

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
RICHARD P. BRESS, ESQ.	
On behalf of the Petitioner	3
KATHERINE BURNETT, ESQ.	
On behalf of the Respondent	27
REBUTTAL ARGUMENT OF	
RICHARD P. BRESS, ESQ.	
On behalf of the Petitioner	51

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(11:15 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-1223, Bell versus Kelly.

Mr. Bress.

ORAL ARGUMENT OF RICHARD P. BRESS

ON BEHALF OF THE PETITIONER

MR. BRESS: Thank you, Mr. Chief Justice, and may it please the Court:

The problem at the heart of this case is construing subsections (d) and (e) of 28 U.S.C. 2254 together in a way that makes sense. The last time that this Court construed those two provisions together was in Michael Williams. Michael Williams presented a different issue.

But we believe that looking at how Michael Williams would play out with a small change in the facts will help frame the issue that's before the court today.

Now, as the Court recalls, in Michael Williams the Virginia Supreme Court denied Williams the investigative assistance he needed in order to help develop a claim based on his suspicions of jury misconduct. He, therefore, didn't make the claim in State court.

On -- in Federal court he got investigative

1 assistance; and, in speaking with the investigator, two
2 of the jurors referred to the foreperson, Bonnie
3 Stinette, as Bonnie Minehart.

4 JUSTICE ALITO: Mr. Bress, before we get
5 into that, could I just ask you a threshold question?
6 We took this case to decide a question, and one of the
7 factual predicates of the question is that the State
8 court refused to consider certain evidence. And I'm
9 puzzled about that.

10 What was the evidence that the State court
11 -- do you say that the State court refused to consider
12 evidence that was proffered to it?

13 MR. BRESS: No, Your Honor. The State court
14 did not refuse to consider evidence proffered to it.
15 The State court refused to permit the full development
16 of the evidence. And it -- I mean it misled the court
17 --

18 JUSTICE GINSBURG: I didn't hear the -- the
19 last part.

20 MR. BRESS: The State court refused to
21 permit the evidence to be fully developed, Your Honor.
22 They didn't refuse to consider evidence.

23 JUSTICE SOUTER: What do you mean by that?
24 What specifically did they --

25 MR. BRESS: Specifically, Your Honor, the

1 State provided 120 days to develop the State habeas
2 petition. The Petitioners during that time developed 14
3 different claims, including the claim that's at issue
4 here today.

5 In the course of that they interviewed, I
6 think, 11 different witnesses. For the ineffective-
7 assistance-of-counsel claim they got affidavits. They
8 also interviewed all 12 jurors for five different claims
9 of juror misconduct. They interviewed five different
10 witnesses for Brady claims, et cetera.

11 They ran out of time, Your Honor, and they
12 asked the court for more time on repeated occasions.
13 They asked the court to investigate --

14 JUSTICE ALITO: But that really does not
15 present the question that you asked the Court to decide.

16 MR. BRESS: Well, Your Honor, if you read it
17 that way, it would not, but I don't read the question
18 presented that way. I read the question presented to
19 present the question of when the district court properly
20 hears evidence after a finding of diligence by the
21 prisoner and holds that the State court didn't provide a
22 full and fair opportunity to that prisoner to develop
23 the facts in State court, that where the evidence is
24 important the -- the district court may consider that
25 evidence, rather than giving deference to the State

1 court.

2 And giving deference to the State court is
3 not even on the table any longer in this case. It was
4 -- what the Fourth Circuit did, the Fourth Circuit took
5 the new evidence into account and deferred to the State
6 court nonetheless.

7 JUSTICE SCALIA: Why wouldn't he have
8 brought that new evidence to the attention of the State
9 court first? Why wasn't he obliged to bring it to the
10 attention of the State court?

11 MR. BRESS: He didn't have the new evidence,
12 Your Honor.

13 JUSTICE SCALIA: Well, he could have a
14 post-conviction proceeding in the State court.

15 MR. BRESS: Actually, no, he couldn't, Your
16 Honor.

17 JUSTICE SCALIA: A State habeas.

18 MR. BRESS: I'm sorry. The -- as the
19 Virginia Commonwealth attorneys point out in their
20 amicus brief, there is a rule in the Virginia State
21 court that any facts not set out in the habeas petition
22 at the State level can't be brought in later. He wasn't
23 able to bring the facts in afterwards.

24 CHIEF JUSTICE ROBERTS: Well, weren't the
25 facts merely cumulative evidence of his claim that was

1 before the State court?

2 MR. BRESS: No, they weren't, Your Honor.

3 There were three categories of new facts or new evidence
4 that came in on Federal habeas.

5 And if I may, the first -- the first of them
6 had to do with facts that undermined the State's claim
7 of aggravation. The State relied on only one
8 aggravating factor. That was future dangerousness. And
9 in the course of that, in developing it, their number
10 one emphasis was on one adjudicated -- unadjudicated bad
11 act, and this was a story told by Billy Jo Swartz about
12 an alleged horrific assault on her and of Tracy
13 Nicholson, who was a girlfriend of the Petitioner.

14 What the jury didn't know at the time was
15 that both Tracy and her mother, who were there, said
16 that the incident did not occur, that there was no
17 assault there, and Billy Jo Swartz was a liar.

18 Now, on State habeas, Joanne did submit an
19 affidavit and, in that affidavit, said that Billy Jo
20 Swartz had lied. That created a dispute of fact at the
21 State level, but unfortunately rather than hear the
22 witnesses to determine the credibility and -- the
23 Virginia Supreme Court instead decided against
24 Petitioner.

25 CHIEF JUSTICE ROBERTS: Well, I think that

1 supports my suggestion, which is that the evidence was
2 cumulative. There was a dispute on that issue. There
3 was evidence on both sides. And now you say, hey, we've
4 got more evidence.

5 MR. BRESS: Well, it's not more evidence,
6 Your Honor; it's just that a dispute over the facts
7 where credibility is at issue shouldn't be decided on
8 the papers.

9 JUSTICE GINSBURG: But the Virginia Supreme
10 Court, on habeas, said we are going to accept as true
11 all the facts as the Petitioner alleged them. They said
12 specifically "all facts alleged in the petition will be
13 taken as true."

14 MR. BRESS: And if they had done that, Your
15 Honor, I think that we'd be in a different position.

16 JUSTICE GINSBURG: They said they did.

17 MR. BRESS: They said, on the one hand, they
18 did, and yet, on the other hand, when they were looking,
19 for example, at Joanne Nicholson's testimony, they said
20 she could have been effectively impeached by other
21 statements that she had made, that in their household,
22 she had never seen Bell be physically abusive to her
23 daughter. Now, Joanne Nicholson and Tracy Nicholson
24 have said throughout that he was never physically
25 abusive to Tracy. The supposed impeachment would have

1 come from police court records that have never been
2 introduced in this case. So the Virginia Supreme Court,
3 without a hearing, just said, on the one hand, we accept
4 these facts as true and, on the other hand, even though
5 Joanne Nicholson would testify that this event never
6 occurred that way, she would have been impeached so the
7 jury wouldn't have believed it.

8 JUSTICE ALITO: Well, your argument is
9 dependent on the proposition that the claim that was
10 advanced in the Federal habeas proceeding is a different
11 claim from a claim that was adjudicated on the merits in
12 the State court?

13 MR. BRESS: That's right, Your Honor.

14 JUSTICE ALITO: And if that's the case, I
15 don't understand why your adversary is not correct that
16 it will always be possible in capital cases for an
17 ineffective assistance of counsel claim that has been
18 adjudicated on the merits in the State court to be
19 advanced and get de novo review in Federal habeas, where
20 every aspect of the defendant's life that is potentially
21 favorable can be advanced as a basis for mitigation.
22 You know, when your firm with all of its expertise and
23 resources comes into the case at the Federal habeas
24 level, will it not always be the case that you will be
25 able to find some additional mitigation evidence and

1 then, under your theory, that will be a new claim and it
2 well get de novo review?

3 MR. BRESS: I'd like to answer that
4 question, Justice Alito, in two ways: One very
5 practical, which is that the Ninth and Tenth Circuits
6 have adopted the rule that we advocated for years. The
7 Sixth Circuit and the Fourth Circuit have adopted that
8 rule for Brady claims, and we haven't seen the flood
9 that supposedly is going to come through the gates.

10 Secondly, on a more theoretical level, for
11 someone to be able to introduce this new evidence on
12 Federal habeas, they have to first be able to
13 demonstrate that they were diligent in attempting
14 formulate it in the State court. Second, they've got to
15 be able to demonstrate that it's important and
16 importantly changes the overall factual mix. Now --

17 JUSTICE GINSBURG: I don't get the diligence
18 part because the whole ineffective assistance of counsel
19 is the client isn't expected to do any of this; it's
20 counsel that's been ineffective.

21 MR. BRESS: Your Honor, I'm referring to
22 Michael Williams, which talks about diligence by the
23 State habeas counsel.

24 JUSTICE GINSBURG: So, it doesn't translate
25 into ineffective assistance of counsel because the

1 client is not the one -- the lawyer has been -- has not
2 been diligent, but there is nothing that the client
3 could do. I just don't see how --

4 MR. BRESS: Well --

5 JUSTICE GINSBURG: -- how you could talk
6 about the diligent -- the diligent client bringing up
7 the ineffectiveness of his lawyer.

8 MR. BRESS: Your Honor, we understand and
9 appreciate the diligence of habeas counsel is not any
10 kind of excuse and can't be -- statutorily it can't be,
11 actually under 2554, but what we are talking about is
12 whether the prisoner and his counsel were diligent in
13 seeking to develop the facts for their claim when they
14 were on State habeas. That's what Michael Williams had
15 to do with it. Michael Williams equated diligence with
16 reasonable efforts and said that the contrary would be
17 negligence.

18 In this case we've got a finding by the
19 district court that Bell and his lawyers were diligent
20 in seeking to develop their ineffective assistance of
21 counsel claim at State habeas. And that's what allows
22 them under (e), that's what says that they didn't fail
23 to develop the evidence under (e)(2) and allows them to
24 go through the gate of (e).

25 Now, in order to get here, you have to

1 demonstrate that diligence. You also have to
2 demonstrate that you're able to develop new facts that
3 matter, that are important, that are significant.

4 JUSTICE GINSBURG: But you use the -- to say
5 that it's a new claim, because that's what it has to be,
6 right, but it's such an extraordinary use of "claim." I
7 mean, we have exhibit cases, the notion is a claim, is a
8 tort claim or a contract claim, but not additional
9 evidence in support of the basic claim. The basic claim
10 is ineffective assistance of counsel.

11 MR. BRESS: Your Honor, I appreciate that
12 it's not "claim" as it's used ordinarily in the Rules of
13 Civil Procedure or when you're talking about making
14 claims in that sort of a complaint. However, this
15 Court, including an opinion -- *Banks v. Dretke*, for
16 example, talked about the two different Brady claims in
17 that case as separate claims, even though they were
18 withholdings by the same prosecutor. More closely even,
19 in *Michael Williams*, there were two separate
20 withholdings of evidence to impeach the same witness.

21 JUSTICE BREYER: All right. So I'm trying
22 to figure out how the statute works.

23 MR. BRESS: Yes.

24 JUSTICE BREYER: And it seems to me that the
25 way it's supposed to work -- have you read, by the way,

1 the facts of the case for December in Bell v. Cohen?
2 No? Okay. Forget that. I was going to shorthand that
3 because it's similar to the hypothetical I'm thinking
4 of.

5 What happens is that the -- the State court
6 now says, okay, I assume all the facts in your favor and
7 you don't prevail. All right. Now, he goes into
8 Federal court and he has some new facts. Now, either
9 they are such that they transform the claim and it's a
10 new claim. I mean, in that case there is an argument
11 for that, maybe not in yours, or they aren't. Now, if
12 they aren't, then what he is supposed to do, the judge,
13 is go look and decide on the basis of what they
14 presented to the State. That's the end of it.

15 Now, if they are, he is supposed to exhaust.
16 You go back, you exhaust this new claim like any other
17 new claim, and if the State bars it, then you go and see
18 if there was cause and prejudice. And that's how it's
19 supposed to work. And if there was cause and prejudice,
20 then you have the hearing. Okay? That's how it's
21 supposed to work factually.

22 I have no idea if that's what went on here,
23 but if it -- it didn't seem to me -- there was some
24 confusion about whether the procedures are adequate in
25 the State. Then there is some other thing that this

1 might be the same claim. I mean, I don't see how we get
2 to the question we took this case to decide, frankly,
3 without knowing what the basis was and whether it was
4 correct for the district court to give him any hearing
5 at all.

6 MR. BRESS: Okay, Your Honor. I'd like to
7 address that. I think that that's essentially how this
8 works in this case. What the district -- what the
9 district court did here is it first made a finding of
10 was there diligence? Because it has to do that under
11 Michael Williams to even take the next step. Did the
12 Petitioner --

13 JUSTICE BREYER: That's the first step. The
14 first step, I'd go and see -- but at any rate, you go
15 ahead.

16 MR. BRESS: Right. But it had to take that
17 step. And it had to take that step, by the way, of
18 course, with (d) in mind as well, because this Court in
19 Schriro said there is no reason to have hearing if it is
20 separately precluded by another predicate. In Schriro,
21 obviously, it was the refusal to -- to allow mitigating
22 evidence. So it does that. Then it determines
23 separately under Townsend, was there a problem in State
24 court that -- did you have a full and fair hearing, and
25 if you can prove the facts that you state, would you

1 win, and so those allowed the court the discretion to
2 hold a hearing.

3 JUSTICE BREYER: Well, why wouldn't you say
4 right off the bat, new claim, go present it to the State
5 court, and exhausts it?

6 MR. BRESS: Well this couldn't have been
7 presented in the State court.

8 JUSTICE BREYER: Why not?

9 MR. BRESS: Well as the State argued below,
10 it would have been procedurally deficient.

11 JUSTICE BREYER: No, no, no. Suppose we
12 have -- that's what I want, not these facts, but I want
13 the facts where really, he couldn't have discovered
14 this, because the first time that the district attorney
15 opened his files for the Brady claim was 140 days after.
16 So we now have some totally new, which he couldn't have
17 gotten; no one disputes it. Where, that kind of
18 thing -- I think he would have to present it to the
19 State court, wouldn't he?

20 MR. BRESS: Well, Your Honor, according to
21 the warden at least, in this case if you took let's say
22 the facts of Banks v Dretke, which this Court decided,
23 where when you were in front of the State court, what
24 you knew was that the girlfriend of the prisoner had
25 said that one of the witnesses was particularly close to

1 law enforcement, and on that basis they made a claim, a
2 Brady claim in State court. It was denied because it
3 wasn't factually developed enough, all right?

4 So they went to Federal court and in Federal
5 court they got a lot more evidence that supported that
6 claim. They actually found out that in fact this person
7 was a Government informant, and on that basis this Court
8 found cause and prejudice and addressed that that
9 claim --

10 JUSTICE BREYER: Well, you must have been
11 assuming then that the State would not give that person
12 a -- a new opportunity to consider the new evidence.

13 MR. BRESS: Well, that's absolutely true --

14 JUSTICE BREYER: Suppose it were really new.

15 MR. BRESS: The State statute is
16 unequivocal.

17 JUSTICE BREYER: Yes, but so is it in
18 Tennessee, and in Tennessee there is an exception where
19 you could bring the thing up because you couldn't
20 possibly have gotten over it.

21 MR. BRESS: Your Honor, there is no
22 exception here in Virginia.

23 JUSTICE BREYER: So in Virginia a person
24 discovers for the first time, 140 days later looks at
25 the D.A.'s files, and discovers something that shows the

1 whole trial was a farce -- I mean, something
2 unbelievable, and there is no way for the person under
3 Virginia law to bring that up in a State court?

4 MR. BRESS: Not in this sort of a claim.
5 No, Your Honor, there isn't.

6 CHIEF JUSTICE ROBERTS: Mr. Bress, your --
7 you're argument that this can't be brought up assumes
8 that it is a new claim rather than the same claim,
9 right? Because if it were just the same claim then the
10 question would be it is simply cumulative rather than
11 new?

12 MR. BRESS: If it's the same claim for
13 2254(d) purposes, yes, Your Honor.

14 CHIEF JUSTICE ROBERTS: Right. And I guess
15 it gets back to Justice Ginsburg's question. We usually
16 don't consider claims different if there is just new
17 evidence, but here didn't the Fourth Circuit necessarily
18 determine that this was the same claim in deciding to
19 defer to the State court findings?

20 MR. BRESS: Yes, it did, Your Honor. The
21 Fourth Circuit viewed this as the same claim and that's
22 the root of some of our disagreement with them.

23 CHIEF JUSTICE ROBERTS: And if fact you got
24 more than you were entitled to, because it did look at
25 the new evidence, albeit through the guise of deference,

1 but it shouldn't have even looked at that at all.

2 MR. BRESS: Your Honor. We would agree that
3 that -- that interim solution is not a plausible
4 solution, so we would agree with that, on the new
5 evidence --

6 CHIEF JUSTICE ROBERTS: So if we think that
7 they were right -- and we are, I think we are getting
8 away from the question presented -- if we agree that
9 they are right, that this is the same claim and it's
10 just additional evidence, then you lose.

11 MR. BRESS: No, not necessarily, Your Honor.
12 We also argued on separate grounds where the State's
13 procedure is inadequate, then the -- the State's
14 application of -- of Federal law would have been
15 unreasonable.

16 JUSTICE SOUTER: Mr. Bress, may I ask you a
17 question --

18 MR. BRESS: And if that's true --

19 JUSTICE SOUTER: May I ask you a question
20 which sort of goes to the utility of raising that issue
21 here, and it's a preliminary, not a doctrinal question.
22 But --

23 MR. BRESS: Sure.

24 JUSTICE SOUTER: -- my understanding is that
25 in the United States District Court on the Federal habe

1 -- the district court made a -- drew a conclusion based
2 on the evidence before it, no deference to the State
3 court, that in fact your client did not demonstrate
4 prejudice. And my understanding is that that --
5 although the Fourth Circuit did not rely upon that, my
6 understanding is that that -- that finding remains
7 undisturbed. Is that correct?

8 MR. BRESS: Your Honor, what the district
9 court found, as the Fourth Circuit saw it and as we see
10 it, was that the State court's finding of prejudice was
11 not unreasonable. Now, I acknowledge that when you read
12 the district court's oral ruling you won't see a
13 reference to 2254(d).

14 JUSTICE SOUTER: No.

15 MR. BRESS: However, when you look at what
16 the State court wrote in its written ruling, what it
17 says is there is a colorable claim that the State court
18 was unreasonable, on -- in application of law to the
19 facts and development of the facts, and then it said
20 that they will -- that the court would not decide this
21 issue yet, until it has a hearing; and so the Fourth
22 Circuit looked at what the district court wrote and
23 presumed that consistent with what it had written, it
24 then confronted this issue, the issue of reasonability,
25 orally; and it didn't require that when a judge is

1 saying something orally, as opposed to putting it in a
2 written opinion, that it dot every i and cross every t.
3 It assumed that it meant what it had said earlier. If
4 this Court has any doubt about that, however, it could
5 certainly remand with instructions.

6 JUSTICE GINSBURG: I that what it was saying
7 is there is legitimate -- this is a Strickland question.
8 Strickland has two parts. Part A is were counsel
9 inadequate; and Part B is did it make any difference?
10 It seemed to me the district court was just making a
11 straight out Strickland determination and not deferring
12 to anything else. It was just saying no, I've looked at
13 all the evidence, and yes -- they certainly were -- they
14 were not effective. On the other hand, there is no
15 prejudice because using the strict Strickland test,
16 there was no reasonable likelihood that a jury would
17 have come out differently.

18 MR. BRESS: Your Honor, consistent with the
19 Fourth Circuit, we don't read him to say that. But even
20 if he meant that, the Fourth Circuit certainly on --
21 looked at this from a reasonableness standpoint, and not
22 from a de novo standpoint. So even had the district
23 court meant a de novo review and engaged in it, we still
24 didn't get the correct standard or review on appeal.

25 JUSTICE SOUTER: Oh, that may be. I didn't

1 mean to imply you didn't have a Fourth Circuit question.
2 I -- I guess I was raising a question to whether it is
3 wise to make this the case to decide the Fourth Circuit
4 issue.

5 JUSTICE SCALIA: Mr. Bress, this case
6 involves Section 2254(d), right? Does that appear
7 somewhere in the briefs? It would be nice to have it in
8 front of me.

9 MR. BRESS: Yes, Your Honor.

10 JUSTICE SCALIA: I mean, it's a central
11 thing the case is about. I cannot find it in any of the
12 briefs. Appendix to the petition for cert; I got -- I
13 got to go back to that. Don't you think it's important
14 enough to be in your brief?

15 MR. BRESS: If I may return to the Chief
16 Judge's -- Chief Justice's question from earlier, there
17 are other new claims, new facts here that are equally
18 important in deciding whether this is a new claim. For
19 example, physical child abuse first came into this case,
20 and really was first discovered --

21 CHIEF JUSTICE ROBERTS: I know, but they're
22 -- your underlying theory is that if you get a lot of
23 new evidence, that somehow changes the claim. And
24 again, I think Justice Ginsburg -- I'm having trouble
25 getting my arms around that, and particularly since it's

1 problematic in this area where there is always new
2 evidence.

3 You're looking at someone's childhood. You
4 can always find a new anecdote, a new concern going
5 either way, that you know, this was unusual because he
6 was a good child, or this is excused because he had such
7 a bad upbringing.

8 MR. BRESS: Mr. Chief Justice, two responses
9 to this. Number one -- and you know, as I've said
10 before, this Court has used claim I think in similar
11 ways. It may have been colloquial but it at least
12 demonstrates that it can use it.

13 I'm not saying it's the most normal, or the
14 ordinary course definition, but I am saying that it's
15 the definition that's necessary to read (d) and (e)
16 together in a way that makes sense; and if I can just
17 explain why I think that's true.

18 If you look at (e), (e) says that you can
19 get a hearing even if you weren't diligent in State
20 court, if the facts that you need to develop were not
21 reasonably available in State court and if they would
22 prove by clear and convincing evidence that you are
23 innocent.

24 CHIEF JUSTICE ROBERTS: All right, well
25 just -- we've got two but just to stop you on one. The

1 fact that they excuse your failure to raise and present
2 the evidence in State court doesn't mean that when you
3 get the evidence you have a new claim. It just means
4 that they are going to let you raise a claim you could
5 have raised before.

6 MR. BRESS: Well, if what they are talking
7 about is -- if that includes the ability when you are in
8 State court -- assume, for instance, House versus Bell,
9 just if can take that as an example.

10 I'm sorry, Your Honor.

11 CHIEF JUSTICE ROBERTS: I've gotten over it.

12 MR. BRESS: I don't know, but if we can --
13 if we can just look at the facts of that case briefly:
14 Assume that in State court, despite diligent a effort,
15 they were able to come up with some of the evidence but
16 not all of the evidence that they later came up with in
17 terms of the blood spattering, the DNA, and such.

18 Their claim is denied on the -- on the
19 merits because they weren't able to get much of the
20 evidence in and denied in State courts. They couldn't
21 go to Federal courts where they were able to bring in
22 all of that evidence, and let's say even more, enough to
23 prove by clear and convincing evidence that they were
24 innocent.

25 Under the warden's view, you'd still go back

1 to the State court opinion and decide whether it was
2 intrinsically reasonable. And so long as it is, you
3 wouldn't -- the State court gets affirmed, and none of
4 that new evidence of innocence comes in.

5 Now, I guess it's a possible solution, but
6 the question is: Is that what Congress really intended
7 here?

8 JUSTICE BREYER: I might say the new claim
9 -- okay, so it's a new claim. I don't know if yours is,
10 by the way, but suppose it's a new claim. Then what you
11 ought to do is go back to the State court and exhaust.
12 So now what you show is that that's futile.

13 Now we get to your question before us.
14 Okay. So it's an imaginary case. It's less imaginary
15 in December than here. But, anyway, the -- the -- you
16 get back to the State court. Now, what is supposed to
17 happen?

18 At that point I guess the statute leaves the
19 judge free to develop the facts. It doesn't say you
20 can't. Okay. So then you do it.

21 Now we have the question, which when we took
22 this we thought we could reach, but I don't know if we
23 can -- now we have the question: When the judge makes
24 the decision on the basis of those facts, if they have
25 never developed any of this in State court, fine. Then

1 have -- then just do it. If it is a regular case, don't
2 defer it.

3 But suppose some of the things have been in
4 State court related to this but not others. Now what do
5 we do?

6 MR. BRESS: Well, Your Honor --

7 JUSTICE BREYER: I mean that's not an
8 obvious answer to that one.

9 MR. BRESS: I -- I think that in -- in that
10 case, by the way, you still have to defer to the State
11 factfinding. I think you always have to when the State
12 determines particular facts.

13 JUSTICE BREYER: What it's going to do is
14 it's going to be finding facts on the basis of certain
15 evidence. And what you will have gotten your new claim
16 granted on is the fact that you found some new evidence
17 that's very significant, and you couldn't possibly have
18 found it before.

19 Now what do we do? Do we defer in part; do
20 we defer -- I mean now what does the district judge do?

21 MR. BRESS: Well, I think that, again, you
22 have to defer under (e)(1) presumably to particular fact
23 findings and find that by clear and convincing evidence
24 you've disproved those facts. But, otherwise, I don't
25 think you could find the application of law to fact. I

1 don't think you can under Holland, et cetera.

2 Now, you know, just to make this a little
3 bit clearer, hopefully, in -- in Keeney, upon which this
4 Court drew in Michael Williams, the Court looked -- the
5 Court did -- looked at a potential distinction between
6 the failure properly to make a claim in State court and
7 the failure properly to develop the facts for that
8 claim.

9 Now, the Court looked at that distinction in
10 the context of seeing whether cause and prejudice, which
11 applied to certainly the major claim in the State court,
12 should apply to the failure to fully develop it. And
13 what it said is that distinguishing between those two
14 circumstances is irrational.

15 Now, I would submit that it's similarly
16 irrational to attribute to Congress the intent to
17 distinguish between the circumstances, or because of
18 these limitations you have in State court, despite your
19 effort, you weren't able to fully develop the record.

20 And the State decided the case on an
21 inadequate record. It comes to Federal court. Do you
22 simply defer? I mean do you simply stop when you say
23 the State court reasonably decided this case based on an
24 inadequate State court record, or do you allow that
25 record to be fully developed and decide it on its

1 merits?

2 That's, I think, the issue that we are
3 presenting today. I'd like to reserve --

4 JUSTICE SOUTER: May I just ask one quick
5 question? The -- the answer, I take it, on -- based on
6 what you just said, the answer to the -- the need-
7 to-exhaust point is you don't have to exhaust because
8 you already tried to exhaust in the State court, and
9 they didn't give you enough time to get your evidence
10 in. That is --

11 MR. BRESS: That's precisely it, Your Honor.
12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. Bress.

15 Ms. Burnett.

16 ORAL ARGUMENT OF KATHERINE BURNETT

17 ON BEHALF OF THE RESPONDENT

18 MS. BURNETT: Mr. Chief Justice, and may it
19 please the Court:

20 The claim in Bell's case is the textbook
21 example of a claim that the effective death penalty
22 intended for 2254(d) to apply to. In the Virginia
23 Supreme Court, Bell presented his claim with his
24 allegations of what he says counsel didn't present and
25 didn't find at trial. And the Virginia Supreme Court

1 assumed the truth of all of those allegations and did
2 not contest any of them. There were never any facts in
3 dispute. The State never contested any facts.

4 The State court assumed them all true, and
5 then applied -- faithfully applied this Court's
6 established precedent under Strickland and Wiggins, in
7 particular, and weighed that evidence that he had
8 claimed had not been found by his counsel against the
9 aggravating evidence in this case of a drug dealer who
10 killed premeditatedly a police officer in a small town
11 and upon weighing that found as a -- as a matter -- as a
12 de novo matter on the merits that he could not show
13 prejudice. Because there was no reasonable probability
14 that a jury would have found a life sentence giving --
15 assuming the truth of everything he alleged.

16 Now, when he went to Federal court, the
17 Fourth Circuit faithfully applied 2254(d) to that after
18 addressing all of the same evidence and also agreeing
19 that there was no prejudice, and then said that the
20 State court decision was not unreasonable under 2254(d).

21 Now, Bell comes to this Court and says for
22 the first time that I have a new claim, and that was not
23 made below, and this is not a new claim. Everything
24 that he presented in Federal court was presented to the
25 State court. There is absolutely no difference. In

1 fact, to the effect that there was some difference in
2 the district court and the State alleged -- we pleaded
3 default because he presented a few new affidavits.

4 The district court resolved that and said:
5 I'm not even going to look at those because they aren't
6 critical to my decision. I am only going to look at --
7 and he described in particular the exact same record
8 that the Virginia Supreme Court had found. And then the
9 district court --

10 JUSTICE GINSBURG: Well, what about the
11 point that Mr. Bress made that there wasn't enough time
12 in the Virginia Supreme Court on habeas to develop
13 everything that was later put before the district court;
14 that there was a very short time to get the petition in,
15 and there were many issues other than ineffective
16 assistance of counsel?

17 MS. BURNETT: Well, Justice Ginsburg, there
18 were approximately 12 issues in this case that the
19 district court disposed of in a very lengthy opinion.
20 It was only this one issue that the district court found
21 -- believed that he needed to have a hearing on, we
22 believe erroneously. But, nevertheless, he had the
23 hearing and -- and listened to all the same evidence.

24 Nothing, Justice Ginsburg -- in our opinion
25 nothing prevented Bell from presenting the allegations

1 that were presented to the Federal court and all the
2 allegations that he presented to the State court. There
3 was no State court procedure or denial of anything.

4 JUSTICE SOUTER: Did he make any request
5 from the State court for more time?

6 MS. BURNETT: Your Honor, I don't -- I don't
7 --

8 JUSTICE SOUTER: Your brother is nodding
9 yes.

10 MS. BURNETT: He may very well have, but the
11 point is that there was nothing that he presented to the
12 Federal court that he didn't also present to the State
13 court. So he was not prevented from -- that -- that's a
14 red herring in this case.

15 Now, he had some very strong arguments that
16 he made in both the State court and in the district
17 court on other claims; not on this claim but on other
18 claims, that he believed that he should have been able
19 to develop certain evidence. And the district court
20 actually on those other claims -- some of them, it found
21 faulted and some not. But not on this claim. On this
22 claim --

23 JUSTICE SOUTER: If we had -- if we had --
24 and I -- I emphasize I'm -- I'm not suggesting this is
25 your case. But if we had a case in which with respect

1 to the disputed issue he had asked for more time -- I'll
2 make it easy. He had asked for more time and -- and had
3 -- had indicated that there were leads that needed to be
4 followed that couldn't be followed unless he got more
5 time and so on, and the State court refused. Could he
6 then come into the Federal court and say: My claim here
7 is not only ineffective assistance, but ineffective
8 assistance with the overlay of the refusal of the State
9 courts to give me an adequate opportunity to develop my
10 -- my ineffective assistance claim? And if he made a
11 colorable showing on those two issues, would he then
12 have an opportunity for a Federal evidentiary issue, and
13 would the findings that eventuated from that be subject
14 to -- in effect, to -- to being short- circuited by
15 deference to the State court findings?

16 MS. BURNETT: I think my answer to that has
17 to be that it depends because the statute before the
18 effective Death Penalty Act in 1996 had clearly had what
19 we would call the Chandler v. Dane factors in which
20 would you look at the adequacy of a State court process.
21 Those were removed after 1996, so the statute does not
22 provide authority for a Federal court to go in and
23 determine was the process adequate if the decision,
24 itself, was reasonable. Now if we are talking -- this
25 is why this case --

1 JUSTICE SOUTER: But if you don't -- I guess
2 what I'm getting at is if we don't in that circumstance
3 recognize that there is a legitimately different claim
4 which is not, for the reason I suggested to Mr. Bress,
5 not subject to further exhaustion requirements because
6 they tried and the State court wouldn't let them do
7 it -- if we don't in that case recognize that there is a
8 claim that can be litigated in the Federal court, which
9 will not be subject to deference to State court
10 findings, then there is a very clear hole in the law,
11 and I assume Congress didn't mean to leave it. I
12 understand you're saying that is not this case. But
13 isn't that a legitimate problem to-- to face at some
14 point.

15 MS. BURNETT: Justice Souter, we don't
16 believe so and here's why: Because it is true, Congress
17 did not change the procedural default doctrine. In the
18 Effective Death Penalty Act Congress left that alone.
19 In fact, this Court recognized that in *House v. Bell*.
20 So when we are talking about new facts or new claims,
21 either one, you're talking about unexhausted or
22 defaulted matters, which the district courts are very
23 familiar how to handle that. Has he shown cause and
24 prejudice? Has he shown diligence?

25 JUSTICE SOUTER: I think you're right in the

1 main. I think that's generally correct. The case that
2 I'm concerned with is the case of the -- of the Brady
3 claim, because if we are proceeding under (e) then as I
4 understand the cause and prejudice can only be
5 established in the case we are talking about if there
6 can be shown a probability of a different verdict.

7 The Brady standard, however, does not
8 require the probability of a different verdict. Brady
9 uses the term "reasonable probability that there would
10 have been a different result," but that has been clearly
11 defined in the cases to mean reasonable possibility. So
12 that in fact with respect to Brady claims subsection (e)
13 is imposing a higher requirement than Brady did and a
14 higher requirement than would have been applied before
15 Brady. And that is the case, it seems to me, that we --
16 it may not be this case, but that's the case that we've
17 got to be concerned about in coming up with doctrine
18 here. Isn't that a legitimate concern?

19 MS. BURNETT: Justice Souter -- and I agree
20 that's not this case. But this Court's already crossed
21 that bridge. That was Michael Williams. Michael
22 Williams was where the individual comes to Federal court
23 with brand new evidence and he has no remedy left in
24 State court. It is defaulted, and what do we do with
25 that? And this Court very clearly -- now, as the issue

1 was presented to this Court in that case it was whether
2 he gets a hearing or not, so that's what was addressed.
3 But this Court also addressed the fact that it most
4 likely was and was a defaulted claim and that it --

5 JUSTICE SOUTER: But I don't, I don't think
6 this Court understood the implication of it when you get
7 into the Brady issue. And my only concern is we've got
8 to leave that door open because I don't think Williams
9 confronted that.

10 MS. BURNETT: And I -- I agree with Your
11 Honor that it's not this case. I think Michael Williams
12 addresses it and I think that the current existing in
13 place cause and prejudice and actual innocence
14 exceptions to default answer all of that. And I believe
15 that --

16 JUSTICE SOUTER: I understand your position.

17 JUSTICE BREYER: I'm still trying to
18 understand the statute. I think their point is we get
19 around (d), (d) doesn't bar us because the district
20 court here, the Federal district court, found that it
21 was an unreasonable determination of the facts, not
22 unreasonable on the substance, but unreasonable because
23 of the procedure. In other words, the State that barred
24 this evidence was having an unreasonable procedure and
25 therefore the determination of the facts is

1 unreasonable. So you're saying that isn't what those
2 words "unreasonable determination of the facts" mean.

3 MS. BURNETT: Well, what I'm saying --

4 JUSTICE BREYER: You mean you're saying that
5 (d)(2), "unreasonable determination of the facts," means
6 the factual outcome. In other words, if the factual
7 outcome is reasonable it doesn't matter if the
8 procedures are inadequate; is that your claim.

9 MS. BURNETT: Well, no. I believe that --

10 JUSTICE BREYER: No? I thought you just
11 said that in answer to Justice Souter.

12 MS. BURNETT: I believe that (d)(2) very
13 clearly -- yes, I think I'm agreeing with you that
14 (d)(2) addresses the actual facts which underlay the
15 State court decision.

16 JUSTICE BREYER: And not whether their
17 procedures are correct?

18 MS. BURNETT: Correct.

19 JUSTICE BREYER: Okay.

20 MS. BURNETT: Correct.

21 JUSTICE BREYER: Okay. So that's the first
22 thing we have to decide to get to the question. If your
23 wrong on that -- and I doesn't know the answer to it --
24 if you're wrong on that, then they're rid of (d). So
25 they say then, we're rid of (e) because it falls within

1 (a)(2), the factual predicate and due diligence, okay.
2 They say we are rid of (e) because of that. Now, how
3 they get around capital (B) I'm not sure, but that isn't
4 in the case.

5 MS. BURNETT: Justice Breyer, I'm not sure
6 they they've argued those exceptions (a)(2) at (i) and
7 (ii). I believe they're simply arguing --

8 JUSTICE BREYER: They're arguing due
9 diligence.

10 MS. BURNETT: My reading of their brief is
11 they are saying: We are Michael Williams and all
12 Michael Williams dealt with was the opening sentence of
13 (e)(2).

14 JUSTICE BREYER: (I). You mean of (e)(2) --

15 MS. BURNETT: Of (e)(2).

16 JUSTICE BREYER: (E)(2).

17 MS. BURNETT: "If the applicant has failed
18 to develop," and Michael Williams interpreted that as
19 someone who has not been diligent in developing the
20 record.

21 JUSTICE BREYER: Okay. So we also get --
22 they get around that because they say the due diligence.
23 You also have an argument about how (2) applies. And if
24 you're wrong about both of those then we get to the
25 question, which would be: If the -- if the hearing's

1 properly before us and it's a new claim -- it's also
2 saying it's a new claim -- if it's a new claim it has to
3 be exhausted. So under Virginia law, under Virginia
4 law, is it really true that -- suppose, not this case,
5 but suppose a Defendant 140 days after discovers the DA
6 says, makes some remark. He couldn't have known about
7 it. He goes to a special file. He couldn't have found
8 out about. And lo and behold, it's the worst thing you
9 can imagine, and you can imagine some pretty bad ones
10 but this is even worse. Now under Virginia law are
11 you -- is it your view that Virginia courts would say
12 you're out of luck, good-bye?

13 MS. BURNETT: Yes, Your Honor, and this
14 Court has recognized that --

15 JUSTICE BREYER: No matter what, it's
16 goodbye?

17 MS. BURNETT: Yes, and here's why: Because
18 Virginia has twin statutes that would bar any further
19 applications to State court. One is the statute of
20 limitations that is strictly applied and the other is a
21 statute which says in essence --

22 JUSTICE BREYER: No excuse? Even if --

23 MS. BURNETT: That's correct.

24 JUSTICE BREYER: Okay.

25 MS. BURNETT: And this Court has --

1 JUSTICE BREYER: So they are right about,
2 they are right about the exhaustion being futile.

3 MS. BURNETT: It is defaulted, yes, Your
4 Honor. In Virginia those are defaulted claims, and now
5 we are in Federal court with those claims. The Federal
6 court judges are very familiar with how to do with them.
7 Has he shown cause and prejudice?

8 JUSTICE BREYER: The first time he discovers
9 DNA evidence in the DA's file that shows he couldn't
10 have done it, there is no way to get relief under
11 Virginia law?

12 MS. BURNETT: Not in State court.

13 JUSTICE BREYER: Not in State court.

14 MS. BURNETT: No, Your Honor.

15 JUSTICE BREYER: Okay, then they're right
16 about that.

17 MS. BURNETT: That's correct. So now he is
18 in Federal court and he has -- he has the thresholds of
19 cause and prejudice or actual innocence. And that's a
20 very familiar thing, is what I'm saying, is that the
21 district courts are familiar with.

22 JUSTICE BREYER: Okay, then let me ask you
23 on the merits. If he's right there and it's exhaustion
24 and it really was a new claim, then wouldn't we apply a
25 decision that does not defer to the State court, because

1 after all the State court never heard this issue?

2 MS. BURNETT: That's not this case. But in
3 a hypothetical case where there are new facts,
4 unexhausted defaulted claims or facts that are presented
5 to a Federal court --

6 JUSTICE BREYER: Okay. There is no real
7 argument between the two of you as to the -- as to the
8 issue that we thought was presented.

9 MS. BURNETT: Well, I think not.

10 JUSTICE BREYER: But there's certainly an
11 argument --

12 MS. BURNETT: The argument is --

13 JUSTICE BREYER: If it's really a new claim,
14 you're going to say they applied --

15 MS. BURNETT: Well, our argument is that,
16 Court, don't use this case to say that, because if the
17 Court uses this case to say that it will be putting its
18 imprimatur on what the district court did in holding a
19 hearing when we don't think it was appropriate.

20 CHIEF JUSTICE ROBERTS: The Fourth Circuit
21 -- I'm sorry to interrupt you, but the Fourth Circuit
22 didn't decide that question either.

23 MS. BURNETT: They did not. It was not
24 presented to them, Your Honor.

25 Nothing --

1 JUSTICE SCALIA: How do you want us to
2 dispose of the case that doesn't, that doesn't do that?
3 What do you want us to do?

4 MS. BURNETT: I think the Court could
5 dismiss this as improvidently granted.

6 JUSTICE SCALIA: That's it?

7 MS. BURNETT: I think the Court could do
8 that.

9 JUSTICE STEVENS: May I ask you, so I
10 understand your position on the underlying question if
11 we don't dismiss. Am I correct that the granting of an
12 evidentiary hearing was based on a showing by the
13 Petitioner that he failed to develop facts which might
14 change the result?

15 MS. BURNETT: Justice Stevens, there was
16 never any showing, there was never any showing of
17 diligence.

18 JUSTICE STEVENS: Why did the -- why did the
19 Federal court grant a hearing?

20 MS. BURNETT: The Federal court simply
21 announced that he was going to hold a hearing on this
22 claim and decide later --

23 JUSTICE STEVENS: Wasn't he only entitled to
24 do that on the basis of a showing that there was more
25 evidence that the State court did not consider?

1 MS. BURNETT: Yes, Your Honor. I believe
2 first he had --

3 JUSTICE STEVENS: So maybe the district
4 court was dead wrong, but the assumption I think we made
5 when we took the case was that there was a body of
6 evidence that had not been available in the State
7 proceeding that might be available in the Federal
8 proceeding.

9 MS. BURNETT: I think that was the
10 misunderstanding.

11 JUSTICE STEVENS: And if that were true -- I
12 know you disagree with that and I understand your
13 argument. Maybe we shouldn't have taken the case. But
14 if that were true and the Federal court then had to
15 decide on the basis of all the evidence, do you read the
16 statute to say at that time he may only rely on the
17 evidence presented to the State court?

18 MS. BURNETT: The way I read the statute is
19 that that is the first thing that the judge was required
20 to do. He had to first determine whether the State
21 court's decision was reasonable.

22 JUSTICE STEVENS: All right. Suppose he
23 looked at the State court evidence and he says, that was
24 not enough. The State court's decision on the merits
25 was reasonable based on that record. I have a different

1 record before me. May he look at the different record?

2 MS. BURNETT: He can -- I think -- I think
3 then we are talking about what I was just saying, new
4 facts, new claims.

5 JUSTICE STEVENS: That's what we're talking
6 about. May he look at it?

7 MS. BURNETT: And then the judge has to go
8 through the determination, before he can decide whether
9 he can look at it, of whether these new facts or new
10 claims meet cause and prejudice or actual innocence.

11 JUSTICE STEVENS: All right. Forget the
12 cause and prejudice for just a moment. But if he looks
13 at that new evidence and he decides that any neutral
14 judge would have reached a different result from the
15 State judge on that evidence, may he reach that result?

16 MS. BURNETT: I don't think just -- I do not
17 believe the judge can do that --

18 JUSTICE STEVENS: Then what's the point --

19 MS. BURNETT: -- just simply to say I'm
20 going to look at just the correctness of the decision
21 first, and then decide whether it's correct.

22 JUSTICE STEVENS: What you're saying is the
23 correctness of decision based on the State court record.
24 And if he decides there was a sound decision on that
25 record, that's the end of the ball game; is that your

1 position?

2 MS. BURNETT: Well, I think it is, unless --
3 unless there are actually new matters that are presented
4 to the Federal court that the Federal court now is going
5 to --

6 JUSTICE STEVENS: It's the same claim. It's
7 the same claim.

8 MS. BURNETT: Yes. Even on the same claim.

9 JUSTICE STEVENS: Then it seems to me the
10 statute has constructed a pointless procedure.

11 MS. BURNETT: Your Honor, I -- I don't see
12 that at all. It seems to me it's a very orderly
13 progression, that the -- that the -- the Effective Death
14 Penalty Act is now telling district court judges, and
15 has made clear that it's doing this for judicial -- for
16 purposes of judicial economy, for finality, for --

17 JUSTICE SCALIA: Why shouldn't the district
18 judge in light of the new evidence decide whether the
19 judgment of the State court was -- would have been
20 reasonable if it came out the same way, including this
21 new evidence in the -- in the consideration? Why
22 shouldn't he do it that way.

23 MS. BURNETT: It could do that, Justice
24 Scalia.

25 JUSTICE SCALIA: I know it could. But I'm

1 asking whether it should.

2 MS. BURNETT: I think -- I think that
3 doesn't really fit with the statute -- with the
4 statutory language.

5 JUSTICE SCALIA: Well, it seems to me the
6 statute certainly contemplates that the States have the
7 first --

8 MS. BURNETT: Yes.

9 JUSTICE SCALIA: -- the first cut at this
10 thing, right? How else do you give them the first cut?

11 MS. BURNETT: Yes. Absolutely. And that's
12 what I'm saying, and I think that -- to -- if the claim
13 is going to in any way differ, it's going to change from
14 what was presented to the State court. On one level,
15 that is all new matters that are defaulted, and in a
16 very literal sense how can -- and I don't believe
17 Congress intended for Federal courts to look at new
18 matters, however they got to them, that were not
19 presented to the State court, and on that basis
20 determine whether the State court's decision was
21 reached.

22 JUSTICE SCALIA: So the Federal court is
23 supposed to do what?

24 MS. BURNETT: The Federal court is supposed
25 to first look at the claim that was presented to the

1 State court, under 2254(d), and the claimants before it.
2 If it's the same claim, if it's the same matters that
3 were adjudicated on the merits in the State court, it
4 has to make the decision up front, was it reasonable or
5 not?

6 JUSTICE SCALIA: Okay.

7 MS. BURNETT: Okay. Now it makes that
8 decision, and then after that, if the Petitioner says
9 well, I have new matters, that I never presented to the
10 State court, the Federal court has a -- a road map.

11 JUSTICE SOUTER: Now -- but the road map
12 that you are now saying could be followed is the same
13 road map implied by -- in your earlier answer to Justice
14 Scalia, your reference to the new claim as being a
15 defaulted claim.

16 MS. BURNETT: Yes.

17 JUSTICE SOUTER: But we are concerned -- I
18 think we are all concerned with the -- with the claim in
19 which it is not defaulted, in the sense that he is at
20 fault in any way for failing to get it into the Federal
21 court -- I'm sorry -- get his entire presentation now
22 into the State court then. So that it is not a
23 defaulted claim in the classic sense. It is not a claim
24 in which he is at fault by having failed to present it
25 in the State court.

1 And in that case, if it cannot go back, if
2 the State court will not take it back, don't we have to
3 find at least implicit in the totality of subsections
4 (d) and (e) the possibility of litigating the -- the
5 fully developed claim in the Federal court without a
6 need to defer to the State court findings?

7 MS. BURNETT: If implicit in your question
8 is -- yes, implicit in your question is that the
9 Petitioner has demonstrated cause; and he may or may not
10 have depending on the facts.

11 JUSTICE SOUTER: Well, he -- I agree with
12 you on the -- on the cause part; but the -- up to this
13 point. He has got to demonstrate cause and prejudice or
14 at least he has got to develop cause. Let me put it --
15 ask you this question. If he simply says look, I tried
16 to get this in to the State court, and he shows that,
17 but the State court for whatever reason just would not
18 take the evidence that he wanted to put in, is that
19 enough for him to have --

20 MS. BURNETT: It may be. It may be. And
21 once again, that's certainly not this case.

22 JUSTICE SOUTER: I'm -- I'm not asking to
23 you stipulate --

24 MS. BURNETT: Right.

25 JUSTICE SOUTER: -- that it's this case.

1 But it's the case we are worried about around the
2 corner.

3 MS. BURNETT: It may be.

4 JUSTICE SOUTER: If that is -- this Court --
5 that's why I'm saying it's a very established law as to
6 what cause is, and external impediments. I mean, this
7 Court has many cases that describe that. The lower
8 courts are very familiar with determining that, and so
9 they can -- they are capable to making that
10 determination as to whether the Federal court can now
11 look at a new matter whether it's a new claim or --

12 JUSTICE SOUTER: But all we are -- I think
13 all we are really getting at is that there are different
14 kinds of new matters. There are some new matters of
15 which he absolutely knew nothing at the State court
16 stage, and he is now saying don't hold that against me:
17 i.e., I'm showing cause and I'll show prejudice. This
18 is new matter that he did or potentially know about and
19 tried to get into, and under our hypothesis, the State
20 court says no, I'm not going to hear it, or I won't give
21 you the time, whatever the case may be.

22 In that case, isn't it -- don't we have to
23 say under the statute all he has got to show is cause in
24 the sense that he tried and the State court wouldn't let
25 him? In order to --

1 MS. BURNETT: And that may -- and that may
2 very well constitute an external impediment --

3 JUSTICE SOUTER: Okay.

4 MS. BURNETT: -- to him being able to
5 present it.

6 JUSTICE SCALIA: Having established cause,
7 he would then in your view not have the Federal court
8 decide the matter de novo. But the only question before
9 the Federal court was whether there was in addition
10 prejudice.

11 MS. BURNETT: Correct.

12 JUSTICE SCALIA: That is to say, whether --
13 but for the error, any reasonable factfinder would find
14 by clear and convincing evidence that he was innocent --

15 MS. BURNETT: Correct.

16 JUSTICE SCALIA: -- right?

17 MS. BURNETT: Correct. And --

18 JUSTICE KENNEDY: In that instance is there
19 room for the district court to hold an evidentiary
20 hearing?

21 MS. BURNETT: Well, I think then you get --
22 that's -- I think it's actually a separate matter. We
23 first have to get to whether the Federal court can look
24 at a new matter de novo. If it can look at it de novo
25 then I think we go to the pre-Effective Death Penalty

1 Act law about when you have a hearing. Are there
2 disputed facts? Are they -- that make a difference?
3 Is it something that actually, you know, needs to have
4 resolution in a hearing?

5 JUSTICE KENNEDY: Can you envisage
6 circumstances in which an ineffective counsel
7 assistance, an ineffective assistance of counsel claim
8 was presented in the State court and then there is a
9 second ineffective assistance in counsel's claims or a
10 further supplemental ineffective assistance of counsel
11 claim based on new evidence that the district court
12 might hear? Does that ever happen?

13 MS. BURNETT: I think it can happen,
14 certainly. I don't think it's restricted just to Brady.
15 I mean, I think that it -- it is -- it is the same
16 analysis, no matter what the claim is, it's the same
17 analysis that the Federal court needs to go through to
18 look -- to see whether it can consider new matter.

19 JUSTICE KENNEDY: So you think there could
20 be instances, we might imagine, in which there could be
21 two ineffective assistance of counsel claims, the second
22 of which could be heard in the district court with
23 evidentiary -- with an evidentiary hearing?

24 MS. BURNETT: I think it's certainly
25 possible. I think that the statutory setup and this

1 Court's established habeas procedures that it had in
2 place for decades permits that.

3 JUSTICE SCALIA: I guess the State court can
4 say, you know, 60 days after the trial is -- is
5 doomsday. No more new evidence. We are not going to
6 consider anything new after that, even if you find Brady
7 stuff or anything else. Suppose that's
8 unconstitutional -- but it isn't. I mean, is that
9 unconstitutional?

10 MS. BURNETT: Well, no, Your Honor, I don't
11 believe it is. In fact, the State court -- we don't
12 have to provide for direct appeals.

13 JUSTICE SCALIA: Right. So if it's not
14 unconstitutional, then you just provide what you say,
15 that the district court sees whether by clear and
16 convincing evidence the case would have come out the
17 other way.

18 If it were unconstitutional, and I guess
19 this is what is sticking in our craw -- my craw,
20 anyway -- if it were unconstitutional, it seems to me
21 there ought to be a way to make the State take the first
22 cut at it. Make the State say oh, yes, even with this
23 new evidence we would still find this person guilty; and
24 then in Federal habeas you would -- you would apply the
25 deference that 2254(d) requires. You'd ask whether that

1 was a reasonable determination.

2 MS. BURNETT: Right. And all I can say to
3 that, Justice Scalia, is this Court has never held that
4 the Constitution applies anywhere after the direct
5 appeal, and that's only the right to cancel.

6 JUSTICE SCALIA: That's the fallacy in my --
7 in my reasoning. Or you're saying I shouldn't be
8 troubled by what has been troubling me, namely that he
9 had no way to get this before the State court. They are
10 entitled to close -- close the gates?

11 MS. BURNETT: Yes, Your Honor. And as a
12 collateral review; that's where they are closing the
13 gate, not on direct review.

14 If there are no further questions, I simply
15 ask to affirm.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 MR. BRESS: I'd like to start where --

18 CHIEF JUSTICE ROBERTS: You have three
19 minute remaining.

20 REBUTTAL ARGUMENT OF RICHARD P. BRESS

21 ON BEHALF OF THE PETITIONER

22 MR. BRESS: I'd like to start where --

23 CHIEF JUSTICE ROBERTS: You have three
24 minutes remaining.

25 MR. BRESS: I'd like to start where the

1 General left off. In McNeal and Claudy, this Court did
2 hold that, in certain instances, a State habeas court
3 must hold a hearing if there are facts in dispute and
4 they are not willing to assume them. I agree that a
5 State doesn't have to have a proceeding at all, but if
6 it has one, it has to be fair.

7 I know that my time is short. I'd like to
8 go through some of the questions you've asked.

9 The State did deny us additional time,
10 expert assistance discovery, and a hearing in this case.
11 The Federal court specifically found that we were
12 diligent. That's at 84a. And in Michael Williams, this
13 court said that the finding of diligence also
14 constituted a finding of cause for purposes of cause and
15 prejudice, which makes sense because you've got a
16 prisoner who has done the most they can and yet hasn't
17 been able to fully develop the record. There was no
18 external impediment. As you'll recall, in Michael
19 Williams, the information was there; it was just very
20 hard to find.

21 Finally, we presented very substantial new
22 evidence on the Federal level here. It's simply not
23 true that there is no new evidence. The new evidence
24 included evidence undermining the sole aggravating
25 factor, both the live testimony of Joanne Nicholson,

1 which allowed the court actually to determine whether
2 she would have been a credible person to undermine the
3 testimony. The State had held on the papers she wasn't
4 credible, which the State can't do on the papers.

5 Secondly, the evidence said he was
6 physically abused as a child. He was beaten with
7 electrical cords, with planks, with a belt, leaving the
8 scars on his body that he bears today. He saw his
9 father knock his mother's teeth out for trying to
10 protect him.

11 JUSTICE ALITO: What is the test for
12 determining whether the addition of new evidence is
13 sufficient to make it a new claim?

14 MR. BRESS: Your Honor, I think the test
15 really ought to be whether an objectively reasonable
16 jurist could find it important in the overall mix of
17 information. And it just strikes me that, if you're the
18 judge in that kind of a case, what you're going to go
19 through is -- if I accept that the State court was right
20 with the evidence that it had and I sort of put myself
21 in that frame, would I, nonetheless, if I were that
22 State court, have found this evidence important when I'm
23 making this decision?

24 JUSTICE SOUTER: It's a materiality
25 standard, really.

1 MR. BRESS: Exactly, Your Honor.

2 CHIEF JUSTICE ROBERTS: So, it's a new claim
3 if it is one on which you would have prevailed, but it's
4 the same claim if the result would be the same.

5 MR. BRESS: I don't -- I don't think it
6 necessarily has to be that way, Your Honor. I think you
7 can have a case where the evidence that was before them
8 was absolutely nil; now they're offering a good bit of
9 evidence that you would at least want to weigh as an
10 objective jurist, even though you decide against them.
11 I think that's possible.

12 I think the reason you've got to adopt this
13 position, however, is that there is no DNA -- I mean, no
14 innocence exception that the General has put forward.
15 If the General is right, it isn't a new claim just
16 because you now have DNA evidence that proves you're
17 innocent. You made that claim of innocence earlier in
18 the proceeding, in your earlier ineffective assistance
19 of counsel claim. What you have new now is you've got
20 the DNA evidence. In her view, it's the same claim.

21 JUSTICE SCALIA: Well, you know, it does
22 read -- 2254(e) -- it does read, "a factual predicate
23 that could not have been previously discovered through
24 the exercise of due diligence." That sounds like
25 exactly what you're describing, the discovery of DNA

1 evidence you didn't know about.

2 MR. BRESS: And I agree completely, Your
3 Honor, that (e) says you can hear it, but the Attorney
4 General says you can't because under (d), she'd say,
5 you'd already be foreclose because the State court has
6 already adjudicated your claim on the merits --

7 JUSTICE GINSBURG: I think she said --

8 MR. BRESS: -- and these new facts don't
9 count.

10 JUSTICE GINSBURG: -- she answered -- the
11 answer that I wrote is the same thing that you could
12 have on the Brady claim you could also have for
13 ineffective assistance of counsel. It's a wholly new
14 matter. I thought that's what she said.

15 MR. BRESS: Your Honor, I think she said
16 that what you would have to look for, I think, is
17 whether "wholly new matter" means "new evidence." If
18 she says it's new evidence, such as new DNA evidence, we
19 agree completely. That's not what she said previously
20 in this case. Previously, she had said that new
21 evidence in that sense, like DNA evidence, can't make
22 that claim a new claim and, therefore, you're foreclosed
23 under 2254(d), so long as the State court's opinion is
24 intrinsically reasonable based on its inadequate record.

25 JUSTICE SCALIA: Mr. Bress, I want to

1 apologize to you for accusing you of not printing
2 2254(d) and (e) in your brief. You indeed did.

3 MR. BRESS: Well, thank you, Your Honor. I
4 thought --

5 JUSTICE SCALIA: I'm grateful for your not
6 throwing it in my teeth.

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 The case is submitted.

10 (Whereupon, at 12:12 p.m., the case in the
11 above-entitled matter was submitted.)

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<p style="text-align: center;">A</p> <p>ability 23:7</p> <p>able 6:23 9:25 10:11,12,15 12:2 23:15,19 23:21 26:19 30:18 48:4 52:17</p> <p>above-entitled 1:11 56:11</p> <p>absolutely 16:13 28:25 44:11 47:15 54:8</p> <p>abuse 21:19</p> <p>abused 53:6</p> <p>abusive 8:22,25</p> <p>accept 8:10 9:3 53:19</p> <p>account 6:5</p> <p>accusing 56:1</p> <p>acknowledge 19:11</p> <p>act 7:11 31:18 32:18 43:14 49:1</p> <p>actual 34:13 35:14 38:19 42:10</p> <p>addition 48:9 53:12</p> <p>additional 9:25 12:8 18:10 52:9</p> <p>address 14:7</p> <p>addressed 16:8 34:2,3</p> <p>addresses 34:12 35:14</p> <p>addressing 28:18</p> <p>adequacy 31:20</p> <p>adequate 13:24 31:9,23</p> <p>adjudicated 7:10 9:11,18 45:3 55:6</p> <p>adopt 54:12</p>	<p>adopted 10:6,7</p> <p>advanced 9:10 9:19,21</p> <p>adversary 9:15</p> <p>advocated 10:6</p> <p>affidavit 7:19,19</p> <p>affidavits 5:7 29:3</p> <p>affirm 51:15</p> <p>affirmed 24:3</p> <p>aggravating 7:8 28:9 52:24</p> <p>aggravation 7:7</p> <p>agree 18:2,4,8 33:19 34:10 46:11 52:4 55:2,19</p> <p>agreeing 28:18 35:13</p> <p>ahead 14:15</p> <p>albeit 17:25</p> <p>Alito 4:4 5:14 9:8,14 10:4 53:11</p> <p>allegations 27:24 28:1 29:25 30:2</p> <p>alleged 7:12 8:11,12 28:15 29:2</p> <p>allow 14:21 26:24</p> <p>allowed 15:1 53:1</p> <p>allows 11:21,23</p> <p>amicus 6:20</p> <p>analysis 49:16 49:17</p> <p>anecdote 22:4</p> <p>announced 40:21</p> <p>answer 10:3 25:8 27:5,6 31:16 34:14 35:11,23 45:13 55:11</p> <p>answered 55:10</p>	<p>anyway 24:15 50:20</p> <p>apologize 56:1</p> <p>appeal 20:24 51:5</p> <p>appeals 50:12</p> <p>appear 21:6</p> <p>APPEARAN... 1:14</p> <p>Appendix 21:12</p> <p>applicant 36:17</p> <p>application 18:14 19:18 25:25</p> <p>applications 37:19</p> <p>applied 26:11 28:5,5,17 33:14 37:20 39:14</p> <p>applies 36:23 51:4</p> <p>apply 26:12 27:22 38:24 50:24</p> <p>appreciate 11:9 12:11</p> <p>appropriate 39:19</p> <p>approximately 29:18</p> <p>area 22:1</p> <p>argued 15:9 18:12 36:6</p> <p>arguing 36:7,8</p> <p>argument 1:12 2:2,7 3:3,6 9:8 13:10 17:7 27:16 36:23 39:7,11,12,15 41:13 51:20</p> <p>arguments 30:15</p> <p>arms 21:25</p> <p>asked 5:12,13 5:15 31:1,2 52:8</p>	<p>asking 44:1 46:22</p> <p>aspect 9:20</p> <p>assault 7:12,17</p> <p>assistance 3:21 4:1 9:17 10:18 10:25 11:20 12:10 29:16 31:7,8,10 49:7 49:7,9,10,21 52:10 54:18 55:13</p> <p>assistance-of... 5:7</p> <p>Assistant 1:17</p> <p>assume 13:6 23:8,14 32:11 52:4</p> <p>assumed 20:3 28:1,4</p> <p>assumes 17:7</p> <p>assuming 16:11 28:15</p> <p>assumption 41:4</p> <p>attempting 10:13</p> <p>attention 6:8,10</p> <p>attorney 1:17 15:14 55:3</p> <p>attorneys 6:19</p> <p>attribute 26:16</p> <p>authority 31:22</p> <p>available 22:21 41:6,7</p> <p>a.m 1:13 3:2</p> <hr/> <p style="text-align: center;">B</p> <p>B 20:9 36:3</p> <p>back 13:16 17:15 21:13 23:25 24:11,16 46:1,2</p> <p>bad 7:10 22:7 37:9</p> <p>ball 42:25</p> <p>Banks 12:15 15:22</p>	<p>bar 34:19 37:18</p> <p>barred 34:23</p> <p>bars 13:17</p> <p>based 3:22 19:1 26:23 27:5 40:12 41:25 42:23 49:11 55:24</p> <p>basic 12:9,9</p> <p>basis 9:21 13:13 14:3 16:1,7 24:24 25:14 40:24 41:15 44:19</p> <p>bat 15:4</p> <p>bears 53:8</p> <p>beaten 53:6</p> <p>behalf 1:15,18 2:4,6,9 3:7 27:17 51:21</p> <p>behold 37:8</p> <p>believe 3:16 29:22 32:16 34:14 35:9,12 36:7 41:1 42:17 44:16 50:11</p> <p>believed 9:7 29:21 30:18</p> <p>Bell 1:3 3:4 8:22 11:19 13:1 23:8 27:23 28:21 29:25 32:19</p> <p>Bell's 27:20</p> <p>belt 53:7</p> <p>Billy 7:11,17,19</p> <p>bit 26:3 54:8</p> <p>blood 23:17</p> <p>body 41:5 53:8</p> <p>Bonnie 4:2,3</p> <p>Brady 5:10 10:8 12:16 15:15 16:2 33:2,7,8 33:12,13,15 34:7 49:14 50:6 55:12</p>
--	--	--	--	---

<p>brand 33:23 Bress 1:15 2:3,8 3:5,6,8 4:4,13 4:20,25 5:16 6:11,15,18 7:2 8:5,14,17 9:13 10:3,21 11:4,8 12:11,23 14:6 14:16 15:6,9 15:20 16:13,15 16:21 17:4,6 17:12,20 18:2 18:11,16,18,23 19:8,15 20:18 21:5,9,15 22:8 23:6,12 25:6,9 25:21 27:11,14 29:11 32:4 51:17,20,22,25 53:14 54:1,5 55:2,8,15,25 56:3 Breyer 12:21,24 14:13 15:3,8 15:11 16:10,14 16:17,23 24:8 25:7,13 34:17 35:4,10,16,19 35:21 36:5,8 36:14,16,21 37:15,22,24 38:1,8,13,15 38:22 39:6,10 39:13 bridge 33:21 brief 6:20 21:14 36:10 56:2 briefly 23:13 briefs 21:7,12 bring 6:9,23 16:19 17:3 23:21 bringing 11:6 brother 30:8 brought 6:8,22 17:7 Burnett 1:17 2:5</p>	<p>27:15,16,18 29:17 30:6,10 31:16 32:15 33:19 34:10 35:3,9,12,18 35:20 36:5,10 36:15,17 37:13 37:17,23,25 38:3,12,14,17 39:2,9,12,15 39:23 40:4,7 40:15,20 41:1 41:9,18 42:2,7 42:16,19 43:2 43:8,11,23 44:2,8,11,24 45:7,16 46:7 46:20,24 47:3 48:1,4,11,15 48:17,21 49:13 49:24 50:10 51:2,11</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 3:1 call 31:19 cancel 51:5 capable 47:9 capital 9:16 36:3 case 3:4,10 4:6 6:3 9:2,14,23 9:24 11:18 12:17 13:1,10 14:2,8 15:21 21:3,5,11,19 23:13 24:14 25:1,10 26:20 26:23 27:20 28:9 29:18 30:14,25,25 31:25 32:7,12 33:1,2,5,15,16 33:16,20 34:1 34:11 36:4 37:4 39:2,3,16 39:17 40:2 41:5,13 46:1</p>	<p>46:21,25 47:1 47:21,22 50:16 52:10 53:18 54:7 55:20 56:9,10 cases 9:16 12:7 33:11 47:7 categories 7:3 cause 13:18,19 16:8 26:10 32:23 33:4 34:13 38:7,19 42:10,12 46:9 46:12,13,14 47:6,17,23 48:6 52:14,14 central 21:10 cert 21:12 certain 4:8 25:14 30:19 52:2 certainly 20:5 20:13,20 26:11 39:10 44:6 46:21 49:14,24 cetera 5:10 26:1 Chandler 31:19 change 3:17 32:17 40:14 44:13 changes 10:16 21:23 Chief 3:3,8 6:24 7:25 17:6,14 17:23 18:6 21:15,16,21 22:8,24 23:11 27:13,18 39:20 51:16,18,23 54:2 56:8 child 21:19 22:6 53:6 childhood 22:3 Circuit 6:4,4 10:7,7 17:17 17:21 19:5,9 19:22 20:19,20</p>	<p>21:1,3 28:17 39:20,21 circuited 31:14 Circuits 10:5 circumstance 32:2 circumstances 26:14,17 49:6 Civil 12:13 claim 3:22,23 5:3,7 6:25 7:6 9:9,11,11,17 10:1 11:13,21 12:5,6,7,8,8,9 12:9,12 13:9 13:10,16,17 14:1 15:4,15 16:1,2,6,9 17:4 17:8,8,9,12,18 17:21 18:9 19:17 21:18,23 22:10 23:3,4 23:18 24:8,9 24:10 25:15 26:6,8,11 27:20,21,23 28:22,23 30:17 30:21,22 31:6 31:10 32:3,8 33:3 34:4 35:8 37:1,2,2 38:24 39:13 40:22 43:6,7,8 44:12 44:25 45:2,14 45:15,18,23,23 46:5 47:11 49:7,11,16 53:13 54:2,4 54:15,17,19,20 55:6,12,22,22 claimants 45:1 claimed 28:8 claims 5:3,8,10 10:8 12:14,16 12:17 17:16 21:17 30:17,18 30:20 32:20</p>	<p>33:12 38:4,5 39:4 42:4,10 49:9,21 classic 45:23 Claudy 52:1 clear 22:22 23:23 25:23 32:10 43:15 48:14 50:15 clearer 26:3 clearly 31:18 33:10,25 35:13 client 10:19 11:1 11:2,6 19:3 close 15:25 51:10,10 closely 12:18 closing 51:12 Cohen 13:1 collateral 51:12 colloquial 22:11 colorable 19:17 31:11 come 9:1 10:9 20:17 23:15 31:6 50:16 comes 9:23 24:4 26:21 28:21 33:22 coming 33:17 Commonwealth 6:19 complaint 12:14 completely 55:2 55:19 concern 22:4 33:18 34:7 concerned 33:2 33:17 45:17,18 conclusion 19:1 confronted 19:24 34:9 confusion 13:24 Congress 24:6 26:16 32:11,16 32:18 44:17 consider 4:8,11</p>
--	---	---	--	---

4:14,22 5:24 16:12 17:16 40:25 49:18 50:6 consideration 43:21 consistent 19:23 20:18 constitute 48:2 constituted 52:14 Constitution 51:4 constructed 43:10 construed 3:13 construing 3:11 contemplates 44:6 contest 28:2 contested 28:3 context 26:10 contract 12:8 contrary 11:16 convincing 22:22 23:23 25:23 48:14 50:16 cords 53:7 corner 47:2 correct 9:15 14:4 19:7 20:24 33:1 35:17,18,20 37:23 38:17 40:11 42:21 48:11,15,17 correctness 42:20,23 counsel 9:17 10:18,20,23,25 11:9,12,21 12:10 20:8 27:24 28:8 29:16 49:6,7 49:10,21 51:16 54:19 55:13	56:8 counsel's 49:9 count 55:9 course 5:5 7:9 14:18 22:14 court 1:1,12 3:9 3:13,18,19,20 3:24,25 4:8,10 4:11,13,15,16 4:20 5:12,13 5:15,19,21,23 5:24 6:1,2,6,9 6:10,14,21 7:1 7:23 8:10 9:1,2 9:12,18 10:14 11:19 12:15 13:5,8 14:4,9 14:18,24 15:1 15:5,7,19,22 15:23 16:2,4,5 16:7 17:3,19 18:25 19:1,3,9 19:16,17,20,22 20:4,10,23 22:10,20,21 23:2,8,14 24:1 24:3,11,16,25 25:4 26:4,4,5,6 26:9,11,18,21 26:23,24 27:8 27:19,23,25 28:4,16,20,21 28:24,25 29:2 29:4,8,9,12,13 29:19,20 30:1 30:2,3,5,12,13 30:16,17,19 31:5,6,15,20 31:22 32:6,8,9 32:19 33:22,24 33:25 34:1,3,6 34:20,20 35:15 37:14,19,25 38:5,6,12,13 38:18,25 39:1 39:5,16,17,18 40:4,7,19,20	40:25 41:4,14 41:17,23 42:23 43:4,4,14,19 44:14,19,22,24 45:1,3,10,10 45:21,22,25 46:2,5,6,16,17 47:4,7,10,15 47:20,24 48:7 48:9,19,23 49:8,11,17,22 50:3,11,15 51:3,9 52:1,2 52:11,13 53:1 53:19,22 55:5 courts 23:20,21 31:9 32:22 37:11 38:21 44:17 47:8 court's 19:10,12 28:5 33:20 41:21,24 44:20 50:1 55:23 craw 50:19,19 created 7:20 credibility 7:22 8:7 credible 53:2,4 critical 29:6 cross 20:2 crossed 33:20 cumulative 6:25 8:2 17:10 current 34:12 cut 44:9,10 50:22	days 5:1 15:15 16:24 37:5 50:4 DA's 38:9 de 9:19 10:2 20:22,23 28:12 48:8,24,24 dead 41:4 dealer 28:9 dealt 36:12 death 27:21 31:18 32:18 43:13 48:25 decades 50:2 December 13:1 24:15 decide 4:6 5:15 13:13 14:2 19:20 21:3 24:1 26:25 35:22 39:22 40:22 41:15 42:8,21 43:18 48:8 54:10 decided 7:23 8:7 15:22 26:20,23 decides 42:13,24 deciding 17:18 21:18 decision 24:24 28:20 29:6 31:23 35:15 38:25 41:21,24 42:20,23,24 44:20 45:4,8 53:23 default 29:3 32:17 34:14 defaulted 32:22 33:24 34:4 38:3,4 39:4 44:15 45:15,19 45:23 Defendant 37:5 defendant's 9:20 defer 17:19 25:2	25:10,19,20,22 26:22 38:25 46:6 deference 5:25 6:2 17:25 19:2 31:15 32:9 50:25 deferred 6:5 deferring 20:11 deficient 15:10 defined 33:11 definition 22:14 22:15 demonstrate 10:13,15 12:1 12:2 19:3 46:13 demonstrated 46:9 demonstrates 22:12 denial 30:3 denied 3:20 16:2 23:18,20 deny 52:9 dependent 9:9 depending 46:10 depends 31:17 describe 47:7 described 29:7 describing 54:25 despite 23:14 26:18 determination 20:11 34:21,25 35:2,5 42:8 47:10 51:1 determine 7:22 17:18 31:23 41:20 44:20 53:1 determines 14:22 25:12 determining 47:8 53:12
--	--	---	---	--

develop 3:22 5:1 5:22 11:13,20 11:23 12:2 22:20 24:19 26:7,12,19 29:12 30:19 31:9 36:18 40:13 46:14 52:17	54:23 discovers 16:24 16:25 37:5 38:8 discovery 52:10 54:25 discretion 15:1 dismiss 40:5,11 dispose 40:2 disposed 29:19 disproved 25:24 dispute 7:20 8:2 8:6 28:3 52:3 disputed 31:1 49:2 disputes 15:17 distinction 26:5 26:9 distinguish 26:17 distinguishing 26:13 district 5:19,24 11:19 14:4,8,9 15:14 18:25 19:1,8,12,22 20:10,22 25:20 29:2,4,9,13,19 29:20 30:16,19 32:22 34:19,20 38:21 39:18 41:3 43:14,17 48:19 49:11,22 50:15 DNA 23:17 38:9 54:13,16,20,25 55:18,21 doctrinal 18:21 doctrine 32:17 33:17 doing 43:15 doomsday 50:5 door 34:8 dot 20:2 doubt 20:4 Dretke 12:15 15:22	drew 19:1 26:4 drug 28:9 due 36:1,8,22 54:24 D.A 16:25 D.C 1:8,15	ESQ 1:15,17 2:3 2:5,8 essence 37:21 essentially 14:7 established 28:6 33:5 47:5 48:6 50:1 et 5:10 26:1 event 9:5 eventuated 31:13 evidence 4:8,10 4:12,14,16,21 4:22 5:20,23 5:25 6:5,8,11 6:25 7:3 8:1,3 8:4,5 9:25 10:11 11:23 12:9,20 14:22 16:5,12 17:17 17:25 18:5,10 19:2 20:13 21:23 22:2,22 23:2,3,15,16 23:20,22,23 24:4 25:15,16 25:23 27:9 28:7,9,18 29:23 30:19 33:23 34:24 38:9 40:25 41:6,15,17,23 42:13,15 43:18 43:21 46:18 48:14 49:11 50:5,16,23 52:22,23,23,24 53:5,12,20,22 54:7,9,16,20 55:1,17,18,18 55:21,21 evidentiary 31:12 40:12 48:19 49:23,23 exact 29:7 exactly 54:1,25 example 8:19	12:16 21:19 23:9 27:21 exception 16:18 16:22 54:14 exceptions 34:14 36:6 excuse 11:10 23:1 37:22 excused 22:6 exercise 54:24 exhaust 13:15 13:16 24:11 27:7,8 exhausted 37:3 exhaustion 32:5 38:2,23 exhausts 15:5 exhibit 12:7 existing 34:12 expected 10:19 expert 52:10 expertise 9:22 explain 22:17 external 47:6 48:2 52:18 extraordinary 12:6
		E		F
developed 4:21 5:2 16:3 24:25 26:25 46:5 developing 7:9 36:19 development 4:15 19:19 differ 44:13 difference 20:9 28:25 29:1 49:2 different 3:15 5:3,6,8,9 8:15 9:10 12:16 17:16 32:3 33:6,8,10 41:25 42:1,14 47:13 differently 20:17 diligence 5:20 10:17,22 11:9 11:15 12:1 14:10 32:24 36:1,9,22 40:17 52:13 54:24 diligent 10:13 11:2,6,6,12,19 22:19 23:14 36:19 52:12 direct 50:12 51:4,13 disagree 41:12 disagreement 17:22 discovered 15:13 21:20		e 2:1 3:1,1,11 11:22,23,24 22:15,18,18 25:22 33:3,12 35:25 36:2,13 36:14,15,16 46:4 55:3 56:2 earlier 20:3 21:16 45:13 54:17,18 easy 31:2 economy 43:16 EDWARD 1:3 effect 29:1 31:14 effective 20:14 27:21 31:18 32:18 43:13 effectively 8:20 effort 23:14 26:19 efforts 11:16 either 13:8 22:5 32:21 39:22 electrical 53:7 emphasis 7:10 emphasize 30:24 enforcement 16:1 engaged 20:23 entire 45:21 entitled 17:24 40:23 51:10 envisage 49:5 equally 21:17 equated 11:15 erroneously 29:22 error 48:13	face 32:13 fact 7:20 16:6 17:23 19:3 23:1 25:16,22 25:25 29:1 32:19 33:12 34:3 50:11 factfinder 48:13 factfinding 25:11 factor 7:8 52:25 factors 31:19 facts 3:17 5:23 6:21,23,25 7:3 7:6 8:6,11,12 9:4 11:13 12:2 13:1,6,8 14:25 15:12,13,22	

19:19,19 21:17 22:20 23:13 24:19,24 25:12 25:14,24 26:7 28:2,3 32:20 34:21,25 35:2 35:5,14 39:3,4 40:13 42:4,9 46:10 49:2 52:3 55:8 factual 4:7 10:16 35:6,6 36:1 54:22 factually 13:21 16:3 fail 11:22 failed 36:17 40:13 45:24 failing 45:20 failure 23:1 26:6 26:7,12 fair 5:22 14:24 52:6 faithfully 28:5 28:17 fallacy 51:6 falls 35:25 familiar 32:23 38:6,20,21 47:8 farce 17:1 father 53:9 fault 45:20,24 faulted 30:21 favor 13:6 favorable 9:21 Federal 3:25 7:4 9:10,19,23 10:12 13:8 16:4,4 18:14 18:25 23:21 26:21 28:16,24 30:1,12 31:6 31:12,22 32:8 33:22 34:20 38:5,5,18 39:5 40:19,20 41:7	41:14 43:4,4 44:17,22,24 45:10,20 46:5 47:10 48:7,9 48:23 49:17 50:24 52:11,22 figure 12:22 file 37:7 38:9 files 15:15 16:25 finality 43:16 Finally 52:21 find 9:25 21:11 22:4 25:23,25 27:25 46:3 48:13 50:6,23 52:20 53:16 finding 5:20 11:18 14:9 19:6,10 25:14 52:13,14 findings 17:19 25:23 31:13,15 32:10 46:6 fine 24:25 firm 9:22 first 6:9 7:5,5 10:12 14:9,13 14:14 15:14 16:24 21:19,20 28:22 35:21 38:8 41:2,19 41:20 42:21 44:7,9,10,25 48:23 50:21 fit 44:3 five 5:8,9 flood 10:8 followed 31:4,4 45:12 foreclose 55:5 foreclosed 55:22 foreperson 4:2 Forget 13:2 42:11 formulate 10:14 forward 54:14 found 16:6,8	19:9 25:16,18 28:8,11,14 29:8,20 30:20 34:20 37:7 52:11 53:22 Fourth 6:4,4 10:7 17:17,21 19:5,9,21 20:19,20 21:1 21:3 28:17 39:20,21 frame 3:18 53:21 frankly 14:2 free 24:19 front 15:23 21:8 45:4 full 4:15 5:22 14:24 fully 4:21 26:12 26:19,25 46:5 52:17 further 32:5 37:18 49:10 51:14 futile 24:12 38:2 future 7:8 <hr/> G <hr/> G 3:1 game 42:25 gate 11:24 51:13 gates 10:9 51:10 General 1:18 52:1 54:14,15 55:4 generally 33:1 getting 18:7 21:25 32:2 47:13 Ginsburg 4:18 8:9,16 10:17 10:24 11:5 12:4 20:6 21:24 29:10,17 29:24 55:7,10 Ginsburg's	17:15 girlfriend 7:13 15:24 give 14:4 16:11 27:9 31:9 44:10 47:20 giving 5:25 6:2 28:14 go 11:24 13:13 13:16,17 14:14 14:14 15:4 21:13 23:21,25 24:11 31:22 42:7 46:1 48:25 49:17 52:8 53:18 goes 13:7 18:20 37:7 going 8:10 10:9 13:2 22:4 23:4 25:13,14 29:5 29:6 39:14 40:21 42:20 43:4 44:13,13 47:20 50:5 53:18 good 22:6 54:8 goodbye 37:16 good-bye 37:12 gotten 15:17 16:20 23:11 25:15 Government 16:7 grant 40:19 granted 25:16 40:5 granting 40:11 grateful 56:5 grounds 18:12 guess 17:14 21:2 24:5,18 32:1 50:3,18 guilty 50:23 guise 17:25 <hr/> H <hr/>	habe 18:25 habeas 5:1 6:17 6:21 7:4,18 8:10 9:10,19 9:23 10:12,23 11:9,14,21 29:12 50:1,24 52:2 hand 8:17,18 9:3,4 20:14 handle 32:23 happen 24:17 49:12,13 happens 13:5 hard 52:20 hear 3:3 4:18 7:21 47:20 49:12 55:3 heard 39:1 49:22 hearing 9:3 13:20 14:4,19 14:24 15:2 19:21 22:19 29:21,23 34:2 39:19 40:12,19 40:21 48:20 49:1,4,23 52:3 52:10 hearing's 36:25 hears 5:20 heart 3:10 held 51:3 53:3 help 3:18,21 herring 30:14 hey 8:3 higher 33:13,14 hold 15:2 40:21 47:16 48:19 52:2,3 holding 39:18 holds 5:21 hole 32:10 Holland 26:1 Honor 4:13,21 4:25 5:11,16 6:12,16 7:2 8:6
--	---	---	---	--

8:15 9:13 10:21 11:8 12:11 14:6 15:20 16:21 17:5,13,20 18:2,11 19:8 20:18 21:9 23:10 25:6 27:11 30:6 34:11 37:13 38:4,14 39:24 41:1 43:11 50:10 51:11 53:14 54:1,6 55:3,15 56:3 hopefully 26:3 horrific 7:12 House 23:8 32:19 household 8:21 hypothesis 47:19 hypothetical 13:3 39:3	21:13,18 53:16 53:22 importantly 10:16 imposing 33:13 imprimatur 39:18 improvidently 40:5 inadequate 18:13 20:9 26:21,24 35:8 55:24 incident 7:16 included 52:24 includes 23:7 including 5:3 12:15 43:20 indicated 31:3 individual 33:22 ineffective 5:6 9:17 10:18,20 10:25 11:20 12:10 29:15 31:7,7,10 49:6 49:7,9,10,21 54:18 55:13 ineffectiveness 11:7 informant 16:7 information 52:19 53:17 innocence 24:4 34:13 38:19 42:10 54:14,17 innocent 22:23 23:24 48:14 54:17 instance 23:8 48:18 instances 49:20 52:2 instructions 20:5 intended 24:6 27:22 44:17 intent 26:16	interim 18:3 interpreted 36:18 interrupt 39:21 interviewed 5:5 5:8,9 intrinsically 24:2 55:24 introduce 10:11 introduced 9:2 investigate 5:13 investigative 3:21,25 investigator 4:1 involves 21:6 irrational 26:14 26:16 issue 3:15,18 5:3 8:2,7 18:20 19:21,24,24 21:4 27:2 29:20 31:1,12 33:25 34:7 39:1,8 issues 29:15,18 31:11 i.e 47:17	jurors 4:2 5:8 jury 3:22 7:14 9:7 20:16 28:14 Justice 3:3,8 4:4 4:18,23 5:14 6:7,13,17,24 7:25 8:9,16 9:8 9:14 10:4,17 10:24 11:5 12:4,21,24 14:13 15:3,8 15:11 16:10,14 16:17,23 17:6 17:14,15,23 18:6,16,19,24 19:14 20:6,25 21:5,10,21,24 22:8,24 23:11 24:8 25:7,13 27:4,13,18 29:10,17,24 30:4,8,23 32:1 32:15,25 33:19 34:5,16,17 35:4,10,11,16 35:19,21 36:5 36:8,14,16,21 37:15,22,24 38:1,8,13,15 38:22 39:6,10 39:13,20 40:1 40:6,9,15,18 40:23 41:3,11 41:22 42:5,11 42:18,22 43:6 43:9,17,23,25 44:5,9,22 45:6 45:11,13,17 46:11,22,25 47:4,12 48:3,6 48:12,16,18 49:5,19 50:3 50:13 51:3,6 51:16,18,23 53:11,24 54:2 54:21 55:7,10	55:25 56:5,8 Justice's 21:16 <hr/> K K 1:6 KATHERINE 1:17 2:5 27:16 Keeney 26:3 Kelly 1:6 3:4 KENNEDY 48:18 49:5,19 killed 28:10 kind 11:10 15:17 53:18 kinds 47:14 knew 15:24 47:15 knock 53:9 know 7:14 9:22 21:21 22:5,9 23:12 24:9,22 26:2 35:23 41:12 43:25 47:18 49:3 50:4 52:7 54:21 55:1 knowing 14:3 known 37:6 <hr/> L language 44:4 Laughter 56:7 law 16:1 17:3 18:14 19:18 25:25 32:10 37:3,4,10 38:11 47:5 49:1 lawyer 11:1,7 lawyers 11:19 leads 31:3 leave 32:11 34:8 leaves 24:18 leaving 53:7 left 32:18 33:23 52:1 legitimate 20:7
---	---	--	--	---

32:13 33:18 legitimately 32:3 lengthy 29:19 let's 15:21 23:22 level 6:22 7:21 9:24 10:10 44:14 52:22 liar 7:17 lied 7:20 life 9:20 28:14 light 43:18 likelihood 20:16 limitations 26:18 37:20 listened 29:23 literal 44:16 litigated 32:8 litigating 46:4 little 26:2 live 52:25 lo 37:8 long 24:2 55:23 longer 6:3 look 13:13 17:24 19:15 22:18 23:13 29:5,6 31:20 42:1,6,9 42:20 44:17,25 46:15 47:11 48:23,24 49:18 55:16 looked 18:1 19:22 20:12,21 26:4,5,9 41:23 looking 3:16 8:18 22:3 looks 16:24 42:12 LORETTA 1:6 lose 18:10 lot 16:5 21:22 lower 47:7 luck 37:12	major 26:11 making 12:13 20:10 47:9 53:23 map 45:10,11,13 materiality 53:24 matter 1:11 12:3 28:11,12 35:7 37:15 47:11,18 48:8,22,24 49:16,18 55:14 55:17 56:11 matters 32:22 43:3 44:15,18 45:2,9 47:14 47:14 McNeal 52:1 mean 4:16,23 12:7 13:10 14:1 17:1 21:1 21:10 23:2 25:7,20 26:22 32:11 33:11 35:2,4 36:14 47:6 49:15 50:8 54:13 means 23:3 35:5 55:17 meant 20:3,20 20:23 meet 42:10 merely 6:25 merits 9:11,18 23:19 27:1 28:12 38:23 41:24 45:3 55:6 Michael 3:14,14 3:16,19 10:22 11:14,15 12:19 14:11 26:4 33:21,21 34:11 36:11,12,18 52:12,18 mind 14:18 Minehart 4:3	minute 51:19 minutes 51:24 misconduct 3:23 5:9 misled 4:16 misunderstan... 41:10 mitigating 14:21 mitigation 9:21 9:25 mix 10:16 53:16 moment 42:12 mother 7:15 mother's 53:9	24:4,8,9,10 25:15,16 28:22 28:23 29:3 32:20,20 33:23 37:1,2,2 38:24 39:3,13 42:3,4 42:9,9,13 43:3 43:18,21 44:15 44:17 45:9,14 47:11,11,14,14 47:18 48:24 49:11,18 50:5 50:6,23 52:21 52:23,23 53:12 53:13 54:2,15 54:19 55:8,13 55:17,17,18,18 55:20,22 nice 21:7 Nicholson 7:13 8:23,23 9:5 52:25 Nicholson's 8:19 nil 54:8 Ninth 10:5 nodding 30:8 normal 22:13 notion 12:7 November 1:9 novo 9:19 10:2 20:22,23 28:12 48:8,24,24 number 7:9 22:9	oh 20:25 50:22 okay 13:2,6,20 14:6 24:9,14 24:20 35:19,21 36:1,21 37:24 38:15,22 39:6 45:6,7 48:3 once 46:21 ones 37:9 open 34:8 opened 15:15 opening 36:12 opinion 12:15 20:2 24:1 29:19,24 55:23 opportunity 5:22 16:12 31:9,12 opposed 20:1 oral 1:11 2:2 3:6 19:12 27:16 orally 19:25 20:1 order 3:21 11:25 47:25 orderly 43:12 ordinarily 12:12 ordinary 22:14 ought 24:11 50:21 53:15 outcome 35:6,7 overall 10:16 53:16 overlay 31:8
<hr/> M <hr/> main 33:1		<hr/> N <hr/> N 2:1,1 3:1 NATHANIEL 1:3 necessarily 17:17 18:11 54:6 necessary 22:15 need 22:20 27:6 46:6 needed 3:21 29:21 31:3 needs 49:3,17 negligence 11:17 neutral 42:13 never 8:22,24 9:1,5 24:25 28:2,3 39:1 40:16,16 45:9 51:3 nevertheless 29:22 new 6:5,8,11 7:3 7:3 10:1,11 12:2,5 13:8,10 13:16,17 15:4 15:16 16:12,12 16:14 17:8,11 17:16,25 18:4 21:17,17,18,23 22:1,4,4 23:3	<hr/> O <hr/> O 2:1 3:1 objective 54:10 objectively 53:15 obliged 6:9 obvious 25:8 obviously 14:21 occasions 5:12 occur 7:16 occurred 9:6 offering 54:8 officer 28:10	<hr/> P <hr/> P 1:15 2:3,8 3:1 3:6 51:20 PAGE 2:2 papers 8:8 53:3 53:4 part 4:19 10:18 20:8,9 25:19 46:12 particular 25:12 25:22 28:7 29:7

<p>particularly 15:25 21:25 parts 20:8 penalty 27:21 31:18 32:18 43:14 48:25 permit 4:15,21 permits 50:2 person 16:6,11 16:23 17:2 50:23 53:2 petition 5:2 6:21 8:12 21:12 29:14 Petitioner 1:4 1:16 2:4,9 3:7 7:13,24 8:11 14:12 40:13 45:8 46:9 51:21 Petitioners 5:2 physical 21:19 physically 8:22 8:24 53:6 place 34:13 50:2 planks 53:7 plausible 18:3 play 3:17 pleaded 29:2 please 3:9 27:19 point 6:19 24:18 27:7 29:11 30:11 32:14 34:18 42:18 46:13 pointless 43:10 police 9:1 28:10 position 8:15 34:16 40:10 43:1 54:13 possibility 33:11 46:4 possible 9:16 24:5 49:25 54:11 possibly 16:20 25:17</p>	<p>post-conviction 6:14 potential 26:5 potentially 9:20 47:18 practical 10:5 precedent 28:6 precisely 27:11 precluded 14:20 predicate 14:20 36:1 54:22 predicates 4:7 prejudice 13:18 13:19 16:8 19:4,10 20:15 26:10 28:13,19 32:24 33:4 34:13 38:7,19 42:10,12 46:13 47:17 48:10 52:15 preliminary 18:21 premeditatedly 28:10 present 5:15,19 15:4,18 23:1 27:24 30:12 45:24 48:5 presentation 45:21 presented 3:14 5:18,18 13:14 15:7 18:8 27:23 28:24,24 29:3 30:1,2,11 34:1 39:4,8,24 41:17 43:3 44:14,19,25 45:9 49:8 52:21 presenting 27:3 29:25 presumably 25:22 presumed 19:23 pretty 37:9</p>	<p>prevail 13:7 prevailed 54:3 prevented 29:25 30:13 previously 54:23 55:19,20 pre-Effective 48:25 printing 56:1 prisoner 5:21,22 11:12 15:24 52:16 probability 28:13 33:6,8,9 problem 3:10 14:23 32:13 problematic 22:1 procedural 32:17 procedurally 15:10 procedure 12:13 18:13 30:3 34:23,24 43:10 procedures 13:24 35:8,17 50:1 proceeding 6:14 9:10 33:3 41:7 41:8 52:5 54:18 process 31:20,23 proffered 4:12 4:14 progression 43:13 properly 5:19 26:6,7 37:1 proposition 9:9 prosecutor 12:18 protect 53:10 prove 14:25 22:22 23:23 proves 54:16 provide 5:21</p>	<p>31:22 50:12,14 provided 5:1 provisions 3:13 purposes 17:13 43:16 52:14 put 29:13 46:14 46:18 53:20 54:14 putting 20:1 39:17 puzzled 4:9 p.m 56:10</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>question 4:5,6,7 5:15,17,18,19 10:4 14:2 17:10,15 18:8 18:17,19,21 20:7 21:1,2,16 24:6,13,21,23 27:5 35:22 36:25 39:22 40:10 46:7,8 46:15 48:8 questions 51:14 52:8 quick 27:4</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 raise 23:1,4 raised 23:5 raising 18:20 21:2 ran 5:11 rate 14:14 reach 24:22 42:15 reached 42:14 44:21 read 5:16,17,18 12:25 19:11 20:19 22:15 41:15,18 54:22 54:22 reading 36:10</p>	<p>real 39:6 really 5:14 15:13 16:14 21:20 24:6 37:4 38:24 39:13 44:3 47:13 53:15,25 reason 14:19 32:4 46:17 54:12 reasonability 19:24 reasonable 11:16 20:16 24:2 28:13 31:24 33:9,11 35:7 41:21,25 43:20 45:4 48:13 51:1 53:15 55:24 reasonableness 20:21 reasonably 22:21 26:23 reasoning 51:7 REBUTTAL 2:7 51:20 recall 52:18 recalls 3:19 recognize 32:3,7 recognized 32:19 37:14 record 26:19,21 26:24,25 29:7 36:20 41:25 42:1,1,23,25 52:17 55:24 records 9:1 red 30:14 reference 19:13 45:14 referred 4:2 referring 10:21 refusal 14:21 31:8 refuse 4:14,22 refused 4:8,11</p>
--	--	---	--	---

<p>4:15,20 31:5 regular 25:1 related 25:4 relied 7:7 relief 38:10 rely 19:5 41:16 remaining 51:19 51:24 remains 19:6 remand 20:5 remark 37:6 remedy 33:23 removed 31:21 repeated 5:12 request 30:4 require 19:25 33:8 required 41:19 requirement 33:13,14 requirements 32:5 requires 50:25 reserve 27:3 resolution 49:4 resolved 29:4 resources 9:23 respect 30:25 33:12 Respondent 1:18 2:6 27:17 responses 22:8 restricted 49:14 result 33:10 40:14 42:14,15 54:4 return 21:15 review 9:19 10:2 20:23,24 51:12 51:13 RICHARD 1:15 2:3,8 3:6 51:20 Richmond 1:18 rid 35:24,25 36:2 right 9:13 12:6 12:21 13:7</p>	<p>14:16 15:4 16:3 17:9,14 18:7,9 21:6 22:24 32:25 38:1,2,15,23 41:22 42:11 44:10 46:24 48:16 50:13 51:2,5 53:19 54:15 road 45:10,11 45:13 ROBERTS 3:3 6:24 7:25 17:6 17:14,23 18:6 21:21 22:24 23:11 27:13 39:20 51:16,18 51:23 54:2 56:8 room 48:19 root 17:22 rule 6:20 10:6,8 Rules 12:12 ruling 19:12,16</p> <hr/> <p style="text-align: center;">S</p> <p>s 2:1 3:1 16:25 saw 19:9 53:8 saying 20:1,6,12 22:13,14 32:12 35:1,3,4 36:11 37:2 38:20 42:3,22 44:12 45:12 47:5,16 51:7 says 11:22 13:6 19:17 22:18 27:24 28:21 37:6,21 41:23 45:8 46:15 47:20 55:3,4 55:18 Scalia 6:7,13,17 21:5,10 40:1,6 43:17,24,25 44:5,9,22 45:6</p>	<p>45:14 48:6,12 48:16 50:3,13 51:3,6 54:21 55:25 56:5 scars 53:8 Schiro 14:19 14:20 second 10:14 49:9,21 Secondly 10:10 53:5 Section 21:6 see 11:3 13:17 14:1,14 19:9 19:12 43:11 49:18 seeing 26:10 seeking 11:13,20 seen 8:22 10:8 sees 50:15 Senior 1:17 sense 3:12 22:16 44:16 45:19,23 47:24 52:15 55:21 sentence 28:14 36:12 separate 12:17 12:19 18:12 48:22 separately 14:20 14:23 set 6:21 setup 49:25 she'd 55:4 short 29:14 31:14 52:7 shorthand 13:2 show 24:12 28:12 47:17,23 showing 31:11 40:12,16,16,24 47:17 shown 32:23,24 33:6 38:7 shows 16:25 38:9 46:16</p>	<p>sides 8:3 significant 12:3 25:17 similar 13:3 22:10 similarly 26:15 simply 17:10 26:22,22 36:7 40:20 42:19 46:15 51:14 52:22 Sixth 10:7 small 3:17 28:10 sole 52:24 solution 18:3,4 24:5 someone's 22:3 sorry 6:18 23:10 39:21 45:21 sort 12:14 17:4 18:20 53:20 sound 42:24 sounds 54:24 Souter 4:23 18:16,19,24 19:14 20:25 27:4 30:4,8,23 32:1,15,25 33:19 34:5,16 35:11 45:11,17 46:11,22,25 47:4,12 48:3 53:24 spattering 23:17 speaking 4:1 special 37:7 specifically 4:24 4:25 8:12 52:11 stage 47:16 standard 20:24 33:7 53:25 standpoint 20:21,22 start 51:17,22 51:25 state 3:24 4:7,10</p>	<p>4:11,13,15,20 5:1,1,21,23,25 6:2,5,8,10,14 6:17,20,22 7:1 7:7,18,21 9:12 9:18 10:14,23 11:14,21 13:5 13:14,17,25 14:23,25 15:4 15:7,9,19,23 16:2,11,15 17:3,19 19:2 19:10,16,17 22:19,21 23:2 23:8,14,20 24:1,3,11,16 24:25 25:4,10 25:11 26:6,11 26:18,20,23,24 27:8 28:3,4,20 28:25 29:2 30:2,3,5,12,16 31:5,8,15,20 32:6,9 33:24 34:23 35:15 37:19 38:12,13 38:25 39:1 40:25 41:6,17 41:20,23,24 42:15,23 43:19 44:14,19,20 45:1,3,10,22 45:25 46:2,6 46:16,17 47:15 47:19,24 49:8 50:3,11,21,22 51:9 52:2,5,9 53:3,4,19,22 55:5,23 statements 8:21 States 1:1,12 18:25 44:6 State's 7:6 18:12 18:13 statute 12:22 16:15 24:18 31:17,21 34:18</p>
---	---	--	--	---

37:19,21 41:16 41:18 43:10 44:3,6 47:23 statutes 37:18 statutorily 11:10 statutory 44:4 49:25 step 14:11,13,14 14:17,17 Stevens 40:9,15 40:18,23 41:3 41:11,22 42:5 42:11,18,22 43:6,9 sticking 50:19 Stinette 4:3 stipulate 46:23 stop 22:25 26:22 story 7:11 straight 20:11 Strickland 20:7 20:8,11,15 28:6 strict 20:15 strictly 37:20 strikes 53:17 strong 30:15 stuff 50:7 subject 31:13 32:5,9 submit 7:18 26:15 submitted 56:9 56:11 subsection 33:12 subsections 3:11 46:3 substance 34:22 substantial 52:21 sufficient 53:13 suggested 32:4 suggesting 30:24 suggestion 8:1	supplemental 49:10 support 12:9 supported 16:5 supports 8:1 suppose 15:11 16:14 24:10 25:3 37:4,5 41:22 50:7 supposed 8:25 12:25 13:12,15 13:19,21 24:16 44:23,24 supposedly 10:9 Supreme 1:1,12 3:20 7:23 8:9 9:2 27:23,25 29:8,12 sure 18:23 36:3 36:5 suspicious 3:22 Swartz 7:11,17 7:20 <hr/> T <hr/> t 2:1,1 20:2 table 6:3 take 14:11,16,17 23:9 27:5 46:2 46:18 50:21 taken 8:13 41:13 talk 11:5 talked 12:16 talking 11:11 12:13 23:6 31:24 32:20,21 33:5 42:3,5 talks 10:22 teeth 53:9 56:6 telling 43:14 Tennessee 16:18 16:18 Tenth 10:5 term 33:9 terms 23:17 test 20:15 53:11 53:14	testify 9:5 testimony 8:19 52:25 53:3 textbook 27:20 thank 3:8 27:12 27:13 51:16 56:3,8 theoretical 10:10 theory 10:1 21:22 thing 13:25 15:18 16:19 21:11 35:22 37:8 38:20 41:19 44:10 55:11 things 25:3 think 5:6 7:25 8:15 14:7 15:18 18:6,7 21:13,24 22:10 22:17 25:9,11 25:21,25 26:1 27:2 31:16 32:25 33:1 34:5,8,11,12 34:18 35:13 39:9,19 40:4,7 41:4,9 42:2,2 42:16 43:2 44:2,2,12 45:18 47:12 48:21,22,25 49:13,14,15,19 49:24,25 53:14 54:5,6,11,12 55:7,15,16 thinking 13:3 thought 24:22 35:10 39:8 55:14 56:4 three 7:3 51:18 51:23 threshold 4:5 thresholds 38:18	throwing 56:6 time 3:12 5:2,11 5:12 7:14 15:14 16:24 27:9 28:22 29:11,14 30:5 31:1,2,5 38:8 41:16 47:21 52:7,9 today 3:18 5:4 27:3 53:8 told 7:11 tort 12:8 totality 46:3 totally 15:16 town 28:10 Townsend 14:23 to-exhaust 27:7 Tracy 7:12,15 8:23,25 transform 13:9 translate 10:24 trial 17:1 27:25 50:4 tried 27:8 32:6 46:15 47:19,24 trouble 21:24 troubled 51:8 troubling 51:8 true 8:10,13 9:4 16:13 18:18 22:17 28:4 32:16 37:4 41:11,14 52:23 truth 28:1,15 trying 12:21 34:17 53:9 twin 37:18 two 3:13 4:1 10:4 12:16,19 20:8 22:8,25 26:13 31:11 39:7 49:21 <hr/> U <hr/> unadjudicated 7:10	unbelievable 17:2 unconstitutio... 50:8,9,14,18 50:20 underlay 35:14 underlying 21:22 40:10 undermine 53:2 undermined 7:6 undermining 52:24 understand 9:15 11:8 32:12 33:4 34:16,18 40:10 41:12 understanding 18:24 19:4,6 understood 34:6 undisturbed 19:7 unequivocal 16:16 unexhausted 32:21 39:4 unfortunately 7:21 United 1:1,12 18:25 unreasonable 18:15 19:11,18 28:20 34:21,22 34:22,24 35:1 35:2,5 unusual 22:5 upbringing 22:7 use 12:4,6 22:12 39:16 uses 33:9 39:17 usually 17:15 utility 18:20 U.S.C 3:11 <hr/> V <hr/> v 1:5 12:15 13:1 15:22 31:19 32:19
--	--	---	--	---

<p>Va 1:18 verdict 33:6,8 versus 3:4 23:8 view 23:25 37:11 48:7 54:20 viewed 17:21 Virginia 3:20 6:19,20 7:23 8:9 9:2 16:22 16:23 17:3 27:22,25 29:8 29:12 37:3,3 37:10,11,18 38:4,11</p>	<p>26:19 We'll 3:3 we're 35:25 42:5 we've 8:3 11:18 22:25 33:16 34:7 wholly 55:13,17 Wiggins 28:6 Williams 3:14 3:14,17,20,20 10:22 11:14,15 12:19 14:11 26:4 33:21,22 34:8,11 36:11 36:12,18 52:12 52:19</p>	<p>Y years 10:6</p> <hr/> <p>0 07-1223 1:5 3:4</p> <hr/> <p>1 1 25:22 11 5:6 11:15 1:13 3:2 12 1:9 5:8 29:18 12:12 56:10 120 5:1 14 5:2 140 15:15 16:24 37:5 1996 31:18,21</p>		
<p>W want 15:12,12 40:1,3 54:9 55:25 wanted 46:18 warden 1:6 15:21 warden's 23:25 Washington 1:8 1:15 wasn't 6:9,22 16:3 29:11 40:23 53:3 way 3:12 5:17 5:18 9:6 12:25 12:25 14:17 17:2 22:5,16 24:10 25:10 38:10 41:18 43:20,22 44:13 45:20 50:17,21 51:9 54:6 ways 10:4 22:11 Wednesday 1:9 weigh 54:9 weighed 28:7 weighing 28:11 went 13:22 16:4 28:16</p>	<p>willing 52:4 win 15:1 wise 21:3 withholdings 12:18,20 witness 12:20 witnesses 5:6,10 7:22 15:25 words 34:23 35:2,6 work 12:25 13:19,21 works 12:22 14:8 worried 47:1 worse 37:10 worst 37:8 wouldn't 6:7 9:7 15:3,19 24:3 32:6 38:24 47:24 written 19:16,23 20:2 wrong 35:23,24 36:24 41:4 wrote 19:16,22 55:11</p>	<p>2 2 11:23 35:5,12 35:14 36:1,6 36:13,14,15,16 36:23 2008 1:9 2254 3:11 2254(d) 17:13 19:13 21:6 27:22 28:17,20 45:1 50:25 55:23 56:2 2254(e) 54:22 2554 11:11 27 2:6 28 3:11</p> <hr/> <p>3 3 2:4</p> <hr/> <p>5 51 2:9</p> <hr/> <p>6 60 50:4</p> <hr/> <p>8 84a 52:12</p>		
<p>weren't 6:24 7:2 22:19 23:19</p>	<p>X x 1:2,7</p>			