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IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD EUGENE GLOSSIP,)

Petitioner,)

v.) No. 22-7466

OKLAHOMA,)

Respondent.)

- - - - -

Washington, D.C.

Wednesday, October 9, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

SETH P. WAXMAN, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

PAUL D. CLEMENT, ESQUIRE, Alexandria, Virginia; on behalf of the Respondent in support of the Petitioner.

CHRISTOPHER G. MICHEL, ESQUIRE, Washington, D.C.; Court-appointed amicus curiae in support of the judgment below.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	SETH P. WAXMAN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	PAUL D. CLEMENT, ESQ.	
7	On behalf of the Respondent	
8	in support of the Petitioner	32
9	ORAL ARGUMENT OF:	
10	CHRISTOPHER G. MICHEL, ESQ.	
11	Court-appointed amicus curiae	
12	in support of the judgment below	70
13	REBUTTAL ARGUMENT OF:	
14	SETH P. WAXMAN, ESQ.	
15	On behalf of the Petitioner	109
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
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5
6
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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 22-7466, Glossip versus Oklahoma.

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONER

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

Richard Glossip was convicted on the word of one man, Justin Sneed, the undisputed murderer in this case. Oklahoma has now disclosed evidence revealing that Mr. Sneed lied to the jury about his history of psychiatric treatment, including the fact that a prison psychiatrist prescribed lithium to treat his previously undiagnosed bipolar disorder. The prosecution suppressed that evidence and then failed to correct Mr. Sneed's perjured denial, just as it suppressed evidence that in the middle of trial, in violation of the court's sequestration order, Sneed altered his testimony about the knife wounds on the victim at the urgent request of the prosecutor, who then

1 falsely denied to the court her prior knowledge.

2 There is no adequate or independent
3 jurisdictional bar to review and no warrant for
4 an evidentiary hearing.

5 As to independence, the court's
6 opinion is suffused with merits determinations
7 on the Brady and Napue claims. And, certainly,
8 there is no "clear and express statement" that
9 the court's decision is based on a bona fide
10 separate, adequate, and independent grounds, as
11 long required by this Court to preclude review.

12 Nor is there any adequate bar. By
13 rejecting the State's waiver, the court created
14 a jurisdictional threshold it had never applied
15 in any other case. The disposition was "without
16 support in prior state law," as required by over
17 60 years of this Court's precedent to establish
18 adequacy.

19 No evidentiary hearing could alter the
20 conclusion that Mr. Glossip was denied due
21 process. There's no dispute that, contrary to
22 Sneed's sworn testimony, the State's own
23 suppressed record shows that he was, in fact,
24 treated by a psychiatrist for bipolar disorder,
25 just as there is no dispute that Sneed changed

1 his testimony about the knife at the urgent
2 mid-trial request of the prosecutor, who then
3 falsely denied that very fact to the court.

4 This Court should reverse and remand
5 for a new trial.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Mr. Waxman, you place
8 quite a bit of weight on the note -- notes from
9 Smothermon and Ackley, and from your opening
10 statement, you clearly do not agree with them.

11 Did you at any point get a statement
12 from either one of the prosecutors?

13 MR. WAXMAN: Yes.

14 JUSTICE THOMAS: Did you interview
15 them?

16 MR. WAXMAN: Well, to be clear, we --
17 we did get a sworn statement, which I believe is
18 at page 960 of the Joint Appendix, from Gary
19 Ackley in which, for -- among other things, he
20 never mentions the fact that -- he never
21 mentions the account that he has now provided to
22 the -- in the amicus brief for the Van Treese
23 family.

24 And, as to Ms. Smothermon,
25 Ms. Smothermon was interviewed both by the

1 independent -- the legislature's independent
2 counsel and by the attorney general's
3 independent counsel, Mr. Duncan. She gave
4 different answers each time, none of which was
5 the account she's now provided in an unsworn
6 letter attached to the Van Treese brief.

7 JUSTICE THOMAS: Well, it would seem
8 that, because not only, you know, their
9 reputations are being impugned, but they are
10 central to this case, it would seem that they --
11 an interview of these two prosecutors would be
12 central. They suggest that the -- their
13 interviews were generally about prosecuting
14 capital cases and not specifically about the
15 details of this.

16 MR. WAXMAN: Well, their current
17 unsworn statement appended at the very last
18 minute for the very first time in a merits
19 amicus brief before this Court deserves all the
20 benefit of the doubt that they -- you know, to
21 which they're entitled.

22 When -- in the context of --
23 Mr. Ackley did file an affidavit. It is in the
24 record in this case. And it is not in any way
25 consistent with his current account. As to --

1 JUSTICE THOMAS: Did they make
2 themselves unavailable? Sorry to interrupt you.

3 MR. WAXMAN: Well, he -- he made
4 himself available. He provided us a
5 declaration.

6 JUSTICE THOMAS: No, it's -- what
7 you're saying is -- would make sense if, for
8 some reason, they had made themselves
9 unavailable. They suggest that they were not
10 sought out and given an opportunity to give
11 detailed accounts of what those notes meant and
12 -- and what they did during the trial.

13 MR. WAXMAN: Justice Thomas, with
14 respect, there is a reason why both independent
15 counsels and the attorney general of the State
16 credited the account of what those notes show,
17 and the -- and their own words, her own words on
18 the notes can't be disputed.

19 And the reason that they gave for that
20 explanation amounts to the fact that, in
21 context, this is a prosecutor who, one,
22 destroyed and disbursed material evidence both
23 before and during the appeal of this case and
24 during post-conviction proceedings; two, she
25 falsely told the court that it had complied with

1 its obligation to provide the substance of all
2 statements by Justin Sneed; number three, they
3 belittled the formal discovery request for
4 mental health records as a "fishing expedition"
5 and said that no such records existed.

6 She -- this is a prosecutor who
7 engineered a mid-trial change in Justin Sneed's
8 testimony and then denied doing so in the court
9 and stood silent in the face of the testimony --
10 the false testimony that she elicited about
11 psychiatric treatment. And I think --

12 CHIEF JUSTICE ROBERTS: Mr. Waxman,
13 the counsel appointed by the Court argues that a
14 central element of your case is the jury -- that
15 the jury would have regarded the matter
16 differently if they knew that the lithium had
17 been prescribed by a psychiatrist as opposed to
18 someone else because the jury knew about the
19 lithium and what they didn't know is that it was
20 prescribed by a psychiatrist.

21 Do you -- do you really think it would
22 make that much of a difference to the jury?

23 MR. WAXMAN: Well, I think that's not
24 the only material difference here, that the --
25 the -- the fact was not only that he was -- it

1 was that he lied and was allowed to lie when he
2 said that he never saw a psychiatrist, which the
3 defense -- which -- you know, it is one thing
4 for a witness to stand up in court and testify
5 on the basis of a promise of leniency by the
6 prosecution.

7 It's one thing for a witness to
8 speculate or be inaccurate about what actually
9 happened. What the jury is told, this is a
10 witness who lied about the fact that he had seen
11 psychiatric testimony and was diagnosed with
12 bipolar disorder, and this is a witness who, at
13 the mid-trial inducement of the prosecutor,
14 changed his testimony about whether, in fact, he
15 had also stabbed the victim.

16 It very well could have made a
17 significant difference in the --

18 JUSTICE SOTOMAYOR: Mr. Waxman --

19 MR. WAXMAN: -- outcome of the case.

20 Just the --

21 JUSTICE SOTOMAYOR: -- the issue
22 wasn't about him taking lithium. The issue was
23 about why he was taking the lithium.

24 MR. WAXMAN: Yes, of course.

25 JUSTICE SOTOMAYOR: And so the fact

1 that the jury knew he had taken lithium during
2 incarceration doesn't tell them anything about
3 whether he had bipolar -- a bipolar condition,
4 that his use of drugs would have led to
5 impulsive and violent behavior, correct?

6 MR. WAXMAN: That's correct. And --

7 JUSTICE SOTOMAYOR: And would have
8 explained the murder, correct?

9 MR. WAXMAN: I'm sorry?

10 JUSTICE SOTOMAYOR: And would have
11 explained --

12 MR. WAXMAN: And would have explained
13 the murder.

14 JUSTICE SOTOMAYOR: -- the murder.

15 Now can I go back to the two questions
16 here? I have three of my own, okay?

17 MR. WAXMAN: Okay.

18 JUSTICE SOTOMAYOR: There's a lot --
19 and you spent a whole lot of time in your
20 introduction, a lot of spilt ink here, on
21 whether the PCPA is an adequate and independent
22 state ground. I'm not even sure why we're doing
23 all that when -- you're right, the court below
24 seemed to confuse the merits with the procedural
25 bar, but it's very clear that a procedural bar

1 is always waiveable under Oklahoma law. Legions
2 of cases say that, correct?

3 MR. WAXMAN: Correct.

4 JUSTICE SOTOMAYOR: So --

5 MR. WAXMAN: And under federal law.

6 JUSTICE SOTOMAYOR: -- so, once you
7 waived, the only issue before the court was the
8 substantive issue of whether there was a
9 violation of federal law, correct?

10 MR. WAXMAN: Correct.

11 JUSTICE SOTOMAYOR: So that's really
12 the only issue before us, the procedural bar. A
13 lot of spilt ink goes on and on about is this
14 the first time they didn't waive it, is it not
15 the first time they didn't waive it.

16 The reason that's true is because they
17 accept the waiver when there's a violation of a
18 right, and they don't accept the waiver when
19 there's no violation of a right.

20 Here, they found no violation of a
21 right, so they reached the substantive legal
22 issue and said: We're not going to waive.

23 You don't find any case in Oklahoma
24 law -- and your adversary, Mr. Waxman, can tell
25 me -- where they found a constitutional

1 violation either under state or federal law and
2 said: We won't accept a PCPA waiver. Can't
3 find it because it doesn't exist.

4 So now we're on the federal issue,
5 okay? That's all I'm looking at. Was there a
6 Napue? Was there a Brady violation? That's
7 your argument, correct?

8 MR. WAXMAN: Correct.

9 JUSTICE SOTOMAYOR: Now, on the
10 Van Treese issue, that's non-record evidence, so
11 it's not before us.

12 MR. WAXMAN: It's not only not before
13 you, it wasn't the basis on -- it wasn't before
14 the Oklahoma Court of Criminal Appeals.

15 JUSTICE SOTOMAYOR: So whatever that
16 was.

17 MR. WAXMAN: It was never even
18 suggested then.

19 JUSTICE SOTOMAYOR: Now we know we had
20 two independent counsels. At least one of them,
21 if not both, talked to Gary Ackley because --

22 MR. WAXMAN: Correct.

23 JUSTICE SOTOMAYOR: -- he submitted an
24 affidavit.

25 MR. WAXMAN: Correct.

1 JUSTICE SOTOMAYOR: And he said in
2 that affidavit that Justin Sneed was on lithium
3 as treatment for bipolar disorder would have
4 been an important fact for the defense to know.

5 MR. WAXMAN: Correct.

6 JUSTICE SOTOMAYOR: So he concedes the
7 basis of the Napue order -- violation here,
8 didn't he?

9 MR. WAXMAN: Certainly the Brady
10 violation.

11 JUSTICE SOTOMAYOR: Right. Now, if
12 he's changed his testimony now in unsworn
13 materials, that's irrelevant to us here, and
14 it's irrelevant to the finding the Oklahoma
15 court made below, correct?

16 MR. WAXMAN: That's right.

17 JUSTICE SOTOMAYOR: All right. So now
18 let's go to the substance of the issue that the
19 Chief raised, which was: Could he have found
20 this earlier and does that make a difference to
21 the Napue violation and the Brady violation?

22 I thought the essence of the Napue
23 violation is: Was there a falsehood? Did the
24 prosecutor know it was a falsehood? Not whether
25 the defendant knew it was a falsehood but

1 whether the prosecutor has an obligation to
2 correct it. Is that correct?

3 MR. WAXMAN: It is correct that both
4 Napue and its subsequent cases and Brady and its
5 progeny both look to the -- the obligation, the
6 constitutional obligation, of the prosecutor and
7 not what the defense could have discovered.

8 JUSTICE SOTOMAYOR: All right. Now
9 let's go to --

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel. We'll -- we'll get back shortly
12 through the seriatim questions.

13 Justice Alito?

14 JUSTICE ALITO: You don't have a
15 question?

16 JUSTICE THOMAS: Go ahead.

17 JUSTICE ALITO: Sorry.

18 All right. Well, Mr. Waxman, Justice
19 Sotomayor has taken us through the whole case,
20 so maybe there's not much left to discuss, but I
21 did have a few questions.

22 The Oklahoma Court of Criminal Appeals
23 said in paragraph 24 of its opinion, "Even if
24 this claim overcomes procedural bar, the facts
25 do not rise to the level of a Brady violation."

1 Why isn't that a quintessential clear
2 statement under -- under Long? Even if it does
3 not overcome the procedural bar, then -- and it
4 goes on, then to the federal issue?

5 MR. WAXMAN: Well, I -- I think -- I
6 think that the sentence you just read me is
7 susceptible to at least two interpretations.
8 One is the one you're implying, and the other is
9 that they have just finished dispensing with a
10 number of other claims in their opinion, all of
11 which they very clearly unequivocally barred on
12 state procedural default grounds.

13 When they come to the Brady claim, the
14 court says: Even if this claim overcomes
15 procedural bar, I will then now spend the next
16 four paragraphs -- well, three of the next four
17 paragraphs discussing the merits of the Brady
18 claim.

19 And, at a minimum, Justice Alito, I
20 think we have to acknowledge that paragraphs 24
21 through 28 -- and this is repeated again at
22 paragraph 41 and paragraph 12 -- that the -- any
23 statements by the court with respect to the
24 state procedural bar are, to quote this Court's
25 precedents, "interwoven with and influenced by

1 its consideration of the federal constitutional
2 claims."

3 JUSTICE ALITO: Why -- why is that so?

4 In paragraph 26, the -- the Oklahoma
5 court goes through the two requirements under
6 state law under 1089. The issue is one that
7 could have been presented previously because the
8 factual basis for the claim was ascertainable
9 through the exercise of reasonable diligence.

10 And then it goes on to the -- to the
11 innocence requirement. And the facts are not
12 sufficient to establish by clear and convincing
13 evidence that but for the alleged error, no
14 reasonable fact finder would have found the
15 applicant guilty of the underlying offense or
16 would have rendered the penalty of death.

17 MR. WAXMAN: I -- I don't deny --

18 JUSTICE ALITO: What's ambiguous about
19 that?

20 MR. WAXMAN: Justice Alito, there is
21 no denying that the entirety of paragraph 26 is
22 a near-verbatim recitation of the two prongs of
23 the state procedural bar.

24 There is also no denying that it is
25 preceded by two paragraphs discussing the merits

1 of the Brady claim and succeeded by a paragraph
2 which also goes in -- which goes in detail in
3 explaining why the Brady claim fails.

4 JUSTICE ALITO: But what does that
5 show? Yes, there's no dispute that they -- they
6 held in the alternative that there was no
7 federal constitutional violation. But there is
8 the Oklahoma statute. It has two requirements.
9 They -- they -- they go through the two
10 requirements, and they say that they weren't
11 satisfied, and -- and they say: Even if it
12 could overcome the procedural bar, it still
13 would not provide a basis for -- for relief.

14 I -- I don't see what's unclear --

15 MR. WAXMAN: Just --

16 JUSTICE ALITO: -- or even ambiguous
17 about that.

18 MR. WAXMAN: Justice Alito, with
19 respect, let me make two points. Number one --
20 I guess maybe two-and-a-half points.

21 Number one, when the court deals with
22 the Napue claim, which it does not address until
23 paragraph 28, it never mentions procedural bar
24 whatsoever. It is fully adjudicated on the
25 merits.

1 Number two, the -- I think that -- I
2 think that one has to concede that at a minimum,
3 a minimum, with respect to the Brady claim,
4 there is -- it is certainly interwoven with --
5 and it's physically on the page interwoven with
6 what may or may not have been an adjudication of
7 the state procedural bar. Certainly, it was
8 influenced by it.

9 And this Court, 41 years ago in Long
10 versus Michigan and reiterated 30 years ago also
11 in another opinion by Justice O'Connor,
12 reiterated that -- and I'm quoting -- "After
13 Long, a state court that wishes to look to
14 federal law for guidance as an alternative
15 holding while still relying on adequate and
16 independent state grounds can avoid the
17 presumption of federal jurisdiction by stating
18 clearly and expressly that its decision is based
19 on bona fide separate, adequate, and independent
20 grounds."

21 JUSTICE ALITO: All right. Going on
22 to another point, you rely very heavily on a
23 note that says "Lithium? Dr. Trumpet?", and you
24 read a lot into that.

25 And the Van Treese family's amicus

1 brief provides a pretty compelling
2 counter-reading of that. And -- and you want us
3 to say, well, just pretend it doesn't exist and
4 read those notes the way we think they should be
5 read, those cryptic notes the way we think they
6 should be read, because it's not the -- the
7 material that the Van Treese brief relies on is
8 not in the record of the case.

9 We shouldn't even remand for an
10 exploration of this?

11 MR. WAXMAN: As to the -- I'll deal
12 with the remand first and then the weight that
13 ought to be given to the Van Treese brief's
14 eleventh-and-a-half-hour explanation of these
15 notes.

16 There is the -- this case comes to you
17 based on a holding of the Oklahoma Court of
18 Appeals that did not have that account in front
19 of it because the Van Treese family did not
20 present it to the court and was predicated on a
21 series of factual allegations and
22 interpretations that were presented both by the
23 prosecutor, the attorney general, and by
24 Mr. Glossip, and fully supported in great detail
25 and with reasoning by the two independent

1 investigators, the --

2 JUSTICE ALITO: All right. I -- I --

3 MR. WAXMAN: -- investigations that
4 had been done, and --

5 JUSTICE ALITO: -- I get your point.
6 Your point is we shouldn't consider it because
7 it's not in the record, right? That's the short
8 answer?

9 MR. WAXMAN: I -- I think you
10 shouldn't consider it for a whole lot of
11 reasons, one of which is that it is inconsistent
12 -- it not only was never mentioned at a time
13 when, surely, if it was the case, it would have
14 been, and is inconsistent with what Mr. Ackley
15 says in his declaration.

16 But let me -- let me just say this,
17 Justice Alito. Even assuming that this account
18 is true, there's no denying the fact -- and it's
19 also in the record -- that on -- while his first
20 conviction was on appeal, he was visited in
21 prison by Mr. Glossip's defense lawyer and an
22 investigator. And that is clearly reflected in
23 the notes of both Ms. Smothermon and Mr. Ackley.

24 There are a lot of other things that
25 are accounted for in those notes that have

1 nothing to do with that interview.

2 JUSTICE ALITO: All right. Let me
3 just --

4 MR. WAXMAN: But even if --

5 JUSTICE ALITO: -- let me -- let me go
6 on to one other question because the time is
7 limited.

8 You read McCarty, a 2005 case where
9 the Oklahoma Court of Criminal Appeals accepted
10 the State's waiver of 1089, you rely on that.
11 But there is no reasoning in McCarty. The court
12 simply said that in a footnote the State
13 expressly waived any procedural bar.

14 Do you -- do you read this for the
15 proposition that the Oklahoma court must accept
16 all 1089 waivers in future cases?

17 MR. WAXMAN: I do. But even if I were
18 wrong about that and it reflected the fact that
19 it was a discretionary rule, it is clear from
20 this Court's cases, Beard versus Kindler and
21 Walker versus Martin, that a discretionary rule
22 is inadequate unless applied consistent with an
23 intelligible principle that is "firmly
24 established and regularly followed."

25 And going all the way back to the

1 1960s --

2 JUSTICE ALITO: So one departure in
3 the application of a discretionary -- if the --
4 in a discretionary rule, if the rule is applied
5 in a discretion -- in -- in a -- in -- in a
6 habeas petitioner-friendly way in one case,
7 that's the end of the matter?

8 MR. WAXMAN: Well, I -- I think that
9 there -- that there is a non-discretionary rule
10 that is the rule of party presentation that
11 Oklahoma has followed for a hundred years, and
12 McCarty is entirely consistent with that. But
13 even if it were simply an instance of some
14 discretion, again, this Court said in -- you
15 know, 60 or 70 years ago and has reiterated
16 since that a declination -- a state -- the
17 invocation of a state procedural rule "without
18 support in prior state law" is inadequate.

19 And in Johnson versus Mississippi,
20 this Court said, "A state procedural rule is not
21 adequate unless strictly or regularly followed."

22 JUSTICE ALITO: All right. Thank you.

23 MR. WAXMAN: Okay.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor?

1 JUSTICE SOTOMAYOR: Counselor, no
2 matter how we get past this, we have to reach
3 whether the court ruled correctly on the
4 constitutional issue, correct?

5 MR. WAXMAN: Well, I -- I -- I think
6 so based on my -- my position and the State's
7 position that there is no jurisdictional bar.

8 JUSTICE SOTOMAYOR: And everything
9 that the Oklahoma courts have done, you said a
10 hundred years of their history, party
11 presentation, the fact that they've never had a
12 case with a constitutional violation where they
13 didn't accept the waiver, correct?

14 MR. WAXMAN: That's right.

15 JUSTICE SOTOMAYOR: And --

16 MR. WAXMAN: In fact, in this Court's
17 -- in -- in the Oklahoma Court of Criminal
18 Appeals' jurisprudence, there is a case -- it's
19 cited by everybody, Valdez versus the State --
20 which says that the power to grant post- --
21 relief post-conviction when an error complained
22 of has resulted in a miscarriage of justice or
23 constitutes a substantive violation of a
24 constitutional or statutory right. So this is
25 not a rule that the court is "powerless" to

1 grant a waiver or that it does not, in fact,
2 routinely defer to party presentation.

3 JUSTICE SOTOMAYOR: So I go back to
4 the -- this is not AEDPA, correct? Our review
5 is not AEDPA? Meaning --

6 MR. WAXMAN: Did you say --

7 JUSTICE SOTOMAYOR: It's not AEDPA
8 review.

9 MR. WAXMAN: AEDPA?

10 JUSTICE SOTOMAYOR: AEDPA.

11 MR. WAXMAN: Oh, yeah. No, no, no.

12 JUSTICE SOTOMAYOR: No, no, no.

13 MR. WAXMAN: This is a direct review
14 --

15 JUSTICE SOTOMAYOR: This is a straight
16 did they get --

17 MR. WAXMAN: -- from a state supreme
18 court.

19 JUSTICE SOTOMAYOR: -- if they -- if
20 they reach the -- if they reach the
21 constitutional question and we de novo decide
22 whether they got the law right, correct?

23 MR. WAXMAN: That's my understanding.

24 JUSTICE SOTOMAYOR: So whatever they
25 said their reasons or thinking was, we have to

1 look at the record and decide whether the facts
2 and law support your argument that there were
3 Brady and Napue violations, correct?

4 MR. WAXMAN: Yes.

5 JUSTICE SOTOMAYOR: Now tell me
6 succinctly why, even assuming their finding that
7 they could have determined this issue earlier,
8 Brady and Napue violations would have occurred.

9 MR. WAXMAN: Well, the --

10 JUSTICE SOTOMAYOR: I say "they,"
11 meaning the court below.

12 MR. WAXMAN: Yeah. So, you know, the
13 -- part of the adequacy determination, leaving
14 aside this novel and unforeseen refusal to give
15 credit to the -- the State's waiver of
16 procedural bars, is whether there is fair and --
17 "fair and substantial support" for the prongs of
18 the State procedural defar -- departure.

19 Here, the court's analysis of
20 diligence, which is paragraph 27 of the -- the
21 court's opinion, defies any reasonable
22 application of state law. The -- the
23 supposition is that Mr. Glossip's lawyers should
24 have brought a claim of constitutional error
25 before they knew the salient facts establishing

1 the error.

2 In this context, we have, number one,
3 with respect to the --

4 JUSTICE SOTOMAYOR: It doesn't matter
5 what state law says about that. The question is
6 what does federal law say about it, correct?

7 MR. WAXMAN: Federal law -- you know,
8 maybe I'm missing something here, but federal
9 law doesn't -- I mean, the federal requirement
10 of adequacy and independence is federal law, and
11 those -- that definition of fair and substantial
12 support comes from --

13 JUSTICE SOTOMAYOR: You miss -- you
14 misunderstood my question, okay?

15 MR. WAXMAN: Okay. I -- I apologize.

16 JUSTICE SOTOMAYOR: I -- I'm past the
17 procedural bar.

18 MR. WAXMAN: Okay.

19 JUSTICE SOTOMAYOR: I was past it long
20 ago because I think we need to get to the
21 federal question.

22 MR. WAXMAN: I hear you.

23 JUSTICE SOTOMAYOR: All right? So
24 even -- is there a Napue or a Brady violation if
25 they could have discovered this earlier?

1 MR. WAXMAN: The answer to that
2 question is yes because the adequacy prong of
3 this Court's --

4 JUSTICE SOTOMAYOR: Forget adequacy.

5 MR. WAXMAN: Okay. The answer is --
6 the answer is yes, the relevant --

7 JUSTICE SOTOMAYOR. Forget -- let's
8 assume they had granted your waiver.

9 MR. WAXMAN: Okay.

10 JUSTICE SOTOMAYOR: All right? Let's
11 assume that. So adequacy and independence is
12 not at issue.

13 Under federal -- and this had
14 happened, and it was the first case before the
15 court, and they come up and they say: There was
16 a Napue violation, there's a Brady violation.
17 And your other side comes up and says: No,
18 there wasn't, because you could have found this
19 earlier.

20 MR. WAXMAN: Okay. The answer to your
21 question is twofold.

22 Number one, as this Court has said in
23 several cases, Brady and Napue do not stand for
24 the proposition -- stand for the opposite of the
25 proposition that the prosecution may hide and

1 the defense must try to seek. That's the
2 antithesis of what Brady and Napue and their
3 progeny provide.

4 In addition, it is simply preposterous
5 to argue either with respect to the -- you know,
6 what's -- the -- the document that is in -- on
7 page 1005 of the Joint Appendix, that is, the --
8 the jail record, that this document could have
9 been discovered in the face of a solicited
10 denial under oath that he'd ever had psychiatric
11 treatment and the State's mocking of a discovery
12 request, number one, for all -- the substance of
13 all statements of Justin Sneed to the
14 prosecutor, which is required not only by the
15 Due Process Clause but also under state
16 statutory law, Title 22, Section 2002(a)(1)(C),
17 which requires the prosecution to produce the
18 substance of any oral statements made to the
19 prosecution by a co-defendant.

20 And how on earth could defense counsel
21 have known that in Ms. Smothermon's files there
22 was a memo that she sent immediately after the
23 medical examiner testified to Mr. Sneed's
24 lawyer, saying we "need to get to Justin today.
25 The knife is our biggest problem," and then

1 received back handwritten notes discovered in
2 Box 8 that -- I guess it was Box 7 -- that, in
3 fact, Sneed was going to change his testimony
4 and say that he did stab the victim.

5 And the prosecutor then, in response
6 to a mistrial motion, affirmatively tells the
7 court --

8 JUSTICE SOTOMAYOR: Counsel, the --
9 the last --

10 MR. WAXMAN: -- we're hearing this for
11 the first time.

12 JUSTICE SOTOMAYOR: -- the one fact
13 you didn't mention is that there was a defense
14 request for medical records --

15 MR. WAXMAN: Absolutely.

16 JUSTICE SOTOMAYOR: -- that were
17 resisted by the government, and they succeeded.
18 They never turned over his medical records.

19 MR. WAXMAN: That's correct.

20 JUSTICE SOTOMAYOR: So they had no way
21 of determining from his medical records the
22 lithium issue?

23 MR. WAXMAN: Correct.

24 JUSTICE SOTOMAYOR: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 JUSTICE BARRETT: You forgot Justice
2 Kavanaugh.

3 CHIEF JUSTICE ROBERTS: Yeah, sorry.
4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh?

7 Justice Barrett?

8 JUSTICE BARRETT: No.

9 CHIEF JUSTICE ROBERTS: Justice
10 Jackson?

11 JUSTICE JACKSON: So, from your
12 colloquy with Justice Alito, it seems that there
13 is agreement that the court in this case applied
14 the procedural bar, right? I mean, at least you
15 -- it's in the alternative, but they did
16 actually apply the bar, is that right?

17 MR. WAXMAN: As -- arguably, as to
18 Brady, not as to Napue.

19 JUSTICE JACKSON: All right. So even
20 with respect to Brady, I guess -- doesn't that
21 seem to be the problem, though, from the
22 standpoint of AISG when the bar has been clearly
23 waived? I think that was Justice Sotomayor's
24 initial point. Can parties in Oklahoma waive
25 non-jurisdictional procedural bars?

1 MR. WAXMAN: Of course.

2 JUSTICE JACKSON: They can. Right.

3 MR. WAXMAN: Of course.

4 JUSTICE JACKSON: And -- and -- and
5 what happens when those waivers occur? I mean,
6 do -- do the Oklahoma courts routinely proceed
7 to either evaluate the reasons for the waiver or
8 reject it and continue on anyway?

9 I thought they just accepted -- if a
10 party says, this is a non-jurisdictional bar, I
11 have a right to raise it, but I'm waiving that
12 right, the Oklahoma courts' standard practice,
13 just like most courts, if not all courts, is to
14 accept that and go on, right?

15 MR. WAXMAN: Yes. Like the federal
16 courts, the Oklahoma courts honor the principle
17 of party presentation and adversarial
18 presentation in honoring the waiver of those
19 non-jurisdictional bars.

20 JUSTICE JACKSON: As a matter of
21 practice. So we don't need a rule necessarily
22 that Oklahoma always accepts these. They just
23 do it. I mean, that's what -- we don't have any
24 evidence that they've ever rejected it, correct,
25 the waiver?

1 MR. WAXMAN: That's correct.

2 JUSTICE JACKSON: Okay.

3 MR. WAXMAN: And, in fact, the rule
4 that this Court applies on the adequacy prong is
5 that it is -- the refusal to accept a waiver is
6 not adequate unless it has been done
7 consistently in the past.

8 JUSTICE JACKSON: Correct. Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 MR. WAXMAN: Yeah. Nothing? Thank
12 you.

13 CHIEF JUSTICE ROBERTS: Mr. Clement.

14 ORAL ARGUMENT OF PAUL D. CLEMENT ON BEHALF OF THE
15 RESPONDENT, IN SUPPORT OF THE PETITIONER

16 MR. CLEMENT: Mr. Chief Justice, and
17 may it please the Court:

18 Attorney General Drummond did not
19 confess error here lightly. Indeed, he
20 continues to defend multiple capital convictions
21 and opposed Mr. Glossip's penultimate cert
22 petition. But, after commissioning an
23 independent review, he reluctantly reached the
24 conclusion that Brady and Napue violations by
25 the State's own prosecutors obligated him to

1 confess error and waive procedural obstacles, as
2 his predecessor had done in McCarty.

3 That confession demanded respectful
4 consideration and resolution of the issues on
5 the merits, as in McCarty. Instead, the court
6 invoked procedural bars and essentially treated
7 the confession of error as unfounded.

8 The resulting decision made errors on
9 two important federal constitutional issues, and
10 those errors are not shielded by adequate
11 independent grounds.

12 When the State's one indispensable
13 witness was under bipolar -- had bipolar
14 disorder and not a toothache or a common cold,
15 that fact is highly material and merits a new
16 trial.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: Mr. Clement, back to
19 the prosecutors. If you had -- if they were
20 using a note of yours from 20 years ago,
21 wouldn't you expect them to call you and have an
22 in-depth investigation as to what your note
23 meant?

24 MR. CLEMENT: I mean, I -- I would
25 expect that, Justice Thomas, and --

1 JUSTICE THOMAS: Well -- well,
2 shouldn't these two prosecutors -- it seems as
3 though their reputations are being impugned,
4 and, according to them, they did not receive an
5 opportunity to explain in depth.

6 MR. CLEMENT: Justice Thomas, that's
7 hard to square with the record here. There were
8 two independent investigations. As Mr. Waxman
9 has indicated, Mr. Axley -- Ackley submitted a
10 affidavit under -- under oath.

11 And, you know, I -- and -- and,
12 ultimately, I think the attorney general, having
13 commissioned a second independent review, looked
14 at the results of that, looked at the notes, and
15 he has to make his own judgment because,
16 ultimately, the prosecutor has to decide whether
17 a Napue violation has occurred.

18 JUSTICE THOMAS: Well, when I looked
19 at the note of Ms. Smothermon, I couldn't make
20 heads or tails of it. It had a few names. It
21 had "lithium" and a question mark. And she
22 explains what it was.

23 And, according to her explanation, if
24 it's true, it was simply about a conversation
25 that Glossip's lawyer had with -- was it Sneed?

1 MR. CLEMENT: Sneed.

2 JUSTICE THOMAS: Sneed. And if that's
3 the case, I don't see how there's any basis for
4 either of those two violations.

5 MR. CLEMENT: So there's a couple of
6 problems with that explanation, Justice Thomas.

7 First, it's inconsistent with her
8 earlier explanations for the notes.

9 Second, when General Drummond is
10 making this determination, the notes don't stand
11 alone. There's also the medical information
12 sheet that was never disclosed to the defense.

13 JUSTICE THOMAS: Where was that --
14 what was that sheet?

15 MR. CLEMENT: That sheet's at Joint
16 Appendix page 933, and it shows that -- that
17 when he was transferred from the jail facility
18 to the correctional facility, he was -- he was
19 under lithium for bipolar disorder.

20 So, if -- if -- if we're looking at
21 those notes in conjunction with that medical
22 information sheet, it seems quite -- the -- the
23 inescapable conclusion that the attorney general
24 had to make on his own was --

25 JUSTICE THOMAS: I think her point was

1 simply, I mean, even that sheet -- is that the
2 sheet that she says the sheriff filled out?
3 That it didn't come from -- actually from a
4 doctor?

5 MR. CLEMENT: Well, but -- but it's
6 the -- the State's own record --

7 JUSTICE THOMAS: It was a transport --

8 MR. CLEMENT: -- that at the point of
9 transfer he was, A, under lithium, and, B, it
10 was for bipolar disorder.

11 And so I -- I mean, again, I think you
12 ultimately have to draw the most plausible
13 inference from all the information available.
14 And the most --

15 JUSTICE THOMAS: But you didn't,
16 though. Her point is that you didn't ask her,
17 that you didn't have an in-depth conversation
18 with her about it. You're drawing it from the
19 note and -- which she thinks is inadequate
20 information.

21 MR. CLEMENT: Well, the attorney
22 general is basing his judgment in part on the
23 independent investigation of Mr. Duncan. He
24 talked to Ms. Smothermon. Afterwards,
25 Ms. Smothermon says it wasn't a sufficiently

1 lengthy conversation.

2 JUSTICE THOMAS: She's --

3 MR. CLEMENT: I mean, at a certain
4 point, I mean -- and -- but let me put one more
5 contextual point on the table here.

6 The original request below was for an
7 evidentiary hearing, and the State did not
8 oppose an evidentiary hearing.

9 Now we think, if you look at those
10 notes in light of the medical information sheet,
11 there's no need for an evidentiary hearing.
12 But, ultimately, we -- we didn't resist it
13 below. If the court had granted it, we wouldn't
14 be here.

15 And the attorney general just wants to
16 get to the bottom of this, but he also, under
17 Napue, has to make his own judgment about
18 whether the prosecutors have elicited perjured
19 testimony and failed to correct it, and his best
20 judgment, based on these records and this
21 information, is that there was a Napue violation
22 here.

23 JUSTICE JACKSON: But are you saying
24 that we are -- that -- that the question of
25 Brady and Napue or a Napue violation is resolved

1 because the attorney general has reached that
2 conclusion?

3 MR. CLEMENT: Absolutely not. And we
4 --

5 JUSTICE JACKSON: All right. So why
6 wouldn't we send it back? I mean, it's my
7 understanding -- if we send it back for an
8 evidentiary hearing? It's my understanding that
9 there's never been a court determination of any
10 of these facts. Justice Thomas is saying there
11 are some disputes about what the notes mean and
12 whatnot. So I just -- I guess I don't
13 understand why we wouldn't, at the minimum, have
14 some sort of requirement that a court make a
15 finding about these things.

16 MR. CLEMENT: I -- I mean, look,
17 again, we didn't resist an evidentiary hearing
18 below. We would be satisfied if you vacate the
19 judgment below and order an evidentiary hearing.
20 We do think an evidentiary hearing is not
21 necessary here because I -- I -- I just think,
22 if you look at those notes in conjunction with
23 the medical information sheet, there's no
24 factual dispute. I don't think there's any
25 factual dispute that they -- that -- that,

1 certainly, the two in conjunction with each
2 other are Brady material. I don't know --

3 JUSTICE SOTOMAYOR: Counselor --

4 MR. CLEMENT: -- how they're not.

5 JUSTICE SOTOMAYOR: -- whether the
6 prosecutor actually knew about it, knowledge is
7 imputed to her, right?

8 MR. CLEMENT: I -- I -- I would
9 certainly think so, and so I don't -- I don't --

10 JUSTICE SOTOMAYOR: I think, under --
11 under the law, anything in the prosecutor's
12 possession, which includes prison records, is --
13 the knowledge is imputed to the prosecutor,
14 correct?

15 MR. CLEMENT: Right. And, ultimately
16 -- look, ultimately, the question is, did she
17 elicit perjured testimony and fail to correct
18 it? And it seems like, especially when you look
19 at it in conjunction with the medical records
20 and then you keep in mind that the medical
21 records were withheld, in contradistinction of
22 -- or in contravention of Oklahoma law and
23 Brady, I think there's only one conclusion to be
24 made -- made here.

25 And you can certainly understand why

1 the attorney general -- I mean, whoever is the
2 -- if you think an evidentiary hearing is fine,
3 I mean is necessary, then the attorney general
4 will be there, confessing error again, because,
5 as you can understand, given all the evidence
6 here of the Napue violation, the Brady
7 violation, I mean, even under the most -- even
8 under Smothermon's explanation that these are
9 notes that she took based on what the -- what
10 Sneed told her, there's an obligation under
11 Oklahoma law to turn over all the defense -- all
12 the -- all the witnesses' statements. So any --
13 and especially -- and, here, there was a request
14 for it.

15 JUSTICE KAGAN: Mr. Clement --

16 MR. CLEMENT: So --

17 JUSTICE KAGAN: I'm sorry. Please.

18 MR. CLEMENT: No, no. So -- so just
19 looking at all of that material, the attorney
20 general drew, I think, the only conclusion that
21 he could.

22 JUSTICE KAGAN: Can I ask you,
23 Mr. Clement, about some of the questions that
24 Justice Alito was asking Mr. Waxman about, the
25 whether there is an independent and adequate

1 state ground here, and -- and -- and really
2 focus on these couple of pages of the Oklahoma
3 court's opinion, which I find difficult to say
4 the least, and ask you what you make of them?

5 MR. CLEMENT: So a -- a couple of
6 things. One is I do think the easiest ground to
7 say there is not an adequate independent state
8 ground here is the waiver issue as opposed to
9 splicing the opinion.

10 If you're going to splice the opinion
11 --

12 JUSTICE KAGAN: When you say "the
13 waiver issue," what do you mean by that?

14 MR. CLEMENT: I mean that it is an
15 established principle of Oklahoma law and
16 federal law up until this point that party
17 presentation that procedural bars are defenses
18 that the State has to invoke and can waive.

19 And that is a hundred years of
20 unbroken practice. McCarty is a perfect example
21 of that. In some respects, I think the fact
22 that there wasn't an elaborate explanation that
23 they were accepting the State's waiver is kind
24 of the point. When the State waives a defense,
25 you move on and you discuss the merits, which is

1 exactly what the Court did in the McCarty
2 decision.

3 This Court's decision in Trest against
4 Cain, which was a unanimous decision, says that
5 procedural default is a defense that the State
6 must raise or it waives. So you just have this,
7 you know, incredibly, like, unbroken tradition
8 that procedural defects, procedural bars, are
9 defenses that the State can waive.

10 JUSTICE KAGAN: And --

11 MR. CLEMENT: And, here, for the first
12 time, they say no, that's -- that's for us to
13 do, not for you to do, Mr. Attorney General.

14 JUSTICE KAGAN: And suppose we want to
15 go beyond that because it is true that we rarely
16 say that there's no adequacy because this --
17 this is so out of the ordinary. It -- it's a
18 very rare kind of thing for us to say.

19 And if we want to just look at -- at
20 what the Oklahoma court did in terms of
21 justifying its denial of the confession of error
22 and its determination to proceed, how -- what do
23 you -- how do you describe what they did?

24 MR. CLEMENT: Sure. I think it's easy
25 as to Napue, and it's a little more complicated

1 as to Brady.

2 As to Napue, I think paragraph 28
3 stands alone. It's their only resolution of the
4 Napue claim. They don't talk about the
5 procedural bars at all.

6 JUSTICE KAGAN: There -- there might
7 be in that paragraph, the last sentence is an
8 oblique, very oblique, reference to the
9 materiality prong of -- of the procedural bar
10 statute.

11 MR. CLEMENT: Well, I read it
12 differently. I read it as oblique reference to
13 the materiality standard under Napue.

14 JUSTICE KAGAN: Of Napue, okay.

15 MR. CLEMENT: But, if we're into the
16 world of competing oblique references, that's
17 when I think Justice O'Connor comes to the
18 rescue and says that if you're not clear about
19 it and it's ambiguous, then the federal issue is
20 before this Court to decide.

21 JUSTICE KAGAN: And paragraph 27?

22 MR. CLEMENT: Paragraph 27, I think,
23 is where the court is wrestling with the Brady
24 issue. I think it's pretty clear that's Brady
25 -- a Brady paragraph, not a Napue paragraph.

1 And I think that --

2 JUSTICE KAGAN: And then you get,
3 like -- that's all the way down, right, until
4 the last sentence, which is the "Moreover"
5 sentence, and the "Moreover" sentence might
6 suggest, again, a reference to the procedural
7 bar. Is that -- is that true?

8 MR. CLEMENT: "Moreover" as to the
9 Brady. It says --

10 JUSTICE KAGAN: Yeah.

11 MR. CLEMENT: -- "this issue," and I
12 think the "this issue" there is Brady. And
13 that's an inference based on the fact that the
14 rest of paragraph 27 is all focused on what the
15 defense counsel knew or should have known. And
16 maybe that's marginally relevant for Brady, but
17 it's completely irrelevant for Napue.

18 JUSTICE KAGAN: At the most, what you
19 have here in these two paragraphs is very
20 significant discussions of the substance and
21 then maybe a sentence about, oh, there's this
22 procedural bar thing that we're doing too. Is
23 that -- is that correct?

24 MR. CLEMENT: I -- I think that's
25 correct. The other point I would make here --

1 JUSTICE KAGAN: And, you know, in a
2 way, this actually relates to the first point
3 that you made about how unusual it is to deny
4 the State's request for a waiver here, because
5 that's sort of what they start with. They say
6 they have these two claims and the State has
7 come forward and said this warrants
8 post-conviction relief, and we're not accepting
9 that because the State -- the State's concession
10 is not based in law or fact.

11 What -- what do you take that to mean?

12 MR. CLEMENT: I -- I -- I just mean,
13 you know, I'm not -- you know, I just take that
14 to be the back of the hand to the confession of
15 error. I think, if you --

16 JUSTICE KAGAN: I mean, the State has
17 only come forward with Napue arguments and Brady
18 arguments, is that right? So they must be
19 saying we're not -- we're not going with the
20 State because we don't agree with their views of
21 Napue and Brady, as we're going to now explain.

22 MR. CLEMENT: I think that's a fair
23 inference. I also think that one of the things
24 that complicates this is -- and -- and maybe I
25 read the one sentence a little differently than

1 Justice Alito did, but they start with the Brad
2 -- Brady claim on -- you know, on the -- on the
3 merits, if you will, and then, you know, in the
4 context of that, they basically say there was no
5 Brady violation here because you should have
6 known everything you needed to know from the
7 fact that he had -- was taking lithium. And
8 then I think that essentially infects the rest
9 of the analysis about diligence and all of the
10 -- the rest.

11 So I think this is a classic case
12 where they are interwoven. But -- but I will
13 say -- and -- and -- and, you know, maybe you
14 think that, you know, this is -- that the
15 adequacy prong is so rare that it doesn't apply
16 here, but this does seem to me to be a classic
17 case for it because --

18 JUSTICE KAGAN: Of interwoven;
19 therefore, you know, not independent?

20 MR. CLEMENT: Well, yeah. Interwoven,
21 not independent, but also inadequate because,
22 gee whiz, you know, this Court unanimously has
23 said, everybody has always said, look, if it's
24 not jurisdictional, procedural bars are defenses
25 that you can waive. Even this opinion isn't

1 very clear about it.

2 Paragraph 24 refers to 1089(D) as a
3 procedural bar. Paragraph 40 --

4 JUSTICE ALITO: Well, whether --

5 JUSTICE KAVANAUGH: Whoever -- whoever
6 received --

7 JUSTICE KAGAN: And is it --

8 JUSTICE BARRETT: Mr. Clement --

9 JUSTICE KAGAN: -- is it possible that
10 -- is it possible that, you know, they know that
11 they're doing something very unusual here, which
12 is rejecting the State's request for a waiver,
13 and they're just throwing everything in the
14 kitchen sink in? They're saying, you know, we
15 don't see the merits of these claims, either the
16 Brady claim or the Napue claim. They're saying
17 there's this procedural bar statute hanging
18 around and we kind of think that that's been
19 violated too. And we actually don't know, like,
20 if you took this piece out, if you took that
21 piece out, how they would have come out.

22 MR. CLEMENT: I -- I think that is
23 fair, and I think that gets you into Michigan
24 v. Long and Coleman against Thompson. I also
25 think it is fair to say what is clear is they

1 have not accepted the State's procedural bar --
2 the waiver of procedural bar defenses for the
3 first time in -- in the court's history.

4 JUSTICE BARRETT: But, Mr. Clement --

5 JUSTICE ALITO: Mr. Clement, whether a
6 procedural bar must -- whether the waiver of a
7 procedural bar must be accepted by the Oklahoma
8 court is a question of Oklahoma law, right?

9 The Oklahoma Court of Criminal Appeals
10 can say: We always accept these, we never
11 accept them, or sometimes we accept them, right?

12 MR. CLEMENT: It's definitely a
13 question of Oklahoma law, but --

14 JUSTICE ALITO: And you have exactly
15 one case, McCarty, for the proposition that this
16 must -- this waiver must be accepted. Exactly
17 one.

18 Have -- can you cite one other case
19 where we've deemed a state decision inadequate
20 for conflicting with one prior opinion?

21 I thought our decision said that
22 there's inadequacy when they conflict with
23 many -- with many "past unambiguous holdings."

24 MR. CLEMENT: So, at least according
25 to the dissenters in Cruz, that was a case where

1 you found inadequacy when there wasn't a single
2 case on point, and it was a question of first
3 impression.

4 I would say, though, this. I mean, I
5 think it's important to understand McCarty does
6 not stand alone. I mean, in addition to
7 accepting the State's waiver in McCarty, the
8 Oklahoma Court of Criminal Appeals on numerous
9 occasions -- Valdez, Malicoat, both cases we
10 cite in our briefs -- they basically treat the
11 bars as things that the court itself can relax
12 or waive. And that is equally inconsistent with
13 treating them as a jurisdictional requirement
14 that can't be waived.

15 That stands, again, against the
16 backdrop of Oklahoma party presentation
17 principles, this Court decision in Trest v.
18 Cain. The Tenth Circuit has treated 1089(D) as
19 a procedural bar that the State can waive.

20 And I think, ultimately, the question
21 for adequacy -- I mean, you know, this Court's
22 cases say a law -- a rule is adequate -- a state
23 rule is adequate if it's firmly established and
24 regularly applied.

25 The question for inadequacy is whether

1 it's an unexplained departure from past
2 practice.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas, anything further?

6 JUSTICE THOMAS: Just one point with
7 respect to the transport order.

8 I think my concern is that in their
9 letter, the prosecutors say they did not see the
10 transport order until 2022.

11 So my problem is, if they don't -- if
12 they never saw it, then how is there a Brady or
13 Napue violation?

14 MR. CLEMENT: So I think there's a
15 Brady violation because, whether they saw it or
16 not, it was something that was available to --

17 JUSTICE THOMAS: No. They say it was
18 not in their files.

19 MR. CLEMENT: I -- I don't think -- I
20 mean, you know, let's keep -- keep in mind the
21 precise dynamic we have here, right? This is --
22 the interview takes place before the second
23 trial. So Gloss -- I mean Sneed has been in
24 state custody for close to five years at this
25 point. He's been transferred from the jail to

1 the correctional facility.

2 I think the State is charged for Brady
3 purposes with that transfer sheet --

4 JUSTICE THOMAS: But wouldn't it --

5 MR. CLEMENT: -- being exchanged.

6 JUSTICE THOMAS: -- matter that --
7 whether or not they have it? I mean, you're --
8 again, I go back to the prosecutors. You're --
9 what I'm hearing is, and they're hearing, is
10 that they did not turn over Brady material or
11 that they permitted false testimony to take
12 place, and they're saying: Look, it did not
13 happen.

14 And why wouldn't they be interviewed?
15 Why don't we have materials from them other than
16 in an amicus brief in this case?

17 MR. CLEMENT: Well, with respect,
18 Justice Thomas, you do have materials from them.
19 Ackley's affidavit is in the Joint Appendix
20 before this Court.

21 And it's not like Smothermon never
22 talked to anybody. She's talked to people at
23 various junctures, and her story has changed
24 over time.

25 Again, I don't want to overstate the

1 point because we didn't resist an evidentiary
2 hearing --

3 JUSTICE THOMAS: But they are central
4 to this. It would seem like any dealings with
5 them would also be central and we would not be
6 arguing about Napue and Brady if that had been
7 cleared up.

8 MR. CLEMENT: I -- I -- I mean, I
9 think they would still be submitting amicus
10 briefs with new stories. And at a certain
11 point, you've got to deal with what is in front
12 of you and what is in the record.

13 And the attorney general had to deal
14 what was in front of him and in the record. And
15 particularly when you read the notes in light of
16 that sheet, all of which is in the record now, I
17 think General Drummond made the correct
18 conclusion --

19 JUSTICE THOMAS: So -- so what are we
20 to do with the point that they make that they
21 were frozen out of the process?

22 MR. CLEMENT: I -- I -- I -- I -- they
23 had access to both independent investigations.
24 And I think, at a certain point, I mean, you
25 know, this -- if I were in their positions, I'd

1 be complaining about the process as well.

2 But, you know, the -- the ultimate
3 process that I think matters here is the process
4 in Glossip's trial, and that was fundamentally
5 distorted when he is allowed to make the lithium
6 use innocuous by saying: Oh, it was for, you
7 know, a common cold, and I've never seen a
8 psychiatrist.

9 CHIEF JUSTICE ROBERTS: Justice Alito?
10 Justice Sotomayor?

11 JUSTICE SOTOMAYOR: At least one of
12 the two prosecutors was interviewed in some way
13 because we have an affidavit from him that was
14 provided before the OCCA while this case was
15 pending, correct?

16 MR. CLEMENT: That is absolutely
17 correct.

18 JUSTICE SOTOMAYOR: Do you know as a
19 matter of fact or not whether or not the first
20 prosecutor -- I can't say her name --

21 MR. CLEMENT: Smothermon.

22 JUSTICE SOTOMAYOR: -- Smothermon,
23 whether she was interviewed?

24 MR. CLEMENT: I mean, she was inter-
25 -- I know she was interviewed by -- by -- by

1 Duncan, who is the independent prosecutor
2 appointed by the attorney general. I think she
3 also talked to people in the context of the
4 ReedSmith independent investigation. But
5 Mr. Waxman --

6 JUSTICE SOTOMAYOR: So --

7 MR. CLEMENT: -- may be able to fill
8 that in. But --

9 JUSTICE SOTOMAYOR: -- so I -- I --
10 I'm having a hard time understanding what the
11 current claim by both of them is: We weren't
12 able to give our full story.

13 They had -- they were interviewed,
14 correct?

15 MR. CLEMENT: My understanding is that
16 they were interviewed. I think they do not
17 think that the interview was as longstanding and
18 as interactive as they had hoped.

19 As I say, I mean, you know, it's --
20 it -- they're -- they --

21 JUSTICE SOTOMAYOR: But there were --
22 it -- it wasn't as if they were boxed out?

23 MR. CLEMENT: I -- I don't believe
24 that they were boxed out. And, again --

25 JUSTICE SOTOMAYOR: All right.

1 MR. CLEMENT: -- the attorney general
2 here had --

3 JUSTICE SOTOMAYOR: Can I go back to
4 your respectful consideration to an attorney
5 general's confession of error, and Justice
6 Jackson asked you whether the Court has to
7 accept the confession of error, and you said no.

8 And I think that's correct. The
9 Court, as I understand the rule of confession of
10 error, it's especially relevant to questions of
11 fact, correct --

12 MR. CLEMENT: I --

13 JUSTICE SOTOMAYOR: -- not questions
14 of law? The court has to be satisfied that
15 there's a basis in law and fact for the
16 confession, correct?

17 MR. CLEMENT: -- I -- I think, as to
18 both, it's respectful consideration. And I
19 think it's at its zenith when it's prosecutorial
20 misconduct because I think the prosecutors are
21 in a particularly good position to judge what --
22 I mean, you know, starting with: What does
23 "Dr. Trumpet?" in the notes mean in the context
24 of a community where everybody knows that
25 Dr. Trombka is the sole psychiatrist at the

1 jail? I mean, I think a prosecutor is going to
2 have a -- a good basis to say everybody knows
3 that's just some kind of shorthand for
4 "Trombka."

5 JUSTICE SOTOMAYOR: That's an issue of
6 fact, and the AG says: If my prosecutor says
7 she didn't know, I'm not accepting that because
8 she should have known.

9 MR. CLEMENT: And -- and -- and I
10 don't find it plausible in light of everything
11 that I now have before me.

12 And I -- you know -- and there's --
13 there's the question of what Smothermon had
14 before her in 2003, but now there's the question
15 of -- I mean, because I think the Napue
16 obligation on the government is a continuing
17 one.

18 So, when they're looking at it,
19 they're looking at the testimony that their
20 prosecutor elicited. They're looking that -- at
21 that in context of the notes and the medical
22 information sheet.

23 And General Drummond reached the
24 conclusion -- regretfully, but reached the
25 conclusion: Our prosecutors elicited perjury

1 here, and a man's going to go to his death. We
2 can't allow that to happen.

3 JUSTICE SOTOMAYOR: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?
5 Justice Kavanaugh?

6 JUSTICE KAVANAUGH: And your view is
7 that the result likely would have been
8 different, right?

9 MR. CLEMENT: We think the result
10 would have been different with respect to the
11 standard that's applied under Brady and under
12 Napue.

13 JUSTICE KAVANAUGH: And what -- can
14 you spell that out? I mean, I think it's
15 obvious, but -- but spell out why you think
16 that.

17 MR. CLEMENT: Well, you know, this is
18 a case where there's just no disputing the fact
19 that the State has one indispensable witness.
20 That witness is Sneed. He's the person who
21 committed the murder. He's the person -- until
22 the police talked to him, Glossip was only
23 charged as an accessory after the fact.

24 So there's every indication this is
25 the absolute critical witness. And if that

1 witness lies on the stand, perjures himself on
2 the stand, that seems to me that that could have
3 a reasonable probability of leading to a
4 different result for at least two reasons.

5 One is this is the key witness, and
6 the jury has just seen him under oath lie to
7 their faces. And if that comes out -- I mean,
8 whatever other problems with his credibility
9 that the prosecutors have at that point, they
10 have a much bigger problem at that point. And
11 without his testimony, there's no way to get the
12 conviction of murder, let alone the death
13 penalty.

14 The second thing, though, of course,
15 is that defense counsel, I think, logically,
16 if -- if -- if Sneed's testimony hadn't led them
17 away from bipolar disorder, then they bring in a
18 psychiatric expert and they make a big deal
19 about how his confessed methamphetamine use,
20 combined with bipolar disorder, makes him
21 somebody who could act impulsively and
22 violently, and that opens up a whole other
23 defense for the -- for -- for -- for -- for
24 Glossip.

25 Now, to be clear, I'm in an unusual

1 position here because General Drummond has not
2 only confessed error, but he's made it clear
3 that he's not going to drop this prosecution or
4 doesn't accept that this is, you know, the
5 poster child for an actual innocence case and he
6 intends to -- to -- to -- to reinitiate criminal
7 process.

8 But I think he thinks that given the
9 centrality of Sneed's testimony in this perjury,
10 this -- this is not a conviction that can stand.

11 JUSTICE KAVANAUGH: Okay. Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

14 JUSTICE BARRETT: On McCarty, so that
15 is the only case, right --

16 MR. CLEMENT: Well --

17 JUSTICE BARRETT: -- that you have? I
18 mean, otherwise, it's party presentation for a
19 long time but not zeroing in on the procedural
20 bar at issue here? I just want to be sure I
21 understand. I'm not trying to be hostile.

22 MR. CLEMENT: And -- and -- and I'm
23 not trying to be evasive. I don't view it as
24 our only case because I think Valdez and
25 Malicoat, both decisions of the OCCA that treat

1 it as non-jurisdictional because they say the
2 court itself can excuse 1089(D) if it -- there's
3 manifest injustice or a serious statutory or
4 constitutional error. And -- and -- and that's
5 -- that's invoked even in paragraph 40 of the
6 opinion here.

7 So -- so I don't think -- the way I
8 think of party presentation in all of that, I
9 don't think that the court can have it both
10 ways. If it's jurisdictional --

11 JUSTICE BARRETT: Mm-hmm.

12 MR. CLEMENT: -- it's jurisdictional
13 and nobody gets to waive it. And so that's why
14 I don't think McCarty stands alone. And, of
15 course, you know, we're talking -- the standard
16 is unexpected departure.

17 JUSTICE BARRETT: Mm-hmm.

18 MR. CLEMENT: Okay? Here's -- here's
19 the attorney general's office. We got McCarty,
20 but we got Valdez, we have Malicoat, we have the
21 Tenth Circuit saying 1089(D) is a procedural
22 defense that we can waive --

23 JUSTICE BARRETT: Did you cite
24 McCarty, or did -- I don't -- so, in the
25 fourth -- let me make sure I've got the

1 sequencing right too. This is the fifth
2 post-conviction application --

3 MR. CLEMENT: Yeah.

4 JUSTICE BARRETT: -- right? And in
5 the fourth, they also refused to accept the
6 confession of error and the waiver, right?

7 MR. CLEMENT: That is true.

8 JUSTICE BARRETT: So, when the fifth
9 came up, it wasn't as -- as much of a surprise,
10 right? I mean, why wasn't the attorney general
11 ready at that point to say, you know, but you --
12 there's McCarty and you can't -- you can't
13 reject our waiver?

14 MR. CLEMENT: I mean, look, in a
15 perfect world, I mean, you know, maybe we would
16 have done that. But, in the real world, we
17 thought we were waiving it. I mean, I know this
18 is, like, in the weeds, but, you know, we
19 expressly argue that the evidence is sufficient
20 under 1089(C), which is the standard for the
21 first habeas petition. So it's clear to
22 everybody -- I mean, you know, my -- my friend
23 and your friend, your Court-appointed friend,
24 says, well, maybe it wasn't clear enough to the
25 Oklahoma Court of Criminals Appeals.

1 But it was crystal-clear to them that
2 we were trying to waive it and they weren't
3 going to let us. And I think the fact that, you
4 know, yes, it's two cases in the history of man,
5 both involving Mr. Glossip, I think that still
6 puts us well within the edits.

7 And the only thing I was going to add,
8 and I know I said it before, but I think it's
9 really powerful, is Trest, Trest against Cain,
10 this Court unanimously says, yeah, of course,
11 procedural bars, procedural default, that's a
12 defense. The State can waive it.

13 And the State can waive it not just by
14 intentional relinquishment but by abandonment.
15 That's Wood against Milyard. And, like, even if
16 there's some question about whether we were
17 sufficient in intentionally relinquishing it, we
18 absolutely abandoned it.

19 So I -- I -- I just think this is a
20 case where -- and -- and there's a systemic
21 issue here, right, because, I mean, it's
22 Oklahoma law. They get to do what they want.
23 But, if Oklahoma is going to say you can't waive
24 under these circumstances, it's going to create
25 a whole federal courts exam about how it is that

1 a pros- -- a state prosecutor is supposed to
2 confess error when they discover a Brady or a
3 Napue violation after the first, like, state
4 habeas petition has been filed.

5 And, you know, I've tried to think
6 through it all, and I think, at the end of the
7 day, there must be a due process right to
8 present that somewhere, but, boy, that's a --

9 JUSTICE BARRETT: But we don't have
10 that issue?

11 MR. CLEMENT: It's -- well, I don't
12 think -- you don't have it directly. And it's a
13 lot harder issue than whether invoking this as
14 an unwaiveable jurisdictional bar for the first
15 time in the history of man is adequate. I think
16 that's a far easier question than the due
17 process question about is there some ability to
18 bring this kind of confession of error to some
19 court somewhere and get to the merits.

20 JUSTICE BARRETT: Okay. I want to ask
21 you about the standard of review for looking at
22 Smothermon's notes because one of the
23 difficulties, I think, with the notes is that,
24 putting aside whether the Van Treese brief is in
25 the record, it's not, it still -- it still

1 reveals that there are multiple plausible
2 interpretations of the notes.

3 So are we supposed to be applying kind
4 of a preponderance standard, that we think it's
5 most likely that they reflect that she knew
6 about the psychiatric examination?

7 MR. CLEMENT: I think that's right. I
8 think it is a preponderance.

9 JUSTICE BARRETT: Okay. Okay.

10 MR. CLEMENT: And I think, not to be
11 repetitive, but I think that's also the standard
12 for the prosecutor, because the prosecutor in
13 the first instance, I think you want them to
14 confess Napue errors. You want them to confess
15 Brady errors. And I don't think you want them
16 applying a clear and convincing standard or
17 beyond a reasonable doubt. I think you want
18 them to say straight up, if -- if -- if we blew
19 it and there's a Napue violation here, we should
20 confess it.

21 CHIEF JUSTICE ROBERTS: Justice
22 Jackson?

23 JUSTICE JACKSON: So just going back
24 to Justice Barrett's question about whether
25 McCarty is your only case, if I'm hearing you

1 correctly, it is not because the principle that
2 you're relying on is the fact that it is firmly
3 established in Oklahoma law and procedure that
4 non-jurisdictional procedural bars are waiveable
5 and the courts accept those waivers. They do it
6 when a party waives a non-procedural
7 jurisdictional bar.

8 So it's pretty much every case in
9 which a non-jurisdictional procedural bar has
10 been offered and accepted by the court, right?

11 MR. CLEMENT: That -- that's our view.
12 And I think it's buttressed by the fact that the
13 Valdez and Malicoat cases, even though they're
14 not sort of confession of error or express
15 waiver cases, they show the Oklahoma Court of
16 Criminal Appeals treating 1089(D) as
17 non-jurisdictional because, if it's
18 non-jurisdictional, they can't excuse it because
19 of --

20 JUSTICE JACKSON: Right. So it fits
21 into the category of a non-procedural -- a
22 non-jurisdictional.

23 MR. CLEMENT: Right.

24 JUSTICE JACKSON: I think that part of
25 the problem here that is what is confusing about

1 Oklahoma's opinion is that they seem to be
2 conflating which I -- what I think are two
3 different bases for not applying the procedural
4 bar, right? One is the waiver, and the other is
5 potentially the confession of error.

6 In your discussion with Justice
7 Barrett, it's -- you talked a little bit about
8 Glossip IV. And in my reading of that, that was
9 a situation in which there was a waiver
10 expressly made, but I didn't know that there was
11 also a confession of error.

12 Am I right about that in that?

13 MR. CLEMENT: You're absolutely right
14 about that. In fact --

15 JUSTICE JACKSON: All right. So --

16 MR. CLEMENT: -- it was the least
17 confession of -- I mean it was the furthest
18 removed --

19 JUSTICE JACKSON: Exactly.

20 MR. CLEMENT: -- from a confession of
21 error. It's like there's a lot of chum in the
22 water and we just want you to decide the merits,
23 but we think they are absolutely wrong.

24 JUSTICE JACKSON: And so I think
25 that's really important because the prosecutor,

1 I think, is actually making two different
2 determinations that might be relevant to whether
3 or not the procedural bar applies.

4 The first is whether or not to waive
5 it, which is what they do in Glossip IV. And
6 the second is whether or not to confess error,
7 which they go on to do in Glossip V.

8 And only the latter, the confession of
9 error, is the one that might call into question
10 the -- the, you know, reasons for it, the court
11 saying, well, you're confessing error, but let
12 me figure out whether or not it's based in law
13 and fact, and I'll only accept it under those
14 conditions.

15 If I'm right about that, then the real
16 problem happened with its deviating from the
17 ordinary practice of allowing parties to waive
18 and accepting them. And that's why you said, I
19 think, in response to Justice Kagan that the
20 waiver track is the easiest way to understand
21 why we don't have an AISG here.

22 MR. CLEMENT: Absolutely, Your Honor.
23 And, again, just in all candor to this Court,
24 I'm representing Oklahoma. Oklahoma, in a lot
25 of other cases, is going to be saying that's

1 adequate and independent state ground.

2 But I think we want to be in a
3 position where, if we make a determination that
4 there's been a constitutional problem with one
5 of our prosecutions, we want to be able to
6 confess that error and get to the merits of it.

7 JUSTICE JACKSON: No, I understand,
8 but I don't want to conflate the two. I mean,
9 when there is a waiver, courts don't ordinarily
10 go into why you are waiving.

11 MR. CLEMENT: Yeah.

12 JUSTICE JACKSON: You say this is my
13 right to press this procedural bar and I'm
14 waiving it, and the court says, fine, we move on
15 to the merits of the argument.

16 What happened here, I appreciate the
17 attorney general goes on to explain the reason
18 why he wants to waive it, it's a confession of
19 error, but I don't think the court gets to
20 reject the waiver if it disagrees with the
21 confession of error because waiver is a separate
22 basis for, you know, relinquishing the
23 procedural bar.

24 MR. CLEMENT: I agree entirely. And I
25 think, ultimately, getting back to Justice

1 Kagan's question, it may also explain why the
2 opinion is sort of intertwined --

3 JUSTICE JACKSON: Correct.

4 MR. CLEMENT: -- because --

5 JUSTICE JACKSON: Correct.

6 MR. CLEMENT: -- they are sort of
7 treating them as one and the same. In fact, I
8 think --

9 JUSTICE JACKSON: Exactly.

10 MR. CLEMENT: -- you know, paragraph
11 25 or 26 specifically says the confession can't
12 overcome 1089(D), which is perfect evidence that
13 they've kind of conflated the two --

14 JUSTICE JACKSON: Correct.

15 MR. CLEMENT: -- because the
16 confession isn't what overcomes 1089(D). It's
17 the waiver that should at least historically
18 everywhere but Oklahoma.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Michel.

23

24

25

1 ORAL ARGUMENT OF CHRISTOPHER G. MICHEL,
2 COURT-APPOINTED AMICUS CURIAE
3 IN SUPPORT OF THE JUDGMENT BELOW

4 MR. MICHEL: Mr. Chief Justice, and
5 may it please the Court:

6 Over the past 20 years, the Oklahoma
7 Court of Criminal Appeals has reviewed and
8 upheld Petitioner's conviction six separate
9 times, finding compelling evidence that he
10 commissioned the murder of Barry Van Treese.
11 Petitioner now contends that the note
12 "Dr. Trumpet?" would have so transformed his
13 case as to justify vacating his conviction.

14 That is wrong. The court below
15 correctly rejected Petitioner's claims on
16 adequate and independent state grounds, that he
17 failed to show reasonable diligence or clear and
18 convincing evidence of innocence.

19 The attorney general did not waive
20 those bars in this case, and the court was free
21 to apply them in any event. This Court should
22 accordingly dismiss the case for lack of
23 jurisdiction, leaving Petitioner free to pursue
24 state law clemency or other available relief.

25 If the Court reaches the merits, it

1 should affirm. The cryptic note does not
2 establish any of the threshold elements of
3 Petitioner's claim, and perhaps, most clearly,
4 the note is immaterial because it adds nothing
5 of substance to what Petitioner already knew.

6 Critically, Petitioner has known since
7 he received the competency report in 1997 that
8 Justin Sneed took lithium and had a mental
9 illness, but Petitioner chose not to question
10 Sneed's mental health at the trial because he
11 knew that doing so would reinforce the
12 prosecution's theory that Sneed was vulnerable
13 to his manipulation.

14 Nothing in the note would have changed
15 that decision or the jury's, particularly
16 considering the extensive other evidence against
17 Petitioner, including his motive to commit the
18 crime and his coverup of the body.

19 The parties rely heavily on the
20 attorney general's confession of error, but
21 courts, not executives, determine whether to
22 vacate final judgments of conviction. The court
23 here decided the case on the law and the facts.
24 This Court cannot ask for any more than that.
25 It should leave the conviction in place.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: What do you make of
3 the absence of statements by the prosecutors in
4 this record and the absence of Ackley's notes
5 from the same meeting?

6 MR. MICHEL: Well, I think, as the Van
7 Treese family's amicus brief explains, it
8 indicates that the investigation the attorney
9 general conducted here and the other independent
10 investigations were not particularly thorough.

11 I will note that the Ackley affidavit
12 -- this is at JA 940 -- says that he thinks the
13 mental condition was disclosed to the Petitioner
14 with the competency report in 1997. And I agree
15 with that, and that's their witness who, I
16 think, has conceded an important point against
17 them.

18 CHIEF JUSTICE ROBERTS: Mr. Michel, I
19 asked -- I forget whether it was Mr. Waxman or
20 Mr. Clement -- about your argument in the brief
21 that all that's at issue here is whether or not
22 the lithium was prescribed by a psychiatrist or
23 by someone else and that that alone was not
24 sufficient to affect the jury's deliberations.

25 Now they had responses to that that

1 elaborate on what they regarded as the
2 significance of not just who prescribed it but
3 the lithium itself, in other words, the -- the
4 bipolar determination. And we heard him, you
5 know, emphasize that, contrary to what he had
6 said, it's not simply for a cold.

7 I wondered if you could respond to
8 that.

9 MR. MICHEL: Sure, Mr. Chief Justice.

10 I think materiality -- I think this
11 question goes to materiality. It's a
12 comparative doctrine. You have to compare what
13 was in the case before the new information and
14 then determine whether the new information would
15 have made a difference.

16 And I think, in this case, that
17 determination -- that determination can be
18 speculative in some cases. This is perhaps the
19 rare case where the defendant's own conduct
20 sheds considerable light on the importance of
21 the information. After all, as I said at the
22 outset, Petitioner has known since 1997 that
23 Sneed took lithium.

24 And if you look at page JA 700, that's
25 the Dr. King competency report. It says, does

1 this patient have a mental illness? And the
2 answer is yes, underlined, exclamation point.

3 If Petitioner thought that Sneed's
4 mental health was important to his defense,
5 surely, that would have been a bright red flag
6 that he would have presented that defense at
7 trial. The notion that the marginal additional
8 information that he was arguably based on the
9 notes treated by a psychiatrist would have
10 changed that decision, I think, is difficult to
11 reconcile with the record.

12 I would also note the way you get from
13 the notes, "Dr. Trumpet?," which I think my
14 friend said they were able to do in a matter of
15 hours because it was well-known that Dr. Trombka
16 was the chief psychiatrist at the jail, they
17 already had the roadmap to do it.

18 Remember, the competency report says
19 that Sneed received lithium at the jail.
20 They've had that since 1997. They could have
21 simply gone to the jail and said: Who's the
22 chief psychiatrist? And they would have been
23 told Dr. Lawrence Trombka, and then they could
24 have asked Dr. Trombka the same question that
25 they asked in 2023, and he would have said:

1 Well, if anybody treated Sneed, I treated him.

2 But they chose not to do that. And I
3 think, one, that's overwhelming evidence of lack
4 of diligence and that the state procedural bar
5 is satisfied, but it's also overwhelming
6 evidence on materiality because Petitioner
7 didn't do this out of negligence. He did it out
8 of strategy. And that was because, as the
9 Oklahoma Court of Criminal Appeals explained on
10 page JA 991, arguing that Sneed had a mental
11 deficiency or a mental illness would have
12 reinforced the prosecution's theory that Sneed
13 was vulnerable to Glossip's -- to Petitioner's
14 manipulation.

15 JUSTICE KAGAN: Isn't that --

16 JUSTICE SOTOMAYOR: Counsel --

17 JUSTICE KAGAN: -- a separate
18 question, though, about just he lied on the
19 stand? And, in a case where the entire case
20 rested on the testimony of one person and his
21 credibility, if you can show that he lied on the
22 stand when he said "I never saw a psychiatrist
23 and I didn't get a prescription from the
24 psychiatrist, it was, you know, they gave me
25 lithium for a common cold," and -- and then the

1 prosecutor says: Well, that was a lie, I better
2 correct that under Napue and -- and doesn't,
3 that seems pretty material to me.

4 I mean, it's just your one witness has
5 been exposed as a liar.

6 MR. MICHEL: I mean, a couple
7 responses, Justice Kagan.

8 I think, first, there are threshold
9 elements under Napue, including whether this was
10 false testimony. I don't think it was false
11 testimony, but I want to take your question on
12 its own terms.

13 This false testimony that Sneed saw a
14 psychiatrist, that would have been harmful to
15 Petitioner under his theory of the case.
16 Remember, the prosecution's --

17 JUSTICE KAGAN: False is false. You
18 know, like, whether you can, like, parse the
19 content of the testimony this way or that way,
20 the critical question that a jury is asking is,
21 do I believe this guy and everything he says and
22 particularly, do I believe him when he points
23 the finger at the accused?

24 And if I know that he has gotten up to
25 the stand and lied about anything, whether it's

1 important or not -- it might have been
2 important; it might not have been important --
3 if he's lying, if he's trying to cover up
4 something about his own behavior, I'm going to
5 take that into account in deciding whether, when
6 he accuses the defendant, he's telling the
7 truth.

8 MR. MICHEL: Justice Kagan, I think,
9 in many cases where we were starting from the
10 blank slate that the witness is presumed to be
11 credible, one lie would be important.

12 In this case, the witness admitted
13 that he beat a man to death with a baseball bat.
14 The witness admitted that he was testifying in
15 exchange for avoiding the death penalty.

16 The jury already had significant
17 credibility questions about Justin Sneed. And
18 the notion that this --

19 JUSTICE KAGAN: I have to say I find
20 that an -- an odd argument, Mr. Michel. It's
21 like this witness was so not credible anyway
22 that we don't have to consider any further lies
23 that he tells?

24 MR. MICHEL: No. What I think is
25 difficult to understand is if the jury would

1 have believed Justin Sneed and convicted
2 Petitioner despite those problems, and yet,
3 because Justin Sneed saw a psychiatrist
4 according to the notes, the jury would have done
5 a 180 and reached a different result.

6 JUSTICE KAGAN: You know, a Napue
7 violation is a pretty dramatic thing when a
8 prosecutor says, like, whoa, whoa, stop there,
9 that was a lie. You know, I think a reasonable
10 jury takes that into account when it's like:
11 Wow, that was such a significant lie that the
12 prosecutor had to sort of say stop.

13 MR. MICHEL: I -- I -- I don't think
14 that would have happened in this case given the
15 distinctive nature of the witness that we're
16 talking about. I also want to underscore that
17 this is a tangential issue. Justin Sneed
18 testified for five hours. The question about
19 lithium was about -- was about 30 seconds.

20 JUSTICE BARRETT: But, I guess, Mr.
21 Michel --

22 JUSTICE SOTOMAYOR: Would it have made
23 -- I'm sorry.

24 JUSTICE BARRETT: Oh, no, go ahead.

25 JUSTICE SOTOMAYOR: What do we do with

1 the other violations that the prosecutor
2 committed? Presumably, he lied about the knife
3 incident, which was provoked by the prosecutor
4 and not his initial statement. There was
5 withheld -- a ton of other withheld information.

6 Once you find a violation and you're
7 deciding on materiality, are you entitled to
8 ignore all that other evidence having been
9 improperly withheld?

10 I know that it was in Glossip IV and
11 -- and prior rulings the court didn't find any
12 one of those a violation, but do we ignore it?
13 Meaning because we're -- we would be looking at
14 this issue de novo, so does the calculus of
15 materiality take into account everything?

16 MR. MICHEL: So I think this is
17 several steps down the road. Of course, I think
18 you should dismiss the case for lack of
19 jurisdiction because there's adequate and
20 independent state grounds.

21 JUSTICE SOTOMAYOR: You've already
22 lost it, but I'm asking you this question.

23 So I -- I give you points --

24 MR. MICHEL: I'm hoping I might find a
25 few.

1 JUSTICE SOTOMAYOR: -- I give you
2 points for -- for trying to --

3 MR. MICHEL: Yeah.

4 JUSTICE SOTOMAYOR: -- revive, but
5 let's get to --

6 MR. MICHEL: Sure.

7 JUSTICE SOTOMAYOR: -- the end, that
8 we accept what Justice Kagan has said, that
9 there was a falsehood. And now you're saying
10 there was, even if she knew about it, it wasn't
11 material.

12 At that point, because, according to
13 you, he lied outside of court a number of times,
14 but does all the other withheld evidence that
15 shows not just one or two lies but a whole body
16 of changed testimony -- do we consider that?

17 MR. MICHEL: I do think the Court has
18 said in cases like Kyles versus Whitley that if
19 you get all the way to the materiality
20 standard -- I think there are many off-ramps
21 before that in this case -- you would consider
22 all of the other evidence.

23 I think it's notable on the knife
24 point, however, which my friend, Mr. Waxman,
25 mentioned at length, the -- the State does not

1 concede error on that point. The State
2 discusses at length why it doesn't support his
3 position on that. And that's actually the
4 subject of the fourth post-conviction relief
5 application.

6 JUSTICE SOTOMAYOR: No. But I do
7 think that we know that he had an accomplice, a
8 girlfriend, in prior robberies, and he never had
9 Mr. Sneed present at the robbery. And yet there
10 were two types of wounds. So it suggests the
11 presence of a second person. And if it's not
12 Mr. Sneed, then this robbery is much more
13 consistent with his pattern.

14 MR. MICHEL: I think the Oklahoma
15 Court --

16 JUSTICE SOTOMAYOR: And that pattern
17 was withheld from defense counsel. So that's
18 why I'm asking about materiality.

19 MR. MICHEL: I mean, to be very clear,
20 the -- the pattern is not the knife. The
21 question about the knife is the wounds on the
22 body and --

23 JUSTICE SOTOMAYOR: No, I agree --

24 MR. MICHEL: Right. The Oklahoma
25 Court --

1 JUSTICE SOTOMAYOR: -- but I -- it had
2 to do with whether there was one or two people
3 involved.

4 JUSTICE BARRETT: Mr. Michel, I do
5 want to ask you about the adequate and
6 independent state grounds because this is
7 unusual, not to accept, you know, the waiver of
8 the procedural bar, and, you know, you heard us
9 talk about that with Mr. Clement and Mr. Waxman.

10 What's your response to that?

11 MR. MICHEL: So, Justice Barrett, I
12 actually don't think it -- it's that unusual,
13 although that's partly because we have a very
14 small sample size. As -- as I -- as I read the
15 cases, there's only one case in which the
16 Oklahoma attorney general has squarely waived a
17 procedural bar and the Oklahoma Court of
18 Criminal Appeals has squarely addressed what to
19 do with that, and that's the decision on the
20 fourth post-conviction review application, in
21 which the Oklahoma Court of Criminal Appeals, on
22 page JA 775, said that it was not going to
23 accept the attorney general's waiver of the
24 procedural bars.

25 The attorney general -- in this Court,

1 this attorney general told you that that was an
2 adequate and independent state ground and that
3 this Court, accordingly, lacks jurisdiction over
4 the -- over the fourth post-conviction relief
5 application.

6 So this -- this decision I actually
7 think does not actually address a waiver of a
8 procedural bar because the attorney general,
9 quite understandably, after he received that
10 decision from the Oklahoma Court of Criminal
11 Appeals, did not actually waive the procedural
12 bar in this case.

13 Instead, if you look at JA 976 and
14 977, the attorney general says, "What Glossip
15 has to do is meet the procedural bar." Then he
16 goes on to describe the diligence prong and the
17 innocence prong and why, in the attorney
18 general's legal opinion, those requirements are
19 satisfied.

20 But arguing that the requirements are
21 satisfied is not the same thing as waiving the
22 procedural bar. And in the one case where the
23 Oklahoma Court of Criminal Appeals has addressed
24 that, it has said that it doesn't have to accept
25 the waiver.

1 JUSTICE BARRETT: What about
2 Mr. Clement saying that we have a hundred years
3 of practice and that this is just what the law
4 is and procedural bars are always waiveable;
5 they're not jurisdictional?

6 MR. MICHEL: With -- with all respect
7 to Mr. Clement, I don't think you have a hundred
8 years of this. I think the one case he's
9 pointed to, as several of the Justices pointed
10 out, is the McCarty case from 2005 --

11 JUSTICE JACKSON: But why is that?
12 Why are you making the sample size so small? I
13 mean, I understand that that's the only case
14 that involves an attorney general who expressly
15 waives a procedural bar, but procedural bars are
16 waived -- of all kinds are waived all the time.

17 So why wouldn't what Oklahoma courts
18 do when a procedural bar is waived, why wouldn't
19 that be the universe of cases that we're looking
20 at?

21 MR. MICHEL: Well, I think I would
22 start with the statute that's before the Court
23 in this case. I think whether that bar has been
24 waived --

25 JUSTICE JACKSON: Are you saying that

1 statute is a jurisdictional one?

2 MR. MICHEL: I'm not saying that
3 statute is a jurisdictional one, but --

4 JUSTICE JACKSON: All right. So then
5 we're into the world of non-jurisdictional
6 procedural bars, and the question is, what is
7 Oklahoma's practice when a party, it doesn't
8 have to be the attorney general, it can be a
9 party, who could have invoked a -- a
10 non-jurisdictional procedural bar, what does the
11 court do?

12 MR. MICHEL: I don't understand my
13 friends to argue -- perhaps this morning they
14 did for the first time -- that Oklahoma has an
15 absolute rigid categorical rule
16 transsubstantively across all areas that
17 procedural --

18 JUSTICE JACKSON: No, but we don't
19 need that.

20 MR. MICHEL: -- non-jurisdictional
21 procedural bars have to be accepted.

22 JUSTICE JACKSON: We don't need that
23 under Cruz. We don't need a rule that says we
24 have to accept it. What we need is the practice
25 --

1 MR. MICHEL: Right.

2 JUSTICE JACKSON: -- of the court when
3 this kind of thing happens.

4 MR. MICHEL: Right.

5 JUSTICE JACKSON: And so have you
6 shown a case in which a non-jurisdictional
7 procedural bar has been rejected by the
8 Oklahoma --

9 MR. MICHEL: Absolutely.

10 JUSTICE JACKSON: Which one?

11 MR. MICHEL: The one that's before
12 you. The one that's before you --

13 JUSTICE JACKSON: Other than the one
14 that's before us. We're trying to determine
15 whether the one that's before us --

16 MR. MICHEL: No, no, I'm sorry. I'm
17 sorry. I wasn't --

18 JUSTICE JACKSON: -- is a deviation.

19 MR. MICHEL: Right. I'm sorry.

20 JUSTICE JACKSON: Right?

21 MR. MICHEL: The one -- the fourth
22 post-conviction relief application, which is
23 also before you on this cert petition --

24 JUSTICE JACKSON: Not -- not
25 Mr. Glossip's situation. Do you have a case

1 that does not involve a person named Glossip --

2 (Laughter.)

3 JUSTICE JACKSON: -- in which the
4 court has rejected any non-jurisdictional
5 procedural bar?

6 MR. MICHEL: Usually, being --

7 JUSTICE JACKSON: That was waived?

8 MR. MICHEL: Right. I mean, usually,
9 being able to cite a case that involves the same
10 litigant seems relatively on point, but I don't
11 -- I think there's only other case that has come
12 before the Oklahoma Court of Criminal Appeals
13 where the attorney general has waived this
14 procedural bar. That's the McCarty case.

15 In three footnotes, the Court of
16 Criminals Appeals observed that the attorney
17 general had waived the procedural bar, but it
18 did not say it was deciding the issues for that
19 reason. And in the 19 years since McCarty --

20 JUSTICE KAGAN: I -- I think,
21 Mr. Michel, you are avoiding the question. It
22 was a pretty simple question. One case not
23 involving this defendant in which a waiver has
24 been rejected.

25 MR. MICHEL: Right. I -- I think

1 there are three cases under this statute in
2 which the court has seen waivers. Arguably, in
3 one of those, it rejected the waiver. In
4 McCarty, it was ambiguous. And in --

5 JUSTICE KAGAN: Not -- not --

6 MR. MICHEL: -- in this case, I think
7 it was also ambiguous.

8 JUSTICE KAGAN: -- not a case
9 involving this -- it doesn't -- not a case
10 involving this defendant, and we don't have to
11 be in attorney general confession-of-error land.
12 Just one case where the Oklahoma court says,
13 even though a party wants to waive this
14 procedural bar, you know, we're going to insist
15 on opposing it.

16 MR. MICHEL: I -- I don't -- I have
17 not canvassed Oklahoma law for all
18 non-jurisdictional procedural waivers, but I
19 think most courts, including this Court, will
20 exercise discretion to allow those waivers in
21 some cases and not allow them in others. And as
22 the Court --

23 JUSTICE BARRETT: Well, I -- I'm just
24 wondering what the right sample size is. When
25 we're asking this question about whether this is

1 adequate or not, should we be looking
2 transsubstantively, or should we be looking just
3 at this statute?

4 MR. MICHEL: I think you should be
5 looking just at this statute. I think that's
6 how the Court has analyzed the adequacy cases in
7 the past. And I think several important
8 adequacy cases here are Beard versus Kindler and
9 Walker versus Martin, where the Court looked
10 at --

11 JUSTICE JACKSON: But the thing that's
12 relevant about this statute is whether or not
13 it's jurisdictional. I don't understand how the
14 sample size could possibly be that small because
15 the question we're asking is whether it's
16 waiveable, right?

17 So I understand we have a statute and
18 the question is what does a court do when this
19 procedural bar is waived. Fine. But do you --
20 are you rejecting the proposition that this is a
21 waiveable bar?

22 MR. MICHEL: I'm not rejecting that.
23 I would --

24 JUSTICE JACKSON: So you don't say
25 this is a jurisdictional statute.

1 MR. MICHEL: I'm not saying that. I
2 think you could understand it that way, but
3 that's not my position.

4 JUSTICE JACKSON: But you're not
5 saying that, all right.

6 MR. MICHEL: No.

7 JUSTICE JACKSON: So you accept that
8 this is waiveable. And assuming -- I understand
9 you -- you -- your argument is that the attorney
10 general did not waive it.

11 MR. MICHEL: Right.

12 JUSTICE JACKSON: But assuming that he
13 did for a moment, do you have any other
14 procedural bar ever that Oklahoma has rejected?
15 Do we have any reason to believe that Oklahoma's
16 practice is to look at particular statutes and
17 it rejects some waivers with respect to certain
18 statutes and it accepts some? No, right?

19 MR. MICHEL: Well, I mean, I don't
20 want to come back to it, but, if you look at
21 practice, you have the decision on the fourth
22 application in this case, which is the only one
23 in which the Court of Criminal Appeals has
24 addressed this issue. So, to be fair, I think
25 that's quite relevant.

1 JUSTICE KAGAN: Can I ask you about
2 the independence prong?

3 MR. MICHEL: Sure.

4 JUSTICE KAGAN: So the way I -- this
5 is very confusing, two pages, to me. I've read
6 it a dozen times and I'm still not sure what
7 each paragraph is doing exactly, you know, what
8 or where or why.

9 But the first thing they say is, you
10 know, the State has come to us and has confessed
11 error and we're not going to accept that
12 concession, is what they call it. And the
13 concession that they're referring to is the
14 concession that he warrants post-conviction
15 relief, right?

16 And what the State has said in its
17 application -- in its, you know, concession as
18 they call it is -- focuses on Napue and why it
19 is that Napue supports Glossip here. And -- and
20 it says the State's concession is not based in
21 law or fact. And -- and that's what gets it to
22 everything else that it does, right, because,
23 first, it has to reject the concession, and it
24 says not based on law and fact, essentially
25 meaning that the state's Napue argument is

1 wrong.

2 So, before it gets to anything that
3 might be conceived of as a procedural bar, what
4 it has said is that the State's Napue argument
5 is wrong, correct?

6 MR. MICHEL: I think that's one
7 potential way to read the opinion. I agree with
8 you it's not pellucid in all respects.

9 JUSTICE KAGAN: Okay. So, if -- if --

10 MR. MICHEL: But I do think it's
11 pretty pellucid in paragraph 26.

12 JUSTICE KAGAN: -- if -- if -- if
13 that's -- if that's one way to read the -- like,
14 the only way that they go through the door to
15 start talking about procedural bars is because
16 they say that the State's Napue argument is
17 wrong, you know, they wouldn't have gone through
18 the door except that they made this error of
19 federal law.

20 So this is all founded on an error of
21 federal law, the error being that the State's
22 concession based on Napue is -- is -- is
23 incorrect in law.

24 MR. MICHEL: I don't agree with that,
25 Justice Kagan. I agree that that sentence comes

1 earlier in -- in the opinion, but I did not mean
2 to agree that, as a substantive legal matter,
3 the court had reached the Napue issue before it
4 was applying the procedural bars.

5 I recognize that it's conceivable this
6 opinion could have been written more clearly,
7 but I do think paragraph 26 is pretty darn clear
8 what it applies --

9 JUSTICE KAGAN: Well, I guess what I
10 was suggesting --

11 MR. MICHEL: -- in terms of two
12 procedural bars.

13 JUSTICE KAGAN: -- was you would never
14 get to paragraph 26, except for the prior
15 determination that the State -- that the State's
16 concession is wrong, which has to be a
17 determination on the merits.

18 Even if that's not the case -- let's
19 say that I've just made it a little bit too
20 neat, that you have to have that the State is
21 wrong with the merits in order to go into the
22 procedural bar analysis. Even if that's too
23 neat, I mean, like, there are sentences in this
24 opinion -- one -- one sentence we're talking
25 about the merits, one sentence we're talking

1 about the procedural bar.

2 It keeps on going back and forth. I
3 mean, how -- how on earth could one reach a
4 conclusion that the -- that the court would have
5 done exactly what the court did if the court had
6 a different view of the merits?

7 I mean, everything was intertwined
8 with everything else here.

9 MR. MICHEL: Well, I mean, just to
10 respond to your prior question and I think this
11 one too, if it's true that the court had
12 resolved the issue on federal law, I'm not sure
13 what paragraph 26 is doing in the opinion. I
14 mean, there's no reason to address the
15 procedural bars at that point.

16 JUSTICE KAGAN: It's like and another
17 thing.

18 MR. MICHEL: Yeah, well -- but I
19 actually think the reason it's in the opinion is
20 because the court is applying the procedural
21 bars there and that your inference,
22 respectfully, is not a correct reading of the
23 case, but --

24 JUSTICE SOTOMAYOR: I'm sorry. They
25 have to decide -- the claim was based on federal

1 and state law. So they might have been going to
2 it based on the state law.

3 But please continue answering.

4 MR. MICHEL: Well, the procedural bars
5 are a state law threshold, reasonable diligence
6 and clear and convincing evidence of innocence,
7 unless those two threshold --

8 JUSTICE KAGAN: I -- I have to say
9 that is not the way these two pages are written.

10 I mean, it would be very easy to say:
11 Before we get to the merits, the procedural bar
12 is a state -- I mean, that's so not the way
13 these two pages are written.

14 (Laughter.)

15 MR. MICHEL: Yeah. Justice Kagan --

16 JUSTICE KAGAN: It -- it -- it starts
17 with the substantive standard. Then it tells
18 you that the State's concession is wrong as a
19 matter of law. Then, by the way, it tells you
20 some stuff about the procedural bar standard.
21 Then it goes back to the merits again.

22 MR. MICHEL: Justice Kagan, you've
23 issued, you know, a strong legal writing
24 critique of this opinion. But this opinion was
25 issued --

1 (Laughter.)

2 JUSTICE KAGAN: I haven't even
3 started.

4 (Laughter.)

5 MR. MICHEL: The question under this
6 Court's independent and adequate state ground
7 doctrine is not how well written the opinion is.

8 JUSTICE KAGAN: No, but, actually --

9 MR. MICHEL: It is what did it decide
10 the case under.

11 JUSTICE KAGAN: Totally right, it's
12 not how well written it is. But it's a high bar
13 to say that something is independent, you know,
14 if there's ambiguity, if there's uncertainty.

15 We do not give that benefit of the
16 doubt to the state under Michigan v. Long.
17 Quite the opposite.

18 MR. MICHEL: Justice Kagan, with
19 respect, I think you're striving for ambiguity
20 where there is clarity in paragraph 26.

21 Paragraph 26 says that the court --

22 JUSTICE KAGAN: Well, paragraph 26 is,
23 number one, one paragraph of six or seven,
24 right? So -- so I don't think that you get to
25 just say: This is my best paragraph.

1 You have to look at the analysis and
2 say: Is it intertwined or is it independent?

3 And, you know, all paragraph 26 does
4 is to state a standard. It's like, okay, we
5 know that they thought that this standard had
6 something to do with something. But the rest of
7 the two pages is, like, totally merits-infused.

8 MR. MICHEL: So I have to respectfully
9 disagree. Twenty-six does not state a standard.
10 It applies the standard and says it's satisfied.

11 Paragraph 27, in particular, if you
12 look at the last sentence, it says: Moreover
13 and controlling here is the fact that this issue
14 could have and should have been raised with
15 reasonable diligence.

16 That's a direct invocation of the bar.

17 I agree that there are other
18 paragraphs in the opinion addressing the federal
19 law issue. But, as this Court held squarely in
20 Harris versus Reed, state courts are allowed to
21 issue alternative holdings, one on the state law
22 and one on the federal law. And that does not
23 mean that the state law holding becomes immune
24 from the adequate and independent state ground
25 doctrine.

1 As the Court said in Coleman versus
2 Thompson, it's ultimately looking for a fair,
3 reasonable reading of what the court did.

4 And this Court, reviewing this case
5 for the sixth time, with a looming execution
6 date on the calendar, trying to decide this
7 quickly, trying to provide reasons for the
8 parties and the public in a case of high public
9 interest, did address both the procedural bar
10 and the merits.

11 But I think, in paragraph 26 and 27,
12 it does squarely independently and adequately
13 apply the state procedural bars. That means
14 this Court lacks jurisdiction.

15 It doesn't mean that Petitioner has no
16 other remedies available. He has the state law
17 clemency relief available to him. My
18 understanding is, if this Court dismisses for
19 lack of jurisdiction or affirms on the merits,
20 his execution will be rescheduled. There will
21 then be a clemency hearing scheduled. He will
22 be able to present his views to the clemency
23 board. Of note, the clemency board has changed
24 in its composition since the last clemency
25 hearing. A member of the board who was --

1 JUSTICE JACKSON: Can I just -- sorry.

2 MR. MICHEL: I -- the Court might be
3 interested to know the -- the member of the
4 board who was recused is no longer on the board.
5 That member has been replaced. Another member
6 of the board who voted against clemency is also
7 no longer on the board. That member has been
8 replaced.

9 JUSTICE KAGAN: Okay.

10 MR. MICHEL: So it's a new board.

11 JUSTICE JACKSON: Yes.

12 MR. MICHEL: Sorry, Justice Jackson.

13 JUSTICE JACKSON: Sorry.

14 MR. MICHEL: Yeah.

15 JUSTICE JACKSON: I'm sorry to have
16 cut you off.

17 MR. MICHEL: Yeah.

18 JUSTICE JACKSON: So you talk about a
19 fair understanding of what the court did. Can
20 we go to a -- to the understanding of what you
21 think the AG did here.

22 I understood from your argument that
23 you said that the AG did not waive the bar in
24 this case, and I'm just trying to understand how
25 that could possibly be when he confessed error

1 and asked for the conviction to be vacated on
2 the grounds of the merits of the Napue claim.

3 If he was also asserting the
4 procedural bar, I don't understand how he -- how
5 he's making arguments about the merits in this
6 way.

7 MR. MICHEL: Oh, I think -- I think --

8 JUSTICE JACKSON: Not in the
9 alternative. He doesn't say "and in the
10 alternative," right? He -- he -- he doesn't
11 say: I'm invoking the procedural bar, but if
12 you, you know, somehow think it's overcome, let
13 me go on, right?

14 MR. MICHEL: Well, I would look at JA
15 976.

16 JUSTICE JACKSON: Okay.

17 MR. MICHEL: He says: To obtain --
18 here, JA 976.

19 JUSTICE JACKSON: Yes.

20 MR. MICHEL: To obtain post-conviction
21 relief, Glossip needs to show that the issue
22 could have been raised in a direct appeal and
23 supports a conclusion that the outcome of the
24 trial would have been different, citing the
25 procedural bar.

1 JUSTICE JACKSON: Okay.

2 MR. MICHEL: Then he says: At a
3 minimum, Glossip was not made aware of Sneed's
4 treatment. That's the diligence prong.

5 JUSTICE JACKSON: Okay.

6 MR. MICHEL: Then he says: The State
7 is also not comfortable asserting that the
8 outcome would have been different. That's the
9 innocence prong.

10 JUSTICE JACKSON: Does he also say:
11 I'm incorporating my arguments from Glossip IV,
12 where he expressly waived?

13 MR. MICHEL: He says: I'm
14 incorporating my arguments from Glossip IV.

15 But remember, in Glossip IV, he said:
16 I expressly waive for this case, but I will
17 expressly invoke the bar for future cases.
18 Enough is enough.

19 And the Oklahoma Court of Criminal
20 Appeals in that case told him that he wasn't
21 allowed to waive. So I think it's quite
22 responsible where the attorney general does not
23 waive.

24 JUSTICE JACKSON: Well, maybe
25 that's -- maybe -- maybe the -- right. But --

1 but maybe the Oklahoma court's telling him he's
2 not allowed to waive explains why he goes
3 through the procedural bar, but it doesn't
4 explain whether or not he intend to -- intended
5 to invoke it.

6 In other words, it -- it seems odd to
7 me that he would be talking about the merits of
8 this claim, trying to get the -- the conviction
9 vacated, but also still invoking the procedural
10 bar. And the oddity, it seems to me, is
11 explained by the previous attempt to waive the
12 -- the -- the -- the procedural bar that was
13 rejected by the court.

14 He sort of -- it was sort of like law
15 of the case, and so he's talking about it in V
16 because the Oklahoma court has already said:
17 Don't talk to us about the waiver.

18 MR. MICHEL: I mean, I think we have a
19 point of agreement, which is that after the
20 Oklahoma court told him that he couldn't waive,
21 which is, after all, a state law issue, then he
22 didn't waive. He said --

23 JUSTICE JACKSON: Right. But what I'm
24 saying is --

25 MR. MICHEL: -- the bar is satisfied

1 and he prevails on the merits.

2 JUSTICE JACKSON: -- don't we have --
3 don't we have to credit his intention to waive
4 in this case, which he expressed clearly in IV
5 and was told by the court he couldn't.

6 And so I understand that your argument
7 that he doesn't waive in V is, you know, he
8 doesn't make an express waiver statement. But,
9 of course, he doesn't because the court already
10 told him he couldn't waive. So --

11 MR. MICHEL: Well, two -- two points.
12 It was his predecessor in -- in IV,
13 not him.

14 And in all events, the fact that the
15 Oklahoma court told him he couldn't waive is
16 strong evidence that the Oklahoma court, as we
17 discussed earlier, doesn't always accept the
18 attorney general's waivers.

19 I mean, remember, we're talking about
20 the state court --

21 JUSTICE JACKSON: No, no, no. It --
22 I'm asking you, isn't it evidence that he
23 expressly intended to waive?

24 MR. MICHEL: No. The -- the fact that
25 he argued that the bar was satisfied is not

1 evidence that he expressly intended to waive.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas?

6 Justice Alito?

7 Justice Sotomayor?

8 Justice Kagan?

9 Justice Kavanaugh?

10 JUSTICE KAVANAUGH: Yeah. I think you
11 had said earlier and I want to explore, if you
12 get past all the procedural bars and you get to
13 the point where the prosecutors didn't comply
14 with their obligations, that it still wouldn't
15 have made a difference to the jury had they
16 known that Sneed was bipolar and that he lied on
17 the stand.

18 And I'm having some trouble on that
19 last piece of the argument, if we get there,
20 understanding that, when the whole case depended
21 on his credibility.

22 Can you explain that some more?

23 MR. MICHEL: Yes. And -- and one of
24 the critical arguments in the case -- if you
25 read the closing arguments, for example, there's

1 extensive discussion about whether Petitioner
2 was manipulating Sneed. That's probably the
3 issue that comes up the most in the closing
4 arguments, which are not evidence but are a
5 reflection of what was at issue in the trial.

6 And, therefore, Petitioner's strategic
7 decision in this case not to question Sneed's
8 mental illness, I think, was informed by the
9 fact that he didn't want to support the
10 prosecution's theory.

11 And, as this Court explained, for
12 example, in Wood versus Bartholomew, you can
13 infer from the -- the strategic decisions of the
14 defendant what was material, what was important
15 in the case.

16 If the defendant himself, who has
17 every incentive to raise the arguments that are
18 best for him, doesn't want to raise arguments
19 about Sneed's mental health, that is a strong
20 clue, a strong indicator that it's not material,
21 at least material in the sense that it would
22 change the result in his favor. It may have
23 made the conviction more likely, but, of course,
24 that's not what he needs to show for
25 materiality.

1 JUSTICE KAVANAUGH: Would have made
2 the conviction more likely if the jury knows
3 that not only does he have an incentive to lie,
4 that he's lied on the stand and that he's
5 bipolar, therefore, creating all sorts of
6 avenues for questioning his credibility?

7 MR. MICHEL: I think that the Oklahoma
8 Court of Criminal Appeals explained in -- on
9 page JA 991 that evidence that would have
10 furthered the prosecution's theory that he could
11 be manipulated, that he had a mental illness,
12 would have undercut his theory and would have
13 made the conviction more likely.

14 Now I do want to underscore there is
15 lots of other evidence in the case against
16 Petitioner that doesn't relate to Sneed,
17 including his motive, including his possession
18 of cash, including the fact that he was the only
19 one who knew where the money would be found,
20 and, I think most importantly, his elaborate
21 24-hour coverup, which cannot be explained by
22 anything having to do with Justin Sneed's mental
23 state or whether he had a psychiatrist or
24 whether he had bipolar. That would be, I think,
25 the second-most prevalent issue in the closing

1 arguments.

2 And so I think it's difficult to say
3 the jury would have rejected Petitioner's
4 central defense that he was only an accessory
5 after the fact and yet turned around and
6 accepted it if only it knew that Justin Sneed
7 allegedly saw a psychiatrist.

8 JUSTICE KAVANAUGH: All right. Thank
9 you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 JUSTICE BARRETT: No.

13 CHIEF JUSTICE ROBERTS: Justice
14 Jackson?

15 JUSTICE JACKSON: It seems like
16 there's some pretty significant factual
17 questions that have been debated. You know,
18 what did counsel know? What do these notes'
19 markings mean? Was Sneed's statement that he
20 never saw a psychiatrist true or false?

21 Would you object to an evidentiary
22 hearing? As I understood it, no court has ever
23 actually made findings on those things.

24 MR. MICHEL: I'm not even really sure
25 if I have standing to object to an evidentiary

1 hearing.

2 (Laughter.)

3 MR. MICHEL: You know, I don't think
4 it's -- I guess we all agree that it's not --

5 JUSTICE JACKSON: No, so you all agree
6 --

7 MR. MICHEL: -- that it's not
8 necessary.

9 JUSTICE JACKSON: -- that it isn't
10 necessary? You say we can look at it and --

11 MR. MICHEL: Well --

12 JUSTICE JACKSON: -- rule in your
13 favor. I mean, they say we can look at it and
14 rule in their favor. But I'm just trying to
15 understand, don't we have to have some -- maybe
16 we don't, but --

17 MR. MICHEL: I mean, I don't want to
18 dodge your question. I think you can dismiss
19 and should dismiss the case for lack of
20 jurisdiction because of the adequate and
21 independent state grounds. If you do that, you
22 don't have to worry --

23 JUSTICE JACKSON: Right.

24 MR. MICHEL: -- about the fact that --

25 JUSTICE JACKSON: If we disagree with

1 that --

2 MR. MICHEL: Yeah.

3 JUSTICE JACKSON: -- if we're getting
4 to the merits, what -- how -- how should we go
5 about deciding whether there was a Brady or
6 Napue violation here?

7 MR. MICHEL: I think you should start
8 with the premise that it's Petitioner's burden
9 to prove the -- the Brady and Napue violations.
10 And based on the evidence that he's chosen to
11 present and particularly given that he's now
12 told you he wants the case decided on the
13 current record without an evidentiary hearing, I
14 think the proper conclusion would be that he's
15 failed to satisfy his burden, and, thus, if you
16 reach the merits, you should affirm the judgment
17 below.

18 JUSTICE JACKSON: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Rebuttal, Mr. Waxman?

22 REBUTTAL ARGUMENT OF SETH P. WAXMAN
23 ON BEHALF OF THE PETITIONER

24 MR. WAXMAN: Thank you, Your Honor. I
25 have a few -- a few short points.

1 Number one, there is -- nothing that
2 will come up at an evidentiary hearing is going
3 to avoid the imperative, the necessity, for a
4 new trial for due process violations.

5 If you look at the -- JA 1005, which
6 is the jail medical report, there is no world in
7 which that report, which was suppressed by the
8 defense -- by the prosecution, is not Brady
9 material and highly, highly relevant impeachment
10 material.

11 There -- if you look at page 953 of
12 the Joint Appendix, these are the Smothermon
13 notes, the Smothermon mid-trial note, "we have
14 to get to Justin right away, the knife is the
15 biggest problem." There is no way that that --
16 those suppressed notes, number one, don't
17 reflect a Napue violation and, number two, are
18 not Brady material.

19 And, with respect to the meaning of
20 the Smothermon notes, even if you were to take
21 the complete extra-record explanation of this,
22 which -- and, yes, Mr. Ackley and Mr. Smothermon
23 were both interviewed by both independent
24 investigations. Mr. Ackley has a declaration
25 which in no way suggests that when he says that

1 he was told by Sneed about taking lithium and
2 when he was told about the discrepancy in the
3 jail medical records, that it had to do with a
4 relating of questions the defense counsel had
5 had.

6 Ms. Smothermon said when she was
7 questioned, number one, I'm not sure that
8 Trumpet is Trombka. Explanation number two, I
9 was referring to Dr. Trumpet, a jazz musician I
10 wanted to hear. That was a personal note.

11 And so, when -- in any event, even if
12 she's right that all Sneed said was I was
13 questioned by the defense and I told them that I
14 was prescribed lithium by Dr. Trumpet, given the
15 obvious fact that this prosecutor for Oklahoma
16 County knew as well as everybody else that
17 Dr. Trombka was the only jail psychiatrist, she
18 committed a Napue violation even under the Van
19 Treese brief extra-record explanation.

20 Now there was a question about -- I
21 think, Justice Thomas, it was yours, but pardon
22 me if I've misallocated it -- about, well, the
23 jail records, like, they were in the
24 prosecutor's file.

25 The jail records are clearly Brady

1 material. They were -- under this Court's
2 decision in Kyles and other cases, Brady
3 material includes not as only -- not only what
4 is in the prosecutor's file but what is also in
5 the police and investigators' files. That is an
6 obligation that the prosecution has. And they
7 were in the -- the sheriff's office files. The
8 sheriff office ran the jail. The sheriff's
9 office was -- investigated this crime. A deputy
10 sheriff was called by the prosecution to report
11 on his investigation. And Mr. Ackley, at page
12 26 -- paragraph 26 of his declaration, page 939,
13 says that he knew about jail records and
14 misapplications.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Mr. Waxman. The case is submitted.

18 Mr. Michel, this Court appointed you
19 to brief and argue this case as an amicus curiae
20 in support of the judgment below. You have ably
21 discharged that responsibility, for which we are
22 grateful. Thank you.

23 (Whereupon, at 11:49 a.m., the case
24 was submitted.)

25

Official - Subject to Final Review

<p style="text-align: center;">1</p> <p>10:05 [2] 1:15 3:2 1005 [2] 28:7 110:5 1089 [3] 16:6 21:10,16 1089(C) [1] 61:20 1089(D) [7] 47:2 49:18 60:2, 21 65:16 69:12,16 109 [1] 2:15 11:49 [1] 112:23 12 [1] 15:22 180 [1] 78:5 19 [1] 87:19 1960s [1] 22:1 1997 [4] 71:7 72:14 73:22 74:20</p> <hr/> <p style="text-align: center;">2</p> <p>20 [2] 33:20 70:6 2002(a)(1)(C) [1] 28:16 2003 [1] 56:14 2005 [2] 21:8 84:10 2022 [1] 50:10 2023 [1] 74:25 2024 [1] 1:11 22 [1] 28:16 22-7466 [1] 3:4 24 [3] 14:23 15:20 47:2 24-hour [1] 106:21 25 [1] 69:11 26 [14] 16:4,21 69:11 92:11 93:7,14 94:13 96:20,21,22 97:3 98:11 112:12,12 27 [6] 25:20 43:21,22 44:14 97:11 98:11 28 [3] 15:21 17:23 43:2</p> <hr/> <p style="text-align: center;">3</p> <p>3 [1] 2:4 30 [2] 18:10 78:19 32 [1] 2:8</p> <hr/> <p style="text-align: center;">4</p> <p>40 [2] 47:3 60:5 41 [2] 15:22 18:9</p> <hr/> <p style="text-align: center;">6</p> <p>60 [2] 4:17 22:15</p> <hr/> <p style="text-align: center;">7</p> <p>7 [1] 29:2 70 [2] 2:12 22:15 700 [1] 73:24 775 [1] 82:22</p> <hr/> <p style="text-align: center;">8</p> <p>8 [1] 29:2</p> <hr/> <p style="text-align: center;">9</p> <p>9 [1] 1:11 933 [1] 35:16 939 [1] 112:12 940 [1] 72:12 953 [1] 110:11 960 [1] 5:18 976 [3] 83:13 100:15,18</p>	<p>977 [1] 83:14 991 [2] 75:10 106:9</p> <hr/> <p style="text-align: center;">A</p> <p>a.m [3] 1:15 3:2 112:23 abandoned [1] 62:18 abandonment [1] 62:14 ability [1] 63:17 able [6] 54:7,12 68:5 74:14 87:9 98:22 ably [1] 112:20 above-entitled [1] 1:13 absence [2] 72:3,4 absolute [2] 57:25 85:15 Absolutely [8] 29:15 38:3 53:16 62:18 66:13,23 67:22 86:9 accept [23] 11:17,18 12:2 21:15 23:13 31:14 32:5 48:10,11,11 55:7 59:4 61:5 65:5 67:13 80:8 82:7,23 83:24 85:24 90:7 91:11 103:17 accepted [8] 21:9 31:9 48:1,7,16 65:10 85:21 107:6 accepting [5] 41:23 45:8 49:7 56:7 67:18 accepts [2] 31:22 90:18 access [1] 52:23 accessory [2] 57:23 107:4 accomplice [1] 81:7 according [5] 34:4,23 48:24 78:4 80:12 accordingly [2] 70:22 83:3 account [9] 5:21 6:5,25 7:16 19:18 20:17 77:5 78:10 79:15 accounted [1] 20:25 accounts [1] 7:11 accused [1] 76:23 accuses [1] 77:6 Ackley [11] 5:9,19 6:23 12:21 20:14,23 34:9 72:11 110:22,24 112:11 Ackley's [2] 51:19 72:4 acknowledge [1] 15:20 across [1] 85:16 act [1] 58:21 actual [1] 59:5 actually [15] 9:8 30:16 36:3 39:6 45:2 47:19 67:1 81:3 82:12 83:6,7,11 94:19 96:8 107:23 add [1] 62:7 addition [2] 28:4 49:6 additional [1] 74:7 address [4] 17:22 83:7 94:14 98:9 addressed [3] 82:18 83:23 90:24 addressing [1] 97:18 adds [1] 71:4 adequacy [12] 4:18 25:13 26:10 27:2,4,11 32:4 42:</p>	<p>16 46:15 49:21 89:6,8 adequate [23] 4:2,10,12 10:21 18:15,19 22:21 32:6 33:10 40:25 41:7 49:22,23 63:15 68:1 70:16 79:19 82:5 83:2 89:1 96:6 97:24 108:20 adequately [1] 98:12 adjudicated [1] 17:24 adjudication [1] 18:6 admitted [2] 77:12,14 adversarial [1] 31:17 adversary [1] 11:24 AEDPA [5] 24:4,5,7,9,10 affect [1] 72:24 affidavit [7] 6:23 12:24 13:2 34:10 51:19 53:13 72:11 affirm [2] 71:1 109:16 affirmatively [1] 29:6 affirms [1] 98:19 Afterwards [1] 36:24 AG [3] 56:6 99:21,23 ago [5] 18:9,10 22:15 26:20 33:20 agree [12] 5:10 45:20 68:24 72:14 81:23 92:7,24,25 93:2 97:17 108:4,5 agreement [2] 30:13 102:19 ahead [2] 14:16 78:24 AISG [2] 30:22 67:21 Alexandria [1] 1:20 Alito [26] 14:13,14,17 15:19 16:3,18,20 17:4,16,18 18:21 20:2,5,17 21:2,5 22:2,22 30:12 40:24 46:1 47:4 48:5,14 53:9 104:6 allegations [1] 19:21 alleged [1] 16:13 allegedly [1] 107:7 allow [3] 57:2 88:20,21 allowed [5] 9:1 53:5 97:20 101:21 102:2 allowing [1] 67:17 alone [6] 35:11 43:3 49:6 58:12 60:14 72:23 already [6] 71:5 74:17 77:16 79:21 102:16 103:9 alter [1] 4:19 altered [1] 3:23 alternative [6] 17:6 18:14 30:15 97:21 100:9,10 although [1] 82:13 ambiguity [2] 96:14,19 ambiguous [5] 16:18 17:16 43:19 88:4,7 6:19 18:25 51:16 52:9 70:2 72:7 112:19 among [1] 5:19 amounts [1] 7:20 analysis [4] 25:19 46:9 93:22 97:1 analyzed [1] 89:6</p>	<p>another [4] 18:11,22 94:16 99:5 answer [6] 20:8 27:1,5,6,20 74:2 answering [1] 95:3 answers [1] 6:4 antithesis [1] 28:2 anybody [2] 51:22 75:1 anyway [2] 31:8 77:21 apologize [1] 26:15 appeal [3] 7:23 20:20 100:22 Appeals [19] 12:14 14:22 19:18 21:9 48:9 49:8 61:25 65:16 70:7 75:9 82:18,21 83:11,23 87:12,16 90:23 101:20 106:8 Appeals' [1] 23:18 APPEARANCES [1] 1:17 appended [1] 6:17 Appendix [5] 5:18 28:7 35:16 51:19 110:12 applicant [1] 16:15 application [9] 22:3 25:22 61:2 81:5 82:20 83:5 86:22 90:22 91:17 applied [6] 4:14 21:22 22:4 30:13 49:24 57:11 applies [4] 32:4 67:3 93:8 97:10 apply [4] 30:16 46:15 70:21 98:13 applying [5] 64:3,16 66:3 93:4 94:20 appointed [3] 8:13 54:2 112:18 appreciate [1] 68:16 areas [1] 85:16 arguably [3] 30:17 74:8 88:2 argue [4] 28:5 61:19 85:13 112:19 argued [1] 103:25 argues [1] 8:13 arguing [3] 52:6 75:10 83:20 argument [22] 1:14 2:2,5,9,13 3:4,7 12:7 25:2 32:14 68:15 70:1 72:20 77:20 90:9 91:25 92:4,16 99:22 103:6 104:19 109:22 arguments [11] 45:17,18 100:5 101:11,14 104:24,25 105:4,17,18 107:1 around [2] 47:18 107:5 ascertainable [1] 16:8 aside [2] 25:14 63:24 asserting [2] 100:3 101:7 27:8,11 assuming [4] 20:17 25:6 90:8,12 attached [1] 6:6 attempt [1] 102:11 attorney [38] 6:2 7:15 19:</p>	<p>23 32:18 34:12 35:23 36:21 37:15 38:1 40:1,3,19 42:13 52:13 54:2 55:1,4 60:19 61:10 68:17 70:19 71:20 72:8 82:16,23,25 83:1,8,14,17 84:14 85:8 87:13,16 88:11 90:9 101:22 103:18 available [6] 7:4 36:13 50:16 70:24 98:16,17 avenues [1] 106:6 avoid [2] 18:16 110:3 avoiding [2] 77:15 87:21 aware [1] 101:3 away [2] 58:17 110:14 Axley [1] 34:9</p> <hr/> <p style="text-align: center;">B</p> <p>back [16] 10:15 14:11 21:25 24:3 29:1 33:18 38:6,7 45:14 51:8 55:3 64:23 68:25 90:20 94:2 95:21 backdrop [1] 49:16 bar [75] 4:3,12 10:25,25 11:12 14:24 15:3,15,24 16:23 17:12,23 18:7 21:13 23:7 26:17 30:14,16,22 31:10 43:9 44:7,22 47:3,17 48:1,2,6,7 49:19 59:20 63:14 65:7,9 66:4 67:3 68:13,23 75:4 82:8,17 83:8,12,15,22 84:15,18,23 85:10 86:7 87:5,14,17 88:14 89:19,21 90:14 92:3 93:22 94:1 95:11,20 96:12 97:16 98:9 99:23 100:4,11,25 101:17 102:3,10,12,25 103:25 barred [1] 15:11 BARRETT [25] 30:1,7,8 47:8 48:4 59:13,14,17 60:11,17,23 61:4,8 63:9,20 64:9 66:7 78:20,24 82:4,11 84:1 88:23 107:11,12 Barrett's [1] 64:24 Barry [1] 70:10 bars [25] 25:16 30:25 31:19 33:6 41:17 42:8 43:5 46:24 49:11 62:11 65:4 70:20 82:24 84:4,15 85:6,21 92:15 93:4,12 94:15,21 95:4 98:13 104:12 Bartholomew [1] 105:12 baseball [1] 77:13 based [16] 4:9 18:18 19:17 23:6 37:20 40:9 44:13 45:10 67:12 74:8 91:20,24 92:22 94:25 95:2 109:10 bases [1] 66:3 basically [2] 46:4 49:10 basing [1] 36:22 basis [9] 9:5 12:13 13:7 16:8 17:13 35:3 55:15 56:2 68:22 bat [1] 77:13</p>
--	--	---	--	--

Official - Subject to Final Review

Beard [2] 21:20 89:8 beat [1] 77:13 becomes [1] 97:23 behalf [8] 1:18,21 2:4,7,15 3:8 32:14 109:23 behavior [2] 10:5 77:4 believe [5] 5:17 54:23 76:21,22 90:15 believed [1] 78:1 belittled [1] 8:3 below [13] 1:25 2:12 10:23 13:15 25:11 37:6,13 38:18, 19 70:3,14 109:17 112:20 benefit [2] 6:20 96:15 best [3] 37:19 96:25 105:18 better [1] 76:1 beyond [2] 42:15 64:17 big [1] 58:18 bigger [1] 58:10 biggest [2] 28:25 110:15 bipolar [16] 3:18 4:24 9:12 10:3,3 13:3 33:13,13 35:19 36:10 58:17,20 73:4 104:16 106:5,24 bit [3] 5:8 66:7 93:19 blank [1] 77:10 blew [1] 64:18 board [8] 98:23,23,25 99:4, 4,6,7,10 body [3] 71:18 80:15 81:22 bona [2] 4:9 18:19 both [18] 5:25 7:14,22 12:21 14:3,5 19:22 20:23 49:9 52:23 54:11 55:18 59:25 60:9 62:5 98:9 110:23,23 bottom [1] 37:16 Box [2] 29:2,2 boxed [2] 54:22,24 boy [1] 63:8 Brad [1] 46:1 Brady [50] 4:7 12:6 13:9,21 14:4,25 15:13,17 17:1,3 18:3 25:3,8 26:24 27:16, 23 28:2 30:18,20 32:24 37:25 39:2,23 40:6 43:1,23,24, 25 44:9,12,16 45:17,21 46:2,5 47:16 50:12,15 51:2,10 52:6 57:11 63:2 64:15 109:5,9 110:8,18 111:25 112:2 brief [11] 5:22 6:6,19 19:1,7 51:16 63:24 72:7,20 111:19 112:19 briefs [1] 19:13 briefs [2] 49:10 52:10 bright [1] 74:5 bring [2] 58:17 63:18 brought [1] 25:24 burden [2] 109:8,15 butressed [1] 65:12 <hr/> <p style="text-align: center;">C</p> <hr/> Cain [3] 42:4 49:18 62:9 calculus [1] 79:14 calendar [1] 98:6	call [4] 33:21 67:9 91:12,18 called [1] 112:10 came [2] 1:13 61:9 candor [1] 67:23 cannot [2] 71:24 106:21 canvassed [1] 88:17 capital [2] 6:14 32:20 Case [87] 3:4,13 4:15 6:10, 24 7:23 8:14 9:19 11:23 14:19 19:8,16 20:13 21:8 22:6 23:12,18 27:14 30:13 35:3 46:11,17 48:15,18,25 49:2 51:16 53:14 57:18 59:5,15,24 62:20 64:25 65:8 70:13,20,22 71:23 73:13, 16,19 75:19,19 76:15 77:12 78:14 79:18 80:21 82:15 83:12,22 84:8,10,13,23 86:6,25 87:9,11,14,22 88:6, 8,9,12 90:22 93:18 94:23 96:10 98:4,8 99:24 101:16, 20 102:15 103:4 104:20,24 105:7,15 106:15 108:19 109:12 112:17,19,23 cases [23] 6:14 11:2 14:4 21:16,20 27:23 49:9,22 62:4 65:13,15 67:25 73:18 77:9 80:18 82:15 84:19 88:1, 21 89:6,8 101:17 112:2 cash [1] 106:18 categorical [1] 85:15 category [1] 65:21 central [6] 6:10,12 8:14 52:3,5 107:4 centrality [1] 59:9 cert [2] 32:21 86:23 certain [4] 37:3 52:10,24 90:17 certainly [7] 4:7 13:9 18:4, 7 39:1,9,25 change [3] 8:7 29:3 105:22 changed [8] 4:25 9:14 13:12 51:23 71:14 74:10 80:16 98:23 charged [2] 51:2 57:23 CHIEF [29] 3:3,9 8:12 13:19 14:10 22:24 29:25 30:3, 5,9 32:9,13,16 50:3 53:9 57:4 59:12 64:21 69:20 70:4 72:18 73:9 74:16,22 104:3 107:10,13 109:19 112:16 child [1] 59:5 chose [2] 71:9 75:2 chosen [1] 109:10 CHRISTOPHER [3] 1:23 2:10 70:1 chum [1] 66:21 Circuit [2] 49:18 60:21 circumstances [1] 62:24 cite [4] 48:18 49:10 60:23 87:9 cited [1] 23:19 citing [1] 100:24 claim [19] 14:24 15:13,14,	18 16:8 17:1,3,22 18:3 25:24 43:4 46:2 47:16,16 54:11 71:3 94:25 100:2 102:8 claims [6] 4:7 15:10 16:2 45:6 47:15 70:15 clarity [1] 96:20 classic [2] 46:11,16 Clause [1] 28:15 clear [19] 4:8 5:16 10:25 15:1 16:12 21:19 43:18,24 47:1,25 58:25 59:2 61:21,24 64:16 70:17 81:19 93:7 95:6 cleared [1] 52:7 clearly [9] 5:10 15:11 18:18 20:22 30:22 71:3 93:6 103:4 111:25 clemency [7] 70:24 98:17, 21,22,23,24 99:6 CLEMENT [87] 1:20 2:6 32:13,14,16 33:18,24 34:6 35:1,5,15 36:5,8,21 37:3 38:3, 16 39:4,8,15 40:15,16,18, 23 41:5,14 42:11,24 43:11, 15,22 44:8,11,24 45:12,22 46:20 47:8,22 48:4,5,12,24 50:14,19 51:5,17 52:8,22 53:16,21,24 54:7,15,23 55:1,12,17 56:9 57:9,17 59:16, 22 60:12,18 61:3,7,14 63:11 64:7,10 65:11,23 66:13, 16,20 67:22 68:11,24 69:4, 6,10,15 72:20 82:9 84:2,7 close [1] 50:24 closing [3] 104:25 105:3 106:25 clue [1] 105:20 co-defendant [1] 28:19 cold [4] 33:14 53:7 73:6 75:25 Coleman [2] 47:24 98:1 colloquy [1] 30:12 combined [1] 58:20 come [10] 15:13 27:15 36:3 45:7,17 47:21 87:11 90:20 91:10 110:2 comes [7] 19:16 26:12 27:17 43:17 58:7 92:25 105:3 comfortable [1] 101:7 commissioned [2] 34:13 70:10 commissioning [1] 32:22 commit [1] 71:17 committed [3] 57:21 79:2 111:18 common [3] 33:14 53:7 75:25 community [1] 55:24 comparative [1] 73:12 compare [1] 73:12 compelling [2] 19:1 70:9 competency [4] 71:7 72:14 73:25 74:18 competing [1] 43:16	complained [1] 23:21 complaining [1] 53:1 complete [1] 110:21 completely [1] 44:17 complicated [1] 42:25 complicates [1] 45:24 complied [1] 7:25 comply [1] 104:13 composition [1] 98:24 concede [2] 18:2 81:1 conceded [1] 72:16 concedes [1] 13:6 conceivable [1] 93:5 conceived [1] 92:3 concern [1] 50:8 concession [10] 45:9 91:12,13,14,17,20,23 92:22 93:16 95:18 conclusion [12] 4:20 32:24 35:23 38:2 39:23 40:20 52:18 56:24,25 94:4 100:23 109:14 condition [2] 10:3 72:13 conditions [1] 67:14 conduct [1] 73:19 conducted [1] 72:9 confess [8] 32:19 33:1 63:2 64:14,14,20 67:6 68:6 confessed [4] 58:19 59:2 91:10 99:25 confessing [2] 40:4 67:11 confession [21] 33:3,7 42:21 45:14 55:5,7,9,16 61:6 63:18 65:14 66:5,11,17,20 67:8 68:18,21 69:11,16 71:20 confession-of-error [1] 88:11 conflate [1] 68:8 conflated [1] 69:13 conflating [1] 66:2 conflict [1] 48:22 conflicting [1] 48:20 confuse [1] 10:24 confusing [2] 65:25 91:5 conjunction [4] 35:21 38:22 39:1,19 consider [5] 20:6,10 77:22 80:16,21 considerable [1] 73:20 consideration [4] 16:1 33:4 55:4,18 considering [1] 71:16 consistent [4] 6:25 21:22 22:12 81:13 consistently [1] 32:7 constitutes [1] 23:23 constitutional [12] 11:25 14:6 16:1 17:7 23:4,12,24 24:21 25:24 33:9 60:4 68:4 contends [1] 70:11 content [1] 76:19 context [7] 6:22 7:21 26:2	46:4 54:3 55:23 56:21 contextual [1] 37:5 continue [2] 31:8 95:3 continues [1] 32:20 continuing [1] 56:16 contradistinction [1] 39:21 contrary [2] 4:21 73:5 contravention [1] 39:22 controlling [1] 97:13 conversation [3] 34:24 36:17 37:1 convicted [2] 3:11 78:1 conviction [12] 20:20 58:12 59:10 70:8,13 71:22,25 100:1 102:8 105:23 106:2, 13 convictions [1] 32:20 convincing [4] 16:12 64:16 70:18 95:6 correct [46] 3:20 10:5,6,8 11:2,3,9,10 12:7,8,22,25 13:5,15 14:2,2,3 23:4,13 24:4,22 25:3 26:6 29:19, 23 31:24 32:1,8 37:19 39:14,17 44:23,25 52:17 53:15,17 54:14 55:8,11,16 69:3,5,14 76:2 92:5 94:22 correctional [2] 35:18 51:1 correctly [3] 23:3 65:1 70:15 couldn't [5] 34:19 102:20 103:5,10,15 counsel [17] 6:2,3 8:13 14:11 28:20 29:8 32:10 44:15 50:4 58:15 69:21 75:16 81:17 104:4 107:18 109:20 111:4 Counselor [2] 23:1 39:3 counselors [2] 7:15 12:20 counter-reading [1] 19:2 County [1] 111:16 couple [4] 35:5 41:2,5 76:6 course [9] 9:24 31:1,3 58:14 60:15 62:10 79:17 103:9 105:23 COURT [133] 1:1,14 3:10 4:1,11,13 5:3,4 6:19 7:25 8:8,13 9:4 10:23 11:7 12:14 13:15 14:22 15:14,23 16:5 17:21 18:9,13 19:17,20 21:9,11,15 22:14,20 23:3,17, 25 24:18 25:11 27:15,22 29:7 30:13 32:4,17 33:5 37:13 38:9,14 42:1,20 43:20,23 46:22 48:8,9 49:8,11, 17 51:20 55:6,9,14 60:2,9 61:25 62:10 63:19 65:10, 15 67:10,23 68:14,19 70:5, 7,14,20,21,25 71:22,24 75:9 79:11 80:13,17 81:15,25 82:17,21,25 83:3,10,23 84:22 85:11 86:2 87:4,12,15
---	---	--	--	---

Official - Subject to Final Review

88:2,12,19,22 89:6,9,18 90:23 93:3 94:4,5,11,20 96:21 97:19 98:1,3,4,14,18 99:2,19 101:19 102:13,16,20 103:5,9,15,16,20 105:11 106:8 107:22 112:18 court's [20] 3:22 4:5,9,17 5:6 15:24 21:20 23:16 25:19, 21 27:3 33:17 41:3 42:3 48:3 49:21 72:1 96:6 102:1 112:1 Court-appointed [4] 1:24 2:11 61:23 70:2 courts [13] 23:9 31:6,13,13, 16,16 62:25 65:5 68:9 71:21 84:17 88:19 97:20 courts' [1] 31:12 cover [1] 77:3 coverup [2] 71:18 106:21 create [1] 62:24 created [1] 4:13 creating [1] 106:5 credibility [5] 58:8 75:21 77:17 104:21 106:6 credible [2] 77:11,21 credit [2] 25:15 103:3 credited [1] 7:16 crime [2] 71:18 112:9 Criminal [18] 12:14 14:22 21:9 23:17 48:9 49:8 59:6 65:16 70:7 75:9 82:18,21 83:10,23 87:12 90:23 101:19 106:8 Criminals [2] 61:25 87:16 critical [3] 57:25 76:20 104:24 Critically [1] 71:6 critique [1] 95:24 Cruz [2] 48:25 85:23 cryptic [2] 19:5 71:1 crystal-clear [1] 62:1 curiae [4] 1:24 2:11 70:2 112:19 current [4] 6:16,25 54:11 109:13 custody [1] 50:24 cut [1] 99:16	D D.C [3] 1:10,18,23 darn [1] 93:7 date [1] 98:6 day [1] 63:7 de [2] 24:21 79:14 deal [4] 19:11 52:11,13 58:18 dealings [1] 52:4 deals [1] 17:21 death [5] 16:16 57:1 58:12 77:13,15 debated [1] 107:17 decide [8] 24:21 25:1 34:16 43:20 66:22 94:25 96:9 98:6 decided [2] 71:23 109:12 deciding [4] 77:5 79:7 87:18 109:5 decision [17] 4:9 18:18 33:8 42:2,3,4 48:19,21 49:17 71:15 74:10 82:19 83:6,10 90:21 105:7 112:2 decisions [2] 59:25 105:13 declaration [4] 7:5 20:15 110:24 112:12 declination [1] 22:16 deemed [1] 48:19 defar [1] 25:18 default [3] 15:12 42:5 62:11 defects [1] 42:8 defend [1] 32:20 defendant [6] 13:25 77:6 87:23 88:10 105:14,16 defendant's [1] 73:19 defense [23] 9:3 13:4 14:7 20:21 28:1,20 29:13 35:12 40:11 41:24 42:5 44:15 58:15,23 60:22 62:12 74:4,6 81:17 107:4 110:8 111:4, 13 defenses [4] 41:17 42:9 46:24 48:2 defer [1] 24:2 deficiency [1] 75:11 defies [1] 25:21 definitely [1] 48:12 definition [1] 26:11 deliberations [1] 72:24 demanded [1] 33:3 denial [3] 3:20 28:10 42:21 denied [4] 4:1,20 5:3 8:8 deny [2] 16:17 45:3 denying [3] 16:21,24 20:18 departure [4] 22:2 25:18 50:1 60:16 depended [1] 104:20 depth [1] 34:5 deputy [1] 112:9 describe [2] 42:23 83:16 deserves [1] 6:19 despite [1] 78:2 destroyed [1] 7:22 detail [2] 17:2 19:24 detailed [1] 7:11 details [1] 6:15 determination [10] 25:13 35:10 38:9 42:22 68:3 73:4,17,17 93:15,17 determinations [2] 4:6 67:2 determine [3] 71:21 73:14 86:14 determined [1] 25:7 determining [1] 29:21 deviating [1] 67:16 deviation [1] 86:18 diagnosed [1] 9:11	difference [6] 8:22,24 9:17 13:20 73:15 104:15 different [10] 6:4 57:8,10 58:4 66:3 67:1 78:5 94:6 100:24 101:8 differently [3] 8:16 43:12 45:25 difficult [4] 41:3 74:10 77:25 107:2 difficulties [1] 63:23 diligence [9] 16:9 25:20 46:9 70:17 75:4 83:16 95:5 97:15 101:4 direct [3] 24:13 97:16 100:22 directly [1] 63:12 disagree [2] 97:9 108:25 disagrees [1] 68:20 disbursed [1] 7:22 discharged [1] 112:21 disclosed [3] 3:14 35:12 72:13 discover [1] 63:2 discovered [4] 14:7 26:25 28:9 29:1 discovery [2] 8:3 28:11 discrepancy [1] 111:2 discretion [3] 22:5,14 88:20 discretionary [4] 21:19,21 22:3,4 discuss [2] 14:20 41:25 discussed [1] 103:17 discusses [1] 81:2 discussing [2] 15:17 16:25 discussion [2] 66:6 105:1 discussions [1] 44:20 dismiss [4] 70:22 79:18 108:18,19 dismisses [1] 98:18 disorder [9] 3:18 4:24 9:12 13:3 33:14 35:19 36:10 58:17,20 dispensing [1] 15:9 disposition [1] 4:15 dispute [5] 4:21,25 17:5 38:24,25 disputed [1] 7:18 disputes [1] 38:11 disputing [1] 57:18 dissenters [1] 48:25 distinctive [1] 78:15 distorted [1] 53:5 doctor [1] 36:4 doctrine [3] 73:12 96:7 97:25 document [2] 28:6,8 dodge [1] 108:18 doing [7] 8:8 10:22 44:22 47:11 71:11 91:7 94:13 done [7] 20:4 23:9 32:6 33:2 61:16 78:4 94:5 door [2] 92:14,18	doubt [3] 6:20 64:17 96:16 down [2] 44:3 79:17 dozen [1] 91:6 dramatic [1] 78:7 draw [1] 36:12 drawing [1] 36:18 drew [1] 40:20 drop [1] 59:3 drugs [1] 10:4 Drummond [5] 32:18 35:9 52:17 56:23 59:1 due [5] 4:20 28:15 63:7,16 110:4 Duncan [3] 6:3 36:23 54:1 during [4] 7:12,23,24 10:1 dynamic [1] 50:21	E each [3] 6:4 39:1 91:7 earlier [8] 13:20 25:7 26:25 27:19 35:8 93:1 103:17 104:11 earth [2] 28:20 94:3 easier [1] 63:16 easiest [2] 41:6 67:20 easy [2] 42:24 95:10 edits [1] 62:6 either [6] 5:12 12:1 28:5 31:7 35:4 47:15 elaborate [3] 41:22 73:1 106:20 element [1] 8:14 elements [2] 71:2 76:9 eleventh-and-a-half-hour [1] 19:14 elicit [1] 39:17 elicited [4] 8:10 37:18 56:20,25 emphasize [1] 73:5 end [3] 22:7 63:6 80:7 engineered [1] 8:7 enough [3] 61:24 101:18, 18 entire [1] 75:19 entirely [2] 22:12 68:24 entirety [1] 16:21 entitled [2] 6:21 79:7 equally [1] 49:12 error [35] 16:13 23:21 25:24 26:1 32:19 33:1,7 40:4 42:21 45:15 55:5,7,10 59:2 60:4 61:6 63:2,18 65:14 66:5,11,21 67:6,9,11 68:6, 19,21 71:20 81:1 91:11 92:18,20,21 99:25 errors [4] 33:8,10 64:14,15 especially [3] 39:18 40:13 55:10 ESQ [4] 2:3,6,10,14 ESQUIRE [3] 1:18,20,23 essence [1] 13:22 essentially [3] 33:6 46:8 91:24 establish [3] 4:17 16:12	71:2 established [4] 21:24 41:15 49:23 65:3 establishing [1] 25:25 EUGENE [1] 1:3 evaluate [1] 31:7 evasive [1] 59:23 even [31] 10:22 12:17 14:23 15:2,14 17:11,16 19:9 20:17 21:4,17 22:13 25:6 26:24 30:19 36:1 40:7,7 46:25 60:5 62:15 65:13 80:10 88:13 93:18,22 96:2 107:24 110:20 111:11,18 event [2] 70:21 111:11 events [1] 103:14 everybody [6] 23:19 46:23 55:24 56:2 61:22 111:16 everything [9] 23:8 46:6 47:13 56:10 76:21 79:15 91:22 94:7,8 everywhere [1] 69:18 evidence [26] 3:14,19,21 7:22 12:10 16:13 13:24 40:5 61:19 69:12 70:9,18 71:16 75:3,6 79:8 80:14,22 95:6 103:16,22 104:1 105:4 106:9,15 109:10 evidentiary [15] 4:4,19 37:7,8,11 38:8,17,19,20 40:2 52:1 107:21,25 109:13 110:2 exactly [7] 42:1 48:14,16 66:19 69:9 91:7 94:5 exam [1] 62:25 examination [1] 64:6 examiner [1] 28:23 example [3] 41:20 104:25 105:12 except [2] 92:18 93:14 exchange [1] 77:15 exchanged [1] 51:5 exclamation [1] 74:2 excuse [2] 60:2 65:18 execution [2] 98:5,20 executives [1] 71:21 exercise [2] 16:9 88:20 exist [2] 12:3 19:3 existed [1] 8:5 expect [2] 33:21,25 expedition [1] 8:4 expert [1] 58:18 explain [6] 34:5 45:21 68:17 69:1 102:4 104:22 explained [8] 10:8,11,12 75:9 102:11 105:11 106:8, 21 explaining [1] 17:3 explains [3] 34:22 72:7 102:2 explanation [9] 7:20 19:14 34:23 35:6 40:8 41:22 110:21 111:8,19 explanations [1] 35:8
---	--	--	--	--	---

Official - Subject to Final Review

<p>exploration ^[1] 19:10 explore ^[1] 104:11 exposed ^[1] 76:5 express ^[3] 4:8 65:14 103:8 expressed ^[1] 103:4 expressly ^[10] 18:18 21:13 61:19 66:10 84:14 101:12, 16,17 103:23 104:1 extensive ^[2] 71:16 105:1 extra-record ^[2] 110:21 111:19</p> <hr/> <p style="text-align: center;">F</p> <p>face ^[2] 8:9 28:9 faces ^[1] 58:7 facility ^[3] 35:17,18 51:1 fact ^[46] 3:16 4:23 5:3,20 7:20 8:25 9:10,14,25 13:4 16:14 20:18 21:18 23:11, 16 24:1 29:3,12 32:3 33:15 41:21 44:13 45:10 46:7 53:19 55:11,15 56:6 57:18, 23 62:3 65:2,12 66:14 67:13 69:7 91:21,24 97:13 103:14,24 105:9 106:18 107:5 108:24 111:15 facts ^[6] 14:24 16:11 25:1, 25 38:10 71:23 factual ^[5] 16:8 19:21 38:24,25 107:16 fail ^[1] 39:17 failed ^[4] 3:20 37:19 70:17 109:15 fails ^[1] 17:3 fair ^[9] 25:16,17 26:11 45:22 47:23,25 90:24 98:2 99:19 false ^[8] 8:10 51:11 76:10, 10,13,17,17 107:20 falsehood ^[4] 13:23,24,25 80:9 falsely ^[3] 4:1 5:3 7:25 family ^[2] 5:23 19:19 family's ^[2] 18:25 72:7 far ^[1] 63:16 favor ^[3] 105:22 108:13,14 federal ^[27] 11:5,9 12:1,4 15:4 16:1 17:7 18:14,17 26:6,7,8,9,10,21 27:13 31:15 33:9 41:16 43:19 62:25 92:19,21 94:12,25 97:18, 22 few ^[5] 14:21 34:20 79:25 109:25,25 fide ^[2] 4:9 18:19 fifth ^[2] 61:1,8 figure ^[1] 67:12 file ^[3] 6:23 111:24 112:4 filed ^[1] 63:4 files ^[4] 28:21 50:18 112:5, 7 fill ^[1] 54:7 filled ^[1] 36:2</p>	<p>final ^[1] 71:22 find ^[8] 11:23 12:3 41:3 56:10 77:19 79:6,11,24 finder ^[1] 16:14 finding ^[4] 13:14 25:6 38:15 70:9 findings ^[1] 107:23 fine ^[3] 40:2 68:14 89:19 finger ^[1] 76:23 finished ^[1] 15:9 firmly ^[3] 21:23 49:23 65:2 first ^[22] 6:18 11:14,15 19:12 20:19 27:14 29:11 35:7 42:11 45:2 48:3 49:2 53:19 61:21 63:3,14 64:13 67:4 76:8 85:14 91:9,23 fishing ^[1] 8:4 fits ^[1] 65:20 five ^[2] 50:24 78:18 flag ^[1] 74:5 focus ^[1] 41:2 focused ^[1] 44:14 focuses ^[1] 91:18 followed ^[3] 21:24 22:11, 21 footnote ^[1] 21:12 footnotes ^[1] 87:15 Forget ^[3] 27:4,7 72:19 forgot ^[1] 30:1 formal ^[1] 8:3 forth ^[1] 94:2 forward ^[2] 45:7,17 found ^[7] 11:20,25 13:19 16:14 27:18 49:1 106:19 founded ^[1] 92:20 four ^[2] 15:16,16 fourth ^[7] 60:25 61:5 81:4 82:20 83:4 86:21 90:21 free ^[2] 70:20,23 friend ^[5] 61:22,23,23 74:14 80:24 friends ^[1] 85:13 front ^[3] 19:18 52:11,14 frozen ^[1] 52:21 full ^[1] 54:12 fully ^[2] 17:24 19:24 fundamentally ^[1] 53:4 further ^[2] 50:5 77:22 furthered ^[1] 106:10 furthest ^[1] 66:17 future ^[2] 21:16 101:17</p> <hr/> <p style="text-align: center;">G</p> <p>Gary ^[2] 5:18 12:21 gave ^[3] 6:3 7:19 75:24 gee ^[1] 46:22 general ^[35] 7:15 19:23 32:18 34:12 35:9,23 36:22 37:15 38:1 40:1,3,20 42:13 52:13,17 54:2 55:1 56:23 59:1 61:10 68:17 70:19 72:9 82:16,25 83:1,8,14 84:14 85:8 87:13,17 88:11 90:10 101:22</p>	<p>general's ^[7] 6:2 55:5 60:19 71:20 82:23 83:18 103:18 generally ^[1] 6:13 gets ^[5] 47:23 60:13 68:19 91:21 92:2 getting ^[2] 68:25 109:3 girlfriend ^[1] 81:8 give ^[6] 7:10 25:14 54:12 79:23 80:1 96:15 given ^[7] 7:10 19:13 40:5 59:8 78:14 109:11 111:14 Gloss ^[1] 50:23 GLOSSIP ^[20] 1:3 3:4,11 4:20 19:24 57:22 58:24 62:5 66:8 67:5,7 79:10 83:14 87:1 91:19 100:21 101:3, 11,14,15 Gossip's ^[7] 20:21 25:23 32:21 34:25 53:4 75:13 86:25 got ^[5] 24:22 52:11 60:19, 20,25 gotten ^[1] 76:24 government ^[2] 29:17 56:16 grant ^[2] 23:20 24:1 granted ^[2] 27:8 37:13 grateful ^[1] 112:22 great ^[1] 19:24 ground ^[8] 10:22 41:1,6,8 68:1 83:2 96:6 97:24 grounds ^[10] 4:10 15:12 18:16,20 33:11 70:16 79:20 82:6 100:2 108:21 guess ^[7] 17:20 29:2 30:20 38:12 78:20 93:9 108:4 guidance ^[1] 18:14 guilty ^[1] 16:15 guy ^[1] 76:21</p> <hr/> <p style="text-align: center;">H</p> <p>habeas ^[3] 22:6 61:21 63:4 hand ^[1] 45:14 handwritten ^[1] 29:1 hanging ^[1] 47:17 happen ^[2] 51:13 57:2 happened ^[5] 9:9 27:14 67:16 68:16 78:14 happens ^[2] 31:5 86:3 hard ^[2] 34:7 54:10 harder ^[1] 63:13 harmful ^[1] 76:14 Harris ^[1] 97:20 heads ^[1] 34:20 health ^[4] 8:4 71:10 74:4 105:19 hear ^[3] 3:3 26:22 111:10 heard ^[2] 73:4 82:8 hearing ^[2] 4:4,19 29:10 37:7,8,11 38:8,17,19,20 40:2 51:9,9 52:2 64:25 98:21, 25 107:22 108:1 109:13 110:2</p>	<p>heavily ^[2] 18:22 71:19 held ^[2] 17:6 97:19 hide ^[1] 27:25 high ^[2] 96:12 98:8 highly ^[3] 33:15 110:9,9 himself ^[3] 7:4 58:1 105:16 historically ^[1] 69:17 history ^[5] 3:15 23:10 48:3 62:4 63:15 holding ^[3] 18:15 19:17 97:23 holdings ^[2] 48:23 97:21 honor ^[3] 31:16 67:22 109:24 honoring ^[1] 31:18 hoped ^[1] 54:18 hoping ^[1] 79:24 hostile ^[1] 59:21 hours ^[2] 74:15 78:18 however ^[1] 80:24 hundred ^[5] 22:11 23:10 41:19 84:2,7</p> <hr/> <p style="text-align: center;">I</p> <p>ignore ^[2] 79:8,12 illness ^[5] 71:9 74:1 75:11 105:8 106:11 immaterial ^[1] 71:4 immediately ^[1] 28:22 immune ^[1] 97:23 impeachment ^[1] 110:9 imperative ^[1] 110:3 implying ^[1] 15:8 importance ^[1] 73:20 important ^[12] 13:4 33:9 49:5 66:25 72:16 74:4 77:1,2,2,11 89:7 105:14 importantly ^[1] 106:20 impression ^[1] 49:3 improperly ^[1] 79:9 impugned ^[2] 6:9 34:3 impulsive ^[1] 10:5 impulsively ^[1] 58:21 imputed ^[2] 39:7,13 in-depth ^[2] 33:22 36:17 inaccurate ^[1] 9:8 inadequacy ^[3] 48:22 49:1, 25 inadequate ^[5] 21:22 22:18 36:19 46:21 48:19 incarceration ^[1] 10:2 incentive ^[2] 105:17 106:3 incident ^[1] 79:3 includes ^[2] 39:12 112:3 including ^[7] 3:16 71:17 76:9 88:19 106:17,17,18 inconsistent ^[4] 20:11,14 35:7 49:12 incorporating ^[2] 101:11, 14 incorrect ^[1] 92:23 incredibly ^[1] 42:7 Indeed ^[1] 32:19 independence ^[4] 4:5 26:</p>	<p>10 27:11 91:2 independent ^[35] 4:2,10 6:1,1,3 7:14 10:21 12:20 18:16,19 19:25 32:23 33:11 34:8,13 36:23 40:25 41:7 46:19,21 52:23 54:1,4 68:1 70:16 72:9 79:20 82:6 83:2 96:6,13 97:2,24 108:21 110:23 independently ^[1] 98:12 indicated ^[1] 34:9 indicates ^[1] 72:8 indication ^[1] 57:24 indicator ^[1] 105:20 indispensable ^[2] 33:12 57:19 independent ^[1] 9:13 inescapable ^[1] 35:23 infects ^[1] 46:8 infer ^[1] 105:13 inference ^[4] 36:13 44:13 45:23 94:21 influenced ^[2] 15:25 18:8 information ^[13] 35:11,22 36:13,20 37:10,21 38:23 56:22 73:13,14,21 74:8 79:5 informed ^[1] 105:8 initial ^[2] 30:24 79:4 injustice ^[1] 60:3 ink ^[2] 10:20 11:13 innocence ^[6] 16:11 59:5 70:18 83:17 95:6 101:9 innocuous ^[1] 53:6 insist ^[1] 88:14 instance ^[2] 22:13 64:13 Instead ^[2] 33:5 83:13 intelligible ^[1] 21:23 intend ^[1] 102:4 intended ^[3] 102:4 103:23 104:1 intends ^[1] 59:6 intention ^[1] 103:3 intentional ^[1] 62:14 intentionally ^[1] 62:17 inter ^[1] 53:24 interactive ^[1] 54:18 interest ^[1] 98:9 interested ^[1] 99:3 interpretations ^[3] 15:7 19:22 64:2 interrupt ^[1] 7:2 intertwined ^[3] 69:2 94:7 97:2 interview ^[5] 5:14 6:11 21:1 50:22 54:17 interviewed ^[8] 5:25 51:14 53:12,23,25 54:13,16 110:23 interviews ^[1] 6:13 interwoven ^[6] 15:25 18:4, 5 46:12,18,20 introduction ^[1] 10:20 investigated ^[1] 112:9</p>
---	---	---	---	---

Official - Subject to Final Review

<p>investigation ^[5] 33:22 36:23 54:4 72:8 112:11</p> <p>investigations ^[5] 20:3 34:8 52:23 72:10 110:24</p> <p>investigator ^[1] 20:22</p> <p>investigators ^[1] 20:1</p> <p>investigators' ^[1] 112:5</p> <p>invocation ^[2] 22:17 97:16</p> <p>invoke ^[3] 41:18 101:17 102:5</p> <p>invoked ^[3] 33:6 60:5 85:9</p> <p>invoking ^[3] 63:13 100:11 102:9</p> <p>involve ^[1] 87:1</p> <p>involved ^[1] 82:3</p> <p>involves ^[2] 84:14 87:9</p> <p>involving ^[4] 62:5 87:23 88:9,10</p> <p>irrelevant ^[3] 13:13,14 44:17</p> <p>isn't ^[6] 15:1 46:25 69:16 75:15 103:22 108:9</p> <p>issue ^[40] 9:21,22 11:7,8,12,22 12:4,10 13:18 15:4 16:6 23:4 25:7 27:12 29:22 41:8,13 43:19,24 44:11,12 56:5 59:20 62:21 63:10,13 72:21 78:17 79:14 90:24 93:3 94:12 97:13,19,21 100:21 102:21 105:3,5 106:25</p> <p>issued ^[2] 95:23,25</p> <p>issues ^[3] 33:4,9 87:18</p> <p>itself ^[3] 49:11 60:2 73:3</p> <p>IV ^[8] 66:8 67:5 79:10 101:11,14,15 103:4,12</p>	<p>judgments ^[1] 71:22</p> <p>junctions ^[1] 51:23</p> <p>jurisdiction ^[7] 18:17 70:23 79:19 83:3 98:14,19 108:20</p> <p>jurisdictional ^[14] 4:3,14 23:7 46:24 49:13 60:10,12 63:14 65:7 84:5 85:1,3 89:13,25</p> <p>jurisprudence ^[1] 23:18</p> <p>jury ^[16] 3:15 8:14,15,18,22 9:9 10:1 58:6 76:20 77:16,25 78:4,10 104:15 106:2 107:3</p> <p>jury's ^[2] 71:15 72:24</p> <p>JUSTICE ^[319] 3:3,9 5:7,14 6:7 7:1,6,13 8:12 9:18,21,25 10:7,10,14,18 11:4,6,11 12:9,15,19,23 13:1,6,11,17 14:8,10,13,14,16,17,18 15:19 16:3,18,20 17:4,16,18 18:11,21 20:2,5,17 21:2,5 22:2,22,24,24 23:1,8,15,22 24:3,7,10,12,15,19,24 25:5,10 26:4,13,16,19,23 27:4,7,10 29:8,12,16,20,24,25,25 30:1,1,3,5,5,7,8,9,9,11,12,19,23 31:2,4,20 32:2,8,9,13,16 33:18,25 34:1,6,18 35:2,6,13,25 36:7,15 37:2,23 38:5,10 39:3,5,10 40:15,17,22,24 41:12 42:10,14 43:6,14 47:21 44:2,10,18 45:1,16 46:1,18 47:4,5,7,8,9 48:4,5,14 50:3,5,6,17 51:4,6,18 52:3,19 53:9,9,10,11,18,22 54:6,9,21,25 55:3,5,13 56:5 57:3,4,4,5,6,13 59:11,12,12,14,17 60:11,17,23 61:4,8 63:9,20 64:9,21,21,23,24 65:20,24 66:6,15,19,24 67:19 68:7,12,25 69:3,5,9,14,19,20 70:4 72:2,18 73:9 75:15,16,17 76:7,17 77:8,19 78:6,20,22,24,25 79:21 80:1,4,7,8 81:6,16,23 82:1,4,11 84:1,11,25 85:4,18,22 86:2,5,10,13,18,20,24 87:3,7 89:11,24 90:4,7,12 99:1,11,12,13,15,18 100:8,16,19 101:1,5,10,24 102:23 103:2,21 104:2 107:14,15 108:5,9,12,23,25 109:3,18</p> <p>jail ^[14] 28:8 35:17 50:25 56:1 74:16,19,21 110:6 111:3,17,23,25 112:8,13</p> <p>jazz ^[1] 111:9</p> <p>Johnson ^[1] 22:19</p> <p>Joint ^[5] 5:18 28:7 35:15 51:19 110:12</p> <p>judge ^[1] 55:21</p> <p>judgment ^[10] 1:25 2:12 34:15 36:22 37:17,20 38:19 70:3 109:16 112:20</p>	<p>3,17 106:22 107:6 110:14</p> <p style="text-align: center;">K</p> <p>Kagan ^[50] 29:25 40:15,17,22 41:12 42:10,14 43:6,14,21 44:2,10,18 45:1,16 46:18 47:7,9 57:4 67:19 75:15,17 76:7,17 77:8,19 78:6 80:8 87:20 88:5,8 91:1,4 92:9,12,25 93:9,13 94:16 95:8,15,16,22 96:2,8,11,18,22 99:9 104:8</p> <p>Kagan's ^[1] 69:1</p> <p>Kavanaugh ^[11] 30:2,6 47:5 57:5,6,13 59:11 104:9,10 106:1 107:8</p> <p>keep ^[3] 39:20 50:20,20</p> <p>keeps ^[1] 94:2</p> <p>key ^[1] 58:5</p> <p>kind ^[8] 41:23 42:18 47:18 56:3 63:18 64:3 69:13 86:3</p> <p>Kindler ^[2] 21:20 89:8</p> <p>kinds ^[1] 84:16</p> <p>King ^[1] 73:25</p> <p>kitchen ^[1] 47:14</p> <p>knife ^[8] 3:24 5:1 28:25 79:2 80:23 81:20,21 110:14</p> <p>knowledge ^[3] 4:1 39:6,13</p> <p>known ^[7] 28:21 44:15 46:6 56:8 71:6 73:22 104:16</p> <p>knows ^[3] 55:24 56:2 106:2</p> <p>Kyles ^[2] 80:18 112:2</p>	<p>leaving ^[2] 25:13 70:23</p> <p>led ^[2] 10:4 58:16</p> <p>left ^[1] 14:20</p> <p>legal ^[4] 11:21 83:18 93:2 95:23</p> <p>Legions ^[1] 11:1</p> <p>legislature's ^[1] 6:1</p> <p>length ^[2] 80:25 81:2</p> <p>lengthy ^[1] 37:1</p> <p>leniency ^[1] 9:5</p> <p>letter ^[2] 6:6 50:9</p> <p>level ^[1] 14:25</p> <p>liar ^[1] 76:5</p> <p>lie ^[7] 9:1 58:6 76:1 77:11 78:9,11 106:3</p> <p>lied ^[10] 3:14 9:1,10 75:18,21 76:25 79:2 80:13 104:16 106:4</p> <p>lies ^[3] 58:1 77:22 80:15</p> <p>light ^[4] 37:10 52:15 56:10 73:20</p> <p>lightly ^[1] 32:19</p> <p>likely ^[5] 57:7 64:5 105:23 106:2,13</p> <p>limited ^[1] 21:7</p> <p>lithium ^[23] 3:17 8:16,19 9:22,23 10:1 13:2 18:23 29:22 34:21 35:19 36:9 46:7 53:5 71:8 72:22 73:3,23 74:19 75:25 78:19 111:1,14</p> <p>litigant ^[1] 87:10</p> <p>little ^[4] 42:25 45:25 66:7 93:19</p> <p>logically ^[1] 58:15</p> <p>long ^[8] 4:11 15:2 18:9,13 26:19 47:24 59:19 96:16</p> <p>longer ^[2] 99:4,7</p> <p>longstanding ^[1] 54:17</p> <p>look ^[23] 14:5 18:13 25:1 37:9 38:16,22 39:16,18 42:19 46:23 51:12 61:14 73:24 83:13 90:16,20 97:1,12 100:14 108:10,13 110:5,11 149:6</p> <p>looked ^[4] 34:13,14,18 89:9</p> <p>looking ^[13] 12:5 35:20 40:19 56:18,19,20 63:21 79:13 84:19 89:1,2,5 98:2</p> <p>looming ^[1] 98:5</p> <p>lost ^[1] 79:22</p> <p>lot ^[10] 10:18,19,20 11:13 18:24 20:10,24 63:13 66:21 67:24</p> <p>lots ^[1] 106:15</p> <p>lying ^[1] 77:3</p>	<p>20 65:13</p> <p>man ^[4] 3:12 62:4 63:15 77:13</p> <p>man's ^[1] 57:1</p> <p>manifest ^[1] 60:3</p> <p>manipulated ^[1] 106:11</p> <p>manipulating ^[1] 105:2</p> <p>manipulation ^[2] 71:13 75:14</p> <p>many ^[4] 48:23,23 77:9 80:20</p> <p>marginal ^[1] 74:7</p> <p>marginally ^[1] 44:16</p> <p>mark ^[1] 34:21</p> <p>markings ^[1] 107:19</p> <p>Martin ^[2] 21:21 89:9</p> <p>material ^[17] 7:22 8:24 19:7 33:15 39:2 40:19 51:10 76:3 80:11 105:14,20,21 110:9,10,18 112:1,3</p> <p>materiality ^[10] 43:9,13 73:10,11 75:6 79:7,15 80:19 81:18 105:25</p> <p>materials ^[3] 13:13 51:15,18</p> <p>matter ^[11] 1:13 8:15 22:7 23:2 26:4 31:20 51:6 53:19 74:14 93:2 95:19</p> <p>matters ^[1] 53:3</p> <p>McCarty ^[20] 21:8,11 22:12 33:2,5 41:20 42:1 48:15 49:5,7 59:14 60:14,19,24 61:12 64:25 84:10 87:14,19 88:4</p> <p>mean ^[66] 26:9 30:14 31:5,23 33:24 36:1,11 37:3,4 38:6,11,16 40:1,3,7 41:13,14 45:11,12,16 49:4,6,21 50:20,23 51:7 52:8,24 53:24 54:19 55:22,23 56:1,15 57:14 58:7 59:18 61:10,14,15,17,22 62:21 66:17 68:8 76:4,6 81:19 84:13 87:8 90:19 93:1,23 94:3,7,9,14 95:10,12 97:23 98:15 102:18 103:19 107:19 108:13,17</p> <p>Meaning ^[5] 24:5 25:11 79:13 91:25 110:19</p> <p>means ^[1] 98:13</p> <p>meant ^[2] 7:11 33:23</p> <p>medical ^[13] 28:23 29:14,18,21 35:11,21 37:10 38:23 39:19,20 56:21 110:6 111:3</p> <p>meet ^[1] 83:15</p> <p>meeting ^[1] 72:5</p> <p>member ^[5] 98:25 99:3,5,5,7</p> <p>memo ^[1] 28:22</p> <p>mental ^[12] 8:4 71:8,10 72:13 74:1,4 75:10,11 105:8,19 106:11,22</p> <p>mention ^[1] 29:13</p>
J	L	M		

Official - Subject to Final Review

<p>mentioned [2] 20:12 80:25</p> <p>mentions [3] 5:20,21 17:23</p> <p>merits [30] 4:6 6:18 10:24 15:17 16:25 17:25 33:5,15 41:25 46:3 47:15 63:19 66:22 68:6,15 70:25 93:17,21,25 94:6 95:11,21 98:10,19 100:2,5 102:7 103:1 109:4,16</p> <p>merits-infused [1] 97:7</p> <p>methamphetamine [1] 58:19</p> <p>MICHEL [89] 1:23 2:10 69:22 70:1,4 72:6,18 73:9 76:6 77:8,20,24 78:13,21 79:16,24 80:3,6,17 81:14,19,24 82:4,11 84:6,21 85:2,12,20 86:1,4,9,11,16,19,21 87:6,8,21,25 88:6,16 89:4,22 90:1,6,11,19 91:3 92:6,10,24 93:11 94:9,18 95:4,15,22 96:5,9,18 97:8 99:2,10,12,14,17 100:7,14,17,20 101:2,6,13 102:18,25 103:11,24 104:23 106:7 107:24 108:3,7,11,17,24 109:2,7 112:18</p> <p>Michigan [3] 18:10 47:23 96:16</p> <p>mid-trial [4] 5:2 8:7 9:13 110:13</p> <p>middle [1] 3:22</p> <p>might [10] 43:6 44:5 67:2,9 77:1,2 79:24 92:3 95:1 99:2</p> <p>Milyard [1] 62:15</p> <p>mind [2] 39:20 50:20</p> <p>minimum [5] 15:19 18:2,3 38:13 101:3</p> <p>minute [1] 6:18</p> <p>misallocated [1] 111:22</p> <p>misapplications [1] 112:14</p> <p>miscarriage [1] 23:22</p> <p>misconduct [1] 55:20</p> <p>miss [1] 26:13</p> <p>missing [1] 26:8</p> <p>Mississippi [1] 22:19</p> <p>mistrial [1] 29:6</p> <p>misunderstood [1] 26:14</p> <p>Mm-hmm [2] 60:11,17</p> <p>mocking [1] 28:11</p> <p>moment [1] 90:13</p> <p>money [1] 106:19</p> <p>Moreover [4] 44:4,5,8 97:12</p> <p>morning [2] 3:4 85:13</p> <p>most [10] 31:13 36:12,14 40:7 44:18 64:5 71:3 88:19 105:3 106:20</p> <p>motion [1] 29:6</p> <p>motive [2] 71:17 106:17</p> <p>move [2] 41:25 68:14</p>	<p>Ms [8] 5:24,25 20:23 28:21 34:19 36:24,25 111:6</p> <p>much [6] 8:22 14:20 58:10 61:9 65:8 81:12</p> <p>multiple [2] 32:20 64:1</p> <p>murder [6] 10:8,13,14 57:21 58:12 70:10</p> <p>murderer [1] 3:13</p> <p>musician [1] 111:9</p> <p>must [9] 21:15 28:1 42:6 45:18 48:6,7,16,16 63:7</p> <p style="text-align: center;">N</p> <p>name [1] 53:20</p> <p>named [1] 87:1</p> <p>names [1] 34:20</p> <p>Napue [53] 4:7 12:6 13:7,21,22 14:4 17:22 25:3,8 26:24 27:16,23 28:2 30:18 32:24 34:17 37:17,21,25,25 40:6 42:25 43:2,4,13,14,25 44:17 45:17,21 47:16 50:13 52:6 56:15 57:12 63:3 64:14,19 76:2,9 78:6 91:18,19,25 92:4,16,22 93:3 100:2 109:6,9 110:17 111:18</p> <p>nature [1] 78:15</p> <p>near-verbatim [1] 16:22</p> <p>neat [2] 93:20,23</p> <p>necessarily [1] 31:21</p> <p>necessary [4] 38:21 40:3 108:8,10</p> <p>necessity [1] 110:3</p> <p>need [8] 26:20 28:24 31:21 37:11 85:19,22,23,24</p> <p>needed [1] 46:6</p> <p>needs [2] 100:21 105:24</p> <p>negligence [1] 75:7</p> <p>never [19] 4:14 5:20,20 9:2 12:17 17:23 20:12 23:11 29:18 35:12 38:9 48:10 50:12 51:21 53:7 75:22 81:8 93:13 107:20</p> <p>new [7] 5:5 33:15 52:10 73:13,14 99:10 110:4</p> <p>next [2] 15:15,16</p> <p>nobody [1] 60:13</p> <p>non-discretionary [1] 22:9</p> <p>non-jurisdictional [15] 30:25 31:10,19 60:1 65:4,9,17,18,22 85:5,10,20 86:6 87:4 88:18</p> <p>non-procedural [2] 65:6,21</p> <p>non-record [1] 12:10</p> <p>none [1] 6:4</p> <p>Nor [1] 4:12</p> <p>notable [1] 80:23</p> <p>note [15] 5:8 18:23 33:20,22 34:19 36:19 70:11 71:1,4,14 72:11 74:12 98:23 110:13 111:10</p>	<p>notes [31] 5:8 7:11,16,18 19:4,5,15 20:23,25 29:1 34:14 35:8,10,21 37:10 38:11,22 40:9 52:15 55:23 56:21 63:22,23 64:2 72:4 74:9,13 78:4 110:13,16,20</p> <p>notes' [1] 107:18</p> <p>nothing [5] 21:1 32:11 71:4,14 110:1</p> <p>notion [2] 74:7 77:18</p> <p>novel [1] 25:14</p> <p>novo [2] 24:21 79:14</p> <p>number [15] 8:2 15:10 17:19,21 18:1 26:2 27:22 28:12 80:13 96:23 110:1,16,17 111:7,8</p> <p>numerous [1] 49:8</p> <p style="text-align: center;">O</p> <p>O'Connor [2] 18:11 43:17</p> <p>oath [3] 28:10 34:10 58:6</p> <p>object [2] 107:21,25</p> <p>obligated [1] 32:25</p> <p>obligation [7] 8:1 14:1,5,6 40:10 56:16 112:6</p> <p>obligations [1] 104:14</p> <p>oblique [4] 43:8,8,12,16</p> <p>observed [1] 87:16</p> <p>obstacles [1] 33:1</p> <p>obtain [2] 100:17,20</p> <p>obvious [2] 57:15 111:15</p> <p>OCCA [2] 53:14 59:25</p> <p>occasions [1] 49:9</p> <p>occur [1] 31:5</p> <p>occurred [2] 25:8 34:17</p> <p>October [1] 1:11</p> <p>odd [2] 77:20 102:6</p> <p>oddity [1] 102:10</p> <p>off-ramps [1] 80:20</p> <p>offense [1] 16:15</p> <p>offered [1] 65:10</p> <p>office [4] 60:19 112:7,8,9</p> <p>okay [23] 10:16,17 12:5 22:23 26:14,15,18 27:5,9,20 32:2 43:14 59:11 60:18 63:20 64:9,9 92:9 97:4 99:9 100:16 101:1,5</p> <p>OKLAHOMA [64] 1:6 3:5,13 11:1,23 12:14 13:14 14:22 16:4 17:8 19:17 21:9,15 22:11 23:9,17 30:24 31:6,12,16,22 39:22 40:11 41:2,15 42:20 48:7,8,9,13 49:8,16 61:25 62:22,23 65:3,15 67:24,24 69:18 70:6 75:9 81:14,24 82:16,17,21 83:10,23 84:17 85:14 86:8 87:12 88:12,17 90:14 101:19 102:1,16,20 103:15,16 106:7 111:15</p> <p>Oklahoma's [3] 66:1 85:7 90:15</p> <p>once [2] 11:6 79:6</p> <p>one [78] 3:12 5:12 7:21 9:3,</p>	<p>7 12:20 15:8,8 16:6 17:19,21 18:2 20:11 21:6 22:2,6 26:2 27:22 28:12 29:12 33:12 37:4 39:23 41:6 45:23,25 48:15,17,18,20 50:6 53:11 56:17 57:19 58:5 63:22 66:4 67:9 68:4 69:7 75:3,20 76:4 77:11 79:12 80:15 82:2,15 83:22 84:8 85:1,3 86:10,11,12,13,15,21 87:22 88:3,12 90:22 92:6,13 93:24,24,25 94:3,11 96:23,23 97:21,22 104:23 106:19 110:1,16 111:7</p> <p>only [32] 6:8 8:24,25 11:7,12 12:12 20:12 28:14 39:23 40:20 43:3 45:17 57:22 59:2,15,24 62:7 64:25 67:8,13 82:15 84:13 87:11 90:22 92:14 106:3,18 107:4,6 111:17 112:3,3</p> <p>opening [1] 5:9</p> <p>opens [1] 58:22</p> <p>opinion [24] 4:6 14:23 15:10 18:11 25:21 41:3,9,10 46:25 48:20 60:6 66:1 69:2 83:18 92:7 93:1,6,24 94:13,19 95:24,24 96:7 97:18</p> <p>opportunity [2] 7:10 34:5</p> <p>oppose [1] 37:8</p> <p>opposed [3] 8:17 32:21 41:8</p> <p>opposing [1] 88:15</p> <p>opposite [2] 27:24 96:17</p> <p>oral [8] 1:14 2:2,5,9 3:7 28:18 32:14 70:1</p> <p>order [6] 3:23 13:7 38:19 50:7,10 93:21</p> <p>ordinarily [1] 68:9</p> <p>ordinary [2] 42:17 67:17</p> <p>original [1] 37:6</p> <p>other [32] 4:15 5:19 15:8,10 20:24 21:6 27:17 39:2 44:25 48:18 51:15 58:8,22 66:4 67:25 70:24 71:16 72:9 73:3 79:1,5,8 80:14,22 86:13 87:11 90:13 97:17 98:16 102:6 106:15 112:2</p> <p>others [1] 88:21</p> <p>otherwise [1] 59:18</p> <p>ought [1] 19:13</p> <p>out [16] 7:10 36:2 42:17 47:20,21,21 52:21 54:22,24 57:14,15 58:7 67:12 75:7,7 84:10</p> <p>outcome [3] 9:19 100:23 101:8</p> <p>outset [1] 73:22</p> <p>outside [1] 80:13</p> <p>over [8] 4:16 29:18 40:11 51:10,24 70:6 83:3,4</p> <p>overcome [4] 15:3 17:12 69:12 100:12</p> <p>overcomes [3] 14:24 15:</p>	<p>14 69:16</p> <p>overstate [1] 51:25</p> <p>overwhelming [2] 75:3,5</p> <p>own [12] 4:22 7:17,17 10:16 32:25 34:15 35:24 36:6 37:17 73:19 76:12 77:4</p> <p style="text-align: center;">P</p> <p>PAGE [12] 2:2 5:18 18:5 28:7 35:16 73:24 75:10 82:22 106:9 110:11 112:11,12</p> <p>pages [5] 41:2 91:5 95:9,13 97:7</p> <p>paragraph [33] 14:23 15:22,22 16:4,21 17:1,23 25:20 43:2,7,21,22,25,25 44:14 47:2,3 60:5 69:10 91:7 92:11 93:7,14 94:13 96:20,21,22,23,25 97:3,11 98:11 112:12</p> <p>paragraphs [6] 15:16,17,20 16:25 44:19 97:18</p> <p>pardon [1] 111:21</p> <p>parse [1] 76:18</p> <p>part [3] 25:13 36:22 65:24</p> <p>particular [2] 90:16 97:11</p> <p>particularly [6] 52:15 55:21 71:15 72:10 76:22 109:11</p> <p>parties [4] 30:24 67:17 71:19 98:8</p> <p>partly [1] 82:13</p> <p>party [13] 22:10 23:10 24:2 31:10,17 41:16 49:16 59:18 60:8 65:6 85:7,9 88:13</p> <p>past [9] 23:2 26:16,19 32:7 48:23 50:1 70:6 89:7 104:12</p> <p>patient [1] 74:1</p> <p>pattern [3] 81:13,16,20</p> <p>PAUL [3] 1:20 2:6 32:14</p> <p>PCPA [2] 10:21 12:2</p> <p>pellucid [2] 92:8,11</p> <p>penalty [3] 16:16 58:13 77:15</p> <p>pending [1] 53:15</p> <p>penultimate [1] 32:21</p> <p>people [3] 51:22 54:3 82:2</p> <p>perfect [3] 41:20 61:15 69:12</p> <p>perhaps [3] 71:3 73:18 85:13</p> <p>perjured [3] 3:20 37:18 39:17</p> <p>perjures [1] 58:1</p> <p>perjury [2] 56:25 59:9</p> <p>permitted [1] 51:11</p> <p>person [5] 57:20,21 75:20 81:11 87:1</p> <p>personal [1] 111:10</p> <p>petition [4] 32:22 61:21 63:4 86:23</p> <p>Petitioner [24] 1:4,19,22 2:4,8,15 3:8 32:15 70:11,23</p>
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Official - Subject to Final Review

<p>71:5,6,9,17 72:13 73:22 74:3 75:6 76:15 78:2 98: 15 105:1 106:16 109:23 Petitioner's [7] 70:8,15 71: 3 75:13 105:6 107:3 109:8 petitioner-friendly [1] 22: 6 physically [1] 18:5 piece [3] 47:20,21 104:19 place [4] 5:7 50:22 51:12 71:25 plausible [3] 36:12 56:10 64:1 please [5] 3:10 32:17 40: 17 70:5 95:3 point [3] 5:11 18:22 20:5,6 30:24 35:25 36:8,16 37:4, 5 41:16,24 44:25 45:2 49: 2 50:6,25 52:1,11,20,24 58: 9,10 61:11 72:16 74:2 80: 12,24 81:1 87:10 94:15 102:19 104:13 pointed [2] 84:9,9 points [7] 17:19,20 76:22 79:23 80:2 103:11 109:25 police [2] 57:22 112:5 position [7] 23:6,7 55:21 59:1 68:3 81:3 90:3 positions [1] 52:25 possession [2] 39:12 106: 17 possible [2] 47:9,10 possibly [2] 89:14 99:25 post [1] 23:20 post-conviction [10] 7:24 23:21 45:8 61:2 81:4 82: 20 83:4 86:22 91:14 100: 20 poster [1] 59:5 potential [1] 92:7 potentially [1] 66:5 power [1] 23:20 powerful [1] 62:9 powerless [1] 23:25 practice [10] 31:12,21 41: 20 50:2 67:17 84:3 85:7, 24 90:16,21 preceded [1] 16:25 precedent [1] 4:17 precedents [1] 15:25 precise [1] 50:21 preclude [1] 4:11 predecessor [2] 33:2 103: 12 predicated [1] 19:20 premise [1] 109:8 preponderance [2] 64:4,8 preposterous [1] 28:4 prescribed [6] 3:17 8:17, 20 72:22 73:2 111:14 prescription [1] 75:23 presence [1] 81:11 present [5] 19:20 63:8 81: 9 98:22 109:11</p>	<p>presentation [9] 22:10 23: 11 24:2 31:17,18 41:17 49: 16 59:18 60:8 presented [3] 16:7 19:22 74:6 press [1] 68:13 Presumably [1] 79:2 presumed [1] 77:10 presumption [1] 18:17 pretend [1] 19:3 pretty [9] 19:1 43:24 65:8 76:3 78:7 87:22 92:11 93: 7 107:16 prevails [1] 103:1 prevalent [1] 106:25 previous [1] 102:11 previously [2] 3:18 16:7 principle [4] 21:23 31:16 41:15 65:1 principles [1] 49:17 prior [8] 4:1,16 22:18 48:20 79:11 81:8 93:14 94:10 prison [3] 3:16 20:21 39:12 probability [1] 58:3 probably [1] 105:2 problem [8] 28:25 30:21 50:11 58:10 65:25 67:16 68:4 110:15 problems [3] 35:6 58:8 78: 2 procedural [9] 10:24,25 11:12 14:24 15:3,12,15,24 16:23 17:12,23 18:7 21:13 22:17,20 25:16,18 26:17 30:14,25 33:1,6 41:17 42: 5,8,8 43:5,9 44:6,22 46:24 47:3,17 48:1,2,6,7 49:19 59:19 60:21 62:11,11 65:4, 9 66:3 67:3 68:13,23 75:4 82:8,17,24 83:8,11,15,22 84:4,15,15,18 85:6,10,17, 21 86:7 87:5,14,17 88:14, 18 89:19 90:14 92:3,15 93: 4,12,22 94:1,15,20 95:4,11, 20 98:9,13 100:4,11,25 102:3,9,12 104:12 procedure [1] 65:3 proceed [2] 31:6 42:22 proceedings [1] 7:24 process [10] 4:21 28:15 52: 21 53:1,3,3 59:7 63:7,17 110:4 produce [1] 28:17 progeny [2] 14:5 28:3 promise [1] 9:5 prong [9] 27:2 32:4 43:9 46:15 83:16,17 91:2 101:4, 9 prongs [2] 16:22 25:17 proper [1] 109:14 proposition [5] 21:15 27: 24,25 48:15 89:20 pros [1] 63:1 prosecuting [1] 6:13</p>	<p>prosecution [9] 3:19 9:6 27:25 28:17,19 59:3 110:8 112:6,10 prosecution's [5] 71:12 75:12 76:16 105:10 106: 10 prosecutions [1] 68:5 prosecutor [29] 3:25 5:2 7: 21 8:6 9:13 13:24 14:1,6 19:23 28:14 29:5 34:16 39: 6,13 53:20 54:1 56:1,6,20 63:1 64:12,12 66:25 76:1 78:8,12 79:1,3 111:15 prosecutor's [3] 39:11 111:24 112:4 prosecutorial [1] 55:19 prosecutors [14] 5:12 6: 11 32:25 33:19 34:2 37:18 50:9 51:8 53:12 55:20 56: 25 58:9 72:3 104:13 prove [1] 109:9 provide [4] 8:1 17:13 28:3 98:7 provided [4] 5:21 6:5 7:4 53:14 provides [1] 19:1 provoked [1] 79:3 psychiatric [6] 3:15 8:11 9: 11 28:10 58:18 64:6 psychiatrist [19] 3:17 4:24 8:17,20 9:2 53:8 55:25 72: 22 74:9,16,22 75:22,24 76: 14 78:3 106:23 107:7,20 111:17 public [2] 98:8,8 purposes [1] 51:3 pursue [1] 70:23 put [1] 37:4 puts [1] 62:6 putting [1] 63:24</p>	<p style="text-align: center;">R</p> <p>raise [4] 31:11 42:6 105:17, 18 raised [3] 13:19 97:14 100: 22 ran [1] 112:8 rare [3] 42:18 46:15 73:19 rarely [1] 42:15 reach [5] 23:2 24:20,20 94: 3 109:16 reached [7] 11:21 32:23 38:1 56:23,24 78:5 93:3 reaches [1] 70:25 read [16] 15:6 18:24 19:4,5, 6 21:8,14 43:11,12 45:25 52:15 82:14 91:5 92:7,13 104:25 reading [3] 66:8 94:22 98: 3 ready [1] 61:11 real [2] 61:16 67:15 really [6] 8:21 11:11 41:1 62:9 66:25 107:24 reason [9] 7:8,14,19 11:16 68:17 87:19 90:15 94:14, 19 reasonable [10] 16:9,14 25:21 58:3 64:17 70:17 78: 9 95:5 97:15 98:3 reasoning [2] 19:25 21:11 reasons [6] 20:11 24:25 31:7 58:4 67:10 98:7 REBUTTAL [3] 2:13 109: 21,22 receive [1] 34:4 received [5] 29:1 47:6 71:7 74:19 83:9 recitation [1] 16:22 recognize [1] 93:5 reconcile [1] 74:11 record [16] 4:23 6:24 19:8 20:7,19 25:1 28:8 34:7 36: 6 52:12,14,16 63:25 72:4 74:11 109:13 records [13] 8:4,5 29:14,18, 21 37:20 39:12,19,21 111: 3,23,25 112:13 recused [1] 99:4 red [1] 74:5 Reed [1] 97:20 ReedSmith [1] 54:4 reference [3] 43:8,12 44:6 references [1] 43:16 referring [2] 91:13 111:9 refers [1] 47:2 reflect [2] 64:5 110:17 reflected [2] 20:22 21:18 reflection [1] 105:5 refusal [2] 25:14 32:5 refused [1] 61:5 regarded [2] 8:15 73:1 regretfully [1] 56:24 regularly [3] 21:24 22:21</p>	<p>49:24 reinforce [1] 71:11 reinforced [1] 75:12 reinitiate [1] 59:6 reiterated [3] 18:10,12 22: 15 reject [4] 31:8 61:13 68:20 91:23 rejected [9] 31:24 70:15 86:7 87:4,24 88:3 90:14 102:13 107:3 rejecting [4] 4:13 47:12 89: 20,22 rejects [1] 90:17 relate [1] 106:16 relates [1] 45:2 relating [1] 111:4 relatively [1] 87:10 relax [1] 49:11 relevant [7] 27:6 44:16 55: 10 67:2 89:12 90:25 110:9 relief [10] 17:13 23:21 45:8 70:24 81:4 83:4 86:22 91: 15 98:17 100:21 relies [1] 19:7 relinquishing [2] 62:17 68: 22 relinquishment [1] 62:14 reluctantly [1] 32:23 rely [3] 18:22 21:10 71:19 relying [2] 18:15 65:2 remand [3] 5:4 19:9,12 remedies [1] 98:16 Remember [4] 74:18 76: 16 101:15 103:19 removed [1] 66:18 rendered [1] 16:16 repeated [1] 15:21 repetitive [1] 64:11 replaced [2] 99:5,8 report [7] 71:7 72:14 73:25 74:18 110:6,7 112:10 representing [1] 67:24 reputations [2] 6:9 34:3 request [9] 3:25 5:2 8:3 28: 12 29:14 37:6 40:13 45:4 47:12 required [3] 4:11,16 28:14 requirement [4] 16:11 26: 9 38:14 49:13 requirements [5] 16:5 17: 8,10 83:18,20 requires [1] 28:17 rescheduled [1] 98:20 rescue [1] 43:18 resist [3] 37:12 38:17 52:1 resisted [1] 29:17 resolution [2] 33:4 43:3 resolved [2] 37:25 94:12 respect [14] 7:14 15:23 17: 19 18:3 26:3 28:5 30:20 50:7 51:17 57:10 84:6 90: 17 96:19 110:19 respectful [3] 33:3 55:4,18</p>
Q				
<p>question [44] 14:15 21:6 24:21 26:5,14,21 27:2,21 34:21 37:24 39:16 48:8,13 49:2,20,25 56:13,14 62:16 63:16,17 64:24 67:9 69:1 71:9 73:11 74:24 75:18 76: 11,20 78:18 79:22 81:21 85:6 87:21,22 88:25 89:15, 18 94:10 96:5 105:7 108: 18 111:20 questioned [2] 111:7,13 questioning [1] 106:6 questions [12] 5:6 10:15 14:12,21 33:17 40:23 55: 10,13 72:1 77:17 107:17 111:4 quickly [1] 98:7 quintessential [1] 15:1 quite [6] 5:8 35:22 83:9 90: 25 96:17 101:21 quote [1] 15:24 quoting [1] 18:12</p>				

Official - Subject to Final Review

<p>respectfully [2] 94:22 97:8 respects [2] 41:21 92:8 respond [2] 73:7 94:10 Respondent [4] 1:7,21 2:7 32:15 response [3] 29:5 67:19 82:10 responses [2] 72:25 76:7 responsibility [1] 112:21 responsible [1] 101:22 rest [4] 44:14 46:8,10 97:6 rested [1] 75:20 result [5] 57:7,9 58:4 78:5 105:22 resulted [1] 23:22 resulting [1] 33:8 results [1] 34:14 revealing [1] 3:14 reveals [1] 64:1 reverse [1] 5:4 review [9] 4:3,11 24:4,8,13 32:23 34:13 63:21 82:20 reviewed [1] 70:7 reviewing [1] 98:4 revive [1] 80:4 RICHARD [2] 1:3 3:11 rigid [1] 85:15 rise [1] 14:25 road [1] 79:17 roadmap [1] 74:17 robberies [1] 81:8 robbery [2] 81:9,12 ROBERTS [22] 3:3 8:12 14:10 22:24 29:25 30:3,5,9 32:9,13 50:3 53:9 57:4 59:12 64:21 69:20 72:18 104:3 107:10,13 109:19 112:16 routinely [2] 24:2 31:6 rule [18] 21:19,21 22:4,4,9,10,17,20 23:25 31:21 32:3 49:22,23 55:9 85:15,23 108:12,14 ruled [1] 23:3 ruulings [1] 79:11</p> <hr/> <p style="text-align: center;">S</p> <p>salient [1] 25:25 same [5] 69:7 72:5 74:24 83:21 87:9 sample [4] 82:14 84:12 88:24 89:14 satisfied [9] 17:11 38:18 55:14 75:5 83:19,21 97:10 102:25 103:25 satisfy [1] 109:15 saw [8] 9:2 50:12,15 75:22 76:13 78:3 107:7,20 saying [19] 7:7 28:24 37:23 38:10 45:19 47:14,16 51:12 53:6 60:21 67:11,25 80:9 84:2,25 85:2 90:1,5 102:24 says [38] 15:14 18:23 20:15 23:20 26:5 27:17 31:10 36:</p>	<p>2,25 42:4 43:18 44:9 56:6,6 61:24 62:10 68:14 69:11 72:12 73:25 74:18 76:1,21 78:8 83:14 85:23 88:12 91:20,24 96:21 97:10,12 100:17 101:2,6,13 110:25 112:13 scheduled [1] 98:21 second [6] 34:13 35:9 50:22 58:14 67:6 81:11 second-most [1] 106:25 seconds [1] 78:19 Section [1] 28:16 see [4] 17:14 35:3 47:15 50:9 seek [1] 28:1 seem [6] 6:7,10 30:21 46:16 52:4 66:1 seemed [1] 10:24 seems [10] 30:12 34:2 35:22 39:18 58:2 76:3 87:10 102:6,10 107:15 seen [4] 9:10 53:7 58:6 88:2 send [2] 38:6,7 sense [2] 7:7 105:21 sent [1] 28:22 sentence [11] 15:6 43:7 44:4,5,5,21 45:25 92:25 93:24,25 97:12 sentences [1] 93:23 separate [5] 4:10 18:19 68:21 70:8 75:17 sequencing [1] 61:1 sequestration [1] 3:23 seriatim [1] 14:12 series [1] 19:21 serious [1] 60:3 SETH [5] 1:18 2:3,14 3:7 109:22 seven [1] 96:23 several [4] 27:23 79:17 84:9 89:7 she's [4] 6:5 37:2 51:22 111:12 sheds [1] 73:20 sheet [10] 35:12,14,22 36:1,2 37:10 38:23 51:3 52:16 56:22 sheet's [1] 35:15 sheriff [3] 36:2 112:8,10 sheriff's [2] 112:7,8 shielded [1] 33:10 short [2] 20:7 109:25 shorthand [1] 56:3 shortly [1] 14:11 shouldn't [4] 19:9 20:6,10 34:2 show [7] 7:16 17:5 65:15 70:17 75:21 100:21 105:24 shown [1] 86:6 shows [3] 4:23 35:16 80:15</p>	<p>side [1] 27:17 significance [1] 73:2 significant [5] 9:17 44:20 77:16 78:11 107:16 silent [1] 8:9 simple [1] 87:22 simply [7] 21:12 22:13 28:4 34:24 36:1 73:6 74:21 since [6] 22:16 71:6 73:22 74:20 87:19 98:24 single [1] 49:1 sink [1] 47:14 situation [2] 66:9 86:25 six [2] 70:8 96:23 sixth [1] 98:5 size [4] 82:14 84:12 88:24 89:14 slate [1] 77:10 small [3] 82:14 84:12 89:14 Smothermon [16] 5:9,24,25 20:23 34:19 36:24,25 51:21 53:21,22 56:13 110:12,13,20,22 111:6 Smothermon's [3] 28:21 40:8 63:22 Sneed [34] 3:12,14,23 4:25 8:2 13:2 28:13 29:3 34:25 35:1,2 40:10 50:23 57:20 71:8,12 73:23 74:19 75:1,10,12 76:13 77:17 78:1,3,17 81:9,12 104:16 105:2 106:16 107:6 111:1,12 Sneed's [13] 3:20 4:22 8:7 28:23 58:16 59:9 71:10 74:3 101:3 105:7,19 106:22 107:19 sole [1] 55:25 solicited [1] 28:9 somebody [1] 58:21 somehow [1] 100:12 someone [2] 8:18 72:23 sometimes [1] 48:11 somewhere [2] 63:8,19 Sorry [14] 7:2 10:9 14:17 30:3 40:17 78:23 86:16,17,19 94:24 99:1,12,13,15 sort [8] 38:14 45:5 65:14 69:2,6 78:12 102:14,14 sorts [1] 106:5 SOTOMAYOR [74] 9:18,21,25 10:7,10,14,18 11:4,6,11 12:9,15,19,23 13:1,6,11,17 14:8,19 22:25 23:1,8,15 24:3,7,10,12,15,19,24 25:5,10 26:4,13,16,19,23 27:4,7,10 29:8,12,16,20,24 39:3,5,10 53:10,11,18,22 54:6,9,21,25 55:3,13 56:5 57:3 75:16 78:22,25 79:21 80:1,4,7 81:6,16,23 82:1 94:24 104:7 Sotomayor's [1] 30:23 sought [1] 7:10 specifically [2] 6:14 69:11</p>	<p>speculate [1] 9:8 speculative [1] 73:18 spell [2] 57:14,15 spend [1] 15:15 spent [1] 10:19 spilt [2] 10:20 11:13 splice [1] 41:10 splicing [1] 41:9 square [1] 34:7 squarely [4] 82:16,18 97:19 98:12 stab [1] 29:4 stabbed [1] 9:15 stand [13] 9:4 27:23,24 35:10 49:6 58:1,2 59:10 75:19,22 76:25 104:17 106:4 standard [16] 31:12 43:13 57:11 60:15 61:20 63:21 64:4,11,16 80:20 95:17,20 97:4,5,9,10 standing [1] 107:25 standpoint [1] 30:22 stands [3] 43:3 49:15 60:14 start [5] 45:5 46:1 84:22 92:15 109:7 started [1] 96:3 starting [2] 55:22 77:9 starts [1] 95:16 state [75] 4:16 7:15 10:22 12:1 15:12,24 16:6,23 18:7,13,16 21:12 22:16,17,18,20 23:19 24:17 25:18,22 26:5 28:15 37:7 41:1,7,18,24 42:5,9 45:6,9,16,20 48:19 49:19,22 50:24 51:2 57:19 62:12,13 63:1,3 68:1 70:16,24 75:4 79:20 80:25 81:1 82:6 83:2 91:10,16 93:15,20 95:1,2,5,12 96:6,16 97:4,9,20,21,23,24 98:13,16 101:6 102:21 103:20 106:23 108:21 State's [22] 4:13,22 21:10 23:6 25:15 28:11 32:25 33:12 36:6 41:23 45:4,9 47:12 48:1 49:7 91:20,25 92:4,16,21 93:15 95:18 statement [9] 4:8 5:10,11,17 6:17 15:2 79:4 103:8 107:19 statements [6] 8:2 15:23 28:13,18 40:12 72:3 STATES [2] 1:1,15 stating [1] 18:17 statute [12] 17:8 43:10 47:17 84:22 85:1,3 88:1 89:3,5,12,17,25 statutes [2] 90:16,18 statutory [3] 23:24 28:16 60:3 steps [1] 79:17 still [9] 17:12 18:15 52:9 62:5 63:25,25 91:6 102:9 104:</p>	<p>14 stood [1] 8:9 stop [2] 78:8,12 stories [1] 52:10 story [2] 51:23 54:12 straight [2] 24:15 64:18 strategic [2] 105:6,13 strategy [1] 75:8 strictly [1] 22:21 striving [1] 96:19 strong [4] 95:23 103:16 105:19,20 stuff [1] 95:20 subject [1] 81:4 submitted [4] 12:23 34:9 112:17,24 submitting [1] 52:9 subsequent [1] 14:4 substance [6] 8:1 13:18 28:12,18 44:20 71:5 substantial [2] 25:17 26:11 substantive [5] 11:8,21 23:23 93:2 95:17 succeeded [2] 17:1 29:17 succinctly [1] 25:6 sufficient [4] 16:12 61:19 62:17 72:24 sufficiently [1] 36:25 suffused [1] 4:6 suggest [3] 6:12 7:9 44:6 suggested [1] 12:18 suggesting [1] 93:10 suggests [2] 81:10 110:25 support [14] 1:21,24 2:8,12 4:16 22:18 25:2,17 26:12 32:15 70:3 81:2 105:9 112:20 supported [1] 19:24 supports [2] 91:19 100:23 suppose [1] 42:14 supposed [2] 63:1 64:3 supposition [1] 25:23 suppressed [5] 3:19,21 4:23 110:7,16 SUPREME [3] 1:1,14 24:17 surely [2] 20:13 74:5 surprise [1] 61:9 susceptible [1] 15:7 sworn [2] 4:22 5:17 systemic [1] 62:20</p> <hr/> <p style="text-align: center;">T</p> <p>table [1] 37:5 tails [1] 34:20 talked [7] 12:21 36:24 51:22,22 54:3 57:22 66:7 tangential [1] 78:17 tells [4] 29:6 77:23 95:17,19 Tenth [2] 49:18 60:21 terms [3] 42:20 76:12 93:11</p>
---	---	--	--	---

Official - Subject to Final Review

<p>testified [2] 28:23 78:18 testify [1] 9:4 testifying [1] 77:14 testimony [23] 3:23 4:22 5:1 8:8,9,10 9:11,14 13:12 29:3 37:19 39:17 51:11 56:19 58:11,16 59:9 75:20 76:10,11,13,19 80:16 themselves [2] 7:2,8 theory [6] 71:12 75:12 76:15 105:10 106:10,12 There's [44] 4:21 10:18 11:17,19 14:20 17:5 20:18 27:16 35:3,5,11 37:11 38:9,23,24 39:23 40:10 42:16 44:21 47:17 48:22 50:14 55:15 56:12,13,14 57:18,24 58:11 60:2 61:12 62:16,20 64:19 66:21 68:4 79:19 82:15 87:11 94:14 96:14,14 104:25 107:16 therefore [3] 46:19 105:6 106:5 they've [4] 23:11 31:24 69:13 74:20 thinking [1] 24:25 thinks [3] 36:19 59:8 72:12 THOMAS [31] 5:7,14 6:7 7:1,6,13 14:16 33:18,25 34:1,6,18 35:2,6,13,25 36:7,15 37:2 38:10 50:5,6,17 51:4,6,18 52:3,19 72:2 104:5 111:21 Thompson [2] 47:24 98:2 thorough [1] 72:10 though [8] 30:21 34:3 36:16 49:4 58:14 65:13 75:18 88:13 three [5] 8:2 10:16 15:16 87:15 88:1 threshold [5] 4:14 71:2 76:8 95:5,7 throwing [1] 47:13 Title [1] 28:16 today [1] 28:24 ton [1] 79:5 took [5] 40:9 47:20,20 71:8 73:23 toothache [1] 33:14 Totally [2] 96:11 97:7 track [1] 67:20 tradition [1] 42:7 transfer [2] 36:9 51:3 transferred [2] 35:17 50:25 transformed [1] 70:12 transport [3] 36:7 50:7,10 transubstantively [2] 85:16 89:2 treat [3] 3:17 49:10 59:25 treated [6] 4:24 33:6 49:18 74:9 75:1,1 treating [3] 49:13 65:16 69:7</p>	<p>treatment [5] 3:16 8:11 13:3 28:11 101:4 Treese [11] 5:22 6:6 12:10 18:25 19:7,13,19 63:24 70:10 72:7 111:19 Trest [4] 42:3 49:17 62:9,9 trial [11] 3:22 5:5 7:12 33:16 50:23 53:4 71:10 74:7 100:24 105:5 110:4 tried [1] 63:5 Trombka [7] 55:25 56:4 74:15,23,24 111:8,17 trouble [1] 104:18 true [8] 11:16 20:18 34:24 42:15 44:7 61:7 94:11 107:20 Trumpet [7] 18:23 55:23 70:12 74:13 111:8,9,14 truth [1] 77:7 try [1] 28:1 trying [11] 59:21,23 62:2 77:3 80:2 86:14 98:6,7 99:24 102:8 108:14 turn [2] 40:11 51:10 turned [2] 29:18 107:5 Twenty-six [1] 97:9 two [40] 6:11 7:24 10:15 12:20 15:7 16:5,22,25 17:8,9,19 18:1 19:25 33:9 34:2,8 35:4 39:1 44:19 45:6 53:12 58:4 62:4 66:2 67:1 68:8 69:13 80:15 81:10 82:2 91:5 93:11 95:7,9,13 97:7 103:11,11 110:17 111:8 two-and-a-half [1] 17:20 twofold [1] 27:21 types [1] 81:10</p> <hr/> <p style="text-align: center;">U</p> <p>ultimate [1] 53:2 ultimately [9] 34:12,16 36:12 37:12 39:15,16 49:20 68:25 98:2 unambiguous [1] 48:23 unanimous [1] 42:4 unanimously [2] 46:22 62:10 unavailable [2] 7:2,9 unbroken [2] 41:20 42:7 uncertainty [1] 96:14 unclear [1] 17:14 under [38] 11:1,5 12:1 15:2, 2 16:5,6 27:13 28:10,15 33:13 34:10,10 35:19 36:9 37:16 39:10,11 40:7,8,10 43:13 57:11,11 58:6 61:20 62:24 67:13 76:2,9,15 85:23 88:1 96:5,10,16 111:18 112:1 undercut [1] 106:12 underlined [1] 74:2 underlying [1] 16:15 underscore [2] 78:16 106:14</p>	<p>understand [19] 38:13 39:25 40:5 49:5 55:9 59:21 67:20 68:7 77:25 84:13 85:12 89:13,17 90:2,8 99:24 100:4 103:6 108:15 understandably [1] 83:9 understanding [9] 24:23 38:7,8 54:10,15 98:18 99:19,20 104:20 understood [2] 99:22 107:22 undiagnosed [1] 3:18 undisputed [1] 3:12 unequivocally [1] 15:11 unexpected [1] 60:16 unexplained [1] 50:1 unforeseen [1] 25:14 unfounded [1] 33:7 UNITED [2] 1:1,15 universe [1] 84:19 unless [4] 21:22 22:21 32:6 95:7 unsworn [3] 6:5,17 13:12 until [5] 17:22 41:16 44:3 50:10 57:21 unusual [5] 45:3 47:11 58:25 82:7,12 unwaiveable [1] 63:14 up [12] 9:4 27:15,17 41:16 52:7 58:22 61:9 64:18 76:24 77:3 105:3 110:2 upheld [1] 70:8 urgent [2] 3:25 5:1 using [1] 33:20</p> <hr/> <p style="text-align: center;">V</p> <p>vacate [2] 38:18 71:22 vacated [2] 100:1 102:9 vacating [1] 70:13 Valdez [5] 23:19 49:9 59:24 60:20 65:13 Van [11] 5:22 6:6 12:10 18:25 19:7,13,19 63:24 70:10 72:6 111:18 various [1] 51:23 versus [12] 3:5 18:10 21:20,21 22:19 23:19 80:18 89:8,9 97:20 98:1 105:12 victim [3] 3:24 9:15 29:4 view [4] 57:6 59:23 65:11 94:6 views [2] 45:20 98:22 violated [1] 47:19 violation [35] 3:22 11:9,17, 19,20 12:1,6 13:7,10,21,21, 23 14:25 17:7 23:12,23 26:24 27:16,16 34:17 37:21, 25 40:6,7 46:5 50:13,15 63:3 64:19 78:7 79:6,12 109:6 110:17 111:18 violations [7] 25:3,8 32:24 35:4 79:1 109:9 110:4 violent [1] 10:5 violently [1] 58:22</p>	<p>Virginia [1] 1:20 visited [1] 20:20 voted [1] 99:6 vulnerable [2] 71:12 75:13</p> <hr/> <p style="text-align: center;">W</p> <p>waive [37] 11:14,15,22 30:24 33:1 41:18 42:9 46:25 49:12,19 60:13,22 62:2,12, 13,23 67:4,17 68:18 70:19 83:11 88:13 90:10 99:23 101:16,21,23 102:2,11,20, 22 103:3,7,10,15,23 104:1 waiveable [6] 11:1 65:4 84:4 89:16,21 90:8 waived [14] 11:7 21:13 30:23 49:14 82:16 84:16,16, 18,24 87:7,13,17 89:19 101:12 waiver [40] 4:13 11:17,18 12:2 21:10 23:13 24:1 25:15 27:8 31:7,18,25 32:5 41:8,13,23 45:4 47:12 48:2,6,16 49:7 61:6,13 65:15 66:4,9 67:20 68:9,20,21 69:17 82:7,23 83:7,25 87:23 88:3 102:17 103:8 waivers [8] 21:16 31:5 65:5 88:2,18,20 90:17 103:18 waives [4] 41:24 42:6 65:6 84:15 waiving [5] 31:11 61:17 68:10,14 83:21 Walker [2] 21:21 89:9 wanted [1] 111:10 wants [4] 37:15 68:18 88:13 109:12 warrant [1] 4:3 warrants [2] 45:7 91:14 Washington [3] 1:10,18, 23 water [1] 66:22 WAXMAN [88] 1:18 2:3,14 3:6,7,9 5:7,13,16 6:16 7:3, 13 8:12,23 9:18,19,24 10:6, 9,12,17 11:3,5,10,24 12:8, 12,17,22,25 13:5,9,16 14:3, 18 15:5 16:17,20 17:15,18 19:11 20:3,9 21:4,17 22:8, 23 23:5,14,16 24:6,9,11,13, 17,23 25:4,9,12 26:7,15,18, 22 27:1,5,9,20 29:10,15,19, 23 30:17 31:1,3,15 32:1,3, 11 34:8 40:24 54:5 72:19 80:24 82:9 109:21,22,24 112:17 way [27] 6:24 19:4,5 21:25 22:6 29:20 44:3 45:2 53:12 58:11 60:7 67:20 74:12 76:19,19 80:19 90:2 91:4 92:7,13,14 95:9,12,19 100:6 110:15,25 ways [1] 60:10 Wednesday [1] 1:11</p>	<p>weeds [1] 61:18 weight [2] 5:8 19:12 welcome [3] 5:6 33:17 72:1 well-known [1] 74:15 whatever [3] 12:15 24:24 58:8 whatnot [1] 38:12 whatsoever [1] 17:24 Whereupon [1] 112:23 whether [50] 9:14 10:3,21 11:8 13:24 14:1 23:3 24:22 25:1,16 34:16 37:18 39:5 40:25 47:4 48:5,6 49:25 50:15 51:7 53:19,23 55:6 62:16 63:13,24 64:24 67:2, 4,6,12 71:21 72:19,21 73:14 76:9,18,25 77:5 82:2 84:23 86:15 88:25 89:12, 15 102:4 105:1 106:23,24 109:5 Whitley [1] 80:18 whiz [1] 46:22 Who's [1] 74:21 whoa [2] 78:8,8 whoever [3] 40:1 47:5,5 whole [7] 10:19 14:19 20:10 58:22 62:25 80:15 104:20 will [12] 3:3 15:15 40:4 46:3, 12 72:11 88:19 98:20,20, 21 101:16 110:2 wishes [1] 18:13 withheld [6] 39:21 79:5,5,9 80:14 81:17 within [1] 62:6 without [4] 4:15 22:17 58:11 109:13 witness [17] 9:4,7,10,12 33:13 57:19,20,25 58:1,5 72:15 76:4 77:10,12,14,21 78:15 witnesses' [1] 40:12 wondered [1] 73:7 wondering [1] 88:24 Wood [2] 62:15 105:12 word [1] 3:12 words [4] 7:17,17 73:3 102:6 world [5] 43:16 61:15,16 85:5 110:6 worry [1] 108:22 wounds [3] 3:24 81:10,21 Wow [1] 78:11 wrestling [1] 43:23 writing [1] 95:23 written [5] 93:6 95:9,13 96:7,12</p> <hr/> <p style="text-align: center;">Y</p> <p>years [13] 4:17 18:9,10 22:11,15 23:10 33:20 41:19 50:24 70:6 84:2,8 87:19</p>
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Z

zenith [1] 55:19

zeroing [1] 59:19