

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LONNIE LEE BURTON, :

4 Petitioner :

5 v. : No. 05-9222

6 BELINDA STEWART, SUPERINTENDENT, :

7 STAFFORD CREEK CORRECTIONS CENTER.:

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9 Washington, D.C.

10 Tuesday, November 7, 2006

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12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:03 a.m.

15 APPEARANCES:

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17 Petitioner.

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23 Respondent.

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	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	JEFFREY L. FISHER, ESQ.	
4	On behalf of Petitioner	3
5	ORAL ARGUMENT OF	
6	WILLIAM B. COLLINS, ESQ.	
7	On behalf of Respondent	26
8	ORAL ARGUMENT OF	
9	MATTHEW D. ROBERTS, ESQ.	
10	On behalf of Respondent	42
11	REBUTTAL ARGUMENT OF	
12	JEFFREY L. FISHER, ESQ.	
13	On behalf of Petitioner	49
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
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8
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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Burton versus Stewart.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

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

In Sharp versus Pain, the Ninth Circuit opinion that first decided the question that's before you today, the Ninth Circuit said, and I'm quoting: "The rule of Blakely that the statutory maximum is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict, was not clear until the Blakely decision itself." The Ninth Circuit is simply wrong. In this Court's Apprendi decision it laid down precisely that rule. At page 483 of that decision this Court described the statutory maximum concept as, quote, "the maximum a defendant would receive if punished according to the facts reflected in the jury verdict alone" -- virtually the identical language.

JUSTICE SOUTER: Mr. Fisher, you know, assuming we read it the way you read it, I've got a

1 basic problem that doesn't really surface until you get
2 to the end of the briefs and I wonder if you would
3 comment on it at the beginning of the argument. That is
4 -- or I'll put it in the form of a question.

5 Is the decision which the judge makes here
6 to sentence consecutively rather than concurrently, a
7 decision that requires the finding of any fact about the
8 commission of the crimes themselves or the circumstances
9 of those crimes or about the defendant's character?

10 Does the judge have to make or does the
11 fact -- some fact finder have to make a finding on any
12 of those subjects -- crimes, circumstances, character of
13 the defendant?

14 MR. FISHER: Yes, he does, Justice Souter.

15 JUSTICE SOUTER: What is that fact?

16 MR. FISHER: It's precisely the same kind of
17 fact that the judge had to find in Blakely itself.
18 Under the Washington, Revised Code of Washington, the
19 statute, the statute for running sentences consecutively
20 in the fashion that Mr. Burton's were run consecutively,
21 refers the judge back to the very same provision that
22 was at issue in Blakely itself, which is the aggravating
23 factors provision of Washington, which was formerly
24 codified at section 390 and is now codified at section
25 400.

1 JUSTICE SOUTER: I thought the only fact
2 that had to be found was that, given the classification
3 sentencing scheme Washington had, there would be, in
4 effect, a free crime, no incremental punishment, unless
5 there were consecutive sentencing. That's not a fact
6 that falls within any of those categories of crime,
7 character, or circumstances.

8 MR. FISHER: That would be a fact, Justice
9 Souter, but that is not the way the Washington law
10 works. It is colloquially known as the free crime
11 aggravator. But in the Washington Supreme Court
12 decision in Hughes which is cited at the end of our
13 reply brief the Washington Supreme Court made clear that
14 to invoke that aggravator a court has to find that
15 there was extraordinarily serious culpability or
16 extraordinarily serious harm that accompanies the
17 multiple offenses.

18 JUSTICE SOUTER: So it's a misnomer to say
19 it's a mere free crime criterion? It's free crime plus
20 some further fact?

21 MR. FISHER: That's right. And this Court's
22 decision -- I'm sorry. The Washington Supreme Court
23 decision in Hughes clearly lays that out. If you have
24 any doubt about the way the consecutive sentences work
25 in Washington, I want to give you one other citation, to

1 a new Washington Court of Appeals decision that
2 considers a consecutive sentences imposed exactly the same
3 way that Mr. Burton's was. That is to say, they are run
4 consecutively based on the clearly too lenient factor.
5 That case is called State versus Washington and it was
6 just reported at 143 P.3d 606, 143 P.3d 606. The
7 Washington Court of Appeals in that case, considering a
8 sentence just like Mr. Burton's, says that it does
9 trigger and violate Blakely.

10 JUSTICE SOUTER: So the extra fact then is a
11 lot like the sort of heinous, atrocious and cruel
12 aggravator? I mean, it's comparable to it?

13 MR. FISHER: Exactly, it's part of the same
14 list. And as this Court said in Apprendi itself, that
15 extra culpability, which is one of the ways this
16 aggravator can be met, is the quintessential type of
17 element that needs to be proven beyond a reasonable
18 doubt .

19 JUSTICE BREYER: When you say extra
20 culpability, do you mean the nature of the crime?
21 Suppose there are three crimes all committed at the same
22 time -- murder, rape, and kidnapping.

23 They're all very serious crimes. And if you
24 sentence them consecutively, you will take into account
25 that there were three. If you sentence them

1 concurrently, it doesn't matter. The Washington court
2 says, we're not just looking to the fact that murder or
3 rape or kidnapping are serious; we're looking to
4 sentence consecutively if do you more than that. You
5 have to look to see that the kidnapping was a special
6 kind of kidnapping.

7 MR. FISHER: That's right, Justice Breyer.
8 In section -- the current section is section 589 of
9 the Washington Code and it says that sentences shall run
10 concurrently unless the judge makes an extra finding of
11 exactly the same type the judge is required to find in
12 Blakely. And if you look at Blakely itself, remember
13 Blakely involved concurrent sentences. And so what Washington
14 is doing is saying all sentences should run concurrently
15 unless there's an extra fact, something about the
16 additional crimes that would otherwise be running
17 concurrently, that simply requires the judge to go above
18 and beyond the ordinary concurrent sentences and punish
19 those crimes separately.

20 JUSTICE SOUTER: But could the nature of the
21 additional crimes themselves satisfy it? In other
22 words, could the judge say, well, all three -- it might
23 be one thing if one were serious and the other two were
24 trivial, but all of these three are very serious. Now,
25 that's in effect a value judgment, not a finding of

1 discrete fact. Could that value judgment satisfy the
2 extraordinary criterion that Washington says there must
3 be in addition to free crime.

4 MR. FISHER: No, it couldn't, and the
5 Washington decision that I've cited to you will help you
6 with this, because it makes it clear that to trigger an
7 aggravator to run sentences concurrently, just as under
8 Blakely itself, there has to be something above and
9 beyond the elements of the crime or the crimes
10 themselves. It can't simply be -- I'm sorry. It can't
11 simply be that there were three crimes committed
12 and all three of them are very serious.
13 It has to be something about the crime, the additional
14 crimes, that takes it above and beyond the ordinary
15 commission of that crime.

16 JUSTICE STEVENS: But, Mr. Fisher, even if
17 it's true that there are other examples out there that
18 might qualify for that example, it's not true of this
19 case?

20 MR. FISHER: I'm not sure I follow, Justice
21 Stevens.

22 JUSTICE STEVENS: In this particular case,
23 there was -- it was necessary to make an additional
24 finding of fact, even though there may be cases out
25 there in which you could get consecutive sentences

1 without an additional finding of fact?

2 MR. FISHER: You're certainly right that in
3 this case you needed to have an extra finding of fact.
4 There are some situations under the Washington Code and
5 I believe in the majority of other States where it is up
6 to the judge's discretion whether to run sentences
7 concurrently, and he could do it for the reason that
8 Justice Souter described. So what Washington does in
9 its respondent's brief is it cites these other State
10 decisions, from other States that simply have different
11 sentencing systems than we have in Washington.

12 CHIEF JUSTICE ROBERTS: I'm not sure I
13 understand that. I mean, we have not held, for example,
14 that the fact of a prior conviction is something that
15 has to be submitted to a jury under Blakely. Why, if
16 you're determining that sentences run consecutively,
17 isn't that just the same as looking at a simultaneous
18 conviction and saying they're going to run
19 consecutively?

20 MR. FISHER: Under some State systems that
21 might be the case, Mr. Chief Justice. However, in
22 Washington the way that the code works is that judges
23 are directed that for multiple crimes the sentences
24 shall run consecutively.

25 CHIEF JUSTICE ROBERTS: So you'd have --

1 MR. FISHER: Unless they make the exact kind
2 of extra finding, and it refers them to the precise same
3 statute that was at issue in Blakely itself.

4 CHIEF JUSTICE ROBERTS: And you're saying
5 that that extra finding can't simply be that this is a
6 conviction for a particular serious crime that's going
7 to go unpunished otherwise?

8 MR. FISHER: That's right.

9 CHIEF JUSTICE ROBERTS: So under this system
10 if you had a regime where if you're convicted of murder
11 and you've been convicted of rape before that, you get
12 an enhanced sentence beyond the normal murder sentence,
13 that would not contravene Blakely. But if you're
14 convicted at the same time for rape and murder and those
15 two sentences run consecutively, you say that that does
16 violate Blakely.

17 MR. FISHER: If the judge needs to make an
18 extra finding beyond the elements of either of those two
19 crimes to run them consecutively, then it would violate
20 Blakely.

21 THE COURT: But we've never held that?
22 We've never held that consecutive -- that the treatment
23 of sentences as concurrent or consecutive is covered by
24 Blakely?

25 MR. FISHER: You haven't had a case in the

1 Apprendi-Blakely line of cases dealing with consecutive
2 sentences. But what you've done is laid down a rule
3 from the very State that we're dealing with here that
4 says that if the judge needs to make an extra finding
5 beyond the elements of the crimes of conviction and
6 beyond the facts encompassed in the jury's finding of
7 guilt for those crimes, then those findings need to be
8 proved to a jury beyond a reasonable doubt. That's why
9 in this case that line, that rule, is triggered.

10 The Ninth Circuit of course didn't talk
11 about any of this. What it said, as I mentioned, is
12 that it simply took Apprendi to be a purely formalistic
13 rule that had nothing to do with the facts according to
14 the jury verdict, but it just had to do with whatever
15 the State happened to label as the statutory maximum.
16 In Apprendi this Court said, not once but three times,
17 that the statutory maximum concept was triggered
18 according to the facts encompassed in the jury verdict.
19 And like the Washington courts, the Ninth Circuit simply
20 ignored that language in this Court's opinion.

21 Lest there be any doubt about the way that
22 concept mapped onto this case, this Court said in Apprendi
23 itself that the relevant inquiry was not one of form but
24 one of effect: Does the required finding take a
25 defendant to a higher sentence level than would

1 otherwise be permissible based on the facts encompassed
2 in the jury verdict?

3 JUSTICE GINSBURG: Mr. Fisher, there's
4 another potential impediment in this case and I would
5 like you to comment on it. That is the petition from
6 the sentence, it was second in time. There was a prior
7 petition that challenged just the conviction, and under
8 the governing statute, to have a second petition, you've
9 got to get permission from the court of appeals and it
10 has to meet stringent criteria.

11 How do you get past that? You went out
12 concentrating on the petition addressed to the sentence
13 which is a second petition.

14 MR. FISHER: This is the very first petition
15 that Mr. Burton has filed against the 1998 judgment. He
16 did file earlier a petition against the original
17 judgment of 1994. In the joint appendix at page 34,
18 that is where that petition is reprinted. He says quite
19 clearly that he is challenging the 1994 judgment in that
20 petition, whereas here this is his first petition
21 against the 1998 judgment.

22 JUSTICE GINSBURG: So did -- then you are
23 bifurcating the judgment in a criminal case, which is
24 not the sentence. You are saying there's an earlier
25 judgment, and looking at it as we would as if it were a

1 civil case, if you have a determination of liability,
2 that doesn't give you a final judgment. The judgment
3 will come at the end of the case when damages are
4 determined.

5 MR. FISHER: That's right, Justice Ginsburg.
6 And if what the State is saying is correct, which is to
7 say that we don't have any judgment at all until the
8 sentence is final, then all you get from that is that
9 Mr. Burton's first petition should have been dismissed
10 and the court could have gotten it dismissed. But we
11 submit what you can't do from that is retroactively
12 change the first petition that he explicitly told the
13 court was against the 1994 judgment, and that he told
14 the court in that same filing on JA 35 and JA 40, that
15 his sentence was still on direct review. You can't
16 retroactively change that challenge to the 1994 judgment
17 into one against the 1998 judgment, for two reasons.

18 One is that if the State is right, the
19 district court wouldn't have had jurisdiction under that
20 1998 -- challenge against the 1998 judgment either,
21 because as Mr. Burton forthrightly told the court, that
22 sentence was still on direct review. But even if you
23 get past that, we submit that this Court's Castro
24 decision simply doesn't allow a court, especially
25 retroactively, to recharacterize a habeas petition that

1 the petitioner himself said was against one judgment as
2 against another.

3 JUSTICE KENNEDY: So you think there can
4 always be two petitions, one -- of sentences on review?

5 MR. FISHER: No, there can't, Justice
6 Kennedy. And so what should have happened according to
7 the state's theory, is that the first petition should,
8 should simply have been dismissed.

9 JUSTICE KENNEDY: But is that also your
10 theory?

11 MR. FISHER: I think that's -- this Court
12 hasn't laid down a solid decision. But I think that's a
13 better reading.

14 JUSTICE KENNEDY: But are you -- are you
15 asking us to say that while the sentence is still under
16 review, there can be no habeas petition filing?

17 MR. FISHER: Am I asking --

18 JUSTICE KENNEDY: Why isn't that up to the
19 option of the petitioner? He can take his chances or he
20 can wait.

21 MR. FISHER: I think that is a fair
22 characterization, Justice Kennedy. But what Mr. Burton
23 did is he went to the district court saying I'm
24 challenging the 1994 judgment. And as I was saying,
25 under Castro before that gets recharacterized --

1 JUSTICE KENNEDY: I'm asking if it is your
2 position whether or not he properly can do that?

3 MR. FISHER: I don't think so. But I'm just
4 recognizing that that's a jurisdictional question that
5 this Court would decide for itself. But assuming that
6 he can't do that, what the district court would have had
7 to say is, Mr. Burton, you're not allowed to challenge
8 the 1994 judgment. And let's assume for the moment he
9 could have challenged the 1998 judgment. The district
10 judge would have said, "Now Mr. Burton, you're only
11 challenging your conviction for the 1994 judgment. You
12 need to wait until you're ready to challenge your
13 sentence, and then you can challenge the 1998 judgment."
14 Presumably -- and this is I think a fair inference
15 especially from the petition itself as it is reprinted,
16 since he told the district court that he was challenging
17 his sentence, if he was told he couldn't bring it at
18 that time he would have said okay, I will withdraw it
19 and wait until I can challenge my sentence.

20 JUSTICE SOUTER: But if the first proceeding
21 was not in fact jurisdictionally barred, then you would
22 lose under the second and successive objection in this
23 case, right?

24 MR. FISHER: I don't know that we would,
25 Justice Souter.

1 JUSTICE SOUTER: Why not?

2 MR. FISHER: Because it is a common rule
3 that -- this Court hasn't had a case exactly like this,
4 but the lower courts do all the time; and the Fourth
5 Circuit case in Taylor which I've cited in the reply
6 brief is one of them. Where, it is a common practice
7 for a petitioner to bring one petition against a
8 judgment and then be partially successful, and then
9 bring a new petition against something in the new
10 judgment. And that's essentially what happened here.
11 And it may --

12 JUSTICE SOUTER: Aren't those cases in which
13 the first judgment is complete, he simply does not
14 attack everything that was a predicate for the first
15 judgment; and then if there is, in fact, a new trial,
16 and a new judgment, of course, the habeas possibility
17 arises again, whereas in this case, the first judgment
18 was not complete.

19 MR. FISHER: No, you put your finger on it
20 exactly. And so, but we still think that, that, either
21 the court had jurisdiction or it didn't. And if it had
22 jurisdiction, then it must be -- fall in somehow into
23 the category that you're talking about.

24 JUSTICE STEVENS: But that's not necessarily
25 true. Isn't it also possible if, at the time of the

1 first judgment the judge could have said, well you really
2 haven't exhausted your remedies because it is not final
3 until the whole thing is over. But nevertheless,
4 because exhaustion is not a jurisdictional matter, I'm
5 going to go ahead and decide it.

6 MR. FISHER: Could a district judge have
7 done that?

8 JUSTICE STEVENS: Yes.

9 MR. FISHER: I think what would have needed
10 to have happened here, since Mr. Burton at pages 35 and
11 40 of the joint appendix, told the district judge, I'm
12 still challenging my sentence on direct appeal, under
13 AEDPA and customary comity principles, the judge would
14 have needed to say, you need either to renounce that
15 appeal from the State court or renounce this one. You
16 couldn't do both at the same time.

17 Mr. Burton, if he had wanted to, I think it
18 is fair to say, could have gone into district court and
19 said, I now have a new judgment and I'm going to
20 challenge my conviction and sentence because I have no
21 intention of challenging my sentence through State court
22 proceedings. And perhaps he could have done that. But
23 that would be a very different situation than what we
24 have here.

25 If I can turn back to the, not a new rule

1 question, another angle at this is not simply to look at
2 the text of this Court's opinion in Apprendi which we
3 submit told a State court in this situation all it would
4 have needed to know, but also perhaps it is helpful to
5 look behind that and look at the statutes that were in
6 play in New Jersey and in Washington. And even if you
7 did that it becomes, we submit, very clear that a
8 district judge, any reasonable trial judge, that is,
9 would have known that Apprendi applied here.

10 What you had in New Jersey was essentially
11 two statutes. One that said an ordinary commission of a
12 crime is punishable up to 10 years. And a second
13 statute that said if you commit that crime with some
14 kind of extra -- extra bad circumstance, there a hate
15 crime, then you get -- you can get a higher sentence.

16 Exactly the same thing was true in
17 Washington. We had one statute that said this is what
18 the, this is what the punishment is for the ordinary
19 commission of this crime. And we had an extra statute
20 that said, but if you commit that crime with extra bad
21 circumstances -- and here the only difference was, there
22 was a list of circumstances, not just a single one --
23 but if you commit the crime with extra circumstances,
24 then you can get extra punishment.

25 And the analogy that the respondents want to

1 draw between the Washington sentencing system and the
2 Federal guidelines just simply doesn't hold up.

3 CHIEF JUSTICE ROBERTS: So you think Blakely
4 was not a new rule but Booker was?

5 MR. FISHER: I think that's fair to say,
6 Mr. Chief Justice. Because in Blakely all you needed to
7 do was apply Apprendi which said that if you have two
8 different statutory thresholds, the pertinent threshold
9 for Sixth Amendment and Fourteenth Amendment purposes is
10 the one that cabins the judge's discretion based on the
11 facts in the jury verdict. To decide Booker this Court
12 had to take the term statutory maximum and apply that to
13 a different type of threshold, which was as this Court
14 put it a court rule or a quasi legislative enactment.

15 So under -- under the system that this Court
16 reviewed in Booker, you had only a single true statutory
17 maximum. And then you had to decide whether the
18 Apprendi principle ought to be in play for the Federal
19 sentencing guidelines. And if there is any confusion on
20 that, a trial judge could have looked at Apprendi itself
21 where this Court and Justice Thomas's concurrence made
22 clear that there was unique status of the Federal
23 sentencing guidelines that made it a more difficult
24 question.

25 However, here where you didn't have anything

1 like that, we had just a simple situation where there
2 were two statutes, one maximum for the ordinary crime,
3 and then an additional maximum for the crime being
4 committed with aggravating circumstances. And so it was
5 a very clear map line. And that's what this Court said
6 in Blakely, of course. It said, it didn't break any new
7 ground in the decision in Blakely. It simply said that,
8 took the state's argument and rejected it by saying our
9 precedents on this point are clear. And it just simply
10 quoted the Apprendi language, that the statutory maximum
11 for Sixth and Fourteenth Amendment purposes is the
12 maximum that a defendant may receive based on the facts
13 and the jury verdict alone.

14 JUSTICE GINSBURG: There were decisions
15 going the other way.

16 MR. FISHER: There were lower court
17 decisions?

18 JUSTICE GINSBURG: Yes.

19 MR. FISHER: Yes, there were. And I think,
20 if we want to talk about these, it is important first to
21 be clear about what we are talking about. There were,
22 there was a Supreme Court of Kansas that had looked to
23 the relevant language in Apprendi and decided that its
24 sentencing guidelines system could not stand. And then
25 you had, on the other side the Supreme Court of

1 Washington, and the Supreme Court of Oregon, and a
2 couple of other State intermediate courts, I think some
3 in unpublished decisions, that had gone the other way.

4 But I think it is very telling, Justice
5 Ginsburg, if you want to look at those State supreme --
6 I'm sorry, those State supreme court and lower court
7 decisions, because none of them -- not a single one --
8 quotes Apprendi or even acknowledges the passages in
9 Apprendi that said the test is not one of form but of
10 effect. And there's several passages in Apprendi that
11 said that the statutory maximum was the maximum allowed
12 based on the facts in the jury verdict. So once you
13 take those into account, we submit, as the Kansas
14 Supreme Court realized, there is only one conclusion
15 that you can reach. The only way those lower courts
16 were able to come to a contrary decision was simply to
17 pluck out -- pluck out other sentences of Apprendi and
18 not acknowledge the rest of the opinion. And of course,
19 the rest of the opinion where this Court has these
20 passages, pages 483, 482, are the absolute guts, the
21 building blocks of the opinion itself. It is where the
22 Court canvasses the historical rule that was
23 incorporated into our constitutional system. And so it
24 is not as though that is some sort of dicta that or
25 loose language that this Court had in its opinion. It

1 was the very guts of the holding of Apprendi.

2 And we submit that, in a Teague analysis
3 where you are indeed supposed to look to whether a
4 reasonable jurist would have found something, not just
5 the fact that they exist, but whether a reasonable
6 jurist would have reached a given conclusion, once you
7 take the whole of Apprendi into account, there was only
8 one conclusion that a reasonable jurist could have come
9 to.

10 JUSTICE KENNEDY: I suppose that doesn't
11 make the dissenters in Blakely feel very good.

12 MR. FISHER: Well, Justice Kennedy, I think,
13 as I understand the dissents in, in Blakely, the
14 dissents in Blakely primarily were saying that Apprendi
15 itself was a bad idea. And that Apprendi really wasn't
16 dictated by the Sixth and Fourteenth Amendments. I see
17 almost nothing, in fact really nothing in the dissents
18 of Blakely itself that says taking Apprendi as the law,
19 we can distinguish it from the facts in this case.
20 There was nothing of that in the dissents.

21 JUSTICE KENNEDY: Of course you have to show
22 that the result was dictated by the prior precedent.
23 That's a strong phrase. We said it in Stringer --
24 Stringer versus Black. But if it has a new application,
25 that's -- that's new. Even though the principle is the

1 same.

2 MR. FISHER: I think the Stringer test is
3 helpful because there, of course, this Court said that
4 one of its prior decisions was not a new rule, because
5 even though there was a different State sentencing
6 system that slightly different before the Court in the
7 subsequent case, the principle from the prior case
8 dictated only one result. And I think once you go back
9 to the dissents in Blakely and compare them let's say,
10 with the dissents in Booker, on the merits that is, in
11 Booker, I think again it is telling, because the
12 dissenters in Blakely had nothing to say in terms of a
13 possible way to distinguish one case from the other;
14 whereas in Booker, the dissents did point out we don't
15 have to extend it this far. We can limit to it to true
16 statutes and not go this far. So there is a difference.

17 Really what this case, I think one way to
18 phrase it in terms of what it comes down to, is whether
19 when this Court lays a decision down like Apprendi, that
20 has a clear rule and lots of historical, robust
21 reasoning behind it, saying why we are adopting a
22 certain rule, whether it is up to the lower courts, in
23 this case the State courts, to second-guess this Court
24 and say I don't know if the Court really means what it
25 says, as Justice Breyer later put it in the Blakely

1 dissent.

2 We think that, we submit what this Court
3 should say is that when we say something is the law,
4 that lower courts ought to assume that's the law, at
5 least until we tell them somehow that the law is
6 different.

7 If there are no more questions on the new
8 rule, I will quickly address the watershed argument.
9 Because if for some reason this Court adopted the
10 state's view that really all Apprendi was was a highly
11 formalistic rule about what is a statutory maximum, and
12 that -- and that just simply labeling, courts could have
13 evaded it, we think that Blakely itself then has to be
14 considered a watershed exception -- a watershed rule.
15 And the reason why is because, is because of an error
16 that runs throughout the state's brief.

17 And the state's position is basically that
18 this can't be watersheded because Apprendi and Blakely
19 deal with circumstances where a defendant has already
20 been convicted of a crime and all we're considering is
21 what sentence ought to be imposed. But, of course, that
22 -- that contravenes the very holding of Apprendi and
23 Blakely which is to remedy the fact that the defendant
24 is being sentenced for a greater crime than the jury
25 actually found him guilty of. And --

1 CHIEF JUSTICE ROBERTS: This argument, this
2 argument assumes that we rule against you on whether or
3 not it is a new rule.

4 MR. FISHER: I think that's right, Mr. Chief
5 Justice.

6 CHIEF JUSTICE ROBERTS: Don't you have --
7 don't you have to address AEDPA before we get to that
8 question?

9 MR. FISHER: In the watershed realm?

10 CHIEF JUSTICE ROBERTS: In other words, it
11 doesn't matter if it's a watershed, I guess it is a
12 point of argument, but it is not clear that it matters
13 whether it is a watershed rule if you read AEDPA
14 2254(d)(1) by its terms.

15 MR. FISHER: If this Court concluded in the
16 Whorton case that watershed did not survive AEDPA, then
17 of course you're right, watershed doesn't -- can't get
18 us home here. But as this case comes to the Court, as I
19 understand it, this Court is considering this case in a
20 posture that it really dealt with in Horn versus Banks
21 where it said that even post AEDPA, what a court is
22 supposed to do is conduct what this Court termed a
23 threshold Teague inquiry as to whether Teague is
24 satisfied. And of course in Horn, this Court mentioned
25 the watershed exception itself.

1 So we think that what this Court should
2 really do is address that threshold question to the
3 extent it needs to holistically.

4 If there are no more questions, I'll reserve
5 the remainder of my time.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 Mr. Fisher.

8 Mr. Collins.

9 ORAL ARGUMENT OF WILLIAM B. COLLINS

10 ON BEHALF OF RESPONDENT

11 MR. COLLINS: Mr. Chief Justice, and may it
12 please the Court:

13 I would like to begin where Justice Ginsburg
14 began, with the issue of successive petitions. We
15 believe that the petition before this Court is a
16 successive petition barred under AEDPA. Now my brother,
17 Mr. Fisher says that it's not a successive petition
18 because the first petition challenged the 1994 judgment.
19 But that is simply not correct as a matter of the facts
20 of this case.

21 A new judgment was entered in March of 1998.
22 That judgment was entered as a result of Mr. Burton's
23 conviction being affirmed and his sentence being
24 reversed. So when he was in custody, when he filed his
25 first petition, he was in custody pursuant to that

1 amended judgment.

2 JUSTICE SOUTER: So that is the only
3 judgment that could be attacked on habeas?

4 MR. COLLINS: Exactly, Your Honor. So he
5 has an amended judgment filed in March of 1998. He
6 files his first petition challenging his conviction
7 under that petition. Later, in 2002, he files a second
8 petition challenging his sentence.

9 CHIEF JUSTICE ROBERTS: It doesn't matter --
10 I'm looking at joint appendix page 34, date of judgment
11 of conviction, he puts in December 16, 1994.

12 MR. COLLINS: He does put that in, Your
13 Honor, but I don't think that's determinative. If you
14 take a look at page 35, on question 8, they say, did you
15 appeal from the judgment of conviction? Answer, yes.
16 If you did appeal, answer the following. And it lays
17 out the facts that he appealed, that his conviction was
18 affirmed, that his sentence was reversed, and then a new
19 judgment is entered in March of 1998.

20 He is not in custody pursuant to the 1994
21 judgment. He is in custody --

22 CHIEF JUSTICE ROBERTS: Where does it say a
23 new judgment was issued in March of '98?

24 MR. COLLINS: Your Honor, that's in the
25 joint appendix at page 3, which shows that --

1 CHIEF JUSTICE ROBERTS: Oh, I thought you
2 meant it was in his petition.

3 MR. COLLINS: No, no, it wasn't in his
4 petition, Your Honor, but it doesn't seem -- the fact
5 that he was looking back at his conviction, original
6 conviction being 1994, and that's what he wrote down,
7 doesn't mean that that was the conviction and that was
8 the judgment under which he was in custody, because it
9 simply wasn't. The original 1994 judgment no longer
10 existed because a new judgment had been entered. So
11 because -- and I don't think -- I think what we disagree
12 about in this is which judgment, if the first petition
13 went to the first -- to the 1994 judgment, and the
14 second petition went to the 1998 judgment, then we would
15 agree with Mr. Fisher that it is not successive.

16 On the other hand, I believe I heard him say
17 that if you agree with us, that the only judgment in
18 existence at the time he filed his petition was the 1998
19 judgment. Then he's filed a successive petition with
20 regard to that judgment, one in December of 1998 dealing
21 with the conviction; a second in 2002, dealing with the
22 sentence.

23 So since it's a successive petition and
24 Mr. Burton did not go through the gatekeeping function
25 that AEDPA requires, there is no -- the district court

1 had no jurisdiction and subsequently, we believe that
2 this Court does not have jurisdiction.

3 JUSTICE BREYER: The fact is, we're looking
4 at page 34, 34 of the joint appendix, and that is the
5 first petition that was filed; is that right?

6 MR. COLLINS: That's correct, Your Honor.

7 JUSTICE BREYER: So you look at it and it
8 says, filed December 28, and maybe this is what you
9 said. Then it says date of judgment of conviction,
10 December 16, 1994. So looking at that, you'd think that
11 is what he was attacking. Where does it say he's
12 attacking anything else?

13 MR. COLLINS: Well, Your Honor, it doesn't
14 say he's attacking anything else, but the problem with
15 that is that when he filed this petition, he was not
16 being confined --

17 JUSTICE BREYER: Yes, but I imagine there
18 are tens of thousands off petitions filed in the Federal
19 system. And I would think that judges when they're
20 trying to look at those petitions, or the magistrate
21 looks at them and says what judgment are you attacking,
22 he has to figure that out often for statute of
23 limitations purposes, or some other purpose. He'd look
24 over there, go down and read that line two, and he'd
25 think yeah, that's the judgment that's being attacked,

1 unless of course there's some indication that it's
2 something else.

3 I've never heard of this before. Is there
4 any precedent on that where even though the petition
5 refers to date A, and there's nothing in to suggest
6 anything other than date A, because it turns out that
7 there's a different judgment that in fact, he's being
8 held, which is date B, that the court says oh, you're
9 attacking date B.

10 Is there any precedent that says that's how
11 it's read?

12 MR. COLLINS: I'm not aware of any
13 precedent.

14 JUSTICE BREYER: No. So this might be the
15 first time. I don't see a reason why you wouldn't read
16 the petition that's filed in an ordinary way and say the
17 judgment that's being attacked is the judgment that it
18 refers to.

19 MR. COLLINS: Well, Your Honor, I think you
20 have to say the judgment that's being attacked is the
21 judgment by which he's being confined. I mean, he --

22 JUSTICE BREYER: I don't know what
23 implication this is going to have for a lot of these
24 petitions. I don't know one way or the other, but it
25 might be there are thousands right now in the Federal

1 court which have date A, and somebody is going to go
2 back and say no, it is really date B or something. I'm
3 a little nervous about it. If you're not nervous,
4 you're the ones in charge.

5 JUSTICE SOUTER: Well, Mr. Collins, isn't it
6 your position that, number one, the only judgment that he
7 can attack on habeas is the judgment that is extant at the
8 time of the habeas proceeding, and that is the '92
9 judgment that follows the resentencing? But he may in
10 attacking that judgment attack the premise of conviction
11 which occurred earlier?

12 MR. COLLINS: Exactly, Your Honor.

13 JUSTICE SOUTER: And if he chooses to attack
14 only the earlier conviction which is the premise of the
15 later judgment, he has simply in effect waived any other
16 issue. And when he comes in later and tries to raise
17 the issue that he could have attacked under the '92
18 judgment, he's in effect trying to split up his habeas,
19 it's second and successive, and that's why he can't do
20 it.

21 MR. COLLINS: That's exactly right, Your
22 Honor.

23 CHIEF JUSTICE ROBERTS: And further, I
24 thought you told me that the petition goes on to
25 indicate that the conviction while affirmed, that the

1 sentence was reversed, looking at 9(b) on joint appendix
2 35.

3 MR. COLLINS: Yes, Your Honor.

4 CHIEF JUSTICE ROBERTS: Which in other
5 words, he details in the petition the subsequent history
6 that would have resulted in a new judgment.

7 MR. COLLINS: That's right, Your Honor.

8 Next I would like to go briefly to the
9 question that Justice Souter asked about --

10 JUSTICE STEVENS: May I just be sure I
11 understand one thing about that? So you're saying at
12 the time he filed the petition on December 28, 1998, he
13 had already had, the second judgment had already been
14 entered by the Washington Supreme Court?

15 MR. COLLINS: It had been entered by the
16 trial court, Your Honor, so he --

17 JUSTICE STEVENS: Pursuant to the reversal
18 of the --

19 MR. COLLINS: Exactly, Your Honor. That
20 sentence is on page -- if you look at page 3 of the
21 joint appendix, that is the second amended judgment
22 filed in the superior court in Washington on March 16,
23 1998, and he was confined under the authority of this
24 judgment.

25 JUSTICE STEVENS: Of the second judgment?

1 MR. COLLINS: Of the second judgment.

2 JUSTICE SCALIA: Why does it make any less
3 sense to allow separate habeas challenges to, first, the
4 conviction, and then the sentence, than it does to allow
5 separate appeals to this Court from each of those? And
6 once again under the statute, we entertain appeals only
7 from final judgment, but you can bring here on
8 certiorari the judgment of conviction, even though
9 proceedings for the sentence are still in progress.

10 MR. COLLINS: Well, Your Honor, I think
11 we're talking about the habeas corpus statute and there
12 the Court --

13 JUSTICE SCALIA: A fortiori, we have a lot
14 more control over habeas corpus, which is an equitable
15 remedy, than we do over, what is it, 1257, our
16 jurisdictional statute under certiorari.

17 Why does it make any more sense for habeas
18 purposes to insist that he await the final sentence
19 before he gets review of the premise for that sentence,
20 namely the conviction?

21 MR. COLLINS: Your Honor, I'm sorry.

22 I think that a couple things are being
23 confused here.

24 JUSTICE SCALIA: All right.

25 MR. COLLINS: The first thing is when -- is

1 this a successive -- is this a successive petition, and
2 we would say it is, because he filed the first one and
3 then the second one.

4 Now the question of whether he can get
5 relief under the first -- under his first habeas
6 petition does not depend on the entry of a final
7 judgment. In fact, under the facts of this case, the
8 judgment was entered in March of 1998. In December of
9 1998, he filed his first petition. And in fact, the
10 first petition was denied in April of 2000 on the
11 merits, because it had been exhausted, he didn't have to
12 wait for that, because those claims were exhausted and
13 because they were ripe, because they -- the factual
14 predicates had occurred in the trial court, then that
15 was all that was required for him to bring those claims.
16 He didn't have to wait for a final judgment.

17 JUSTICE SCALIA: But you're saying he can't
18 later bring any claim about the sentence?

19 MR. COLLINS: That's because Congress in
20 AEDPA has declared that you have to bring all of your
21 claims in your -- at one time, and if you don't, then
22 your petition should be dismissed as successive, unless
23 you go through the gatekeeping solution.

24 JUSTICE SOUTER: So that if the statute
25 governing our review had an exhaustion requirement and a

1 second and successive requirement comparable to the
2 AEDPA requirement, the case that Justice Scalia put
3 would be exactly like this case?

4 MR. COLLINS: I believe so, Your Honor.

5 JUSTICE SOUTER: Okay.

6 MR. COLLINS: So I just briefly want to go,
7 Justice Souter, to where you started about the
8 consecutive sentence issue.

9 We believe that consecutive sentence is
10 quite different than, from what exists in Blakely and
11 that, in fact, there aren't really additional findings
12 of fact. I think you referred to about the crime, about
13 the circumstances, about the character. In fact, in
14 this case, the finding of fact entered by the trial
15 court in order to justify the exceptional sentence --
16 this is on page 27 of the joint appendix, finding of
17 fact 18 -- if the court were to sentence the defendant
18 to a standard range sentence on each count run
19 concurrently, he would receive the same punishment as if
20 he had committed only the rape in the first degree.
21 This would effectively result in the free crimes
22 of robbery in the first degree and burglary in the first
23 degree because he would receive no additional penalty
24 for those crimes. Now --

25 JUSTICE SOUTER: That's -- I keep doing

1 this. I'm sorry. Is that sufficient, as you understand
2 it, under the Washington case that your brother cited to
3 me?

4 MR. COLLINS: I believe it is, Your Honor.

5 JUSTICE SOUTER: Okay.

6 JUSTICE GINSBURG: I thought the law was
7 that the sentence shall be concurrent unless, and the
8 unless is that the judge makes an additional finding,
9 the very same kind of finding that he would make in
10 determining aggravating factor.

11 MR. COLLINS: Your Honor, the sentence could
12 have been run consecutively because of an aggravating
13 factor. In fact, in this case the trial court judge, in
14 fact, had three independent and separate reasons for
15 running the sentence consecutively. Two of those would
16 be, I think we would say aggravating factors that the
17 Blakely reasoning would apply to. But the court of
18 appeals when it considered this case only looked at the
19 free crimes element to make that decision.

20 JUSTICE STEVENS: Maybe you can give me just
21 a little more help on this. The finding number 18 that
22 you referred to says in substance, if by just sentencing
23 him on the basis of the jury verdict he won't get --
24 he'll get a free pass. But it doesn't say the judge
25 can -- could therefore increase the sentence. It seems

1 to me there had to be additional findings that justify a
2 result that he thought would have been a miscarriage of
3 justice.

4 MR. COLLINS: No, Your Honor. I don't think
5 that's right.

6 JUSTICE STEVENS: You think that just having
7 pointed out that he would get a pass would have been
8 sufficient to justify consecutive sentences?

9 MR. COLLINS: I think it would, and the
10 State supreme court affirmed this decision.

11 JUSTICE STEVENS: Yeah, but he did make
12 additional findings. It goes on. In fact, 19 and 20
13 are additional findings.

14 MR. COLLINS: Your Honor, I think -- I mean,
15 I agree with you that he did make additional findings.
16 But --

17 JUSTICE STEVENS: It nowhere says they're
18 unnecessary either.

19 MR. COLLINS: That's true, Your Honor. But
20 if you take a look at the court of appeals opinion which
21 is at page 52 and 53 of the joint appendix, when the
22 court of appeals looks at the sentence, what the court
23 of appeals says is, "nonetheless, the sentencing court
24 concluded that the multiple offender policy alone
25 justified the exceptional sentence. The fact that the

1 defendant offender score for rape in the first degree is
2 16, thus invoking the multiple offense policy of the
3 Sentencing Reform Act standing alone, is a substantial
4 and compelling reason and justification for imposing the
5 exceptional sentence here."

6 JUSTICE SOUTER: That is to say that that
7 would have been sufficient.

8 MR. COLLINS: Exactly.

9 JUSTICE SOUTER: But in fact that is not
10 what the trial court premised its decision on, because,
11 as Justice Stevens points out, it went on in findings
12 19, 20, and 21 about deliberate cruelty, sophistication
13 and planning, and so on. Having been through those
14 findings, the court says, from the foregoing facts the
15 court now makes the following conclusions of law.

16 It seems to me as though the trial court was
17 basing its decision on those foregoing facts as well as
18 upon finding 18, which was the free crime finding.

19 MR. COLLINS: Well, I think that the --

20 JUSTICE SOUTER: I guess what I'm saying is
21 the fact that he might have -- I'm assuming for the sake
22 of argument that the trial court might on the basis
23 simply of the free crime conclusion have sentenced
24 consecutively, is simply not the case that we've got,
25 because he sentenced consecutively on that basis and on

1 cruelty, sophistication, and so on.

2 MR. COLLINS: Well, Your Honor, I believe
3 that the court of appeals felt that that consecutive
4 sentence on the free crimes was -- standing alone would
5 have been sufficient.

6 JUSTICE BREYER: I don't want to take you
7 up. Let me just have one on the merits, one. I mean,
8 the reason I want you to get to the merits, and I put in
9 my dissent. I was trying as hard as I could to show why
10 I thought this case was wrong. I start the dissent by
11 saying that -- what it says, and then I quote the two
12 sentences that any fact, et cetera, any fact that
13 increases beyond the prescribed statutory maximum must
14 be submitted to a jury and prescribed statutory maximum,
15 again quote, means "solely on the basis of the facts
16 reflected in the jury verdict." Okay.

17 Then at the end of the opinion I say:
18 "Until now I would have thought the Court might have
19 limited Apprendi so its underlying principle wouldn't
20 cause so much harm." Now, the next sentence of course I
21 explain how they might have limited Apprendi, but
22 somehow that disappeared from the opinion because I
23 guess I couldn't think of it.

24 So you're going to tell me now -- I mean, I
25 didn't say how they might have limited Apprendi and I

1 couldn't think of how they might have limited Apprendi,
2 and they read Apprendi to mean what it said. Now, you
3 tell me the phrase I might have put in but couldn't
4 think of that would have limited Apprendi?

5 MR. COLLINS: Well, Your Honor, I think that
6 you could have said that the definition of "statutory
7 maximum" is the traditional statutory maximum that was
8 at issue in Apprendi. And in fact in the Apprendi
9 decision the Court specifically, I think in response to
10 Justice O'Connor's dissent, explained that Walton versus
11 Arizona was still good law. And as you know, in Walton
12 the jury would find somebody guilty of aggravated first
13 degree murder, but they could not receive the death
14 penalty unless the judge made additional findings in a
15 hearing.

16 And it seemed to say that the statutory
17 maximum was death and that in fact the judge's findings
18 would not take you above that statutory maximum. I
19 think that --

20 JUSTICE GINSBURG: Wasn't that overturned in
21 Ring?

22 MR. COLLINS: It was overturned in Ring,
23 Your Honor. But when you had lower court appellate
24 judges looking at your decision in Apprendi and seeing
25 the fact that Walton and Apprendi were consistent, it

1 was logical for them to conclude, as virtually every
2 single court did except for Kansas, that the definition
3 of "statutory maximum" was the traditional statutory
4 maximum that was in Apprendi.

5 JUSTICE SOUTER: Was it logical for them to
6 conclude it or were they -- were they expressing the
7 hope that the Court would draw a distinction which it
8 had not drawn in the formulation that it gave in
9 Apprendi? It's one thing to say that if you draw no
10 further distinctions, Apprendi requires a certain
11 result. It's another thing to say but maybe they will
12 draw a distinction and we're going to predict that they
13 will, and hence not apply Apprendi.

14 Weren't the other appellate courts to which
15 you refer engaged in the latter exercise, which I call
16 the exercise of hope?

17 MR. COLLINS: I'm not sure that I would
18 agree with that, Justice Souter, only because as I think
19 Justice O'Connor explained in her dissent, there are two
20 ways to read Apprendi, and one of those ways would
21 result in upholding guideline systems which are now
22 invalid because of Blakely and Booker, but really quite
23 different from Apprendi because those systems involve
24 what you would call guided discretion. That is, in
25 Apprendi if you wanted the aggravating factor if the

1 judge found it by a preponderance then the sentence was
2 enhanced.

3 JUSTICE SOUTER: Okay, but doesn't that
4 require drawing a distinction that Apprendi did not
5 speak to? And isn't it still the case that, I think
6 Mr. Fisher points out that three times we repeated in
7 Apprendi the formula about fact, beyond fact found by a
8 jury on the basis of which, et cetera, the range
9 increases.

10 Isn't the distinction which -- and I trust
11 your recollection here -- that Justice O'Connor had in
12 mind and that they had in mind a distinction which
13 simply was not addressed in Apprendi and would have been
14 something new as opposed to merely an application of
15 what was implicit in Apprendi?

16 MR. COLLINS: I believe it definitely would
17 have been something new, Your Honor.

18 JUSTICE SOUTER: Yes.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 Mr. Collins.

21 Mr. Roberts?

22 ORAL ARGUMENT OF MATTHEW D. ROBERTS

23 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE,
24 SUPPORTING THE RESPONDENT

25 MR. ROBERTS: Mr. Chief Justice and may it

1 please the Court:

2 If I could begin by addressing the issues
3 that you were just talking about, there was a
4 distinction that the Court could have drawn between
5 Apprendi and Blakely and that reasonable jurists could
6 have drawn and did draw. One was the formal distinction
7 that you were discussing before with the State, which
8 was supported by Justice O'Connor's proposing that as an
9 interpretation in her dissent and the majority not
10 responding to that, that that distinction was contrary
11 to the rule but implausible, but in fact accepting
12 the -- accepting that it was a plausible distinction and
13 saying that it still wouldn't have made a difference,
14 that the Apprendi rule still was important.

15 The second -- and in addition to that, that
16 distinction that Justice O'Connor drew there was
17 consistent with the Apprendi Court's distinction of
18 Walton. And you have to look at what reasonable jurists
19 could have interpreted looking at that decision at the
20 time with those distinctions and what the Court said in
21 Apprendi.

22 But in addition to that, there was more than
23 a formal distinction that could have been drawn between
24 the system in Apprendi and the Washington guidelines
25 system. That's the distinction that we proposed in our

1 amicus brief in Blakely and it rested on the fact that
2 sentencing guideline systems like Washington try to
3 channel but not to eliminate the discretion that
4 sentencing judges have to sentence within the otherwise
5 applicable limits. And in the Washington system the
6 sentencing judge retained a significant degree of
7 discretion that reasonable jurists could have analogized
8 to traditional sentencing systems that aren't
9 constrained by Apprendi.

10 The facts, the facts on which the judge
11 could rely to go above the guidelines, were not
12 specified as in Apprendi and as in Ring by the
13 legislature, but it was a wide open set that enabled the
14 judge himself or herself to determine what facts the
15 judge thought could justify a higher sentence; and in
16 addition, the facts alone didn't trigger the higher
17 sentence. The judge had to look at those facts and make
18 the additional determination that those facts rose to
19 the level of substantial and compelling reasons that
20 justified the higher sentence.

21 In that respect, the judge had a degree of
22 sentencing discretion to decide what facts justified it
23 and whether it was in fact justified.

24 Now, of course, this Court rejected those
25 distinctions in Blakely. But the question is whether a

1 reasonable jurist could have accepted those distinctions
2 and drawn a difference, and we submit that they could
3 have.

4 CHIEF JUSTICE ROBERTS: Mr. Roberts, do you
5 have a position on whether we have a successive petition
6 problem here?

7 MR. ROBERTS: We don't have a position on
8 that precise, on that particular issue here, because it
9 can't arise for Federal prisoners. But let me explain
10 why it can't arise for Federal prisoners because perhaps
11 that will give the Court some guidance in resolving the
12 issue. In the Federal system, it's well established
13 that the conviction and the sentence are part of a
14 unitary judgment and that that unitary judgment doesn't
15 become final until the conviction and the sentence have
16 both been fully adjudicated.

17 That understanding is reflected in the
18 language of 28 U.S.C. 2255, which is the statute that
19 authorizes collateral attacks by Federal prisoners.
20 That statute authorizes attacks -- what it authorizes is
21 motions to vacate, set aside, or correct a sentence. So
22 it's clear from that that it's not authorizing
23 collateral attacks on a conviction independent of the
24 attendant sentence. And I think that could shed some
25 guidance here, because 2255 was intended to be a

1 parallel and substitute remedy to traditional habeas for
2 Federal prisoners.

3 I would also make a point on the other sort
4 of preliminary issues that were being discussed on the
5 consecutive sentence issue, that it's not only the fact
6 that the judge said that the multiple offense policy
7 standing alone could justify the consecutive sentence
8 here and that the court of appeals relied on that in
9 upholding that.

10 But the court of appeals went further,
11 because petitioner had made a separate challenge to --
12 and this is on page 52 and 53 of the joint appendix.
13 Petitioner made a separate challenge to the other two
14 aggravating factors. Petitioner argued that the
15 district court wasn't allowed to rely on -- excuse me,
16 the trial court couldn't rely on those two other
17 aggravating factors because he had not relied on them in
18 the original sentencing and this was a resentencing.

19 The court of appeals rejected that challenge
20 and it rejected that challenge because it said the
21 sentencing court concluded that the multiple offense
22 policy alone justified the exceptional sentence, and
23 then on page 53 it said: "The sentencing court did not
24 rely on the additional aggravating factors for imposing
25 an exceptional sentence." So I think these --

Official

1 JUSTICE SOUTER: Is that true in fact?

2 MR. ROBERTS: Well, that is how --

3 JUSTICE SOUTER: I'm mean, I'm sure you're
4 reading correctly, but is that in fact true? Because,
5 having talked, as I just read out a moment ago, having
6 spoken about free crimes, aggravating factors, it says,
7 on the basis of the foregoing facts I now draw the
8 following conclusions of law.

9 MR. ROBERTS: The trial court said each of
10 the three standing alone was sufficient. But what the
11 court of appeals said is these other two have been
12 challenged, but these other two are -- we're not going
13 to deal with this challenge to these other two
14 factors because they're out of the case. So I think
15 that this Court has to take the case as coming from --
16 coming from the Washington courts as if what the courts
17 essentially said is those other two are not in the case
18 any more.

19 JUSTICE SOUTER: So we can treat it in
20 effect -- and this may be the way to do it -- we can
21 treat it as the ultimate sentencer was the Washington
22 appellate court and that's what they said?

23 MR. ROBERTS: Well, what the Washington
24 appellate court essentially, they could have said
25 petitioner is right, those other two aggravating factors

1 couldn't be relied on, and so we're relying on this the
2 standing alone. What they chose to do is, we're going
3 to interpret what the trial court did as relying only on
4 the one. And that was the basis for responding to that
5 claim of error, and I do think that the Court has to
6 take this case as coming on that basis.

7 If I could turn to the issue of Blakely
8 retroactivity for a few minutes. In addition to the
9 points that I made before about why Blakely was a new
10 rule, I would also submit that Blakely is not a
11 watershed rule because it's not a bedrock rule that's
12 essential to a fair trial, and rules are only bedrock if
13 they approach the fundamental and sweeping importance of
14 Gideon, and Blakely doesn't have that kind of importance
15 for three reasons. First, the right to counsel
16 pervasively affects every aspect of the trial, but
17 Blakely affects only the procedure for determining the
18 punishment of defendants who have already been found
19 guilty beyond a reasonable doubt of all the elements of a
20 crime.

21 Second, a felony trial in which the
22 defendant is denied counsel is inherently unfair, but
23 it's not inherently unfair to use the preponderance
24 standard to find facts that determine the extent of
25 punishment, and in fact the Constitution permits the use

1 of a preponderance standard to find many facts that have
2 as much or more impact on punishment as facts covered by
3 Blakely. Those include facts that trigger mandatory
4 minimums, facts on which a judge relies to sentence
5 within a broad statutory range, and even facts on which
6 a judge relies to sentence above the standard range in
7 advisory guideline systems.

8 Third, counsel is so essential to a fair
9 trial that deprivation of the right can never be
10 discounted as harmless error. But this Court held in
11 Recuenco that Blakely errors can be harmless, and in
12 reaching that holding the Court expressly concluded that
13 Blakely errors do not necessarily render a criminal
14 trial fundamentally unfair or an unreliable vehicle for
15 determining guilt or innocence.

16 That conclusion seems to strongly suggest
17 that Blakely is not a bedrock rule essential to a fair
18 trial.

19 If the Court has no further questions --
20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 Mr. Fisher, you have four minutes remaining.

22 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

23 ON BEHALF OF PETITIONER

24 MR. FISHER: Let me say one word on
25 jurisdiction and then turn to two comments on the

1 merits. On jurisdiction, I think Mr. Roberts is right
2 that this rarely happens in the Federal system. It
3 rarely happens in the State system. We can't find any
4 other case where a petitioner has gone in naming, as the
5 State would say, in effect the wrong judgment and
6 saying: "I'm challenging this judgment."

7 But what happened here was just that.
8 Mr. Burton went in and said he was challenging the 1994
9 judgment. And under this Court's Castro decision, when
10 a pro se petitioner comes in and says I'm doing one
11 thing, in that case making a motion for a new trial, it
12 can't be converted into something else which is a first
13 habeas petition without advising the petitioner. And
14 here, not only was he not advised by the trial court but
15 the State in its own answer, which we attached to our
16 reply brief, agreed that he could challenge the 1994
17 conviction, and said that conviction is final, and he
18 can challenge that judgment, the 1994 judgment.

19 So it's way too late in the day for the
20 State to stand up to you now and say this pro se
21 petitioner should bear the burden of bringing an
22 improper petition.

23 On the merits, I don't want to elaborate
24 beyond simply just telling this Court that if you look
25 at the Hughes decision and you look at the Washington

1 decision from the Washington state courts, it is clear
2 that an extra finding was necessary here, even if the
3 only aggravator in play is the free crimes are clearly
4 too lenient factor. Hughes makes it crystal clear that
5 a judge needs to find, and I'm quoting, "extraordinarily
6 serious harm or culpability arising from the multiple
7 offenses." And to the extent that the State stands
8 before you now and quotes from parts of Mr. Burton's
9 case where the trial judge did not explicitly make that
10 finding, that only reinforces the strength of his habeas
11 petition now, that under Washington state law, the judge
12 needed to make that kind of an extra finding and the
13 judge didn't do so.

14 Let me finally turn to a discussion about
15 whether this Court's treatment of Walton and Apprendi
16 could have given a State judge a reasonable basis to
17 distinguish the system at issue in Blakely. We don't
18 think it could because this Court didn't simply say in
19 Apprendi that Walton stands. It explicitly said the
20 reason why the Arizona capital system as we understand
21 it is okay is because it's nothing more than a system
22 that is permissible under Williams against New York.

23 It's one where on the basis of the jury's
24 finding of guilt that the death penalty is permissible
25 without anything else. And so the only disagreement

1 between the majority and Justice O'Connor's dissent was
2 as to the way Arizona's system worked, but any judge that
3 would have looked at Apprendi would have seen, the
4 majority is telling us that a system is okay so long as
5 the jury verdict itself allows the ultimate sentence.

6 That is exactly the kind of system that was
7 not in place in Washington, so a judge should have full
8 well realized.

9 And of course as Justice Ginsburg pointed
10 out, once it became clear to this Court the way that
11 Arizona's capital sentencing system functioned, this
12 Court had little difficulty simply applying the Apprendi rule
13 and agreeing that that system had to be invalid too.
14 And just like the Blakely decision itself, not even the
15 dissenters suggested that Apprendi dictated otherwise.

16 If this Court has no further questions, I'll
17 submit the case.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 Mr. Fisher. The case is submitted.

20 (Whereupon, at 12:01 a.m., the case in the
21 above-entitled matter was submitted.)

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24

25

A	<p>40:12 aggravating 4:22 20:4 36:10,12,16 41:25 46:14,17 46:24 47:6,25 aggravator 5:11 5:14 6:12,16 8:7 51:3 ago 47:5 agree 28:15,17 37:15 41:18 agreed 50:16 agreeing 52:13 ahead 17:5 allow 13:24 33:3 33:4 allowed 15:7 21:11 46:15 allows 52:5 amended 27:1,5 32:21 Amendment 19:9,9 20:11 Amendments 22:16 amicus 1:22 42:23 44:1 analogized 44:7 analogy 18:25 analysis 22:2 angle 18:1 answer 27:15,16 50:15 appeal 17:12,15 27:15,16 appealed 27:17 appeals 6:1,7 12:9 33:5,6 36:18 37:20,22 37:23 39:3 46:8,10,19 47:11 APPEARAN... 1:15 appellate 40:23 41:14 47:22,24</p>	<p>appendix 12:17 17:11 27:10,25 29:4 32:1,21 35:16 37:21 46:12 applicable 44:5 application 22:24 42:14 applied 18:9 apply 19:7,12 36:17 41:13 applying 52:12 Apprendi 3:17 6:14 11:12,16 11:22 18:2,9 19:7,18,20 20:10,23 21:8 21:9,10,17 22:1,7,14,15 22:18 23:19 24:10,18,22 39:19,21,25 40:1,2,4,8,8,24 40:25 41:4,9 41:10,13,20,23 41:25 42:4,7 42:13,15 43:5 43:14,17,21,24 44:9,12 51:15 51:19 52:3,12 52:15 Apprendi-Bla... 11:1 approach 48:13 April 34:10 argued 46:14 argument 1:13 2:2,5,8,11 3:4 3:6 4:3 20:8 24:8 25:1,2,12 26:9 38:22 42:22 49:22 arises 16:17 arising 51:6 Arizona 40:11 51:20 Arizona's 52:2</p>	<p>52:11 aside 45:21 asked 32:9 asking 14:15,17 15:1 aspect 48:16 Assistant 1:20 assume 15:8 24:4 assumes 25:2 assuming 3:25 15:5 38:21 atrocious 6:11 attached 50:15 attack 16:14 31:7,10,13 attacked 27:3 29:25 30:17,20 31:17 attacking 29:11 29:12,14,21 30:9 31:10 attacks 45:19,20 45:23 attendant 45:24 authority 32:23 authorizes 45:19,20,20 authorizing 45:22 await 33:18 aware 30:12 a.m 1:14 3:2 52:20</p>	<p>21:12 basic 4:1 basically 24:17 basing 38:17 basis 3:15 36:23 38:22,25 39:15 42:8 47:7 48:4 48:6 51:16,23 bear 50:21 bedrock 48:11 48:12 49:17 began 26:14 beginning 4:3 behalf 1:16,19 2:4,7,10,13 3:7 26:10 42:23 49:23 believe 9:5 26:15 28:16 29:1 35:4,9 36:4 39:2 42:16 BELINDA 1:6 better 14:13 beyond 6:17 7:18 8:9,14 10:12,18 11:5 11:6,8 39:13 42:7 48:19 50:24 bifurcating 12:23 Bit 14:9 Black 22:24 Blakely 3:13,16 4:17,22 6:9 7:12,12,13 8:8 9:15 10:3,13 10:16,20,24 19:3,6 20:6,7 22:11,13,14,18 23:9,12,25 24:13,18,23 35:10 36:17 41:22 43:5 44:1,25 48:7,9 48:10,14,17</p>
B			<p>B 1:18 2:6 26:9 30:8,9 31:2 back 4:21 17:25 23:8 28:5 31:2 bad 18:14,20 22:15 Banks 25:20 barred 15:21 26:16 based 6:4 12:1 19:10 20:12</p>	

49:3,11,13,17 51:17 52:14 blocks 21:21 Booker 19:4,11 19:16 23:10,11 23:14 41:22 break 20:6 Breyer 6:19 7:7 23:25 29:3,7 29:17 30:14,22 39:6 brief 5:13 9:9 16:6 24:16 44:1 50:16 briefly 32:8 35:6 briefs 4:2 bring 15:17 16:7 16:9 33:7 34:15,18,20 bringing 50:21 broad 49:5 brother 26:16 36:2 building 21:21 burden 50:21 burglary 35:22 Burton 1:3 3:4 12:15 13:21 14:22 15:7,10 17:10,17 28:24 50:8 Burton's 4:20 6:3,8 13:9 26:22 51:8	12:4,23 13:1,3 15:23 16:3,5 16:17 22:19 23:7,7,13,17 23:23 25:16,18 25:19 26:20 34:7 35:2,3,14 36:2,13,18 38:24 39:10 42:5 47:14,15 47:17 48:6 50:4,11 51:9 52:17,19,20 cases 8:24 11:1 16:12 Castro 13:23 14:25 50:9 categories 5:6 category 16:23 cause 39:20 CENTER 1:7 certain 23:22 41:10 certainly 9:2 certiorari 33:8 33:16 cetera 39:12 42:8 challenge 13:16 13:20 15:7,12 15:13,19 17:20 46:11,13,19,20 47:13 50:16,18 challenged 12:7 15:9 26:18 47:12 challenges 33:3 challenging 12:19 14:24 15:11,16 17:12 17:21 27:6,8 50:6,8 chances 14:19 change 13:12,16 channel 44:3 character 4:9,12 5:7 35:13	characterizati... 14:22 charge 31:4 Chief 3:3,8 9:12 9:21,25 10:4,9 19:3,6 25:1,4,6 25:10 26:6,11 27:9,22 28:1 31:23 32:4 42:19,25 45:4 49:20 52:18 chooses 31:13 chose 48:2 Circuit 3:10,12 3:17 11:10,19 16:5 circumstance 18:14 circumstances 4:8,12 5:7 18:21,22,23 20:4 24:19 35:13 citation 5:25 cited 5:12 8:5 16:5 36:2 cites 9:9 civil 13:1 claim 34:18 48:5 claims 34:12,15 34:21 classification 5:2 clear 3:16 5:13 8:6 18:7 19:22 20:5,9,21 23:20 25:12 45:22 51:1,4 52:10 clearly 5:23 6:4 12:19 51:3 code 4:18 7:9 9:4,22 codified 4:24,24 collateral 45:19 45:23 Collins 1:18 2:6	26:8,9,11 27:4 27:12,24 28:3 29:6,13 30:12 30:19 31:5,12 31:21 32:3,7 32:15,19 33:1 33:10,21,25 34:19 35:4,6 36:4,11 37:4,9 37:14,19 38:8 38:19 39:2 40:5,22 41:17 42:16,20 colloquially 5:10 come 13:3 21:16 22:8 comes 23:18 25:18 31:16 50:10 coming 47:15,16 48:6 comity 17:13 comment 4:3 12:5 comments 49:25 commission 4:8 8:15 18:11,19 commit 18:13 18:20,23 committed 6:21 8:11 20:4 35:20 common 16:2,6 comparable 6:12 35:1 compare 23:9 compelling 38:4 44:19 complete 16:13 16:18 concentrating 12:12 concept 3:20 11:17,22 conclude 41:1,6 concluded 25:15	37:24 46:21 49:12 conclusion 21:14 22:6,8 38:23 49:16 conclusions 38:15 47:8 concurrence 19:21 concurrent 7:13 7:18 10:23 36:7 concurrently 4:6 7:1,10,14 7:17 8:7 9:7 35:19 conduct 25:22 confined 29:16 30:21 32:23 confused 33:23 confusion 19:19 Congress 34:19 consecutive 5:5 5:24 6:2 8:25 10:22,23 11:1 35:8,9 37:8 39:3 46:5,7 consecutively 4:6,19,20 6:4 6:24 7:4 9:16 9:19,24 10:15 10:19 36:12,15 38:24,25 considered 24:14 36:18 considering 6:7 24:20 25:19 considers 6:2 consistent 40:25 43:17 Constitution 48:25 constitutional 21:23 constrained 44:9 contrary 21:16
<hr/> C <hr/> C 2:1 3:1 cabins 19:10 Cal 1:16 call 41:15,24 called 6:5 canvasses 21:22 capital 51:20 52:11 case 6:5,7 8:19 8:22 9:3,21 10:25 11:9,22				

<p>43:10 contravene 10:13 contravenes 24:22 control 33:14 converted 50:12 convicted 10:10 10:11,14 24:20 conviction 9:14 9:18 10:6 11:5 12:7 15:11 17:20 26:23 27:6,11,15,17 28:5,6,7,21 29:9 31:10,14 31:25 33:4,8 33:20 45:13,15 45:23 50:17,17 corpus 33:11,14 correct 13:6 26:19 29:6 45:21 CORRECTI... 1:7 correctly 47:4 counsel 48:15,22 49:8,20 count 35:18 couple 21:2 33:22 course 11:10 16:16 20:6 21:18 22:21 23:3 24:21 25:17,24 30:1 39:20 44:24 52:9 court 1:1,13 3:9 3:19 5:11,13 5:14,22 6:1,7 6:14 7:1 10:21 11:16,22 12:9 13:10,13,14,19 13:21,24 14:11 14:23 15:5,6 15:16 16:3,21</p>	<p>17:15,18,21 18:3 19:11,13 19:14,15,21 20:5,16,22,25 21:1,6,6,14,19 21:22,25 23:3 23:6,19,23,24 24:2,9 25:15 25:18,19,21,22 25:24 26:1,12 26:15 28:25 29:2 30:8 31:1 32:14,16,22 33:5,12 34:14 35:15,17 36:13 36:17 37:10,20 37:22,22,23 38:10,14,15,16 38:22 39:3,18 40:9,23 41:2,7 43:1,4,20 44:24 45:11 46:8,10,15,16 46:19,21,23 47:9,11,15,22 47:24 48:3,5 49:10,12,19 50:14,24 51:18 52:10,12,16 courts 11:19 16:4 21:2,15 23:22,23 24:4 24:12 41:14 47:16,16 51:1 Court's 3:17 5:21 11:20 13:23 18:2 43:17 50:9 51:15 covered 10:23 49:2 CREEK 1:7 crime 5:4,6,10 5:19,19 6:20 8:3,9,13,15 10:6 18:12,13 18:15,19,20,23</p>	<p>20:2,3 24:20 24:24 35:12 38:18,23 48:20 crimes 4:8,9,12 6:21,23 7:16 7:19,21 8:9,11 8:14 9:23 10:19 11:5,7 35:21,24 36:19 39:4 47:6 51:3 criminal 12:23 49:13 criteria 12:10 criterion 5:19 8:2 cruel 6:11 cruelty 38:12 39:1 crystal 51:4 culpability 5:15 6:15,20 51:6 curiae 1:22 42:23 current 7:8 custody 26:24 26:25 27:20,21 28:8 customary 17:13</p> <hr/> <p>D</p> <p>D 1:20 2:9 3:1 42:22 damages 13:3 date 27:10 29:9 30:5,6,8,9 31:1 31:2 day 50:19 deal 24:19 47:13 dealing 11:1,3 28:20,21 dealt 25:20 death 40:13,17 51:24 December 27:11 28:20 29:8,10 32:12 34:8</p>	<p>decide 15:5 17:5 19:11,17 44:22 decided 3:11 20:23 decision 3:16,18 3:19 4:5,7 5:12 5:22,23 6:1 8:5 13:24 14:12 20:7 21:16 23:19 36:19 37:10 38:10,17 40:9,24 43:19 50:9,25 51:1 52:14 decisions 9:10 20:14,17 21:3 21:7 23:4 declared 34:20 defendant 3:20 4:13 11:25 20:12 24:19,23 35:17 38:1 48:22 defendants 48:18 defendant's 4:9 definitely 42:16 definition 40:6 41:2 degree 35:20,22 35:23 38:1 40:13 44:6,21 deliberate 38:12 denied 34:10 48:22 Department 1:21 depend 34:6 deprivation 49:9 Deputy 1:18 described 3:19 9:8 details 32:5 determination 13:1 44:18 determinative</p>	<p>27:13 determine 44:14 48:24 determined 13:4 determining 9:16 36:10 48:17 49:15 dicta 21:24 dictated 22:16 22:22 23:8 52:15 difference 18:21 23:16 43:13 45:2 different 9:10 17:23 19:8,13 23:5,6 24:6 30:7 35:10 41:23 difficult 19:23 difficulty 52:12 direct 13:15,22 17:12 directed 9:23 disagree 28:11 disagreement 51:25 disappeared 39:22 discounted 49:10 discrete 8:1 discretion 9:6 19:10 41:24 44:3,7,22 discussed 46:4 discussing 43:7 discussion 51:14 dismissed 13:9 13:10 14:8 34:22 dissent 24:1 39:9,10 40:10 41:19 43:9 52:1 dissenters 22:11 23:12 52:15</p>
--	---	---	--	--

<p>dissents 22:13 22:14,17,20 23:9,10,14</p> <p>distinction 41:7 41:12 42:4,10 42:12 43:4,6 43:10,12,16,17 43:23,25</p> <p>distinctions 41:10 43:20 44:25 45:1</p> <p>distinguish 22:19 23:13 51:17</p> <p>district 13:19 14:23 15:6,9 15:16 17:6,11 17:18 18:8 28:25 46:15</p> <p>doing 7:14 35:25 50:10</p> <p>doubt 5:24 6:18 11:8,21 48:19</p> <p>draw 19:1 41:7 41:9,12 43:6 47:7</p> <p>drawing 42:4</p> <p>drawn 41:8 43:4 43:6,23 45:2</p> <p>drew 43:16</p> <p>D.C 1:9,21</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1</p> <p>earlier 12:16,24 31:11,14</p> <p>effect 5:4 7:25 11:24 21:10 31:15,18 47:20 50:5</p> <p>effectively 35:21</p> <p>either 10:18 13:20 16:20 17:14 37:18</p> <p>elaborate 50:23</p> <p>element 6:17 36:19</p>	<p>elements 8:9 10:18 11:5 48:19</p> <p>eliminate 44:3</p> <p>enabled 44:13</p> <p>enactment 19:14</p> <p>encompassed 11:6,18 12:1</p> <p>engaged 41:15</p> <p>enhanced 10:12 42:2</p> <p>entered 26:21 26:22 27:19 28:10 32:14,15 34:8 35:14</p> <p>entertain 33:6</p> <p>entry 34:6</p> <p>equitable 33:14</p> <p>error 24:15 48:5 49:10</p> <p>errors 49:11,13</p> <p>especially 13:24 15:15</p> <p>ESQ 1:16,18,20 2:3,6,9,12</p> <p>essential 48:12 49:8,17</p> <p>essentially 16:10 18:10 47:17,24</p> <p>established 45:12</p> <p>et 39:12 42:8</p> <p>evaded 24:13</p> <p>exact 10:1</p> <p>exactly 6:2,13 7:11 16:3,20 18:16 27:4 31:12,21 32:19 35:3 38:8 52:6</p> <p>example 8:18 9:13</p> <p>examples 8:17</p> <p>exception 24:14 25:25</p> <p>exceptional 35:15 37:25</p>	<p>38:5 46:22,25</p> <p>excuse 46:15</p> <p>exercise 41:15 41:16</p> <p>exhausted 17:2 34:11,12</p> <p>exhaustion 17:4 34:25</p> <p>exist 22:5</p> <p>existed 28:10</p> <p>existence 28:18</p> <p>exists 35:10</p> <p>explain 39:21 45:9</p> <p>explained 40:10 41:19</p> <p>explicitly 13:12 51:9,19</p> <p>expressing 41:6</p> <p>expressly 49:12</p> <p>extant 31:7</p> <p>extend 23:15</p> <p>extent 26:3 48:24 51:7</p> <p>extra 6:10,15,19 7:10,15 9:3 10:2,5,18 11:4 18:14,14,19,20 18:23,24 51:2 51:12</p> <p>extraordinarily 5:15,16 51:5</p> <p>extraordinary 8:2</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fact 4:7,11,11,15 4:17 5:1,5,8,20 6:10 7:2,15 8:1 8:24 9:1,3,14 15:21 16:15 22:5,17 24:23 28:4 29:3 30:7 34:7,9 35:11 35:12,13,14,17 36:13,14 37:12 37:25 38:9,21</p>	<p>39:12,12 40:8 40:17,25 42:7 42:7 43:11 44:1,23 46:5 47:1,4 48:25</p> <p>factor 6:4 36:10 36:13 41:25 51:4</p> <p>factors 4:23 36:16 46:14,17 46:24 47:6,14 47:25</p> <p>facts 3:15,21 11:6,13,18 12:1 19:11 20:12 21:12 22:19 26:19 27:17 34:7 38:14,17 39:15 44:10,10,14,16 44:17,18,22 47:7 48:24 49:1,2,3,4,5</p> <p>factual 34:13</p> <p>fair 14:21 15:14 17:18 19:5 48:12 49:8,17</p> <p>fall 16:22</p> <p>falls 5:6</p> <p>far 23:15,16</p> <p>fashion 4:20</p> <p>Federal 19:2,18 19:22 29:18 30:25 45:9,10 45:12,19 46:2 50:2</p> <p>feel 22:11</p> <p>felony 48:21</p> <p>felt 39:3</p> <p>figure 29:22</p> <p>file 12:16</p> <p>filed 12:15 26:24 27:5 28:18,19 29:5,8,15,18 30:16 32:12,22 34:2,9</p> <p>files 27:6,7</p>	<p>filing 13:14 14:16</p> <p>final 13:2,8 17:2 33:7,18 34:6 34:16 45:15 50:17</p> <p>finally 51:14</p> <p>find 4:17 5:14 7:11 40:12 48:24 49:1 50:3 51:5</p> <p>finder 4:11</p> <p>finding 4:7,11 7:10,25 8:24 9:1,3 10:2,5,18 11:4,6,24 35:14,16 36:8 36:9,21 38:18 38:18 51:2,10 51:12,24</p> <p>findings 11:7 35:11 37:1,12 37:13,15 38:11 38:14 40:14,17</p> <p>finger 16:19</p> <p>first 3:11 12:14 12:20 13:9,12 14:7 15:20 16:13,14,17 17:1 20:20 26:18,25 27:6 28:12,13 29:5 30:15 33:3,25 34:2,5,5,9,10 35:20,22,22 38:1 40:12 48:15 50:12</p> <p>Fisher 1:16 2:3 2:12 3:5,6,8,24 4:14,16 5:8,21 6:13 7:7 8:4,16 8:20 9:2,20 10:1,8,17,25 12:3,14 13:5 14:5,11,17,21 15:3,24 16:2 16:19 17:6,9</p>
--	---	--	--	---

19:5 20:16,19 22:12 23:2 25:4,9,15 26:7 26:17 28:15 42:6 49:21,22 49:24 52:19 follow 8:20 following 27:16 38:15 47:8 follows 31:9 foregoing 38:14 38:17 47:7 form 4:4 11:23 21:9 formal 43:6,23 formalistic 11:12 24:11 formerly 4:23 formula 42:7 formulation 41:8 forthrightly 13:21 fortiori 33:13 found 5:2 22:4 24:25 42:1,7 48:18 four 49:21 Fourteenth 19:9 20:11 22:16 Fourth 16:4 free 5:4,10,19,19 8:3 35:21 36:19,24 38:18 38:23 39:4 47:6 51:3 full 52:7 fully 45:16 function 28:24 functioned 52:11 fundamental 48:13 fundamentally 49:14 further 5:20 31:23 41:10	46:10 49:19 52:16 <hr/> G G 3:1 gatekeeping 28:24 34:23 General 1:18,21 Gideon 48:14 Ginsburg 12:3 12:22 13:5 20:14,18 21:5 26:13 36:6 40:20 52:9 give 5:25 13:2 36:20 45:11 given 5:2 22:6 51:16 go 7:17 10:7 17:5 23:8,16 28:24 29:24 31:1 32:8 34:23 35:6 44:11 goes 31:24 37:12 going 9:18 10:6 17:5,19 20:15 30:23 31:1 39:24 41:12 47:12 48:2 good 22:11 40:11 gotten 13:10 governing 12:8 34:25 greater 24:24 ground 20:7 guess 25:11 38:20 39:23 guidance 45:11 45:25 guided 41:24 guideline 41:21 44:2 49:7 guidelines 19:2 19:19,23 20:24 43:24 44:11	guilt 11:7 48:19 49:15 51:24 guilty 24:25 40:12 guts 21:20 22:1 <hr/> H habeas 13:25 14:16 16:16 27:3 31:7,8,18 33:3,11,14,17 34:5 46:1 50:13 51:10 hand 28:16 happened 11:15 14:6 16:10 17:10 50:7 happens 50:2,3 hard 39:9 harm 5:16 39:20 51:6 harmless 49:10 49:11 hate 18:14 hear 3:3 heard 28:16 30:3 hearing 40:15 heinous 6:11 held 9:13 10:21 10:22 30:8 49:10 help 8:5 36:21 helpful 18:4 23:3 he'll 36:24 higher 11:25 18:15 44:15,16 44:20 highly 24:10 historical 21:22 23:20 history 32:5 hold 19:2 holding 22:1 24:22 49:12 holistically 26:3	home 25:18 Honor 27:4,13 27:24 28:4 29:6,13 30:19 31:12,22 32:3 32:7,16,19 33:10,21 35:4 36:4,11 37:4 37:14,19 39:2 40:5,23 42:17 hope 41:7,16 Horn 25:20,24 Hughes 5:12,23 50:25 51:4 <hr/> I idea 22:15 identical 3:23 ignored 11:20 imagine 29:17 impact 49:2 impediment 12:4 implausible 43:11 implication 30:23 implicit 42:15 importance 48:13,14 important 20:20 43:14 impose 3:14 imposed 6:2 24:21 imposing 38:4 46:24 improper 50:22 include 49:3 incorporated 21:23 increase 36:25 increases 39:13 42:9 incremental 5:4 independent 36:14 45:23	indicate 31:25 indication 30:1 inference 15:14 inherently 48:22 48:23 innocence 49:15 inquiry 11:23 25:23 insist 33:18 intended 45:25 intention 17:21 intermediate 21:2 interpret 48:3 interpretation 43:9 interpreted 43:19 invalid 41:22 52:13 invoke 5:14 invoking 38:2 involve 41:23 involved 7:13 issue 4:22 10:3 26:14 31:16,17 35:8 40:8 45:8 45:12 46:5 48:7 51:17 issued 27:23 issues 43:2 46:4 <hr/> J JA 13:14,14 JEFFREY 1:16 2:3,12 3:6 49:22 Jersey 18:6,10 joint 12:17 17:11 27:10,25 29:4 32:1,21 35:16 37:21 46:12 judge 3:14 4:5 4:10,17,21 7:10,11,17,22 10:17 11:4
---	---	--	--	--

15:10 17:1,6 17:11,13 18:8 18:8 19:20 36:8,13,24 40:14 42:1 44:6,10,14,15 44:17,21 46:6 49:4,6 51:5,9 51:11,13,16 52:2,7 judges 9:22 29:19 40:24 44:4 judge's 9:6 19:10 40:17 judgment 7:25 8:1 12:15,17 12:19,21,23,25 13:2,2,7,13,16 13:17,20 14:1 14:24 15:8,9 15:11,13 16:8 16:10,13,15,16 16:17 17:1,19 26:18,21,22 27:1,3,5,10,15 27:19,21,23 28:8,9,10,12 28:13,14,17,19 28:20 29:9,21 29:25 30:7,17 30:17,20,21 31:6,7,9,10,15 31:18 32:6,13 32:21,24,25 33:1,7,8 34:7,8 34:16 45:14,14 50:5,6,9,18,18 jurisdiction 13:19 16:21,22 29:1,2 49:25 50:1 jurisdictional 15:4 17:4 33:16 jurisdictionally 15:21	jurist 22:4,6,8 45:1 jurists 43:5,18 44:7 jury 3:15,22 9:15 11:8,14 11:18 12:2 19:11 20:13 21:12 24:24 36:23 39:14,16 40:12 42:8 52:5 jury's 11:6 51:23 justice 1:21 3:3 3:8,24 4:14,15 5:1,8,18 6:10 6:19 7:7,20 8:16,20,22 9:8 9:12,21,25 10:4,9 12:3,22 13:5 14:3,5,9 14:14,18,22 15:1,20,25 16:1,12,24 17:8 19:3,6,21 20:14,18 21:4 22:10,12,21 23:25 25:1,5,6 25:10 26:6,11 26:13 27:2,9 27:22 28:1 29:3,7,17 30:14,22 31:5 31:13,23 32:4 32:9,10,17,25 33:2,13,24 34:17,24 35:2 35:5,7,25 36:5 36:6,20 37:3,6 37:11,17 38:6 38:9,11,20 39:6 40:10,20 41:5,18,19 42:3,11,18,19 42:25 43:8,16 45:4 47:1,3,19	49:20 52:1,9 52:18 justification 38:4 justified 37:25 44:20,22,23 46:22 justify 35:15 37:1,8 44:15 46:7 <hr/> K Kansas 20:22 21:13 41:2 keep 35:25 Kennedy 14:3,6 14:9,14,18,22 15:1 22:10,12 22:21 kidnapping 6:22 7:3,5,6 kind 4:16 7:6 10:1 18:14 36:9 48:14 51:12 52:6 know 3:24 15:24 18:4 23:24 30:22,24 40:11 known 5:10 18:9 <hr/> L L 1:16 2:3,12 3:6 49:22 label 11:15 labeling 24:12 laid 3:18 11:2 14:12 language 3:23 11:20 20:10,23 21:25 45:18 late 50:19 law 5:9 22:18 24:3,4,5 36:6 38:15 40:11 47:8 51:11 lays 5:23 23:19 27:16 LEE 1:3	legislative 19:14 legislature 44:13 lenient 6:4 51:4 Lest 11:21 let's 15:8 23:9 level 11:25 44:19 liability 13:1 limit 23:15 limitations 29:23 limited 39:19,21 39:25 40:1,4 limits 44:5 line 11:1,9 20:5 29:24 list 6:14 18:22 little 31:3 36:21 52:12 logical 41:1,5 long 52:4 longer 28:9 LONNIE 1:3 look 7:5,12 18:1 18:5,5 21:5 22:3 27:14 29:7,20,23 32:20 37:20 43:18 44:17 50:24,25 looked 19:20 20:22 36:18 52:3 looking 7:2,3 9:17 12:25 27:10 28:5 29:3,10 32:1 40:24 43:19 looks 29:21 37:22 loose 21:25 lose 15:22 lot 6:11 30:23 33:13 lots 23:20 lower 16:4 20:16	21:6,15 23:22 24:4 40:23 <hr/> M magistrate 29:20 majority 9:5 43:9 52:1,4 making 50:11 mandatory 49:3 map 20:5 mapped 11:22 March 26:21 27:5,19,23 32:22 34:8 matter 1:12 7:1 17:4 25:11 26:19 27:9 52:21 matters 25:12 MATTHEW 1:20 2:9 42:22 maximum 3:13 3:14,20,20 11:15,17 19:12 19:17 20:2,3 20:10,12 21:11 21:11 24:11 39:13,14 40:7 40:7,17,18 41:3,4 mean 6:12,20 9:13 28:7 30:21 37:14 39:7,24 40:2 47:3 means 23:24 39:15 meant 28:2 meet 12:10 mentioned 11:11 25:24 mere 5:19 merely 42:14 merits 23:10 34:11 39:7,8 50:1,23
--	---	---	---	---

<p>met 6:16 mind 42:12,12 minimums 49:4 minutes 48:8 49:21 miscarriage 37:2 misnomer 5:18 moment 15:8 47:5 motion 50:11 motions 45:21 multiple 5:17 9:23 37:24 38:2 46:6,21 51:6 murder 6:22 7:2 10:10,12,14 40:13</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:1,1 3:1 naming 50:4 nature 6:20 7:20 necessarily 16:24 49:13 necessary 8:23 51:2 need 11:7 15:12 17:14 needed 9:3 17:9 17:14 18:4 19:6 51:12 needs 6:17 10:17 11:4 26:3 51:5 nervous 31:3,3 never 10:21,22 30:3 49:9 nevertheless 17:3 new 6:1 16:9,9 16:15,16 17:19 17:25 18:6,10 19:4 20:6 22:24,25 23:4 24:7 25:3 26:21 27:18,23</p>	<p>28:10 32:6 42:14,17 48:9 50:11 51:22 Ninth 3:10,12 3:16 11:10,19 normal 10:12 November 1:10 number 31:6 36:21</p> <hr/> <p style="text-align: center;">O</p> <p>O 2:1 3:1 objection 15:22 occurred 31:11 34:14 offender 37:24 38:1 offense 38:2 46:6,21 offenses 5:17 51:7 oh 28:1 30:8 okay 15:18 35:5 36:5 39:16 42:3 51:21 52:4 Olympia 1:19 once 11:16 21:12 22:6 23:8 33:6 52:10 ones 31:4 open 44:13 opinion 3:11 11:20 18:2 21:18,19,21,25 37:20 39:17,22 opposed 42:14 option 14:19 oral 1:12 2:2,5,8 3:6 26:9 42:22 order 35:15 ordinary 7:18 8:14 18:11,18 20:2 30:16 Oregon 21:1 original 12:16</p>	<p>28:5,9 46:18 ought 19:18 24:4,21 overturned 40:20,22 O'Connor 41:19 42:11 43:16 O'Connor's 40:10 43:8 52:1</p> <hr/> <p style="text-align: center;">P</p> <p>P 3:1 page 2:2 3:18 12:17 27:10,14 27:25 29:4 32:20,20 35:16 37:21 46:12,23 pages 17:10 21:20 Pain 3:10 parallel 46:1 part 6:13 45:13 partially 16:8 particular 8:22 10:6 45:8 parts 51:8 pass 36:24 37:7 passages 21:8,10 21:20 penalty 35:23 40:14 51:24 permissible 12:1 51:22,24 permission 12:9 permits 48:25 pertinent 19:8 pervasively 48:16 petition 12:5,7,8 12:12,13,14,16 12:18,20,20 13:9,12,25 14:7,16 15:15 16:7,9 26:15 26:16,17,18,25 27:6,7,8 28:2,4</p>	<p>28:12,14,18,19 28:23 29:5,15 30:4,16 31:24 32:5,12 34:1,6 34:9,10,22 45:5 50:13,22 51:11 petitioner 1:4,17 2:4,13 3:7 14:1 14:19 16:7 46:11,13,14 47:25 49:23 50:4,10,13,21 petitions 14:4 26:14 29:18,20 30:24 phrase 22:23 23:18 40:3 place 52:7 planning 38:13 plausible 43:12 play 18:6 19:18 51:3 please 3:9 26:12 43:1 pluck 21:17,17 plus 5:19 point 20:9 23:14 25:12 46:3 pointed 37:7 52:9 points 38:11 42:6 48:9 policy 37:24 38:2 46:6,22 position 15:2 24:17 31:6 45:5,7 possibility 16:16 possible 16:25 23:13 post 25:21 posture 25:20 potential 12:4 practice 16:6 precedent 22:22 30:4,10,13</p>	<p>precedents 20:9 precise 10:2 45:8 precisely 3:18 4:16 predicate 16:14 predicates 34:14 predict 41:12 preliminary 46:4 premise 31:10 31:14 33:19 premised 38:10 preponderance 42:1 48:23 49:1 prescribed 39:13,14 Presumably 15:14 primarily 22:14 principle 19:18 22:25 23:7 39:19 principles 17:13 prior 9:14 12:6 22:22 23:4,7 prisoners 45:9 45:10,19 46:2 pro 50:10,20 problem 4:1 29:14 45:6 procedure 48:17 proceeding 15:20 31:8 proceedings 17:22 33:9 progress 33:9 properly 15:2 proposed 43:25 proposing 43:8 proved 11:8 proven 6:17 provision 4:21 4:23 punish 7:18 punishable</p>
---	---	---	---	---

<p>18:12 punished 3:21 punishment 5:4 18:18,24 35:19 48:18,25 49:2 purely 11:12 purpose 29:23 purposes 19:9 20:11 29:23 33:18 pursuant 26:25 27:20 32:17 put 4:4 16:19 19:14 23:25 27:12 35:2 39:8 40:3 puts 27:11 P.3d 6:6,6</p> <hr/> <p style="text-align: center;">Q</p> <p>qualify 8:18 quasi 19:14 question 3:11 4:4 15:4 18:1 19:24 25:8 26:2 27:14 32:9 34:4 44:25 questions 24:7 26:4 49:19 52:16 quickly 24:8 quintessential 6:16 quite 12:18 35:10 41:22 quote 3:20 39:11 39:15 quoted 20:10 quotes 21:8 51:8 quoting 3:12 51:5</p> <hr/> <p style="text-align: center;">R</p> <p>R 3:1 raise 31:16 range 35:18 42:8 49:5,6</p>	<p>rape 6:22 7:3 10:11,14 35:20 38:1 rarely 50:2,3 reach 21:15 reached 22:6 reaching 49:12 read 3:25,25 25:13 29:24 30:11,15 40:2 41:20 47:5 reading 14:13 47:4 ready 15:12 realized 21:14 52:8 really 4:1 17:1 22:15,17 23:17 23:24 24:10 25:20 26:2 31:2 35:11 41:22 realm 25:9 reason 9:7 24:9 24:15 30:15 38:4 39:8 51:20 reasonable 6:17 11:8 18:8 22:4 22:5,8 43:5,18 44:7 45:1 48:19 51:16 reasoning 23:21 36:17 reasons 13:17 36:14 44:19 48:15 REBUTTAL 2:11 49:22 receive 3:21 20:12 35:19,23 40:13 recharacterize 13:25 recharacterized 14:25 recognizing</p>	<p>15:4 recollection 42:11 Recuenco 49:11 refer 41:15 referred 35:12 36:22 refers 4:21 10:2 30:5,18 reflected 3:15 3:22 39:16 45:17 Reform 38:3 regard 28:20 regime 10:10 reinforces 51:10 rejected 20:8 44:24 46:19,20 relevant 11:23 20:23 relied 46:8,17 48:1 relief 34:5 relies 49:4,6 rely 44:11 46:15 46:16,24 relying 48:1,3 remainder 26:5 remaining 49:21 remedies 17:2 remedy 24:23 33:15 46:1 remember 7:12 render 49:13 renounce 17:14 17:15 repeated 42:6 reply 5:13 16:5 50:16 reported 6:6 reprinted 12:18 15:15 require 42:4 required 7:11 11:24 34:15 requirement 34:25 35:1,2</p>	<p>requires 4:7 7:17 28:25 41:10 resentencing 31:9 46:18 reserve 26:4 resolving 45:11 respect 44:21 Respondent 1:19,23 2:7,10 26:10 42:24 respondents 18:25 respondent's 9:9 responding 43:10 48:4 response 40:9 rest 21:18,19 rested 44:1 result 22:22 23:8 26:22 35:21 37:2 41:11,21 resulted 32:6 retained 44:6 retroactively 13:11,16,25 retroactivity 48:8 reversal 32:17 reversed 26:24 27:18 32:1 review 13:15,22 14:4,16 33:19 34:25 reviewed 19:16 Revised 4:18 right 5:21 7:7 9:2 10:8 13:5 13:18 15:23 25:4,17 29:5 30:25 31:21 32:7 33:24 37:5 47:25 48:15 49:9 50:1</p>	<p>Ring 40:21,22 44:12 ripe 34:13 robbery 35:22 Roberts 1:20 2:9 3:3 9:12,25 10:4,9 19:3 25:1,6,10 26:6 27:9,22 28:1 31:23 32:4 42:19,21,22,25 45:4,4,7 47:2,9 47:23 49:20 50:1 52:18 robust 23:20 rose 44:18 rule 3:13,18 11:2,9,13 16:2 17:25 19:4,14 21:22 23:4,20 23:22 24:8,11 24:14 25:2,3 25:13 43:11,14 48:10,11,11 49:17 52:12 rules 48:12 run 4:20 6:3 7:9 7:14 8:7 9:6,16 9:18,24 10:15 10:19 35:18 36:12 running 4:19 7:16 36:15 runs 24:16</p> <hr/> <p style="text-align: center;">S</p> <p>S 2:1 3:1 sake 38:21 satisfied 25:24 satisfy 7:21 8:1 saying 7:14 9:18 10:4 12:24 13:6 14:23,24 20:8 22:14 23:21 32:11 34:17 38:20 39:11 43:13</p>
--	--	--	---	--

<p>50:6 says 6:8 7:2,9 8:2 11:4 12:18 22:18 23:25 26:17 29:8,9 29:21 30:8,10 36:22 37:17,23 38:14 39:11 47:6 50:10 Scalia 33:2,13 33:24 34:17 35:2 scheme 5:3 score 38:1 se 50:10,20 second 12:6,8,13 15:22 18:12 27:7 28:14,21 31:19 32:13,21 32:25 33:1 34:3 35:1 43:15 48:21 second-guess 23:23 section 4:24,24 7:8,8,8 see 7:5 22:16 30:15 seeing 40:24 seen 52:3 sense 33:3,17 sentence 3:14 4:6 6:8,24,25 7:4 10:12,12 11:25 12:6,12 12:24 13:8,15 13:22 14:15 15:13,17,19 17:12,20,21 18:15 24:21 26:23 27:8,18 28:22 32:1,20 33:4,9,18,19 34:18 35:8,9 35:15,17,18 36:7,11,15,25 37:22,25 38:5</p>	<p>39:4,20 42:1 44:4,15,17,20 45:13,15,21,24 46:5,7,22,25 49:4,6 52:5 sentenced 24:24 38:23,25 sentencer 47:21 sentences 4:19 5:24 6:2 7:9,13 7:14,18 8:7,25 9:6,16,23 10:15,23 11:2 14:4 21:17 37:8 39:12 sentencing 5:3,5 9:11 19:1,19 19:23 20:24 23:5 36:22 37:23 38:3 44:2,4,6,8,22 46:18,21,23 52:11 separate 33:3,5 36:14 46:11,13 separately 7:19 serious 5:15,16 6:23 7:3,23,24 8:12 10:6 51:6 set 44:13 45:21 Sharp 3:10 shed 45:24 show 22:21 39:9 shows 27:25 side 20:25 significant 44:6 simple 20:1 simply 3:17 7:17 8:10,11 9:10 10:5 11:12,19 13:24 14:8 16:13 18:1 19:2 20:7,9 21:16 24:12 26:19 28:9 31:15 38:23,24 42:13 50:24</p>	<p>51:18 52:12 simultaneous 9:17 single 18:22 19:16 21:7 41:2 situation 17:23 18:3 20:1 situations 9:4 Sixth 19:9 20:11 22:16 slightly 23:6 solely 3:14 39:15 Solicitor 1:18,20 solid 14:12 solution 34:23 somebody 31:1 40:12 sophistication 38:12 39:1 sorry 5:22 8:10 21:6 33:21 36:1 sort 6:11 21:24 46:3 Souter 3:24 4:14 4:15 5:1,9,18 6:10 7:20 9:8 15:20,25 16:1 16:12 27:2 31:5,13 32:9 34:24 35:5,7 35:25 36:5 38:6,9,20 41:5 41:18 42:3,18 47:1,3,19 speak 42:5 special 7:5 specifically 40:9 specified 44:12 split 31:18 spoken 47:6 STAFFORD 1:7 stand 20:24 50:20 standard 35:18 48:24 49:1,6</p>	<p>standing 38:3 39:4 46:7 47:10 48:2 stands 51:7,19 Stanford 1:16 start 39:10 started 35:7 state 6:5 9:9,20 11:3,15 13:6 13:18 17:15,21 18:3 21:2,5,6 23:5,23 37:10 43:7 50:3,5,15 50:20 51:1,7 51:11,16 States 1:1,13,22 9:5,10 42:23 state's 14:7 20:8 24:10,16,17 status 19:22 statute 4:19,19 10:3 12:8 18:13,17,19 29:22 33:6,11 33:16 34:24 45:18,20 statutes 18:5,11 20:2 23:16 statutory 3:13 3:19 11:15,17 19:8,12,16 20:10 21:11 24:11 39:13,14 40:6,7,16,18 41:3,3 49:5 Stevens 8:16,21 8:22 16:24 17:8 32:10,17 32:25 36:20 37:6,11,17 38:11 Stewart 1:6 3:4 strength 51:10 stringent 12:10 Stringer 22:23 22:24 23:2 strong 22:23</p>	<p>strongly 49:16 subjects 4:12 submit 13:11,23 18:3,7 21:13 22:2 24:2 45:2 48:10 52:17 submitted 9:15 39:14 52:19,21 subsequent 23:7 32:5 subsequently 29:1 substance 36:22 substantial 38:3 44:19 substitute 46:1 successful 16:8 successive 15:22 26:14,16,17 28:15,19,23 31:19 34:1,1 34:22 35:1 45:5 sufficient 36:1 37:8 38:7 39:5 47:10 suggest 30:5 49:16 suggested 52:15 SUPERINTE... 1:6 superior 32:22 supported 43:8 supporting 1:22 42:24 suppose 6:21 22:10 supposed 22:3 25:22 supreme 1:1,13 5:11,13,22 20:22,25 21:1 21:5,6,14 32:14 37:10 sure 8:20 9:12 32:10 41:17 47:3</p>
---	---	---	---	---

surface 4:1	theory 14:7,10	32:12 34:21	49:25	10:19
survive 25:16	thing 7:23 17:3	43:20	type 6:16 7:11	virtually 3:22
sweeping 48:13	18:16 32:11	times 11:16 42:6	19:13	41:1
system 10:9 19:1	33:25 41:9,11	today 3:12		
19:15 20:24	50:11	told 13:12,13,21	U	W
21:23 23:6	things 33:22	15:16,17 17:11	ultimate 47:21	wait 14:20 15:12
29:19 43:24,25	think 14:3,11,12	18:3 31:24	52:5	15:19 34:12,16
44:5 45:12	14:21 15:3,14	traditional 40:7	underlying	waived 31:15
50:2,3 51:17	16:20 17:9,17	41:3 44:8 46:1	39:19	Walton 40:10,11
51:20,21 52:2	19:3,5 20:19	treat 47:19,21	understand 9:13	40:25 43:18
52:4,6,11,13	21:2,4 22:12	treatment 10:22	22:13 25:19	51:15,19
systems 9:11,20	23:2,8,11,17	51:15	32:11 36:1	want 5:25 14:23
41:21,23 44:2	24:2,13 25:4	trial 16:15 18:8	51:20	18:25 20:20
44:8 49:7	26:1 27:13	19:20 32:16	understanding	21:5 35:6 39:6
	28:11,11 29:10	34:14 35:14	45:17	39:8 50:23
T	29:19,25 30:19	36:13 38:10,16	unfair 48:22,23	wanted 17:17
T 2:1,1	33:10,22 35:12	38:22 46:16	49:14	41:25
take 6:24 11:24	36:16 37:4,6,9	47:9 48:3,12	unique 19:22	Wash 1:19
14:19 19:12	37:14 38:19	48:16,21 49:9	unitary 45:14,14	Washington 1:9
21:13 22:7	39:23 40:1,4,5	49:14,18 50:11	United 1:1,13,22	1:21 4:18,18
27:14 37:20	40:9,19 41:18	50:14 51:9	42:23	4:23 5:3,9,11
39:6 40:18	42:5 45:24	tries 31:16	unnecessary	5:13,22,25 6:1
47:15 48:6	46:25 47:14	trigger 6:9 8:6	37:18	6:5,7 7:1,9,13
takes 8:14	48:5 50:1	44:16 49:3	unpublished	8:2,5 9:4,8,11
talk 11:10 20:20	51:18	triggered 11:9	21:3	9:22 11:19
talked 47:5	Third 49:8	11:17	unpunished	18:6,17 19:1
talking 16:23	Thomas's 19:21	trivial 7:24	10:7	21:1 32:14,22
20:21 33:11	thought 5:1 28:1	true 8:17,18	unreliable 49:14	36:2 43:24
43:3	31:24 36:6	16:25 18:16	upholding 41:21	44:2,5 47:16
Taylor 16:5	37:2 39:10,18	19:16 23:15	46:9	47:21,23 50:25
Teague 22:2	44:15	37:19 47:1,4	use 48:23,25	51:1,11 52:7
25:23,23	thousands 29:18	trust 42:10	U.S.C 45:18	wasn't 22:15
tell 24:5 39:24	30:25	try 44:2		28:3,9 40:20
40:3	three 6:21,25	trying 29:20	V	46:15
telling 21:4	7:22,24 8:11	31:18 39:9	v 1:5	watershed 24:8
23:11 50:24	8:12 11:16	Tuesday 1:10	vacate 45:21	24:14,14,18
52:4	36:14 42:6	turn 17:25 48:7	value 7:25 8:1	25:9,11,13,16
tens 29:18	47:10 48:15	49:25 51:14	vehicle 49:14	25:17,25 48:11
term 19:12	threshold 19:8	turns 30:6	verdict 3:15,22	way 3:25 5:9,24
termed 25:22	19:13 25:23	two 7:23 10:15	11:14,18 12:2	6:3 9:22 11:21
terms 23:12,18	26:2	10:18 13:17	19:11 20:13	20:15 21:3,15
25:14	thresholds 19:8	14:4 18:11	21:12 36:23	23:13,17 30:16
test 21:9 23:2	time 6:22 10:14	19:7 20:2	39:16 52:5	30:24 47:20
text 18:2	12:6 15:18	29:24 36:15	versus 3:4,10	50:19 52:2,10
Thank 3:8 26:6	16:4,25 17:16	39:11 41:19	6:5 22:24	ways 6:15 41:20
42:19 49:20	26:5 28:18	46:13,16 47:11	25:20 40:10	41:20
52:18	30:15 31:8	47:12,13,17,25	view 24:10	went 12:11
			violate 6:9 10:16	

28:13,14 38:11 46:10 50:8 Weren't 41:14 we're 7:2,3 11:3 24:20 29:3 33:11 41:12 47:12 48:1,2 we've 10:21,22 38:24 Whorton 25:16 wide 44:13 WILLIAM 1:18 2:6 26:9 Williams 51:22 withdraw 15:18 wonder 4:2 word 49:24 words 7:22 25:10 32:5 work 5:24 worked 52:2 works 5:10 9:22 wouldn't 13:19 30:15 39:19 43:13 wrong 3:17 39:10 50:5 wrote 28:6	32:22 38:2 18 35:17 36:21 38:18 19 37:12 38:12 1994 12:17,19 13:13,16 14:24 15:8,11 26:18 27:11,20 28:6 28:9,13 29:10 50:8,16,18 1998 12:15,21 13:17,20,20 15:9,13 26:21 27:5,19 28:14 28:18,20 32:12 32:23 34:8,9	52 37:21 46:12 53 37:21 46:12 46:23 589 7:8		
	<hr/> 2 <hr/>	<hr/> 6 <hr/>		
	20 37:12 38:12 2000 34:10 2002 27:7 28:21 2006 1:10 21 38:12 2254(d)(1) 25:14 2255 45:18,25 26 2:7 27 35:16 28 29:8 32:12 45:18	<hr/> 7 <hr/>	606 6:6,6	
	<hr/> 3 <hr/>	<hr/> 8 <hr/>	589 7:8	
	2 37:12 38:12 2000 34:10 2002 27:7 28:21 2006 1:10 21 38:12 2254(d)(1) 25:14 2255 45:18,25 26 2:7 27 35:16 28 29:8 32:12 45:18	<hr/> 9 <hr/>	7 1:10	
<hr/> X <hr/>		<hr/> 9 <hr/>	7 1:10	
x 1:2,8		9(b) 32:1 92 31:8,17 98 27:23		
<hr/> Y <hr/>				
yeah 29:25 37:11 years 18:12 York 51:22	3 2:4 27:25 32:20 34 12:17 27:10 29:4,4 35 13:14 17:10 27:14 32:2 390 4:24			
<hr/> 0 <hr/>	<hr/> 4 <hr/>			
05-9222 1:5	40 13:14 17:11 400 4:25 42 2:10 482 21:20 483 3:18 21:20 49 2:13			
<hr/> 1 <hr/>	<hr/> 5 <hr/>			
10 18:12 11:03 1:14 3:2 12:01 52:20 1257 33:15 143 6:6,6 16 27:11 29:10				