

IN THE SUPREME COURT OF THE UNITED STATES

BARION PERRY, :  
 :  
 Petitioner : No. 10-8974  
 :  
 v. :  
 :  
 NEW HAMPSHIRE. :

Washington, D.C.

Wednesday, November 2, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

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Petitioner.

MICHAEL A. DELANEY, ESQ., Attorney General, Concord, New Hampshire; for Respondent.

NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	RICHARD GUERRIERO, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	MICHAEL A. DELANEY, ESQ.	
7	On behalf of the Respondent	28
8	ORAL ARGUMENT OF	
9	NICOLE A. SAHARSKY, ESQ.	
10	On behalf of the United States,	
11	as amicus curiae, supporting the Respondent	41
12	REBUTTAL ARGUMENT OF	
13	RICHARD GUERRIERO, ESQ.	
14	On behalf of the Petitioner	52
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first today in Case 10-8974, Perry v. New Hampshire.

5 Mr. Guerriero.

6 ORAL ARGUMENT OF RICHARD GUERRIERO

7 ON BEHALF OF THE PETITIONER

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

10 An eyewitness identification made under a  
11 suggestive influence presents a unique danger of  
12 misidentification and a miscarriage of justice. It is  
13 that danger of misidentification which implicates due  
14 process and requires an evaluation of the reliability of  
15 the identification. The constitutional --

16 JUSTICE SOTOMAYOR: Counselor, does your  
17 position depend on police involvement at all?

18 MR. GUERRIERO: No, Your Honor.

19 JUSTICE SOTOMAYOR: I'm -- if a private  
20 investigator shows a picture or -- that has no  
21 connection to the police, a company's investigator --

22 MR. GUERRIERO: What I would suggest is  
23 that --

24 JUSTICE SOTOMAYOR: -- or the news media  
25 publishes a picture of someone that it thinks --

1                   MR. GUERRIERO: I have a two-part answer to  
2   that. The -- the significance of the suggestive  
3   influence is how it affects reliability. Most of the  
4   time that influence, the defense will allege, is from  
5   some police activity and rightly so because they're  
6   mostly involved and rightly so because police suspicion  
7   is the kind of influence that would direct the witness's  
8   attention and say that's the man.

9                   But it's not necessarily required, and in  
10  fact in -- one of the Federal court of appeal cases,  
11  Dunnigan v. Keane, involved exactly that, a private  
12  investigator, where a private investigator from a bank  
13  showed surveillance photos to the witness and then later  
14  the witnesses made an ID. I mean --

15                  JUSTICE SCALIA: Mr. Guerriero, if it's  
16  not -- if it's not limited to suggestive circumstances  
17  created by the police, why is unreliable eyewitness  
18  identification any different from unreliable anything  
19  else? So, shouldn't we look at every instance of  
20  evidence introduced in criminal cases to see if it was  
21  reliable or not?

22                  MR. GUERRIERO: No, Your Honor. I suggest  
23  that eyewitness identification evidence is unique, and I  
24  think that this Court recognized that in Wade and in the  
25  subsequent cases, in fact described it at that time as

1     probably the leading cause of miscarriages of justice.  
2     And in fact experience with the DNA exonerations that  
3     we've seen recently in the last 10 or 15 years have  
4     shown that.

5                 JUSTICE GINSBURG:  So, at least for all  
6     eyewitness testimony, there would have to be some  
7     pretesting for reliability; is that -- is that your  
8     contention?

9                 MR. GUERRIERO:  No, Your Honor, and I don't  
10    think that's exactly what the Court said in Wade and the  
11    subsequent cases.  It's the combination of eyewitness  
12    identification testimony plus the suggestive influence  
13    which makes -- which brings it to sort of the height of  
14    suspicion and creates the greatest risk.

15                JUSTICE GINSBURG:  And in this case, in  
16    which category do you place the eyewitness testimony?  
17    Is it police suggestion, or is it suggestive but not  
18    through any manipulation on the police's part?

19                MR. GUERRIERO:  In our case, we do not  
20    allege any manipulation or intentional orchestration by  
21    the police.  But our position is that it appeared to the  
22    witness, to Ms. Blandon, that Mr. Perry was in fact a  
23    suspect, and she looked down, and there was that  
24    suspicion.

25                Now, if we would have been able to have our

1 due process claim heard, the judge may or may not have  
2 agreed that that was suggestive and created a risk.  
3 But --

4 JUSTICE SCALIA: Do you think that our cases  
5 which exclude or -- or require reversal when there's  
6 eyewitness testimony impaired by the police -- you think  
7 that's really limited to eyewitness testimony? Suppose  
8 the police created suggestiveness in another category of  
9 evidence. Let's say -- let's say voice evidence, that  
10 the killer had left a message on the -- on the phone.  
11 And the police in some manner create suggestiveness that  
12 causes a witness to identify that as the voice of the  
13 killer. You really think that we would say, well, this  
14 is not eyewitness testimony; eyewitness testimony  
15 creates a special risk? Don't you think that we would  
16 say, whenever the police render evidence unreliable, it  
17 -- it should be excluded?

18 MR. GUERRIERO: I think that may be a  
19 separate due process claim. For example, if the  
20 police --

21 JUSTICE SCALIA: Exactly. But that -- that  
22 impairs your argument, because if we accept your  
23 argument for eyewitness, we should similarly accept it  
24 for everything else. There's nothing special about  
25 eyewitness.

1                   MR. GUERRIERO: I -- I disagree, Your Honor.  
2 I think that what the Court has said is that there is  
3 something special about eyewitness identification  
4 testimony.

5                   JUSTICE SCALIA: No, I'm saying we don't  
6 mean it.

7                   (Laughter.)

8                   MR. GUERRIERO: Well --

9                   JUSTICE SCALIA: I'm saying that it's  
10 unbelievable that if the -- if the police created  
11 testimony, not eyewitness testimony, but testimony that  
12 was unreliable because of police suggestiveness, I think  
13 we would throw that out as well. Don't you think so?

14                  MR. GUERRIERO: I -- well, I think that in  
15 any case -- and I think the Court has said this in other  
16 circumstances, that in any case a defendant could raise  
17 a due process claim and say, either because of the way  
18 the prosecution handled the evidence or because of the  
19 -- the combination of rulings on evidence, that there  
20 was a due process violation that implicated fundamental  
21 fairness.

22                  JUSTICE KENNEDY: In this case, suppose that  
23 the police talked to this -- to the lady that was in the  
24 -- in the apartment and saw the thing out the window and  
25 said: We -- we think we've solved this case, but you

1 can't look at this man. We don't want to you look at  
2 this man. Don't tell us. We're not going to let you  
3 look out that window.

4 It seems to me that the defendant might have  
5 a due process argument that the police interfered, that  
6 she couldn't say, right when he was there, that's not  
7 the man. I don't know what you want the police to do in  
8 this case. It seems to me it would have been (a)  
9 risking this argument from the defendant and (b)  
10 improper police conduct not to ask the woman, is this  
11 the man?

12 MR. GUERRIERO: I disagree, Your Honor. If  
13 the police wanted to ask her to make an identification,  
14 they could have done a line-up procedure or a photo  
15 line-up procedure fairly promptly that would be distinct  
16 from and much more fair than the show-up at the scene.  
17 And there was no emergency or exigency here that would  
18 require a show-up.

19 JUSTICE SCALIA: What about -- what about  
20 unreliable eyewitness testimony in favor of the  
21 defendant? Let's assume the same suggestiveness that  
22 causes you to exclude it when it's been introduced by  
23 the prosecution, but here it's being introduced by the  
24 defendant to show that it was somebody else, okay? Is  
25 that going to be excluded?



1           MR. GUERRIERO: It may be excluded under the  
2 rules of evidence, but the Due Process Clause doesn't --

3           JUSTICE SCALIA: Do you think it should be  
4 excluded under the rules of evidence? If you say it's  
5 so unreliable -- this is a one-way door?

6           MR. GUERRIERO: The Due Process Clause --

7           JUSTICE SCALIA: All of the evidence that --  
8 that causes the defendant to be convicted is excluded,  
9 but -- but any -- any evidence -- any evidence on the  
10 other side is not?

11          MR. GUERRIERO: Well, the defendant is  
12 obviously not trying to deprive the State of its liberty  
13 in the same way that the State is trying to deprive the  
14 defendant of his liberty at trial. So, the Due Process  
15 Clause would not apply in that sense. That's not to say  
16 that there wouldn't be evidentiary grounds for the State  
17 to raise that objection.

18          JUSTICE SCALIA: No, but you see, when --  
19 when it's the State that causes the unreliability, I can  
20 see why it is a -- a ground that can be invoked only by  
21 the defendant. But when you come up with a theory that  
22 it doesn't matter whether the State was the cause or  
23 not, I don't know why it wouldn't work both ways, that  
24 the evidence is inherently unreliable, and it ought to  
25 be excluded whether it helps the defendant or hurts the

1 defendant.

2 MR. GUERRIERO: It --

3 JUSTICE SCALIA: Once you take the State out  
4 of the mix, there's no reason to limit it to the -- to  
5 the defendant.

6 JUSTICE GINSBURG: You -- you answered that  
7 due process works only in favor of the defendant.

8 MR. GUERRIERO: That's right.

9 JUSTICE GINSBURG: Not in favor of the  
10 State.

11 MR. GUERRIERO: That's right.

12 JUSTICE GINSBURG: And that is your only --  
13 your only distinction. You are saying this is a one --  
14 one-way --

15 MR. GUERRIERO: That's right, Justice  
16 Ginsburg.

17 JUSTICE GINSBURG: -- street.

18 JUSTICE SCALIA: Well --

19 JUSTICE ALITO: I take it from your -- I  
20 take it from your answers that simple unreliability is  
21 not enough. If there's testimony --

22 MR. GUERRIERO: That's right.

23 JUSTICE ALITO: -- eyewitness testimony that  
24 seems of very dubious unreliability, that cannot be  
25 excluded.

1 MR. GUERRIERO: That's right. I --

2 JUSTICE ALITO: At least not on that ground.

3 MR. GUERRIERO: That's right, and I might  
4 even go further.

5 JUSTICE ALITO: Something more is needed;  
6 suggestiveness is needed.

7 MR. GUERRIERO: That's right.

8 JUSTICE ALITO: But suggestiveness doesn't  
9 require any police involvement? Is that right?

10 MR. GUERRIERO: That's right. And --

11 JUSTICE ALITO: Can you just define what you  
12 mean by "suggestiveness"?

13 MR. GUERRIERO: Well, I think the Court has  
14 given examples. If it's effectively a show-up or a  
15 show-up -- the example in Foster involved a couple of  
16 different kinds of suggestiveness. One was where the  
17 police did a line-up where the defendant was the only  
18 common person.

19 JUSTICE ALITO: Yes, but those are all  
20 situations where the police is involved -- the police  
21 are involved.

22 MR. GUERRIERO: Right. The nonpolice  
23 examples of suggestiveness that rise to the due process  
24 level are mostly going to be show-ups. The example in  
25 Dunnigan v. Keane was a private investigator showing --

1 from the bank. They had an ATM card that was stolen  
2 from the person, and he --

3 JUSTICE ALITO: Well, what if you have  
4 cross-racial identification? Would that qualify on the  
5 ground that studies have shown that those may be less  
6 reliable?

7 MR. GUERRIERO: That may be a separate  
8 ground to move for a jury instruction or for an expert.  
9 I'm not sure that -- we certainly don't argue here and  
10 it wasn't argued below that that's a separate due  
11 process ground.

12 JUSTICE SCALIA: Why not? I mean, that's  
13 the point. Why not? What about an eyewitness  
14 identification from 200 yards? You know, normally you'd  
15 leave it to the jury, and the jury would say that's very  
16 unlikely. But you want to say it's -- it has to be  
17 excluded, and if it's not, you retry the person. What  
18 is magic about suggestiveness as opposed to all of the  
19 other matters that could cause eyewitness identification  
20 to be wrong?

21 MR. GUERRIERO: Well, two answers to that,  
22 Your Honor. First, it's not that these things are --  
23 are always excluded, and in fact the Court has set a  
24 very high bar. I mean, the standard is this evidence is  
25 excluded only if it's very substantially likely to lead

1 to a misidentification. So --

2 JUSTICE ALITO: I understand that, but I  
3 need to know what you mean by "suggestiveness." What  
4 does that mean? Can you just give me a definition of  
5 it?

6 MR. GUERRIERO: It is conduct or  
7 circumstances that point -- that tell the witness that's  
8 the man. And, most commonly, it would be showing a  
9 single photograph or presenting the person as a suspect  
10 or it appearing, as in this case, that the -- the  
11 defendant was a suspect. And that's essentially how the  
12 Court has defined it, as conduct that says that's the  
13 man.

14 So, there may be some things that the  
15 defense argues that are suggestive, and the trial court  
16 looks at it and says, you know, that's a very slight  
17 suggestion. You say he is the only guy in the line-up  
18 with a mustache. I don't even -- I'm not going any  
19 further. I don't think that's sufficient suggestion.  
20 That doesn't qualify as saying that's the man.

21 JUSTICE KAGAN: But just to repeat Justice  
22 Scalia's question, once you're not talking about police  
23 suggestiveness, once you're talking about suggestiveness  
24 that arises from non-State conduct, why should we be  
25 focused on suggestiveness as opposed to any other cause

1 of unreliability?

2 MR. GUERRIERO: Well, because that's what --  
3 my first reason is that that's what the Court focused on  
4 in Wade as -- as the main danger.

5 JUSTICE KAGAN: Well, the Court was focusing  
6 on police suggestiveness. That's the context of all our  
7 cases. Now, you might say, well, look, there's a bigger  
8 problem, and the bigger problem is the unreliability of  
9 identifications generally, but that doesn't relate to  
10 suggestiveness per se.

11 MR. GUERRIERO: Well, I think our position  
12 is in between there. We're not saying that there's a  
13 due process right to have eyewitness evidence excluded  
14 generally without some suggestiveness. What we are  
15 saying is that if the suggestion comes from a nonpolice  
16 source or if it, as in this case, involved the police  
17 but their involvement was unintentional, it's just  
18 accidental, that that suggestiveness should still be  
19 considered because --

20 JUSTICE BREYER: What does that mean?

21 JUSTICE GINSBURG: Do you distinguish the --  
22 do you distinguish the husband's situation? He was an  
23 eyewitness too, but there was a motion to suppress her  
24 testimony. Is that an example where there's an  
25 eyewitness testimony but no suggestiveness? Why didn't

1     you move to suppress the husband's statement?

2                   MR. GUERRIERO:   Trial counsel simply did not  
3     move to suppress that testimony.   I don't have a good  
4     explanation, and, to be frank, I would have filed the  
5     motion to suppress his testimony as well.

6                   JUSTICE GINSBURG:   So, you'd put them both  
7     in the same category?

8                   MR. GUERRIERO:   I would have.

9                   CHIEF JUSTICE ROBERTS:   Why isn't it -- this  
10    may be -- just, again, following up on Justice Alito's  
11    question, but there's always a degree of suggestiveness.  
12    It's not like the person is, you know, picked randomly  
13    off the street and saying, you know, do you know this  
14    person?   It's in the context of an investigation.   The  
15    person has some contact with it.   So, there's always  
16    some suggestiveness that, well, this person might have  
17    something to do with what went on.

18                   MR. GUERRIERO:   That's right.   And if there  
19    -- if it rises to the level of what the Court has given  
20    as examples of a show-up or the same defendant appearing  
21    in a line-up or something else that says that's the man,  
22    then that raises a red flag.   And it's not a --

23                   CHIEF JUSTICE ROBERTS:   But whenever --  
24    whenever the witness is asked, at least there's a  
25    suggestion that this might be the man.   And I don't know

1    why you would think that's any greater than this is the  
2    man.  The police don't come up usually and say, this is  
3    the person that we think did it; is that who you saw?  
4    They say, did you see this guy?

5                   MR. GUERRIERO:  Actually, I disagree with  
6    that aspect of your question, Your Honor.  And in fact I  
7    think the proper police procedure in certainly the  
8    police departments that I'm familiar with will instruct  
9    the witness that -- do not assume that anyone that we  
10   think is a suspect is in this line-up.  And that's in  
11   the standard witness instructions, and they may even do  
12   multiple line-ups where they say, okay, we're going to  
13   show you three sets of eight, and the suspect -- or  
14   there may or may not be a suspect in any of them.  We  
15   just want you to look at this set and see if anyone --

16                   CHIEF JUSTICE ROBERTS:  Well, what about a  
17   situation like the one we had here, where you're not  
18   talking about a line-up?

19                   MR. GUERRIERO:  That's right.

20                   CHIEF JUSTICE ROBERTS:  But you're talking  
21   about the scene of a crime, and the police says, do you  
22   know this person, did you see this person, or anything  
23   else?  That in itself, any type of identification in the  
24   course of an investigation, I think you would have to  
25   say is suggestive, because the person is not picked up



1 randomly.

2 MR. GUERRIERO: It is, but the key is that  
3 it's not the suggestion that results in exclusion. It's  
4 the suggestion that raises the red flag that allows the  
5 defendant to say, would the trial court please evaluate  
6 this according to the standards?

7 CHIEF JUSTICE ROBERTS: So, this is --  
8 again, this is just following up, I guess. But I  
9 remember in law school one of the things in criminal  
10 law, the professor says, all right, everybody be quiet.  
11 And then a certain amount of time goes by, and then he  
12 starts asking people, well, how much time went by? And  
13 people -- some people say 4 minutes, some people say,  
14 you know, 1 minute. And it turns out, if I'm  
15 remembering correctly, to be a lot shorter than most  
16 people think.

17 So, that's at least, the point was trying to  
18 be made anyway, at least as unreliable as eyewitness  
19 testimony. So, your argument would have to cover that,  
20 wouldn't it?

21 MR. GUERRIERO: I --

22 CHIEF JUSTICE ROBERTS: You know, how long  
23 were you there before this individual came into the  
24 shop? The person says, I was there for 5 minutes. And  
25 that ruins the person's alibi, when it turns out, you

1 know, study after study would say, you know, it really  
2 was 45 seconds or 1 minute.

3 MR. GUERRIERO: I think it's important to  
4 look back at what the Court said in Wade and in fact how  
5 what the Court said in Wade has been borne out. Of  
6 course, there's aspects of unreliability to any kind of  
7 evidence. Somebody could come and claim that there's  
8 issues with false confessions or issues with forensic  
9 evidence. I think last term somebody made a claim --  
10 tried to assert a claim regarding DNA evidence that was  
11 akin to an eyewitness identification claim.

12 But the point is that this kind of evidence  
13 was singled out by the Court and recognized as having  
14 particular dangers, and it's been borne out by the  
15 studies, not psychological --

16 JUSTICE KENNEDY: But, again, that was in  
17 the context of procedures that the police had  
18 instituted.

19 MR. GUERRIERO: It may be that --

20 JUSTICE KENNEDY: And your -- and your  
21 rationale goes much beyond it. In a way, you're  
22 infringing on the province of the jury. I don't usually  
23 like to reminisce, but there was a case I had where a  
24 prosecution witness was very, very certain, all too  
25 certain. And I said: Do you ever take your wife out to

1 dinner or go out to dinner with friends? And he said:  
2 Oh, yes. I said: Has it ever happened to you that  
3 midway in the meal you say, is that our waiter? And  
4 you've seen -- the waiter has brought you the menu, he  
5 has taken your order, he has brought your food, and you  
6 were under no stress at the time.

7 (Laughter.)

8 MR. GUERRIERO: Right.

9 JUSTICE KENNEDY: And there was good light.  
10 So, you teach the jury this way. And you're  
11 just -- you're just usurping the province of the jury,  
12 it seems.

13 MR. GUERRIERO: I don't think so, Your  
14 Honor. I mean, we're -- what -- I think what this Court  
15 has said is that this is a special category of evidence  
16 that has to be red-flagged by or can be red-flagged by  
17 the defense for the trial judge to look at it and say --

18 JUSTICE BREYER: What is --

19 MR. GUERRIERO: -- on a case by -- I'm  
20 sorry.

21 JUSTICE BREYER: Go ahead. You were saying  
22 on a case that all you want to do is red-flag it for the  
23 judge.

24 MR. GUERRIERO: And then the trial judge  
25 would look at it and in the rare case where he says it's

1 very substantially likely, which we agree is a high  
2 standard --

3 JUSTICE BREYER: All right. Now, how does  
4 that differ from what exists in I think every State and  
5 certainly in the Federal Rules in Rule 403? The judge  
6 may exclude evidence if its relevance is outweighed by  
7 its prejudice or misleading the jury. So, why, in any  
8 instance where you think that this statement about to  
9 come in is unreliable for various reasons, you say:  
10 Judge, will you please look please look at Rule 403? I  
11 have some experts over here and whatever else you want  
12 that would show that this is misleading to the jury.

13 For all the reasons you have said in your brief, right?

14 All right. So -- so, since that is already  
15 the law and it does apply to every piece of evidence,  
16 including all the things we've been talking about, what  
17 is it that you want to change?

18 MR. GUERRIERO: Well, to answer the first  
19 part of your question, what's different about this  
20 evidence is that --

21 JUSTICE BREYER: I didn't say what's  
22 different about it. I'm not looking for a difference.  
23 I'm looking -- I'm saying they're all the same. And,  
24 indeed, we do what you want right now. It's called Rule  
25 403 in the Federal system. What I'm asking you is what

1 is it you want done, since all you want is the judge to  
2 look at it carefully, that is not done at this moment?

3 MR. GUERRIERO: The analysis under 403,  
4 which New Hampshire of course has as well, will accord a  
5 certain weight and value to the opportunity of counsel  
6 to cross-examine the witness and to make arguments to  
7 the jury. And unlike any other kind of evidence, this  
8 Court has said, precious though it is, the right of  
9 cross-examination does not always --

10 JUSTICE BREYER: No, but, judges don't, I'm  
11 sure -- I'm not 100 percent sure; you'd have to ask a  
12 trial judge. But I am sure there are instances where  
13 judges say under Rule 403: I conclude it is misleading  
14 and it is prejudicial and it can't be made up for;  
15 therefore, I exclude it.

16 All right? That happens. Now, since that's  
17 what you want the judge to do, I repeat my question:  
18 What is the difference between what you're asking for  
19 and what already exists in the law?

20 MR. GUERRIERO: The --

21 JUSTICE BREYER: Unless -- well, go ahead.

22 MR. GUERRIERO: I'm sorry.

23 The difference is that under a normal 403  
24 analysis, when I told the judge, when I said she never  
25 could describe his face, she couldn't even say what

1 clothes he was wearing, the judge will respond to me and  
2 say, that's fine; that's all great fodder for  
3 cross-examination. But the difference with this kind of  
4 evidence is that it's not just ---

5 JUSTICE BREYER: Whoa, wait. Let me stop  
6 you there, because now what you seem to be saying is it  
7 isn't the case that you simply want the judge to look at  
8 this with care; rather, you want the judge to change her  
9 result. You want sometimes this to be excluded where  
10 under 403 it is sometimes not excluded. All right.  
11 Now, I asked, if that's what you want, that's a  
12 different matter. That's a substantive standard. And  
13 so, you're proposing a different substantive standard,  
14 and I want to know what it is.

15 MR. GUERRIERO: It's -- it's the standard  
16 that this Court has established: If it's reasonably --  
17 reasonably likely or substantially likely to lead to a  
18 risk of misidentification at trial. Very substantially  
19 likely.

20 JUSTICE ALITO: But that would be really a  
21 great change from the way trials are now conducted,  
22 wouldn't it? Let me give you this example: A victim is  
23 raped, and the victim doesn't really have a very good  
24 opportunity to see the perpetrator. It's dark, the  
25 person has a mask and so forth. A couple of weeks go

1 by, and the victim reads on article in the paper that  
2 says so-and-so has been arrested for a rape in another  
3 part of the city. There's a picture of that person in  
4 the paper. And the victim says that's the person who --  
5 who raped me.

6 Now, you want to make it possible for the  
7 judge to say to the -- that victim may not testify and  
8 identify the person -- that that person -- that the  
9 victim says was the perpetrator of the rape, on the  
10 ground that the newspaper picture was suggestive, even  
11 though there wasn't any police involvement, and when you  
12 look at all the circumstances, the identification is  
13 unreliable.

14 Now, maybe that's a good system, but that is  
15 a drastic change, is it not, from the way criminal  
16 trials are now conducted?

17 MR. GUERRIERO: Well, it's certainly not the  
18 change from what the law is in the Federal circuits that  
19 we cited. And I would also point out that in one of  
20 the --

21 JUSTICE ALITO: Do you know of cases like  
22 that in which the judge has said that eyewitness  
23 identification cannot come in?

24 MR. GUERRIERO: In Thigpen v. Cory, which is  
25 a Sixth Circuit case, the court said -- in fact, they

1 specifically used the phrase "police machinations" --  
2 that this did not arise from police machinations. It  
3 was basically happenstance in that case that the witness  
4 was -- the witness identified the defendant, and that  
5 was excluded as unreliable.

6 JUSTICE KENNEDY: But we've said in our  
7 case, Neil v. Biggers -- that was a rape case, and we  
8 allowed it. We allowed the eyewitness.

9 MR. GUERRIERO: Well -- and I think the  
10 Court said in all its cases, and in particular in  
11 Simmons, that each case --

12 JUSTICE KENNEDY: And, in fact, we said that  
13 it was unnecessarily suggestive but that it was still  
14 reliable.

15 MR. GUERRIERO: And it may be. I mean, it  
16 may -- you could have an extremely -- you could have a  
17 -- the police could do a show-up intending to produce an  
18 ID, but if the witness got a very good look at the  
19 person, was calm, was maybe a police officer like in  
20 Brathwaite, and the court said, we don't care how  
21 deliberate this -- and even if there's manipulation, we  
22 don't care how much of that there is, we find it's  
23 reliable here.

24 JUSTICE KAGAN: Suppose that there were some  
25 other category of testimony which proved even more



1     unreliable than the category that you're talking about.  
2     Let's say that it turned out, study after study after  
3     study, that jailhouse informants lie. And so, the  
4     testimony of jailhouse informants is likely to be just  
5     completely unreliable, to, you know, double as much as  
6     eyewitness testimony. Same rule for that?

7                   MR. GUERRIERO: I think it would be a very  
8     high burden for the defense to meet there, but if the  
9     finding was that there are times that a witness, that --  
10    like in the eyewitness situation, where the witness  
11    truly believes that they're identifying the right  
12    person, but they are actually not and it could result in  
13    a miscarriage of justice, then I do believe fundamental  
14    fairness requires the Court to say due process doesn't  
15    allow that evidence.

16                  JUSTICE KAGAN: Okay. Well, now we're  
17    talking about -- now we are setting up a standard that  
18    applies outside eyewitness testimony. It's just  
19    testimony that we find to be -- categories of testimony  
20    that we find to be extremely unreliable will be subject  
21    to this new due process red flag. Is that right?

22                  MR. GUERRIERO: Well, I don't think so, Your  
23    Honor, but more for a factual reason in that the Court  
24    said in 1967 that this is the leading cause of  
25    miscarriage of justice. The studies and -- not just

1 studies, but the transcripts and records of actual  
2 trials.

3 JUSTICE KAGAN: No, I understand you have  
4 very good empirical evidence which should lead us all to  
5 wonder about the reliability of eyewitness testimony.  
6 I'm just suggesting that eyewitness testimony is not the  
7 only kind of testimony which people can do studies on  
8 and find that it's more unreliable than you would think.

9 MR. GUERRIERO: Well, it may -- if somebody  
10 else came along and said we've done a study and we find  
11 this kind of evidence, that in 75 percent of the  
12 wrongful convictions, this evidence contributed to the  
13 miscarriage of justice, then I would think the Court  
14 should take a look at that. But I don't think any other  
15 evidence matches that.

16 JUSTICE GINSBURG: What about all the -- all  
17 the other safeguards that you have? I mean, you can ask  
18 the judge to tell the jury be careful; eyewitness  
19 testimony is often unreliable. You can point that out  
20 in cross-examination --

21 MR. GUERRIERO: Yes.

22 JUSTICE GINSBURG: -- ask all those  
23 questions. You can say something about it in your  
24 summation to the jury. And, as Justice Breyer brought  
25 up, you have the evidence rule that says if the

1 prejudicial value outweighs probative value, that the  
2 judge can say, I'm not going to let it in.

3 Why aren't all those safeguards enough?

4 MR. GUERRIERO: If all of those safeguards  
5 were enough, even when the police made --

6 JUSTICE GINSBURG: Well, leaving aside the  
7 police --

8 MR. GUERRIERO: Okay.

9 JUSTICE GINSBURG: -- because, there,  
10 there's an interest in deterrence, in deterring the  
11 police from manipulating evidence.

12 MR. GUERRIERO: I don't think deterrence is  
13 the primary basis of the Court's cases, Your Honor,  
14 because the Court has said that if it proves to be  
15 reliable, no matter how manipulative the police were,  
16 this evidence comes in. So, the basis of the rule is  
17 not primarily deterrence; it's the risk of an unfair  
18 trial and the risk of a miscarriage of justice.

19 JUSTICE GINSBURG: It is a difference  
20 between --

21 JUSTICE KENNEDY: Well, it seems to me --

22 JUSTICE GINSBURG: -- suggestive and  
23 suggested by the police.

24 MR. GUERRIERO: I'm sorry, Your Honor, I --

25 JUSTICE GINSBURG: The -- if the suggestion

1 comes from the police, then the evidence will be  
2 excluded. If the suggestion comes from some place else,  
3 unless we change the rules --

4 MR. GUERRIERO: Well, I think that that's  
5 a --

6 JUSTICE GINSBURG: -- it would be admitted.

7 MR. GUERRIERO: I mean, I think that that's  
8 a -- that's a tricky issue to consider, because  
9 suggestion coming from the police is different from  
10 manipulation. And if -- if the rule is unintended  
11 suggestion from the police implicates due process, then  
12 Perry was entitled to a due process analysis, because  
13 the unintended suggestion here was apparent police  
14 suspicion as he stood there.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 MR. GUERRIERO: Thank you.

17 CHIEF JUSTICE ROBERTS: General Delaney.

18 ORAL ARGUMENT OF MICHAEL A. DELANEY

19 ON BEHALF OF THE RESPONDENT

20 MR. DELANEY: Mr. Chief Justice, and may it  
21 please the Court:

22 An eyewitness identification implicates due  
23 process concerns only when the police arrange a  
24 confrontation to elicit a witness's identification of a  
25 suspect and use unnecessarily suggestive techniques that

1 skew the fact-finding process. The central concern --

2 JUSTICE SOTOMAYOR: Now we've changed the  
3 language of Wade when it talks about intentional or  
4 unintentional. And you're suggesting that police  
5 manipulation always has to be intentionally suggestive?

6 MR. DELANEY: I'm not --

7 JUSTICE SOTOMAYOR: Even if the policeman  
8 tells you he wasn't really thinking or focusing on a  
9 distinguishing characteristic in the line-up?

10 MR. DELANEY: That may play a role, Justice  
11 Sotomayor, but only in a limited sense, and not in the  
12 way the Petitioner is suggesting we look at  
13 unintentional conduct. First, for the due process  
14 inquiry to trigger, there must be an arranged  
15 confrontation of a suspect and a witness by the police.

16 JUSTICE SOTOMAYOR: Could you tell me what  
17 you think would have happened here? There was a reason  
18 the police asked this defendant to stay put. They  
19 didn't want him to leave the scene, correct?

20 MR. DELANEY: That -- that's correct.

21 JUSTICE SOTOMAYOR: In your judgment -- I  
22 think Justice Kennedy hit the nail on the head. My  
23 suspicion is that at some point they would have asked  
24 the witnesses in the building and engaged in a show-up.  
25 What's so different between intentionally doing the

1 show-up and holding the defendant in the back yard  
2 standing there next to a police officer, so that anyone  
3 who wants to -- like this woman, who wants to find the  
4 guy, can just point to that one? What's the difference?

5 MR. DELANEY: The difference in this case is  
6 the role that the police played in bringing about  
7 potential suggestion under your hypothetical. What the  
8 Due Process Clause is concerned about is the role of the  
9 police in essentially stacking the deck, putting their  
10 thumb on the scale and skewing the fact-finding process.  
11 It goes to the integrity of the process --

12 JUSTICE SOTOMAYOR: No. I mean, the way not  
13 to skew it was to put him in the police car and just let  
14 him sit there in the dark. So, they intentionally made  
15 him wait at the scene of the crime.

16 I'm not talking about whether this was  
17 necessary or unnecessary, because I think that a  
18 perfectly good argument could be made that the police  
19 acted reasonably and necessarily. All right? It makes  
20 no sense to move a defendant that far from the scene of  
21 a crime if you're not sure he's the one who committed  
22 the crime, he or she.

23 But I'm going to the question of how do we  
24 define, if we write this opinion, manipulation without  
25 getting into a mens rea type analysis and adding yet

1 another layer to Biggers?

2 MR. DELANEY: Well, first, I don't think you  
3 need to go there in this case. You can simply say that,  
4 based on the factual findings of the State court, the  
5 police did not induce any type of show-up --

6 JUSTICE SCALIA: But that's not -- we face  
7 that problem anyway, even if we -- whether or not we  
8 decide in this case that it doesn't matter that the  
9 police manipulated it, we're always going to have the  
10 problem of when has there been police manipulation;  
11 right?

12 MR. DELANEY: That's correct.

13 JUSTICE SCALIA: I mean, that -- that's not  
14 a creation of this -- of this case.

15 MR. DELANEY: That's correct.

16 JUSTICE SCALIA: And I -- I would guess that  
17 in the case you're talking about, just telling the  
18 person to stay where he is, is not -- now, it would be  
19 different if -- if the defendant was -- was caught two  
20 blocks away and the police bring him back to the scene  
21 of the crime and make him stand there so that the woman  
22 can see him from the window. That's quite different.

23 MR. DELANEY: It is quite different. And  
24 Stovall tells us that the test is an objective one. We  
25 look at the totality of the circumstances to determine

1 whether there has been suggestive conduct.

2 Now, in that regard --

3 CHIEF JUSTICE ROBERTS: When you say  
4 that's -- when you say that's different, you're not --  
5 you're not suggesting that that would be suggestive, are  
6 you?

7 MR. DELANEY: No, I'm not.

8 CHIEF JUSTICE ROBERTS: Because presumably,  
9 that's the same argument -- that's for the jury and the  
10 counsel. They can say during cross-examination the guy  
11 was two blocks away, you know, and wasn't it only  
12 because the police brought him back that you -- you  
13 know, all of that. I don't see what difference it makes  
14 in terms of whether you have a suppression hearing  
15 before the trial.

16 MR. DELANEY: That's correct, Mr. Chief  
17 Justice. It would not make a difference in that regard.  
18 And on the facts of this case, we do have clear factual  
19 findings that this police officer in no way -- in no way  
20 induced this witness to move towards the window and  
21 identify a suspect who just happened to be standing next  
22 to a police officer.

23 If the concern under due process in this  
24 area has been a deterrence rationale, which this Court  
25 has stated in both *Neil v. Biggers* and in *Manson v.*



1 Brathwaite, that must be the guiding principle.

2 JUSTICE KAGAN: Well, it's both, right,  
3 General Delaney? I mean, the Court has certainly talked  
4 about deterrence, but the Court also has very  
5 substantial discussions in all of these opinions about  
6 reliability. And from the criminal defendant's point of  
7 view, it doesn't really much matter whether the  
8 unreliability is caused by police conduct or by  
9 something else.

10 So -- so, tell me a little bit why you think  
11 the police conduct here -- you know, that has to be  
12 there in every case?

13 MR. DELANEY: That is true, Justice Kagan,  
14 that -- that the opinions have discussed both issues.  
15 And I would offer two considerations. First, to the  
16 extent that the courts have talked about reliability as  
17 the linchpin or the likelihood of misidentification  
18 playing a role, they have only done that read in context  
19 within and only after an unnecessarily suggestive  
20 circumstance has been applied.

21 JUSTICE KAGAN: I think that that's not  
22 right. I mean, the reason we want to deter this conduct  
23 is because the conduct results in misidentifications, in  
24 unreliable testimony. That's the reason that deterrence  
25 is an important goal, is because this conduct leads to

1 unreliable testimony.

2 MR. DELANEY: That is correct, and if we  
3 expand that out and we apply that rationale to the  
4 circumstances of a case not involving police activity,  
5 we lose that deterrence rationale. There is no  
6 deterrence involved in a suggestive circumstance that  
7 does not involve the police. Civilians are not going to  
8 be repeat players in this system.

9 JUSTICE KENNEDY: And what you're -- what  
10 you're saying, I take it, in the answer to Justice  
11 Kagan, was that there's really a two-part step. First,  
12 was the police procedure unnecessarily suggestive? And  
13 then if it was, are there other reliability -- was  
14 reliability impaired?

15 So, you go -- you ask both questions.

16 MR. DELANEY: And that is the Biggers test.  
17 And if we looked at reliability further as sort of the  
18 touchstone of our due process inquiry, we would need to  
19 misplace completely the role of examining whether the  
20 suggestive circumstances are unnecessary. An -- an  
21 inquiry into necessity only makes sense in the context  
22 of a police investigation or police work. And if we  
23 look at Stovall, certainly there's an example of a case  
24 that was a show-up, where this Court said that, despite  
25 the clearly suggestive circumstances, that show-up was

1 imperative and necessary because the witness may have  
2 been about to die.

3 The Court did not conduct a reliability  
4 analysis. So, if reliability is the linchpin, it puts  
5 the Stovall holding in question, and really Stovall  
6 would be undermined.

7 JUSTICE ALITO: What you seem to -- what  
8 you're saying -- what you're saying seems to suggest  
9 that the rule we're talking about here is really not an  
10 aspect of due process per se, but, like the Fourth  
11 Amendment exclusionary rule, it's a special due process  
12 exclusionary rule that is meant to deter conduct that  
13 could result in a constitutional violation.

14 Is that right?

15 MR. DELANEY: I -- I think that's correct,  
16 Justice Alito. And the analogy I would use would be to  
17 your perjury cases. In Mooney, you have clearly set a  
18 due process standard that prevents police or prosecutors  
19 from knowingly using false evidence. And the concern  
20 there is how the police will skew the fact-finding  
21 process. Stovall and the identification cases are very  
22 similar to that.

23 Our concern, in essence, is that the police  
24 through unnecessary suggestion in that circumstance are  
25 going to skew the fact-finding process and, in this

1 instance, in essence, create a false or altered memory.

2 JUSTICE ALITO: If -- if the exclusionary  
3 aspect of this is not part of due process itself, then  
4 doesn't it follow that what due process requires is  
5 reliability? So, doesn't that mean that -- that the  
6 Petitioner's argument is correct, the due process  
7 standard is simply reliability, not suggestiveness?

8 MR. DELANEY: It's -- the standard is not  
9 reliability, Justice Alito. The standard for due  
10 process in this area is the use of orchestrated police  
11 suggestion. In --

12 JUSTICE KENNEDY: What -- what about cases  
13 with inflammatory evidence, too many lurid photos or  
14 testimony that ignites prejudice in the community?  
15 That's -- that's a -- that's reliability.

16 MR. DELANEY: That is, and we have both  
17 constitutional and non-constitutional tools and  
18 procedures right now to address that. At the base, we  
19 require prosecutors, under Jackson v. Virginia, to have  
20 some minimum level of evidence so that a rational trier  
21 of fact can establish guilt beyond a reasonable doubt.

22 Above that, under the Sixth Amendment, we  
23 provide tools and procedures that allow a defendant to  
24 assess the reliability of evidence through  
25 cross-examination and summation and the right to

1 counsel. And, beyond that, we have non-constitutional  
2 sources under the rules of evidence that are  
3 specifically designed to assess the relevance and the  
4 reliability of the evidence. But if we go before that  
5 and say that the Due Process Clause, after all that, has  
6 some additional standing in -- in your jurisprudence to  
7 assess reliability, we really have gone to a very  
8 different place.

9 JUSTICE ALITO: You have two cases. You  
10 have Mr. Perry's case; then you have another case that's  
11 very similar. In fact, it's identical, except that in  
12 that instance the police officer talking to the witness  
13 said, would you take a look out the window and see if  
14 you recognize anybody?

15 Now, from the perspective of the defendants,  
16 the cases are -- seem -- as far as whether they get a  
17 fair trial, the cases are identical; are they not? The  
18 evidence is the same. The suggestiveness is the same.

19 MR. DELANEY: No, Justice Alito. Those cases  
20 are quite different. And to the extent we did have  
21 objective evidence that the police here had in some way  
22 brought that woman to the window to, in essence, conduct  
23 a show-up, then we may have triggered the first prong of  
24 Biggers. And the court would then be required to do two  
25 things: First, to determine whether the circumstances

1 were suggestive and, independent of that, also determine  
2 whether it was necessary or not, depending on the  
3 circumstances of the investigation.

4               So, if in fact the police officer had  
5 directed the witness to the window, there may be at  
6 least grounds for the Biggers and Manson analysis to  
7 come into play. These facts are very different from  
8 that.

9               JUSTICE KAGAN: Well, I'm not sure you  
10 answered Justice Alito's questions about why there  
11 should be this difference between these two cases. Now,  
12 you might want to say that where police conduct is  
13 involved, the chances of an unreliable identification  
14 are greater. Or you may want to say something else.  
15 But the question is: If we're focused on reliability,  
16 why are those two cases any different?

17              MR. DELANEY: Well, if we do look back, to  
18 determine whether the circumstances involving the police  
19 are any more -- of more serious concern, if we look back  
20 to Wade, this Court did talk about the unique role of  
21 police suggestion in this context of confrontations, and  
22 it specifically focused on the manner and the degree of  
23 suggestion in which the manner that police or  
24 prosecution present a witness, present a witness to a  
25 suspect, what impact that can have.

1                   That unique aspect of police suggestibility,  
2   the fact that a police officer when it brings someone  
3   forward is going to influence a witness to a high  
4   degree, does play a role and is the grounds upon which  
5   the Stovall cases have been built.

6                   JUSTICE SOTOMAYOR:  So, tell me -- they gave  
7   the hypothetical of the police pointing out the  
8   defendant out the window.  But earlier you said it might  
9   be a different case if the defendant was two blocks away  
10  and they brought him back.  Same scenario.  They do  
11  that, bring him back two blocks; make him stand at the  
12  scene of the crime; and go upstairs, talk to the woman  
13  and she spontaneously says it's the guy standing over  
14  there.  That would entitle the defendant to a Wade  
15  motion?  To a Wade hearing?

16                  MR.  DELANEY:  You would look at the  
17  totality of the circumstances.  And to the extent from  
18  an objective standpoint it could be demonstrated that  
19  the police intentionally brought that witness back to  
20  the scene --

21                  JUSTICE SOTOMAYOR:  We're now -- we're now  
22  at mens rea again.  So, what has surprised me about this  
23  case is in some ways the way the State court wrote this,  
24  because if the State court had simply said something  
25  like there was no unnecessary show-up here, they were

1 just holding someone until they could figure out what  
2 happened, there was no suggestiveness by the police  
3 because the woman pointed out the window, throw out the  
4 motion, we wouldn't be here. The argument has become  
5 something else now because you're trying to define a  
6 level of intent on the part of the police to create  
7 unreliability that I think just complicates the inquiry.

8 MR. DELANEY: And I -- and, Justice  
9 Sotomayor, I'm not trying to create that complication.  
10 And, in fact, I would -- I would reference the State  
11 court decision a little bit differently. It did ground  
12 its holding specifically in a finding that there were no  
13 sort of suggestive techniques at play here and no  
14 inducement. The trial court order very specifically  
15 said it disagrees with the show-up characterization,  
16 that the witness had pointed out the Petitioner without  
17 any inducement from the police officer; the officer did  
18 not direct the witness's attention to the window, and  
19 the officer did not ask whether a man in the parking lot  
20 was the man who broke into the cars.

21 JUSTICE SOTOMAYOR: But I think that --

22 MR. DELANEY: On those facts, that can  
23 dispose of this case without getting into the issue of  
24 mens rea.

25 JUSTICE SOTOMAYOR: Well, what's happened is



1     that your briefing and your counter's briefing is  
2     broader than I think needs to be on the facts of this  
3     case. But putting that aside, you've addressed this as  
4     the need for police manipulation. If you define it that  
5     way, then we do get into a mens rea discussion rather  
6     than what I think Biggers and Wade were about, which is  
7     are the circumstances created by the police  
8     unnecessarily suggestive.

9                     MR. DELANEY: Yes. And I agree with you  
10    that the inquiry under the -- under the first prong of  
11    Biggers is just that. It's an objective inquiry based  
12    on the totality of the circumstances.

13                    If there are no further questions -- because  
14    the defendant's conviction was the product of a fair  
15    trial, because the State court properly applied this  
16    Court's jurisprudence and precedent in the area of  
17    eyewitness identifications, and because the Petitioner's  
18    proposed rule would markedly expand this Court's due  
19    process jurisdiction, we respectfully request that the  
20    State court judgment be affirmed.

21                    Thank you.

22                    CHIEF JUSTICE ROBERTS: Thank you, counsel.

23                    Ms. Saharsky.

24                    ORAL ARGUMENT OF NICOLE A. SAHARSKY

25                    ON BEHALF OF THE UNITED STATES,

1 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

2 MS. SAHARSKY: Mr. Chief Justice, and may it  
3 please the Court:

4 A due process inquiry is required only when  
5 there's a police-arranged confrontation in order to  
6 obtain an identification and then the police  
7 unnecessarily suggest that a certain suspect is guilty.  
8 And that's because, as the State has said, the Court's  
9 central concern in these cases is the State putting a  
10 thumb on the scales, gaining an unfair advantage. Just  
11 as, as Justice Scalia said, the State can't create a  
12 false document and introduce it at trial, it can't  
13 manipulate someone's memory and then use that evidence  
14 to prove guilt at trial.

15 JUSTICE KAGAN: So, do you mean to say, Ms.  
16 Saharsky, that there can never be a due process  
17 violation from the admission of unreliable evidence?  
18 Assuming that the State has not created that evidence,  
19 has not produced that evidence, but the State knows that  
20 the evidence is unreliable or has a very substantial  
21 chance of being so, that that can never be a due process  
22 violation?

23 MS. SAHARSKY: I'm saying that's where the  
24 Court's cases are now. The State can't knowingly  
25 introduce perjured testimony, but you're not talking

1 about perjured, knowingly perjured, testimony.

2           If the question is just unreliable, the  
3 Court has said on numerous occasions -- it's rejected  
4 claims like that and said the Constitution doesn't  
5 protect to ensure all evidence is reliable. It provides  
6 a process by which the court can test reliability  
7 through cross-examination, confrontation, et cetera.  
8 The Court has -- and that was in Crawford.

9           The Court has also said -- and if I could  
10 just add one more thing -- in the due process context,  
11 that where the check comes in is in Jackson v. Virginia,  
12 that the verdict has to have enough evidence to be  
13 supported, each element of the crime, beyond a  
14 reasonable doubt that a rational jury could find it.  
15 So, that is a due process check.

16           But where the Court's cases stand today, the  
17 Court has not found, so far as we can tell, a case where  
18 it said that the mere introduction of unreliable  
19 evidence would violate the Due Process Clause. And  
20 every time it's been confronted with a claim like that,  
21 in Dowling, for example, in Colorado v. Connelly, the  
22 Court has rejected such a claim.

23           JUSTICE KAGAN: I'll give you an extreme  
24 example. The extreme example is where an identification  
25 has been produced by torture, but the torture has been

1 by a non-State actor. Same answer?

2 MS. SAHARSKY: That is an extreme example.  
3 There are many reasons why (a) the prosecution would  
4 never introduce that kind of evidence to begin with and  
5 (b) that there would be other checks on the process in  
6 addition to the confrontation and cross-examination  
7 types of things that we talked about.

8 There would be a check on the process  
9 through Brady and Giglio, for example, that if the  
10 government knew that those were the circumstances of the  
11 identification, they would have to turn that evidence  
12 over to the other side. There would also be checks in  
13 terms of the trial process if the government actually  
14 put on evidence like that. So, it is -- it is very  
15 unlikely that such a thing would happen.

16 We're not saying that the Court has to hold  
17 in this case that due process could never play a role  
18 there. But what we're saying here is this is very  
19 routine, run-of-the-mill evidence. Someone who saw what  
20 happened and wants to come into court and tell the jury  
21 that. And, as Justice Kennedy noted, you know, what  
22 Petitioner is asking for here is to take all of those  
23 away from the jury, really usurping the jury function  
24 and having these mini-trials where the court itself is  
25 trying to decide reliability.

1 JUSTICE KENNEDY: It is interesting. I was  
2 trying to find a case where some other class of evidence  
3 was excluded because it's unreliable. And as --  
4 Thompson v. Louisville, as you say, is just insufficient  
5 evidence, and that's different. Inflammatory evidence  
6 might be an example.

7 MS. SAHARSKY: Yes. I mean, that's  
8 different because --

9 JUSTICE KENNEDY: Lurid photos or something  
10 like that.

11 MS. SAHARSKY: I mean, there you have, first  
12 of all, a separate constitutional provision of an  
13 impartial jury, and you have you a direct influence upon  
14 the jury. So, it's not just unreliable evidence being a  
15 due process problem. You have this separate Sixth  
16 Amendment protection, and then you have it acting  
17 directly on the jury. So, we think that's a different  
18 case. In the due process context, where the Court's  
19 cases have really focused is on the State tilting the  
20 scales, the State corrupting the process by knowingly  
21 introducing perjured testimony or by, for example,  
22 refusing to disclose material exculpatory evidence.

23 JUSTICE KENNEDY: I think there were some  
24 early cases when fingerprint testimony couldn't come in,  
25 when fingerprint technology was just new. I don't know

1 if those were due process or not.

2 MS. SAHARSKY: I can't say. I mean, when  
3 you look -- when look at the Court's more current cases,  
4 though, to the extent that the Court has heard arguments  
5 like this evidence is too unreliable, we need a special  
6 Constitutional rule, for example, in Ventriss, with  
7 respect to jailhouse snitches, the Court rejected that  
8 argument. When the Court was told in Colorado v.  
9 Connelly there were concerns about reliability, it said,  
10 no, reliability is up to the jury, and it uses the State  
11 rules of evidence, and this Court's not going to be a  
12 rulemaking organ for rules of procedure. The  
13 Constitution puts in place the various checks on the  
14 process: compulsory process, cross-examination, et  
15 cetera. And then outside of that, it's really the role  
16 of the States to mold the trial process.

17 JUSTICE ALITO: I was intrigued by what your  
18 brief said about Federal Rule of Evidence 403. Do you  
19 think that a Federal judge under that rule may exclude  
20 the testimony of a witness on the ground that the  
21 witness is, in the judgment of the trial judge,  
22 completely unbelievable?

23 MS. SAHARSKY: Well, I mean you would need  
24 to meet the standard of Rule 403, which is that the --  
25 the probative value of the witness would be

1 substantially outweighed by unfair prejudice. I think  
2 it is unlikely that evidence would -- of an eyewitness,  
3 which the Court has said, particularly in cases like  
4 Biggers and Manson, is fairly probative, important  
5 evidence; the Court wanted to let it in, even in the  
6 circumstances of where you know, the police played a  
7 role in manipulation. So, probably, no, the Court  
8 wouldn't -- wouldn't take the evidence --

9 JUSTICE ALITO: But you think in theory that  
10 could be done? So, if you put on a cooperating witness  
11 in the case and this witness has made a hundred  
12 inconsistent statements previously and has been  
13 convicted of perjury, that the judge could just say you  
14 can't put that witness on because that person is -- is a  
15 liar, and I'm not going to have the witness testify in  
16 my courtroom?

17 MS. SAHARSKY: Well, I mean, Rule 403 isn't  
18 talking about whether evidence is true or false. It's  
19 talking about unfair prejudice to the jury, unfair  
20 prejudice being -- outweighing the probative value of  
21 the testimony. So, you know, I think it would be a call  
22 for the judge in that individual case. I don't know  
23 that that -- that that kind of argument has been made  
24 very often.

25 But it's not just that trial protection;

1   there are numerous trial protections outside of the  
2   constitutional limits that the States have put into  
3   place specifically with respect to eyewitness  
4   identification testimony. For example, there are  
5   special jury instructions that most States use, and New  
6   Hampshire used special jury instructions here. And  
7   there's something that's really notable about these  
8   instructions, which is that what Petitioner wants is,  
9   when the jury has made a determination here, looking at  
10  factors like how far was the witness away from the  
11  person, how long was it before -- between the crime and  
12  when she made the identification, the jury heard all of  
13  those factors, heard argument on it, was instructed on  
14  those things, and it made a determination. And what  
15  Petitioner wants is for a trial court -- this Court,  
16  after the fact -- to use those exact same factors and  
17  come to a different conclusion.

18               JUSTICE KENNEDY: Was the -- was the Daubert  
19  case, our expert witness case where you have to have a  
20  threshold showing -- was that due process or was that  
21  just -- that was just rule of evidence.

22               MS. SAHARSKY: Yes, it was just interpreting  
23  Rule of Evidence 702. So, you know, at the end of the  
24  day, what -- what Petitioner is really asking for here  
25  is not some kind of threshold inquiry, but really taking



1 the question of reliability away from the jury. And it  
2 would be a very big change in our system. And --

3 CHIEF JUSTICE ROBERTS: Well, we did it --

4 JUSTICE SOTOMAYOR: Counsel, there are a  
5 number of circuits that already follow your adversary  
6 rules. I think it's not just one or two. It's about  
7 five or six.

8 The floodgates open there? How many -- how  
9 many suppressions of witness identification has occurred  
10 in those circuits?

11 MS. SAHARSKY: It is not many, but the  
12 principle the Petitioner is arguing for is a significant  
13 one. It is that the Due Process Clause protects  
14 against -- protects reliability. And I assure you that  
15 once this Court says that that is the case, that there  
16 will be defendants throughout the United States making  
17 arguments about all different kinds of evidence, not  
18 involving the police, being unreliable and that that all  
19 needs to be taken away for -- from the jury, and --

20 CHIEF JUSTICE ROBERTS: Well, suppose the --  
21 lie detectors, for example, that's been taken away from  
22 the jury on a categorical basis, right?

23 MS. SAHARSKY: Well, there are some State  
24 rules of evidence that do that, but, I mean, we're  
25 talking about as a matter of due process that it is

1 fundamentally unfair at trial to not allow -- this --  
2 to -- this evidence if given to the trial would be  
3 fundamentally unfair. And, you know, the Constitution  
4 has enshrined the jury as the fundamental guarantee, as  
5 the fundamental protector of liberty; and to think that  
6 that same Constitution through the Due Process Clause  
7 means that run-of-the-mill evidence has to be taken away  
8 from the juries, that the trial court can itself look at  
9 factors like how good of a view the person had --

10 JUSTICE ALITO: There surely is some minimal  
11 due process requirement for the admission of evidence,  
12 isn't there? Are you saying there is none? If a State  
13 abolished the hearsay rule, could it -- would it not be  
14 a violation of due process if the prosecution introduced  
15 quadruple hearsay?

16 MS. SAHARSKY: Well, I think that there  
17 would initially be a problem with respect to the  
18 Confrontation Clause, and the court would probably go  
19 through the analysis that way. We're not saying that  
20 the court --

21 JUSTICE ALITO: All right. Let me give --  
22 you're right. Let me give you another example. Let's  
23 say you have -- the State puts on a witness who -- who  
24 says this person did it because I saw it in my crystal  
25 ball.

1                   MS. SAHARSKY: Right. And I think that the  
2 answer that I would give is the same one to the question  
3 Justice Kagan asked, which is where the Court is now,  
4 the Court has never said that the introduction of some  
5 kind of evidence is so unreliable it would violate due  
6 process. In Dowling, for example, it had evidence  
7 that --

8                   JUSTICE KENNEDY: Is tea-leaf reading okay?

9                   MS. SAHARSKY: What I'm saying is the Court  
10 doesn't need to address that question here. It also  
11 doesn't need to foreclose it. But this is very  
12 run-of-the-mill evidence. It doesn't mean that the  
13 Court could never find that some kind of evidence is so  
14 problematic that the Due Process Clause could preclude  
15 its admission, but what we're talking about here is  
16 fairly run-of-the-mill evidence.

17                   I would just point the Court to the decision  
18 in Dowling, which was about a prior conviction for which  
19 the person had been acquitted; and then that evidence  
20 was let in at his trial, and he said that's a problem.  
21 That evidence is too unreliable and too prejudicial, and  
22 the Court said that's not for the Due Process Clause.  
23 The Constitution gives you the process to test evidence.  
24 It doesn't ensure that all of the evidence that's going  
25 be introduced be reliable. And that's what Petitioner

1 is saying here today, and that would be a very expansive  
2 view of the Due Process Clause that just can't be  
3 reconciled with cases like Dowling and Colorado v.  
4 Connelly.

5 If the Court has no further questions, we'd  
6 submit that the judgment of the court below should be  
7 affirmed.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Mr. Guerriero, you have 2 minutes remaining.

10 REBUTTAL ARGUMENT OF RICHARD GUERRIERO

11 ON BEHALF OF THE PETITIONER

12 MR. GUERRIERO: I will try to make three  
13 points in those 2 minutes.

14 I would ask the Court to consider the  
15 circumstances that would be excluded if the Court  
16 accepts the rule proposed by the State, that there has  
17 to be some intentional manipulation or intentional  
18 orchestration. Suppose that rather than the accidental  
19 or happenstance show-up we had here, suppose that the  
20 accident was in the line-up at the police station, and  
21 the police were completely in good faith, getting to the  
22 mental state issue, and -- but in spite of their good  
23 faith, there was suggestion in the line-up. Would the  
24 trial court look at that and say, even though this was a  
25 suggestive line-up, we're not going to consider a due

1 process claim because it wasn't intentional or  
2 deliberate manipulation? We would suggest that that  
3 would be contrary to the principle that the primary evil  
4 is the risk of misidentification.

5           Consider another circumstance. Suppose  
6 there are two witnesses at the police station, and in  
7 spite of the best efforts and good rules of the police,  
8 witness one looks at the line-up and then -- or looks at  
9 the photo line-up so that they can't be changed, let's  
10 say, and leaves the line-up and somehow communicates to  
11 witness two, I picked the one on the bottom at the  
12 right; I think that's the one. That suggestion would be  
13 very powerful from the person who experienced the very  
14 same crime.

15           JUSTICE SCALIA: Tell that to the jury.  
16 What jury isn't going to be -- I mean, the more  
17 persuasive your argument is, the more likely it is that  
18 a jury will take care of that.

19           MR. GUERRIERO: The problem is that the  
20 witnesses who have -- are under the suggestive influence  
21 actually believe what they're testifying to, and the --  
22 that's why the Court said in Wade cross-examination for  
23 this one kind of evidence -- not floodgates, but this  
24 one kind of evidence -- cross-examination may not always  
25 be enough. The witness's sincerity has a powerful

1 effect on the jury.

2           The last point I want to make is that this  
3 is not going to open the floodgates, as we say, or  
4 create a slew of new claims. Under the Watkins case,  
5 this Court knows that there -- there's not even required  
6 to have a separate hearing on this evidence. And the  
7 reason a separate hearing isn't required is because  
8 these issues would be fleshed out in front of the jury.

9           This is only a question of what legal  
10 standard applies when the judge hears the defendant's  
11 objection that this violates due process, there's a --  
12 there's a substantial likelihood of misidentification.  
13 So, it's not any new claims. It's not any separate  
14 hearings. It's simply a question of what exactly is the  
15 due process rule.

16           Thank you.

17           CHIEF JUSTICE ROBERTS: Thank you, counsel.

18           The case is submitted.

19           (Whereupon, at 10:58 a.m., the case in the  
20 above-entitled matter was submitted.)

21

22

23

24

25

<b>A</b>	<b>allow</b> 25:15 36:23 50:1	2:2,5,8,12 3:3 3:6 6:22,23 8:5 8:9 17:19 28:18 30:18 32:9 36:6 40:4 41:24 46:8 47:23 48:13 52:10 53:17	<b>ball</b> 50:25 <b>bank</b> 4:12 12:1 <b>bar</b> 12:24 <b>BARION</b> 1:3 <b>base</b> 36:18 <b>based</b> 31:4 41:11 <b>basically</b> 24:3 <b>basis</b> 27:13,16 49:22	<b>broader</b> 41:2 <b>broke</b> 40:20 <b>brought</b> 19:4,5 26:24 32:12 37:22 39:10,19 <b>building</b> 29:24 <b>built</b> 39:5 <b>burden</b> 25:8
<b>able</b> 5:25	<b>allowed</b> 24:8,8	<b>arguments</b> 21:6 46:4 49:17	<b>behalf</b> 2:4,7,10 2:14 3:7 28:19 41:25 52:11	<b>C</b>
<b>abolished</b> 50:13	<b>allows</b> 17:4	<b>arises</b> 13:24	<b>believe</b> 25:13 53:21	<b>C</b> 2:1 3:1
<b>above-entitled</b> 1:11 54:20	<b>altered</b> 36:1	<b>arrange</b> 28:23	<b>believes</b> 25:11	<b>call</b> 47:21
<b>accept</b> 6:22,23	<b>Amendment</b> 35:11 36:22 45:16	<b>arranged</b> 29:14	<b>best</b> 53:7	<b>called</b> 20:24
<b>accepts</b> 52:16	<b>amicus</b> 1:21 2:11 42:1	<b>arrested</b> 23:2	<b>beyond</b> 18:21 36:21 37:1 43:13	<b>calm</b> 24:19
<b>accident</b> 52:20	<b>amount</b> 17:11	<b>article</b> 23:1	<b>big</b> 49:2	<b>car</b> 30:13
<b>accidental</b> 14:18 52:18	<b>analogy</b> 35:16	<b>aside</b> 27:6 41:3	<b>bigger</b> 14:7,8	<b>card</b> 12:1
<b>accord</b> 21:4	<b>analysis</b> 21:3,24 28:12 30:25 35:4 38:6 50:19	<b>asked</b> 15:24 22:11 29:18,23 51:3	<b>Biggers</b> 24:7 31:1 32:25 34:16 37:24 38:6 41:6,11 47:4	<b>care</b> 22:8 24:20 24:22 53:18
<b>acquitted</b> 51:19	<b>answer</b> 4:1 20:18 34:10 44:1 51:2	<b>asking</b> 17:12 20:25 21:18 44:22 48:24	<b>bit</b> 33:10 40:11	<b>careful</b> 26:18
<b>acted</b> 30:19	<b>answered</b> 10:6 38:10	<b>aspect</b> 16:6 35:10 36:3 39:1	<b>Blandon</b> 5:22	<b>carefully</b> 21:2
<b>acting</b> 45:16	<b>answers</b> 10:20 12:21	<b>aspects</b> 18:6	<b>blocks</b> 31:20 32:11 39:9,11	<b>cars</b> 40:20
<b>activity</b> 4:5 34:4	<b>anybody</b> 37:14	<b>assert</b> 18:10	<b>borne</b> 18:5,14	<b>case</b> 3:4 5:15,19 7:15,16,22,25 8:8 13:10 14:16 18:23 19:19,22,25 22:7 23:25 24:3,7,7,11 30:5 31:3,8,14 31:17 32:18 33:12 34:4,23 37:10,10 39:9 39:23 40:23 41:3 43:17 44:17 45:2,18 47:11,22 48:19 48:19 49:15 54:4,18,19
<b>actor</b> 44:1	<b>anyway</b> 17:18 31:7	<b>assess</b> 36:24 37:3,7	<b>bottom</b> 53:11	<b>cases</b> 4:10,20,25 5:11 6:4 14:7 23:21 24:10 27:13 35:17,21 36:12 37:9,16 37:17,19 38:11 38:16 39:5 42:9,24 43:16 45:19,24 46:3
<b>actual</b> 26:1	<b>apartment</b> 7:24	<b>Assistant</b> 1:19	<b>Brady</b> 44:9	
<b>add</b> 43:10	<b>apparent</b> 28:13	<b>assume</b> 8:21 16:9	<b>Brathwaite</b> 24:20 33:1	
<b>adding</b> 30:25	<b>appeal</b> 4:10	<b>Assuming</b> 42:18	<b>Breyer</b> 14:20 19:18,21 20:3 20:21 21:10,21 22:5 26:24	
<b>addition</b> 44:6	<b>APPEARAN...</b> 1:14	<b>assure</b> 49:14	<b>brief</b> 20:13 46:18	
<b>additional</b> 37:6	<b>appeared</b> 5:21	<b>ATM</b> 12:1	<b>briefing</b> 41:1,1	
<b>address</b> 36:18 51:10	<b>appearing</b> 13:10 15:20	<b>attention</b> 4:8 40:18	<b>bring</b> 31:20 39:11	
<b>addressed</b> 41:3	<b>applied</b> 33:20 41:15	<b>Attorney</b> 1:17	<b>bringing</b> 30:6	
<b>admission</b> 42:17 50:11 51:15	<b>applies</b> 25:18 54:10	<b>a.m</b> 1:13 3:2 54:19	<b>brings</b> 5:13 39:2	
<b>admitted</b> 28:6	<b>apply</b> 9:15 20:15 34:3	<b>B</b>		
<b>advantage</b> 42:10	<b>area</b> 32:24 36:10 41:16	<b>b</b> 8:9 44:5		
<b>adversary</b> 49:5	<b>argue</b> 12:9	<b>back</b> 18:4 30:1 31:20 32:12 38:17,19 39:10 39:11,19		
<b>affirmed</b> 41:20 52:7	<b>argued</b> 12:10			
<b>agree</b> 20:1 41:9	<b>argues</b> 13:15			
<b>agreed</b> 6:2	<b>arguing</b> 49:12			
<b>ahead</b> 19:21 21:21	<b>argument</b> 1:12			
<b>akin</b> 18:11				
<b>alibi</b> 17:25				
<b>Alito</b> 10:19,23 11:2,5,8,11,19 12:3 13:2 22:20 23:21 35:7,16 36:2,9 37:9,19 46:17 47:9 50:10,21				
<b>Alito's</b> 15:10 38:10				
<b>allege</b> 4:4 5:20				

47:3 52:3 <b>categorical</b> 49:22 <b>categories</b> 25:19 <b>category</b> 5:16 6:8 15:7 19:15 24:25 25:1 <b>caught</b> 31:19 <b>cause</b> 5:1 9:22 12:19 13:25 25:24 <b>caused</b> 33:8 <b>causes</b> 6:12 8:22 9:8,19 <b>central</b> 29:1 42:9 <b>certain</b> 17:11 18:24,25 21:5 42:7 <b>certainly</b> 12:9 16:7 20:5 23:17 33:3 34:23 <b>cetera</b> 43:7 46:15 <b>chance</b> 42:21 <b>chances</b> 38:13 <b>change</b> 20:17 22:8,21 23:15 23:18 28:3 49:2 <b>changed</b> 29:2 53:9 <b>characteristic</b> 29:9 <b>characterizati...</b> 40:15 <b>check</b> 43:11,15 44:8 <b>checks</b> 44:5,12 46:13 <b>Chief</b> 3:3,8 15:9 15:23 16:16,20 17:7,22 28:15 28:17,20 32:3 32:8,16 41:22 42:2 49:3,20	52:8 54:17 <b>Circuit</b> 23:25 <b>circuits</b> 23:18 49:5,10 <b>circumstance</b> 33:20 34:6 35:24 53:5 <b>circumstances</b> 4:16 7:16 13:7 23:12 31:25 34:4,20,25 37:25 38:3,18 39:17 41:7,12 44:10 47:6 52:15 <b>cited</b> 23:19 <b>city</b> 23:3 <b>Civilians</b> 34:7 <b>claim</b> 6:1,19 7:17 18:7,9,10 18:11 43:20,22 53:1 <b>claims</b> 43:4 54:4 54:13 <b>class</b> 45:2 <b>Clause</b> 9:2,6,15 30:8 37:5 43:19 49:13 50:6,18 51:14 51:22 52:2 <b>clear</b> 32:18 <b>clearly</b> 34:25 35:17 <b>clothes</b> 22:1 <b>Colorado</b> 43:21 46:8 52:3 <b>combination</b> 5:11 7:19 <b>come</b> 9:21 16:2 18:7 20:9 23:23 38:7 44:20 45:24 48:17 <b>comes</b> 14:15 27:16 28:1,2 43:11 <b>coming</b> 28:9	<b>committed</b> 30:21 <b>common</b> 11:18 <b>commonly</b> 13:8 <b>communicates</b> 53:10 <b>community</b> 36:14 <b>company's</b> 3:21 <b>completely</b> 25:5 34:19 46:22 52:21 <b>complicates</b> 40:7 <b>complication</b> 40:9 <b>compulsory</b> 46:14 <b>concern</b> 29:1 32:23 35:19,23 38:19 42:9 <b>concerned</b> 30:8 <b>concerns</b> 28:23 46:9 <b>conclude</b> 21:13 <b>conclusion</b> 48:17 <b>Concord</b> 1:15 1:17 <b>conduct</b> 8:10 13:6,12,24 29:13 32:1 33:8,11,22,23 33:25 35:3,12 37:22 38:12 <b>conducted</b> 22:21 23:16 <b>confessions</b> 18:8 <b>confrontation</b> 28:24 29:15 42:5 43:7 44:6 50:18 <b>confrontations</b> 38:21 <b>confronted</b> 43:20 <b>connection</b> 3:21	<b>Connelly</b> 43:21 46:9 52:4 <b>consider</b> 28:8 52:14,25 53:5 <b>considerations</b> 33:15 <b>considered</b> 14:19 <b>Constitution</b> 43:4 46:13 50:3,6 51:23 <b>constitutional</b> 3:15 35:13 36:17 45:12 46:6 48:2 <b>contact</b> 15:15 <b>contention</b> 5:8 <b>context</b> 14:6 15:14 18:17 33:18 34:21 38:21 43:10 45:18 <b>contrary</b> 53:3 <b>contributed</b> 26:12 <b>convicted</b> 9:8 47:13 <b>conviction</b> 41:14 51:18 <b>convictions</b> 26:12 <b>cooperating</b> 47:10 <b>correct</b> 29:19,20 31:12,15 32:16 34:2 35:15 36:6 <b>correctly</b> 17:15 <b>corrupting</b> 45:20 <b>Cory</b> 23:24 <b>counsel</b> 15:2 21:5 28:15 32:10 37:1 41:22 49:4 52:8 54:17 <b>Counselor</b> 3:16	<b>counter's</b> 41:1 <b>couple</b> 11:15 22:25 <b>course</b> 16:24 18:6 21:4 <b>court</b> 1:1,12 3:9 4:10,24 5:10 7:2,15 11:13 12:23 13:12,15 14:3,5 15:19 17:5 18:4,5,13 19:14 21:8 22:16 23:25 24:10,20 25:14 25:23 26:13 27:14 28:21 31:4 32:24 33:3,4 34:24 35:3 37:24 38:20 39:23,24 40:11,14 41:15 41:20 42:3 43:3,6,8,9,17 43:22 44:16,20 44:24 46:4,7,8 47:3,5,7 48:15 48:15 49:15 50:8,18,20 51:3,4,9,13,17 51:22 52:5,6 52:14,15,24 53:22 54:5 <b>courtroom</b> 47:16 <b>courts</b> 33:16 <b>Court's</b> 27:13 41:16,18 42:8 42:24 43:16 45:18 46:3,11 <b>cover</b> 17:19 <b>Crawford</b> 43:8 <b>create</b> 6:11 36:1 40:6,9 42:11 54:4 <b>created</b> 4:17 6:2 6:8 7:10 41:7 42:18
---	---	--	---	---



<b>creates</b> 5:14 6:15	31:19 36:23 39:8,9,14	48:9,14	<b>doing</b> 29:25	<b>ensure</b> 43:5 51:24
<b>creation</b> 31:14	<b>defendants</b>	<b>determine</b> 31:25	<b>door</b> 9:5	<b>entitle</b> 39:14
<b>crime</b> 16:21	37:15 49:16	37:25 38:1,18	<b>double</b> 25:5	<b>entitled</b> 28:12
30:15,21,22	<b>defendant's</b>	<b>deterrence</b>	<b>doubt</b> 36:21	<b>ESQ</b> 1:15,17,19
31:21 39:12	33:6 41:14	27:10,12,17	43:14	2:3,6,9,13
43:13 48:11	54:10	32:24 33:4,24	<b>Dowling</b> 43:21	<b>essence</b> 35:23
53:14	<b>defense</b> 4:4	34:5,6	51:6,18 52:3	36:1 37:22
<b>criminal</b> 4:20	13:15 19:17	<b>detering</b> 27:10	<b>drastic</b> 23:15	<b>essentially</b> 13:11
17:9 23:15	25:8	<b>die</b> 35:2	<b>dubious</b> 10:24	30:9
33:6	<b>define</b> 11:11	<b>differ</b> 20:4	<b>due</b> 3:13 6:1,19	<b>establish</b> 36:21
<b>cross-examina...</b>	30:24 40:5	<b>difference</b> 20:22	7:17,20 8:5 9:2	<b>established</b>
21:9 22:3	41:4	21:18,23 22:3	9:6,14 10:7	22:16
26:20 32:10	<b>defined</b> 13:12	27:19 30:4,5	11:23 12:10	<b>et</b> 43:7 46:14
36:25 43:7	<b>definition</b> 13:4	32:13,17 38:11	14:13 25:14,21	<b>evaluate</b> 17:5
44:6 46:14	<b>degree</b> 15:11	<b>different</b> 4:18	28:11,12,22	<b>evaluation</b> 3:14
53:22,24	38:22 39:4	11:16 20:19,22	29:13 30:8	<b>everybody</b>
<b>cross-examine</b>	<b>Delaney</b> 1:17	22:12,13 28:9	32:23 34:18	17:10
21:6	2:6 28:17,18	29:25 31:19,22	35:10,11,18	<b>evidence</b> 4:20,23
<b>cross-racial</b>	28:20 29:6,10	31:23 32:4	36:3,4,6,9 37:5	6:9,9,16 7:18
12:4	29:20 30:5	37:8,20 38:7	41:18 42:4,16	7:19 9:2,4,7,9
<b>crystal</b> 50:24	31:2,12,15,23	38:16 39:9	42:21 43:10,15	9:9,24 12:24
<b>curiae</b> 1:21 2:11	32:7,16 33:3	45:5,8,17	43:19 44:17	14:13 18:7,9
42:1	33:13 34:2,16	48:17 49:17	45:15,18 46:1	18:10,12 19:15
<b>current</b> 46:3	35:15 36:8,16	<b>differently</b>	48:20 49:13,25	20:6,15,20
	37:19 38:17	40:11	50:6,11,14	21:7 22:4
	39:16 40:8,22	<b>dinner</b> 19:1,1	51:5,14,22	25:15 26:4,11
	41:9	<b>direct</b> 4:7 40:18	52:2,25 54:11	26:12,15,25
<b>D</b>		45:13	54:15	27:11,16 28:1
<b>D</b> 3:1	<b>deliberate</b> 24:21	<b>directed</b> 38:5	<b>Dunnigan</b> 4:11	35:19 36:13,20
<b>danger</b> 3:11,13	53:2	<b>directly</b> 45:17	11:25	36:24 37:2,4
14:4	<b>demonstrated</b>	<b>disagree</b> 7:1	<b>D.C</b> 1:8,20	37:18,21 42:13
<b>dangers</b> 18:14	39:18	8:12 16:5		42:17,18,19,20
<b>dark</b> 22:24	<b>Department</b>	<b>disagrees</b> 40:15	<b>E</b>	43:5,12,19
30:14	1:20	<b>disclose</b> 45:22	<b>E</b> 2:1 3:1,1	44:4,11,14,19
<b>Daubert</b> 48:18	<b>departments</b>	<b>discussed</b> 33:14	<b>earlier</b> 39:8	45:2,5,5,14,22
<b>day</b> 48:24	16:8	<b>discussion</b> 41:5	<b>early</b> 45:24	46:5,11,18
<b>decide</b> 31:8	<b>depend</b> 3:17	<b>discussions</b> 33:5	<b>effect</b> 54:1	47:2,5,8,18
44:25	<b>depending</b> 38:2	<b>dispose</b> 40:23	<b>effectively</b> 11:14	48:21,23 49:17
<b>decision</b> 40:11	<b>deprive</b> 9:12,13	<b>distinct</b> 8:15	<b>efforts</b> 53:7	49:24 50:2,7
51:17	<b>describe</b> 21:25	<b>distinction</b>	<b>eight</b> 16:13	50:11 51:5,6
<b>deck</b> 30:9	<b>described</b> 4:25	10:13	<b>either</b> 7:17	51:12,13,16,19
<b>defendant</b> 7:16	<b>designed</b> 37:3	<b>distinguish</b>	<b>element</b> 43:13	51:21,23,24
8:4,9,21,24 9:8	<b>despite</b> 34:24	14:21,22	<b>elicit</b> 28:24	53:23,24 54:6
9:11,14,21,25	<b>detectors</b> 49:21	<b>distinguishing</b>	<b>emergency</b> 8:17	<b>evidentiary</b> 9:16
10:1,5,7 11:17	<b>deter</b> 33:22	29:9	<b>empirical</b> 26:4	<b>evil</b> 53:3
13:11 15:20	35:12	<b>DNA</b> 5:2 18:10	<b>engaged</b> 29:24	<b>exact</b> 48:16
17:5 24:4	<b>determination</b>	<b>document</b> 42:12	<b>enshrined</b> 50:4	
29:18 30:1,20				

<b>exactly</b> 4:11 5:10 6:21 54:14	46:4	<b>familiar</b> 16:8	<b>Foster</b> 11:15	11:24 13:18
<b>examining</b> 34:19	<b>extreme</b> 43:23 43:24 44:2	<b>far</b> 30:20 37:16 43:17 48:10	<b>found</b> 43:17	16:12 27:2
<b>example</b> 6:19 11:15,24 14:24 22:22 34:23 43:21,24,24 44:2,9 45:6,21 46:6 48:4 49:21 50:22 51:6	<b>extremely</b> 24:16 25:20	<b>favor</b> 8:20 10:7 10:9	<b>Fourth</b> 35:10	30:23 31:9
<b>examples</b> 11:14 11:23 15:20	<b>eyewitness</b> 3:10 4:17,23 5:6,11 5:16 6:6,7,14 6:14,23,25 7:3 7:11 8:20 10:23 12:13,19 14:13,23,25 17:18 18:11 23:22 24:8 25:6,10,18 26:5,6,18 28:22 41:17 47:2 48:3	<b>Federal</b> 4:10 20:5,25 23:18 46:18,19	<b>frank</b> 15:4	34:7 35:25
<b>exclude</b> 6:5 8:22 20:6 21:15 46:19		<b>figure</b> 40:1	<b>friends</b> 19:1	39:3 46:11
<b>excluded</b> 6:17 8:25 9:1,4,8,25 10:25 12:17,23 12:25 14:13 22:9,10 24:5 28:2 45:3 52:15	<b>F</b>	<b>filed</b> 15:4	<b>front</b> 54:8	47:15 51:24
<b>exclusion</b> 17:3	<b>face</b> 21:25 31:6	<b>find</b> 24:22 25:19 25:20 26:8,10 30:3 43:14 45:2 51:13	<b>function</b> 44:23	52:25 53:16
<b>exclusionary</b> 35:11,12 36:2	<b>fact</b> 4:10,25 5:2 5:22 12:23 16:6 18:4 23:25 24:12 36:21 37:11 38:4 39:2 40:10 48:16	<b>findings</b> 31:4 32:19	<b>fundamental</b> 7:20 25:13 50:4,5	54:3
<b>exculpatory</b> 45:22	<b>factors</b> 48:10,13 48:16 50:9	<b>fine</b> 22:2	<b>fundamentally</b> 50:1,3	<b>good</b> 15:3 19:9 22:23 23:14 24:18 26:4 30:18 50:9 52:21,22 53:7
<b>exigency</b> 8:17	<b>facts</b> 32:18 38:7 40:22 41:2	<b>finger</b> 22:2	<b>further</b> 11:4 13:19 34:17 41:13 52:5	<b>government</b> 44:10,13
<b>exists</b> 20:4 21:19	<b>factual</b> 25:23 31:4 32:18	<b>fingerprint</b> 45:24,25	<b>G</b>	<b>great</b> 22:2,21
<b>exonerations</b> 5:2	<b>fact-finding</b> 29:1 30:10 35:20,25	<b>first</b> 3:4 12:22 14:3 20:18 29:13 31:2 33:15 34:11 37:23,25 41:10 45:11	<b>G 3:1</b>	<b>greater</b> 16:1 38:14
<b>expand</b> 34:3 41:18	<b>fair</b> 8:16 37:17 41:14	<b>flag</b> 15:22 17:4 25:21	<b>gaining</b> 42:10	<b>greatest</b> 5:14
<b>expansive</b> 52:1	<b>fairly</b> 8:15 47:4 51:16	<b>fleshed</b> 54:8	<b>General</b> 1:17,20 28:17 33:3	<b>ground</b> 9:20 11:2 12:5,8,11 23:10 40:11 46:20
<b>experience</b> 5:2	<b>fact-finding</b> 29:1 30:10 35:20,25	<b>floodgates</b> 49:8 53:23 54:3	<b>generally</b> 14:9 14:14	<b>grounds</b> 9:16 38:6 39:4
<b>experienced</b> 53:13	<b>fact-finding</b> 29:1 30:10 35:20,25	<b>focused</b> 13:25 14:3 38:15,22 45:19	<b>getting</b> 30:25 40:23 52:21	<b>greatest</b> 5:14
<b>expert</b> 12:8 48:19	<b>fact-finding</b> 29:1 30:10 35:20,25	<b>food</b> 19:5	<b>Giglio</b> 44:9	<b>ground</b> 9:20 11:2 12:5,8,11 23:10 40:11 46:20
<b>experts</b> 20:11	<b>fact-finding</b> 29:1 30:10 35:20,25	<b>foreclose</b> 51:11	<b>Ginsburg</b> 5:5,15 10:6,9,12,16 10:17 14:21 15:6 26:16,22 27:6,9,19,22 27:25 28:6	<b>grounds</b> 9:16 38:6 39:4
<b>explanation</b> 15:4	<b>fact-finding</b> 29:1 30:10 35:20,25	<b>forensic</b> 18:8	<b>give</b> 13:4 22:22 43:23 50:21,22 51:2	<b>guarantee</b> 50:4
<b>extent</b> 33:16 37:20 39:17	<b>fact-finding</b> 29:1 30:10 35:20,25	<b>forth</b> 22:25	<b>given</b> 11:14 15:19 50:2	<b>Guerrero</b> 1:15 2:3,13 3:5,6,8 3:18,22 4:1,15 4:22 5:9,19 6:18 7:1,8,14 8:12 9:1,6,11 10:2,8,11,15 10:22 11:1,3,7 11:10,13,22 12:7,21 13:6 14:2,11 15:2,8 15:18 16:5,19 17:2,21 18:3 18:19 19:8,13 19:19,24 20:18 21:3,20,22 22:15 23:17,24 24:9,15 25:7 25:22 26:9,21 27:4,8,12,24 28:4,7,16 52:9
	<b>fairness</b> 7:21 25:14	<b>forward</b> 39:3	<b>goal</b> 33:25	
	<b>faith</b> 52:21,23		<b>goes</b> 17:11 18:21 30:11	
	<b>false</b> 18:8 35:19 36:1 42:12 47:18		<b>going</b> 8:2,25	

52:10,12 53:19 <b>guess</b> 17:8 31:16 <b>guiding</b> 33:1 <b>guilt</b> 36:21 42:14 <b>guilty</b> 42:7 <b>guy</b> 13:17 16:4 30:4 32:10 39:13	<b>husband's</b> 14:22 15:1 <b>hypothetical</b> 30:7 39:7	<b>induced</b> 32:20 <b>inducement</b> 40:14,17 <b>inflammatory</b> 36:13 45:5 <b>influence</b> 3:11 4:3,4,7 5:12 39:3 45:13 53:20 <b>informants</b> 25:3 25:4 <b>infringing</b> 18:22 <b>inherently</b> 9:24 <b>initially</b> 50:17 <b>inquiry</b> 29:14 34:18,21 40:7 41:10,11 42:4 48:25 <b>instance</b> 4:19 20:8 36:1 37:12 <b>instances</b> 21:12 <b>instituted</b> 18:18 <b>instruct</b> 16:8 <b>instructed</b> 48:13 <b>instruction</b> 12:8 <b>instructions</b> 16:11 48:5,6,8 <b>insufficient</b> 45:4 <b>integrity</b> 30:11 <b>intending</b> 24:17 <b>intent</b> 40:6 <b>intentional</b> 5:20 29:3 52:17,17 53:1 <b>intentionally</b> 29:5,25 30:14 39:19 <b>interest</b> 27:10 <b>interesting</b> 45:1 <b>interfered</b> 8:5 <b>interpreting</b> 48:22 <b>intrigued</b> 46:17 <b>introduce</b> 42:12 42:25 44:4 <b>introduced</b> 4:20	8:22,23 50:14 51:25 <b>introducing</b> 45:21 <b>introduction</b> 43:18 51:4 <b>investigation</b> 15:14 16:24 34:22 38:3 <b>investigator</b> 3:20,21 4:12 4:12 11:25 <b>invoked</b> 9:20 <b>involve</b> 34:7 <b>involved</b> 4:6,11 11:15,20,21 14:16 34:6 38:13 <b>involvement</b> 3:17 11:9 14:17 23:11 <b>involving</b> 34:4 38:18 49:18 <b>issue</b> 28:8 40:23 52:22 <b>issues</b> 18:8,8 33:14 54:8	41:19 <b>jurisprudence</b> 37:6 41:16 <b>jury</b> 12:8,15,15 18:22 19:10,11 20:7,12 21:7 26:18,24 32:9 43:14 44:20,23 44:23 45:13,14 45:17 46:10 47:19 48:5,6,9 48:12 49:1,19 49:22 50:4 53:15,16,18 54:1,8 <b>justice</b> 1:20 3:3 3:8,12,16,19 3:24 4:15 5:1,5 5:15 6:4,21 7:5 7:9,22 8:19 9:3 9:7,18 10:3,6,9 10:12,15,17,18 10:19,23 11:2 11:5,8,11,19 12:3,12 13:2 13:21,21 14:5 14:20,21 15:6 15:9,10,23 16:16,20 17:7 17:22 18:16,20 19:9,18,21 20:3,21 21:10 21:21 22:5,20 23:21 24:6,12 24:24 25:13,16 25:25 26:3,13 26:16,22,24 27:6,9,18,19 27:21,22,25 28:6,15,17,20 29:2,7,10,16 29:21,22 30:12 31:6,13,16 32:3,8,17 33:2 33:13,21 34:9 34:10 35:7,16 36:2,9,12 37:9
<b>H</b> <b>Hampshire</b> 1:6 1:15,18 3:4 21:4 48:6 <b>handled</b> 7:18 <b>happen</b> 44:15 <b>happened</b> 19:2 29:17 32:21 40:2,25 44:20 <b>happens</b> 21:16 <b>happenstance</b> 24:3 52:19 <b>head</b> 29:22 <b>hear</b> 3:3 <b>heard</b> 6:1 46:4 48:12,13 <b>hearing</b> 32:14 39:15 54:6,7 <b>hearings</b> 54:14 <b>hears</b> 54:10 <b>hearsay</b> 50:13 50:15 <b>height</b> 5:13 <b>helps</b> 9:25 <b>high</b> 12:24 20:1 25:8 39:3 <b>hit</b> 29:22 <b>hold</b> 44:16 <b>holding</b> 30:1 35:5 40:1,12 <b>Honor</b> 3:18 4:22 5:9 7:1 8:12 12:22 16:6 19:14 25:23 27:13,24 <b>hundred</b> 47:11 <b>hurts</b> 9:25	<b>I</b> <b>ID</b> 4:14 24:18 <b>identical</b> 37:11 37:17 <b>identification</b> 3:10,15 4:18 4:23 5:12 7:3 8:13 12:4,14 12:19 16:23 18:11 23:12,23 28:22,24 35:21 38:13 42:6 43:24 44:11 48:4,12 49:9 <b>identifications</b> 14:9 41:17 <b>identified</b> 24:4 <b>identify</b> 6:12 23:8 32:21 <b>identifying</b> 25:11 <b>ignites</b> 36:14 <b>impact</b> 38:25 <b>impaired</b> 6:6 34:14 <b>impairs</b> 6:22 <b>impartial</b> 45:13 <b>imperative</b> 35:1 <b>implicated</b> 7:20 <b>implicates</b> 3:13 28:11,22 <b>important</b> 18:3 33:25 47:4 <b>improper</b> 8:10 <b>including</b> 20:16 <b>inconsistent</b> 47:12 <b>independent</b> 38:1 <b>individual</b> 17:23 47:22 <b>induce</b> 31:5	<b>J</b> <b>Jackson</b> 36:19 43:11 <b>jailhouse</b> 25:3,4 46:7 <b>judge</b> 6:1 19:17 19:23,24 20:5 20:10 21:1,12 21:17,24 22:1 22:7,8 23:7,22 26:18 27:2 46:19,21 47:13 47:22 54:10 <b>judges</b> 21:10,13 <b>judgment</b> 29:21 41:20 46:21 52:6 <b>juries</b> 50:8 <b>jurisdiction</b>		

37:19 38:9,10 39:6,21 40:8 40:21,25 41:22 42:2,11,15 43:23 44:21 45:1,9,23 46:17 47:9 48:18 49:3,4 49:20 50:10,21 51:3,8 52:8 53:15 54:17	44:21 45:25 47:6,21,22 48:23 50:3 <b>knowingly</b> 35:19 42:24 43:1 45:20 <b>knows</b> 42:19 54:5	35:4 <b>line-up</b> 8:14,15 11:17 13:17 15:21 16:10,18 29:9 52:20,23 52:25 53:8,9 53:10 <b>line-ups</b> 16:12 <b>little</b> 33:10 40:11 <b>long</b> 17:22 48:11 <b>look</b> 4:19 8:1,1,3 14:7 16:15 18:4 19:17,25 20:10,10 21:2 22:7 23:12 24:18 26:14 29:12 31:25 34:23 37:13 38:17,19 39:16 46:3,3 50:8 52:24 <b>looked</b> 5:23 34:17 <b>looking</b> 20:22,23 48:9 <b>looks</b> 13:16 53:8 53:8 <b>lose</b> 34:5 <b>lot</b> 17:15 40:19 <b>Louisville</b> 45:4 <b>lurid</b> 36:13 45:9	<b>manipulating</b> 27:11 <b>manipulation</b> 5:18,20 24:21 28:10 29:5 30:24 31:10 41:4 47:7 52:17 53:2 <b>manipulative</b> 27:15 <b>manner</b> 6:11 38:22,23 <b>Manson</b> 32:25 38:6 47:4 <b>markedly</b> 41:18 <b>mask</b> 22:25 <b>matches</b> 26:15 <b>material</b> 45:22 <b>matter</b> 1:11 9:22 22:12 27:15 31:8 33:7 49:25 54:20 <b>matters</b> 12:19 <b>meal</b> 19:3 <b>mean</b> 4:14 7:6 11:12 12:12,24 13:3,4 14:20 19:14 24:15 26:17 28:7 30:12 31:13 33:3,22 36:5 42:15 45:7,11 46:2,23 47:17 49:24 51:12 53:16 <b>means</b> 50:7 <b>meant</b> 35:12 <b>media</b> 3:24 <b>meet</b> 25:8 46:24 <b>memory</b> 36:1 42:13 <b>mens</b> 30:25 39:22 40:24 41:5 <b>mental</b> 52:22 <b>menu</b> 19:4 <b>mere</b> 43:18	<b>message</b> 6:10 <b>MICHAEL</b> 1:17 2:6 28:18 <b>midway</b> 19:3 <b>minimal</b> 50:10 <b>minimum</b> 36:20 <b>mini-trials</b> 44:24 <b>minute</b> 17:14 18:2 <b>minutes</b> 17:13 17:24 52:9,13 <b>miscarriage</b> 3:12 25:13,25 26:13 27:18 <b>miscarriages</b> 5:1 <b>misidentificati...</b> 3:12,13 13:1 22:18 33:17 53:4 54:12 <b>misidentificati...</b> 33:23 <b>misleading</b> 20:7 20:12 21:13 <b>misplace</b> 34:19 <b>mix</b> 10:4 <b>mold</b> 46:16 <b>moment</b> 21:2 <b>Mooney</b> 35:17 <b>motion</b> 14:23 15:5 39:15 40:4 <b>move</b> 12:8 15:1 15:3 30:20 32:20 <b>multiple</b> 16:12 <b>mustache</b> 13:18
<b>K</b> <b>Kagan</b> 13:21 14:5 24:24 25:16 26:3 33:2,13,21 34:11 38:9 42:15 43:23 51:3 <b>Keane</b> 4:11 11:25 <b>Kennedy</b> 7:22 18:16,20 19:9 24:6,12 27:21 29:22 34:9 36:12 44:21 45:1,9,23 48:18 51:8 <b>key</b> 17:2 <b>killer</b> 6:10,13 <b>kind</b> 4:7 18:6,12 21:7 22:3 26:7 26:11 44:4 47:23 48:25 51:5,13 53:23 53:24 <b>kinds</b> 11:16 49:17 <b>knew</b> 44:10 <b>know</b> 8:7 9:23 12:14 13:3,16 15:12,13,13,25 16:22 17:14,22 18:1,1 22:14 23:21 25:5 32:11,13 33:11	<b>L</b> <b>lady</b> 7:23 <b>language</b> 29:3 <b>Laughter</b> 7:7 19:7 <b>law</b> 17:9,10 20:15 21:19 23:18 <b>layer</b> 31:1 <b>lead</b> 12:25 22:17 26:4 <b>leading</b> 5:1 25:24 <b>leads</b> 33:25 <b>leave</b> 12:15 29:19 <b>leaves</b> 53:10 <b>leaving</b> 27:6 <b>left</b> 6:10 <b>legal</b> 54:9 <b>let's</b> 6:9,9 8:21 25:2 50:22 53:9 <b>level</b> 11:24 15:19 36:20 40:6 <b>liar</b> 47:15 <b>liberty</b> 9:12,14 50:5 <b>lie</b> 25:3 49:21 <b>light</b> 19:9 <b>likelihood</b> 33:17 54:12 <b>limit</b> 10:4 <b>limited</b> 4:16 6:7 29:11 <b>limits</b> 48:2 <b>linchpin</b> 33:17	<b>M</b> <b>machinations</b> 24:1,2 <b>magic</b> 12:18 <b>main</b> 14:4 <b>making</b> 49:16 <b>man</b> 4:8 8:1,2,7 8:11 13:8,13 13:20 15:21,25 16:2 40:19,20 <b>manipulate</b> 42:13 <b>manipulated</b> 31:9	<b>N</b> <b>N</b> 2:1,1 3:1 <b>nail</b> 29:22 <b>necessarily</b> 4:9 30:19 <b>necessary</b> 30:17 35:1 38:2 <b>necessity</b> 34:21	

<p><b>need</b> 13:3 31:3 34:18 41:4 46:5,23 51:10 51:11 <b>needed</b> 11:5,6 <b>needs</b> 41:2 49:19 <b>Neil</b> 24:7 32:25 <b>never</b> 21:24 42:16,21 44:4 44:17 51:4,13 <b>new</b> 1:6,15,17 3:4 21:4 25:21 45:25 48:5 54:4,13 <b>news</b> 3:24 <b>newspaper</b> 23:10 <b>NICOLE</b> 1:19 2:9 41:24 <b>nonpolice</b> 11:22 14:15 <b>non-constituti...</b> 36:17 37:1 <b>non-State</b> 13:24 44:1 <b>normal</b> 21:23 <b>normally</b> 12:14 <b>notable</b> 48:7 <b>noted</b> 44:21 <b>November</b> 1:9 <b>number</b> 49:5 <b>numerous</b> 43:3 48:1</p> <hr/> <p><b>O</b></p> <p><b>O</b> 2:1 3:1 <b>objection</b> 9:17 54:11 <b>objective</b> 31:24 37:21 39:18 41:11 <b>obtain</b> 42:6 <b>obviously</b> 9:12 <b>occasions</b> 43:3 <b>occurred</b> 49:9 <b>offer</b> 33:15 <b>officer</b> 24:19</p>	<p>30:2 32:19,22 37:12 38:4 39:2 40:17,17 40:19 <b>Oh</b> 19:2 <b>okay</b> 8:24 16:12 25:16 27:8 51:8 <b>once</b> 10:3 13:22 13:23 49:15 <b>one-way</b> 9:5 10:14 <b>open</b> 49:8 54:3 <b>opinion</b> 30:24 <b>opinions</b> 33:5,14 <b>opportunity</b> 21:5 22:24 <b>opposed</b> 12:18 13:25 <b>oral</b> 1:11 2:2,5,8 3:6 28:18 41:24 <b>orchestrated</b> 36:10 <b>orchestration</b> 5:20 52:18 <b>order</b> 19:5 40:14 42:5 <b>organ</b> 46:12 <b>ought</b> 9:24 <b>outside</b> 25:18 46:15 48:1 <b>outweighed</b> 20:6 47:1 <b>outweighing</b> 47:20 <b>outweighs</b> 27:1</p> <hr/> <p><b>P</b></p> <p><b>P</b> 3:1 <b>PAGE</b> 2:2 <b>paper</b> 23:1,4 <b>parking</b> 40:19 <b>part</b> 5:18 20:19 23:3 36:3 40:6 <b>particular</b> 18:14 24:10</p>	<p><b>particularly</b> 47:3 <b>people</b> 17:12,13 17:13,13,16 26:7 <b>percent</b> 21:11 26:11 <b>perfectly</b> 30:18 <b>perjured</b> 42:25 43:1,1 45:21 <b>perjury</b> 35:17 47:13 <b>perpetrator</b> 22:24 23:9 <b>Perry</b> 1:3 3:4 5:22 28:12 <b>Perry's</b> 37:10 <b>person</b> 11:18 12:2,17 13:9 15:12,14,15,16 16:3,22,22,25 17:24 22:25 23:3,4,8,8 24:19 25:12 31:18 47:14 48:11 50:9,24 51:19 53:13 <b>person's</b> 17:25 <b>perspective</b> 37:15 <b>persuasive</b> 53:17 <b>Petitioner</b> 1:4 1:16 2:4,14 3:7 29:12 40:16 44:22 48:8,15 48:24 49:12 51:25 52:11 <b>Petitioner's</b> 36:6 41:17 <b>phone</b> 6:10 <b>photo</b> 8:14 53:9 <b>photograph</b> 13:9 <b>photos</b> 4:13 36:13 45:9 <b>phrase</b> 24:1</p>	<p><b>picked</b> 15:12 16:25 53:11 <b>picture</b> 3:20,25 23:3,10 <b>piece</b> 20:15 <b>place</b> 5:16 28:2 37:8 46:13 48:3 <b>play</b> 29:10 38:7 39:4 40:13 44:17 <b>played</b> 30:6 47:6 <b>players</b> 34:8 <b>playing</b> 33:18 <b>please</b> 3:9 17:5 20:10,10 28:21 42:3 <b>plus</b> 5:12 <b>point</b> 12:13 13:7 17:17 18:12 23:19 26:19 29:23 30:4 33:6 51:17 54:2 <b>pointed</b> 40:3,16 <b>pointing</b> 39:7 <b>points</b> 52:13 <b>police</b> 3:17,21 4:5,6,17 5:17 5:21 6:6,8,11 6:16,20 7:10 7:12,23 8:5,7 8:10,13 11:9 11:17,20,20 13:22 14:6,16 16:2,7,8,21 18:17 23:11 24:1,2,17,19 27:5,7,11,15 27:23 28:1,9 28:11,13,23 29:4,15,18 30:2,6,9,13,18 31:5,9,10,20 32:12,19,22 33:8,11 34:4,7 34:12,22,22</p>	<p>35:18,20,23 36:10 37:12,21 38:4,12,18,21 38:23 39:1,2,7 39:19 40:2,6 40:17 41:4,7 42:6 47:6 49:18 52:20,21 53:6,7 <b>policeman</b> 29:7 <b>police's</b> 5:18 <b>police-arranged</b> 42:5 <b>position</b> 3:17 5:21 14:11 <b>possible</b> 23:6 <b>potential</b> 30:7 <b>powerful</b> 53:13 53:25 <b>precedent</b> 41:16 <b>precious</b> 21:8 <b>preclude</b> 51:14 <b>prejudice</b> 20:7 36:14 47:1,19 47:20 <b>prejudicial</b> 21:14 27:1 51:21 <b>present</b> 38:24,24 <b>presenting</b> 13:9 <b>presents</b> 3:11 <b>presumably</b> 32:8 <b>pretesting</b> 5:7 <b>prevents</b> 35:18 <b>previously</b> 47:12 <b>primarily</b> 27:17 <b>primary</b> 27:13 53:3 <b>principle</b> 33:1 49:12 53:3 <b>prior</b> 51:18 <b>private</b> 3:19 4:11,12 11:25 <b>probably</b> 5:1 47:7 50:18</p>
--	--	--	--	---

<b>probative</b> 27:1 46:25 47:4,20	52:16	34:15 38:10	<b>reconciled</b> 52:3	25:14 36:4
<b>problem</b> 14:8,8 31:7,10 45:15	<b>proposing</b> 22:13	41:13 52:5	<b>records</b> 26:1	<b>respect</b> 46:7
50:17 51:20	<b>prosecution</b>	<b>quiet</b> 17:10	<b>red</b> 15:22 17:4	48:3 50:17
53:19	7:18 8:23	<b>quite</b> 31:22,23	25:21	<b>respectfully</b>
<b>problematic</b>	18:24 38:24	37:20	<b>red-flag</b> 19:22	41:19
51:14	44:3 50:14	<b>R</b>	<b>red-flagged</b>	<b>respond</b> 22:1
<b>procedure</b> 8:14	<b>prosecutors</b>	<b>R</b> 3:1	19:16,16	<b>Respondent</b>
8:15 16:7	35:18 36:19	<b>raise</b> 7:16 9:17	<b>reference</b> 40:10	1:18,22 2:7,11
34:12 46:12	<b>protect</b> 43:5	<b>raises</b> 15:22	<b>refusing</b> 45:22	28:19 42:1
<b>procedures</b>	<b>protection</b> 45:16	17:4	<b>regard</b> 32:2,17	<b>result</b> 22:9
18:17 36:18,23	47:25	<b>randomly</b> 15:12	<b>regarding</b> 18:10	25:12 35:13
<b>process</b> 3:14 6:1	<b>protections</b> 48:1	17:1	<b>rejected</b> 43:3,22	<b>results</b> 17:3
6:19 7:17,20	<b>protector</b> 50:5	<b>rape</b> 23:2,9 24:7	46:7	33:23
8:5 9:2,6,14	<b>protects</b> 49:13	<b>raped</b> 22:23	<b>relate</b> 14:9	<b>retry</b> 12:17
10:7 11:23	49:14	23:5	<b>relevance</b> 20:6	<b>reversal</b> 6:5
12:11 14:13	<b>prove</b> 42:14	<b>rare</b> 19:25	37:3	<b>RICHARD</b> 1:15
25:14,21 28:11	<b>proved</b> 24:25	<b>rational</b> 36:20	<b>reliability</b> 3:14	2:3,13 3:6
28:12,23 29:1	<b>proves</b> 27:14	43:14	4:3 5:7 26:5	52:10
29:13 30:8,10	<b>provide</b> 36:23	<b>rationale</b> 18:21	33:6,16 34:13	<b>right</b> 8:6 10:8,11
30:11 32:23	<b>provides</b> 43:5	32:24 34:3,5	34:14,17 35:3	10:15,22 11:1
34:18 35:10,11	<b>province</b> 18:22	<b>rea</b> 30:25 39:22	35:4 36:5,7,9	11:3,7,9,10,22
35:18,21,25	19:11	40:24 41:5	36:15,24 37:4	14:13 15:18
36:3,4,6,10	<b>provision</b> 45:12	<b>read</b> 33:18	37:7 38:15	16:19 17:10
37:5 41:19	<b>psychological</b>	<b>reading</b> 51:8	43:6 44:25	19:8 20:3,13
42:4,16,21	18:15	<b>reads</b> 23:1	46:9,10 49:1	20:14,24 21:8
43:6,10,15,19	<b>publishes</b> 3:25	<b>really</b> 6:7,13	49:14	21:16 22:10
44:5,8,13,17	<b>put</b> 15:6 29:18	18:1 22:20,23	<b>reliable</b> 4:21	25:11,21 30:19
45:15,18,20	30:13 44:14	29:8 33:7	12:6 24:14,23	31:11 33:2,22
46:1,14,14,16	47:10,14 48:2	34:11 35:5,9	27:15 43:5	35:14 36:18,25
48:20 49:13,25	<b>puts</b> 35:4 46:13	37:7 44:23	51:25	49:22 50:21,22
50:6,11,14	50:23	45:19 46:15	<b>remaining</b> 52:9	51:1 53:12
51:6,14,22,23	<b>putting</b> 30:9	48:7,24,25	<b>remember</b> 17:9	<b>rightly</b> 4:5,6
52:2 53:1	41:3 42:9	<b>reason</b> 10:4 14:3	<b>remembering</b>	<b>rise</b> 11:23
54:11,15	<b>Q</b>	25:23 29:17	17:15	<b>rises</b> 15:19
<b>produce</b> 24:17	<b>quadruple</b>	33:22,24 54:7	<b>reminisce</b> 18:23	<b>risk</b> 5:14 6:2,15
<b>produced</b> 42:19	50:15	<b>reasonable</b>	<b>render</b> 6:16	22:18 27:17,18
43:25	<b>qualify</b> 12:4	36:21 43:14	<b>repeat</b> 13:21	53:4
<b>product</b> 41:14	13:20	<b>reasonably</b>	21:17 34:8	<b>risking</b> 8:9
<b>professor</b> 17:10	<b>question</b> 13:22	22:16,17 30:19	<b>request</b> 41:19	<b>ROBERTS</b> 3:3
<b>promptly</b> 8:15	15:11 16:6	<b>reasons</b> 20:9,13	<b>require</b> 6:5 8:18	15:9,23 16:16
<b>prong</b> 37:23	20:19 21:17	44:3	11:9 36:19	16:20 17:7,22
41:10	30:23 35:5	<b>REBUTTAL</b>	<b>required</b> 4:9	28:15,17 32:3
<b>proper</b> 16:7	38:15 43:2	2:12 52:10	37:24 42:4	32:8 41:22
<b>properly</b> 41:15	49:1 51:2,10	<b>recognize</b> 37:14	54:5,7	49:3,20 52:8
<b>proposed</b> 41:18	54:9,14	<b>recognized</b> 4:24	<b>requirement</b>	54:17
	<b>questions</b> 26:23	18:13	50:11	<b>role</b> 29:10 30:6
			<b>requires</b> 3:14	30:8 33:18

34:19 38:20 39:4 44:17 46:15 47:7 <b>routine</b> 44:19 <b>ruins</b> 17:25 <b>rule</b> 20:5,10,24 21:13 25:6 26:25 27:16 28:10 35:9,11 35:12 41:18 46:6,18,19,24 47:17 48:21,23 50:13 52:16 54:15 <b>rulemaking</b> 46:12 <b>rules</b> 9:2,4 20:5 28:3 37:2 46:11,12 49:6 49:24 53:7 <b>rulings</b> 7:19 <b>run-of-the-mill</b> 44:19 50:7 51:12,16	<b>says</b> 13:12,16 15:21 16:21 17:10,24 19:25 23:2,4,9 26:25 39:13 49:15 50:24 <b>scale</b> 30:10 <b>scales</b> 42:10 45:20 <b>Scalia</b> 4:15 6:4 6:21 7:5,9 8:19 9:3,7,18 10:3 10:18 12:12 31:6,13,16 42:11 53:15 <b>Scalia's</b> 13:22 <b>scenario</b> 39:10 <b>scene</b> 8:16 16:21 29:19 30:15,20 31:20 39:12,20 <b>school</b> 17:9 <b>se</b> 14:10 35:10 <b>seconds</b> 18:2 <b>see</b> 4:20 9:18,20 16:4,15,22 22:24 31:22 32:13 37:13 <b>seen</b> 5:3 19:4 <b>sense</b> 9:15 29:11 30:20 34:21 <b>separate</b> 6:19 12:7,10 45:12 45:15 54:6,7 54:13 <b>serious</b> 38:19 <b>set</b> 12:23 16:15 35:17 <b>sets</b> 16:13 <b>setting</b> 25:17 <b>shop</b> 17:24 <b>shorter</b> 17:15 <b>show</b> 8:24 16:13 20:12 <b>showed</b> 4:13 <b>showing</b> 11:25 13:8 48:20 <b>shown</b> 5:4 12:5	<b>shows</b> 3:20 <b>show-up</b> 8:16,18 11:14,15 15:20 24:17 29:24 30:1 31:5 34:24,25 37:23 39:25 40:15 52:19 <b>show-ups</b> 11:24 <b>side</b> 9:10 44:12 <b>significance</b> 4:2 <b>significant</b> 49:12 <b>similar</b> 35:22 37:11 <b>similarly</b> 6:23 <b>Simmons</b> 24:11 <b>simple</b> 10:20 <b>simply</b> 15:2 22:7 31:3 36:7 39:24 54:14 <b>sincerity</b> 53:25 <b>single</b> 13:9 <b>singled</b> 18:13 <b>sit</b> 30:14 <b>situation</b> 14:22 16:17 25:10 <b>situations</b> 11:20 <b>six</b> 49:7 <b>Sixth</b> 23:25 36:22 45:15 <b>skew</b> 29:1 30:13 35:20,25 <b>skewing</b> 30:10 <b>slew</b> 54:4 <b>slight</b> 13:16 <b>snitches</b> 46:7 <b>Solicitor</b> 1:19 <b>solved</b> 7:25 <b>somebody</b> 8:24 18:7,9 26:9 <b>someone's</b> 42:13 <b>sorry</b> 19:20 21:22 27:24 <b>sort</b> 5:13 34:17 40:13 <b>Sotomayor</b> 3:16	3:19,24 29:2,7 29:11,16,21 30:12 39:6,21 40:9,21,25 49:4 <b>source</b> 14:16 <b>sources</b> 37:2 <b>so-and-so</b> 23:2 <b>special</b> 6:15,24 7:3 19:15 35:11 46:5 48:5,6 <b>specifically</b> 24:1 37:3 38:22 40:12,14 48:3 <b>spite</b> 52:22 53:7 <b>spontaneously</b> 39:13 <b>stacking</b> 30:9 <b>stand</b> 31:21 39:11 43:16 <b>standard</b> 12:24 16:11 20:2 22:12,13,15 25:17 35:18 36:7,8,9 46:24 54:10 <b>standards</b> 17:6 <b>standing</b> 30:2 32:21 37:6 39:13 <b>standpoint</b> 39:18 <b>starts</b> 17:12 <b>state</b> 9:12,13,16 9:19,22 10:3 10:10 20:4 31:4 39:23,24 40:10 41:15,20 42:8,9,11,18 42:19,24 45:19 45:20 46:10 49:23 50:12,23 52:16,22 <b>stated</b> 32:25 <b>statement</b> 15:1 20:8	<b>statements</b> 47:12 <b>States</b> 1:1,12,21 2:10 41:25 46:16 48:2,5 49:16 <b>station</b> 52:20 53:6 <b>stay</b> 29:18 31:18 <b>step</b> 34:11 <b>stolen</b> 12:1 <b>stood</b> 28:14 <b>stop</b> 22:5 <b>Stovall</b> 31:24 34:23 35:5,5 35:21 39:5 <b>street</b> 10:17 15:13 <b>stress</b> 19:6 <b>studies</b> 12:5 18:15 25:25 26:1,7 <b>study</b> 18:1,1 25:2,2,3 26:10 <b>subject</b> 25:20 <b>submit</b> 52:6 <b>submitted</b> 54:18 54:20 <b>subsequent</b> 4:25 5:11 <b>substantial</b> 33:5 42:20 54:12 <b>substantially</b> 12:25 20:1 22:17,18 47:1 <b>substantive</b> 22:12,13 <b>sufficient</b> 13:19 <b>suggest</b> 3:22 4:22 35:8 42:7 53:2 <b>suggested</b> 27:23 <b>suggestibility</b> 39:1 <b>suggesting</b> 26:6 29:4,12 32:5 <b>suggestion</b> 5:17
---	--	--	--	--

13:17,19 14:15 15:25 17:3,4 27:25 28:2,9 28:11,13 30:7 35:24 36:11 38:21,23 52:23 53:12 <b>suggestive</b> 3:11 4:2,16 5:12,17 6:2 13:15 16:25 23:10 24:13 27:22 28:25 29:5 32:1,5 33:19 34:6,12,20,25 38:1 40:13 41:8 52:25 53:20 <b>suggestiveness</b> 6:8,11 7:12 8:21 11:6,8,12 11:16,23 12:18 13:3,23,23,25 14:6,10,14,18 14:25 15:11,16 36:7 37:18 40:2 <b>summation</b> 26:24 36:25 <b>supported</b> 43:13 <b>supporting</b> 1:21 2:11 42:1 <b>suppose</b> 6:7 7:22 24:24 49:20 52:18,19 53:5 <b>suppress</b> 14:23 15:1,3,5 <b>suppression</b> 32:14 <b>suppressions</b> 49:9 <b>Supreme</b> 1:1,12 <b>sure</b> 12:9 21:11 21:11,12 30:21 38:9 <b>surely</b> 50:10 <b>surprised</b> 39:22	<b>surveillance</b> 4:13 <b>suspect</b> 5:23 13:9,11 16:10 16:13,14 28:25 29:15 32:21 38:25 42:7 <b>suspicion</b> 4:6 5:14,24 28:14 29:23 <b>system</b> 20:25 23:14 34:8 49:2 <hr/> <b>T</b> <hr/> <b>T</b> 2:1,1 <b>take</b> 10:3,19,20 18:25 26:14 34:10 37:13 44:22 47:8 53:18 <b>taken</b> 19:5 49:19 49:21 50:7 <b>talk</b> 38:20 39:12 <b>talked</b> 7:23 33:3 33:16 44:7 <b>talking</b> 13:22,23 16:18,20 20:16 25:1,17 30:16 31:17 35:9 37:12 42:25 47:18,19 49:25 51:15 <b>talks</b> 29:3 <b>teach</b> 19:10 <b>tea-leaf</b> 51:8 <b>techniques</b> 28:25 40:13 <b>technology</b> 45:25 <b>tell</b> 8:2 13:7 26:18 29:16 33:10 39:6 43:17 44:20 53:15 <b>telling</b> 31:17 <b>tells</b> 29:8 31:24	<b>term</b> 18:9 <b>terms</b> 32:14 44:13 <b>test</b> 31:24 34:16 43:6 51:23 <b>testify</b> 23:7 47:15 <b>testifying</b> 53:21 <b>testimony</b> 5:6,12 5:16 6:6,7,14 6:14 7:4,11,11 7:11 8:20 10:21,23 14:24 14:25 15:3,5 17:19 24:25 25:4,6,18,19 25:19 26:5,6,7 26:19 33:24 34:1 36:14 42:25 43:1 45:21,24 46:20 47:21 48:4 <b>Thank</b> 28:15,16 41:21,22 52:8 54:16,17 <b>theory</b> 9:21 47:9 <b>Thigpen</b> 23:24 <b>thing</b> 7:24 43:10 44:15 <b>things</b> 12:22 13:14 17:9 20:16 37:25 44:7 48:14 <b>think</b> 4:24 5:10 6:4,6,13,15,18 7:2,12,13,14 7:15,25 9:3 11:13 13:19 14:11 16:1,3,7 16:10,24 17:16 18:3,9 19:13 19:14 20:4,8 24:9 25:7,22 26:8,13,14 27:12 28:4,7 29:17,22 30:17 31:2 33:10,21	35:15 40:7,21 41:2,6 45:17 45:23 46:19 47:1,9,21 49:6 50:5,16 51:1 53:12 <b>thinking</b> 29:8 <b>thinks</b> 3:25 <b>Thompson</b> 45:4 <b>three</b> 16:13 52:12 <b>threshold</b> 48:20 48:25 <b>throw</b> 7:13 40:3 <b>thumb</b> 30:10 42:10 <b>tilting</b> 45:19 <b>time</b> 4:4,25 17:11,12 19:6 43:20 <b>times</b> 25:9 <b>today</b> 3:4 43:16 52:1 <b>told</b> 21:24 46:8 <b>tools</b> 36:17,23 <b>torture</b> 43:25,25 <b>totality</b> 31:25 39:17 41:12 <b>touchstone</b> 34:18 <b>transcripts</b> 26:1 <b>trial</b> 9:14 13:15 15:2 17:5 19:17,24 21:12 22:18 27:18 32:15 37:17 40:14 41:15 42:12,14 44:13 46:16,21 47:25 48:1,15 50:1,2 50:8 51:20 52:24 <b>trials</b> 22:21 23:16 26:2 <b>tricky</b> 28:8 <b>tried</b> 18:10 <b>trier</b> 36:20	<b>trigger</b> 29:14 <b>triggered</b> 37:23 <b>true</b> 33:13 47:18 <b>truly</b> 25:11 <b>try</b> 52:12 <b>trying</b> 9:12,13 17:17 40:5,9 44:25 45:2 <b>turn</b> 44:11 <b>turned</b> 25:2 <b>turns</b> 17:14,25 <b>two</b> 12:21 31:19 32:11 33:15 37:9,24 38:11 38:16 39:9,11 49:6 53:6,11 <b>two-part</b> 4:1 34:11 <b>type</b> 16:23 30:25 31:5 <b>types</b> 44:7 <hr/> <b>U</b> <hr/> <b>unbelievable</b> 7:10 46:22 <b>undermined</b> 35:6 <b>understand</b> 13:2 26:3 <b>unfair</b> 27:17 42:10 47:1,19 47:19 50:1,3 <b>unintended</b> 28:10,13 <b>unintentional</b> 14:17 29:4,13 <b>unique</b> 3:11 4:23 38:20 39:1 <b>United</b> 1:1,12,21 2:10 41:25 49:16 <b>unnecessarily</b> 24:13 28:25 33:19 34:12 41:8 42:7 <b>unnecessary</b>
--	---	--	---	---



30:17 34:20 35:24 39:25 <b>unreliability</b> 9:19 10:20,24 14:1,8 18:6 33:8 40:7 <b>unreliable</b> 4:17 4:18 6:16 7:12 8:20 9:5,24 17:18 20:9 23:13 24:5 25:1,5,20 26:8 26:19 33:24 34:1 38:13 42:17,20 43:2 43:18 45:3,14 46:5 49:18 51:5,21 <b>upstairs</b> 39:12 <b>use</b> 28:25 35:16 36:10 42:13 48:5,16 <b>uses</b> 46:10 <b>usually</b> 16:2 18:22 <b>usurping</b> 19:11 44:23	<b>violates</b> 54:11 <b>violation</b> 7:20 35:13 42:17,22 50:14 <b>Virginia</b> 36:19 43:11 <b>voice</b> 6:9,12	17:12 <b>We'll</b> 3:3 <b>we're</b> 8:2 14:12 16:12 19:14 25:16 31:9 35:9 38:15 39:21,21 44:16 44:18 49:24 50:19 51:15 52:25 <b>we've</b> 5:3 7:25 20:16 24:6 26:10 29:2 <b>Whoa</b> 22:5 <b>wife</b> 18:25 <b>window</b> 7:24 8:3 31:22 32:20 37:13,22 38:5 39:8 40:3,18 <b>witness</b> 4:13 5:22 6:12 13:7 15:24 16:9,11 18:24 21:6 24:3,4,18 25:9 25:10 29:15 32:20 35:1 37:12 38:5,24 38:24 39:3,19 40:16 46:20,21 46:25 47:10,11 47:14,15 48:10 48:19 49:9 50:23 53:8,11 <b>witnesses</b> 4:14 29:24 53:6,20 <b>witness's</b> 4:7 28:24 40:18 53:25 <b>woman</b> 8:10 30:3 31:21 37:22 39:12 40:3 <b>wonder</b> 26:5 <b>work</b> 9:23 34:22 <b>works</b> 10:7 <b>wouldn't</b> 9:16 9:23 17:20	22:22 40:4 47:8,8 <b>write</b> 30:24 <b>wrong</b> 12:20 <b>wrongful</b> 26:12 <b>wrote</b> 39:23	<b>702</b> 48:23 <b>75</b> 26:11
<hr/> <b>V</b> <hr/>	<hr/> <b>W</b> <hr/>		<hr/> <b>X</b> <hr/>	
	<b>Wade</b> 4:24 5:10 14:4 18:4,5 29:3 38:20 39:14,15 41:6 53:22 <b>wait</b> 22:5 30:15 <b>waiter</b> 19:3,4 <b>want</b> 8:1,7 12:16 16:15 19:22 20:11,17,24 21:1,1,17 22:7 22:8,9,11,14 23:6 29:19 33:22 38:12,14 54:2 <b>wanted</b> 8:13 47:5 <b>wants</b> 30:3,3 44:20 48:8,15 <b>Washington</b> 1:8 1:20 <b>wasn't</b> 12:10 23:11 29:8 32:11 53:1 <b>Watkins</b> 54:4 <b>way</b> 7:17 9:13 18:21 19:10 22:21 23:15 29:12 30:12 32:19,19 37:21 39:23 41:5 50:19 <b>ways</b> 9:23 39:23 <b>wearing</b> 22:1 <b>Wednesday</b> 1:9 <b>weeks</b> 22:25 <b>weight</b> 21:5 <b>went</b> 15:17	<hr/> <b>Y</b> <hr/>	<b>x</b> 1:2,7	
			<hr/> <b>1</b> <hr/>	
			1 17:14 18:2 <b>10</b> 5:3 <b>10-8974</b> 1:4 3:4 <b>10:02</b> 1:13 3:2 <b>10:58</b> 54:19 <b>100</b> 21:11 <b>15</b> 5:3 <b>1967</b> 25:24	
			<hr/> <b>2</b> <hr/>	
			2 1:9 52:9,13 <b>200</b> 12:14 <b>2011</b> 1:9 <b>28</b> 2:7	
			<hr/> <b>3</b> <hr/>	
			3 2:4	
			<hr/> <b>4</b> <hr/>	
			4 17:13 <b>403</b> 20:5,10,25 21:3,13,23 22:10 46:18,24 47:17 <b>41</b> 2:11 <b>45</b> 18:2	
			<hr/> <b>5</b> <hr/>	
			5 17:24 <b>52</b> 2:14	
			<hr/> <b>7</b> <hr/>	