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IN THE SUPREME COURT OF THE UNITED STATES

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SHERRY L. BURT, WARDEN, :

Petitioner : No. 12-414

v. :

VONLEE NICOLE TITLOW :

- - - - - x

Washington, D.C.

Tuesday, October 8, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

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

ANN O'CONNELL, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

VALERIE R. NEWMAN, ESQ., Assistant Defender, Detroit, Michigan; on behalf of Respondent.

	C O N T E N T S	
		PAGE
1		
2	ORAL ARGUMENT OF	
3	JOHN J. BURSCH, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	ANN O'CONNELL, ESQ.	
7	For United States, as amicus curiae,	
8	supporting the Petitioner	17
9	ORAL ARGUMENT OF	
10	VALERIE R. NEWMAN, ESQ.	
11	On behalf of the Respondent	27
12	REBUTTAL ARGUMENT OF	
13	JOHN J. BURSCH, ESQ.	
14	On behalf of the Petitioner	53
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
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19
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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 12-414, Burt v. Titlow.

Mr. Bursch.

ORAL ARGUMENT OF JOHN J. BURSCH
ON BEHALF OF THE PETITIONER

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

No court has ever held that AEDPA and Strickland can be satisfied by presumption based on a silent record. Yet that is precisely the approach the Sixth Circuit adopted in granting habeas relief here.

The record doesn't say how attorney Toca investigated or what advice attorney Toca gave, but based on that record silence, the Sixth Circuit assumed Toca was ineffective. And under AEDPA and Strickland, the presumptions run the opposite way.

Now, if there's one thing that the Court takes away from the oral argument this morning, I hope that it's -- it's this: How upside down the Sixth Circuit's analysis is when it says, on page 19A of the petition appendix, that Toca was deficient because the record contains no evidence that he advised Titlow about elements, evidence, or sentencing exposure.

1 The correct question is whether the record
2 contains evidence that Toca did not do those things.
3 And that record silence is dispositive in favor of the
4 State on habeas review.

5 Now, if we could pull the curtain back and
6 see what really happened here, it may be the case that
7 Toca gave the proper advice, that he advised Titlow
8 about all the perils of going to trial, and that Titlow
9 continued to maintain her innocence.

10 Under Strickland, we're supposed to presume
11 that Toca did exactly that, especially when it's
12 Titlow's burden to satisfy the burden of proof, and she
13 failed to do that.

14 So I'd like to begin with our first issue,
15 which is AEDPA deference and the performance prong of
16 Strickland.

17 JUSTICE GINSBURG: May I just ask a question
18 about what you just said? The record does show that
19 Toca came into the case very late in the day, and he
20 asked to have a postponement because he said, I have to
21 get up to speed. I don't know anything about this case.

22 So Toca, himself, is saying, I'm not
23 acquainted with the case -- with the case.

24 MR. BURSCH: Well, I don't think he's --
25 he's saying that, Justice Ginsburg. He's saying I'm not

1 prepared for trial yet, but he says, I've got a lot of
2 materials here. He goes through a very sophisticated
3 sentencing analysis with the -- the sentencing court in
4 this plea withdrawal hearing.

5 If you understand Michigan sentencing, if
6 you've got a manslaughter charge, there's a grid. And
7 there's all kinds of different boxes that this could
8 have fit into, and he would have had to have analyzed
9 the evidence in order to determine that the two to five
10 range was appropriate for a manslaughter conviction and
11 to be able to then negotiate with the prosecutor about
12 whether that was or was not appropriate.

13 And so we know that -- that Toca did a lot
14 of work.

15 JUSTICE ALITO: Was -- was the sentence that
16 was ultimately imposed after the trial for the
17 second-degree murder conviction within the guidelines --
18 within the Michigan guidelines?

19 MR. BURSCH: Yes, it was.

20 JUSTICE ALITO: What -- do you know what
21 those guidelines were?

22 MR. BURSCH: I don't recall, but it's
23 something on the range of 15 to 20 years. And when
24 we're talking about guidelines, it's important for the
25 Court to understand the difference between what the

1 guidelines called for, for manslaughter, and what was in
2 the plea agreement because Michigan's got this
3 indeterminate sentencing system, where you've got a
4 range for the lower end.

5 And so the plea deal was 7 to 15 years on
6 the lower end. And a manslaughter conviction -- that
7 is, if they had gone to trial and lost for manslaughter,
8 the lower end was 2 years to 5 years.

9 And so it was entirely reasonable, from an
10 objective perspective, for an attorney, looking at this
11 record, at the time the plea was withdrawn, to say, yes,
12 if you want to maintain your innocence, the most likely
13 bad result at trial is most likely better than the plea
14 deal that you already have.

15 Sure, there's a risk that something worse
16 could happen, but this Court has said in Strickland and
17 Lafler and other places that bad predictions are not
18 deficient performance.

19 And so, really, when you get down to it,
20 it's really a problem with both the advice being
21 reasonable, but also the failure to carry the burden of
22 proof. It's just the case that Titlow has not come
23 forward to demonstrate, as he was required to do -- she
24 was required to do, on the record, what Titlow -- or
25 what Toca did to investigate and what advice Toca

1 actually gave to Titlow.

2 JUSTICE KENNEDY: When we're asking whether
3 the advice was reasonable, what force do we give to the
4 proposition that a well-counselled defendant was now
5 insisting that he wanted to change his plea? And there
6 was only three days. How do we factor that in? If --
7 if we look at the gist of what the counsel did --

8 MR. BURSCH: Right. I think that's an
9 important factor.

10 JUSTICE KENNEDY: -- it may lead us to one
11 answer. But if we know that a previously
12 well-counselled defendant had now changed his mind and
13 wanted to withdraw, how do we factor that in?

14 MR. BURSCH: I think that's a significant
15 factor because, as you point out, before the ink was
16 even dry on the plea agreement, Titlow was already in
17 prison saying, I'm innocent, maybe I should be
18 withdrawing this plea, setting in motion a chain of
19 events that resulted in her firing the first attorney
20 and then hiring a second attorney.

21 And I don't think that the court of
22 appeals -- the Michigan Court of Appeals, articulated
23 any kind of a -- a per se rule about that -- you know,
24 certainly, we all understand that the ethical obligation
25 of the lawyer is that, if your client insists that they

1 want to maintain their innocence, you have to allow them
2 to do that.

3 But what the court of appeals did, at pages
4 100 to 101A of the petition appendix, it looked at that,
5 but it also looked at the other evidence. It looked at
6 the Strickland presumption that Toca did his job. And
7 then it says, at the very conclusion of that sentence,
8 based on all the proofs and arguments presented, Titlow
9 failed to satisfy her burden. This instance is one part
10 of that.

11 JUSTICE ALITO: Could you -- could you
12 explain the procedural situation before the Michigan
13 Court of Appeals? There was a motion by the Respondent
14 for a remand to the trial court to create a record; is
15 that -- that correct --

16 MR. BURSCH: That's correct.

17 JUSTICE ALITO: -- on the issue of
18 ineffective assistance of counsel?

19 And so the -- the question that the court of
20 appeals had to decide was whether the materials that
21 were submitted by the Respondent were sufficient to
22 justify the hearing.

23 MR. BURSCH: That's correct.

24 JUSTICE ALITO: And the court of appeals, I
25 gather, said they're not sufficient and cited, among

1 other things or principally, the fact that the
2 Respondent had claimed innocence, and that was the
3 reason for the -- the change of attorney.

4 So the issue really wasn't -- that was
5 before them was really not entitlement to relief, but in
6 the course of deciding whether there should be a remand,
7 they necessarily got to the issue of whether there was
8 an entitlement to relief.

9 Is that -- is that correct? Or do I not
10 understand?

11 MR. BURSCH: Just to be clear about Michigan
12 procedure, the defendant has an opportunity to ask for
13 what's called a Ginther hearing in Michigan, and that's
14 an evidentiary hearing to develop a record for an
15 ineffective assistance claim.

16 Titlow did not ask for that hearing in the
17 trial court. She did ask for it in the -- the Michigan
18 Court of Appeals. But under the Michigan court rules --
19 this is 7.211(C)(1)(a)(2) -- she was required to make a
20 proffer to justify that hearing on this motion to
21 remand.

22 And so the court of appeals, before it
23 issued its merits opinion, issues a one-sentence order
24 that says, the motion to remand is denied because you
25 have not proffered enough evidence to demonstrate that a

1 hearing is warranted.

2 And that makes sense because the only
3 proffer was the polygraph, Lustig affidavit, and the
4 Pierson affidavit. You know, it would be entirely
5 appropriate -- this often happens -- that Titlow herself
6 would have submitted an affidavit saying, this is what
7 Titlow knew -- or I'm sorry, this is what Toca knew,
8 this is what Toca advised, and I relied on that.

9 Or as sometimes is even the case, that the
10 previous defense counsel is willing to submit the
11 affidavit that says, this is what I knew, this is the
12 advice that I gave. None of that was there. And so
13 that's why you have this denial of the motion.

14 So now, in the context of that record and,
15 Justice Kennedy, the claim of innocence and this whole
16 thing being set in motion by that claim of innocence, it
17 was quite easy for the Michigan Court of Appeals to say
18 that, on the proofs presented and in light of the
19 Strickland presumption, there was nothing objectively
20 unreasonable about allowing Titlow to recall her plea.

21 JUSTICE KAGAN: In just thinking about that
22 Michigan Court of Appeals decision, there is one sort of
23 troubling line in it to me. It says, "When a defendant
24 proclaims his innocence, it is not objectively
25 unreasonable to recommend that the defendant refrain

1 from pleading guilty no matter how good the deal may
2 appear."

3 And one way to read this is it's a kind of
4 categorical rule, which says that, when the defendant
5 says he is innocent, basically your obligations to
6 properly advise him about a plea, go away. Now, I
7 understand you not to read it that way.

8 MR. BURSCH: Correct.

9 JUSTICE KAGAN: So could you tell me a
10 little bit about what you think of that question and why
11 you read the sentence the way you read the sentence?

12 MR. BURSCH: Yes. I think it would be very
13 difficult to defend the opinion if that was the only
14 sentence of analysis because we do not agree that a
15 simple claim of innocence by your client relieves the
16 attorney of any responsibility to do anything. That's
17 not what happened here.

18 Four sentences before the sentence you just
19 read on page 101A, the court of appeals talks about the
20 Strickland presumption that the attorney is doing his or
21 her job. Two sentences after that sentence you just
22 read, on page 102A, the Michigan Court of Appeals
23 specifically says, "On the proofs and arguments offered
24 by defendant, there is no ineffective assistance here."

25 And so that was part of a larger discussion

1 about attorneys who do their job when their clients are
2 claiming innocence. And you have to put all that
3 together.

4 And I think it's significant, also, that the
5 Michigan Court of Appeals was giving Titlow the benefit
6 of the doubt here because, on page 100A, just one page
7 earlier, it assumes Titlow's position, that is that Toca
8 actually gave the advice to withdraw the plea. We don't
9 even know that because we don't have credible evidence
10 in this record.

11 We don't have an affidavit from Titlow. We
12 don't have an affidavit from Toca that indicates that
13 Toca ever gave that advice. Again, if you could draw
14 the curtain back, it may very well have been, as we
15 assume under Strickland, that he totally and completely
16 advised about all the risks of trial before the plea was
17 withdrawn.

18 JUSTICE BREYER: Can you clarify something
19 for me about habeas corpus law?

20 MR. BURSCH: Yes.

21 JUSTICE BREYER: I -- I have to imagine
22 facts, so let's take it as a hypothetical. The U.S. --
23 the district attorney says, this lawyer was adequate,
24 and really, two factors make that obvious. The first
25 factor is that the client said that she was innocent,

1 and taking that into account with the other things, that
2 could have justified, adequately, his withdrawal of the
3 plea and not convincing her not to.

4 Second, the sentence that the district
5 attorney wanted to give was more than a year greater
6 than the guidelines for manslaughter, and that could
7 have justified it.

8 Now, it writes -- the court then writes in
9 its opinion only the second reason and never mentions
10 the first. Now, we go to habeas, and the habeas court
11 thinks that second reason is pretty flimsy there. Gee,
12 she was exposing herself to murder, et cetera, it's
13 pretty flimsy. The first isn't so bad, but they didn't
14 rely on it. Okay.

15 So now, what is the habeas court supposed to
16 do? Is -- should the -- should the defendant have gone
17 back to the State court first? Is the habeas court
18 supposed to have its own independent hearing and make up
19 its own mind?

20 How does this work?

21 MR. BURSCH: That's a delightful question.

22 JUSTICE BREYER: I'm glad. I would love to
23 have an answer.

24 MR. BURSCH: And I want to start with a
25 record response to distinguish our case from your

1 hypothetical and then address the habeas question. Your
2 hypothetical assumed that the State court only mentioned
3 one of the two reasons, and here, obviously, the court
4 of appeals talked about innocence. We've discussed that
5 at length.

6 But on page 100A of the opinion, the court
7 of appeals also notes that the defendant moved to
8 withdraw her plea because the agreed-upon sentence
9 exceeded the sentencing guidelines range. So they are
10 both here.

11 But assuming your hypothetical that we only
12 had one and not two, the question is really easy under
13 2254 because, so long as the decision was not a
14 misapplication of this Court's clearly established
15 precedent, there is no violation, even if their
16 reasoning might not have been as strong as it could have
17 been, had they mentioned the other reason.

18 So next habeas question, does the defendant
19 get an opportunity to have a Federal habeas hearing to
20 further develop the record about what happened? And the
21 answer is no, because under 2254(e)(1) and (e)(2), there
22 is a presumption of correctness about everything that
23 was found in the State court system.

24 And there is no right to get a Federal
25 evidentiary record if you have not adequately pursued

1 your ability to develop the record in the State court.

2 And as Justice Alito has already pointed
3 out, it was Titlow's failure, not the State's failure,
4 to properly proffer evidence to get the Ginther hearing.

5 JUSTICE ALITO: What do you make of the fact
6 that -- what do you make of the fact that, at the change
7 of plea hearing, the first attorney didn't mention the
8 claim of innocence, only mentioned the fact that the
9 sentence was above the guidelines?

10 MR. BURSCH: I don't think that's
11 significant because those two things are not mutually
12 exclusive. The defendant could believe, in her heart of
13 hearts, that she's innocent, and at the same time, the
14 attorney could acknowledge that there are facts in the
15 record already admitted that a reasonable jury could
16 conclude that you were guilty of manslaughter.

17 And so it would not be inconsistent for that
18 attorney to argue for a lower guidelines range in the
19 plea, and so there's really nothing inconsistent about
20 that. But the important thing to understand here is
21 just the failure of the burden of proof. The Sixth
22 Circuit is upside-down when it reads into the record's
23 silence ineffective assistance.

24 JUSTICE GINSBURG: When you say the record
25 is silence -- silent, I am looking at the Joint

1 Appendix, page 295, and this is Titlow's statement. "I
2 would have testified against my...had I not been
3 persuaded to withdraw my plea agreement because an
4 attorney promised me he would represent me. He told me
5 he could take my case to trial and win."

6 So that sounds like she was persuaded by
7 Mr. Toca to go to trial because she could win. And he
8 had, at that point, not made any appraisal of the case.

9 MR. BURSCH: Well, first, I have to disagree
10 with the premise of your question, Justice Ginsburg,
11 because there is no doubt that Toca made an appraisal.
12 He had -- you know, the quote from the plea withdrawal
13 hearing is "a lot of materials," and he made a very
14 sophisticated argument about what the guidelines range
15 should be, and that range was lower than the plea
16 actually offered.

17 But what you need to understand about this
18 testimony from Titlow right here, this was a plea for
19 leniency at sentencing. This was not part of the
20 proffer to the Michigan Court of Appeals as part of the
21 motion for remand. What -- what Titlow could have done
22 was submit her own affidavit or the affidavit from Toca
23 establishing whether this was actually true or not.

24 In addition, you've got to take the context
25 of this and juxtapose it against the other things that

1 Titlow was saying at this very same sentencing hearing.
2 And it -- it's remarkable, really, that she says both of
3 these things.

4 She says she feels sorry for her Aunt Billie
5 for being this manipulating and evil person and thanks
6 God that she did not do what Billie asked her to do.
7 And she says it was only because of her, Titlow, that
8 the truth came out. So somehow, it's -- it's still a
9 claim of innocence, even after trial, even after there
10 has been a conviction.

11 If there are no further questions, I will
12 reserve the balance of my time.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Ms. O'Connell.

15 ORAL ARGUMENT OF ANN O'CONNELL,
16 FOR UNITED STATES, AS AMICUS CURIAE,
17 SUPPORTING THE PETITIONER

18 MS. O'CONNELL: Mr. Chief Justice, and may
19 it please the Court:

20 There are two primary points that the United
21 States would like to make. First, when evaluating
22 Strickland prejudice in the context of a rejected plea
23 offer, the statement of a convicted defendant that she
24 would have accepted the plea absent sufficient advice
25 should be viewed with skepticism, and to support a

1 finding of causation, the statement should be judged
2 based on all the objective circumstances.

3 Second, when a Federal habeas court finds a
4 Sixth Amendment violation in the rejected plea context,
5 it should not categorically require the government to
6 reoffer a rejected plea deal. That decision should be
7 left to the sentencing court, and requiring the
8 government to reoffer a rejected plea deal in a context
9 like this case where the plea agreement required the
10 defendant to do something other than plead guilty --
11 give testimony against her aunt -- it doesn't make
12 sense, and the government should not be required to make
13 the reoffer.

14 Every defendant who rejects a plea offer and
15 then is convicted after a trial will have an incentive
16 and will want to revert back to a plea deal that she
17 rejected beforehand. The statement of a convicted
18 defendant that she would not have withdrawn her plea --

19 JUSTICE SOTOMAYOR: Counsel, years ago, one
20 of my colleagues, not on this bench, but a different
21 one, said to me -- you know, there's much to-do about
22 judges basing credibility on demeanor. And he said, no
23 one does that. What you base it on is the internal
24 consistency and logic of the testimony and how it's
25 corroborated by circumstances.

1 And he said, otherwise, you just rarely hear
2 anybody say, story makes sense, nothing -- story doesn't
3 make sense, the story's not corroborated, but the guy
4 looks like he's telling the truth.

5 I'm reading all the decisions that you cited
6 for me and not one, including in this circuit, relies
7 simply on that kind of statement. Every one of them is
8 based on comparing the testimony to other factors; to
9 logic, to evidence, to objectives.

10 So I don't know what rule it is, what
11 objective evidence means. Do you mean corroboration the
12 way you need to prove a murder? Is that what you want
13 us to announce?

14 MS. O'CONNELL: I don't -- we're not asking
15 for any kind of a special rule that there has to
16 be -- you know, a certain amount of corroborating
17 evidence in addition to the defendant's statement. I do
18 think it is just a general rule that you have to expand
19 out to all the objective circumstances to evaluate the
20 credibility of the defendant.

21 And what the Sixth Circuit says in this case
22 is, unlike some circuits, this court does not require
23 that a defendant must support his own assertion that he
24 would have accepted the offer with additional objective
25 evidence.

1 JUSTICE SOTOMAYOR: It said it, but it
2 didn't do it.

3 MS. O'CONNELL: Well, to the extent that the
4 court was saying that the defendant's statement should
5 be credited or not credited alone, without necessarily
6 looking at everything, that's wrong. And to the extent
7 that it -- that it looked to other evidence in the
8 record and to corroborating circumstances, the ones that
9 it pointed to were too weak, and they were also very
10 selective.

11 The court pointed to two things that the
12 court --

13 JUSTICE SOTOMAYOR: Well, counselor, that's
14 what juries do all the time, selectivity. That doesn't
15 move me. What I want to know is, why do we announce a
16 rule that, somehow, suggests a limitation that can't
17 exist? Meaning what judges look to, to determine
18 credibility relies on factors that you can't sum up in
19 one word?

20 MS. O'CONNELL: All we're asking the Court
21 to announce or to clarify on this question is that the
22 subjective statement -- or the self-serving statement of
23 the defendant in these circumstances should be viewed
24 with skepticism and that the Court should look --

25 JUSTICE SOTOMAYOR: Every court says that.

1 MS. O'CONNELL: Well, to the -- there could
2 be confusion on what the Sixth Circuit's rule is. I
3 mean, there is -- the Sixth Circuit believed that it was
4 announcing a rule or that it has a standard --

5 JUSTICE BREYER: Well, are there rules in
6 this area? I didn't think -- are there rules? I mean,
7 doesn't every judge, whenever that judge is deciding a
8 factual matter or the jury, take into account from every
9 witness, whether that witness is making a pretty
10 self-serving statement? I mean, that's a factor.

11 And I guess we could have some situations,
12 sometime, in some place, where a witness got on the
13 stand and said something that was totally in his favor,
14 but when you heard it, hmm, and you knew the case, hmm,
15 he's right. And then that could happen with this kind
16 of witness, too. It could happen. I'm not saying it
17 very often does, but it could.

18 So why should we have any special rule for
19 these witnesses and not for any other?

20 MS. O'CONNELL: We are not asking for any
21 kind of a special rule. We are just asking that -- that
22 the Court clarify, if it addresses the second question,
23 that what the Sixth Circuit is saying, that you
24 essentially -- if you interpret it to mean that you
25 don't have to look out to all the -- the objective

1 circumstances to determine the credibility of the
2 defendant, that that's wrong.

3 CHIEF JUSTICE ROBERTS: Well, you need to
4 give us some examples of things that don't count. I
5 thought it was in your brief that you had said, look,
6 the fact that it turns out to have been a very bad
7 deal -- you know, the bargain was one year, and the
8 sentence after guilty was 20 years, that, I take it, you
9 say is not a corroborating factor.

10 MS. O'CONNELL: Not in this case. The --
11 the disparity between the sentence that a person
12 receives after the plea deal and the sentence that they
13 received after a trial is going to be present in every
14 case.

15 CHIEF JUSTICE ROBERTS: Right.

16 MS. O'CONNELL: In fact, it has to be for
17 prejudice. That could be a corroborating circumstance
18 or something to support the defendant's statement in a
19 case where, like some of the court of appeals' opinions,
20 the defendant was misadvised on sentencing exposure.
21 The lawyer said, well, you should reject this plea deal
22 for 15 years because the maximum that you could get at
23 trial is 20, and so it's worth the risk.

24 But this defendant understood completely and
25 said multiple times, on the record, that she understood

1 that the -- the potential sentence for a murder
2 conviction was a life sentence and that that was back on
3 the table, if she withdrew the plea offer.

4 JUSTICE ALITO: On the question of this --
5 of this sentence, what do you think were the -- the
6 range of reasonable sentences that could have been
7 imposed in compliance with our recent decisions?

8 You have -- you have the sentence that was
9 offered before the trial, but that was predicated on, A,
10 testimony and, B, not having to go to trial. And then
11 you have the sentence that was imposed after the trial,
12 when there was no testimony and there was a trial.

13 So what was the -- what do you think a trial
14 court could reasonably do in that situation, just split
15 the difference?

16 MS. O'CONNELL: Well, I think the trial
17 court has a lot of discretion under the Court's opinion,
18 but I think what -- what should have happened in this
19 circumstance is to go back to the sentencing court, not
20 require the government to reoffer this plea deal, which
21 just simply can't be -- can't be offered and accepted
22 anymore.

23 In fact, in the record, when you see it
24 being reoffered, they're saying we're offering
25 manslaughter in exchange for her testimony at a trial

1 that already happened. It doesn't make sense.

2 In this case, there -- there should be no
3 reoffer. We should go based on the conviction after
4 trial because of that, and perhaps there could be some
5 kind of a reduction of the sentence within the district
6 court's discretion to --

7 JUSTICE GINSBURG: Why -- why -- you made
8 the point that this plea bargain could not be carried
9 out once the number one condition, the prosecutor said,
10 you testify against your aunt, and then we'll give you
11 this deal. Once the aunt is tried and she doesn't
12 testify, there's no -- there's no plea bargain.

13 So why isn't that enough to decide this
14 case? If you can't tell a prosecutor to renew a bargain
15 that can't be carried out, then it's become impossible.

16 MS. O'CONNELL: Well, I mean, we think
17 that's right. I don't know that it makes sense to say
18 that, because there is no remedy, that the Court
19 shouldn't address the first or second questions.

20 I mean, maybe if the Court thinks that
21 there's -- there's definitely no remedy and that this
22 20- to 40-year sentence should remain in place, but --
23 but, exactly, we don't think that the -- that the
24 government should be required to reoffer the plea
25 agreement in these circumstances.

1 JUSTICE KAGAN: But we're in a position now,
2 aren't we, where the State court can do exactly that,
3 can say the circumstances have changed and -- and so
4 leave everything undisturbed.

5 MS. O'CONNELL: Yes. The problem -- one of
6 the problems here is that the Sixth Circuit sort of
7 took, as a given, that in circumstances like this, that
8 the -- the original plea offer has to be reoffered. And
9 what we think the court was saying in Lafler is that
10 that's one thing that's on the table.

11 It's not necessarily required in every case.
12 There could be other creative remedies, like there could
13 be a defendant who can no longer -- who missed the
14 opportunity to give the testimony she was supposed to
15 give, but perhaps she has information on somebody else,
16 and so maybe we could do a renegotiation of the plea.

17 The Sixth Circuit, we do not think, should
18 be just requiring after it finds a Sixth Amendment
19 violation that the government reoffer a plea agreement
20 in circumstances that are different from those in
21 Lafler.

22 JUSTICE SOTOMAYOR: But isn't that -- I
23 mean, the court didn't say that the court -- that the
24 court below -- the Sixth Circuit didn't say that the
25 court below had to accept the reoffered plea agreement.

1 It seemed inherent in Lafler and Frye that
2 what the court was saying is that the court below has to
3 use its judgment on whether offer -- accepting the plea
4 is -- is right or giving another remedy is right. All
5 of these arguments should be before that court, not
6 before us, as an absolute rule.

7 MS. O'CONNELL: That's right. And -- and we
8 simply think that the decision whether to require the
9 government to reoffer it in the first place should also
10 be something that's left up to the sentencing court --

11 JUSTICE SOTOMAYOR: So that's your only
12 point, which is that that should be an issue for the
13 court below?

14 MS. O'CONNELL: Yes. So this should all be
15 left to the discretion -- discretion of the sentencing
16 court to come up with an adequate remedy.

17 JUSTICE SOTOMAYOR: But some remedy has to
18 be offered --

19 MS. O'CONNELL: Well --

20 JUSTICE SOTOMAYOR: -- if there is a
21 violation.

22 MS. O'CONNELL: The -- the court's opinion
23 in Lafler, I think, leaves that question open. It says
24 that it could be the circumstances that the sentencing
25 judge determines that the most fair result is to leave

1 the conviction and the sentence in place, but the
2 sentencing court has that discretion.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Ms. Newman?

6 ORAL ARGUMENT OF VALERIE R. NEWMAN

7 ON BEHALF OF THE RESPONDENT

8 MS. NEWMAN: Mr. Chief Justice, and may it
9 please the Court:

10 There is no question that the Michigan Court
11 of Appeals erred and created an end-run around
12 Strickland in finding the professed -- that if a
13 defendant professes innocence, that there's no need to
14 look any further to say that defense counsel provided
15 effective assistance.

16 There is also --

17 JUSTICE SOTOMAYOR: I agree with you -- I
18 agree with you and so does your adversary, but he says
19 there is nothing in this record to show what research
20 was done or not done.

21 The fact that the prior counsel's record
22 wasn't reviewed doesn't say that he didn't talk to the
23 prosecutor, doesn't say that he didn't look into other
24 record evidence, any of the discovery that had been
25 filed with the court, or any of the other circumstances

1 that could have informed him adequately.

2 MS. NEWMAN: That is partially true, Justice
3 Sotomayor. The record does show that, at every turn,
4 when Mr. Toca stepped into the courtroom, he asked for
5 more time and indicated he wasn't ready. The record
6 does show that, as soon as the plea was withdrawn,
7 Mr. Toca said, I need more time. I'm not ready to go to
8 trial. And in all fairness, my -- my client deserves to
9 have a fair trial. I'm not ready.

10 He's not ready to go to trial. He doesn't
11 have a good handle on what the record is. My brother
12 counsel makes an argument that Mr. Toca made a very
13 sophisticated sentencing analysis and, therefore, had a
14 grasp of the record. I would disagree with that
15 interpretation of the record.

16 Mr. Toca came in and said that the
17 guidelines were two to five on the minimum sentence.
18 The prosecutor said, I don't know what the guidelines
19 are, and I don't care. There's -- we don't even know if
20 his recitation of what the guidelines range was, was
21 accurate, so there is nothing on this record to show
22 that Mr. Toca even knew anything about the --

23 JUSTICE SOTOMAYOR: Well, that's --

24 JUSTICE ALITO: Are you arguing that he --
25 he needed to be -- he needed to have enough material and

1 to have familiarized himself enough with everything
2 that's relevant to the case to be able to go to trial
3 before he could move to have the -- the previous plea
4 withdrawn?

5 MS. NEWMAN: No, my argument does not go
6 that far. What I'm arguing --

7 JUSTICE ALITO: All right. Well, then I
8 don't understand what the argument was.

9 MS. NEWMAN: The argument is that defense
10 counsel has a duty to investigate, that the defense
11 attorney has a duty to be able to inform the client of
12 the risks of either accepting a plea, withdrawing a
13 plea, whatever the case. In this case, it's withdrawing
14 a plea that has already been accepted by the court.
15 This is a very significant step in this matter.

16 JUSTICE SCALIA: Well, that's true, but --
17 but you -- you have the duty, or -- or counsel for the
18 defendant has the duty to show that counsel did not do
19 that. It's -- it seems to me you are putting the burden
20 on the other side to -- to prove that the -- that
21 counsel knew all this. And that's not the way -- that's
22 not the way the game is played.

23 MS. NEWMAN: I agree with that,
24 Justice Scalia, and we are not putting the burden on the
25 other side. There is -- I will refer the Court to the

1 Pierson affidavit, which is in the Joint Appendix at
2 page 298. That affidavit, in particular, paragraphs 6,
3 7, and 8, indicates that, in an arbitration hearing,
4 when Ms. Titlow testified and Mr. Ott or deputy --
5 Sheriff's Deputy Ott testified -- in arbitration
6 hearings, witnesses are put under oath, and the
7 affidavit is a sworn affidavit from an attorney.

8 So it is a notarized affidavit from -- about
9 testimony that was taken under oath, that indicates that
10 Mr. Toca approached Ms. Titlow while she was in jail,
11 while she was represented by counsel, that the approach
12 was, you should reject the plea and not testify against
13 your aunt. That's the evidence that we have in the
14 record, and that is not just Ms. Titlow.`

15 JUSTICE KENNEDY: But just -- just to be
16 clear, isn't that after Titlow had asked for an attorney
17 because Titlow had talked with the jailer, who
18 encouraged Titlow to plead innocent? So -- so you have
19 to include that preface to this statement, or it's quite
20 incomplete.

21 MS. NEWMAN: Justice Kennedy --

22 JUSTICE KENNEDY: Or correct me if that's
23 wrong.

24 MS. NEWMAN: I would say that's wrong, and
25 that's where the court of appeals is wrong again and why

1 the State court's findings are entitled to no deference
2 because the state court took that affidavit from William
3 Pierson and turned the words on its head.

4 The affidavit does not state that Vonlee
5 Titlow approached the sheriff's deputy and asked for a
6 new attorney. The affidavit states that the sheriff's
7 deputy approached her. He told her she should consult
8 with his attorney because his attorney was really good
9 and his attorney would be able to help her.

10 And so it's the sheriff's deputy,
11 unequivocally, from this affidavit, because it's the
12 only place that this evidence comes from, it's the
13 sheriff's deputy -- I'm sorry. Were you looking -- it's
14 on page 298 of the Joint Appendix in William Pierson's
15 affidavit.

16 It's the sheriff's deputy that sets
17 everything in motion about innocence. And why does he
18 do that? Because he's in the courtroom when the plea is
19 entered. And what is part of the plea? Part of the
20 plea is that Vonlee Titlow passed a polygraph. Well, to
21 a layperson what does that mean? You pass a polygraph,
22 you are innocent, you didn't do the crime.

23 Well, in this case, that's not the situation
24 at all. The passing of the polygraph cemented her guilt
25 in participating in this crime. But what the -- what

1 she passed in the polygraph was that she was an aider
2 and abettor, so it was her aunt who took the pillow and
3 smothered her uncle, not Ms. Titlow, but she was
4 present. She participated. She accepted money after
5 the crime.

6 So everything that happened in the Michigan
7 Court of Appeals took the actual facts and turned them
8 on its head, which is why the factual findings are not
9 entitled to deference.

10 JUSTICE ALITO: Isn't it -- is it
11 unreasonable to read the Pierson affidavit -- and -- and
12 you submitted that; isn't that correct?

13 MS. NEWMAN: Correct.

14 JUSTICE ALITO: All right. To read it to
15 mean that there were discussions between Deputy Ott and
16 Titlow, and Titlow said she wasn't guilty? Ott said,
17 well, if you are not guilty, you shouldn't plead guilty.
18 I will refer you to an attorney. If you want me to, I
19 could ask somebody to come and talk to me.

20 That seems to be a direct quote from -- from
21 Titlow. Isn't that -- so isn't it reasonable to read it
22 that way?

23 MS. NEWMAN: Justice Alito, that's one --
24 part of what you said, I would agree with, that the --
25 it does state in the affidavit, certainly, that he had

1 an attorney that was really good and could ask somebody
2 to come talk to me. But the rest of the statements, I
3 would argue, are -- are inferences and not facts, and we
4 have facts in the affidavit.

5 JUSTICE BREYER: So the point is that there
6 has to be some evidence. You -- you are saying that the
7 court was wrong when they said your client said she
8 wasn't guilty.

9 Now, this affidavit doesn't show that. I
10 mean, paragraph 6 doesn't say who spoke first, but
11 common sense suggests that the deputy sheriff wouldn't
12 have made that statement, unless she spoke first. I
13 mean, does he go around saying to everybody, just
14 generally, oh -- you know, if you are not guilty, you
15 shouldn't plead guilty.

16 I mean, it says they had discussions, and
17 during discussions, he told her she shouldn't plead
18 guilty if she wasn't guilty.

19 MS. NEWMAN: It also -- it also says, with
20 all due respect, that --

21 JUSTICE BREYER: Where?

22 MS. NEWMAN: -- the deputy approached her.

23 JUSTICE BREYER: Where -- approached her --

24 MS. NEWMAN: Right.

25 JUSTICE BREYER: -- and had discussions with

1 her. It doesn't say why he approached her. I mean, I
2 just don't think people normally do that, they go to
3 every person in jail and say, you know, if you are not
4 guilty, you shouldn't plead guilty.

5 I mean, somebody might, but something
6 triggered that advice, and the affidavit doesn't tell me
7 what triggered that advice. So I could infer that what
8 triggered the advice was her statement she was not
9 guilty, or I could infer this is an unusual situation
10 where, for some reason unknown, he brought it up. I
11 don't know, from reading paragraph 6.

12 MS. NEWMAN: And Justice Breyer --

13 JUSTICE BREYER: So whose burden is it?

14 MS. NEWMAN: Justice Breyer, I would argue
15 that it's -- it's an inference that doesn't matter.
16 It's an --

17 JUSTICE BREYER: Okay.

18 MS. NEWMAN: -- in this case.

19 JUSTICE BREYER: It doesn't matter. Why
20 doesn't it matter? Because if she went, he -- she
21 said -- you know, I'm not really guilty, he said, well,
22 you shouldn't plead guilty, she said -- but I have a
23 lawyer that will get rid of your guilty plea. If it
24 went something like that, and then we assume the lawyer
25 was told about this -- it doesn't say, but that's a

1 reasonable assumption.

2 And then the court opinion of Michigan seems
3 to make sense that that was a reason -- that was one of
4 the reasons that made his conduct in -- in withdrawing
5 the plea or -- you know, not strongly advising her
6 against it. That was one reason why that wasn't an
7 inadequate assistance of counsel.

8 Now, where have I made my mistake in this
9 chain?

10 MS. NEWMAN: Well, in paragraph 8 of William
11 Pierson's affidavit on page 298, it indicates that it
12 was Frederick Toca who encouraged her to reject a plea
13 agreement to testify against the aunt. So, again, we
14 have the attorney, who is not Ms. Titlow; who is saying,
15 I want to withdraw my plea. It's the attorney who is
16 saying to her and encouraging her to reject the plea.

17 JUSTICE SOTOMAYOR: Ms. Newman -- you know,
18 I -- I'm -- this may be the first case that I have been
19 involved in as a judge -- and there might be others, but
20 myself, personally -- where, in a situation like this,
21 the defendant has not put in an affidavit to explain
22 what happened.

23 There is some force to your adversary's
24 argument that there's a really sparse record here, and
25 AEDPA deference requires the burden on you. You can't

1 deny that. I guess -- I don't know if you were
2 responsible, but what other circumstances that would
3 occasion a defendant not saying, this is what I was
4 told?

5 MS. NEWMAN: I was not the attorney. I came
6 into the case at this level, so I did not do any of the
7 litigation below. However, there are -- there is record
8 evidence to support, not -- there is record evidence
9 that supports the claim and maybe was a strategic
10 decision by the attorney not to submit other affidavits
11 because the attorney was simply looking for a hearing to
12 expand the record. So we have --

13 JUSTICE SOTOMAYOR: But they didn't ask for
14 the hearing in the court below. They only asked for it
15 at the court of appeals.

16 MS. NEWMAN: They -- Michigan -- Michigan --
17 the way Michigan works is, within 56 days of getting the
18 transcripts, you can file in the trial court. If you --
19 if you fail to make that 56-day deadline, then your
20 alternative is to go to the court of appeals and ask for
21 a remand.

22 So we don't know when the case got to the
23 attorney. So I don't think that there's any inference
24 that can be drawn from the fact that, within that very
25 short time period, there was no motion filed in the

1 trial court.

2 JUSTICE ALITO: Who was the attorney at that
3 stage? I take it, it wasn't the trial attorney because
4 the -- a big part of the claim before the Michigan Court
5 of Appeals was that the trial attorney was also
6 ineffective.

7 MS. NEWMAN: Right. It was --

8 JUSTICE ALITO: Who was it?

9 MS. NEWMAN: It was an appellate attorney,
10 Liz Jacobs, was the attorney at that stage.

11 JUSTICE ALITO: And she's -- is she with
12 your office or she's --

13 MS. NEWMAN: She's not with my office, no.

14 JUSTICE ALITO: But she was appointed.

15 MS. NEWMAN: She was -- I don't know if she
16 was appointed or retained, but she's not with my office.

17 JUSTICE GINSBURG: May I ask you,
18 Ms. Newman, if you would agree that the Sixth Circuit
19 was wrong, at least to this extent, is there -- what is
20 the argument for directing a prosecutor to make a plea
21 offer that was never previously made? The offer that
22 was made is impossible to carry out now. The offer was
23 conditioned on her testimony at her aunt's trial. That
24 didn't happen.

25 So there is no -- there is no plea bargain

1 offered. And yet, the court instructs a renewal,
2 instructs the prosecutor to renew an offer that doesn't
3 exist.

4 MS. NEWMAN: Well, Justice Ginsburg --
5 Ginsburg, as the Court decided last term in
6 *Lafler v. Cooper*, the point of the remedy is to put the
7 defendant as closely as possible back in the position he
8 or she would have been in, but for the ineffective
9 assistance.

10 In *Lafler v. Cooper*, the Court recognized
11 that there's going to be situations where circumstances
12 have changed, and there's going to be circumstances
13 where that is not possible to -- to do that exactly.

14 In this case, of course, she cannot testify
15 against her aunt because her aunt was acquitted and is
16 deceased; however --

17 JUSTICE GINSBURG: Then how could -- how
18 could this Court order the prosecutor to renew an offer
19 that can't be made?

20 MS. NEWMAN: Well, it is an offer that can
21 be made if you remove the condition precedent. So the
22 offer -- the -- the premise of the offer is a charge
23 reduction. From first-degree --

24 JUSTICE GINSBURG: But the whole -- what
25 drove the prosecutor to make this bargain was he wanted

1 the testimony, so how -- how can that -- that's -- I've
2 never seen anything like this, where a court orders a
3 prosecutor to make a plea offer that was never made.

4 MS. NEWMAN: Well, again, referring to
5 *Lafler v. Cooper*, the remedy goes -- the Sixth Amendment
6 right attaches to the defendant, not to the prosecution,
7 so the goal here is to remedy, if the Court finds and
8 agrees that there's a Sixth Amendment violation, to
9 remedy that Sixth Amendment violation. If there is an
10 unequal burden to be borne by one -- one side or the
11 other, it has to be borne by the government.

12 And so, therefore, the way to remedy the
13 Sixth Amendment violation, it was a charge reduction, is
14 to reoffer the manslaughter plea, which has already been
15 done in this case, by the way. My client has already
16 accepted that plea.

17 And then it's up to the trial court now
18 whether or not to accept the plea, reject the plea, or
19 do some sort of modification, which is exactly what the
20 Sixth Circuit ordered and is exactly what this Court
21 ordered in -- in *Lafler v. Cooper*, to allow the trial
22 court to have the discretion in fashioning a remedy that
23 both will take care of the Sixth Amendment violation and
24 can balance the concerns of the prosecution in what's
25 been lost in that process, but still be able to craft a

1 remedy.

2 JUSTICE SCALIA: I don't know that it's so
3 strange to make the prosecutor -- to make the
4 prosecution submit an offer that can no longer be
5 accepted. I mean, it doesn't seem to me any more
6 strange than to make the prosecution submit an offer
7 where the situation was at the beginning. You do this,
8 and I will -- you know, I will prosecute. The quid pro
9 quo was you avoid the possibility of conviction.

10 But here, she's already been convicted. She
11 had a trial -- you know, by 12 fair, impartial jurors,
12 and she was guilty. That's -- that's what the jury
13 found. So it seems to me just as strange to make the
14 prosecution, now that we know she's guilty, submit --
15 submit that prior offer.

16 So, I mean, it seems to me quite weird, in
17 any event. So one -- one incremental weirdness is -- is
18 not so bad.

19 MS. NEWMAN: Justice Scalia, though, I think
20 you hit the point on the head. She -- she was always
21 guilty. And as my brother counsel stated, this case, in
22 some ways, is very, very similar to Cooper. You have
23 comments on the record by Frederick Toca that the
24 prosecution is -- has made comments and -- and they
25 reference this in the appendix, they reference a

1 newspaper article, the prosecutor talking about the fact
2 that this is nothing more than a manslaughter case.

3 This is -- we're charging first-degree
4 murder, but really, it's sort of a -- in sheep's
5 clothing, it's really just manslaughter. And Frederick
6 Toca is saying on the record, this is just a
7 manslaughter case.

8 Why should my client accept an
9 above-guideline sentence of a seven-year minimum and
10 have to testify against a codefendant. She's going to
11 go to trial, and the prosecutor's already admitted this
12 is nothing more than a manslaughter case, so she'll be
13 convicted of manslaughter, and she's going to be in a
14 better position following trial and conviction, just
15 like in Cooper.

16 There was no question Mr. Cooper was going
17 to be convicted. There was no question at all. Defense
18 counsel gave the same advice. You can't be convicted of
19 the charged offense. You're going to be convicted of a
20 lesser sentence, and following that conviction, you will
21 be in a better position for sentencing than you will be
22 with this plea.

23 JUSTICE ALITO: If that's the case --

24 MS. NEWMAN: The facts are in all force.

25 JUSTICE ALITO: Your arguments seemed to

1 be -- have had a head-on collision. If this is nothing
2 but a manslaughter case, then why was -- what argument
3 do you have that Toca was ineffective in saying, let's
4 go to trial. So if you're convicted of manslaughter
5 without the plea, you'll get your guidelines sentence on
6 the manslaughter case?

7 MS. NEWMAN: Because it's for the same
8 reason in Cooper. He was absolutely wrong, and he was
9 not aware of the evidence that had been marshalled
10 against Ms. Titlow, including their own confessions.

11 JUSTICE ALITO: Well, that's not a
12 manslaughter case. I thought you were just saying it's
13 a manslaughter case.

14 MS. NEWMAN: I'm saying that his
15 representations on the record are similar to the
16 representations made by Mr. Cooper's attorney on the
17 record. That you would -- in response to Justice --

18 JUSTICE GINSBURG: But the charge was --
19 that she was convicted of second-degree murder, right?

20 MS. NEWMAN: She was convicted of
21 second-degree murder. And in this case -- in Cooper,
22 the defense attorney never filed a motion to quash. So
23 he never challenged the efficient -- the legal
24 sufficiency of the evidence.

25 In this case, attorney number one,

1 Mr. Lustig, did file a motion to quash. She tested the
2 sufficiency, the legal sufficiency of the prosecution's
3 case for first-degree murder.

4 JUSTICE ALITO: You have my head --

5 MS. NEWMAN: So there's no question --

6 JUSTICE ALITO: You have my head spinning.
7 I thought you were making the argument that there's
8 nothing unfair about requiring acceptance of -- about
9 the imposition of a manslaughter sentence because this
10 was a manslaughter case. I thought you were making that
11 argument.

12 MS. NEWMAN: I'm not making that --

13 JUSTICE ALITO: Did I misunderstand that?

14 MS. NEWMAN: I'm not making that argument.

15 JUSTICE BREYER: I thought you were -- there
16 is a reason that they spoke about, which was, well, she
17 said she was innocent. Now, as to that one, what they
18 wrote is the record discloses that the second attorney's
19 advice was set in motion by defendant's statement to the
20 sheriff's deputy that he did not commit the offense.

21 Now, you say that's just contrary to fact as
22 you point to the affidavit. And the affidavit I read, I
23 think it's a little -- rather ambiguous in that respect,
24 and I can overturn that, or a Federal court can, only if
25 this factual statement I just read you is clearly wrong,

1 clearly. So I have a tough time saying it's clearly.

2 And I know they overstated because they said
3 automatically, in this case -- well, that may be an
4 overstatement. You have to read it in light of that
5 sentence. But then you're making a second argument, I
6 take it, if this is right. Your second argument is,
7 anyway, he was incompetent for a completely different
8 reason.

9 He didn't read the record. And if he'd read
10 it, he never would have made the statement that this is
11 just a manslaughter case. He would have seen that, if
12 she withdrew her guilty plea, she'd be tried for murder,
13 and then she'd get a really long sentence.

14 So that's an ineffective assistance of
15 counsel. Now, what does the Court in Michigan say about
16 that? Nothing. Nothing. So now, I wonder. Maybe
17 nobody made that argument to them, or maybe they made
18 it, and they rejected it sub silentio. That's why I
19 asked my first question. Okay? So -- and you heard the
20 response.

21 Even if they had heard that argument and
22 they said nothing about it, they don't have to -- they
23 don't have to mention every argument made. If they just
24 deny, we assume they deny it, and what we do is see
25 whether they were within their rights to deny it.

1 That's how we are supposed to look at it, does it
2 clearly violate Supreme Court law to deny it?

3 And there is going to be a factual part of
4 that and a legal part. All right. How do we deal with
5 that?

6 MS. NEWMAN: Well, 2254 gives -- has
7 separate provisions for the legal aspect of that.

8 JUSTICE BREYER: First of all, did anybody
9 make the argument as clearly as you have made it? I saw
10 what it was, I think. So that's -- did anybody make
11 that argument to the Michigan court?

12 MS. NEWMAN: Not that I'm aware of.

13 JUSTICE BREYER: No. Okay. Well, that's
14 the end of that, isn't it? What you are coming for is
15 you have to proceed by asking for reopening in the
16 Michigan court and see if they say it's too late. And
17 then -- you know, et cetera, they're all spelled out in
18 this opinion, which I can't remember, Cullen or
19 Pinholster or something, and this isn't an argument for
20 us now.

21 MS. NEWMAN: It's just a factual argument
22 trying to respond to the Court's questions about what
23 happened in this case and about what is contained in the
24 record and what Mr. Toca did say on the record.

25 CHIEF JUSTICE ROBERTS: If I could move

1 beyond the particular facts to some of the broader
2 points that the Solicitor General has raised? If you
3 don't have the requirement of at least some
4 corroboration, then all you have in every case is a
5 completely self-serving assertion, I wouldn't have pled
6 guilty -- you know, if I had known this or I had known
7 that.

8 And everybody will raise that argument.
9 Everybody raises ineffective assistance of counsel
10 anyway, and they will just add onto it this plea
11 assertion. I mean, shouldn't it be -- the Sixth Circuit
12 really went out of its way saying there is no
13 requirement of corroboration at all.

14 MS. NEWMAN: Mr. Chief Justice, there is no
15 question the Sixth Circuit, in dicta, said that we don't
16 require it, but it exists in this case. And the reality
17 is, as we discussed in our brief, that every circuit
18 looks -- it's a Strickland analysis.

19 Just like every other Strickland analysis,
20 the court looks at the entire record and makes a
21 determination based on the record. And this Court has
22 always eschewed hard, fast, bright-line rules in terms
23 of telling courts what has to exist in order to make a
24 specific finding.

25 CHIEF JUSTICE ROBERTS: So you think the

1 Sixth Circuit was wrong in what you are characterizing
2 as dicta? You think it was wrong to say that and that
3 the other circuits which require something in addition,
4 that that's the rule that we should adopt?

5 MS. NEWMAN: I don't think -- no, I don't
6 think that any particular rule should be adopted. I
7 think the rules that exist under Strickland are fine for
8 the circuits. The rules have existed for decades, and
9 the circuits have no trouble figuring out when the
10 threshold is met and when it's not.

11 CHIEF JUSTICE ROBERTS: Well, I thought --
12 maybe I'm misremembering, but the Sixth Circuit
13 distanced it itself from the other circuits, didn't it?

14 MS. NEWMAN: Yes, it did distance itself by
15 stating --

16 CHIEF JUSTICE ROBERTS: Now, you are telling
17 me that all the circuits have always done this. So the
18 Sixth Circuit at least thinks it's doing something
19 different?

20 MS. NEWMAN: It may think it is doing
21 something different, but in this particular case, there
22 was objective evidence that they pointed to, and as the
23 Solicitor General mentioned, there's always going to be
24 sentencing disparity because you're going to have to
25 have a sentencing disparity in order to show prejudice.

1 So, in effect, there will always be objective evidence
2 that will support any subjective statement of a criminal
3 defendant, or you're never going to see a --

4 CHIEF JUSTICE ROBERTS: Well, if there is
5 always going to be objective evidence, that's like
6 saying you don't have to have corroboration.

7 MS. NEWMAN: Well, for this Court -- my
8 point is, obviously, the Court can -- can set forth a
9 rule, but in doing so, I think we are going to run into
10 what Justice Sotomayor said earlier, in terms of judges
11 do this all the time, they -- they figure out who's
12 credible. I mean, it's never just like here's these
13 things, but this guy's credible, so I'm going to believe
14 him.

15 It's the totality of the circumstances, and
16 it's always going to have to be a totality of the
17 circumstances. So to say, here's the line, there has to
18 be objective evidence, then what is the objective
19 evidence? How are you going to define objective
20 evidence.

21 CHIEF JUSTICE ROBERTS: So the Sixth Circuit
22 was wrong when it said, we are doing something different
23 than the other circuits?

24 MS. NEWMAN: They certainly did not do
25 anything different in this case. In the other cases

1 that I have reviewed from the Sixth Circuit, I have not
2 seen a case that relied only on subjective testimony, so
3 I can't point to a case where the Sixth Circuit is doing
4 something different than any other case, and I don't
5 believe anyone else has pointed to a particular case.

6 So they might think they are doing something
7 different, but in reality, they are doing the same thing
8 as everybody else.

9 JUSTICE ALITO: Can I ask you about Mr. --
10 Mr. Toca's ethical lapses? Are they -- do they have a
11 legal significance in this case?

12 MS. NEWMAN: They certainly speak to his
13 credibility. United States v. Soto-Lopez is a very
14 similar case out of the Ninth Circuit, where the Court
15 did rely on the fact that the attorney had significant
16 problems, ethical problems. And in this case,
17 Mr. Toca's actions and his ethical problems go
18 hand-in-hand.

19 I mean, he approached a represented
20 defendant who was in jail and encouraged her to reject a
21 plea. He did this on a very short timeline,
22 admitting that -- well, not admitting, but we know, from
23 prior counsel, that he had not even picked up the phone
24 to speak with prior counsel, who had spent almost a year
25 litigating this case. He had not retrieved prior

1 counsel's file. It appears from the record -- those are
2 facts.

3 In terms of inferences, it appears from the
4 record that he got his information from the media. This
5 was a highly, highly publicized case. He signed a
6 retainer agreement with a client who had no money, who
7 gave him some jewelry and the right to promote her
8 story.

9 So he had every -- he violated multiple
10 ethical rules, and those violations lead to the
11 conclusion -- a reasonable conclusion that the reason
12 for withdrawing the plea was to make the deal more
13 lucrative. It is not lucrative if she pleads.

14 She had already pled, so she had already
15 entered a plea, and all that was left was sentencing.
16 That's not a very exciting story, if your entire
17 retainer agreement relies on the fact that you have the
18 media rights to sell this story.

19 So, yes, I would argue that the ethical
20 lapses are very significant in this case and lend
21 credibility to --

22 JUSTICE ALITO: In what sense is his
23 credibility -- did his credibility figure in the
24 decision of the Michigan Court of Appeals?

25 MS. NEWMAN: Well, it didn't. There were

1 separate issues raised on ethical violations, and they
2 were denied by the Michigan Court of Appeals, and they
3 were denied by the Federal court.

4 JUSTICE KAGAN: Do you know if the Michigan
5 Court of Appeals was ever presented with this argument
6 that, in fact, he gave the advice that he did because of
7 the peculiar fee arrangement that he had?

8 MS. NEWMAN: They were specifically
9 presented with the conflict argument, and off the top of
10 my head, I apologize, I don't recall if that is
11 specifically contained in there, but I think it was. I
12 mean, it was definitely briefed and argued, the ethical
13 violations.

14 JUSTICE KAGAN: And Mr. Toca is now, remind
15 me, disbarred for?

16 MS. NEWMAN: Disbarred.

17 JUSTICE KAGAN: Forever?

18 MS. NEWMAN: Yes. He committed multiple
19 misdemeanors and a felony and, in part, was disbarred
20 based on this conduct in this case, so he is no longer
21 practicing law. Last I checked, he is no longer
22 practicing law anywhere in the United States.

23 JUSTICE ALITO: What was submitted to the
24 Michigan Court of Appeals? Not the -- I am not talking
25 about the exhibits that were attached, but there was a

1 motion, a brief? What was it?

2 MS. NEWMAN: Yes, in Michigan, it's called a
3 motion to remand. You are required under the court
4 rules to submit a brief in support of that motion to
5 remand, and you are required to submit a proffer. So
6 the proffer --

7 JUSTICE ALITO: It's not in the habeas
8 record, it's not in the record of the Federal Court.
9 And we've been unable to get it from the State court,
10 but it does exist?

11 MS. NEWMAN: Yes.

12 JUSTICE ALITO: This motion?

13 MS. NEWMAN: Absolutely, yes. You have to
14 file a motion to remand, and the court of appeals
15 specifically references that motion to remand and the
16 proffer by the affidavit in stating that normally they
17 wouldn't consider those, that proffer as substantive of
18 evidence, but in this case, inexplicably, they did,
19 which leads to another reason why the Michigan Court of
20 Appeals decision is unreasonable because the Michigan
21 Court of Appeals failed to engage in further fact
22 finding.

23 So we take the record, as we get it from
24 them and under Williams and other decisions, if the
25 Court is the one responsible for an inadequate record,

1 and we would have what we have, and I would argue to
2 this Court that the record that we had supports that the
3 Michigan Court of Appeals erred both legally and
4 factually in its findings, and therefore, neither are
5 entitled to any deference. And the Sixth Circuit habeas
6 should be affirmed in this matter.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Mr. Bursch, you have four minutes remaining.

10 REBUTTAL ARGUMENT OF JOHN J. BURSCH

11 ON BEHALF OF THE PETITIONER

12 MR. BURSCH: Thank you, Mr. Chief Justice.

13 A few clean-up points, starting with this
14 idea that the actual predicate was wrong. As we
15 explained in our briefing in the habeas pleadings in
16 this very case, Titlow already conceded that the factual
17 predicate was correct.

18 And, Justice Breyer, you asked about the
19 quantum of proof necessary to overcome that assumption
20 that the Court of Appeals made based on the record
21 before it, and actually, the legal standard under AEDPA
22 is not clearly wrong. Under 2254(e)(1), which is
23 reprinted in our blue brief, it is presumed correct, and
24 that presumption could only be overcome by clear and
25 convincing evidence, and we don't have that here.

1 Second, with respect to the advice, my
2 friend on the other side points to Paragraph 8 of the
3 Pierson affidavit. And it's a little ironic that they
4 put all their eggs in that basket now because, in their
5 briefing, they disclaim it as triple hearsay and say
6 this Court should not rely on it, and she said some
7 things characterizing that paragraph that aren't in
8 there. There is nothing in paragraph 8 or the rest of
9 the affidavit that says Toca approached Titlow. I don't
10 think where that comes from.

11 But assume that everything that she says is
12 correct and that Toca did give the advice to withdraw
13 the plea, that still doesn't mean that it's bad advice
14 when you apply the AEDPA and Strickland rubrics because,
15 as Justice Alito pointed out, the differentiation in the
16 manslaughter guidelines and what was actually in the
17 plea actually makes this objectively reasonable advice.

18 And, in fact, it's more than that because,
19 at the time the plea was withdrawn, consider all the
20 facts that were known from talking to the prosecutor,
21 looking in the police file and everything else that --
22 that Toca presumably did. At that time, no one knew
23 about this critical Chahine testimony, which only came
24 out at trial, that it was actually Titlow who held Uncle
25 Don down while he was being smothered.

1 I mean, that completely changes the
2 complexion of this case. And so to say that Titlow was
3 always guilty when all of her testimony up to the point
4 of the plea withdrawal had been, I told my Aunt Billie
5 to stop, and then I left the scene, that's just not
6 credible.

7 Point on the second issue, the prejudice
8 prong. Chief Justice Roberts and Justice Sotomayor, you
9 note that the other circuits all look at objective
10 evidence, and we think that's the right way to approach
11 this. And you're exactly right, Chief Justice, that the
12 Sixth Circuit takes a different approach.

13 The Sixth Circuit says, although some
14 circuits have held that a defendant must support his own
15 assertion that he would have accepted the offer with
16 additional objective evidence, we, in this circuit, have
17 declined to adopt such a requirement.

18 And you can see how that difference played
19 out in this very case because the Sixth Circuit didn't
20 look at all the other evidence that was in the record
21 that was contrary to this self-serving statement that
22 Titlow made; that Titlow had the plea in hand and,
23 before the ink was even dry, was already professing
24 innocence and talking to other lawyers; that she fired
25 Lustig and there was no reason to do that, unless she

1 wanted to -- to withdraw the plea; that she did not have
2 a propensity for truthfulness.

3 At trial, she lied about the fact that she
4 was drunk, when she was not, the night of the murder.
5 The evidence came out that she asked Chahine to lie
6 about the alibi, and she hid the murder weapon. And
7 then you've got all these statements at the sentencing
8 hearing and post remand, where she's continually
9 asserting her innocence. It's happening all the time.

10 When you consider all that objectively,
11 under the other circuit standards, clearly, that would
12 not be sufficient to establish prejudice here.

13 JUSTICE SOTOMAYOR: I -- I --

14 MR. BURSCH: That's the objective evidence.

15 JUSTICE SOTOMAYOR: I -- I don't understand
16 what you're saying. The other side says -- and I think
17 it's the standard -- that you look at the totality of
18 the circumstances.

19 MR. BURSCH: Correct.

20 JUSTICE SOTOMAYOR: And what you're saying
21 is they didn't do that here. It's not that -- they use
22 some objective evidence, you're saying they didn't use
23 other objective evidence. I am --

24 MR. BURSCH: Here's -- yeah. Here's the
25 connection, Justice Sotomayor. The reason they didn't

1 look at the other evidence is because they have a
2 different rule. They don't think they have to look at
3 it. They did look at things like sentencing
4 disparities.

5 As the Solicitor General's office explained,
6 that shouldn't come into play here because that was a
7 well-known disparity; it wasn't something that was
8 hidden by client's ineffective assistance. And they --
9 the Sixth Circuit talks about the fact that she accepted
10 the plea once and then withdrew it. Obviously, that
11 cuts both ways.

12 So all you are left with is the subjective
13 testimony. And when you look at all the other objective
14 evidence, the evidence that other circuits would look
15 at, there's really only one possible outcome here.

16 So in sum, Your Honors -- oh, I guess I do
17 want to mention one other quick point since my light
18 hasn't gone yet. The book deal, there was no book deal.
19 Look at page Joint Appendix 60, and I've seen copyright
20 assignments. That wasn't the case here. They were
21 trying to raise money for the trial.

22 And -- and this case had nothing to do with
23 the reason why Toca was disbarred. That's at Joint
24 Appendix 302 to 317. It was because he falsely put
25 someone else's license tabs on his license plate, and

1 that was a misdemeanor, and then he lied about it.

2 In sum, record silence under AEDPA and
3 Strickland means the State wins, not the convicted
4 murderer.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

8 (Whereupon, at 12:04 p.m., the case in the
9 above-entitled matter was submitted.)

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A				
abettor 32:2	41:11	aid 32:1	32:7 36:15,20	44:23 45:9,11
ability 15:1	admitting 49:22	alibi 56:6	37:5 50:24 51:2	45:19,21 46:8
able 5:11 29:2,11	49:22	alito 5:15,20 8:11	51:5,24 52:14	51:5,9 53:10
31:9 39:25	adopt 47:4 55:17	8:17,24 15:2,5	52:20,21 53:3	arguments 8:8
aboveentitled	adopted 3:13	23:4 28:24 29:7	53:20	11:23 26:5
1:11 58:9	47:6	32:10,14,23	appear 11:2	41:25
aboveguideline	adversary 27:18	37:2,8,11,14	appearances	arrangement
41:9	adversarys	41:23,25 42:11	1:14	51:7
absent 17:24	35:23	43:4,6,13 49:9	appears 50:1,3	article 41:1
absolute 26:6	advice 3:15 4:7	50:22 51:23	appellate 37:9	articulated 7:22
absolutely 42:8	6:20,25 7:3	52:7,12 54:15	appendix 3:23	asked 4:20 17:6
52:13	10:12 12:8,13	allow 8:1 39:21	8:4 16:1 30:1	28:4 30:16 31:5
accept 25:25	17:24 34:6,7,8	allowing 10:20	31:14 40:25	36:14 44:19
39:18 41:8	41:18 43:19	alternative 36:20	57:19,24	53:18 56:5
acceptance 43:8	51:6 54:1,12,13	ambiguous 43:23	apply 54:14	asking 7:2 19:14
accepted 17:24	54:17	amendment 18:4	appointed 37:14	20:20 21:20,21
19:24 23:21	advise 11:6	25:18 39:5,8,9	37:16	45:15
29:14 32:4	advised 3:24 4:7	39:13,23	appraisal 16:8	aspect 45:7
39:16 40:5	10:8 12:16	amicus 1:19 2:7	16:11	asserting 56:9
55:15 57:9	advising 35:5	17:16	approach 3:12	assertion 19:23
accepting 26:3	aedpa 3:10,17	amount 19:16	30:11 55:10,12	46:5,11 55:15
29:12	4:15 35:25	analysis 3:22 5:3	approached	assignments
account 13:1	53:21 54:14	11:14 28:13	30:10 31:5,7	57:20
21:8	58:2	46:18,19	33:22,23 34:1	assistance 8:18
accurate 28:21	affidavit 10:3,4,6	analyzed 5:8	49:19 54:9	9:15 11:24
acknowledge	10:11 12:11,12	ann 1:17 2:6	appropriate 5:10	15:23 27:15
15:14	16:22,22 30:1,2	17:15	5:12 10:5	35:7 38:9 44:14
acquainted 4:23	30:7,7,8 31:2,4	announce 19:13	arbitration 30:3	46:9 57:8
acquitted 38:15	31:6,11,15	20:15,21	30:5	assistant 1:17,20
actions 49:17	32:11,25 33:4,9	announcing 21:4	area 21:6	assume 12:15
actual 32:7 53:14	34:6 35:11,21	answer 7:11	arent 25:2 54:7	34:24 44:24
add 46:10	43:22,22 52:16	13:23 14:21	argue 15:18 33:3	54:11
addition 16:24	54:3,9	anybody 19:2	34:14 50:19	assumed 3:16
19:17 47:3	affidavits 36:10	45:8,10	53:1	14:2
additional 19:24	affirmed 53:6	anymore 23:22	argued 51:12	assumes 12:7
55:16	ago 18:19	anyway 44:7	arguing 28:24	assuming 14:11
address 14:1	agree 11:14	46:10	29:6	assumption 35:1
24:19	27:17,18 29:23	apologize 51:10	argument 1:12	53:19
addresses 21:22	32:24 37:18	appeals 7:22,22	2:2,5,9,12 3:4,6	attached 51:25
adequate 12:23	agreedupon 14:8	8:3,13,20,24	3:20 16:14	attaches 39:6
26:16	agreement 6:2	9:18,22 10:17	17:15 27:6	attorney 3:14,15
adequately 13:2	7:16 16:3 18:9	10:22 11:19,22	28:12 29:5,8,9	6:10 7:19,20
14:25 28:1	24:25 25:19,25	12:5 14:4,7	35:24 37:20	9:3 11:16,20
admitted 15:15	35:13 50:6,17	16:20 22:19	42:2 43:7,11,14	12:23 13:5 15:7
	agrees 39:8	27:11 30:25	44:5,6,17,21	15:14,18 16:4

<p>29:11 30:7,16 31:6,8,8,9 32:18 33:1 35:14,15 36:5 36:10,11,23 37:2,3,5,9,10 42:16,22,25 49:15 attorneys 12:1 43:18 aunt 17:4 18:11 24:10,11 30:13 32:2 35:13 38:15,15 55:4 aunts 37:23 automatically 44:3 avoid 40:9 aware 42:9 45:12</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>b 23:10 back 4:5 12:14 13:17 18:16 23:2,19 38:7 bad 6:13,17 13:13 22:6 40:18 54:13 balance 17:12 39:24 bargain 22:7 24:8,12,14 37:25 38:25 base 18:23 based 3:11,16 8:8 18:2 19:8 24:3 46:21 51:20 53:20 basically 11:5 basing 18:22 basket 54:4 beginning 40:7 behalf 1:16,21 2:4,11,14 3:7 27:7 53:11</p>	<p>believe 15:12 48:13 49:5 believed 21:3 bench 18:20 benefit 12:5 better 6:13 41:14 41:21 beyond 46:1 big 37:4 billie 17:4,6 55:4 bit 11:10 blue 53:23 book 57:18,18 borne 39:10,11 boxes 5:7 breyer 12:18,21 13:22 21:5 33:5 33:21,23,25 34:12,13,14,17 34:19 43:15 45:8,13 53:18 brief 22:5 46:17 52:1,4 53:23 briefed 51:12 briefing 53:15 54:5 brightline 46:22 broader 46:1 brother 28:11 40:21 brought 34:10 burden 4:12,12 6:21 8:9 15:21 29:19,24 34:13 35:25 39:10 bursch 1:15 2:3 2:13 3:5,6,8 4:24 5:19,22 7:8,14 8:16,23 9:11 11:8,12 12:20 13:21,24 15:10 16:9 53:9 53:10,12 56:14 56:19,24 burt 1:3 3:4</p>	<hr/> <p style="text-align: center;">C</p> <hr/> <p>c 1:8,18 2:1 3:1 9:19 called 6:1 9:13 52:2 cant 20:16,18 23:21,21 24:14 24:15 35:25 38:19 41:18 45:18 49:3 care 28:19 39:23 carried 24:8,15 carry 6:21 37:22 case 3:4 4:6,19 4:21,23,23 6:22 10:9 13:25 16:5 16:8 18:9 19:21 21:14 22:10,14 22:19 24:2,14 25:11 29:2,13 29:13 31:23 34:18 35:18 36:6,22 38:14 39:15 40:21 41:2,7,12,23 42:2,6,12,13 42:21,25 43:3 43:10 44:3,11 45:23 46:4,16 47:21 48:25 49:2,3,4,5,11 49:14,16,25 50:5,20 51:20 52:18 53:16 55:2,19 57:20 57:22 58:7,8 cases 48:25 categorical 11:4 categorically 18:5 causation 18:1 cemented 31:24 certain 19:16 certainly 7:24 32:25 48:24</p>	<p>49:12 cetera 13:12 45:17 chahine 54:23 56:5 chain 7:18 35:9 challenged 42:23 change 7:5 9:3 15:6 changed 7:12 25:3 38:12 changes 55:1 characterizing 47:1 54:7 charge 5:6 38:22 39:13 42:18 charged 41:19 charging 41:3 checked 51:21 chief 3:3,8 17:13 17:18 22:3,15 27:4,8 45:25 46:14,25 47:11 47:16 48:4,21 53:8,12 55:8,11 58:6 circuit 3:13,16 15:22 19:6,21 21:3,23 25:6,17 25:24 37:18 39:20 46:11,15 46:17 47:1,12 47:18 48:21 49:1,3,14 53:5 55:12,13,16,19 56:11 57:9 circuits 3:22 19:22 21:2 47:3 47:8,9,13,17 48:23 55:9,14 57:14 circumstance 22:17 23:19 circumstances 18:2,25 19:19</p>	<p>20:8,23 22:1 24:25 25:3,7,20 26:24 27:25 36:2 38:11,12 48:15,17 56:18 cited 8:25 19:5 claim 9:15 10:15 10:16 11:15 15:8 17:9 36:9 37:4 claimed 9:2 claiming 12:2 clarify 12:18 20:21 21:22 cleanup 53:13 clear 9:11 30:16 53:24 clearly 14:14 43:25 44:1,1 45:2,9 53:22 56:11 client 7:25 11:15 12:25 28:8 29:11 33:7 39:15 41:8 50:6 clients 12:1 57:8 closely 38:7 clothing 41:5 codefendant 41:10 colleagues 18:20 collision 42:1 come 6:22 26:16 32:19 33:2 57:6 comes 31:12 54:10 coming 45:14 comments 40:23 40:24 commit 43:20 committed 51:18 common 33:11 comparing 19:8 completely 12:15 22:24 44:7 46:5</p>
---	--	--	--	---

<p>55:1 complexion 55:2 compliance 23:7 conceded 53:16 concerns 39:24 conclude 15:16 conclusion 8:7 50:11,11 condition 24:9 38:21 conditioned 37:23 conduct 35:4 51:20 confessions 42:10 conflict 51:9 confusion 21:2 connection 56:25 connell 1:17 2:6 consider 52:17 54:19 56:10 consistency 18:24 consult 31:7 contained 45:23 51:11 contains 3:24 4:2 context 10:14 16:24 17:22 18:4,8 continually 56:8 continued 4:9 contrary 43:21 55:21 convicted 17:23 18:15,17 40:10 41:13,17,18,19 42:4,19,20 58:3 conviction 5:10 5:17 6:6 17:10 23:2 24:3 27:1 40:9 41:14,20 convincing 13:3 53:25</p>	<p>cooper 38:6,10 39:5,21 40:22 41:15,16 42:8 42:21 coopers 42:16 copyright 57:19 corpus 12:19 correct 4:1 8:15 8:16,23 9:9 11:8 30:22 32:12,13 53:17 53:23 54:12 56:19 correctness 14:22 corroborated 18:25 19:3 corroborating 19:16 20:8 22:9 22:17 corroboration 19:11 46:4,13 48:6 counsel 7:7 8:18 10:10 17:13 18:19 27:4,14 28:12 29:10,17 29:18,21 30:11 35:7 40:21 41:18 44:15 46:9 49:23,24 53:8 58:6 counselor 20:13 counsels 27:21 50:1 count 22:4 course 9:6 38:14 court 1:1,12 3:9 3:10,19 5:3,25 6:16 7:21,22 8:3,13,14,19 8:24 9:17,18,18 9:22 10:17,22 11:19,22 12:5 13:8,10,15,17</p>	<p>13:17 14:2,3,6 14:23 15:1 16:20 17:19 18:3,7 19:22 20:4,11,12,20 20:24,25 21:22 22:19 23:14,17 23:19 24:18,20 25:2,9,23,23 25:24,25 26:2,2 26:5,10,13,16 27:2,9,10,25 29:14,25 30:25 31:2 32:7 33:7 35:2 36:14,15 36:18,20 37:1,4 38:1,5,10,18 39:2,7,17,20 39:22 43:24 44:15 45:2,11 45:16 46:20,21 48:7,8 49:14 50:24 51:2,3,5 51:24 52:3,8,9 52:14,19,21,25 53:2,3,20 54:6 courtroom 28:4 31:18 courts 14:14 23:17 24:6 26:22 31:1 45:22 46:23 craft 39:25 create 8:14 created 27:11 creative 25:12 credibility 18:22 19:20 20:18 22:1 49:13 50:21,23,23 credible 12:9 48:12,13 55:6 credited 20:5,5 crime 31:22,25 32:5</p>	<p>criminal 48:2 critical 54:23 cullen 45:18 curiae 1:19 2:7 17:16 curtain 4:5 12:14 cuts 57:11</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>d 1:8,18 3:1 day 4:19 days 7:6 36:17 deadline 36:19 deal 6:5,14 11:1 18:6,8,16 22:7 22:12,21 23:20 24:11 45:4 50:12 57:18,18 decades 47:8 deceased 38:16 decide 8:20 24:13 decided 38:5 deciding 9:6 21:7 decision 10:22 14:13 18:6 26:8 36:10 50:24 52:20 decisions 19:5 23:7 52:24 declined 55:17 defend 11:13 defendant 7:4,12 9:12 10:23,25 11:4,24 13:16 14:7,18 15:12 17:23 18:10,14 18:18 19:20,23 20:23 22:2,20 22:24 25:13 27:13 29:18 35:21 36:3 38:7 39:6 48:3 49:20 55:14 defendants</p>	<p>19:17 20:4 22:18 43:19 defender 1:20 defense 10:10 27:14 29:9,10 41:17 42:22 deference 4:15 31:1 32:9 35:25 53:5 deficient 3:23 6:18 define 48:19 definitely 24:21 51:12 delightful 13:21 demeanor 18:22 demonstrate 6:23 9:25 denial 10:13 denied 9:24 51:2 51:3 deny 36:1 44:24 44:24,25 45:2 department 1:18 deputy 30:4,5 31:5,7,10,13 31:16 32:15 33:11,22 43:20 deserves 28:8 determination 46:21 determine 5:9 20:17 22:1 determines 26:25 detroit 1:20 develop 9:14 14:20 15:1 dicta 46:15 47:2 didnt 13:13 15:7 20:2 21:6 25:23 25:24 27:22,23 31:22 36:13 37:24 44:9 47:13 50:25</p>
--	---	--	--	---

<p>55:19 56:21,22 56:25 difference 5:25 23:15 55:18 different 5:7 18:20 25:20 44:7 47:19,21 48:22,25 49:4,7 55:12 57:2 differentiation 54:15 difficult 11:13 direct 32:20 directing 37:20 disagree 16:9 28:14 disbarred 51:15 51:16,19 57:23 disclaim 54:5 discloses 43:18 discovery 27:24 discretion 23:17 24:6 26:15,15 27:2 39:22 discussed 14:4 46:17 discussion 11:25 discussions 32:15 33:16,17 33:25 disparities 57:4 disparity 22:11 47:24,25 57:7 dispositive 4:3 distance 47:14 distanced 47:13 distinguish 13:25 district 12:23 13:4 24:5 doesnt 3:14 18:11 19:2 20:14 21:7 24:1 24:11 27:22,23 28:10 33:9,10 34:1,6,15,19</p>	<p>34:20,25 38:2 40:5 54:13 doing 11:20 47:18,20 48:9 48:22 49:3,6,7 don 54:25 dont 4:21,24 5:22 7:21 12:8,9,11 12:12 15:10 19:10,14 21:25 22:4 24:17,23 28:18,19,19 29:8 34:2,11 36:1,22,23 37:15 40:2 44:22,23 46:3 46:15 47:5,5 48:6 49:4 51:10 53:25 54:9 56:15 57:2 doubt 12:6 16:11 draw 12:13 drawn 36:24 drove 38:25 drunk 56:4 dry 7:16 55:23 due 33:20 duty 29:10,11,17 29:18</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>e 2:1 3:1,1 14:21 14:21 53:22 earlier 12:7 48:10 easy 10:17 14:12 effect 48:1 effective 27:15 efficient 42:23 eggs 54:4 either 29:12 elements 3:25 elses 57:25 encouraged 30:18 35:12</p>	<p>49:20 encouraging 35:16 endrun 27:11 engage 52:21 entered 31:19 50:15 entire 46:20 50:16 entirely 6:9 10:4 entitled 31:1 32:9 53:5 entitlement 9:5,8 erred 27:11 53:3 eschewed 46:22 especially 4:11 esq 1:15,17,20 2:3,6,10,13 essentially 21:24 establish 56:12 established 14:14 establishing 16:23 et 13:12 45:17 ethical 7:24 49:10,16,17 50:10,19 51:1 51:12 evaluate 19:19 evaluating 17:21 event 40:17 events 7:19 everybody 33:13 46:8,9 49:8 evidence 3:24,25 4:2 5:9 8:5 9:25 12:9 15:4 19:9 19:11,17,25 20:7 27:24 30:13 31:12 33:6 36:8,8 42:9,24 47:22 48:1,5,18,19 48:20 52:18</p>	<p>53:25 55:10,16 55:20 56:5,14 56:22,23 57:1 57:14,14 evidentiary 9:14 14:25 evil 17:5 exactly 4:11 24:23 25:2 38:13 39:19,20 55:11 examples 22:4 exceeded 14:9 exchange 23:25 exciting 50:16 exclusive 15:12 exhibits 51:25 exist 20:17 38:3 46:23 47:7 52:10 existed 47:8 exists 46:16 expand 19:18 36:12 explain 8:12 35:21 explained 53:15 57:5 exposing 13:12 exposure 3:25 22:20 extent 20:3,6 37:19</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fact 9:1 15:5,6,8 22:6,16 23:23 27:21 36:24 41:1 43:21 49:15 50:17 51:6 52:21 54:18 56:3 57:9 factor 7:6,9,13 7:15 12:25 21:10 22:9</p>	<p>factors 12:24 19:8 20:18 facts 12:22 15:14 32:7 33:3,4 41:24 46:1 50:2 54:20 factual 21:8 32:8 43:25 45:3,21 53:16 factually 53:4 fail 36:19 failed 4:13 8:9 52:21 failure 6:21 15:3 15:3,21 fair 26:25 28:9 40:11 fairness 28:8 falsely 57:24 familiarized 29:1 far 29:6 fashioning 39:22 fast 46:22 favor 4:3 21:13 federal 14:19,24 18:3 43:24 51:3 52:8 fee 51:7 feels 17:4 felony 51:19 figure 48:11 50:23 figuring 47:9 file 36:18 43:1 50:1 52:14 54:21 filed 27:25 36:25 42:22 finding 18:1 27:12 46:24 52:22 findings 31:1 32:8 53:4 finds 18:3 25:18 39:7</p>
--	--	--	--	--

fine 47:7	15:24 16:10	15:18 16:14	14:19 15:4,7	impossible 24:15
fired 55:24	24:7 37:17 38:4	28:17,18,20	16:13 17:1 30:3	37:22
firing 7:19	38:5,17,24	42:5 54:16	36:11,14 56:8	inadequate 35:7
first 4:14 7:19	42:18	guilt 31:24	hearings 30:6	52:25
12:24 13:10,13	ginther 9:13 15:4	guilty 11:1 15:16	hearsay 54:5	incentive 18:15
13:17 15:7 16:9	gist 7:7	18:10 22:8	heart 15:12	include 30:19
17:21 24:19	give 7:3 13:5	32:16,17,17	hearts 15:13	including 19:6
26:9 33:10,12	18:11 22:4	33:8,14,15,18	hed 44:9	42:10
35:18 44:19	24:10 25:14,15	33:18 34:4,4,9	held 3:10 54:24	incompetent
45:8	54:12	34:21,22,23	55:14	44:7
firstdegree	given 25:7	40:12,14,21	help 31:9	incomplete 30:20
38:23 41:3 43:3	gives 45:6	44:12 46:6 55:3	heres 48:12,17	inconsistent
fit 5:8	giving 12:5 26:4	guy 19:3	56:24,24	15:17,19
five 5:9 28:17	glad 13:22	guys 48:13	hes 4:24,25,25	incremental
flimsy 13:11,13	go 11:6 13:10		19:4 21:15	40:17
following 41:14	16:7 23:10,19	H	28:10 31:18	independent
41:20	24:3 28:7,10	habeas 3:13 4:4	hid 56:6	13:18
force 7:3 35:23	29:2,5 33:13	12:19 13:10,10	hidden 57:8	indeterminate
41:24	34:2 36:20	13:15,17 14:1	highly 50:5,5	6:3
forever 51:17	41:11 42:4	14:18,19 18:3	hiring 7:20	indicated 28:5
forth 48:8	49:17	52:7 53:5,15	hit 40:20	indicates 12:12
forward 6:23	goal 39:7	hand 55:22	hmm 21:14,14	30:3,9 35:11
found 14:23	god 17:6	handinhand	honors 57:16	ineffective 3:17
40:13	goes 5:2 39:5	49:18	hope 3:20	8:18 9:15 11:24
four 11:18 53:9	going 4:8 22:13	handle 28:11	hypothetical	15:23 37:6 38:8
frederick 35:12	38:11,12 41:10	happen 6:16	12:22 14:1,2,11	42:3 44:14 46:9
40:23 41:5	41:13,16,19	21:15,16 37:24		57:8
friend 54:2	45:3 47:23,24	happened 4:6	I	inexplicably
frye 26:1	48:3,5,9,13,16	11:17 14:20	id 4:14	52:18
further 14:20	48:19	23:18 24:1 32:6	idea 53:14	infer 34:7,9
17:11 27:14	good 11:1 28:11	35:22 45:23	im 4:22,25 7:17	inference 34:15
52:21	31:8 33:1	happening 56:9	10:7 13:22 19:5	36:23
G	government 18:5	happens 10:5	21:16 28:7,9	inferences 33:3
g 3:1	18:8,12 23:20	hard 46:22	29:6 31:13	50:3
game 29:22	24:24 25:19	hasnt 57:18	34:21 35:18	inform 29:11
gather 8:25	26:9 39:11	head 31:3 32:8	42:14 43:12,14	information
gee 13:11	granting 3:13	40:20 43:4,6	45:12 47:12	25:15 50:4
general 1:15,17	grasp 28:14	51:10	48:13	informed 28:1
19:18 46:2	greater 13:5	headon 42:1	imagine 12:21	inherent 26:1
47:23	grid 5:6	hear 3:3 19:1	impartial 40:11	ink 7:15 55:23
generally 33:14	guess 21:11 36:1	heard 21:14	important 5:24	innocence 4:9
generals 57:5	57:16	44:19,21	7:9 15:20	6:12 8:1 9:2
getting 36:17	guidelines 5:17	hearing 5:4 8:22	imposed 5:16	10:15,16,24
ginsburg 4:17,25	5:18,21,24 6:1	9:13,14,16,20	23:7,11	11:15 12:2 14:4
	13:6 14:9 15:9	10:1 13:18	imposition 43:9	15:8 17:9 27:13

<p>31:17 55:24 56:9 innocent 7:17 11:5 12:25 15:13 30:18 31:22 43:17 insisting 7:5 insists 7:25 instance 8:9 instructs 38:1,2 internal 18:23 interpret 21:24 interpretation 28:15 investigate 6:25 29:10 investigated 3:15 involved 35:19 ironic 54:3 isnt 13:13 24:13 25:22 30:16 32:10,12,21,21 45:14,19 issue 4:14 8:17 9:4,7 26:12 55:7 issued 9:23 issues 9:23 51:1 ive 5:1 39:1 57:19</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>j 1:15 2:3,13 3:6 53:10 jacobs 37:10 jail 30:10 34:3 49:20 jailer 30:17 jewelry 50:7 job 8:6 11:21 12:1 john 1:15 2:3,13 3:6 53:10 joint 15:25 30:1</p>	<p>31:14 57:19,23 judge 21:7,7 26:25 35:19 judged 18:1 judges 18:22 20:17 48:10 judgment 26:3 juries 20:14 jurors 40:11 jury 15:15 21:8 40:12 justice 1:18 3:3,8 4:17,25 5:15,20 7:2,10 8:11,17 8:24 10:15,21 11:9 12:18,21 13:22 15:2,5,24 16:10 17:13,18 18:19 20:1,13 20:25 21:5 22:3 22:15 23:4 24:7 25:1,22 26:11 26:17,20 27:4,8 27:17 28:2,23 28:24 29:7,16 29:24 30:15,21 30:22 32:10,14 32:23 33:5,21 33:23,25 34:12 34:13,14,17,19 35:17 36:13 37:2,8,11,14 37:17 38:4,17 38:24 40:2,19 41:23,25 42:11 42:17,18 43:4,6 43:13,15 45:8 45:13,25 46:14 46:25 47:11,16 48:4,10,21 49:9 50:22 51:4,14 51:17,23 52:7 52:12 53:8,12 53:18 54:15 55:8,8,11 56:13</p>	<p>56:15,20,25 58:6 justified 13:2,7 justify 8:22 9:20 juxtapose 16:25</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>kagan 10:21 11:9 25:1 51:4,14,17 kennedy 7:2,10 10:15 30:15,21 30:22 kind 7:23 11:3 19:7,15 21:15 21:21 24:5 kinds 5:7 knew 10:7,7,11 21:14 28:22 29:21 54:22 know 4:21 5:13 5:20 7:11,23 10:4 12:9 16:12 18:21 19:10,16 20:15 22:7 24:17 28:18,19 33:14 34:3,11 34:21 35:5,17 36:1,22 37:15 40:2,8,11,14 44:2 45:17 46:6 49:22 51:4 known 46:6,6 54:20</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>l 1:3 lafler 6:17 25:9 25:21 26:1,23 38:6,10 39:5,21 lansing 1:15 lapses 49:10 50:20 larger 11:25 late 4:19 45:16 law 12:19 45:2</p>	<p>51:21,22 lawyer 7:25 12:23 22:21 34:23,24 lawyers 55:24 layperson 31:21 lead 7:10 50:10 leads 52:19 leave 25:4 26:25 leaves 26:23 left 18:7 26:10 26:15 50:15 55:5 57:12 legal 42:23 43:2 45:4,7 49:11 53:21 legally 53:3 lend 50:20 length 14:5 leniency 16:19 lesser 41:20 level 36:6 license 57:25,25 lie 56:5 lied 56:3 58:1 life 23:2 light 10:18 44:4 57:17 limitation 20:16 line 10:23 48:17 litigating 49:25 litigation 36:7 little 11:10 43:23 54:3 liz 37:10 logic 18:24 19:9 long 14:13 44:13 longer 25:13 40:4 51:20,21 look 7:7 20:17,24 21:25 22:5 27:14,23 45:1 55:9,20 56:17 57:1,2,3,13,14 57:19</p>	<p>looked 8:4,5,5 20:7 looking 6:10 15:25 20:6 31:13 36:11 54:21 looks 19:4 46:18 46:20 lost 6:7 39:25 lot 5:1,13 16:13 23:17 love 13:22 lower 6:4,6,8 15:18 16:15 lucrative 50:13 50:13 lustig 10:3 43:1 55:25</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>m 1:13 3:2 58:8 maintain 4:9 6:12 8:1 making 21:9 43:7 43:10,12,14 44:5 manipulating 17:5 manslaughter 5:6,10 6:1,6,7 13:6 15:16 23:25 39:14 41:2,5,7,12,13 42:2,4,6,12,13 43:9,10 44:11 54:16 marshalled 42:9 material 28:25 materials 5:2 8:20 16:13 matter 1:11 11:1 21:8 29:15 34:15,19,20 53:6 58:9 maximum 22:22</p>
---	--	--	--	--

mean 19:11 21:3 21:6,10,24 24:16,20 25:23 31:21 32:15 33:10,13,16 34:1,5 40:5,16 46:11 48:12 49:19 51:12 54:13 55:1	misrememberi... 47:12 missed 25:13 mistake 35:8 misunderstand 43:13 modification 39:19 money 32:4 50:6 57:21 morning 3:20 motion 7:18 8:13 9:20,24 10:13 10:16 16:21 31:17 36:25 42:22 43:1,19 52:1,3,4,12,14 52:15	newman 1:20 2:10 27:5,6,8 28:2 29:5,9,23 30:21,24 32:13 32:23 33:19,22 33:24 34:12,14 34:18 35:10,17 36:5,16 37:7,9 37:13,15,18 38:4,20 39:4 40:19 41:24 42:7,14,20 43:5 43:12,14 45:6 45:12,21 46:14 47:5,14,20 48:7 48:24 49:12 50:25 51:8,16 51:18 52:2,11 52:13	obligation 7:24 obligations 11:5 obvious 12:24 obviously 14:3 48:8 57:10 occasion 36:3 oconnell 17:14 17:15,18 19:14 20:3,20 21:1,20 22:10,16 23:16 24:16 25:5 26:7 26:14,19,22 october 1:9 offense 41:19 43:20 offer 17:23 18:14 19:24 23:3 25:8 26:3 37:21,21 37:22 38:2,18 38:20,22,22 39:3 40:4,6,15 55:15 offered 11:23 16:16 23:9,21 26:18 38:1 offering 23:24 office 37:12,13 37:16 57:5 oh 33:14 57:16 okay 13:14 34:17 44:19 45:13 once 24:9,11 57:10 ones 20:8 onesentence 9:23 open 26:23 opinion 9:23 11:13 13:9 14:6 23:17 26:22 35:2 45:18 opinions 22:19 opportunity 9:12 14:19 25:14 opposite 3:18	oral 1:11 2:2,5,9 3:6,20 17:15 27:6 order 5:9 9:23 38:18 46:23 47:25 ordered 39:20,21 orders 39:2 original 25:8 ott 30:4,5 32:15 32:16 outcome 57:15 overcome 53:19 53:24 overstated 44:2 overstatement 44:4 overturn 43:24
meaning 20:17 means 19:11 58:3 media 50:4,18 mention 15:7 44:23 57:17 mentioned 14:2 14:17 15:8 47:23 mentions 13:9 merits 9:23 met 47:10 michigan 1:16,21 5:5,18 7:22 8:12 9:11,13,17 9:18 10:17,22 11:22 12:5 16:20 27:10 32:6 35:2 36:16 36:16,17 37:4 44:15 45:11,16 50:24 51:2,4,24 52:2,19,20 53:3	move 20:15 29:3 45:25 moved 14:7 multiple 22:25 50:9 51:18 murder 5:17 13:12 19:12 23:1 41:4 42:19 42:21 43:3 44:12 56:4,6 murderer 58:4 mutually 15:11	newspaper 41:1 nicole 1:6 night 56:4 ninth 49:14 normally 34:2 52:16 notarized 30:8 note 55:9 notes 14:7 number 24:9 42:25	offered 11:23 16:16 23:9,21 26:18 38:1 offering 23:24 office 37:12,13 37:16 57:5 oh 33:14 57:16 okay 13:14 34:17 44:19 45:13 once 24:9,11 57:10 ones 20:8 onesentence 9:23 open 26:23 opinion 9:23 11:13 13:9 14:6 23:17 26:22 35:2 45:18 opinions 22:19 opportunity 9:12 14:19 25:14 opposite 3:18	<hr/> P <hr/> p 3:1 58:8 page 2:2 3:22 11:19,22 12:6,6 14:6 16:1 30:2 31:14 35:11 57:19 pages 8:3 paragraph 33:10 34:11 35:10 54:2,7,8 paragraphs 30:2 part 8:9 11:25 16:19,20 31:19 31:19 32:24 37:4 45:3,4 51:19 partially 28:2 participated 32:4 participating 31:25 particular 30:2 46:1 47:6,21 49:5 pass 31:21 passed 31:20
mentions 13:9 merits 9:23 met 47:10 michigan 1:16,21 5:5,18 7:22 8:12 9:11,13,17 9:18 10:17,22 11:22 12:5 16:20 27:10 32:6 35:2 36:16 36:16,17 37:4 44:15 45:11,16 50:24 51:2,4,24 52:2,19,20 53:3 michigans 6:2 mind 7:12 13:19 minimum 28:17 41:9 minutes 53:9 misadvised 22:20 misapplication 14:14 misdemeanor 58:1 misdemeanors 51:19	<hr/> N <hr/> n 2:1,1 3:1 necessarily 9:7 20:5 25:11 necessary 53:19 need 16:17 19:12 22:3 27:13 28:7 needed 28:25,25 negotiate 5:11 neither 53:4 never 13:9 37:21 39:2,3 42:22,23 44:10 48:3,12 new 31:6	<hr/> O <hr/> o 1:17 2:1,6 3:1 oath 30:6,9 objective 6:10 18:2 19:11,19 19:24 21:25 47:22 48:1,5,18 48:18,19 55:9 55:16 56:14,22 56:23 57:13 objectively 10:19 10:24 54:17 56:10 objectives 19:9	offered 11:23 16:16 23:9,21 26:18 38:1 offering 23:24 office 37:12,13 37:16 57:5 oh 33:14 57:16 okay 13:14 34:17 44:19 45:13 once 24:9,11 57:10 ones 20:8 onesentence 9:23 open 26:23 opinion 9:23 11:13 13:9 14:6 23:17 26:22 35:2 45:18 opinions 22:19 opportunity 9:12 14:19 25:14 opposite 3:18	<hr/> P <hr/> p 3:1 58:8 page 2:2 3:22 11:19,22 12:6,6 14:6 16:1 30:2 31:14 35:11 57:19 pages 8:3 paragraph 33:10 34:11 35:10 54:2,7,8 paragraphs 30:2 part 8:9 11:25 16:19,20 31:19 31:19 32:24 37:4 45:3,4 51:19 partially 28:2 participated 32:4 participating 31:25 particular 30:2 46:1 47:6,21 49:5 pass 31:21 passed 31:20

<p>32:1 passing 31:24 peculiar 51:7 people 34:2 performance 4:15 6:18 perils 4:8 period 36:25 person 17:5 22:11 34:3 personally 35:20 perspective 6:10 persuaded 16:3 16:6 petition 3:23 8:4 petitioner 1:4,16 1:19 2:4,8,14 3:7 17:17 53:11 phone 49:23 picked 49:23 pierson 10:4 30:1 31:3 32:11 54:3 piersons 31:14 35:11 pillow 32:2 pinholster 45:19 place 21:12 24:22 26:9 27:1 31:12 places 6:17 plate 57:25 play 57:6 played 29:22 55:18 plea 5:4 6:2,5,11 6:13 7:5,16,18 10:20 11:6 12:8 12:16 13:3 14:8 15:7,19 16:3,12 16:15,18 17:22 17:24 18:4,6,8 18:9,14,16,18 22:12,21 23:3 23:20 24:8,12 24:24 25:8,16</p>	<p>25:19,25 26:3 28:6 29:3,12,13 29:14 30:12 31:18,19,20 34:23 35:5,12 35:15,16 37:20 37:25 39:3,14 39:16,18,18 41:22 42:5 44:12 46:10 49:21 50:12,15 54:13,17,19 55:4,22 56:1 57:10 plead 18:10 30:18 32:17 33:15,17 34:4 34:22 pleading 11:1 pleadings 53:15 pleads 50:13 please 3:9 17:19 27:9 pled 46:5 50:14 point 7:15 16:8 24:8 26:12 33:5 38:6 40:20 43:22 48:8 49:3 55:3,7 57:17 pointed 15:2 20:9 20:11 47:22 49:5 54:15 points 17:20 46:2 53:13 54:2 police 54:21 polygraph 10:3 31:20,21,24 32:1 position 12:7 25:1 38:7 41:14 41:21 possibility 40:9 possible 38:7,13 57:15 post 56:8</p>	<p>postponement 4:20 potential 23:1 practicing 51:21 51:22 precedent 14:15 38:21 precisely 3:12 predicate 53:14 53:17 predicated 23:9 predictions 6:17 preface 30:19 prejudice 17:22 22:17 47:25 55:7 56:12 premise 16:10 38:22 prepared 5:1 present 22:13 32:4 presented 8:8 10:18 51:5,9 presumably 54:22 presume 4:10 presumed 53:23 presumption 3:11 8:6 10:19 11:20 14:22 53:24 presumptions 3:18 pretty 13:11,13 21:9 previous 10:10 29:3 previously 7:11 37:21 primary 17:20 principally 9:1 prior 27:21 40:15 49:23,24,25 prison 7:17 pro 40:8</p>	<p>problem 6:20 25:5 problems 25:6 49:16,16,17 procedural 8:12 procedure 9:12 proceed 45:15 process 39:25 proclaims 10:24 professed 27:12 professes 27:13 professing 55:23 proffer 9:20 10:3 15:4 16:20 52:5 52:6,16,17 proffered 9:25 promised 16:4 promote 50:7 prong 4:15 55:8 proof 4:12 6:22 15:21 53:19 proofs 8:8 10:18 11:23 propensity 56:2 proper 4:7 properly 11:6 15:4 proposition 7:4 prosecute 40:8 prosecution 39:6 39:24 40:4,6,14 40:24 prosecutions 43:2 prosecutor 5:11 24:9,14 27:23 28:18 37:20 38:2,18,25 39:3 40:3 41:1 54:20 prosecutors 41:11 prove 19:12 29:20 provided 27:14 provisions 45:7</p>	<p>publicized 50:5 pull 4:5 pursued 14:25 put 12:2 30:6 35:21 38:6 54:4 57:24 putting 29:19,24</p> <hr/> <p style="text-align: center;">Q</p> <p>quantum 53:19 quash 42:22 43:1 question 4:1,17 8:19 11:10 13:21 14:1,12 14:18 16:10 20:21 21:22 23:4 26:23 27:10 41:16,17 43:5 44:19 46:15 questions 17:11 24:19 45:22 quick 57:17 quid 40:8 quite 10:17 30:19 40:16 quo 40:9 quote 16:12 32:20</p> <hr/> <p style="text-align: center;">R</p> <p>r 1:20 2:10 3:1 27:6 raise 46:8 57:21 raised 46:2 51:1 raises 46:9 range 5:10,23 6:4 14:9 15:18 16:14,15 23:6 28:20 rarely 19:1 read 11:3,7,11 11:11,19,22 32:11,14,21 43:22,25 44:4,9</p>
---	---	---	--	--

<p>44:9 reading 19:5 34:11 reads 15:22 ready 28:5,7,9 28:10 reality 46:16 49:7 really 4:6 6:19 6:20 9:4,5 12:24 14:12 15:19 17:2 31:8 33:1 34:21 35:24 41:4,5 44:13 46:12 57:15 reason 9:3 13:9 13:11 14:17 34:10 35:3,6 42:8 43:16 44:8 50:11 52:19 55:25 56:25 57:23 reasonable 6:9 6:21 7:3 15:15 23:6 32:21 35:1 50:11 54:17 reasonably 23:14 reasoning 14:16 reasons 14:3 35:4 rebuttal 2:12 53:10 recall 5:22 10:20 51:10 received 22:13 receives 22:12 recitation 28:20 recognized 38:10 recommend 10:25 record 3:12,14 3:16,24 4:1,3 4:18 6:11,24</p>	<p>8:14 9:14 10:14 12:10 13:25 14:20,25 15:1 15:15,24 20:8 22:25 23:23 27:19,21,24 28:3,5,11,14 28:15,21 30:14 35:24 36:7,8,12 40:23 41:6 42:15,17 43:18 44:9 45:24,24 46:20,21 50:1,4 52:8,8,23,25 53:2,20 55:20 58:2 records 15:22 reduction 24:5 38:23 39:13 refer 29:25 32:18 reference 40:25 40:25 references 52:15 referring 39:4 refrain 10:25 reject 22:21 30:12 35:12,16 39:18 49:20 rejected 17:22 18:4,6,8,17 44:18 rejects 18:14 relevant 29:2 relied 10:8 49:2 relief 3:13 9:5,8 relies 19:6 20:18 50:17 relieves 11:15 rely 13:14 49:15 54:6 remain 24:22 remaining 53:9 remand 8:14 9:6 9:21,24 16:21 36:21 52:3,5,14</p>	<p>52:15 56:8 remarkable 17:2 remedies 25:12 remedy 24:18,21 26:4,16,17 38:6 39:5,7,9,12,22 40:1 remember 45:18 remind 51:14 remove 38:21 renegotiation 25:16 renew 24:14 38:2 38:18 renewal 38:1 reoffer 18:6,8,13 23:20 24:3,24 25:19 26:9 39:14 reoffered 23:24 25:8,25 reopening 45:15 represent 16:4 representations 42:15,16 represented 30:11 49:19 reprinted 53:23 require 18:5 19:22 23:20 26:8 46:16 47:3 required 6:23,24 9:19 18:9,12 24:24 25:11 52:3,5 requirement 46:3,13 55:17 requires 35:25 requiring 18:7 25:18 43:8 research 27:19 reserve 17:12 respect 33:20 43:23 54:1 respond 45:22</p>	<p>respondent 1:21 2:11 8:13,21 9:2 27:7 response 13:25 42:17 44:20 responsibility 11:16 responsible 36:2 52:25 rest 33:2 54:8 result 6:13 26:25 resulted 7:19 retained 37:16 retainer 50:6,17 retrieved 49:25 revert 18:16 review 4:4 reviewed 27:22 49:1 rid 34:23 right 7:8 14:24 16:18 21:15 22:15 24:17 26:4,4,7 29:7 32:14 33:24 37:7 39:6 42:19 44:6 45:4 50:7 55:10,11 rights 44:25 50:18 risk 6:15 22:23 risks 12:16 29:12 roberts 3:3 17:13 22:3,15 27:4 45:25 46:25 47:11,16 48:4 48:21 53:8 55:8 58:6 rubrics 54:14 rule 7:23 11:4 19:10,15,18 20:16 21:2,4,18 21:21 26:6 47:4 47:6 48:9 57:2 rules 9:18 21:5,6</p>	<p>46:22 47:7,8 50:10 52:4 run 3:18 48:9</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>s 2:1 3:1 12:22 satisfied 3:11 satisfy 4:12 8:9 saw 45:9 saying 4:22,25 4:25 7:17 10:6 17:1 20:4 21:16 21:23 23:24 25:9 26:2 33:6 33:13 35:14,16 36:3 41:6 42:3 42:12,14 44:1 46:12 48:6 56:16,20,22 says 3:22 5:1 8:7 9:24 10:11,23 11:4,5,23 12:23 17:2,4,7 19:21 20:25 26:23 27:18 33:16,19 54:9,11 55:13 56:16 scalia 29:16,24 40:2,19 scene 55:5 se 7:23 second 7:20 13:4 13:9,11 18:3 21:22 24:19 43:18 44:5,6 54:1 55:7 seconddegree 5:17 42:19,21 see 4:6 23:23 44:24 45:16 48:3 55:18 seen 39:2 44:11 49:2 57:19 selective 20:10 selectivity 20:14</p>
---	---	--	---	--

selfserving 20:22 21:10 46:5 55:21	40:10,14 41:10 41:13 56:8	55:12,13,19 57:9	53:21 56:17	48:2 49:2 57:12
sell 50:18	short 36:25 49:21	skepticism 17:25 20:24	standards 56:11	submit 10:10 16:22 36:10 40:4,6,14,15 52:4,5
sense 10:2 18:12 19:2,3 24:1,17 33:11 35:3 50:22	shouldnt 24:19 32:17 33:15,17 34:4,22 46:11 57:6	smothered 32:3 54:25	start 13:24	submitted 8:21 10:6 32:12 51:23 58:7,9
sentence 5:15 8:7 11:11,11,14 11:18,21 13:4 14:8 15:9 22:8 22:11,12 23:1,2 23:5,8,11 24:5 24:22 27:1 28:17 41:9,20 42:5 43:9 44:5 44:13	show 4:18 27:19 28:3,6,21 29:18 33:9 47:25	solicitor 1:15,17 46:2 47:23 57:5	state 4:4 13:17 14:2,23 15:1 25:2 31:1,2,4 32:25 52:9 58:3	substantive 52:17
sentences 11:18 11:21 23:6	side 29:20,25 39:10 54:2 56:16	somebody 25:15 32:19 33:1 34:5	stated 40:21	sufficiency 42:24 43:2,2
sentencing 3:25 5:3,3,5 6:3 14:9 16:19 17:1 18:7 22:20 23:19 26:10,15,24 27:2 28:13 41:21 47:24,25 50:15 56:7 57:3	signed 50:5	soon 28:6	statement 16:1 17:23 18:1,17 19:7,17 20:4,22 20:22 21:10 22:18 30:19 33:12 34:8 43:19,25 44:10 48:2 55:21	sufficient 8:21 8:25 17:24 56:12
sentences 11:18 11:21 23:6	significance 49:11	sophisticated 5:2 16:14 28:13	statements 33:2 56:7	suggests 20:16 33:11
sentencing 3:25 5:3,3,5 6:3 14:9 16:19 17:1 18:7 22:20 23:19 26:10,15,24 27:2 28:13 41:21 47:24,25 50:15 56:7 57:3	significant 7:14 12:4 15:11 29:15 49:15 50:20	sorry 10:7 17:4 31:13	states 1:1,12,19 2:7 15:3 17:16 17:21 31:6 49:13 51:22	sum 20:18 57:16 58:2
separate 45:7 51:1	silence 3:16 4:3 15:23,25 58:2	sort 10:22 25:6 39:19 41:4	stating 47:15 52:16	support 17:25 19:23 22:18 36:8 48:2 52:4 55:14
set 10:16 43:19 48:8	silent 3:12 15:25	sotolopez 49:13	step 29:15	supporting 1:19 2:8 17:17
sets 31:16	silentio 44:18	sotomayor 18:19 20:1,13,25 25:22 26:11,17 26:20 27:17 28:3,23 35:17 36:13 48:10 55:8 56:13,15 56:20,25	stepped 28:4	supports 36:9 53:2
setting 7:18	similar 40:22 42:15 49:14	sounds 16:6	stop 55:5	supposed 4:10 13:15,18 25:14 45:1
sevenyear 41:9	simple 11:15	sparse 35:24	story 19:2,2 50:8 50:16,18	supreme 1:1,12 45:2
shed 44:12,13	simply 19:7 23:21 26:8 36:11	speak 49:12,24	stories 19:3	sure 6:15
sheeps 41:4	situation 8:12 23:14 31:23 34:9 35:20 40:7	special 19:15 21:18,21	strange 40:3,6 40:13	sworn 30:7
shell 41:12	situations 21:11 38:11	specific 46:24	strickland 3:11 3:17 4:10,16 6:16 8:6 10:19 11:20 12:15 17:22 27:12 46:18,19 47:7 54:14 58:3	system 6:3 14:23
sheriff 33:11	sixth 3:13,16,21 15:21 18:4 19:21 21:2,3,23 25:6,17,18,24 37:18 39:5,8,9 39:13,20,23 46:11,15 47:1 47:12,18 48:21 49:1,3 53:5	specifically 11:23 51:8,11 52:15	strong 14:16	<hr/> T <hr/>
sheriffs 30:5 31:5,6,10,13 31:16 43:20		speed 4:21	strongly 35:5	t 2:1,1
sherry 1:3		spelled 45:17	sub 44:18	table 23:3 25:10
shes 15:13 37:11 37:12,13,16		spent 49:24	subjective 20:22	tabs 57:25
		split 23:14		take 12:22 16:5 16:24 21:8 22:8 37:3 39:23 44:6 52:23
		spoke 33:10,12 43:16		taken 30:9
		stage 37:3,10		
		stand 21:13		
		standard 21:4		

<p>takes 3:20 55:12 talk 27:22 32:19 33:2 talked 14:4 30:17 talking 5:24 41:1 51:24 54:20 55:24 talks 11:19 57:9 tell 11:9 24:14 34:6 telling 19:4 46:23 47:16 term 38:5 terms 46:22 48:10 50:3 tested 43:1 testified 16:2 30:4,5 testify 24:10,12 30:12 35:13 38:14 41:10 testimony 16:18 18:11,24 19:8 23:10,12,25 25:14 30:9 37:23 39:1 49:2 54:23 55:3 57:13 thank 3:8 17:13 27:3,4 53:7,8 53:12 58:5,6 thanks 17:5 thats 7:8,14 8:16 8:23 9:13 10:13 11:16 13:21 15:10 20:6,13 21:10 22:2 24:17 25:10,10 26:7,10,11 28:23 29:2,16 29:21,21 30:13 30:22,24,25 31:23 32:23 34:25 39:1</p>	<p>40:12,12 41:23 42:11 43:21 44:14,18 45:1 45:10,13 47:4 48:5 50:16 55:5 55:10 56:14 57:23 theres 3:19 5:6,7 6:15 15:19 18:21 24:12,12 24:21,21 27:13 28:19 35:24 36:23 38:11,12 39:8 43:5,7 47:23 57:15 theyre 8:25 23:24 45:17 thing 3:19 10:16 15:20 25:10 49:7 things 4:2 9:1 13:1 15:11 16:25 17:3 20:11 22:4 48:13 54:7 57:3 think 4:24 7:8,14 7:21 11:10,12 12:4 15:10 19:18 21:6 23:5 23:13,16,18 24:16,23 25:9 25:17 26:8,23 34:2 36:23 40:19 43:23 45:10 46:25 47:2,5,6,7,20 48:9 49:6 51:11 54:10 55:10 56:16 57:2 thinking 10:21 thinks 13:11 24:20 47:18 thought 22:5 42:12 43:7,10 43:15 47:11</p>	<p>three 7:6 threshold 47:10 time 6:11 15:13 17:12 20:14 28:5,7 36:25 44:1 48:11 54:19,22 56:9 timeline 49:21 times 22:25 titlow 1:6 3:4,24 4:7,8 6:22,24 7:1,16 8:8 9:16 10:5,7,20 12:5 12:11 16:18,21 17:1,7 30:4,10 30:14,16,17,18 31:5,20 32:3,16 32:16,21 35:14 42:10 53:16 54:9,24 55:2,22 55:22 titlows 4:12 12:7 15:3 16:1 toca 3:14,15,17 3:23 4:2,7,11 4:19,22 5:13 6:25,25 8:6 10:7,8 12:7,12 12:13 16:7,11 16:22 28:4,7,12 28:16,22 30:10 35:12 40:23 41:6 42:3 45:24 51:14 54:9,12 54:22 57:23 tocas 49:10,17 todo 18:21 told 16:4 31:7 33:17 34:25 36:4 55:4 top 51:9 totality 48:15,16 56:17 totally 12:15 21:13</p>	<p>tough 44:1 transcripts 36:18 trial 4:8 5:1,16 6:7,13 8:14 9:17 12:16 16:5 16:7 17:9 18:15 22:13,23 23:9 23:10,11,12,13 23:16,25 24:4 28:8,9,10 29:2 36:18 37:1,3,5 37:23 39:17,21 40:11 41:11,14 42:4 54:24 56:3 57:21 tried 24:11 44:12 triggered 34:6,7 34:8 triple 54:5 trouble 47:9 troubling 10:23 true 16:23 28:2 29:16 truth 17:8 19:4 truthfulness 56:2 trying 45:22 57:21 tuesday 1:9 turn 28:3 turned 31:3 32:7 turns 22:6 two 5:9 11:21 12:24 14:3,12 15:11 17:20 20:11 28:17</p>	<p>56:15 understood 22:24,25 undisturbed 25:4 unequal 39:10 unequivocally 31:11 unfair 43:8 united 1:1,12,18 2:7 17:16,20 49:13 51:22 unknown 34:10 unreasonable 10:20,25 32:11 52:20 unusual 34:9 upside 3:21 upside down 15:22 use 26:3 56:21 56:22</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:4 38:6,10 39:5,21 49:13 valerie 1:20 2:10 27:6 viewed 17:25 20:23 violate 45:2 violated 50:9 violation 14:15 18:4 25:19 26:21 39:8,9,13 39:23 violations 50:10 51:1,13 vonlee 1:6 31:4 31:20</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>want 6:12 8:1 13:24 18:16 19:12 20:15 32:18 35:15</p>
--	---	---	--	---

<p>57:17 wanted 7:5,13 13:5 38:25 56:1 warden 1:3 warranted 10:1 washington 1:8 1:18 wasnt 9:4 27:22 28:5 32:16 33:8 33:18 35:6 37:3 57:7,20 way 3:18 11:3,7 11:11 19:12 29:21,22 32:22 36:17 39:12,15 46:12 55:10 ways 40:22 57:11 weak 20:9 weapon 56:6 weird 40:16 weirdness 40:17 wellcounselled 7:4,12 wellknown 57:7 went 34:20,24 46:12 weve 14:4 52:9 whats 9:13 39:24 whos 48:11 william 31:2,14 35:10 williams 52:24 willing 10:10 win 16:5,7 wins 58:3 withdraw 7:13 12:8 14:8 16:3 35:15 54:12 56:1 withdrawal 5:4 13:2 16:12 55:4 withdrawing 7:18 29:12,13 35:4 50:12 withdrawn 6:11</p>	<p>12:17 18:18 28:6 29:4 54:19 withdrew 23:3 44:12 57:10 witness 21:9,9 21:12,16 witnesses 21:19 30:6 wonder 44:16 word 20:19 words 31:3 work 5:14 13:20 works 36:17 worse 6:15 worth 22:23 wouldnt 33:11 46:5 52:17 writes 13:8,8 wrong 20:6 22:2 30:23,24,25 33:7 37:19 42:8 43:25 47:1,2 48:22 53:14,22 wrote 43:18</p> <hr/> <p>X</p> <p>x 1:2,7</p> <hr/> <p>Y</p> <p>yeah 56:24 year 13:5 22:7 49:24 years 5:23 6:5,8 6:8 18:19 22:8 22:22 youll 42:5 youre 41:19 42:4 44:5 47:24 48:3 55:11 56:16,20 56:22 youve 5:6 6:3 16:24 56:7</p> <hr/> <p>Z</p> <hr/> <p>0</p>	<p>04 1:13 3:2 58:8</p> <hr/> <p>1</p> <p>1 9:19 14:21 53:22 100 8:4 100a 12:6 14:6 101a 8:4 11:19 102a 11:22 11 1:13 3:2 12 40:11 58:8 12414 1:4 3:4 15 5:23 6:5 22:22 17 2:8 19a 3:22</p> <hr/> <p>2</p> <p>2 6:8 9:19 14:21 20 5:23 22:8,23 24:22 2013 1:9 211 9:19 2254 14:13,21 45:6 53:22 27 2:11 295 16:1 298 30:2 31:14 35:11</p> <hr/> <p>3</p> <p>3 2:4 302 57:24 317 57:24</p> <hr/> <p>4</p> <p>40year 24:22</p> <hr/> <p>5</p> <p>5 6:8 53 2:14 56 36:17 56day 36:19</p> <hr/> <p>6</p> <p>6 30:2 33:10 34:11</p>	<p>60 57:19</p> <hr/> <p>7</p> <p>7 6:5 9:19 30:3</p> <hr/> <p>8</p> <p>8 1:9 30:3 35:10 54:2,8</p> <hr/> <p>9</p>
--	---	--	---