

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

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - x

MARK A BRISCOE AND SHELDON A. :

CYPRESS, :

Petitioners :

v. : No. 07-11191

VIRGINIA :

- - - - - x

Washington, D.C.

Monday, January 11, 2010

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

APPEARANCES:

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

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

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

C O N T E N T S	
	PAGE
1	
2	ORAL ARGUMENT OF
3	RICHARD D. FRIEDMAN, ESQ.
4	On behalf of the Petitioners
5	STEPHEN R. McCOLLOUGH, ESQ.
6	On behalf of Respondent
7	LEONDRA R. KRUGER, ESQ.
8	On behalf of the Respondent
9	REBUTTAL ARGUMENT OF
10	RICHARD D. FRIEDMAN, ESQ.
11	On behalf of the Petitioner
12	
13	
14	
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  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

(11:40 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 07-11191, *Briscoe v. Virginia*.  
Mr. Friedman.

ORAL ARGUMENT OF RICHARD D. FRIEDMAN  
ON BEHALF OF THE PETITIONERS

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

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

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

MR. FRIEDMAN: Your Honor, the -- the State courts, since the time of this case, since the time that

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

7 JUSTICE SOTOMAYOR: Well, how is that  
8 different from a notice statute?

9 MR. FRIEDMAN: Okay.

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

12 MR. FRIEDMAN: Right.

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

19 MR. FRIEDMAN: That --

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

22 MR. FRIEDMAN: Okay, fine, fine. The -- the  
23 two aspects that Melendez-Diaz said were wrong with the  
24 subpoena statute are both present in this statute even  
25 as interpreted by the -- by the State supreme court.

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

7 JUSTICE SOTOMAYOR: So that's our first  
8 question: Does the Confrontation Clause require, not  
9 just the ability to cross-examine --

10 MR. FRIEDMAN: That's right.

11 JUSTICE SOTOMAYOR: -- but an affirmative  
12 obligation to place the witness on the stand.

13 MR. FRIEDMAN: That's correct. That's  
14 correct.

15 JUSTICE SOTOMAYOR: Could I just ask you --

16 MR. FRIEDMAN: Yes. Sure.

17 JUSTICE SOTOMAYOR: Would swearing the  
18 witness in and saying to the witness "Is this your  
19 report" and the witness saying "Yes," what would be  
20 unconstitutional about that, given our case law that  
21 says that any prior statements by a witness are  
22 admissible once the witness is on the stand or  
23 constitutionally admissible once they are on the stand?

24 MR. FRIEDMAN: Right. Right. The cases  
25 involve that were California v. Green and United

1 States v. Owens. In both cases, there were questions  
2 asked of the witness about what happened. So I do  
3 believe -- though it hasn't been resolved in this Court,  
4 I do believe that the prosecution should go beyond  
5 simply saying, "Is this" --

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

8 MR. FRIEDMAN: No. I mean, I think the  
9 Constitution -- I think constitutionally, the -- the  
10 prosecution would be compelled at least to ask, "What is  
11 your recollection? Do you endorse this statement?" But  
12 even if that's not true --

13 JUSTICE SOTOMAYOR: Do you have anything  
14 historically or in any case that would suggest that that  
15 is a constitutional requirement? I mean, I do accept  
16 that there is plenty that says you have a right to be --  
17 to confront the witness.

18 MR. FRIEDMAN: Right. Right.

19 JUSTICE SOTOMAYOR: But what would require  
20 the prosecutor to actually do more than I just  
21 suggested? "Is this your statement? Is this your lab  
22 report?"

23 MR. FRIEDMAN: Your Honor, so far as I can  
24 tell, it's hardly ever been tried, for the obvious  
25 reason that if all the prosecution does is say, "Is this

1 it," and not ask a further question of the witness --

2 JUSTICE SOTOMAYOR: It's not terribly  
3 persuasive. I don't disagree with you as a matter of  
4 trial tactics, but I'm not talking about trial tactics.

5 MR. FRIEDMAN: Yes. Right. But it's  
6 something that prosecutors don't try because they would  
7 have to bear the -- the risk. So part of my response  
8 is: Well, let them go ahead and try it if they want to.

9 JUSTICE SCALIA: Bear what risk?

10 MR. FRIEDMAN: I'm sorry?

11 JUSTICE SCALIA: Bear what risk? What risk?  
12 Bear what risk?

13 MR. FRIEDMAN: Bear -- bear the risk that  
14 the -- that the witness has gotten on the stand and is  
15 not even asked to recall. Bear the cost of putting a  
16 witness on with no recollection.

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

19 MR. FRIEDMAN: The "Do you stand by it?,"  
20 that's the critical point. That's going beyond the  
21 hypothetical, as I understood it from Justice Sotomayor.

22 JUSTICE SCALIA: Oh, I see. So -- okay. I  
23 understood the hypothetical to be -- to be otherwise,  
24 then.

25 MR. FRIEDMAN: But -- no, no. If it's "And

1 do you stand by it," then that's fine.

2 But I do know of a couple of cases involving  
3 child witnesses where they don't ask -- they put the  
4 witness on the stand and they don't ask anything about  
5 the events at issue. And in those cases courts have  
6 held that that's not acceptable.

7 JUSTICE SOTOMAYOR: Well, but so what --  
8 that's because there is nothing in evidence about the  
9 incident, correct?

10 MR. FRIEDMAN: Well, no. No, then they  
11 presented a former statement by the child. So I do  
12 think that there is some justification --

13 JUSTICE SOTOMAYOR: And that was a -- those  
14 were found -- I don't -- were those found as violations  
15 of the Confrontation Clause?

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

18 JUSTICE SOTOMAYOR: Or due process?

19 MR. FRIEDMAN: Confrontation Clause. State  
20 v. Rohrich, which is cited in my brief on another point;  
21 and Warren, - an Illinois appellate case from I think,  
22 just last --

23 JUSTICE ALITO: It's not clear to me what  
24 your answer to these questions is. If all the  
25 prosecution does is call the analyst on the stand and



1 admit -- have the analyst provide a foundation for the  
2 admission of the report, let's say, pursuant to the  
3 hearsay exception for recorded recollection, and does  
4 nothing more, would there be a Confrontation Clause  
5 problem?

6 MR. FRIEDMAN: And there is -- there is the  
7 question, is this your report, do you stand by it? Then  
8 -- then I don't think there is a Confrontation Clause  
9 problem, because -- because the prosecution has put the  
10 witness on the stand, has asked those questions and then  
11 the witness -- and --

12 JUSTICE ALITO: What's the difference  
13 between that situation and the situation in which the  
14 report is -- is admitted, subject to -- and the analyst  
15 is available, and the defense can question the analyst  
16 if the defense wishes to?

17 MR. FRIEDMAN: Well, I think -- I think the  
18 difference is that once you ask the question, do you  
19 stand by it, then the witness has testified one way or  
20 another. And the prosecution, as I say, bears the risk  
21 that the witness will not testify in accordance with the  
22 prior statement. California --

23 JUSTICE SOTOMAYOR: On the past recollection  
24 recorded, the witness doesn't stand by the statement.  
25 The witness says: I made the statement, but I have no

1 current knowledge; I can't stand by it or not stand by  
2 it.

3 MR. FRIEDMAN: That's right. I take  
4 California v. Green at its word. California v. Green  
5 says -- and Owen follows up -- and says that if the  
6 witness does not testify in accordance with the prior  
7 statement, then the defendant has had some of the -- has  
8 had considerable benefit of the cross-examination  
9 already. So -- so the prosecution has to -- has to put  
10 the witness through that pace to make sure that that  
11 happens. Beyond that --

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

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

24 JUSTICE SOTOMAYOR: You are asking us now to  
25 state something that you admit is in really no

1 constitutional case or historical case, that says the  
2 right to confrontation means that the witness has to  
3 tell the story, and the form of telling that story has  
4 to be a verbal recitation; it can't be past recorded  
5 recollection because you just said they have to tell the  
6 story. It can't be based on official documents or  
7 anything else, because it has to be their story. Am I  
8 hearing you wrong?

9 MR. FRIEDMAN: No, I don't believe so. I'm  
10 saying that the -- that the witness has to take the  
11 stand, has to -- has to testify live, viva voce,  
12 face-to-face, in the time-honored phrases which have  
13 always governed testimony in an Anglo-American trial.  
14 Then the -- I think the witness has to at least be asked  
15 what happened. If the witness says, I don't recall,  
16 then the prior statement may be introduced. I am not --  
17 I am not asking the Court to go beyond anything that has  
18 previously been said.

19 JUSTICE BREYER: What is the -- what is the  
20 theory of this? I understand in hearsay, which as we  
21 have just seen demonstrated, is very complicated, filled  
22 with all kinds of rules.

23 MR. FRIEDMAN: Right.

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

1 (Laughter.)

2 MR. FRIEDMAN: Right.

3 JUSTICE BREYER: But the -- the  
4 Confrontation Clause I would have thought would have  
5 picked out the heart of that. So we have Sir Walter  
6 Raleigh and sir Walter Raleigh says: "Bring in  
7 witnesses," which they wouldn't. So why shouldn't we  
8 say what this clause is about is Sir Walter Raleigh?

9 MR. FRIEDMAN: Well --

10 JUSTICE BREYER: Bring in the witnesses.  
11 Now, once you bring them in, the defendant can do what  
12 he wants. He has had his chance to cross-examine them.  
13 End of the matter, and leave the rest up to the hearsay  
14 law?

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

23 So -- so it's -- it's the fundamental  
24 question that -- that Crawford establishes, fundamental  
25 principle that Crawford establishes, is this is the way

1 witnesses testify in our trials: live, in front of the  
2 jury, subject to oath and then cross-exam.

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

6 MR. FRIEDMAN: Right.

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

15 MR. FRIEDMAN: I --

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

21 MR. FRIEDMAN: Right. Yes.

22 JUSTICE SOTOMAYOR: Which was --

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

1 reason to -- to put the witness on first. The problem  
2 is that the -- the defunct Virginia statute puts the  
3 burden on the defendant of bringing the witness in, and  
4 the defense --

5 JUSTICE SOTOMAYOR: I was starting from a  
6 different proposition than you did.

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

8 JUSTICE SOTOMAYOR: I think that is a  
9 question for your adversaries: How would you have  
10 known --

11 MR. FRIEDMAN: Right.

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

14 But putting that aside --

15 MR. FRIEDMAN: But --

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

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

1 actually just testified.

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

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

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

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

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

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

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

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

19 MR. FRIEDMAN: Yes, I under --

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



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

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

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

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

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

1 impairment to the confrontation right and makes it  
2 harder for defendants.

3 It makes -- it makes it less likely that the  
4 confrontation right is going to -- is going to be  
5 invoked. Let's look at the District of Columbia. The  
6 District of Columbia, it's about -- it's about a half a  
7 person a year in extra expense caused by lab techs  
8 having to come and testify.

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

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

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

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

5 MR. FRIEDMAN: Right.

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

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

14 What happens?

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

17 JUSTICE BREYER: I'm trying to think of  
18 something that is hearsay, and what I'm trying to figure  
19 out is --

20 MR. FRIEDMAN: Yes.

21 JUSTICE BREYER: -- will defense attorneys,  
22 if they have the right under the Constitution to insist  
23 that a lab technician be present, in cases where they  
24 happen to know that lab technician's left the job and is  
25 married and is living in a different State, and say,

1 okay, let's call her, and that way the prosecution  
2 really cannot present the case except at inordinate  
3 expense.

4 And I'm concerned about that, but I don't  
5 see quite how to deal with it, how much of a problem it  
6 is, and the impact on this particular situation.

7 MR. FRIEDMAN: I don't think it's a  
8 significant problem, and I do want to say -- I didn't --  
9 I didn't select data. I just got -- presented the data  
10 on the States that I had, and my own State --

11 JUSTICE SCALIA: Mr. Friedman, aren't there  
12 states that have been proceeding this way even before we  
13 came down with our opinion?

14 MR. FRIEDMAN: Absolutely, absolutely,  
15 including --

16 JUSTICE SCALIA: And which States are they?

17 MR. FRIEDMAN: They -- well, they include my  
18 own State of Michigan, they include the State of New  
19 York --

20 JUSTICE SCALIA: And they are not under  
21 water, are they?

22 MR. FRIEDMAN: The problems of the State of  
23 Michigan are not attributable to the use of this  
24 procedure, no.

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: Your answer to  
2 Justice Breyer has to be, of course, you would insist  
3 that the person be called. It would be malpractice for  
4 you not to.

5 MR. FRIEDMAN: It -- it is -- yes, but it's  
6 not a significant problem, and one reason it is not a  
7 significant problem is that the possibility of a  
8 deposition is always --

9 JUSTICE BREYER: I don't know except  
10 anecdotally, but Massachusetts seems to be having huge  
11 problems, reported anecdotally, with the --

12 MR. FRIEDMAN: Not according to -- not  
13 according to the chief of -- chief trial counsel,  
14 Suffolk -- the Suffolk district attorney's office --

15 JUSTICE BREYER: Rouse?

16 MR. FRIEDMAN: Excuse me?

17 JUSTICE BREYER: The woman, Barbara --  
18 Barbara Rouse?

19 MR. FRIEDMAN: In my reply brief on page 27,  
20 I quote Patrick Hagan, who says -- who says: "The sky  
21 has not fallen; we can do this very well."

22 JUSTICE BREYER: And there are conflicting  
23 reports in the newspapers, but I don't know.

24 MR. FRIEDMAN: It's -- and, of course, there  
25 can be an adjustment period, but -- but States can

1 adjust. I think the -- the simplest answer to your  
2 question, Justice Breyer, is the use of depositions, and  
3 I think prosecutors probably have been underusing  
4 depositions. But -- but if a lab tech is about to  
5 retire and that lab tech has done a test that is about  
6 to be used, then take the deposition.

7 JUSTICE BREYER: What happens if the lab  
8 is -- is divided into four or five parts and there is  
9 several different machines and we have different people  
10 at different times using these different machines and  
11 performing different operations and each at the end,  
12 certifies that the red light was on or it was this or it  
13 was that. Now, do we have to call all those people?

14 MR. FRIEDMAN: No, I don't believe you have  
15 to call all those people. I do believe that --

16 JUSTICE BREYER: Why not? Each of them --  
17 each of them looked at a special part. Each of them  
18 said that it was this or that, and in respect to each of  
19 those statements, it was this or that. That is hearsay.

20 MR. FRIEDMAN: Right. The problem, of  
21 course, isn't hearsay. The problem is -- the only  
22 question is --

23 JUSTICE BREYER: No, no, it's no  
24 confrontation because in this instance the hearsay  
25 prevents the confrontation.

1 MR. FRIEDMAN: Right. The -- the  
2 prosecution has to present the testimony of witnesses.  
3 It has to present the testimony live. Depending on how  
4 the lab is organized -- usually, labs can organize so  
5 that only one person needs to -- needs to present.

6 In any event, of course, the State is  
7 acknowledging that, if the defendant brings -- demands,  
8 they have to bring in the witnesses, and that is not --

9 JUSTICE BREYER: But your answer to my  
10 question is, if a laboratory is so organized so that six  
11 or seven people perform different steps of the  
12 operation, if it is organized in that way, all of them  
13 must be brought?

14 MR. FRIEDMAN: I -- I don't believe so. I  
15 believe --

16 JUSTICE BREYER: You don't believe so, but  
17 you gave me an answer saying they did have to, but you  
18 said they could organize differently. So now explain to  
19 me why they don't.

20 MR. FRIEDMAN: But even if -- even if they  
21 are organized in that way, for instance if one person  
22 observes all the -- all the procedures, that is  
23 sufficient. Apart from that, as Melendez-Diaz  
24 indicates, it's up to the -- it's up to the State to  
25 decide what the evidence they are going to present is.

1 JUSTICE KENNEDY: Suppose one person doesn't  
2 observe all the procedures. One person prepares the  
3 sample, another person puts it on the paper, another  
4 person reads the machine, another person calibrates the  
5 machine.

6 MR. FRIEDMAN: Yes. Right. Well, I think  
7 Melendez-Diaz indicates that it is up to the State to  
8 determine what the -- the evidence that is going to be  
9 presented, and there may be gaps. I do want to  
10 emphasize that this is an issue --

11 JUSTICE KENNEDY: No, no, no. The evidence  
12 is presented, and the test comes out so -- positive, so  
13 that the gun fires or that it's a drug or that it's a  
14 DNA sample. Can the conclusion be presented by one  
15 witness from the lab, when that witness did not observe  
16 all of the procedures?

17 MR. FRIEDMAN: I think -- I think that there  
18 probably has to be a witness who has observed the  
19 procedures. If I am -- and that's an issue that will be  
20 presented to the Court, we can be pretty certain. I  
21 think that issue is entirely orthogonal to the issue  
22 here because the Commonwealth is acknowledging --

23 CHIEF JUSTICE ROBERTS: I'm sorry. Entirely  
24 what?

25 MR. FRIEDMAN: Orthogonal. Right angle.



1 Unrelated. Irrelevant.

2 CHIEF JUSTICE ROBERTS: Oh.

3 JUSTICE SCALIA: What was that adjective? I  
4 liked that.

5 MR. FRIEDMAN: Orthogonal.

6 CHIEF JUSTICE ROBERTS: Orthogonal.

7 MR. FRIEDMAN: Right, right.

8 JUSTICE SCALIA: Orthogonal, ooh.

9 (Laughter.)

10 JUSTICE KENNEDY: I knew this case presented  
11 us a problem.

12 (Laughter.)

13 MR. FRIEDMAN: I should have -- I probably  
14 should have said --

15 JUSTICE SCALIA: I think we should use that  
16 in the opinion.

17 (Laughter.)

18 MR. FRIEDMAN: I thought -- I thought I had  
19 seen it before.

20 JUSTICE SCALIA: Or the dissent.

21 (Laughter.)

22 MR. FRIEDMAN: That is a bit of  
23 professorship creeping in, I suppose.

24 But the Commonwealth is acknowledging that  
25 they have to bring in witnesses if they -- if the

1 defense demands, so this is another issue as to who  
2 are -- who are the witnesses.

3 JUSTICE GINSBURG: But, in your view it  
4 wouldn't satisfy the Confrontation Clause if, say, the  
5 supervisor shows up and said, this is way -- this is the  
6 way the analysts operate, and describes the procedures.

7 MR. FRIEDMAN: In my view it wouldn't, but  
8 if I'm wrong, it doesn't change this case whatsoever.  
9 It does not change this case whatsoever. It has nothing  
10 to do with the issue here. The issue here is -- is the  
11 witnesses who are going to testify and how much they --  
12 they testify, and I want to --

13 JUSTICE BREYER: Well, the reason that I ask  
14 is because floating in the back of my mind is, A, does  
15 the Confrontation Clause apply?

16 MR. FRIEDMAN: Right.

17 JUSTICE BREYER: And if the answer to A is  
18 yes, then are there different kinds of implementation  
19 rules in different areas where there are other signs of  
20 security, where there are other reasons for thinking  
21 it's not bad testimony? That line is not something that  
22 is necessarily workable, and -- but I brought it up to  
23 try to think about it.

24 MR. FRIEDMAN: Yes. I think -- I think it's  
25 an interesting question, and question 3 in the evidence

1 exam that I am just grading, in fact. But I think that  
2 an issue that the Court will have to resolve.

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

6 What I think is important to recognize is  
7 how fundamental a transformation in the Anglo-American  
8 trial is threatened if -- if the Court were to hold that  
9 the prosecution can present an affidavit and leave it to  
10 the defendant, if he dares, to put the witness on the  
11 stand.

12 JUSTICE ALITO: Well, does that square with  
13 where we started out? We have situation A, where the  
14 prosecutor calls the lab analyst, and the lab analyst  
15 says, this is my report, and I stand by it, period.  
16 Now, it's up to the defense to cross-examine. That's  
17 situation A.

18 Situation B is the report is admitted  
19 without the analyst present, but the defense can then --  
20 without the analyst on the stand --

21 MR. FRIEDMAN: Right.

22 JUSTICE ALITO: But the defense can then  
23 cross-examine the analyst.

24 MR. FRIEDMAN: I wouldn't call that  
25 cross-exam --

1                   JUSTICE ALITO:  Such a slight difference  
2  between those two situation.  Now, how is that a  
3  fundamental transformation of the way Anglo-American  
4  trials are conducted?

5                   MR. FRIEDMAN:  It's fundamental  
6  transformation because the prosecution can present a  
7  stack of affidavits, and they wouldn't even have to be  
8  affidavits.  They could just be signed -- they could  
9  just be statements.  It could present videotapes.  It  
10 could present audio tapes.  It could craft those and  
11 rehearse those behind the scene.  It could present those  
12 to the trial --

13                   JUSTICE ALITO:  No.  Let's just not get  
14 beyond the facts of this case -- we're all -- all that  
15 we are dealing with is an analyst's report relating to  
16 the -- the nature of the substance that was tested and,  
17 if it's a controlled substance, the amount.  That's it.  
18 It doesn't extend to anything else, videotapes or  
19 anything more.  There is such a slight difference  
20 between those two situations.

21                   MR. FRIEDMAN:  I think there is an enormous  
22 difference in -- in impact.  It's an enormous impact, as  
23 I've emphasized in my brief, because of the impairment  
24 of the ability to examine.

25                   I don't believe it's cross-examination.  In

1 practice, it is as if the defendant said, "I don't want  
2 to cross-examine," but I still insist that the witness  
3 get up on the stand and let's see what the witness can  
4 do. And the Commonwealth makes no attempt to  
5 distinguish between these witnesses and other witnesses  
6 for what is -- what is satisfactory confrontation. It  
7 says: This is good confrontation. He could do it with  
8 all witnesses.

9 If the Court pleases, I will reserve the  
10 balance of my time.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 Mr. Friedman.

13 MR. FRIEDMAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Mr. McCullough.

15 ORAL ARGUMENT OF STEPHEN R. McCULLOUGH

16 ON BEHALF OF THE RESPONDENT

17 MR. McCULLOUGH: Mr. Chief Justice, and may  
18 it please the Court:

19 I think an appropriate place to start would  
20 be how the Supreme Court of Virginia construed the  
21 statute and get past that and into the confrontation  
22 issue.

23 The first thing I would note there is that  
24 the Petitioners simply have not challenged the decision  
25 -- the interpretation of the Supreme Court of Virginia

1 that it placed on the statute. So I think, to the  
2 extent that they are now, for the first time, in their  
3 reply brief trying to raise a separate due process issue  
4 that the construction of the court was so unreasonable  
5 that it violates due process, it's far too late in the  
6 day to do that. So I think the Court --

7 JUSTICE SOTOMAYOR: It goes -- that goes to  
8 the waiver question.

9 MR. McCULLOUGH: Right.

10 JUSTICE SOTOMAYOR: How did they know at  
11 trial that they were supposed to say to you: I don't  
12 want a subpoena; you bring them in?

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

24 In a criminal trial at the time these  
25 Petitioners were being tried, there were two parties

1 that have authority to issue summons. One was the clerk  
2 of court; that is, a defendant would go to the court and  
3 say: These are my witnesses; have them produced for  
4 trial on this date. And the other was the Commonwealth.  
5 So the statute simply doesn't say it has to be the  
6 Commonwealth, it has to be the defendant. It's silent.  
7 The Supreme Court of Virginia has a long history of  
8 construing statutes in a way that obviates a  
9 constitutional problem.

10 JUSTICE SOTOMAYOR: But you're -- you're  
11 still begging the question. How -- they did what any  
12 reasonable defendant would do and say, "I object to the  
13 admission of this lab report. I have a right under the  
14 Confrontation Clause to have the -- the lab technician  
15 here." And the Commonwealth court said, "No, you  
16 don't." And so did the court on appeal.

17 How did they know that this was a notice and  
18 demand statute as opposed to a subpoena statute?

19 MR. McCULLOUGH: I think it was incumbent on  
20 counsel to raise the issue exactly like counsel for the  
21 defendant did in the Grant case. And I think it's  
22 noteworthy that in the Grant case the motion was filed  
23 well in advance of trial, on November 2nd, 2007, before  
24 the Supreme Court of Virginia ever construed the statute  
25 in this fashion. And so the fact that a statute may be

1 susceptible to more than one interpretation doesn't  
2 obviate the need for counsel to take the steps that are  
3 necessary to protect the right.

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

13 What rule would we announce in this case  
14 that would avoid -- what constitutional construction of  
15 the Confrontation Clause would we issue that would  
16 protect against that?

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

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

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



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

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

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

19           JUSTICE SCALIA: So just one or two. Just  
20 one or two affidavits. Or it -- the Court has a rule  
21 you have to provide those affidavits several weeks  
22 before trial. That would be okay? We'd have a whole  
23 European-type trial, right? We trial by affidavit.

24           MR. McCULLOUGH: Right. I don't think the  
25 Confrontation Clause, in terms of what it's historically

1 intended to protect, blocks that scenario.

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

10 JUSTICE SCALIA: It does more than that. It  
11 does more than that. It is the prosecution that has had  
12 to place the witness on the stand. It has not been up  
13 to the defense to say, "Oh, no, I object to this  
14 affidavit. I would like you to bring" -- no. The  
15 prosecution has to bring in the witness. That has been  
16 what the Confrontation Clause has meant.

17 MR. McCULLOUGH: We agree that we have to  
18 produce the witness for court, but we see little --

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

22 MR. McCULLOUGH: Well, we agree that if the  
23 defendant does provide the notice, as with the notice on  
24 demand statute, that it's -- that it is our burden to  
25 make sure that witness is there. And if -- as the

1 statute provides, the witness has to be summoned and  
2 appear.

3 So this statute has always been strictly  
4 construed against the prosecution. If it fails to do  
5 exactly what the statute requires, that cuts against the  
6 prosecution. So the witness does have to appear.

7 JUSTICE SCALIA: How is that clear from the  
8 statute?

9 MR. McCULLOUGH: I'm sorry?

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

13 MR. McCULLOUGH: Right. And it -- the fact  
14 that the prosecution -- excuse me, that the statute is  
15 interpreted strictly against the prosecution comes from  
16 several decades of jurisprudence from the Supreme Court  
17 of Virginia, and we cite those cases on page 1 our  
18 brief.

19 JUSTICE SCALIA: Strict construction of  
20 statutes in general, or strict construction of this  
21 provision?

22 MR. McCULLOUGH: This particular -- this  
23 particular statutory scheme. For example, if the --  
24 19.2-187, the statute that precedes this, says it has to  
25 be filed seven days before the trial. And if it's filed

1 six days, forget it, you have to bring in a live  
2 witness.

3 JUSTICE SCALIA: I'm talking about the  
4 specific issue of the person subpoenaed not appearing.  
5 Do you have a case?

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

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

8 MR. McCULLOUGH: -- but I think the answer  
9 follows inexorably --

10 JUSTICE SCALIA: I don't know how strict  
11 construction gets you to the result that when it is the  
12 defendant who has to take the initiative to get the  
13 person brought in, if the person doesn't show up,  
14 it's -- it doesn't fall on the defendant, it falls on  
15 the prosecution. I don't see how strict construction  
16 gets you that.

17 MR. McCULLOUGH: The -- the Grant case, for  
18 example, which our Court of Appeals of Virginia said was  
19 simply was an application of the holding in the Magruder  
20 decision. There the defendant did -- well in advance of  
21 trial sent notice to the Commonwealth and said I want  
22 the witness there. The Commonwealth didn't get the  
23 subpoena out. So that was the first part of that,  
24 "shall be summoned." And the court of appeals said you  
25 should never have allowed this in, without the live

1 witness being present.

2           And so what -- although Grant didn't address  
3 the appear part, the same answer is true, that is, the  
4 defendant says, "I want the witness there," the  
5 Commonwealth issues a summons but the witness doesn't  
6 appear. It's the same result.

7           JUSTICE BREYER: I think that underlying  
8 this is a fairly simple problem, conceptually. Imagine  
9 we have Sir Walter Raleigh at trial, and there is an  
10 affidavit for missing witness A and witness B and  
11 witness C, and they are over in a room somewhere whether  
12 they were treated badly or not, and they have written  
13 these pieces of paper. In they come.

14           And Walter Raleigh says: "Bring me the  
15 witness." Now suppose they had trotted him out, and he  
16 cross-examined him. Still, those pieces of paper came  
17 in, and they weren't cross-examined. And so what do we  
18 do about that? They weren't cross-examined, and how did  
19 they get in here?

20           MR. McCULLOUGH: I think your question goes  
21 to the very heart of why we have the Confrontation  
22 Clause. It wasn't because of this formalistic order of  
23 proof that our modern trials have. And one thing that  
24 makes this case conceptually difficult is we are so  
25 accustomed to this clean order of presentation -- that

1 that's how we have all tried our cases, that's how we  
2 are used to seeing them, but that's not the heart of the  
3 Confrontation Clause.

4 The Confrontation Clause is because, for  
5 example, the colonists were subject to anonymous --

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

8 MR. McCULLOUGH: It does. But --

9 JUSTICE BREYER: And so why then by analogy  
10 isn't the statute bad?

11 MR. McCULLOUGH: Well, because --

12 JUSTICE BREYER: Unless you -- unless you  
13 have some special kind -- you have to some specially --  
14 specially reliable evidence that sort of fell within the  
15 Confrontation Clause but not totally, and that's what I  
16 -- the more I think about that, the harder that one is  
17 to set up. So --

18 MR. McCULLOUGH: There are characteristics,  
19 of course, to this particular type of evidence that were  
20 debated in this Court's Melendez-Diaz opinion that make  
21 this procedure certainly more appropriate, and one of  
22 those is, these -- functionally what you are doing when  
23 you have the witness on the stand is either past  
24 recollection recorded, or past recollection refreshed,  
25 because they are doing approximately 900 of these

1 certificates a year. They are largely fungible things  
2 like -- like crack cocaine or powdered cocaine. And so  
3 we're miles from the type of scenario where --

4 JUSTICE BREYER: Well, to put my chips on  
5 the table, which you probably understand, I thought the  
6 reliability of this evidence in the mine run of cases  
7 was such, and the distance from Sir Walter Raleigh was  
8 sufficiently great, that it fell outside the scope of  
9 the Confrontation Clause for those two reasons; but mine  
10 was a dissenting opinion.

11 MR. McCULLOUGH: Right. I --

12 JUSTICE BREYER: So therefore, what do I do?

13 (Laughter.)

14 MR. McCULLOUGH: Well, I think, though, even  
15 -- even going back to the very heart -- the historical  
16 heart of this clause, the problems for these colonists  
17 was anonymous accusers and absentee witnesses. That's  
18 -- that's why -- they were enraged because of this  
19 deeply unfair trial procedure. It wasn't because, for  
20 example, a harbor master might be called in, and records  
21 of what ships came in for these colonists who were in  
22 the vice admiralty courts, and some paper is introduced  
23 about what ships came in, and then they get an  
24 opportunity to cross-examine them before the prosecution  
25 had asked any questions of the -- the harbor master.

1                   That's not the problem, that the  
2 Confrontation -- Confrontation Clause --

3                   JUSTICE SCALIA: The problem you described,  
4 the hearsay rule would have solved that alone, wouldn't  
5 it?

6                   MR. McCULLOUGH: Well, that's one of the  
7 practical --

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

10                  MR. McCULLOUGH: Well, the Confrontation  
11 Clause is designed to ensure -- the core of it -- and we  
12 agree with this -- is what this Court has said for a  
13 long time, a face-to-face encounter with a witness who  
14 is cross-examined face to face, under oath.

15                  JUSTICE GINSBURG: But it doesn't have to  
16 happen in the prosecutor's case. In other words, the  
17 prosecutor puts in the reports and rests. And the  
18 defendant says, there wasn't sufficient evidence, I move  
19 to dismiss the case. It couldn't be dismissed at that  
20 point. The prosecutor would prove its case by the  
21 affidavit alone.

22                  MR. McCULLOUGH: Right. But first -- a  
23 couple points in response.

24                  First of all, the statute doesn't say at  
25 what point the defendant gets to treat this witness as



1 an adverse witness. It just says the report comes in,  
2 and then the defendant can call the witness as an  
3 adverse witness. And the Supreme Court of Virginia  
4 deliberately left the question of the order of proof  
5 unresolved, because it viewed those things as a due  
6 process issue. So I don't think it's axiomatic under  
7 the statute, although it's possible, that the defendant  
8 would conduct a cross-examination during his case.

9 But -- but beyond that, the Confrontation  
10 Clause isn't designed to constitutionalize Federal Rule  
11 of Criminal Procedure 29 -- motion to strike. The  
12 defendant could still -- in Virginia procedure, it's a  
13 motion to strike. The defendant could still make that  
14 motion at the close of all the evidence.

15 JUSTICE SCALIA: And it's still not clear --  
16 not clear under the statute that if the witness doesn't  
17 show up, it's the prosecution that bears the burden.

18 MR. McCULLOUGH: No, I think that is very  
19 clear.

20 JUSTICE SCALIA: How is that clear?

21 MR. McCULLOUGH: Under both the plain  
22 language of the statute and the way it has been  
23 construed adversely to the Commonwealth. The plain  
24 language of the statute is the witness shall be summoned  
25 and appear. So there is a requirement of appearance,

1 and if the defendant asks the prosecutor to summon the  
2 witness, the witness then has to appear. And going --  
3 and we cite some of these cases, again on page 1 of our  
4 brief.

5 JUSTICE SCALIA: It doesn't say what the  
6 consequence of his not appearing is. That the written  
7 testimony is -- stands, and is admitted, without the  
8 opportunity to cross-examine the witness?

9 MR. McCULLOUGH: The consequence emerges  
10 from this line of cases, Justice Scalia, that if the --  
11 the statute requires the witness to appear, and if the  
12 Commonwealth doesn't do exactly what the statute  
13 requires, a live witness -- or excuse me, the  
14 certificate does not come in without the live witness.  
15 Just like the statute, if you don't -- the statute says  
16 file 7-days before court.

17 JUSTICE SCALIA: The prosecutor issues the  
18 subpoena.

19 MR. McCULLOUGH: Right.

20 JUSTICE SCALIA: The witness does not show  
21 up.

22 MR. McCULLOUGH: Right.

23 JUSTICE SCALIA: I'm not talking about fault  
24 on the part of the prosecutor. I'm talking about the  
25 fact that the witness has died, has fled the State, is

1 simply not available.

2 MR. McCULLOUGH: But I think the language  
3 answers that. The witness has to appear. The statute  
4 says shall be summoned, and the requirement is that the  
5 witness appear. If the witness does not appear --

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

8 MR. McCULLOUGH: I'm sorry, but we seem to  
9 be going in -- in circles.

10 JUSTICE SCALIA: We are not going in circles  
11 at all. You -- you -- you appeal to the language that  
12 the witness shall appear, as resolving what happens when  
13 he doesn't, and it doesn't resolve that. It just says,  
14 he must appear. And he doesn't appear, what happens?

15 MR. McCULLOUGH: If he doesn't appear, the  
16 Commonwealth has failed to do what the statute requires,  
17 which is to make sure the witness appears. And if the  
18 Commonwealth fails to do exactly what the statute  
19 requires, it must -- it cannot rely on a piece of paper.

20 JUSTICE SCALIA: Well, I don't see the  
21 statute requiring that. It requires that of the  
22 witness, he shall appear.

23 MR. McCULLOUGH: And -- I mean, to the  
24 extent that there is any question about that, I don't  
25 think it's a matter that this Court should resolve in

1 the first instance. I think it would be a matter of  
2 remand to the Supreme Court of Virginia to determine  
3 what -- what the statute requires in that instance.

4 Let me just spend a moment since we've  
5 talked about the costs. Our experience in Virginia, we  
6 -- of course we've repealed this statute, this Court  
7 signaled in *Melendez-Diaz* what a safe harbor was, with  
8 notice and demand, and so we went there.

9 And what we have seen under our new statute  
10 is rampant demands for the witness to appear, followed  
11 by, "oh, well, he's here; I will stipulate," or no  
12 questions of the witness. So our experience under this  
13 old statute compared to our new one is that we had far  
14 more -- or far less under our old statute of this sort  
15 of tactical demands for confrontation.

16 JUSTICE SCALIA: How new is the new one?

17 MR. McCULLOUGH: It went into effect  
18 August 21, 2009.

19 JUSTICE SCALIA: The reply brief of -- of  
20 the Petitioners mentions that -- that the same thing, a  
21 spike occurred in other jurisdictions after  
22 *Melendez-Diaz*, but then the spike went down. After --  
23 after six months or a short period.

24 MR. McCULLOUGH: The spike has plateaued  
25 somewhat in Virginia but we are still seeing extensive

1 gamesmanship. And I think --

2 JUSTICE SCALIA: What is peculiar about  
3 Virginia that -- or what is peculiar about Michigan or  
4 the other states that have this system and, somehow, are  
5 able to live with it.

6 MR. McCULLOUGH: Well, I think --

7 JUSTICE SCALIA: Virginia criminals are  
8 nastier; is that it?

9 (Laughter.)

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

16 JUSTICE SCALIA: Right.

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

22 I do want to just say, really briefly, that  
23 the practical concerns, even if they were not  
24 constitutional concerns, are very important because the  
25 prosecution always bears the burden of persuasion, and a

1 live witness is always more compelling than a piece of  
2 paper.

3 And so the practical realities of this --  
4 trial by affidavit, simply are not likely to be there.

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

6 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

7 Ms. Kruger?

8 ORAL ARGUMENT OF LEONDRA R. KRUGER

9 FOR UNITED STATES, AS AMICUS CURIAE,

10 SUPPORTING RESPONDENT

11 MS. KRUGER: Mr. Chief Justice, and may it  
12 please the Court:

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

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

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

21 JUSTICE SCALIA: We said the following:

22 More fundamentally, the Confrontation Clause imposes a  
23 burden on the prosecution to present its witnesses, not  
24 on the defendant to bring those adverse witnesses into  
25 court.

1                   Its value to the defendant is not replaced  
2 by a system in which the prosecution presents its  
3 evidence via ex parte affidavits and waits for the  
4 defendant to subpoena the affiants, if he chooses. So  
5 you are asking us to overrule that -- that statement?

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

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

14                   MS. KRUGER: That's right, and that's  
15 because --

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

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

1           It is ultimately up to the defendant in  
2 every case to decide, no matter how the prosecution  
3 presents its evidence on direct, whether or not it wants  
4 to confront the witness and submit that witness'  
5 testimony to adversarial testing --

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

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

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

23           MS. KRUGER: I think the statement is it  
24 requires only that the court reaffirm what it already  
25 said in Crawford, in the context of the lab analyst



1 testimony at issue in this case, which is, again, when  
2 the analyst is available for cross-examination at trial,  
3 the government has complied with what the Confrontation  
4 Clause demands.

5 It has provided a constitutionally  
6 sufficient opportunity for the defendants to submit that  
7 analysts's findings --

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

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

15 JUSTICE SCALIA: Okay.

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

22 To the extent that the Court --

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

25 MS. KRUGER: Well, it is to say that

1 Confrontation Clause is not what prohibits that  
2 practice. What prohibits that practice are other  
3 equally effective verses in the law --

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

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

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

18 (Laughter.)

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

24 And it's precisely in response to that point  
25 that Crawford, again, reaffirmed a rule that it first

1 announced in Greene, that so long as the out-of-court  
2 declarant is present at trial to explain or defend his  
3 out-of-court statements, the Confrontation Clause is  
4 satisfied.

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

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

17 Now, there we are, accepting the warnings of  
18 the dissenters in Crawford.

19 (Laughter.)

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

23 It's simply a practical point. To the  
24 extent the petitioners are arguing that their  
25 opportunity to confront and to cross-examine is

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

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

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

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

23 MS. KRUGER: Our principal submission is  
24 that the Confrontation Clause allows the government to  
25 rely on affidavits, so long as it bring the affiants

1 into court, so that the defendant can ask whatever --

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

5 MS. KRUGER: That is a principle --

6 JUSTICE SOTOMAYOR: So are you -- are you  
7 then saying that there is some other constitutional  
8 limit to that choice outside of the Confrontation  
9 Clause? And if you are, what would be that other  
10 constitutional limit?

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

14 JUSTICE SCALIA: How many hundreds of cases  
15 will it take to identify those limits under that very  
16 clear Due Process Clause?

17 (Laughter.)

18 MS. KRUGER: Well, it's somewhat of a  
19 difficult question to answer because this is not a  
20 question that arises particularly frequently. The laws  
21 of evidence, as a general matter, express a strong  
22 preference for the prosecution to present its evidence  
23 through live testimony --

24 JUSTICE SCALIA: Don't we want clear rules  
25 for the presentation? Don't we want clear rules, not

1 gambling on what the Supreme Court will say about due  
2 process?

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

8 JUSTICE STEVENS: Ms. Kruger, can I just ask  
9 this question? I just want to be sure. Supposing you  
10 have an eyewitness. Can you follow the same procedure  
11 that you recommend for the scientific eyewitness --  
12 forensic eyewitness?

13 MS. KRUGER: We think that you could, so  
14 long as the defendant has an adequate opportunity to  
15 cross-examine that eye witness about the testimonial  
16 statement.

17 But even if you disagreed with that, we  
18 think that the Court could take a due account of the  
19 fact that there is a significant difference between the  
20 kind of testimony that an eyewitness provides and the  
21 kind of testimony that a forensic analyst provides.

22 The forensic analyst's lab report is not  
23 merely a weaker substitute for live testimony. It is,  
24 in fact, I think, as we see, by the relative infrequency  
25 with which analysts are called into Court before

1 Melendez-Diaz, something that has been seen to have  
2 equal value, regardless of the manner in which it is  
3 presented.

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

10 JUSTICE SCALIA: Why -- why do we have to  
11 say anything? Why is this case here except as an  
12 opportunity to upset Melendez-Diaz.

13 MS. KRUGER: I think that --

14 JUSTICE SCALIA: This Virginia statute no  
15 longer exists, does it? So we are pronouncing on the  
16 validity of a Virginia statute that is now gone, right?  
17 They have adopted a statute that complies completely  
18 with Melendez-Diaz.

19 MS. KRUGER: That's true, and I think that  
20 that's because Virginia was unwilling to stake the  
21 validity of however many convictions in the interim  
22 on the outcome --

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

25 (Laughter.)

1 MS. KRUGER: I think that this -- this case  
2 presents, I think, an important opportunity for the  
3 Court to provide guidance to States that are currently  
4 grappling with how to respond to the practical problems  
5 that have been presented in the wake of Melendez-Diaz.

6 JUSTICE SOTOMAYOR: So we say to them  
7 contrary to what Melendez-Diaz says, that subpoena  
8 statutes -- when you read the statute, it says the  
9 defendant has to subpoena the witness. On its -- on the  
10 face of this statute, without the Commonwealth court's  
11 gloss on it.

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

21 JUSTICE SCALIA: That question of prior  
22 State law, right?

23 MS. KRUGER: Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Friedman, you have four minutes left.



1 REBUTTAL ARGUMENT OF RICHARD D. FRIEDMAN,  
2 ON BEHALF OF THE PETITIONERS

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

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

11 There is no deadline. It doesn't put the  
12 burden of no-shows on the prosecution. It's the  
13 defendant's witness, and it clearly doesn't call -- it  
14 doesn't provide that the prosecution should call the --  
15 the witness.

16 CHIEF JUSTICE ROBERTS: Well, the no -- just  
17 the first one, the no- notice problem, that's kind of  
18 silly, isn't it? Because if you are being prosecuted  
19 for 50 grams of crack cocaine, you can expect the  
20 government is going to try to prove that.

21 MR. FRIEDMAN: That's likely, of course.  
22 But the fact is, Virginia needs to know how to write a  
23 good notice and demand statute and has done it, contrast  
24 the -- the new statute, which gives 28 days notice.  
25 It's -- it's very glaring. If Virginia wanted to write

1 a notice and demand statute before, it could have.

2 Now I think I can explain what is different  
3 about Virginia. And what happened is after the -- after  
4 the defendants' trial -- after the defendants' trial --  
5 let me say, after the defendants' trials, the -- the  
6 prosecution is saying, you could have subpoenaed. And  
7 they said this isn't testimony. Okay? They were wrong  
8 in both of those counts.

9 After the defendants' trials, in a case  
10 called Brooks, the -- the Virginia Court of Appeals  
11 suggested that the defendant could ask the prosecution  
12 to bring the witness in. Many defendants did that,  
13 including Grant, the defendant on whom -- in the case on  
14 whom the Commonwealth relied so heavily.

15 The prosecution ignored those requests. It  
16 was still taking a view that this is not -- this is not  
17 testimonial, up until the moment that this Court decided  
18 in Melendez-Diaz, the Commonwealth in Virginia in -- in  
19 Grant said, we don't have to bring the witness in; the  
20 witness -- the defendant should subpoena the witness if  
21 he wants.

22 No court has ever held -- no court has ever  
23 held in Virginia that the prosecution bears the risk of  
24 -- of no-shows.

25 Now, the Commonwealth and the United States

1 suggest oh, it's okay to -- to transform the way trials  
2 are conducted by allowing the prosecution to present  
3 affidavits because you can backfill with the Due Process  
4 Clause. I think that goes against decisions of this  
5 Court that say when there is a specific right to address  
6 a particular situation, we rely on that, not on the Due  
7 Process Clause.

8 JUSTICE ALITO: I take it your position is  
9 it wouldn't matter. If Virginia said that the -- the  
10 Commonwealth bears the risk of a no-show, that wouldn't  
11 make any difference?

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

14 JUSTICE ALITO: So we have to assume that  
15 that's the case.

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

18 JUSTICE ALITO: Well, would you like --

19 MR. FRIEDMAN: -- but they are two -- they  
20 are both problems.

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

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

25 JUSTICE ALITO: And then Supreme Court of

1 Virginia on remand could decide whether in fact the --  
2 the prosecution bore that risk?

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

13 JUSTICE ALITO: You think Melendez-Diaz  
14 addressed the question of the order of proof? Where did  
15 it address that?

16 MR. FRIEDMAN: I don't think this is a  
17 question of order of proof. This is a question of who  
18 puts the witness on the stand. Melendez addressed that  
19 very explicitly in part III-E, and said that an  
20 affidavit doesn't do, that the prosecution has to  
21 present prosecution witnesses.

22 JUSTICE GINSBURG: So is the proper to  
23 grant, vacate and remand in light of Melendez-Diaz?

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

25 CHIEF JUSTICE ROBERTS: Yes.

1 MR. FRIEDMAN: Thank you.

2 Your Honor, I think that the -- the proper  
3 response here is the Court has taken the case; there is  
4 enough without any -- resolving any ambiguities of the  
5 Virginia statute to say that the -- this procedure is  
6 unconstitutional, because it imposes, even without  
7 worrying about the no-show point, it imposes upon the  
8 defendant the burden of putting the witness on the  
9 stand. Given that all of these States in the United  
10 States are contesting that this procedure is acceptable,  
11 I think is proper for the Court to say right now that it  
12 -- that it is not.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel,  
14 the case is submitted.

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

17

18

19

20

21

22

23

24

25

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

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

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



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

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

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

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

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

<p><b>reply</b> 21:19 30:3 44:19 <b>report</b> 5:19 6:22 7:18 9:2,7,14 27:15,18 28:15 31:13 41:1 54:22 <b>reported</b> 21:11 <b>reports</b> 21:23 40:17 <b>request</b> 46:15 <b>requests</b> 58:15 <b>require</b> 5:8 6:19 54:5 <b>required</b> 43:6 <b>requirement</b> 6:15 41:25 43:4 <b>requires</b> 35:5 42:11,13 43:16 43:19,21 44:3 48:24 <b>requiring</b> 43:21 <b>reserve</b> 29:9 <b>resolve</b> 27:2 43:13,25 <b>resolved</b> 6:3 <b>resolving</b> 43:12 61:4 <b>respect</b> 22:18 <b>respond</b> 16:12 56:4 60:24 <b>Respondent</b> 1:19 1:23 2:6,8 29:16 46:10 <b>response</b> 7:7 40:23 50:24 61:3 <b>rest</b> 12:13 <b>rests</b> 40:17 <b>result</b> 36:11 37:6 <b>retire</b> 22:5 <b>return</b> 51:21 <b>reverse</b> 3:13 <b>RICHARD</b> 1:16 2:3,10 3:6 57:1</p>	<p><b>Richmond</b> 1:19 <b>right</b> 3:16 4:12 5:10,24,24 6:16 6:18,18 7:5 10:3 11:2,23 12:2 13:6,21 14:7,11,18,22 14:23,25 15:2,4 15:6 16:4 18:1 18:4,16 19:5,22 22:20 23:1 24:6 24:25 25:7,7 26:16 27:21 30:9 31:13 32:3 32:22 33:23,24 35:13 39:11 40:22 42:19,22 45:16 46:14 47:10,13,14,22 48:19 49:9 50:7 53:13 55:16 56:22 59:5 61:11 <b>risk</b> 7:7,9,11,11 7:12,13 9:20 17:3 58:23 59:10,23 60:2 <b>Roberts</b> 3:3 18:14 21:1 24:23 25:2,6 29:11,14 46:6 51:22 56:24 57:16 60:25 61:13 <b>Rohrich</b> 8:20 <b>room</b> 37:11 <b>Rouse</b> 21:15,18 <b>rule</b> 32:5,13 33:20 40:4 41:10 47:7 50:25 54:4 <b>rules</b> 11:22 16:2 17:13 26:19 48:14 53:24,25 <b>run</b> 39:6</p>	<p style="text-align: center;"><b>S</b></p> <p><b>S</b> 2:1 3:1 <b>safe</b> 44:7 <b>safeguards</b> 46:13 <b>sample</b> 24:3,14 <b>satisfaction</b> 16:4 16:5 <b>satisfactory</b> 29:6 <b>satisfied</b> 16:7 51:4 <b>satisfy</b> 26:4 49:19 <b>saying</b> 5:18,19 6:5 10:19 11:10 23:17 30:21 48:8 52:20 53:3 53:7 58:6 <b>says</b> 5:21 6:16 7:17 9:25 10:5 10:5,15 11:1,15 12:6 21:20,20 27:15 29:7 30:15,23 34:9 35:11,24 37:4 37:14 40:18 41:1 42:15 43:4 43:13 56:7,8,14 57:8,9 <b>Scalia</b> 7:9,11,17 7:22 10:12 16:3 20:11,16,20 25:3,8,15,20 33:10,19 34:10 34:19 35:7,10 35:19 36:3,7,10 40:3,8 41:15,20 42:5,10,17,20 42:23 43:6,10 43:20 44:16,19 45:2,7,16 46:18 46:21 47:6,12 47:16 48:6 49:8 49:15,23 50:4 50:16 53:14,24</p>	<p>55:10,14,23 56:21 <b>scenario</b> 34:1 39:3 <b>scene</b> 28:11 <b>scheme</b> 35:23 <b>scientific</b> 54:11 <b>scope</b> 39:8 <b>security</b> 26:20 <b>see</b> 7:22 20:5 29:3 34:18 36:15 43:20 46:5 54:24 <b>seeing</b> 38:2 44:25 <b>seen</b> 11:21 25:19 44:9 52:16 55:1 <b>select</b> 20:9 <b>sense</b> 51:10 <b>sensible</b> 30:15 <b>sent</b> 36:21 <b>sentence</b> 48:20 <b>separate</b> 4:18,20 30:3 <b>series</b> 33:15 <b>services</b> 18:11 <b>set</b> 38:17 <b>seven</b> 23:11 35:25 <b>severely</b> 3:16 <b>SHELDON</b> 1:3 <b>ships</b> 39:21,23 <b>short</b> 44:23 <b>show</b> 16:14 17:3 36:13 41:17 42:20 <b>showing</b> 10:17 <b>shows</b> 17:6 26:5 <b>signaled</b> 44:7 <b>signed</b> 28:8 <b>significance</b> 50:14 <b>significant</b> 20:8 21:6,7 54:19 <b>signs</b> 26:19</p>	<p><b>silent</b> 31:6 <b>silly</b> 57:18 <b>simple</b> 37:8 <b>simplest</b> 22:1 <b>simply</b> 6:5 16:24 29:24 31:5 32:24 33:7 36:19 43:1 46:4 50:12 51:23 <b>sir</b> 12:5,6,8 37:9 39:7 <b>situation</b> 9:13,13 20:6 27:13,17 27:18 28:2 59:6 <b>situations</b> 28:20 <b>six</b> 23:10 36:1 44:23 <b>sky</b> 21:20 <b>slight</b> 28:1,19 <b>small</b> 18:15 <b>Solicitor</b> 1:18,20 18:20 <b>solidarity</b> 17:22 <b>solved</b> 40:4 <b>somewhat</b> 44:25 50:14 53:18 <b>sorry</b> 5:1 7:10 14:7 24:23 35:9 43:8 <b>sort</b> 38:14 44:14 54:6 <b>Sotomayor</b> 3:19 4:7,10,13,20 5:7,11,15,17 6:6,13,19 7:2 7:21 8:7,13,18 9:23 10:24 13:3 13:7,16,22 14:5 14:8,12,16 30:7 30:10 31:10 32:4,20 52:19 53:2,6 56:6,13 <b>special</b> 22:17 38:13 <b>specially</b> 38:13</p>
--	---	---	--	---

<p>38:14  <b>specific</b> 36:4                      59:5  <b>speculation</b> 17:8  <b>spend</b> 44:4  <b>spike</b> 44:21,22                      44:24  <b>square</b> 27:12  <b>stack</b> 28:7 32:25  <b>stake</b> 55:20  <b>stakes</b> 3:12  <b>stand</b> 3:15 5:4,12                      5:22,23 7:14,18                      7:19 8:1,4,25                      9:7,10,19,24                      10:1,1 11:11                      13:25 14:22,25                      27:11,15,20                      29:3 33:6 34:12                      38:23 52:3 60:7                      60:8,11,18 61:9  <b>stands</b> 42:7 55:7  <b>start</b> 13:10 29:19  <b>started</b> 27:13  <b>starting</b> 14:5  <b>state</b> 3:14,19,21                      3:24 4:11,16,25                      5:5 8:19 10:25                      14:13 15:19                      17:15 18:16,24                      19:25 20:10,18                      20:18,22 23:6                      23:24 24:7                      42:25 46:13                      47:7 56:20,22                      60:8  <b>statement</b> 6:11                      6:21 8:11 9:22                      9:24,25 10:7,16                      10:21 11:16                      16:3 47:5 48:20                      48:22,23 54:16  <b>statements</b> 5:21                      22:19 28:9                      48:18 51:3</p>	<p><b>states</b> 1:1,13,22                      6:1 15:19 16:17                      17:6,18 20:10                      20:12,16 21:25                      45:4 46:9 56:3                      58:25 61:9,10  <b>statute</b> 4:5,8,11                      4:14,24,24 14:2                      14:19 15:3,3,8                      17:25 29:21                      30:1,14 31:5,18                      31:18,24,25                      34:8,24 35:1,3                      35:5,8,11,14                      35:24 38:6,10                      40:24 41:7,16                      41:22,24 42:11                      42:12,15,15                      43:3,16,18,21                      44:3,6,9,13,14                      45:13,18,21                      55:14,16,17                      56:8,10,13 57:4                      57:9,23,24 58:1                      60:4,6,9,11                      61:5  <b>statutes</b> 30:18                      30:20 31:8                      35:20 56:8  <b>statutory</b> 35:23  <b>STEPHEN</b> 1:18                      2:5 29:15  <b>steps</b> 23:11 32:2  <b>STEVENS</b> 54:8  <b>stick</b> 52:8  <b>stipulate</b> 16:24                      44:11  <b>story</b> 11:3,3,6,7                      13:9  <b>straight</b> 4:5  <b>strategy</b> 13:18  <b>strict</b> 35:19,20                      36:10,15  <b>strictly</b> 35:3,15  <b>strike</b> 41:11,13</p>	<p><b>strong</b> 53:21  <b>subject</b> 9:14 13:2                      38:5 47:24  <b>subjecting</b> 34:6  <b>submission</b>                      49:12 50:8                      52:16,23  <b>submit</b> 47:9 48:4                      49:6  <b>submitted</b> 61:14                      61:16  <b>subpoena</b> 4:5,15                      4:24 30:12,19                      31:18 34:21                      35:11,12 36:23                      42:18 47:4,19                      56:7,9,14 58:20  <b>subpoenaed</b> 36:4                      58:6  <b>subpoenaing</b>                      3:21  <b>substance</b> 15:5                      28:16,17  <b>substantial</b> 16:21  <b>substantive</b>                      52:17  <b>substitute</b> 50:12                      54:23  <b>sufficient</b> 16:13                      23:23 40:18                      49:6 60:4  <b>sufficiently</b> 39:8  <b>Suffolk</b> 21:14,14  <b>suggest</b> 6:14                      59:1  <b>suggested</b> 6:21                      58:11  <b>suggesting</b> 52:20  <b>suggests</b> 5:2  <b>summon</b> 30:19                      42:1  <b>summoned</b> 30:17                      30:23 35:1                      36:24 41:24                      43:4 56:15</p>	<p>57:10  <b>summons</b> 30:22                      31:1 37:5  <b>supervisor</b> 26:5  <b>supporting</b> 1:23                      17:11 46:10  <b>suppose</b> 19:3,10                      24:1 25:23                      37:15  <b>supposed</b> 30:11  <b>Supposing</b> 54:9  <b>supreme</b> 1:1,13                      4:11,25 5:5                      29:20,25 30:14                      31:7,24 35:16                      41:3 44:2 54:1                      56:19 59:25  <b>sure</b> 5:16 10:10                      17:21,23 34:25                      43:17 54:9  <b>surprising</b> 48:9  <b>susceptible</b> 32:1  <b>swearing</b> 5:17  <b>system</b> 32:24                      45:4 47:2,18                      50:20 51:11,12</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>T</b> 2:1,1  <b>table</b> 39:5  <b>tactical</b> 44:15  <b>tactics</b> 7:4,4  <b>take</b> 3:10 4:10                      10:3 11:10 22:6                      32:2,6 36:12                      52:3 53:15                      54:18 57:7 59:8  <b>taken</b> 61:3  <b>Talk</b> 32:21  <b>talked</b> 44:5  <b>talking</b> 7:4 13:4                      19:15 36:3                      42:23,24  <b>tapes</b> 28:10  <b>tech</b> 22:4,5</p>	<p><b>technician</b> 13:12                      19:23 31:14  <b>technicians</b>                      18:12  <b>technician's</b>                      19:24  <b>techs</b> 18:7  <b>tell</b> 4:14 6:24                      11:3,5  <b>telling</b> 11:3  <b>tells</b> 13:8  <b>term</b> 3:11 12:21  <b>terms</b> 33:25                      51:15  <b>terribly</b> 7:2  <b>test</b> 22:5 24:12  <b>tested</b> 28:16  <b>testified</b> 9:19                      15:1  <b>testifies</b> 10:15  <b>testify</b> 9:21 10:6                      10:20 11:11                      13:1 15:13,15                      18:8 26:11,12  <b>testimonial</b>                      54:15 58:17  <b>testimony</b> 11:13                      12:20 15:23,24                      19:2 23:2,3                      26:21 42:7 48:5                      48:18 49:1                      50:13 53:23                      54:20,21,23                      58:7  <b>testing</b> 47:24                      48:5  <b>thank</b> 29:11,13                      46:5,6 56:23,24                      57:3 61:1,13  <b>theory</b> 11:20  <b>thing</b> 29:23 37:23                      44:20  <b>things</b> 16:24 39:1                      41:5  <b>think</b> 5:4 6:8,9</p>
---	--	---	---	--

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



14:13,21,25	<b>written</b> 37:12	<b>57</b> 2:11		
15:6 19:8,10,12	42:6	<hr/>		
19:13 24:15,15	<b>wrong</b> 4:23 11:8	<b>7</b>		
24:18 27:10	26:8 58:7	<hr/>		
29:2,3 33:2,6,7	<hr/>	<b>7-days</b> 42:16		
34:9,12,15,18	<b>X</b>	<hr/>		
34:25 35:1,6	x 1:2,8	<b>9</b>		
36:2,22 37:1,4	<hr/>	<hr/>		
37:5,10,10,11	<b>Y</b>	<b>900</b> 38:25		
37:15 38:23	<b>year</b> 18:7 39:1			
40:13,25 41:1,2	<b>years</b> 3:18 12:17			
41:3,16,24 42:2	15:25			
42:2,8,11,13	<b>York</b> 20:19			
42:14,20,25	<hr/>			
43:3,5,5,12,17	<b>0</b>			
43:22 44:10,12	<b>07-11191</b> 1:6 3:4			
46:1 48:4,4,15	<hr/>			
49:11 52:3 53:4	<b>1</b>			
54:15 56:9,15	<b>1</b> 35:17 42:3			
57:10,13,15	<b>11</b> 1:10			
58:12,19,20,20	<b>11:40</b> 1:14 3:2			
60:6,10,18 61:8	<b>12:41</b> 61:15			
<b>witnesses</b> 8:3	<b>19.2-187</b> 35:24			
12:7,10,19 13:1	<hr/>			
23:2,8 25:25	<b>2</b>			
26:2,11 29:5,5	<b>2</b> 30:16			
29:8 30:17 31:3	<b>2nd</b> 31:23			
32:8,11 33:10	<b>200</b> 12:17			
34:7 39:17	<b>2007</b> 31:23			
46:23,24 50:6	<b>2009</b> 44:18			
52:6,14 60:21	<b>2010</b> 1:10			
<b>woman</b> 21:17	<b>21</b> 44:18			
<b>word</b> 10:4	<b>26</b> 16:17 17:18			
<b>worded</b> 15:8	<b>27</b> 21:19			
<b>words</b> 40:16	<b>28</b> 57:24			
<b>work</b> 51:6	<b>29</b> 2:6 41:11			
<b>workable</b> 26:22	<hr/>			
51:11	<b>3</b>			
<b>worry</b> 52:9,9	<b>3</b> 2:4 26:25			
<b>worrying</b> 61:7	<hr/>			
<b>wouldn't</b> 12:7	<b>4</b>			
26:4,7 27:24	<b>4,000</b> 19:11			
28:7 40:4 59:9	<b>46</b> 2:8			
59:10	<hr/>			
<b>write</b> 57:22,25	<b>5</b>			
	<b>50</b> 57:19			