1 IN THE SUPREME COURT OF THE UNITED STATES

2 - x

3 JOHN FRANCIS FRY, :

4 Petitioner :

5 v. : No. 06-5247

6 CHERYL K. PLILER, WARDEN. :

7 - x

8 Washington, D.C.

9 Tuesday, March 20, 2007

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:06 a.m.

14 APPEARANCES:

15 VICTOR S. HALTOM, ESQ., Sacramento, Cal.; on behalf of

16 Petitioner.

17 ROSS C. MOODY, ESQ., Deputy Attorney General, San

18 Francisco, Cal.; on behalf of Respondent.

19 PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor

20 General, Department of Justice, Washington, D.C.; for

21 United States, as amicus curiae, supporting

22 Respondent.

23

24

25

1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE
3 VICTOR S. HALTOM, ESQ.
4 On behalf of the Petitioner 3
5 ORAL ARGUMENT OF
6 ROSS C. MOODY, ESQ.
7 On behalf of the Respondent 24
8 ORAL ARGUMENT OF
9 PATRICIA A. MILLETT, ESQ.
10 On behalf of United States, as amicus
11 curiae, supporting Respondent 41
12 REBUTTAL ARGUMENT OF
13 VICTOR S. HALTOM, ESQ.
14 On behalf of the Petitioner 51
15
16
17
18
19
20
21
22
23
24
25

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

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 this morning in case 06-5247, Fry versus Pliler.

5 Mr. Haltom.

6 ORAL ARGUMENT OF VICTOR S. HALTOM

7 ON BEHALF OF PETITIONER

8 MR. HALTOM: Mr. Chief Justice, and may it

9 please the Court:

10 The constitutional error that occurred in

11 Mr. Fry's third trial is the type of error that can

12 result in a conviction of an innocent person.

13 Notwithstanding the nature of the error that occurred in

14 Mr. Fry's trial, no court has reviewed the effect of

15 that error or evaluated the effect of that error under

16 the constitutionally mandated Chapman standard.

17 Mr. Fry's position is simply that he is

18 entitled to one bite at the Chapman apple. In the

19 California Court of Appeal, that State appellate court

20 should have, but did not, rectify the constitutional

21 trial error that occurred in this case. Had that court

22 complied with this Court's precedent, that court would

23 have first identified the constitutional error that

24 occurred at trial, namely the Chambers error, and

25 second, reviewed the effect of that error, assessed the

1 effect of that error under the Chapman test.
2 The failure of that court to do so, the
3 unreasonable decisionmaking of that court, relegated
4 Mr. Fry to seeking relief in Federal habeas proceedings.
5 It scarcely seems reasonable --
6 JUSTICE KENNEDY: I suppose he could have
7 come here on direct.
8 MR. HALTOM: He could have, Your Honor,
9 however, he didn't have the right to counsel to come
10 following his appeal to the State appellate court, and
11 then after the denial of his petition for review,
12 discretionary review in the California Supreme Court, he
13 no longer had the right to counsel.
14 And the fact of the matter is if he had
15 filed a petition for writ of certiorari following that,
16 it would have effectively been asking at that stage for
17 a type of error correction.
18 It scarcely seems logical that the scope of
19 the remedy to which Mr. Fry is entitled for the
20 constitutional violation that he suffered, that that
21 should be curtailed based upon simply the unreasonable
22 decisionmaking of the State appellate court in --
23 JUSTICE SCALIA: Well, if we're talking
24 about what -- where is the logic in the result that I
25 believe you're position produces, which is that a

1 prisoner who loses in the State court on harmlessness
2 grounds, because a State court finds it's harmless,
3 obtains no habeas relief in Federal court unless the
4 error actually prejudiced him. Whereas if the State
5 court never reached the harmlessness ground, and erred
6 on -- or ruled on whether the violation occurred,
7 whether there was any constitutional violation, then he
8 would obtain relief if there is merely a reasonable
9 probability of harm.
10 Now, you know, why would there -- what does
11 he care whether -- whether the error below consisted in
12 an erroneous harmlessness determination or an erroneous
13 determination that there was no violation? Why should
14 there be a different standard of review between the two?
15 MR. HALTOM: Justice Scalia, that's a
16 point raised in the Solicitor General's amicus brief
17 here. And in Mr. Fry's case, what happened was that
18 there was a harmless error analysis conducted, albeit
19 truncated, by the State appellate court. But it was not
20 a Chapman analysis. And that failure of the State
21 appellate court to engage in a Chapman analysis is
22 contrary to this Court's precedent. It ignores Chapman,
23 it also would be an attack on --
24 JUSTICE SCALIA: Let's assume another
25 violation, the court erroneously determines --

1 erroneously -- that there was no constitutional
2 violation at all. Its error is not with regard to the
3 harmlessness, but with regard to whether there was a
4 constitutional violation. Why should there be one
5 standard of review for one error and a different
6 standard of review for the other, regardless of whether
7 the State court conducted Chapman or not?
8 MR. HALTOM: I don't know that necessarily
9 there has to be one standard of review for the other --
10 for one or the other, Your Honor. Our position in this
11 case is simply following the logic of this Court's
12 decision in Mitchell versus Esparza, this Court or
13 any Federal habeas court needs to consider what the
14 State appellate court did. You cannot divorce -- there
15 is the underlying constitutional violation that occurred
16 in Mr. Fry's trial. Then that error is compounded when
17 a State appellate court fails to assess the effect of
18 that error under the Chapman standard.
19 JUSTICE SCALIA: You could say the same
20 thing when the State court has erroneously determined
21 that there was no violation.
22 In that case, you apply the Kotteakos
23 standard. I just don't understand the rationale of
24 applying a higher standard to the other error.
25 MR. HALTOM: Well --

1 JUSTICE GINSBURG: I thought the State court
2 didn't find that there was error. I thought the State
3 court said, this was cumulative, I'm not going to let it
4 in.
5 MR. HALTOM: That's correct.
6 JUSTICE GINSBURG: It wasn't until we got
7 into the Federal court that there was an error determined.
8 So as far as the State was concerned, there was no reason
9 to engage in any kind of harmless error review, Chapman
10 or Brecht, because there was no error.
11 MR. HALTOM: That's correct. That's in
12 pages 94 through 97 of the joint appendix. The State
13 appellate court concluded there was no error as a matter
14 of State law in this case. The court also concluded
15 that there was no constitutional error.
16 Then in a footnote, it's footnote 17 on page 97
17 of the joint appendix, the State appellate court stated
18 in the alternative, effectively, there was no prejudice
19 that Mr. Fry possibly could have suffered in this case.
20 However, in making that alternative holding, the State
21 appellate court, the California court, was applying
22 what's known as the Watson standard, which as this Court
23 has repeatedly recognized, is the functional equivalent
24 of the Kotteakos type standard.
25 JUSTICE SCALIA: And it is that

1 determination that you are objecting to here. The
2 harmlessness determination.
3 MR. HALTOM: I am, Your Honor. Obviously,
4 we are objecting to the State court's finding of no
5 underlying substantive constitutional violation, as well
6 as the State court's determination that there was no
7 possible prejudice.
8 JUSTICE SCALIA: But for the former, you are
9 perfectly content with our applying Kotteakos. And for
10 the latter, however, you say we have to apply Chapman.
11 I just don't see the logic of that.
12 MR. HALTOM: Well, first of all, this case,
13 since it has now been determined in the Federal courts
14 that there was the underlying constitutional violation,
15 does not present that question. We do -- and I
16 understand the position that you are raising,
17 Justice Scalia, that there is a potential split in the
18 logic there. I don't think the Court has to resolve
19 that here.
20 Some of the lower Federal courts have
21 determined that now, in light of AEDPA, the Brecht
22 standard has been completely supplanted. Some courts
23 have construed this Court's decision in Mitchell versus
24 Esparza to lead to that conclusion. And that very well
25 may be the case. However, I don't think the Court needs

1 to ultimately address that proposition in this case.
2 CHIEF JUSTICE ROBERTS: As I read the
3 Court's opinion in Brecht, the Brecht standard on
4 harmlessness is based on the structural consideration
5 that you're under collateral review at that point, rather
6 than under direct review. You would apply a different
7 harmlessness standard that doesn't seem to take into
8 account the fact that it's collateral review rather than
9 direct?
10 MR. HALTOM: Certainly, Mr. Chief Justice,
11 collateral review, as this Court pointed out in Brecht,
12 can result in a more deferential standard of harmless
13 error inquiry. The -- those considerations that led
14 this Court in Brecht to adopt Kotteakos rather than
15 Chapman apply across-the-board in all habeas cases.
16 However, a central theme of the Brecht
17 decision was that there have been Chapman analysis
18 conducted by the State appellate judiciary --
19 CHIEF JUSTICE ROBERTS: Well, I guess that's
20 where maybe we -- is the subject of debate, rather the
21 central theme in Brecht was, this is collateral review,
22 and that calls for a different standard, or whether the
23 central theme was Chapman review had been undertaken,
24 and therefore, that calls for a different standard.
25 I'm not sure I agree with you that the

1 latter is the case.

2 MR. HALTOM: I agree that it could be -- it

3 is a debatable point. But the -- to ignore the

4 circumstance that this Court stressed, I think

5 undoubtedly stressed in Brecht that there had been that

6 State appellate review is to basically divorce the

7 holding in Brecht from the factual context in which that

8 case -- or out of which that case arose.

9 JUSTICE SCALIA: The dissenters certainly

10 thought that that was the consequence, the dissenters in

11 Brecht. They said that Kotteakos would apply even where

12 the State court has found that "no violation has

13 occurred."

14 MR. HALTOM: That's true, Justice Scalia.

15 But similarly --

16 JUSTICE SCALIA: In other words, never

17 approached the harmlessness thing. That's what the

18 dissenters thought.

19 MR. HALTOM: The dissenters thought that the

20 import of Brecht was that it was going to apply

21 across-the-board in Federal habeas, and made statements

22 to that effect --

23 JUSTICE BREYER: And I don't think the

24 majority said the contrary. I mean, I wrote it. I

25 mean, I don't know -- what counts is what I wrote, not

1 what I thought. But if you read it, I don't think it
2 decides this question.
3 What I wonder, though, is why does the --
4 how does this case present the issue you want to argue?
5 I'm -- Justice Ginsburg made me wonder about that. As I
6 understand it, the trial court said, I'm not going to
7 let this witness testify, it is cumulative. All right.
8 And then the appeals court said, well, that wasn't a
9 mistake. And one reason it wasn't a mistake is that
10 this witness added nothing. There could no possible
11 prejudice, says the trial court, when he excluded that
12 person. That means it was cumulative, that means it did
13 nothing, and that was the appeals court. So the appeals
14 court finds no error.
15 Now, we get over to the Federal court. And
16 they say, oh, no, this witness added a lot. Well, they
17 couldn't have thought this witness added a lot to the
18 point where the Constitution is violated unless they
19 disagreed with that decision of making no possible
20 difference. Very well. We disagree, send it back. End
21 of case.
22 Now, where does it raise all this stuff
23 about harmless error and -- I mean, when I -- it is very
24 hard for me to get my mind around this issue, because
25 it's so complicated. How does this case raise it?

1 MR. HALTOM: Well, I suppose, Your Honor,
2 because of the fact that the State appellate court
3 didn't simply state, we find no error, and leave it at
4 that, but rather, the State appellate court also raised
5 the point that, in a footnote, in a truncated manner,
6 that there is no possible --
7 JUSTICE BREYER: Was that as a reason for
8 there not being error? Or was it in the context of
9 saying, well, even if there was a mistake, there was no
10 possible prejudice. What does the footnote mean, in
11 your opinion?
12 MR. HALTOM: Clearly -- I think clearly,
13 Your Honor, the latter.
14 JUSTICE BREYER: The second?
15 MR. HALTOM: Yes.
16 JUSTICE BREYER: What is the footnote
17 number?
18 MR. HALTOM: It's footnote 17. It's page --
19 JUSTICE BREYER: Okay. I'll read it.
20 CHIEF JUSTICE ROBERTS: I'm sorry, it's page
21 what?
22 MR. HALTOM: It's 97 in the joint appendix,
23 Your Honor.
24 CHIEF JUSTICE ROBERTS: Thank you.
25 JUSTICE BREYER: Thank you. Very helpful.

1 The other thing which I brought up, so I might as well
2 get both my questions out, is that years ago I read a
3 decision by Judge Leventhal that made a big impression
4 on me. And he was a very good judge. It's in a
5 different context, but it's the same problem.
6 He said, I originally thought this was the
7 case dreamed of by law professors, a case where I could
8 conscientiously say, although I consider the findings
9 clearly erroneous, so I'd reverse if it were a judge's
10 decision, nonetheless, there is support and substantial
11 evidence. And therefore, I affirm it, because it comes
12 from an agency.
13 But when I think about it, I don't think
14 there's substantial evidence either. Okay. In other
15 words, has there ever been a case in the history of
16 mankind where you think a judge has actually thought to
17 himself, after reviewing the record, oh, I think that
18 this is harmless, so I'll affirm. But I don't think
19 it's harmless beyond a reasonable doubt, so I'll
20 reverse.
21 I mean, I find it very difficult to get
22 myself in that state of mind, where I think such a thing
23 is possible.
24 MR. HALTOM: I agree with you, Your Honor.
25 It's angels on the pin of a needle, I think is the

1 phrase here, and this case may be a case where the
2 difference between Chapman and Brecht could be of
3 consequence. If you'd look at the district court's
4 treatment of this case, at the district court level the
5 court stated: "Mr. Fry comes close to demonstrating
6 actionable error," and that court is applying the Brecht
7 standard. The district court states: "I cannot rule
8 out prejudice in this case." So seemingly had that
9 court applied Chapman, Mr. Fry would have prevailed in
10 the district court.
11 Likewise, in the Ninth Circuit we have the
12 dissenting justice concluding that there is prejudice
13 even under the Brecht standard, and then we have the
14 panel majority in ruling against Mr. Fry on the
15 prejudice issue stating that had Pamela Maples'
16 testimony been admitted, that would have substantially
17 bolstered Mr. Fry's claim of innocence. That statement
18 seems inconsistent with the -- a finding that it is
19 harmless error under Brecht; and even if it's not
20 inconsistent it seems that had that court been applying
21 the Chapman standard, that court would have ruled in
22 Mr. Fry's favor.
23 JUSTICE ALITO: If I could come back to --
24 JUSTICE STEVENS: May I ask this question:
25 Is part of your argument that even under the Brecht

1 standard it was not harmless?

2 MR. HALTOM: Yes, Your Honor.

3 JUSTICE STEVENS: This is a case, am I

4 correct, where there were two, two hung juries and then

5 a five-week deliberation in this case? And there was a

6 harmless -- and the testimony of Maples was she had seen

7 a guy who didn't fit the description do the killing?

8 MR. HALTOM: Correct, Your Honor.

9 CHIEF JUSTICE ROBERTS: Where is that in your

10 question presented?

11 JUSTICE STEVENS: It says, "And, if the Brecht

12 standard applies, does the Petitioner or the State bear

13 the burden?" I guess that's the narrower question, who

14 has the burden.

15 MR. HALTOM: Well, the Respondent has

16 essentially conceded that under O'Neal that they bear

17 the risk of nonpersuasion.

18 JUSTICE BREYER: But O'Neal, I thought O'Neal

19 just says that this word "burden of proof" is out of place

20 when you talk about an appellate judge reading a record?

21 MR. HALTOM: I think that that was what the

22 holding in the majority opinion was, but I think, as

23 Justice Thomas pointed out in his dissenting opinion,

24 the effect of that is to allocate the risk of

25 nonpersuasion to the State. And so I think that

1 that's -- I could be wrong, but it seems to me a
2 semantic point.
3 And to Justice Stevens' question, as you
4 pointed out in your concurrence in Brecht, the Kotteakos
5 standard which this Court adopted in Brecht, is an
6 exacting standard. And in applying that standard, if
7 you look at this case, the Court's decisions,
8 Sullivan, Kotteakos, say that the focus has to be on the
9 jury. Here we have a jury in the third trial that
10 deliberated for 23 court days after 29 court days --
11 CHIEF JUSTICE ROBERTS: You're now arguing
12 that under Brecht this should not have been harmless; is
13 that the point you're making?
14 MR. HALTOM: Yes, Your Honor.
15 CHIEF JUSTICE ROBERTS: Okay. Now, I didn't
16 hear the answer to my question. I'm not sure that is in
17 the question that you presented and on which we've granted
18 cert. It says which standard applies, who bears the
19 burden. I don't see anything saying is this -- was it
20 erroneous to conclude that this was harmless under
21 Brecht.
22 MR. HALTOM: Well, I believe, number one,
23 does it matter which standard applies as part of the
24 question presented? Does it matter which harmless error
25 standard is employed? My answer to that is no, because

1 Mr. Fry prevails under either Brecht or Chapman.
2 And this Court could in this case simply
3 decide this case on that very narrow question, like many
4 courts do where this issue is raised, this intellectually
5 challenging issue of what should a habeas court apply,
6 Brecht or Chapman, when there has been no Chapman
7 analysis in the State court or when there has been an
8 objectively unreasonable Chapman analysis in the State
9 court. Most courts confronted with that issue say, we
10 don't need to decide the question here because either
11 the error was plainly harmless under both of those
12 standards or plainly not harmless under both of these
13 standards. And I simply recounted the history of the
14 litigation below in the Federal courts to point out
15 this could be a case where that makes a difference. It
16 seems like --
17 JUSTICE SCALIA: The trouble with reading
18 that second question that way is that, you know, it
19 follows from your first question, which speaks in the
20 generality of cases. It's not speaking to this case.
21 Your first question presented is, "If constitutional
22 error in a State trial is not recognized by the
23 judiciary until the case ends up in Federal court, is
24 the prejudicial impact assessed under the standard set
25 forth in Chapman or in Brecht?" That's the first

1 question. Very generalized.
2 Second question: "Does it matter which
3 harmless error standard is employed?" I didn't take that
4 to mean does it matter in this case which of the two. I
5 thought it meant, you know, is there any difference
6 between the two standards? Don't you think that's fair
7 reading of it?
8 MR. HALTOM: No, Your Honor.
9 JUSTICE SCALIA: You think it means, does it
10 matter in this case which harmless -- you think that
11 second sentence means would, would the defendant be
12 entitled to reversal of the conviction no matter which
13 harmless error standard is employed? You think that's
14 what it means?
15 MR. HALTOM: I think that that is the import
16 of that portion of the question.
17 JUSTICE GINSBURG: Is that a question on
18 which we would be likely to grant cert?
19 MR. HALTOM: Perhaps not if that was the
20 only question in and of itself, but perhaps so because,
21 as I indicated before, as Justice Stevens stressed in
22 his concurring opinion in Brecht, the Kotteakos standard
23 is a demanding standard. And look at this case. If the
24 error in this case can be deemed harmless under any
25 standard, then what cannot? What is prejudice when

1 you're looking at the jury and when you have a jury
2 where nine days into the deliberations, at least five of
3 them voted that Mr. Fry was not guilty. They told the
4 judge that they were at an impasse. This jury struggled
5 mightily with this evidence.
6 JUSTICE STEVENS: Would you help me with one
7 thing I'm not terribly clear about, though. Is it clear
8 which -- what side the magistrate thought had the burden
9 of persuasion?
10 MR. HALTOM: It is not, and it seems as
11 though, looking at the language that the magistrate
12 judge utilized in his findings and recommendations, that
13 he was looking to me, to Mr. Fry, to meet that burden.
14 And I quoted his language in my briefing to the Ninth
15 Circuit and I argued to the Ninth Circuit that the
16 burden of persuasion had been improperly allocated to
17 Mr. Fry. However, that issue was simply not addressed
18 in the Ninth Circuit's opinion.
19 JUSTICE STEVENS: Does your opponent now
20 concede that the State had the burden?
21 MR. HALTOM: Yes, Respondent concedes that
22 their burden -- that it's their burden --
23 JUSTICE BREYER: How do they say that after
24 I thought I wrote an opinion for a majority of the
25 Court, which said this concept is not applicable in --

1 when you're reviewing a record for harmless error. It's
2 not a question of presenting evidence. What I think it
3 said is that it's not a question of presentation of
4 evidence. In such a case, you think it's conceptually
5 clear for the judge to ask directly, do I the judge
6 think that the error substantially influenced the
7 judge's -- the jury's decision? Maybe that was wrong,
8 but I think there was a majority of the Court that
9 agreed with it.
10 MR. HALTOM: Yes, Your Honor. And I think
11 your point, as I understood it, in O'Neal was that it
12 analytically does not make sense when --
13 JUSTICE BREYER: To talk about burdens of
14 proof?
15 MR. HALTOM: -- for an appellate court
16 conducting a prejudice inquiry.
17 JUSTICE BREYER: Yes. But that's my basic
18 question in this case and it's a serious question.
19 Suppose I think, which I do think, that I as a judge can
20 conscientiously review a record and decide for myself
21 whether I think this error of the judge was harmless,
22 and if I really try I can bring myself to understand
23 this question. Regardless of what I think, could
24 another judge, say a State judge, reasonably have
25 thought the opposite? I can do that mentally.

1 You try to get me to make more fine
2 distinctions than that, I cannot do it. I can't. I'm
3 sorry. I admit it.
4 Now, if that's the state of mind that I can
5 get myself into -- and I believe that's true of many
6 judges -- how do I write words that are realistic in
7 this area?
8 MR. HALTOM: I think that that's a question,
9 Your Honor, that this Court has struggled with. As
10 Justice Scalia pointed out in his concurring opinion in
11 Dominguez Benitez, that we're talking about with these
12 harmless error standards ineffable gradations of
13 probability that are beyond even the judicial mind to
14 grasp. But I think if we just tie it to the facts of
15 this case, I think that in the explanation you just gave
16 that there is no reasonable judge who could look at this
17 case and conclude --
18 JUSTICE ALITO: There are many situations in
19 which an appellate court has to apply a legal standard
20 to facts in criminal cases and civil cases. In a
21 criminal case, an issue on appeal could be whether
22 there's sufficient evidence to support the verdict. Do
23 you think there's a burden of persuasion on appeal on
24 all of those issues?
25 MR. HALTOM: With respect to a standard

1 sufficiency analysis, no, Justice Alito. It's just a
2 question for the appellate judge to discern, was there
3 sufficient evidence in the record reviewing the evidence
4 in the light most favorable to the prosecution.
5 JUSTICE ALITO: What's the difference
6 between that and applying any harmless error standard?
7 It's exactly the same kind of analysis. It's a
8 different legal test, but you're applying, you're
9 applying the law to facts.
10 MR. HALTOM: I agree. And I don't quarrel
11 at all with the way that the Court described -- said
12 that looking at the prejudice inquiry or a harmless
13 error inquiry in the O'Neal case, that it doesn't fit to
14 look at it in terms of the allocation of burden. I
15 don't think that this case ultimately turns on that,
16 except to the extent that the magistrate judge, when he
17 wrote his finding and recommendations that were adopted
18 by the district court judge, did state that he was
19 looking to Mr. Fry to make the sufficient showing --
20 JUSTICE GINSBURG: Are you talking about
21 what's on the bottom of page 181 of the joint appendix?
22 That was the only place that I found where the
23 magistrate expressed a view on this. It reads: "The
24 court does not find that there has been" -- "the court
25 does find that there has been an insufficient showing.

1 So that "insufficient showing" means showing by the
2 Petitioner." Is that what you're relying on?
3 MR. HALTOM: Yes. That's exactly what I'm
4 relying on, Your Honor.
5 So, going back to specifically the facts of
6 this case, this Court could, as I indicated earlier,
7 without regard to the thorny Chapman versus Brecht
8 question, decide this case solely in terms of, under
9 Brecht, does Mr. Fry prevail; and we look at the nature
10 of the constitutional violation that occurred.
11 CHIEF JUSTICE ROBERTS: That wouldn't help
12 us resolve the conflict in the circuits between which
13 standard is applicable, though, right?
14 MR. HALTOM: No, it certainly would not,
15 Your Honor. And this Court may very well deem that to
16 be necessary. But I think also that this Court
17 fashioning a decision which is faithful to the
18 requirement that -- or the principle that Kotteakos is
19 an exacting standard, would also be an important
20 constitutional principle. In a case like this, where
21 there has been no Chapman review and where the Chapman
22 Court stated that we need a rigorous harmless error
23 standard in order to safeguard convictions -- safeguard
24 against erroneous convictions where there is a close
25 question of guilt or innocence, that hasn't happened in

1 this case and it would be appropriate for this Court to
2 fashion a rule, or a holding in this case that would
3 ensure that that happens And if I could, I'd like to --
4 JUSTICE GINSBURG: And that would put 2254
5 out of sync with 2255, where I understand if it's a
6 Federal conviction then it's always Brecht on
7 postconviction relief?
8 MR. HALTOM: As I understand that question,
9 the Solicitor General pointed out in the introduction of
10 its amicus brief that there are some 2255 cases where
11 there's been an intervening change in the law which
12 could involve this question of Brecht versus Chapman.
13 And I've cited in my brief a district court case, United
14 States versus Monsanto, where the court concluded, in
15 accordance with the position that I'm advocating, that
16 it makes no sense for a reviewing court in a habeas
17 proceeding to apply the Brecht standard blindly without
18 regard to what was done in prior proceedings, that rather
19 there's no need for deference, where the -- the big
20 issue in Brecht, as I understand it, was this Court was
21 concerned about simply repeating a harmless error
22 analysis that the State court had already done; and
23 we're not asking this Court to do that in this case.
24 The same concern, Justice Ginsburg, holds
25 over in certain limited 2255 cases.

1 If I may save the balance of my time.
2 CHIEF JUSTICE ROBERTS: Thank you,
3 Mr. Haltom.
4 Mr. Moody.
5 ORAL ARGUMENT OF ROSS C. MOODY
6 ON BEHALF OF THE RESPONDENT
7 MR. MOODY: Mr. Chief Justice, and may it
8 please the Court:
9 Federal habeas is limited in scope and
10 purpose. It is not a continuation of the appellate
11 process. Rather, it is an extraordinary remedy limited
12 by fundamental concepts of federalism, comity, and State
13 sovereignty. In Brecht, this Court held that the
14 stringent Chapman standard was inappropriate for use on
15 collateral review. Instead, in order to strike a proper
16 balance between State and Federal interests, the actual
17 prejudice standard of substantial and injurious effect
18 on the verdict should be used in collateral cases.
19 Petitioner is asking for an exception to
20 this rule. He claims that if he did not receive Chapman
21 review in State court, he should receive it on Federal
22 habeas. That was not the rule in Brecht and it should
23 not be adopted by this Court here. The Brecht decision
24 did not state an exception based on the State standard
25 used. The key in Brecht was that appropriate balance

1 between the Federal Government and the State. This
2 Court has never treated cases where there was not a
3 State Chapman finding differently from other cases. It
4 applies Brecht throughout. In the Penry case and in the
5 O'Neal case there was no Chapman finding in State court,
6 yet this Court applied Brecht and made no comment about
7 that.
8 JUSTICE GINSBURG: You said in your brief
9 that the remedy, if the Petitioner wants to assure that
10 he's going to get Chapman review someplace, then he
11 should have sought cert on direct review from the State
12 court conviction. You said that?
13 MR. MOODY: Yes, Your Honor.
14 JUSTICE GINSBURG: But realistically, the
15 likelihood that such a petition would be successful,
16 passing the problem that the Petitioner is not likely to
17 have a lawyer -- the likelihood that this Court would
18 grant cert on such a question is very slim.
19 MR. MOODY: I agree, the likelihood of a
20 cert grant in that circumstance is slim but it does not
21 change the fact that once you come to court under 2254,
22 you are asking for collateral review. And in collateral
23 review, it's inappropriate to apply the Chapman
24 standard.
25 JUSTICE SCALIA: I suppose you could say

1 that of all the questions that go into habeas under
2 2254, that they could have been brought up directly but
3 the chances of their being taken here are negligible?
4 MR. MOODY: I, I agree with that, Your
5 Honor.
6 CHIEF JUSTICE ROBERTS: Counsel, if the
7 State court had conducted a Chapman review, erroneously,
8 how would that be reviewed under Federal habeas? You
9 would ask under AEDPA whether it was an unreasonable
10 application of Chapman?
11 MR. MOODY: Yes, Your Honor. First you
12 would ask if it was an unreasonable application of
13 Chapman. If you found that it was not, then the case is
14 over, there's no need to grant the writ. If you found
15 that it was, then you would proceed and do a Brecht
16 analysis. And that's what we learned from --
17 CHIEF JUSTICE ROBERTS: That seems awfully
18 refined, doesn't it, to do two different analyses? Is
19 this an -- is this an unreasonable application of
20 Chapman? And then apply the Brecht standard after
21 determining that it was an unreasonable application of
22 Chapman?
23 MR. MOODY: I don't disagree. I'm merely
24 trying to make sense of the various decisions in this,
25 in this arena. There's some tension between the Esparza

1 decision and other decisions of the Court; and one has
2 to find a place for the AEDPA standard. So we would not
3 object to simply an application of Brecht which is what
4 this Court has always done. But Esparza seems to suggest
5 that there may be an interim step.
6 JUSTICE BREYER: Suppose we apply Brecht.
7 This is what I'm having a little trouble with but I'd
8 appreciate your commenting or straightening this out.
9 The Ninth Circuit holds two things according to the SG
10 in the briefs. He states them very well. The first is
11 let's look at this witness. The testimony was excluded.
12 Now the Ninth Circuit says that exclusion was
13 unreasonable of -- an unreasonable application of
14 clearly established Federal law, because that testimony
15 of the witness that was excluded was not only material,
16 it would have substantially bolstered the claim of
17 innocence. So that's their finding on the merits.
18 Then they go on to say, but the exclusion
19 was harmless.
20 How could both those things be true? How
21 could it be true that the reason that there was error in
22 excluding it was that the evidence is so important that
23 it substantially bolsters the claim of innocence?
24 That's one thing they say.
25 But the exclusion was harmless. I just fail

1 to understand how anyone could think both those things.
2 But maybe in the context of the case it was possible,
3 but that's what I'd appreciate your explaining.
4 MR. MOODY: I think that the explanation is
5 as follows. When you're analyzing the denial of a
6 defense type of evidence, a Chambers claim, you first
7 look to see how it fit into the defense. And that is
8 what they were doing. You're not looking at the entire
9 case. You're looking only at the defense.
10 And so in the sense that something is better
11 than nothing, adding a twelfth witness instead of eleven
12 may improve the defense case.
13 And yet nonetheless, when you move to the
14 next question, which is, was there a substantial and
15 injurious effect on the verdict in the case, and now
16 you're not just looking at the defense, you're looking
17 at everything that was available to the jury, it may
18 be that there was still so much other evidence that it
19 could overcome whatever increase you received on the
20 defense.
21 JUSTICE ALITO: Why is it necessary for us
22 to try to reconcile those two statements? The Ninth
23 Circuit may well have been wrong in finding that there
24 was a violation at all, but we have to assume that, for
25 purposes of the question that's presented to us. So why

1 shouldn't we just analyze the harmless error question
2 independently of what they said about whether there was
3 a Chambers violation?
4 MR. MOODY: We would not object to that.
5 I'm trying to -- I'm trying to assist Justice Breyer in
6 that perceived imbalance between a finding of substance
7 above and then a finding of harmless error below.
8 JUSTICE ALITO: Well, every time evidence is
9 excluded on the ground that it is cumulative, or is the
10 equivalent of a 403 balancing in Federal court, there's
11 not a constitutional error under Chambers and related
12 cases, is there?
13 MR. MOODY: Yes. We agree. That's
14 certainly the law of this Court. And in this, in --
15 well, let me move on. I'd like to make a couple of
16 other points.
17 JUSTICE SOUTER: May I go just back to
18 Justice Breyer's question for a second?
19 MR. MOODY: Sure.
20 JUSTICE SOUTER: And I mean, I think your
21 answer to Justice Breyer was a very good answer as a, as
22 sort of a general statement. But in -- would you agree
23 that in this case, if we -- if we do proceed, number
24 one, to agree with you that Brecht is the standard, and
25 we then do proceed to apply Brecht here or to determine

1 whether Brecht was properly applied here, that in this
2 particular case, the, the record indicates that the case
3 was so close that there would have to be a finding of
4 harmful error, or at least it would be impossible to
5 find harmless error. Even applying Brecht here.
6 And you know what I'm getting at. I mean,
7 five weeks of deliberation; the question after,
8 whatever it was, two weeks, and four ballots, and so on.
9 Obviously this, this case was just to tottering on the
10 edge. So even if we, if we do get to the point of
11 applying Brecht, wouldn't it be impossible to say that
12 he's -- he gets no relief under Brecht?
13 MR. MOODY: No, I would disagree with that.
14 You're the sixth court to hear this case. The prior
15 five have all rejected his claim. And while --
16 JUSTICE STEVENS: But two or three of those
17 did it on an improper ground, that you agree with now,
18 don't you?
19 MR. MOODY: No, I don't agree with that.
20 JUSTICE STEVENS: For purposes of argument.
21 MR. MOODY: For purposes of argument I do.
22 The district court and the Ninth Circuit both applied
23 Brecht and found that this was not an error which --
24 JUSTICE GINSBURG: It was two to one in the
25 Ninth Circuit.

1 MR. MOODY: This is true.
2 JUSTICE GINSBURG: Judge Rawlinson I think
3 said that using the Brecht standard, that there was
4 actual prejudice.
5 MR. MOODY: Yes, she did. There was a
6 dissent in the Ninth Circuit.
7 JUSTICE STEVENS: Isn't this the -- I may
8 have it wrong -- but isn't this the case in which the
9 witness was unique, not cumulative, because she was the
10 only one who was completely disinterested?
11 MR. MOODY: No. I would disagree with that.
12 She's been characterized that way. But, and I want to
13 point out that, I would like to clarify the record in
14 response to your question, Justice Stevens. You asked
15 whether or not she saw another man commit the murder.
16 And counsel appeared to agree with you. That was not
17 her testimony. Her testimony was that she overheard
18 someone else confessing to murders that may or may not
19 have been these murders.
20 And the -- and this was a very long case.
21 This case lasted eleven weeks, it involved a hundred
22 witnesses. You can look at the opinions that it produced
23 in state court and in the district court. They're each
24 100 pages long. It's not unreasonable to expect the jury
25 to take a long time to decide that case.

1 Now there are 25 court days of
2 deliberations --
3 JUSTICE SOUTER: Five, five weeks?
4 MR. MOODY: Five weeks, 25 court days, 24 of
5 which were taken up with read back. Several -- several
6 holidays. I mean if you want to go through and look at
7 it, now --
8 JUSTICE SOUTER: Do you know of any other
9 case in which the jury deliberated for five weeks?
10 MR. MOODY: I haven't attempted to find one.
11 It is a long deliberation, and we don't conclude it's not.
12 JUSTICE SOUTER: I'm sure there's an example
13 somewhere, but I -- I've practiced law for over 40 years,
14 and I never heard of it.
15 JUSTICE GINSBURG: At what point, how many
16 weeks had gone by when they said they were hung?
17 MR. MOODY: I believe that was -- I keep,
18 I've been switching back and forth between calendar days
19 and court days. So forgive me. I believe that was on
20 the eighth court day. And at that point, when they
21 announced they were hung, they selected a new foreperson
22 and then rolled up their sleeves and went back in and
23 deliberated the case.
24 JUSTICE BREYER: So --
25 MR. MOODY: And after --

1 JUSTICE BREYER: Go ahead. Finish.
2 MR. MOODY: After they selected the new
3 foreperson, they asked for 15 read backs, including the
4 crucial evidence in the case. The ballistics experts.
5 They asked for that. They asked for the testimony of
6 the in-custody witness who heard the confession of
7 Mr. Fry. They asked for Mr. Fry's testimony.
8 JUSTICE STEVENS: Did they ask for a read
9 back of Mrs. Maples' testimony?
10 MR. MOODY: Well, Mrs. Maples' testimony was
11 not admitted. It was excluded.
12 JUSTICE STEVENS: Oh, that's right. Of
13 course.
14 MR. MOODY: But they did not --
15 significantly they did not ask for read back of the
16 witnesses who testified similarly to, to Ms. Maples.
17 The third-party culpability case was basically not
18 credited by the jury. They did not ask for read back
19 of those witnesses.
20 JUSTICE BREYER: Well, maybe, maybe you'd
21 end up --
22 JUSTICE STEVENS: Well, maybe there was a
23 critical witness left out. That argues the other way,
24 I think.
25 MR. MOODY: I would encourage the Court to

1 carefully look at what Ms. Maples was going to say. If
2 you look in her own words, and I'm quoting: "I was just
3 in and out of the room. I just listened to bits and
4 pieces of it." And that's at joint appendix 10. This,
5 this witness may have been Mr. Hurtz's cousin, and not
6 his ex-girlfriend, or his ex-girlfriend's mother, but
7 she did not have very much to say about this. She said
8 she didn't hear the beginning of the statement. She
9 could not tell you whether it was a serious discussion.
10 She was in and out of the room. She heard only bits and
11 pieces.
12 JUSTICE BREYER: But what she heard was that
13 they were going to kill, that this other person was going
14 to kill a man and a woman, and it turned out that that was
15 the crime at issue.
16 MR. MOODY: With respect, that's not what
17 she heard.
18 JUSTICE BREYER: What did she hear?
19 MR. MOODY: What she heard was a statement
20 that he had killed a man and a woman. And this was not
21 immediately after the offense. This is 18 months after
22 the offense; this is not the next day.
23 JUSTICE BREYER: Do you think -- do you
24 think, do you think I should do this? I'm still
25 looking -- I'm worried about on the one hand, as you are,

1 having this Court announce too many six-part tests, and
2 having a lot of words and it becomes easy to make a
3 mistake for a judge and then you never finish a
4 proceeding. I'm worried about that, as are you.
5 MR. MOODY: Yes.
6 JUSTICE BREYER: At the same time, I think
7 what counts is what the judge does, the reviewing judge.
8 Not what -- quite what the test says.
9 So there has to be a conscientious effort to
10 decide, was there -- was it harmless? Could a
11 reasonable jurist in California have concluded the
12 opposite? Okay.
13 So maybe we should do it in this case. We
14 simply try ourselves to go through this record, make
15 that determination to show by example, rather than by
16 trying to find a form of words.
17 MR. MOODY: Well, you don't do it very
18 often. I understand that that's something that you could
19 do if you wanted to. I think that this is just a classic
20 case where two courts applied the Brecht standard and
21 reached their conclusions and there's nothing really
22 remarkable about it.
23 JUSTICE KENNEDY: The third-party
24 perpetrator that Maples was going to talk about
25 according to the prosecution's theory, was Hurtz or

1 Hearst?

2 MR. MOODY: Hurtz. Yes.

3 JUSTICE KENNEDY: And there -- there was a

4 link between Hurtz, there was an acquaintanceship

5 between Hurtz and the victim?

6 MR. MOODY: That's right.

7 JUSTICE KENNEDY: Was that established in

8 other testimony or would that all come out just

9 only through Maples?

10 MR. MOODY: Actually, I'm thinking about my

11 answer because I was thinking about Borelli. There were

12 three third-party culpability, potential targets in this

13 case. And I believe that Hurtz -- the testimony of

14 several of the witnesses who were admitted did testify of

15 a link between Cindy Bell and Hurtz.

16 JUSTICE SOUTER: Otherwise, I mean, they

17 couldn't have found it was cumulative if -- if that had

18 not been the case.

19 MR. MOODY: In order to -- I need to correct

20 the record on that as well. The trial judge did not

21 find that this was cumulative. He found a lack of

22 foundation. What happened was, was Ms. Maples was

23 offered as a witness --

24 JUSTICE SOUTER: But -- on appellate review

25 in California, they found it cumulative, didn't they?

1 MR. MOODY: The alternative prejudice
2 holding, the footnote 17, they said it would have been
3 cumulative.
4 JUSTICE KENNEDY: Right. Okay.
5 MR. MOODY: Yes.
6 JUSTICE SOUTER: And they -- they couldn't
7 have found that if there hadn't been some evidence on
8 Hurtz, apart from Maples?
9 MR. MOODY: Oh, that's right. Yes. There
10 was, and that's really my point. My point is that 11
11 third-party culpability witnesses were allowed to
12 testify in this trial. And one was excluded.
13 JUSTICE KENNEDY: How did Hurtz's name enter
14 into the trial?
15 MR. MOODY: Well --
16 JUSTICE KENNEDY: Why did anybody mention
17 him?
18 MR. MOODY: For one thing, he was called
19 to testify and asked if he killed these people. Mr.
20 Hurtz testified at this trial. The jury got to see
21 him, they got to look him in the eye, they got to hear
22 him on direct, they got to hear him on cross. And they
23 did not ask for read back of that testimony.
24 JUSTICE SOUTER: And if Maples' testimony
25 had come in, I presume they could have cross-examined

1 him on the basis of Maples' testimony?

2 MR. MOODY: Well, he stated he never said he

3 killed these people. And he, he stated he'd never said

4 he killed a man and a woman in a car. So it -- it went

5 to what Maples would have said, and also --

6 JUSTICE KENNEDY: Did he say he'd killed

7 peoples in other ways, or at other times?

8 (Laughter.)

9 MR. MOODY: He also denied doing that.

10 JUSTICE KENNEDY: Well, but then at that

11 point Maples, Maples' conviction -- Maples' testimony

12 becomes, assuming there's a foundation, becomes more

13 relevant.

14 MR. MOODY: I would disagree, simply because

15 she says she didn't hear the conversation well enough to

16 really give her testimony any true probative value in

17 the case because she was in and out of the room. She

18 didn't hear the beginning. She didn't hear the end.

19 And when she's asked, was it a serious discussion, she

20 says, I don't know. So this could be -- this could be

21 something very different --

22 JUSTICE STEVENS: That's classic going to

23 the weight of the evidence. That goes to the weight,

24 not the admissibility.

25 MR. MOODY: Ordinarily I would agree with

1 that. And if we knew, Your Honor, that he was speaking
2 about these killings, then certainly it would go to the
3 weight. But since he was speaking about killings that
4 she said she didn't know if they were in California, New
5 Jersey, she didn't know when they occurred, and
6 therefore -- in California we ask that before you
7 present third-party culpability evidence you tie it to
8 this crime.
9 JUSTICE STEVENS: So we don't assume that
10 he's committed a whole lot of killings, I don't suppose?
11 MR. MOODY: Well, it's -- he may have
12 committed other killings, but if he did not confess to
13 committing these killings then there's no probative
14 value to her testimony.
15 CHIEF JUSTICE ROBERTS: Do you think the
16 question of the application of Brecht is included within
17 the questions presented?
18 MR. MOODY: No. I briefed it because I was
19 concerned that the Court might reach it, but I don't
20 think it is fairly presented.
21 The only other point that I wanted to make
22 is that if one accepts Petitioner's rule, it will
23 basically swallow up the Brecht standard and return to a
24 near wholesale application of Chapman on collateral
25 review. As Tyson v. Trigg pointed out, many, many

1 times Petitioners come to court and they have a case
2 where there was no finding of constitutional error in
3 State court and therefore no Chapman application, but
4 they're going to assert that in Federal court. And so
5 if in every one of those cases you apply Chapman, then
6 you really have reduced application of Brecht.
7 JUSTICE GINSBURG: But on the other side,
8 State courts say, we don't have, we don't have to bother
9 in any case with Chapman because when it goes over into
10 the Federal court they're going to apply Brecht.
11 MR. MOODY: I don't think we should assume
12 that the State courts are going to do that. I think
13 that what -- it's sort of like what we said earlier in
14 the argument, Your Honor, where not every evidentiary
15 ruling is a constitutional violation. I would say most
16 of them are not. And this Court has not drawn a bright
17 line of exactly where that is. So in many cases, this
18 is just an erroneous exclusion of evidence at best. And
19 so, therefore, the State court would not be going to a
20 Chapman standard because it would not be finding error.
21 And with that, I'm prepared to submit.
22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 Ms. Millett.
24 ORAL ARGUMENT OF PATRICIA A. MILLETT
25 ON BEHALF OF THE UNITED STATES, AS AMICUS

1 CURIAE, SUPPORTING RESPONDENT
2 MS. MILLETT: Mr. Chief Justice, and may it
3 please the Court:
4 The distinction between collateral review
5 and direct review is deeply rooted in the law, and what
6 Petitioner is asking is to have the standard of review
7 for harmlessness in collateral review become the same
8 standard as direct review whenever the courts on direct
9 review got Chapman wrong or unreasonably applied it.
10 That is the exact same argument Mr. Brecht made in this
11 Court. He got Chapman review. They cited Chapman.
12 They didn't cite it here. That's the only difference.
13 Mr. Brecht came to this Court and said they
14 unreasonably applied Chapman review and I should get it
15 again on habeas, and this Court said that there is a
16 deep difference -- a deep distinction, between collateral
17 review and direct review and that distinction turns upon
18 the fundamental rule of habeas corpus, and that is not
19 to sit here as the sixth court on direct review of a
20 long record where difficult calls were made. It is to
21 correct fundamental miscarriages of justice, grievous
22 wrongs that have caused custody in violation of
23 constitutional --
24 JUSTICE STEVENS: May I ask two questions
25 and then you can proceed. One, do you take a position

1 on who has the burden of persuasion? That's the first
2 question. And do you have an opinion on proper
3 application of Brecht in this case?
4 MS. MILLETT: If I can adopt
5 Justice Breyer's language from O'Neal and say that this
6 Court eschewed couching this discussion in terms of
7 burden of persuasion. We accept O'Neal's holding that
8 when there is equipoise, which is not what happened in
9 this case, the tie goes to the prisoner.
10 JUSTICE STEVENS: But you do agree if it
11 were in equipoise the State would have the burden?
12 MS. MILLETT: The tie would go to the
13 prisoner, yes. If we were in absolute equipoise -- it's
14 not that the State would have the burden, it's the State
15 would lose. I don't think that's what happened in this
16 case. I think what Justice Breyer, what this Court said in
17 O'Neal is, the way you articulated it, instead of burden
18 of proof is that it's a level of conviction on the part
19 of the court and what the judge will say in -- and this is
20 what the Court said in O'Neal -- is, do I think the error
21 substantially contributed to the jury's verdict? And that
22 is essentially what the court said here on 181 at the very
23 bottom when it said "The court doesn't find that there's
24 an insufficient showing" -- that's the same way of
25 saying I haven't been persuaded that the error

1 contributed to the verdict. So I don't think that this
2 case in any sense could turn upon, whether we call it
3 the burden of persuasion or the proper level of
4 conviction on the part of the Court. This court was not
5 persuaded and that is all that matters. When the court
6 is not persuaded and not left in equipoise, the prisoner
7 loses.
8 The second question you asked was whether we
9 have a position on application of Brecht, and we do.
10 We've laid it out in our brief. We think that in no
11 sense does this record support the notion, support the
12 argument, that there was a substantial and injurious
13 effect when the twelfth out of eleven witnesses was
14 excluded, talking about third-party culpability. And
15 that requires not just looking at what, in isolation,
16 what evidence was in there about Mr. Hurtz. There was
17 some -- there were about -- I think six or seven witnesses
18 who said they heard him either say he did it or he was
19 there or he was involved.
20 But it requires looking at the whole record.
21 And there were -- the defense here was not a Hurtz
22 versus Fry. This was a case where the defense did an
23 excellent job. It was a well defended case, and threw
24 up a buffet of options for the jury, none of which it
25 bought on.

1 In the third trial you had what you didn't
2 have in the prior trials. You had ballistics evidence
3 that linked his gun to the crime. You have his own
4 admission, his own testimony, that he left the house
5 that night with the gun, with the bullets, and went out
6 in the truck that was seen at -- a truck of the same
7 type -- that was seen at the crime scene.
8 JUSTICE STEVENS: I have the same problem
9 Justice Souter does, in all candor. The jury takes five
10 weeks to decide the case and there's a fairly
11 interesting bit of testimony that doesn't get in. And
12 to say to be totally satisfied it didn't have an
13 injurious effect on the deliberations is a close
14 question, I think.
15 MS. MILLETT: Well, two answers. If it's a
16 close question, if AEDPA and if Kotteakos and Brecht
17 mean anything, it's that the close calls go to the State
18 and are not overturned by the sixth court on review.
19 JUSTICE STEVENS: No, but an equally divided
20 call goes the other way.
21 MS. MILLETT: I'm sorry?
22 JUSTICE STEVENS: If it's not just a close
23 call, but if it's equal, it goes the other way.
24 MS. MILLETT: It is, and no one has thought
25 this was equal. The two courts -- the three courts -- I

1 mean, the California Court of Appeals also said in any
2 event there's no possible prejudice.
3 Now, how they could say no possible
4 prejudice under a State standard and still say, ah, but
5 it would have affected the verdict under Chapman, is not
6 something I'm able to understand. So I think you have
7 a grievance.
8 JUSTICE SOUTER: Neither am I. But I draw a
9 different conclusion from it from the one you're
10 drawing.
11 MS. MILLETT: I guess I misunderstand your
12 point, because I think when the court said there's no
13 possible prejudice --
14 JUSTICE SOUTER: I mean, I cannot accept the
15 State -- the conclusion that there was no possible
16 prejudice, on the premises that Justice Stevens a moment
17 ago and I a moment before sort of put out. I just do
18 not find that a reasonable conclusion.
19 MS. MILLETT: Well, again, even if the Court
20 thinks there may have been some chance, may have been,
21 you know, relevant testimony -- this Court can well
22 disagree and can conclude that this was abuse of
23 discretion. If it were Federal Rule of Evidence 403,
24 you could decide this was an abuse of discretion.
25 Whether it was unconstitutional, so clearly

1 unconstitutional as to merit, under AEDPA and under
2 Brecht, reversal of the conviction 12 years after the
3 fact --
4 JUSTICE GINSBURG: I thought the AEDPA
5 question was out of it because that hasn't been -- there
6 was no cross-appeal on that question. I thought it was
7 a given, a given in this case, that the California
8 courts did not apply or unreasonably applied clearly
9 established Federal law.
10 I didn't think that was an issue in the
11 case. I think we took it on the assumption that it was
12 such an error.
13 MS. MILLETT: Again, the Respondents in this
14 case have not conceded constitutional error, and in
15 their brief they repeat that. And I think there's a
16 question whether a court should --
17 JUSTICE GINSBURG: It's not raised here.
18 There was no cross-appeal from that question.
19 MS. MILLETT: Well, a Respondent is entitled
20 to defend on any ground supported by the record. But
21 even assuming that, we'll assume the error, assume that
22 there was an error and one assumes that it was -- which
23 is hard for me to get to, but one assumes it was clearly
24 unconstitutional in this close call, the type of call
25 that's made hundreds of times in every trial, balancing

1 this, and the combination of lack of foundation and
2 cumulativeness. It's hard for me to understand when
3 that rises to the level of unconstitutionality.
4 But if we assume that it did, you have the
5 two courts that applied the Brecht standard here. And
6 the district court decision here is nearly 100 pages
7 long. It's a very careful, methodical analysis.
8 JUSTICE GINSBURG: That's because there were
9 many, many issues raised.
10 MS. MILLETT: There's many issues, but also
11 it was being careful and it was being very methodical.
12 And it went through this and it went through this
13 record. That court went through this record, more
14 than 5,000 transcript pages, 11 weeks of trial, more than
15 100 witnesses. And it was on that --
16 CHIEF JUSTICE ROBERTS: I suppose if we're
17 going to apply the Brecht standard ourselves, we would
18 have to do the same thing.
19 MS. MILLETT: I think that's what this Court
20 has said.
21 The other thing I want to get back to is the
22 question about the length of jury deliberations. Sure,
23 this was really wrong. Now, they changed forepersons
24 midstream and got a reasonable doubt instruction
25 repeated. Who knows what happened. But what I will not

1 concede -- I will concede it's long, but I will not
2 concede that the mere fact of length of deliberations
3 says anything about this one particular, narrow error in
4 applying a balancing test substantially affected the
5 verdict. I think the length of deliberations is so
6 incredibly speculative.
7 JUSTICE STEVENS: You will concede it was a
8 close case, won't you?
9 MS. MILLETT: I will concede it was -- I will
10 concede it was a difficult case for the State. I mean,
11 it clearly was a difficult case.
12 JUSTICE STEVENS: If you take five weeks
13 it's pretty clearly a close case.
14 MS. MILLETT: That's right. But you know,
15 the whole point of Federal habeas corpus is that it's --
16 that this is not filling in the gaps in direct review.
17 We're not going to give you --
18 CHIEF JUSTICE ROBERTS: There's no evidence
19 or inference that it was close on the alternative
20 murderer theory, which is the only thing that Maples'
21 testimony goes to.
22 MS. MILLETT: That's exactly right. In
23 fact, if you look at the closing argument, Mr. Hurtz
24 has a couple of references in a two-day closing
25 argument. That was not the centerpiece of this case.

1 JUSTICE KENNEDY: It has to be close on an
2 alternative murderer. It wasn't suicide. Obviously, if
3 he didn't do it, somebody else did. So if it's a close
4 case for the first, it's obviously a close case for the
5 second.
6 MS. MILLETT: No, but as to who did it and
7 whether Hurtz did it or whether -- remember, what the
8 defense is trying to show is not who did it; it's that
9 this person didn't do it, and whether it was them or
10 someone else is what we don't know.
11 Again, this is Federal habeas corpus before
12 this Court, and I don't think that the misapplication of
13 a valid rule of evidence, which is not what this Court
14 had in Chambers, Holmes, or any of the cases that were
15 involved, was so -- that simply disallowed the twelfth
16 out of eleven witnesses on third-party culpability is so
17 clearly erroneous, it was so clearly impacting the
18 verdict in this case, as to warrant a retrial 15 years
19 after the crime.
20 And yes, the jury -- it was close in the
21 sense that they worked a long hard time. But at the end
22 of the day, they were unanimous. There's nothing close
23 about unanimous. And I think it would be the wrong
24 message to say that a jury that works as hard as this
25 one did, did the read backs, crawled through this

1 record --

2 JUSTICE STEVENS: Yes, but we don't know

3 what they would have done if they had this evidence that

4 was excluded. That's the problem.

5 MS. MILLETT: One never knows that in habeas

6 corpus. But what you do when you look at what they were

7 focusing on, they were focusing on the two ballistics

8 experts. They had them read back right next each other.

9 They made that call. It's their job to do it.

10 JUSTICE SOUTER: But the reason they may

11 have been doing that is that they may very well have

12 thought that the evidence indicating third-party guilt

13 was close and perhaps persuasive and what they wanted to

14 know was whether the evidence going specifically to this

15 defendant was strong enough to overcome it.

16 MS. MILLETT: May I answer? One would have

17 expected at least one read back on third-party

18 culpability instead of three read backs of Mr. Fry's

19 testimony which put himself that night with the gun in

20 the truck, and which he said -- you know -- and

21 beforehand he agreed he might have said he wanted to

22 blow them away.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Haltom, you have three minutes

1 remaining.

2 REBUTTAL ARGUMENT OF VICTOR S. HALTOM

3 ON BEHALF OF PETITIONER

4 MR. HALTOM: Thank you. The trial counsel

5 --

6 JUSTICE KENNEDY: Mr. Haltom, before you go

7 drifting, counsel, into the evidentiary questions in the

8 case, I have one question. Two cases. A, Hurtz did not

9 testify at all. B, he did. Is the foundation ruling

10 any different in the two cases insofar as Maples'

11 testimony or is it the same? I.e., is there a lesser

12 showing for foundation if Hurtz did testify?

13 MR. HALTOM: I think that possibly the

14 foundation with Hurtz there could be increased. The

15 jury sought Mr. Hurtz.

16 JUSTICE KENNEDY: Oh, you mean, oh, you mean

17 it's more? You have to be more strict for foundation after

18 Hurtz testified? I was suggesting the opposite.

19 MR. HALTOM: Well, I was just thinking that

20 his presence there would be relevant. The jury actually

21 saw him. They heard a truck driver describing, a

22 neutral truck driver, describing the actual killer, who

23 in no way fit the description of Mr. Fry.

24 Unfortunately, the record doesn't indicate what Mr.

25 Hurtz looked like, but the jury saw it. And if the jury

1 saw that that truck driver was describing a man that
2 looked like Mr. Hurtz, then that --
3 JUSTICE GINSBURG: But there were all kinds
4 of infirmities in that truck driver's testimony,
5 including the time, the timing of the murder.
6 MR. HALTOM: There were infirmities in his
7 testimony, Your Honor. However, he came from Missouri,
8 so maybe he was looking at a Missouri clock. We don't
9 know. But why would that man make up a story? He has
10 no axe to grind in this case. And then his testimony is
11 corroborated by a gentleman who sees him immediately
12 after it and says: He looks like he had just seen a
13 ghost, and described seeing a double execution-style
14 murder. Now --
15 CHIEF JUSTICE ROBERTS: That was all presented
16 to the jury, right?
17 MR. HALTOM: That was all presented to the
18 jury. However, Ms. Maples' testimony was not, and
19 counsel did not argue that heavily focused on Mr. Hurtz's
20 guilt. She certainly did argue it, but the reason that
21 she didn't is because, as the court of appeals, the
22 California Court of Appeals, said, the other seven
23 witnesses who said Mr. Hurtz said he had killed the
24 Bells were all described as having been flimsy witnesses
25 who gave contradictory, unbelievable testimony.

1 CHIEF JUSTICE ROBERTS: Well, how strong is
2 this witness, who didn't even know if it was a serious
3 conversation, didn't hear the beginning of it, and
4 didn't -- couldn't tell whether he was talking about
5 something that happened 10 years before or 2 days
6 before?
7 MR. HALTOM: Mr. Chief Justice, she was
8 extremely strong. Page JA-78 in the joint appendix,
9 Respondent concedes she was the only unbiased witness
10 concerning Mr. Hurtz's -- concerning Mr. Hurtz. She
11 heard this, her cousin, saying he shot a man and a woman
12 in a parked car, first shooting the woman in the head,
13 then shooting the man, getting blood all over himself.
14 That linked up with all the other confessions in this
15 case. Interlinking confessions just like in Chambers
16 were deemed to provide adequate assurance of
17 reliability.
18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 The case is submitted.
20 (Whereupon, at 11:06 a.m. the case in the
21 above-entitled matter was submitted.)
22
23
24
25

A

able 46:6
above-entitled 1:11 54:21
absolute 43:13
abuse 46:22,24
accept 43:7 46:14
accepts 40:22
account 9:8
acquaintances... 37:4
across-the-bo... 9:15 10:21
actionable 14:6
actual 25:16 32:4 52:22
added 11:10,16 11:17
adding 29:11
address 9:1
addressed 19:17
adequate 54:16
admissibility 39:24
admission 45:4
admit 21:3
admitted 14:16 34:11 37:14
adopt 9:14 43:4
adopted 16:5 22:17 25:23
advocating 24:15
AEDPA 8:21 27:9 28:2 45:16 47:1,4
affirm 13:11,18
agency 13:12
ago 13:2 46:17
agree 9:25 10:2 13:24 22:10 26:19 27:4 30:13,22,24 31:17,19 32:16 39:25 43:10
agreed 20:9 51:21
ah 46:4
ahead 34:1
albeit 5:18
Alito 14:23 21:18 22:1,5 29:21 30:8
allocate 15:24
allocated 19:16
allocation 22:14
allowed 38:11
alternative 7:18 7:20 38:1 49:19 50:2
amicus 1:21 2:10 5:16 24:10 41:25
analyses 27:18
analysis 5:18,20 5:21 9:17 17:7 17:8 22:1,7 24:22 27:16 48:7
analytically 20:12
analyze 30:1
analyzing 29:5
angels 13:25
announce 36:1
announced 33:21
answer 16:16,25 30:21,21 37:11 51:16
answers 45:15
anybody 38:16
apart 38:8
appeal 3:19 4:10 21:21,23
appeals 11:8,13 11:13 46:1 53:21,22
APPEARAN... 1:14
appeared 32:16
appellate 3:19 4:10,22 5:19 5:21 6:14,17 7:13,17,21 9:18 10:6 12:2 12:4 15:20 20:15 21:19 22:2 25:10 37:24
appendix 7:12 7:17 12:22 22:21 35:4 54:8
apple 3:18
applicable 19:25 23:13
application 27:10,12,19,21 28:3,13 40:16 40:24 41:3,6 43:3 44:9
applied 14:9 26:6 31:1,22 36:20 42:9,14 47:8 48:5
applies 15:12 16:18,23 26:4
apply 6:22 8:10 9:6,15 10:11 10:20 17:5 21:19 24:17 26:23 27:20 28:6 30:25 41:5,10 47:8 48:17
applying 6:24 7:21 8:9 14:6 14:20 16:6 22:6,8,9 31:5 31:11 49:4
appreciate 28:8 29:3
approached 10:17
appropriate 24:1 25:25
area 21:7
arena 27:25
argue 11:4 53:19,20
argued 19:15
argues 34:23
arguing 16:11
argument 1:12 2:2,5,8,12 3:3 3:6 14:25 25:5 31:20,21 41:14 41:24 42:10 44:12 49:23,25 52:2
arose 10:8
articulated 43:17
asked 32:14 34:3,5,5,7 38:19 39:19 44:8
asking 4:16 24:23 25:19 26:22 42:6
assert 41:4
assess 6:17
assessed 3:25 17:24
assist 30:5
Assistant 1:19
assume 5:24 29:24 40:9 41:11 47:21,21 48:4
assumes 47:22 47:23
assuming 39:12 47:21
assumption 47:11
assurance 54:16
assure 26:9
attack 5:23
attempted 33:10
Attorney 1:17
available 29:17
awfully 27:17
axe 53:10
a.m 1:13 3:2 54:20

B

B 52:9
back 11:20 14:23 23:5 30:17 33:5,18 33:22 34:9,15 34:18 38:23 48:21 51:8,17
backs 34:3 50:25 51:18
balance 25:1,16 25:25
balancing 30:10 47:25 49:4
ballistics 34:4 45:2 51:7
ballots 31:8
based 4:21 9:4 25:24
basic 20:17
basically 10:6 34:17 40:23
basis 39:1
bear 15:12,16
bears 16:18
beginning 35:8 39:18 54:3
behalf 1:15,18 2:4,7,10,14 3:7 25:6 41:25 52:3
believe 4:25 16:22 21:5 33:17,19 37:13
Bell 37:15
Bells 53:24
Benitez 21:11
best 41:18
better 29:10
beyond 13:19 21:13
big 13:3 24:19
bit 45:11
bite 3:18
bits 35:3,10
blindly 24:17
blood 54:13

blow 51:22
bolstered 14:17 28:16
bolsters 28:23
Borelli 37:11
bother 41:8
bottom 22:21 43:23
bought 44:25
Brecht 7:10 8:21 9:3,3,11,14,16 9:21 10:5,7,11 10:20 14:2,6 14:13,19,25 15:11 16:4,5 16:12,21 17:1 17:6,25 18:22 23:7,9 24:6,12 24:17,20 25:13 25:22,23,25 26:4,6 27:15 27:20 28:3,6 30:24,25 31:1 31:5,11,12,23 32:3 36:20 40:16,23 41:6 41:10 42:10,13 43:3 44:9 45:16 47:2 48:5,17
Breyer 10:23 12:7,14,16,19 12:25 15:18 19:23 20:13,17 28:6 30:5,21 33:24 34:1,20 35:12,18,23 36:6 43:16
Breyer's 30:18 43:5
brief 5:16 24:10 24:13 26:8 44:10 47:15
briefed 40:18
briefing 19:14
briefs 28:10
bright 41:16
bring 20:22
brought 13:1 27:2
buffet 44:24
bullets 45:5
burden 15:13,14 15:19 16:19 19:8,13,16,20 19:22,22 21:23 22:14 43:1,7 43:11,14,17 44:3
burdens 20:13

C

C 1:17 2:1,6 3:1 25:5
Cal 1:15,18
calendar 33:18
California 3:19 4:12 7:21 36:11 37:25 40:4,6 46:1 47:7 53:22
call 44:2 45:20 45:23 47:24,24 51:9
called 38:18
calls 9:22,24 42:20 45:17
candor 45:9
car 39:4 54:12
care 5:11
careful 48:7,11
carefully 35:1
case 3:4,21 5:17 6:11,22 7:14 7:19 8:12,25 9:1 10:1,8,8 11:4,21,25 13:7,7,15 14:1 14:1,4,8 15:3,5 16:7 17:2,3,15 17:20,23 18:4 18:10,23,24 20:4,18 21:15 21:17,21 22:13 22:15 23:6,8 23:20 24:1,2 24:13,23 26:4 26:5 27:13 29:2,9,12,15 30:23 31:2,2,9 31:14 32:8,20 32:21,25 33:9 33:23 34:4,17 36:13,20 37:13 37:18 39:17 41:1,9 43:3,9 43:16 44:2,22 44:23 45:10 47:7,11,14 49:8,10,11,13 49:25 50:4,4 50:18 52:8 53:10 54:15,19 54:20
cases 9:15 17:20 21:20,20 24:10 24:25 25:18 26:2,3 30:12 41:5,17 50:14 52:8,10
caused 42:22
centerpiece 49:25
central 9:16,21 9:23
cert 16:18 18:18 26:11,18,20
certain 24:25
certainly 9:10 10:9 23:14 30:14 40:2 53:20
certiorari 4:15
challenging 17:5
Chambers 3:24 29:6 30:3,11 50:14 54:15
chance 46:20
chances 27:3
change 24:11 26:21
changed 48:23
Chapman 3:16 3:18 4:1 5:20 5:21,22 6:7,18 7:9 8:10 9:15 9:17,23 14:2,9 14:21 17:1,6,6 17:8,25 23:7 23:21,21 24:12 25:14,20 26:3 26:5,10,23 27:7,10,13,20 27:22 40:24 41:3,5,9,20 42:9,11,11,14 46:5
characterized 32:12
CHERYL 1:6
Chief 3:3,8 9:2 9:10,19 12:20 12:24 15:9 16:11,15 23:11 25:2,7 27:6,17 40:15 41:22 42:2 48:16 49:18 51:24 53:15 54:1,7 54:18
Cindy 37:15
Circuit 14:11 19:15,15 28:9 28:12 29:23 31:22,25 32:6
circuits 23:12
Circuit's 19:18
circumstance 10:4 26:20
cite 42:12
cited 24:13 42:11
civil 21:20
claim 14:17 28:16,23 29:6 31:15
claims 25:20
clarify 32:13
classic 36:19 39:22
clear 19:7,7 20:5
clearly 12:12,12 13:9 28:14 46:25 47:8,23 49:11,13 50:17 50:17
clock 53:8
close 14:5 23:24 31:3 45:13,16 45:17,22 47:24 49:8,13,19 50:1,3,4,20,22 51:13
closing 49:23,24
collateral 9:5,8 9:11,21 25:15 25:18 26:22,22 40:24 42:4,7 42:16
combination 48:1
come 4:7,9 14:23 26:21 37:8 38:25 41:1
comes 13:11 14:5
comity 25:12
comment 26:6
commenting 28:8
commit 32:15
committed 40:10,12
committing 40:13
completely 8:22 32:10
complicated 11:25
complied 3:22
compounded 6:16
concede 19:20 49:1,1,2,7,9,10

conceded 15:16 47:14
concedes 19:21 54:9
concept 19:25
concepts 25:12
conceptually 20:4
concern 24:24
concerned 7:8 24:21 40:19
concerning 54:10,10
conclude 16:20 21:17 33:11 46:22
concluded 7:13 7:14 24:14 36:11
concluding 14:12
conclusion 8:24 46:9,15,18
conclusions 36:21
concurrence 16:4
concurring 18:22 21:10
conducted 5:18 6:7 9:18 27:7
conducting 20:16
confess 40:12
confessing 32:18
confession 34:6
confessions 54:14,15
conflict 23:12
confronted 17:9
conscientious 36:9
conscientiously 13:8 20:20
consequence 10:10 14:3
consider 6:13 13:8
consideration 9:4
considerations 9:13
consisted 5:11
Constitution 11:18
constitutional 3:10,20,23 4:20 5:7 6:1,4 6:15 7:15 8:5 8:14 17:21 23:10,20 30:11 41:2,15 42:23 47:14
constitutionally 3:16
construed 8:23
content 8:9
context 10:7 12:8 13:5 29:2
continuation 25:10
contradictory 53:25
contrary 5:22 10:24
contributed 43:21 44:1
conversation 39:15 54:3
conviction 3:12 18:12 24:6 26:12 39:11 43:18 44:4 47:2
convictions 23:23,24
corpus 42:18 49:15 50:11 51:6
correct 7:5,11 15:4,8 37:19 42:21
correction 4:17
corroborated 53:11
couching 43:6
counsel 4:9,13 27:6 32:16 41:22 51:24 52:4,7 53:19 54:18
counts 10:25 36:7
couple 30:15 49:24
course 34:13
court 1:1,12 3:9 3:14,19,19,21 3:22 4:2,3,10 4:12,22 5:1,2,3 5:5,19,21,25 6:7,12,13,14 6:17,20 7:1,3,7 7:13,14,17,21 7:21,22 8:18 8:25 9:11,14 10:4,12 11:6,8 11:11,13,14,15 12:2,4 14:4,5,6 14:7,9,10,20 14:21 16:5,10 16:10 17:2,5,7 17:9,23 19:25 20:8,15 21:9 21:19 22:11,18 22:24,24 23:6 23:15,16,22 24:1,13,14,16 24:20,22,23 25:8,13,21,23 26:2,5,6,12,17 26:21 27:7 28:1,4 30:10 30:14 31:14,22 32:23,23 33:1 33:4,19,20 34:25 36:1 40:19 41:1,3,4 41:10,16,19 42:3,11,13,15 42:19 43:6,16 43:19,20,22,23 44:4,4,5 45:18 46:1,12,19,21 47:16 48:6,13 48:19 50:12,13 53:21,22
courts 8:13,20 8:22 17:4,9,14 36:20 41:8,12 42:8 45:25,25 47:8 48:5
court's 3:22 5:22 6:11 8:4,6 8:23 9:3 14:3 16:7
cousin 35:5 54:11
crawled 50:25
credited 34:18
crime 35:15 40:8 45:3,7 50:19
criminal 21:20 21:21
critical 34:23
cross 38:22
cross-appeal 47:6,18
cross-examined 38:25
crucial 34:4
culpability 34:17 37:12 38:11 40:7 44:14 50:16 51:18
cumulative 7:3 11:7,12 30:9 32:9 37:17,21 37:25 38:3
cumulativeness 48:2
curiae 1:21 2:11 42:1
curtailed 4:21
custody 42:22

D

D 3:1
day 33:20 35:22 50:22
days 16:10,10 19:2 33:1,4,18 33:19 54:5
debatable 10:3
debate 9:20
decide 17:3,10 20:20 23:8 32:25 36:10 45:10 46:24
decides 11:2
decision 6:12 8:23 9:17 11:19 13:3,10 20:7 23:17 25:23 28:1 48:6
decisionmaking 4:3,22
decisions 16:7 27:24 28:1
deem 23:15
deemed 18:24 54:16
deep 42:16,16
deeply 42:5
defend 47:20
defendant 18:11 51:15
defended 44:23
defense 29:6,7,9 29:12,16,20 44:21,22 50:8
deference 24:19
deferential 9:12
deliberated 16:10 33:9,23
deliberation 15:5 31:7 33:11
deliberations 19:2 33:2 45:13 48:22 49:2,5

demanding 18:23
demonstrating 14:5
denial 4:11 29:5
denied 39:9
Department 1:20
Deputy 1:17
described 22:11 53:13,24
describing 52:21,22 53:1
description 15:7 52:23
determination 5:12,13 8:1,2,6 36:15
determine 30:25
determined 6:20 7:7 8:13,21
determines 5:25
determining 27:21
difference 11:20 14:2 17:15 18:5 22:5 42:12,16
different 5:14 6:5 9:6,22,24 13:5 22:8 27:18 39:21 46:9 52:10
differently 26:3
difficult 13:21 42:20 49:10,11
direct 4:7 9:6,9 26:11 38:22 42:5,8,8,17,19 49:16
directly 20:5 27:2
disagree 11:20 27:23 31:13 32:11 39:14 46:22
disagreed 11:19
disallowed 50:15
discern 22:2
discretion 46:23 46:24
discretionary 4:12
discussion 35:9 39:19 43:6
disinterested 32:10
dissent 32:6
dissenters 10:9 10:10,18,19
dissenting 14:12 15:23
distinction 42:4 42:16,17
distinctions 21:2
district 14:3,4,7 14:10 22:18 24:13 31:22 32:23 48:6
divided 45:19
divorce 6:14 10:6
doing 29:8 39:9 51:11
Dominguez 21:11
double 53:13
doubt 13:19 48:24
draw 46:8
drawing 46:10
drawn 41:16
dreamed 13:7
drifting 52:7
driver 52:21,22 53:1
driver's 53:4
D.C 1:8,20

E

E 2:1 3:1,1
earlier 23:6 41:13
easy 36:2
edge 31:10
effect 3:14,15,25 4:1 6:17 10:22 15:24 25:17 29:15 44:13 45:13
effectively 4:16 7:18
effort 36:9
eighth 33:20
either 13:14 17:1,10 44:18
eleven 29:11 32:21 44:13 50:16
employed 16:25 18:3,13
encourage 34:25
ends 17:23
engage 5:21 7:9
ensure 24:3
enter 38:13
entire 29:8
entitled 3:18 4:19 18:12 47:19
equal 45:23,25
equally 45:19
equipoise 43:8 43:11,13 44:6
equivalent 7:23 30:10
erred 5:5
erroneous 5:12 5:12 13:9 16:20 23:24 41:18 50:17
erroneously 5:25 6:1,20 27:7
error 3:10,11,13 3:15,15,21,23 3:24,25 4:1,17 5:4,11,18 6:2,5 6:16,18,24 7:2 7:7,9,10,13,15 9:13 11:14,23 12:3,8 14:6,19 16:24 17:11,22 18:3,13,24 20:1,6,21 21:12 22:6,13 23:22 24:21 28:21 30:1,7 30:11 31:4,5 31:23 41:2,20 43:20,25 47:12 47:14,21,22 49:3
eschewed 43:6
Esparza 6:12 8:24 27:25 28:4
ESQ 1:15,17,19 2:3,6,9,13
essentially 15:16 43:22
established 28:14 37:7 47:9
evaluated 3:15
event 46:2
evidence 13:11 13:14 19:5 20:2,4 21:22 22:3,3 28:22 29:6,18 30:8 34:4 38:7 39:23 40:7 41:18 44:16 45:2 46:23 49:18 50:13 51:3,12,14
evidentiary 41:14 52:7
exact 42:10
exacting 16:6 23:19
exactly 22:7 23:3 41:17 49:22
example 33:12 36:15
excellent 44:23
exception 25:19 25:24
excluded 11:11 28:11,15 30:9 34:11 38:12 44:14 51:4
excluding 28:22
exclusion 28:12 28:18,25 41:18
execution-style 53:13
expect 32:24
expected 51:17
experts 34:4 51:8
explaining 29:3
explanation 21:15 29:4
expressed 22:23
extent 22:16
extraordinary 25:11
extremely 54:8
ex-girlfriend 35:6
ex-girlfriend's 35:6
eye 38:21

F

fact 4:14 9:8 12:2 26:21 47:3 49:2,23
facts 21:14,20 22:9 23:5
factual 10:7
fail 28:25
fails 6:17
failure 4:2 5:20
fair 18:6
fairly 40:20 45:10
faithful 23:17
far 7:8
fashion 24:2
fashioning

23:17
favor 14:22
favorable 22:4
Federal 4:4 5:3 6:13 7:7 8:13 8:20 10:21 11:15 17:14,23 24:6 25:9,16 25:21 26:1 27:8 28:14 30:10 41:4,10 46:23 47:9 49:15 50:11
federalism 25:12
filed 4:15
filling 49:16
find 7:2 12:3 13:21 22:24,25 28:2 31:5 33:10 36:16 37:21 43:23 46:18
finding 8:4 14:18 22:17 26:3,5 28:17 29:23 30:6,7 31:3 41:2,20
findings 13:8 19:12
finds 5:2 11:14
fine 21:1
finish 34:1 36:3
first 3:23 8:12 17:19,21,25 27:11 28:10 29:6 43:1 50:4 54:12
fit 15:7 22:13 29:7 52:23
five 19:2 31:7,15 33:3,3,4,9 45:9 49:12
five-week 15:5
flimsy 53:24
focus 16:8
focused 53:19
focusing 51:7,7
following 4:10 4:15 6:11
follows 17:19 29:5
footnote 7:16,16 12:5,10,16,18 38:2
foreperson 33:21 34:3
forepersons 48:23
forgive 33:19
form 36:16
former 8:8
forth 17:25 33:18
found 10:12 22:22 27:13,14 31:23 37:17,21 37:25 38:7
foundation 37:22 39:12 48:1 52:9,12 52:14,17
four 31:8
FRANCIS 1:3
Francisco 1:18
Fry 1:3 3:4 4:4 4:19 7:19 14:5 14:9,14 17:1 19:3,13,17 22:19 23:9 34:7 44:22 52:23
Fry's 3:11,14,17 5:17 6:16 14:17,22 34:7 51:18
functional 7:23
fundamental 25:12 42:18,21

G

G 3:1
gaps 49:16
general 1:17,20 24:9 30:22
generality 17:20
generalized 18:1
General's 5:16
gentleman 53:11
getting 31:6 54:13
ghost 53:13
Ginsburg 7:1,6 11:5 18:17 22:20 24:4,24 26:8,14 31:24 32:2 33:15 41:7 47:4,17 48:8 53:3
give 39:16 49:17
given 47:7,7
go 27:1 28:18 30:17 33:6 34:1 36:14 40:2 43:12 45:17 52:6
goes 39:23 41:9 43:9 45:20,23 49:21
going 7:3 10:20 11:6 23:5 26:10 35:1,13 35:13 36:24 39:22 41:4,10 41:12,19 48:17 49:17 51:14
good 13:4 30:21
Government 26:1
gradations 21:12
grant 18:18 26:18,20 27:14
granted 16:17
grasp 21:14
grievance 46:7
grievous 42:21
grind 53:10
ground 5:5 30:9 31:17 47:20
grounds 5:2
guess 9:19 15:13 46:11
guilt 23:25 51:12 53:20
guilty 19:3
gun 45:3,5 51:19
guy 15:7

H

habeas 4:4 5:3 6:13 9:15 10:21 17:5 24:16 25:9,22 27:1,8 42:15 42:18 49:15 50:11 51:5
Haltom 1:15 2:3 2:13 3:5,6,8 4:8 5:15 6:8,25 7:5,11 8:3,12 9:10 10:2,14 10:19 12:1,12 12:15,18,22 13:24 15:2,8 15:15,21 16:14 16:22 18:8,15 18:19 19:10,21 20:10,15 21:8 21:25 22:10 23:3,14 24:8 25:3 51:25 52:2,4,6,13,19 53:6,17 54:7
hand 35:25
happened 5:17 23:25 37:22 43:8,15 48:25 54:5
happens 24:3
hard 11:24 47:23 48:2 50:21,24
harm 5:9
harmful 31:4
harmless 5:2,18 7:9 9:12 11:23 13:18,19 14:19 15:1,6 16:12 16:20,24 17:11 17:12 18:3,10 18:13,24 20:1 20:21 21:12 22:6,12 23:22 24:21 28:19,25 30:1,7 31:5 36:10
harmlessness 5:1,5,12 6:3 8:2 9:4,7 10:17 42:7
head 54:12
hear 3:3 16:16 31:14 35:8,18 38:21,22 39:15 39:18,18 54:3
heard 33:14 34:6 35:10,12 35:17,19 44:18 52:21 54:11
Hearst 37:1
heavily 53:19
held 25:13
help 19:6 23:11
helpful 12:25
higher 6:24
history 13:15 17:13
holding 7:20 10:7 15:22 24:2 38:2 43:7
holds 24:24 28:9
holidays 33:6
Holmes 50:14
Honor 4:8 6:10 8:3 12:1,13,23 13:24 15:2,8 16:14 18:8 20:10 21:9 23:4,15 26:13 27:5,11 40:1 41:14 53:7
house 45:4
hundred 32:21

hundreds 47:25
hung 15:4 33:16 33:21
Hurtz 36:25 37:2,4,5,13,15 38:8,20 44:16 44:21 49:23 50:7 52:8,12 52:14,15,18,25 53:2,23 54:10
Hurtz's 35:5 38:13 53:19 54:10

I

identified 3:23
ignore 10:3
ignores 5:22
imbalance 30:6
immediately 35:21 53:11
impact 17:24
impacting 50:17
impasse 19:4
import 10:20 18:15
important 23:19 28:22
impossible 31:4 31:11
impression 13:3
improper 31:17
improperly 19:16
improve 29:12
inappropriate 25:14 26:23
included 40:16
including 34:3 53:5
inconsistent 14:18,20
increase 29:19
increased 52:14
incredibly 49:6
independently 30:2
indicate 52:24
indicated 18:21 23:6
indicates 31:2
indicating 51:12
ineffable 21:12
inference 49:19
infirmities 53:4 53:6
influenced 20:6
injurious 25:17 29:15 44:12 45:13
innocence 14:17 23:25 28:17,23
innocent 3:12
inquiry 9:13 20:16 22:12,13
insofar 52:10
instruction 48:24
insufficient 22:25 23:1 43:24
intellectually 17:4
interesting 45:11
interests 25:16
interim 28:5
Interlinking 54:15
intervening 24:11
introduction 24:9
involve 24:12
involved 32:21 44:19 50:15
in-custody 34:6
isolation 44:15
issue 11:4,24 14:15 17:4,5,9 19:17 21:21 24:20 35:15 47:10
issues 21:24
48:9,10
I.e 52:11

J

JA-78 54:8
Jersey 40:5
job 44:23 51:9
JOHN 1:3
joint 7:12,17 12:22 22:21 35:4 54:8
judge 13:3,4,16 15:20 19:4,12 20:5,5,19,21 20:24,24 21:16 22:2,16,18 32:2 36:3,7,7 37:20 43:19
judges 21:6
judge's 13:9 20:7
judicial 21:13
judiciary 9:18 17:23
juries 15:4
jurist 36:11
jury 16:9,9 19:1 19:1,4 29:17 32:24 33:9 34:18 38:20 44:24 45:9 48:22 50:20,24 52:15,20,25,25 53:16,18
jury's 20:7 43:21
justice 1:20 3:3 3:8 4:6,23 5:15 5:24 6:19 7:1,6 7:25 8:8,17 9:2 9:10,19 10:9 10:14,16,23 11:5 12:7,14 12:16,19,20,24 12:25 14:12,23 14:24 15:3,9 15:11,18,23 16:3,11,15 17:17 18:9,17 18:21 19:6,19 19:23 20:13,17 21:10,18 22:1 22:5,20 23:11 24:4,24 25:2,7 26:8,14,25 27:6,17 28:6 29:21 30:5,8 30:17,18,20,21 31:16,20,24 32:2,7,14 33:3 33:8,12,15,24 34:1,8,12,20 34:22 35:12,18 35:23 36:6,23 37:3,7,16,24 38:4,6,13,16 38:24 39:6,10 39:22 40:9,15 41:7,22 42:2 42:21,24 43:5 43:10,16 45:8 45:9,19,22 46:8,14,16 47:4,17 48:8 48:16 49:7,12 49:18 50:1 51:2,10,24 52:6,16 53:3 53:15 54:1,7 54:18

K

K 1:6
keep 33:17
KENNEDY 4:6 36:23 37:3,7 38:4,13,16 39:6,10 50:1 52:6,16
key 25:25
kill 35:13,14
killed 35:20 38:19 39:3,4,6 53:23
killer 52:22
killing 15:7
killings 40:2,3 40:10,12,13
kind 7:9 22:7
kinds 53:3
knew 40:1
know 5:10 6:8 10:25 17:18 18:5 31:6 33:8 39:20 40:4,5 46:21 49:14 50:10 51:2,14 51:20 53:9 54:2
known 7:22
knows 48:25 51:5
Kotteakos 6:22 7:24 8:9 9:14 10:11 16:4,8 18:22 23:18 45:16

L

lack 37:21 48:1
laid 44:10
language 19:11 19:14 43:5
lasted 32:21
Laughter 39:8
law 7:14 13:7 22:9 24:11 28:14 30:14 33:13 42:5 47:9
lawyer 26:17
lead 8:24
learned 27:16
leave 12:3
led 9:13
left 34:23 44:6 45:4
legal 21:19 22:8
length 48:22 49:2,5
lesser 52:11

let's 5:24 28:11
level 14:4 43:18 44:3 48:3
Leventhal 13:3
light 8:21 22:4
likelihood 26:15 26:17,19
Likewise 14:11
limited 24:25 25:9,11
line 41:17
link 37:4,15
linked 45:3 54:14
listened 35:3
litigation 17:14
little 28:7
logic 4:24 6:11 8:11,18
logical 4:18
long 32:20,24,25 33:11 42:20 48:7 49:1 50:21
longer 4:13
look 14:3 16:7 18:23 21:16 22:14 23:9 28:11 29:7 32:22 33:6 35:1,2 38:21 49:23 51:6
looked 52:25 53:2
looking 19:1,11 19:13 22:12,19 29:8,9,16,16 35:25 44:15,20 53:8
looks 53:12
lose 43:15
loses 5:1 44:7
lot 11:16,17 36:2 40:10
lower 8:20

M

magistrate 19:8 19:11 22:16,23
majority 10:24 14:14 15:22 19:24 20:8
making 7:20 11:19 16:13
man 32:15 35:14 35:20 39:4 53:1,9 54:11 54:13
mandated 3:16
mankind 13:16
manner 12:5
Maples 14:15 15:6 34:9,10 34:16 35:1 36:24 37:9,22 38:8,24 39:1,5 39:11,11,11 49:20 52:10 53:18
March 1:9
material 28:15
matter 1:11 4:14 7:13 16:23,24 18:2,4,10,12 54:21
matters 44:5
mean 10:24,25 11:23 12:10 13:21 18:4 30:20 31:6 33:6 37:16 45:17 46:1,14 49:10 52:16,16
means 11:12,12 18:9,11,14 23:1
meant 18:5
meet 19:13
mentally 20:25
mention 38:16
mere 49:2
merely 5:8 27:23
merit 47:1
merits 28:17
message 50:24
methodical 48:7 48:11
midstream 48:24
mightily 19:5
Millett 1:19 2:9 41:23,24 42:2 43:4,12 45:15 45:21,24 46:11 46:19 47:13,19 48:10,19 49:9 49:14,22 50:6 51:5,16
mind 11:24 13:22 21:4,13
minutes 51:25
misapplication 50:12
miscarriages 42:21
Missouri 53:7,8
mistake 11:9,9 12:9 36:3
misunderstand 46:11
Mitchell 6:12 8:23
moment 46:16 46:17
Monsanto 24:14
months 35:21
Moody 1:17 2:6 25:4,5,7 26:13 26:19 27:4,11 27:23 29:4 30:4,13,19 31:13,19,21 32:1,5,11 33:4 33:10,17,25 34:2,10,14,25 35:16,19 36:5 36:17 37:2,6 37:10,19 38:1 38:5,9,15,18 39:2,9,14,25 40:11,18 41:11
morning 3:4
mother 35:6
move 29:13 30:15
murder 32:15 53:5,14
murderer 49:20 50:2
murders 32:18 32:19

N

N 2:1,1 3:1
name 38:13
narrow 17:3 49:3
narrower 15:13
nature 3:13 23:9
near 40:24
nearly 48:6
necessarily 6:8
necessary 23:16 29:21
need 17:10 23:22 24:19 27:14 37:19
needle 13:25
needs 6:13 8:25
negligible 27:3
Neither 46:8
neutral 52:22
never 5:5 10:16 26:2 33:14 36:3 39:2,3 51:5
new 33:21 34:2 40:4
night 45:5 51:19
nine 19:2
Ninth 14:11 19:14,15,18 28:9,12 29:22 31:22,25 32:6
nonpersuasion 15:17,25
notion 44:11
Notwithstandi... 3:13
number 12:17 16:22 30:23

O

O 2:1 3:1
object 28:3 30:4
objecting 8:1,4
objectively 17:8
obtain 5:8
obtains 5:3
obviously 8:3 31:9 50:2,4
occurred 3:10 3:13,21,24 5:6 6:15 10:13 23:10 40:5
offense 35:21,22
offered 37:23
oh 11:16 13:17 34:12 38:9 52:16,16
Okay 12:19 13:14 16:15 36:12 38:4
once 26:21
opinion 9:3 12:11 15:22,23 18:22 19:18,24 21:10 43:2
opinions 32:22
opponent 19:19
opposite 20:25 36:12 52:18
options 44:24
oral 1:11 2:2,5,8 3:6 25:5 41:24
order 23:23 25:15 37:19
Ordinarily 39:25
originally 13:6
overcome 29:19 51:15
overheard 32:17
overturned

45:18
O'Neal 15:16,18 15:18 20:11 22:13 26:5 43:5,17,20
O'Neal's 43:7

P

P 3:1
page 2:2 7:16 12:18,20 22:21 54:8
pages 7:12 32:24 48:6,14
Pamela 14:15
panel 14:14
parked 54:12
part 14:25 16:23 43:18 44:4
particular 31:2 49:3
passing 26:16
PATRICIA 1:19 2:9 41:24
Penry 26:4
people 38:19 39:3
peoples 39:7
perceived 30:6
perfectly 8:9
perpetrator 36:24
person 3:12 11:12 35:13 50:9
persuaded 43:25 44:5,6
persuasion 19:9 19:16 21:23 43:1,7 44:3
persuasive 51:13
petition 4:11,15 26:15
Petitioner 1:4 1:16 2:4,14 3:7 15:12 23:2 25:19 26:9,16 42:6 52:3
Petitioners 41:1
Petitioner's 40:22
phrase 14:1
pieces 35:4,11
pin 13:25
place 15:19 22:22 28:2
plainly 17:11,12
please 3:9 25:8 42:3
Pliler 1:6 3:4
point 5:16 9:5 10:3 11:18 12:5 16:2,13 17:14 20:11 31:10 32:13 33:15,20 38:10 38:10 39:11 40:21 46:12 49:15
pointed 9:11 15:23 16:4 21:10 24:9 40:25
points 30:16
portion 18:16
position 3:17 4:25 6:10 8:16 24:15 42:25 44:9
possible 8:7 11:10,19 12:6 12:10 13:23 29:2 46:2,3,13 46:15
possibly 7:19 52:13
postconviction 24:7
potential 8:17 37:12
practiced 33:13
precedent 3:22 5:22
prejudice 7:18 8:7 11:11 12:10 14:8,12 14:15 18:25 20:16 22:12 25:17 32:4 38:1 46:2,4,13 46:16
prejudiced 5:4
prejudicial 17:24
premises 46:16
prepared 41:21
presence 52:20
present 8:15 11:4 40:7
presentation 20:3
presented 15:10 16:17,24 17:21 29:25 40:17,20 53:15,17
presenting 20:2
presume 38:25
pretty 49:13
prevail 23:9
prevailed 14:9
prevails 17:1
principle 23:18 23:20
prior 24:18 31:14 45:2
prisoner 5:1 43:9,13 44:6
probability 5:9 21:13
probative 39:16 40:13
problem 13:5 26:16 45:8 51:4
proceed 27:15 30:23,25 42:25
proceeding 24:17 36:4
proceedings 4:4 24:18
process 25:11
produced 32:22
produces 4:25
professors 13:7
proof 15:19 20:14 43:18
proper 25:15 43:2 44:3
properly 31:1
proposition 9:1
prosecution 22:4
prosecution's 36:25
provide 54:16
purpose 25:10
purposes 29:25 31:20,21
put 24:4 46:17 51:19

Q

quarrel 22:10
question 8:15 11:2 14:24 15:10,13 16:3 16:16,17,24 17:3,10,18,19 17:21 18:1,2 18:16,17,20 20:2,3,18,18 20:23 21:8 22:2 23:8,25 24:8,12 26:18 29:14,25 30:1 30:18 31:7 32:14 40:16 43:2 44:8 45:14,16 47:5 47:6,16,18 48:22 52:8
questions 13:2 27:1 40:17 42:24 52:7
quite 36:8
quoted 19:14
quoting 35:2

R

R 3:1
raise 11:22,25
raised 5:16 12:4 17:4 47:17 48:9
raising 8:16
rationale 6:23
Rawlinson 32:2
reach 40:19
reached 5:5 36:21
read 9:2 11:1 12:19 13:2 33:5 34:3,8,15 34:18 38:23 50:25 51:8,17 51:18
reading 15:20 17:17 18:7
reads 22:23
realistic 21:6
realistically 26:14
really 20:22 36:21 38:10 39:16 41:6 48:23
reason 7:8 11:9 12:7 28:21 51:10 53:20
reasonable 4:5 5:8 13:19 21:16 36:11 46:18 48:24
reasonably 20:24
REBUTTAL 2:12 52:2
receive 25:20,21
received 29:19
recognized 7:23 17:22
recommendat... 19:12 22:17
reconcile 29:22
record 13:17

15:20 20:1,20 22:3 31:2 32:13 36:14 37:20 42:20 44:11,20 47:20 48:13,13 51:1 52:24
recounted 17:13
rectify 3:20
reduced 41:6
references 49:24
refined 27:18
regard 6:2,3 23:7 24:18
regardless 6:6 20:23
rejected 31:15
related 30:11
relegated 4:3
relevant 39:13 46:21 52:20
reliability 54:17
relief 4:4 5:3,8 24:7 31:12
relying 23:2,4
remaining 52:1
remarkable 36:22
remedy 4:19 25:11 26:9
remember 50:7
repeat 47:15
repeated 48:25
repeatedly 7:23
repeating 24:21
requirement 23:18
requires 44:15 44:20
resolve 8:18 23:12
respect 21:25 35:16
Respondent 1:18,22 2:7,11 15:15 19:21 25:6 42:1 47:19 54:9
Respondents 47:13
response 32:14
result 3:12 4:24 9:12
retrial 50:18
return 40:23
reversal 18:12 47:2
reverse 13:9,20
review 4:11,12 5:14 6:5,6,9 7:9 9:5,6,8,11 9:21,23 10:6 20:20 23:21 25:15,21 26:10 26:11,22,23 27:7 37:24 40:25 42:4,5,6 42:7,8,9,11,14 42:17,17,19 45:18 49:16
reviewed 3:14 3:25 27:8
reviewing 13:17 20:1 22:3 24:16 36:7
right 4:9,13 11:7 23:13 34:12 37:6 38:4,9 49:14,22 51:8 53:16
rigorous 23:22
rises 48:3
risk 15:17,24
ROBERTS 3:3 9:2,19 12:20 12:24 15:9 16:11,15 23:11 25:2 27:6,17 40:15 41:22 48:16 49:18 51:24 53:15 54:1,18
rolled 33:22
room 35:3,10 39:17
rooted 42:5
ROSS 1:17 2:6 25:5
rule 14:7 24:2 25:20,22 40:22 42:18 46:23 50:13
ruled 5:6 14:21
ruling 14:14 41:15 52:9

S

S 1:15 2:1,3,13 3:1,6 52:2
Sacramento 1:15
safeguard 23:23 23:23
San 1:17
satisfied 45:12
save 25:1
saw 32:15 52:21 52:25 53:1
saying 12:9 16:19 43:25 54:11
says 11:11 15:11 15:19 16:18 28:12 36:8 39:15,20 49:3 53:12
Scalia 4:23 5:15 5:24 6:19 7:25 8:8,17 10:9,14 10:16 17:17 18:9 21:10 26:25
scarcely 4:5,18
scene 45:7
scope 4:18 25:9
second 3:25 12:14 17:18 18:2,11 30:18 44:8 50:5
see 8:11 16:19 29:7 38:20
seeing 53:13
seeking 4:4
seemingly 14:8
seen 15:6 45:6,7 53:12
sees 53:11
selected 33:21 34:2
semantic 16:2
send 11:20
sense 20:12 24:16 27:24 29:10 44:2,11 50:21
sentence 18:11
serious 20:18 35:9 39:19 54:2
set 17:24
seven 44:17 53:22
SG 28:9
shooting 54:12 54:13
shot 54:11
show 36:15 50:8
showing 22:19 22:25 23:1,1 43:24 52:12
side 19:8 41:7
significantly 34:15
similarly 10:15 34:16
simply 3:17 4:21 6:11 12:3 17:2 17:13 19:17 24:21 28:3 36:14 39:14 50:15
sit 42:19
situations 21:18
six 44:17
sixth 31:14 42:19 45:18
six-part 36:1
sleeves 33:22
slim 26:18,20
solely 23:8
Solicitor 1:19 5:16 24:9
somebody 50:3
someplace 26:10
sorry 12:20 21:3 45:21
sort 30:22 41:13 46:17
sought 26:11 52:15
Souter 30:17,20 33:3,8,12 37:16,24 38:6 38:24 45:9 46:8,14 51:10
sovereignty 25:13
speaking 17:20 40:1,3
speaks 17:19
specifically 23:5 51:14
speculative 49:6
split 8:17
stage 4:16
standard 3:16 5:14 6:5,6,9,18 6:23,24 7:22 7:24 8:22 9:3,7 9:12,22,24 14:7,13,21 15:1,12 16:5,6 16:6,18,23,25 17:24 18:3,13 18:22,23,25 21:19,25 22:6 23:13,19,23 24:17 25:14,17 25:24 26:24 27:20 28:2 30:24 32:3 36:20 40:23 41:20 42:6,8 46:4 48:5,17
standards 17:12

17:13 18:6 21:12
state 3:19 4:10 4:22 5:1,2,4,19 5:20 6:7,14,17 6:20 7:1,2,8,12 7:14,17,20 8:4 8:6 9:18 10:6 10:12 12:2,3,4 13:22 15:12,25 17:7,8,22 19:20 20:24 21:4 22:18 24:22 25:12,16 25:21,24,24 26:1,3,5,11 27:7 32:23 41:3,8,12,19 43:11,14,14 45:17 46:4,15 49:10
stated 7:17 14:5 23:22 39:2,3
statement 14:17 30:22 35:8,19
statements 10:21 29:22
states 1:1,12,21 2:10 14:7 24:14 28:10 41:25
stating 14:15
step 28:5
Stevens 14:24 15:3,11 16:3 18:21 19:6,19 31:16,20 32:7 32:14 34:8,12 34:22 39:22 40:9 42:24 43:10 45:8,19 45:22 46:16 49:7,12 51:2
story 53:9
straightening 28:8
stressed 10:4,5 18:21
strict 52:17
strike 25:15
stringent 25:14
strong 51:15 54:1,8
structural 9:4
struggled 19:4 21:9
stuff 11:22
subject 9:20
submit 41:21
submitted 54:19 54:21
substance 30:6
substantial 13:10,14 25:17 29:14 44:12
substantially 14:16 20:6 28:16,23 43:21 49:4
substantive 8:5
successful 26:15
suffered 4:20 7:19
sufficiency 22:1
sufficient 21:22 22:3,19
suggest 28:4
suggesting 52:18
suicide 50:2
Sullivan 16:8
supplanted 8:22
support 13:10 21:22 44:11,11
supported 47:20
supporting 1:21 2:11 42:1
suppose 4:6 12:1 20:19 26:25 28:6 40:10 48:16
Supreme 1:1,12 4:12
sure 9:25 16:16 30:19 33:12 48:22
swallow 40:23
switching 33:18
sync 24:5

T

T 2:1,1
take 9:7 18:3 32:25 42:25 49:12
taken 27:3 33:5
takes 45:9
talk 15:20 20:13 36:24
talking 4:23 21:11 22:20 44:14 54:4
targets 37:12
tell 35:9 54:4
tension 27:25
terms 22:14 23:8 43:6
terribly 19:7
test 4:1 22:8 36:8 49:4
testified 34:16 38:20 52:18
testify 11:7 37:14 38:12,19 52:9,12
testimony 14:16 15:6 28:11,14 32:17,17 34:5 34:7,9,10 37:8 37:13 38:23,24 39:1,11,16 40:14 45:4,11 46:21 49:21 51:19 52:11 53:4,7,10,18 53:25
tests 36:1
Thank 12:24,25 25:2 41:22 51:23,24 52:4 54:18
theme 9:16,21 9:23
theory 36:25 49:20
thing 6:20 10:17 13:1,22 19:7 28:24 38:18 48:18,21 49:20
things 28:9,20 29:1
think 8:18,25 10:4,23 11:1 12:12 13:13,13 13:16,17,18,22 13:25 15:21,22 15:25 18:6,9 18:10,13,15 20:2,4,6,8,10 20:19,19,21,23 21:8,14,15,23 22:15 23:16 29:1,4 30:20 32:2 34:24 35:23,24,24 36:6,19 40:15 40:20 41:11,12 43:15,16,20 44:1,10,17 45:14 46:6,12 47:10,11,15 48:19 49:5 50:12,23 52:13
thinking 37:10 37:11 52:19
thinks 46:20
third 3:11 16:9 45:1
third-party 34:17 36:23 37:12 38:11 40:7 44:14 50:16 51:12,17
Thomas 15:23
thorny 23:7
thought 7:1,2 10:10,18,19 11:1,17 13:6 13:16 15:18 18:5 19:8,24 20:25 45:24 47:4,6 51:12
three 31:16 37:12 45:25 51:18,25
threw 44:23
tie 21:14 40:7 43:9,12
time 25:1 30:8 32:25 36:6 50:21 53:5
times 39:7 41:1 47:25
timing 53:5
told 19:3
totally 45:12
tottering 31:9
transcript 48:14
treated 26:2
treatment 14:4
trial 3:11,14,21 3:24 6:16 11:6 11:11 16:9 17:22 37:20 38:12,14,20 45:1 47:25 48:14 52:4
trials 45:2
Trigg 40:25
trouble 17:17 28:7
truck 45:6,6 51:20 52:21,22 53:1,4
true 10:14 21:5 28:20,21 32:1 39:16
truncated 5:19 12:5
try 20:22 21:1 29:22 36:14
trying 27:24 30:5,5 36:16 50:8
Tuesday 1:9

turn 44:2
turned 35:14
turns 22:15 42:17
twelfth 29:11 44:13 50:15
two 5:14 15:4,4 18:4,6 27:18 28:9 29:22 31:8,16,24 36:20 42:24 45:15,25 48:5 51:7 52:8,10
two-day 49:24
type 3:11 4:17 7:24 29:6 45:7 47:24
Tyson 40:25

U

ultimately 9:1 22:15
unanimous 50:22,23
unbelievable 53:25
unbiased 54:9
unconstitutio... 46:25 47:1,24
unconstitutio... 48:3
underlying 6:15 8:5,14
understand 6:23 8:16 11:6 20:22 24:5,8 24:20 29:1 36:18 46:6 48:2
understood 20:11
undertaken 9:23
undoubtedly 10:5
Unfortunately 52:24
unique 32:9
United 1:1,12,21 2:10 24:13 41:25
unreasonable 4:3,21 17:8 27:9,12,19,21 28:13,13 32:24
unreasonably 42:9,14 47:8
use 25:14
utilized 19:12

V

v 1:5 40:25
valid 50:13
value 39:16 40:14
various 27:24
verdict 21:22 25:18 29:15 43:21 44:1 46:5 49:5 50:18
versus 3:4 6:12 8:23 23:7 24:12,14 44:22
victim 37:5
VICTOR 1:15 2:3,13 3:6 52:2
view 22:23
violated 11:18
violation 4:20 5:6,7,13,25 6:2 6:4,15,21 8:5 8:14 10:12 23:10 29:24 30:3 41:15 42:22
voted 19:3

W

want 11:4 32:12 33:6 48:21
wanted 36:19 40:21 51:13,21
wants 26:9
WARDEN 1:6
warrant 50:18
Washington 1:8 1:20
wasn't 7:6 11:8 11:9 50:2
Watson 7:22
way 17:18 22:11 32:12 34:23 43:17,24 45:20 45:23 52:23
ways 39:7
weeks 31:7,8 32:21 33:3,4,9 33:16 45:10 48:14 49:12
weight 39:23,23 40:3
went 33:22 39:4 45:5 48:12,12 48:13
we'll 3:3 47:21
we're 4:23 21:11 24:23 48:16 49:17
we've 16:17 44:10
wholesale 40:24
witness 11:7,10 11:16,17 28:11 28:15 29:11 32:9 34:6,23 35:5 37:23 54:2,9
witnesses 32:22 34:16,19 37:14 38:11 44:13,17 48:15 50:16 53:23,24
woman 35:14,20 39:4 54:11,12
wonder 11:3,5
word 15:19
words 10:16 13:15 21:6 35:2 36:2,16
worked 50:21
works 50:24
worried 35:25 36:4
wouldn't 23:11 31:11
writ 4:15 27:14
write 21:6
wrong 16:1 20:7 29:23 32:8 42:9 48:23 50:23
wrongs 42:22
wrote 10:24,25 19:24 22:17

X

x 1:2,7

Y

years 13:2 33:13 47:2 50:18 54:5

0

06-5247 1:5 3:4

1

10 35:4 54:5
10:06 1:13 3:2
100 32:24 48:6 48:15
11 38:10 48:14
11:06 54:20
12 47:2
15 34:3 50:18
17 7:16 12:18 38:2
18 35:21
181 22:21 43:22

2

2 54:5
20 1:9
2007 1:9
2254 24:4 26:21 27:2
2255 24:5,10,25
23 16:10
24 2:7 33:4
25 33:1,4
29 16:10

3

3 2:4

4

40 33:13
403 30:10 46:23
41 2:11

5

5,000 48:14
51 2:14

9

94 7:12
97 7:12,16 12:22