44:1 50:5 51:12	38:14,17 42:17	signaled 47:2	9:6,8,13 10:18
result 38:18	53:24 57:8	42:22 44:5,11	signed 29:25	11:19 14:1,5,15
39:13	rules 12:19 17:1	44:21 45:1,8,11	significance	14:21 15:4,7,11
retire 23:12	18:13 28:10	45:14,22 46:2	53:13	15:15 31:25
return 54:22	57:3,4	46:14 47:11,14	significant 21:12	32:3 33:4,13
reverse 3:13	run 41:18	47:22 48:2,12	22:11,12 57:23	34:3,15,21
RICHARD 1:16		49:16,19 50:4	signs 28:10	55:22 56:6,10
2:3,11 3:6 60:7	S	50:10,14 51:4	silent 33:1	59:12,19
Richmond 1:19	S 2:1 3:1	52:7,14,22 53:3	silly 60:25	sources 53:2
right 3:16 4:13	safe 47:2	53:15 56:18	simple 39:15	special 24:3
5:14 6:5,5,22	safeguards	57:3 58:15,19	simplest 23:8	40:22,23
6:24 7:2,14,17	49:11	59:3 60:2	simply 6:11	specially 40:23
8:17 10:23	sample 25:18	scenario 36:6	17:24 31:16	specific 38:11
11:22 12:20,24	26:4	41:15	32:24 34:25	62:14
14:4,20 15:6,10	satisfaction 17:3	scene 30:3	35:8 39:1 45:17	speculation 18:9
15:17,21,22,24	17:4	scheme 38:5	48:25 53:11	spend 46:24
16:1,3,5 17:3	satisfactory	scientific 57:15	54:24	spike 47:16,17
19:1,3,17 20:5	30:23	scope 41:21	Sir 13:2,3,5	47:19
20:24 21:7 24:4	satisfied 17:6	security 28:11	39:16 41:19	square 29:4
24:8,14 25:21	54:3	see 8:11 21:8	situation 10:8,8	stack 29:24 35:1
26:15,22,22	satisfy 27:19	30:20 36:24	21:10 29:5,9,10	stake 58:25
28:7 29:13 32:2	52:19	38:22 46:14	62:14	stakes 3:12
33:7,12 34:2,23	saying 5:23,24	49:2 58:3	situations 29:19	stand 3:15 5:5,16
36:1,3 37:20	6:11 11:14 12:5	seeing 40:10	30:12	6:2,4 8:2,6,7,16
41:23 43:11	25:6 32:15 51:6	47:20	six 24:24	8:21 9:20 10:2
45:10,13 48:12	55:23 56:7,11	seen 12:17 27:9	sky 23:1	10:5,14,19,21
49:12 50:8,11	61:14	47:4 55:18 58:5	slight 29:18	10:21 12:6
50:12,20 51:17	says 6:1,22 8:5	select 21:13	30:12	14:24 15:21,24
52:8 53:6 56:17	10:20,25,25	sense 54:10	small 19:15	29:3,7,12 30:20
58:22 60:3	11:10,21 12:10	sensible 32:8	Solicitor 1:18,20	35:7 36:18

41:10 55:4 63:15,16,19 64:1,18 stands 44:23 58:12 start 14:8 31:11 started 29:5 starting 15:5 state 3:14,20,22 3:25 4:12,17 5:1,6 9:14 11:20 15:12 16:18 18:15 19:16,24 21:3 21:14,20,23,23 22:2 24:19 25:13,22 45:16 49:11 50:5 60:1 60:3 63:16 statement 6:17 7:5 9:4 10:17 10:19,20 11:2 11:11,16 12:11 17:2 50:3 51:18 51:21,22 57:20 statements 6:1 24:6 30:1 51:16 54:2 States 1:1,14,22 2:8 6:7 16:18 17:16 18:6,18 21:14,17,21 23:7 47:24 49:6 59:8 62:8 64:18 64:19 statute 4:7,9,11 4:15,25,25 15:1 15:18 16:2,2,7 18:25 31:13,18 32:7,24 33:16 33:16,23,24 36:13 37:6,8,10 37:12,15,18,21 38:6 40:15,19 43:13,21 44:6 44:13,15 45:2,3	45:6,19 46:9,12 46:15,22 47:1,4 47:8,9 48:8,14 48:17 58:19,21 58:22 59:14,16 59:19 60:10,16 61:5,6,8 63:12 63:14,18,20 64:14 statutes 32:12,14 33:2 38:2 59:14 statutory 38:5 STEPHEN 1:18 2:5 31:7 steps 24:25 34:1 STEVENS 57:12 stick 55:10 stipulate 17:23 47:6 story 11:23,23 12:1,2 14:7 straight 4:6 strategy 14:17 strict 38:1,2,18 38:23 strictly 37:10,22 strike 44:1,3 strong 57:1 subject 10:9 13:24 40:14 50:22 subjecting 36:11 submission 52:11 53:8 55:19 56:1 submit 50:7 51:2 52:5 submitted 64:23 64:25 subpoena 4:6,16 4:25 32:5,12 33:16 37:3,18 37:19 39:5 45:9 50:1,17 59:13 59:15,20 62:4 subpoenaed	38:11 61:14 subpoenaing 3:22 substance 16:4 30:8,9 substantial 17:20 substantive 55:20 substitute 53:12 58:2 sufficient 17:12 25:12 43:7 52:5 63:12 sufficiently 41:20 Suffolk 22:19,19 suggest 6:20 62:9 suggested 7:5 61:19 suggesting 55:23 suggests 5:4 summon 32:13 44:18 summoned 32:10,17 37:8 39:6 44:16 45:20 59:21 60:17 summons 32:16 32:20 39:12 supervisor 27:20 supporting 1:23 2:9 18:11 49:8 suppose 20:3,10 25:16 27:13 39:23 supposed 32:4 Supposing 57:13 supreme 1:1,13 4:12 5:1,6 31:12,17 32:7 33:1,22 37:23 43:17 46:21 57:5 59:25 63:8	sure 5:21 11:5 18:21,23 37:7 46:10 57:13 surprising 51:7 susceptible 33:24 swearing 5:22 system 34:25 47:24 49:24 50:16 53:19 54:11,12 <hr/> T <hr/> T 2:1,1 table 41:17 tactic 7:16,16 tactical 47:10 take 3:10 4:11 10:23 12:5 23:13 34:1,5 38:19 55:4 56:19 57:22 60:13 62:16 taken 64:12 Talk 34:22 talked 46:25 talking 7:16 14:2 20:15 38:10 45:14,15 tech 23:11,12 technician 14:11 20:25 21:2 33:9 technicians 19:12 techs 19:7 tell 4:15 7:8 11:23,25 telling 11:23 tells 14:6 term 3:11 9:17 13:18 terms 36:4 54:15 terribly 7:12 test 23:12 26:2 tested 30:9 testified 10:14	15:25 testifies 11:10 testify 10:16 11:1 11:15 12:6 13:23 16:12,14 19:8 28:2,3 testimonial 57:19 61:25 testimony 12:8 13:17 16:22,23 20:2 24:15,16 28:12 44:23 51:3,16,25 53:12 57:2,24 57:25 58:2 61:15 testing 50:23 51:3 52:6 thank 31:3,5 49:2,3 60:4,5,9 64:10,22 that's 5:10 7:14 8:23 15:8 20:18 24:21 25:11,23 27:12 28:13,18 44:9 50:13 53:6 53:11 theory 12:16 there's 8:23 9:1 10:1,1 18:22 29:18 30:11,13 39:17 44:16 46:18,18 60:18 60:18 62:13 thing 31:15 40:7 47:16 things 17:23 41:13 43:19 think 5:5 6:14,15 9:5,17 10:3,12 10:12 12:9 14:11 15:7,23 16:1,20 18:5,22 18:24 20:17 21:11 23:8,10 25:21 26:7,11
--	--	--	--	---

27:5 28:14,15 28:15,18,23 30:13 31:11,19 31:23 32:6 33:17,19 34:14 34:18 35:24 36:3,7 38:15 39:14 40:3,25 41:2 42:2 43:20 44:9 45:18 46:19,20 47:21 48:1,5 51:7,22 53:6 54:21 55:4 55:13 56:15 57:7,17,22 58:3 58:8,18,24 59:6 59:7,21 61:10 62:12 63:21,24 64:11,20 thinking 28:12 thought 13:1 27:8,8 41:17 threaten 3:17 threatened 28:25 time 4:1,1 16:10 31:2,20 32:18 36:8 43:2 60:12 times 23:17 time's 49:2 time-honored 12:7 told 4:17 totally 40:25 touchstone 53:22 54:22 transform 62:9 transformation 3:17 28:24 29:20,23 transmit 16:25 treat 43:14 treated 39:19 trial 7:15,16 12:8 13:16 14:2,16 22:18 28:25 30:4 32:4,18,23	33:21 34:24 35:11,16,23 36:1,1 38:7 39:3,17 42:7 48:25 49:15 50:23 51:14 52:2,20 53:12 54:1,16 55:12 55:23 56:7 58:13 trials 3:18 13:23 29:21 34:6,6 40:6 61:12,13 61:17 62:10 tried 4:2 7:8 32:19 40:10 trotted 39:23 true 6:18 39:10 58:24 trust 14:1 try 7:18,20 28:14 61:2 trying 20:17,20 31:20 turning 36:8 two 4:22,24 29:19 30:12 32:19 34:24 35:20,21 41:21 63:2 type 18:9 34:24 35:10 41:5,14 48:8,15 types 35:8	15:23 understood 8:9 8:13 underusing 23:10 unfair 42:7 unfortunately 49:17 54:11 United 1:1,13,22 2:8 6:6 49:6 62:8 64:19 unreasonable 31:22 Unrelated 26:16 unresolved 43:19 unwilling 58:25 upset 58:17 use 22:3 23:9 27:5 51:16 usually 24:17	viewed 43:19 views 28:20,21 violates 31:22 violation 54:15 violations 9:9,12 Virginia 1:7,19 3:4 15:1,18 16:2,2 18:25 31:12,18 32:7 33:2,22 37:24 38:25 43:17 44:2 46:21,25 47:20,23 48:2,7 58:19,21,25 59:4,25 60:22 61:4,7,11,18 62:1,6,17 63:9 64:14 virtual 17:2 virtually 20:13 viva 12:6 voce 12:6	wasn't 40:5 42:7 43:7 wasting 16:10 water 22:1 way 3:17 10:15 13:23 15:16 16:6,7 21:4,17 25:1,10 27:21 29:20 32:6 33:3 36:11 44:13 57:10 62:9 weaker 53:12 58:2 weeks 35:22 went 47:3,12,18 51:8 weren't 39:25 40:1 We'll 3:3 we're 46:2 we're 41:14 we've 46:24 47:1 whatsoever 17:21 27:24,25 28:22 what's 11:13 61:10 White 53:10 wholesale 34:24 35:10 willing 17:10 wishes 10:11 witness 3:15,22 3:23 4:3,5,16 4:17 5:5,16,23 5:23,24 6:1,2,8 7:1,11 8:2,4,21 10:5,6,14,16,19 10:20,25 11:5 11:10,15,22 12:5,9,10 14:6 14:12,23,25 15:2,12,20,24 16:5 20:8,10,12 20:13 26:5,5,8 29:3 30:19,20
<hr/>				
U				
<hr/>				
ultimately 50:24 unclear 63:6 unconstitutional 5:25 64:15 underlying 39:15 understand 11:7 12:17 20:7 41:17 52:22 understands				
<hr/>				
V				
<hr/>				
v 1:6 3:4 6:6,7 9:15 10:24,24 11:9 53:10 54:23 vacate 63:5 64:6 valid 18:13 validity 58:21 59:1 valuable 15:23 value 48:16 49:23 58:6 variety 48:16 vast 14:11 verbal 11:24 vice 42:10 video 16:13,23 17:10 videotape 34:8 35:6 videotapes 30:1 30:11 view 27:18,23 61:24				
<hr/>				
W				
<hr/>				
waits 49:25 50:17 waiver 32:1 wake 59:10 Walter 13:2,3,5 13:14 39:16,22 41:19 want 4:16 7:21 11:8 13:12 17:9 17:11 21:12 25:24 28:3 30:18 32:5 39:4 39:11 45:25 48:9,18 53:16 57:3,4,13 wanted 61:8 wants 13:9 36:14 51:2 62:4 warnings 54:19 Warren 9:16 Washington 1:9 1:16,21				

35:3,7,9 36:14	wrong 4:24 12:3	6		
36:18,21,24	27:24 61:16	6 38:8 47:18		
37:7,8,13 38:9	X	60 2:12		
39:4,8,11,12,17	x 1:2,8	7		
39:18,18,23	Y	7 38:7 45:6		
41:9 43:2,14,15	year 19:7 41:12	9		
43:16,17 44:6	years 3:19 13:14	900 41:12		
44:15,18,18,24	16:24			
45:2,4,5,11,16	York 21:24			
45:19,21,21	you'd 40:22			
46:4,10,16 47:5	0			
47:7 48:22 51:2	07-11191 1:5 3:4			
51:14 52:10	1			
55:4 56:8 57:15	1 37:24 44:20			
57:19 59:15,21	11 1:10			
60:17,20,22	11:40 1:14 3:2			
61:20 62:3,3,4	12:41 64:24			
63:14,19 64:1	19.2-187 38:6			
64:17	2			
witnesses 8:20	2 32:9			
13:4,7,16,23	2nd 33:21			
24:15,21 27:15	200 13:14			
27:17 28:2	2007 33:22			
30:22,23,25	2009 47:13			
32:10,22 34:8	2010 1:10			
34:11 35:11	21 47:13			
36:13 42:5	26 17:16 18:18			
49:21,22 53:5	27 22:25			
55:8,16 64:4	28 61:6			
witness's 51:3	29 44:1			
woman 22:23	3			
word 10:24	3 2:4 28:16			
worded 16:7	31 2:6			
words 43:5	4			
work 54:5	4 60:6			
workable 28:13	4,000 20:11			
54:11	49 2:9			
worry 55:11,11	5			
worrying 64:16	50 61:1			
wouldn't 13:4				
27:19,23 29:16				
29:24 42:19				
62:17,19				
write 61:4,8				
written 39:20				
44:23				