



	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	JEFFREY L. FISHER, ESQ.	
4	On behalf of the Petitioner	3
5	MARTHA COAKLEY, ESQ.	
6	On behalf of the Respondent	28
7	LISA H. SCHERTLER, ESQ.	
8	On behalf of the United States, as amicus	
9	curiae, supporting the Respondent	48
10	REBUTTAL ARGUMENT OF	
11	JEFFREY L. FISHER, ESQ.	
12	On behalf of the Petitioner	58
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-591, Melendez-Diaz v. Massachusetts.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

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

In Crawford v. Washington, this Court made clear that the right to confrontation, at its core, is a protection against a system of trial by affidavit. It is an ancient procedural guarantee that requires the prosecution to prove its case through live witnesses who testify before the jury and who are subject to cross-examination.

Introducing forensic laboratory reports, such as the -- such as the certificates at issue in this case, is the modern equivalent of trial by affidavit. The documents are sworn formal statements. They are crafted purposefully for the express purpose of proving a fact that is an element of a criminal offense, and, as the State forthrightly admits in its brief, they are introduced in lieu of having the analyst called as a witness to the stand. They are therefore

1 quintessentially testimonial evidence.

2 Massachusetts --

3 CHIEF JUSTICE ROBERTS: You say -- you say  
4 "the analyst." I suppose it doesn't have to be the  
5 analyst but whoever they decide to call. So if you had  
6 a supervisor who runs the cocaine testing lab and he is  
7 the one whose report is submitted, I take it he is the  
8 one who would have to show up.

9 MR. FISHER: That's right. Our position --  
10 our position is that whoever the Commonwealth wants to  
11 use to prove the fact that they are trying to prove is  
12 the person that needs to take the stand. In this case,  
13 it would be the analyst.

14 JUSTICE SCALIA: But -- but you would ask --  
15 if a supervisor did it, what would you ask the  
16 supervisor? You'd say, you know, did you -- did you do  
17 this? Can you testify to your own knowledge that this  
18 is what the analysis showed? And he would have to say,  
19 no, it was one of my subordinates who did it, but I can  
20 tell you he was a very reliable person. How would that  
21 -- I don't understand how that would work.

22 MR. FISHER: I took the Chief Justice's  
23 hypothetical to be that the supervisor had actually done  
24 the testing, but if the supervisor had not --

25 CHIEF JUSTICE ROBERTS: No. No. No. No,

1 I'm saying that he would testify, I guess: I run the  
2 lab, these are the people I hire, they know how to  
3 do these tests, and this guy did the test. And since he  
4 was the one that the Government decided to -- on whose  
5 affidavit they decided to rely, that's the only person  
6 you could get.

7 Now, you could -- to impeach him, you say,  
8 well, did you do the test? No. But you say, well --  
9 but I mean you don't have a right to an analyst at a  
10 particular level.

11 MR. FISHER: That's right. There is no  
12 substantive right. I think everything you've said is  
13 right as far as it goes. It just depends what the  
14 Commonwealth wants to put in in terms of evidence.

15 JUSTICE KENNEDY: Well, suppose --

16 MR. FISHER: If they want to put in --

17 JUSTICE KENNEDY: Suppose the tests were by  
18 John Smith, assistant lab technician, and you call John  
19 Smith, and you say, "Is this your signature?" "Yes."  
20 "Do you remember doing this test?" And he says, "I do  
21 thousands of tests. I don't remember. I'll tell you  
22 the way I always do them." I mean, is that what you  
23 want?

24 MR. FISHER: Well, if that's what -- at a  
25 minimum, that's what we want, Justice Kennedy. This

1 Court has made clear in California --

2 JUSTICE KENNEDY: Well, that's what you're  
3 usually going to get, isn't it?

4 MR. FISHER: Well, we don't know what we are  
5 going to get. In some cases, unquestionably --

6 JUSTICE KENNEDY: Well, you know what you're  
7 going to get if you -- if by looking, number one, at the  
8 States which allow this, where this has happened all the  
9 time. You know what you're going to get in the States  
10 where the defendant -- where the defense can subpoena  
11 the witness.

12 Now, if there are new tests, complex DNA  
13 tests and so forth, I suppose there is a lot to ask  
14 about. Standard blood alcohol, not much to ask about.

15 MR. FISHER: But even in a test where the  
16 analyst doesn't remember and, as you put it, is a more  
17 standardized test, there are still plenty of questions  
18 the defendant might want to ask, such as what test was  
19 performed? We don't even know from the record what test  
20 was performed in this case. What's the error rate on  
21 that test? How do your protocols work? What are your  
22 experience and credentials in analyzing those? There's  
23 plenty of questions the defendant might ask.

24 JUSTICE KENNEDY: You can raise all those  
25 questions from the fact of the -- from the document.

1 Tell the jury, "This doesn't show what tests were  
2 performed." It's there on the document.

3 MR. FISHER: Well, I think that's a choice  
4 that defense counsel could make, as the defense counsel  
5 always has a choice in a criminal case to decide whether  
6 to press the prosecution's evidence or to simply stay  
7 silent and then later argue at closing the prosecution  
8 hasn't given you enough to prove the case.

9 But to the extent the Commonwealth is taking  
10 the position that cross-examining would be fruitless in  
11 a situation like this, the very basis of this Court's  
12 Crawford decision is that's not for courts to decide.  
13 It is up to the defense counsel to -- if he wishes, to  
14 insist on live testimony that he can cross-examine and  
15 then --

16 JUSTICE GINSBURG: Well, then why -- why  
17 isn't it an adequate substitute to say that, if the  
18 defendant wants this testimony, the defendant can call  
19 the analyst and cross-examine the analyst as an adverse  
20 witness?

21 MR. FISHER: Well, three reasons, Justice  
22 Ginsburg: First, if that were correct, then I don't see  
23 anything that would stop the prosecution in every  
24 criminal case simply from putting a pile of affidavits  
25 on a judge's desk and saying it's up to the defense to

1 call whatever witnesses he wants and cross-examine them.

2 But even as a matter of text and structure  
3 of the Constitution, as a textual matter, the right to  
4 confrontation is a passive right in the defendant's  
5 hands. It requires the prosecution to arrange for the  
6 confrontation, and that's bolstered structurally by the  
7 Compulsory Process Clause. Remember, the Compulsory  
8 Process Clause gives the defendant the very right that  
9 you just explained, that the defendant can subpoena  
10 witnesses into court and ask them questions. And surely  
11 the Confrontation Clause adds something on top of that.

12 And I think this Court's decision in Taylor  
13 against Illinois is the best explanation of the  
14 difference between the two clauses. This Court said  
15 that the Confrontation Clause arises simply by the  
16 nature of adversary proceedings, and it's a -- it's a  
17 rule that governs the way the prosecution must introduce  
18 its case. As I said at the opening here, it's a  
19 requirement that the prosecution put its live witnesses  
20 on the stand for the jury to observe them. The defense,  
21 of course, has the decision whether to cross-examine  
22 those witnesses, or if witnesses are not called by the  
23 prosecution that he would wish to be part of the case,  
24 he can subpoena them. But we would vigorously oppose  
25 any attempt to shift the burden on the defense to call

1 witnesses like this.

2 JUSTICE GINSBURG: But you would say that  
3 what they call the notice-and-demand type statute, that  
4 that's all right?

5 MR. FISHER: There is a variety of  
6 notice-and-demand type statutes, Justice Ginsburg, and I  
7 think the law professors' brief lays -- lays it out the  
8 best of what you have before you. We agree with the  
9 Solicitor General that a plain notice-and-demand statute  
10 that requires the defense to do nothing more than assert  
11 his right in advance of trial to have the prosecution  
12 put a live witness on the stand would be constitutional,  
13 I think, under this Court's jurisprudence. Under the  
14 Compulsory Process Clause, under the jury right, there  
15 are plenty of constitutional rights that, with fair  
16 notice, a Defendant can be required to assert in advance  
17 of trial.

18 Now, there are other types of statutes that  
19 other States call "notice and demand" that require  
20 something more of the defendant, whether it be that the  
21 defendant himself call the witness, whether it be the  
22 defendant himself make some kind of good faith or prima  
23 facie showing in order to have the prosecution call the  
24 witness. Those types of statutes, I think this Court,  
25 to the extent in this opinion it would mention

1 notice-and-demand statutes, it would want to be careful  
2 to leave for another day, because, again, we would agree  
3 with the Solicitor General that those would raise more  
4 difficult constitutional questions.

5 JUSTICE KENNEDY: Well, in your answer, you  
6 said, well, there would be this stack of affidavits and  
7 that's all the State would have to do. I think, Mr.  
8 Fisher, that was not quite responsive because the  
9 question here is whether or not there is an exception  
10 for business records. Nobody is talking about  
11 affidavits, witnesses, and so forth. We are talking  
12 about business records done in the ordinary course.

13 It's true that it -- that the core principle  
14 is whether that confrontation is required, but the  
15 question is whether or not business records should be  
16 treated as something that are not testimony because they  
17 are done based on other protocols with other procedures  
18 where there is substantial insulation from the facts of  
19 the particular case because it's a routine scientific  
20 exercise.

21 So I think your answer, I would agree, is  
22 responsive based on your theory of the case, but as a  
23 matter of practice and as a matter of the issue that's  
24 before the Court, I don't think it addresses it.

25 MR. FISHER: Okay. Thank you.

1           I -- I took Justice Ginsburg's question to  
2 be asking whether giving the defendant the right to  
3 subpoena the witness would be adequate under the  
4 Confrontation Clause if these documents were  
5 testimonial.

6           Now, your question is whether they might not  
7 be testimonial at all viewed through the lens of whether  
8 they are a business record.

9           So, as a historical matter, I think it's  
10 plain that no documents prepared in contemplation of  
11 litigation were ever considered to be business records.  
12 And this Court's decision in *Palmer v. Hoffman* in 1943 I  
13 think lays that out very, very clearly.

14           So there is no historical argument that  
15 business records would fit -- would be exempted from the  
16 testimonial rule as a class. And, of course, this Court  
17 said in *Crawford v. Washington* that even if a State  
18 under a modern hearsay exception, whether it be a  
19 business-record rule or in the State of Massachusetts's  
20 case a special, brand-new hearsay rule -- just because  
21 that might be okay in the run-of-the-mill cases doesn't  
22 exempt it from the right to confrontation.

23           JUSTICE KENNEDY: Well, but of course the  
24 railroad case was an accident report. This is a  
25 scientific analysis.

1           MR. FISHER: Well, I think that is best  
2 characterized, with all due respect, as an argument for  
3 its reliability. And it may well be that judges and  
4 juries think that certain scientific processes yield  
5 more reliable results in terms of reports and testimony  
6 and assertions. But we think, again -- and this Court's  
7 decision in Crawford says quite strongly that a judge  
8 cannot decide just on the basis of reliability to exempt  
9 a given record or a class of records from the  
10 Confrontation Clause.

11           And I think, Justice Kennedy, another  
12 analogy that makes it even more clear is police reports.  
13 Police reports, just like the lab report in this case,  
14 are -- are sworn documents created by public servants  
15 who are sworn to tell the truth, sworn to find evidence  
16 whether it exonerates, whether it incriminates, and to  
17 write up a report. And I don't think anyone has ever  
18 suggested that police reports describing a crime scene  
19 -- for example, no matter how objective the facts  
20 relayed, such as there is a blood stain on the carpet,  
21 there is -- the door was wide open when I got there --  
22 those kinds of assertions would be exempted from the  
23 Confrontation Clause.

24           It may well be that they are likely to be  
25 correct, that they are assertions of fact that can be

1 verified, but we've never understood that to fall  
2 outside of the ambit of the Confrontation Clause.

3 JUSTICE KENNEDY: But if you had what we can  
4 call an independent lab, that certainly -- you certainly  
5 can distinguish that from a police report. It's a  
6 line-drawing question, I'll admit, but I think it's  
7 easily distinguished.

8 MR. FISHER: Well, I think if you had -- in  
9 contrast to this case, if you had a laboratory that was  
10 a private lab being used by the police, that would raise  
11 the question whether police agents who are private  
12 individuals but -- but asked by the police to create  
13 something like this, would generate testimonial evidence  
14 just as well. And I think the answer would be yes.

15 In fact, in Davis this Court already  
16 addressed the situation, although it reserved in the  
17 footnote, but it assumed that the 911 operator in that  
18 case, who was a private individual working for a private  
19 company hired by the -- by the police --

20 JUSTICE SCALIA: Mr. Fisher, how many States  
21 do things the way -- the way you would have them done?  
22 I mean, how many States don't have these -- these notice  
23 laws, but in fact bring in the analyst to -- to give the  
24 information?

25 MR. FISHER: Well, let me give you a few

1 categories, Justice Scalia.

2           There are six States, it is our  
3 understanding, including big populous States like  
4 California, Illinois and Georgia, that have no special  
5 hearsay law whatsoever, that bring in witnesses if  
6 defendants demand it.

7           There is another category of States --

8           JUSTICE SCALIA: Well, they bring in  
9 witnesses if -- if defendants demand, but --

10           MR. FISHER: I'm sorry, I misspoke. I  
11 misspoke. That in the ordinary course need to bring in  
12 witnesses. Now, that was getting ahead to my next --  
13 my next category, there are at least nine or ten other  
14 States that have the kind of bland notice-and-demand  
15 regime that I was discussing with Justice Ginsburg. And  
16 so that's another category.

17           And then you have -- since Crawford there is  
18 another, I believe, five additional States where their  
19 State supreme courts have held that Crawford applies to  
20 lab reports like this. So at least for the past couple  
21 of years they have been doing it the way that we would  
22 urge on this --

23           JUSTICE KENNEDY: I wonder -- and correct me  
24 if I'm wrong -- if you -- if you didn't state your case  
25 strongly enough with reference to California. I thought

1 California followed the rule that you advocate here.

2 MR. FISHER: That's what I meant to say if I  
3 didn't say it that way. Yes.

4 JUSTICE BREYER: Is there anything else? I  
5 -- I think you're quite right that -- that, look, I  
6 can't find anything in the history that suggests lab  
7 reports would be admitted because they would be  
8 considered being prepared for trial. But business  
9 records are kept out.

10 So we have here a source that's unlikely to  
11 be particularly biased, the University of Massachusetts  
12 labs. And we have the checks of the discipline -- the  
13 scientific discipline. On the other hand, it's being  
14 prepared for this trial.

15 So it seems to me some things go one way;  
16 some things go the other way. I don't know exactly what  
17 the predominant things are. That's what I'd like you to  
18 address as much as possible.

19 And when I look at the definition of  
20 "business records hearsay exception" today, it seems to  
21 me that a "hearsay exception" does cover today some of  
22 the things under "business records" that would be  
23 prepared particularly for trial. You could have a  
24 company that goes and measures lines on the street, or  
25 tread marks, or a variety of things. And I guess they

1 come in under "business records exceptions." Do  
2 they? I mean, is that right?

3 MR. FISHER: They might, Justice Breyer, and  
4 I'd -- I'd be willing to assume for purposes of argument  
5 that they would. But to the extent that they would be  
6 offered by the prosecution in a criminal case, the fact  
7 that they were a business record would not answer the  
8 confrontation question as to whether --

9 JUSTICE BREYER: Well, of course, it  
10 wouldn't.

11 MR. FISHER: Yes.

12 JUSTICE BREYER: And that's why -- and maybe  
13 you have nothing else you want to say on this point.  
14 It's the same as Justice Kennedy raised.

15 MR. FISHER: I think I do, Justice --

16 JUSTICE BREYER: It seems like there are  
17 some things going one way, and some things going the  
18 other on the issue of whether to call it "testimonial."

19 MR. FISHER: But I do want to -- with all  
20 respect, I did want to add something to what you said  
21 about the rigors of the lab or of science. It may well  
22 be that those add to the truth, the reliability of  
23 reports. Let me say two things about that.

24 First of all, the Confrontation Clause  
25 doesn't exempt bishops and nuns, or -- or anyone who we

1 know or who we would think just as well would obviously  
2 be telling the truth. It's, again, for the defendant to  
3 decide and not for the court to decide whether  
4 cross-examination would be useful.

5 But let me add to that, Justice Breyer, that  
6 the Innocence Project brief in this case and plenty of  
7 other sources widely available I think very, very, very  
8 persuasively explain that lab reports are not quite as  
9 reliable as we might want to think they are, and not --

10 JUSTICE BREYER: There have been bad  
11 instances. You are absolutely right.

12 MR. FISHER: Yes.

13 JUSTICE BREYER: But what -- what I'm trying  
14 to work out in my mind is not necessarily what happened  
15 in the year 1084. I'd -- I'd be quite interested in  
16 your views on what's a workable rule. And when I look  
17 across the country on this, it seems most States have  
18 worked with a rule that has allowed the defendant to  
19 call the witness if he wants. There is not a particular  
20 unfairness to that. If he can get ahold of the witness,  
21 no problem. But they said: We are not going to make  
22 the State do this because it's a waste of time, for the  
23 most part. It just delays the trial, and there is  
24 really nothing at issue.

25 MR. FISHER: Well, to the extent that is the

1 prominent practice, it's one that grew up under this  
2 Court's Roberts jurisprudence.

3 JUSTICE BREYER: That's true.

4 MR. FISHER: I think --

5 JUSTICE BREYER: But if I assume -- I'm  
6 really uncertain as to whether it has covered  
7 "testimonial" or not. And also, I'm not enamored  
8 particularly of seeing on a close question what happened  
9 in the ancient history.

10 MR. FISHER: I understand.

11 JUSTICE BREYER: All right. Now, is there  
12 anything else you want to add to me on those  
13 assumptions?

14 MR. FISHER: Yes, that -- that, again, it is  
15 -- it is not for the court; it's for the defendant to  
16 decide. We think the definition of "testimonial"  
17 generally speaking ought to be that when a document is  
18 prepared in contemplation of prosecution, or more  
19 specifically in this case to prove a fact that is an  
20 element of a criminal case, because that's what these  
21 reports say, then they should fall under the  
22 Confrontation Clause.

23 And to the extent that these are in some  
24 realms and in some places reliable pieces of evidence,  
25 there is every reason to believe it's not going to cause

1 any problem, because defendants aren't going to want to  
2 challenge them very often. If you look at the  
3 statistics in the law professors' brief, they say in  
4 States like California that -- first of all, we have a  
5 huge category of cases that go away at plea bargains.  
6 And then even within the category of cases that go to  
7 trial, it's 10 percent of the time or less that  
8 defendants even want to --

9 CHIEF JUSTICE ROBERTS: Well, a good defense  
10 lawyer would love to have the guy there. The first  
11 thing you say is: Do you remember testing Mr. Diaz's  
12 sample? The guy is going to say no. Just as was  
13 pointed out, I, you know, test thousands of samples.  
14 Well, how long have you been working with the lab? You  
15 know, just what -- what was your scientific background?  
16 When did you -- how does this test work? You put three  
17 drops of the acid in there. It turns color, whatever it  
18 does. How do you know that? What is the chemical? I  
19 mean, you spend three hours with the guy until the jury  
20 just doesn't think there is anything to the case at all.

21 MR. FISHER: Well, the best I can do to  
22 answer that, Mr. Chief Justice, is to say that  
23 empirically apparently that just doesn't happen. And I  
24 think the reason why is explained in some of the defense  
25 manuals that we have cited in our brief, which say that

1 if your theory of the case has nothing to do with  
2 whether the scientific report being introduced by the  
3 prosecution is correct or not, very often the defense  
4 isn't going to do itself any favors by -- by insisting  
5 that that person take the stand, recite his credentials,  
6 recite the testing, and recite the damning evidence.

7 JUSTICE ALITO: What does that fact support  
8 -- why does that fact support your argument, that in all  
9 of those cases you're arguing for what's going to be an  
10 empty exercise?

11 MR. FISHER: No, I would very much resist  
12 that it will always be an empty exercise.

13 JUSTICE ALITO: No. But in -- in the  
14 instance where the defendant doesn't think it would be  
15 worthwhile to subpoena the -- the recordkeeper, or the  
16 person who performed the test, but simply wants to put  
17 the prosecution through the effort of getting the person  
18 there to testify, it's -- what is achieved?

19 MR. FISHER: Well, as I said, I think that  
20 through notice-and-demand regimes and stipulations,  
21 often that is not going to happen. But if it is  
22 achieved, what is achieved is the same thing that is  
23 achieved in any criminal trial where a defendant insists  
24 periodically that the prosecution be put to its proof.

25 After all, we are talking about putting

1 somebody away for many years in a typical --

2 JUSTICE BREYER: Of course, and I absolutely  
3 see that point. So that -- all right, go back to the  
4 plea bargaining, which is your first thing, which makes  
5 me a little nervous for the reason that I see this  
6 bargaining system as a system where the prosecutor makes  
7 a charge, the prosecutor controls the sentence, then the  
8 defense bar would like to have an added weapon, and this  
9 added weapon is if you actually go to trial, I'm going  
10 to insist that you call these people. You don't even  
11 know where they are. I'm not going to accept the lab  
12 report. And then maybe the prosecutor will lower the  
13 requirement or maybe the prosecutor raised it in the  
14 first place because he thought you would say something  
15 like that.

16 So I'm not -- is there anything you can say  
17 about how this works in the presence of plea bargaining?  
18 Do we know any -- do we have any information on that?

19 MR. FISHER: I don't know of any empirical  
20 study where you might say what the price of this is. Of  
21 course, it happens already every day with other  
22 witnesses. That you're going to have to bring in other  
23 witnesses, and this is one more witness. But again,  
24 even in a case where that's all that's going on, it's no  
25 different than all the other procedural rights the

1 defendant has.

2 JUSTICE KENNEDY: I'm not sure it's one more  
3 witness. Labs are backed up with DNA. You know, the  
4 Federal budget for the courts -- for the Federal courts  
5 -- is \$6 billion. Well, \$1 billion of that is spent  
6 under the Criminal Justice Act for experts and  
7 translators and counsels. This -- this is a very, very  
8 substantial burden if we tell every State in the country  
9 that every -- in every drug case you are -- the State  
10 must produce the expert.

11 MR. FISHER: Remember, Justice Kennedy,  
12 that -- that if you look at the States where this  
13 exists, that's not what happens and that's not what we  
14 are insisting on. All we are insisting is that the  
15 prosecution in a case where the defendant demands it,  
16 whether it be through a notice and demand regime or  
17 whether it be because the prosecution simply calls the  
18 defense on the phone two weeks before trial and says,  
19 I'd like to do this through documentary evidence -- and  
20 then these repeat players remember who -- who -- one  
21 thing I think it's worth keeping in mind in all this, is  
22 that in the criminal justice system, by and large,  
23 especially in drug cases like this, we are talking about  
24 repeat players. Defense lawyers --

25 CHIEF JUSTICE ROBERTS: You're talking about

1 the defendants or the lawyers?

2 MR. FISHER: I'm talking about the  
3 lawyers --

4 (Laughter.)

5 MR. FISHER: -- by and large, Your Honor.  
6 And they have every -- they have incentives not to, as  
7 you might say, yank the chain of the other side.

8 JUSTICE SCALIA: Mr. Fisher, I am interested  
9 in the history since that's what the Court held in  
10 Crawford, that the content of the Confrontation Clause  
11 is not what we would like it to be, but what it  
12 historically was when it was enshrined in the  
13 Constitution. As a matter of history, was there a  
14 business records exception, not from the hearsay rule  
15 but from the Confrontation Clause?

16 MR. FISHER: Not that I'm aware of. The  
17 best -- the best source that I believe exists is the  
18 Wigmore treatise, which both sides have cited. It says  
19 there was a shop-book rule that allowed shop-book  
20 ledgers and entries in at the common law. But there is  
21 no -- there's no suggestion that that was --

22 JUSTICE SCALIA: Why isn't that a business  
23 records exception? I don't --

24 MR. FISHER: It is a business records  
25 exception, but it's not an exception to the right to

1 confrontation because no one would have considered  
2 ordinary business records created without contemplation  
3 of litigation to be -- to be testimonial evidence.

4 JUSTICE STEVENS: Let me ask you --

5 MR. FISHER: What we have here --

6 JUSTICE SCALIA: Oh, wait. You say it's --  
7 that business records would often or usually not be  
8 testimonial?

9 MR. FISHER: I think all of the business  
10 records that were admissible at the time of the founding  
11 would have been nontestimonial.

12 JUSTICE SCALIA: Would have been  
13 nontestimonial. So they'd come in on that basis, not  
14 because they were business records?

15 MR. FISHER: In a criminal case -- well, the  
16 typical regime -- and I'm going to assume that it exists  
17 at the time of founding, but you need some evidentiary  
18 rule to get a piece of evidence in in the first place,  
19 whether it be business records or whether it be just an  
20 ordinary rule of relevance. But, yes, they would have  
21 been admissible at the time of -- an ordinary business  
22 record like a shop book would have been admissible at  
23 the time of the founding, but would have not raised a  
24 confrontation problem even in a criminal cause because  
25 it would have been nontestimonial.

1 JUSTICE STEVENS: Mr. Fisher, I just want to  
2 be about -- clear about one thing. We are talking about  
3 drug cases primarily. But the rule that we are fighting  
4 about is not limited to drugs. Isn't it -- doesn't it  
5 apply to laboratory reports on DNA, blood tests, all  
6 sorts of evidence? Isn't that correct?

7 MR. FISHER: That's right, Justice Stevens.  
8 And you can you look at the Massachusetts own decisions.  
9 The State courts in Massachusetts have already extended  
10 their rule in their day to ballistics tests, for  
11 example, which are notoriously unreliable in terms of  
12 empirical studies that have been -- that have been  
13 conducted about them. And my understanding -- I think  
14 you're right -- is that nothing in the Commonwealth's  
15 rule distinguishes one kind of forensic report from  
16 another.

17 The United States is offering a slightly  
18 different analysis that appears to ask, to some degree,  
19 the degree of interpretation involved in a given  
20 forensic laboratory report. I don't know how you would  
21 administer that rule, but I can say that to whatever  
22 extent interpretation would be required, this is clearly  
23 on the interpretive side of the ledger.

24 And again, if I could point the Court to a  
25 source for that, the Scientific Evidence treatise by

1 Giannelli and Imwinkelried that the both parties cite at  
2 section 23.030(c) lays out the mass spectrometry way of  
3 testing for drugs that the Commonwealth tells you was  
4 the test used in this case and describes in great detail  
5 the amount of expertise, care, skill and interpretive  
6 methods that need to be brought in that kind of a test.

7 CHIEF JUSTICE ROBERTS: How do we know that  
8 this was prepared in contemplation of litigation? I  
9 mean, let's suppose the lab occasionally does analyses  
10 for other -- research purposes. They get a sample, they  
11 want to know what it's -- they want to test it, however  
12 they do it. Are we just assuming that it's prepared in  
13 contemplation of litigation because it usually is, or --  
14 you can imagine a situation where the analyst really has  
15 no idea, other than perhaps supposition, why he is being  
16 asked to test the sample.

17 MR. FISHER: The easiest answer in this  
18 case, Mr. Chief Justice, is it's required by  
19 Massachusetts law that -- that these tests be done in  
20 contemplation of prosecution. The law itself says that  
21 the police officer can give it to an analyst, and the  
22 analyst can certify a report if it's to be used for law  
23 enforcement purposes. So there is a statutory  
24 requirement. Now, you raise a question --

25 CHIEF JUSTICE ROBERTS: Well, the question

1 is it could be law enforcement purposes to test it for  
2 the police to use and what -- educational programs; they  
3 want the rookies to know what the cocaine looks like.

4 MR. FISHER: Well, to the degree it's not  
5 answered in this case by statute, undoubtedly this  
6 Court as it works through this jurisprudence will need  
7 to ask a question of common sense, whether the actors  
8 involved -- as this Court did in Davis -- whether the  
9 actors involved would understand what they are doing is  
10 creating evidence for a criminal case?

11 If there are no more questions --

12 CHIEF JUSTICE ROBERTS: What if -- so -- I'm  
13 sorry. Go ahead.

14 MR. FISHER: Okay. I'll reserve my time.

15 CHIEF JUSTICE ROBERTS: Thank you.

16 JUSTICE GINSBURG: May I -- may I just ask,  
17 you would extend this to a -- a breath test, a blood  
18 test, fingerprints, urinalysis? All of those would be  
19 covered by your position?

20 MR. FISHER: To the extent that the  
21 prosecution wanted to introduce a report certifying a  
22 reporting results of a test, yes, it would be covered by  
23 ours.

24 JUSTICE GINSBURG: And you answered the  
25 question that a supervisor wouldn't be an adequate

1 substitute for the analyst. But suppose the lab says:  
2 We are very busy in this place; could we schedule a  
3 deposition; we'll present the analyst at a time mutually  
4 agreeable to both sides, rather than have the analyst on  
5 the hook to show up on a trial date?

6 MR. FISHER: That would work to preserve the  
7 evidence in case the analyst became unavailable at the  
8 time of trial. And then under this Court's  
9 jurisprudence that deposition would be admissible.

10 JUSTICE GINSBURG: But only if the analyst  
11 wasn't there on the day of trial?

12 MR. FISHER: Then you -- then I don't think  
13 it would substitute for live testimony.

14 But let me say one other way that this  
15 problem can be addressed by States is that they could  
16 have a supervisor take the stand and rely on raw data --  
17 on raw data and give his or her explanation of raw data.  
18 It's just that the person cannot take the stand and  
19 relay somebody else's conclusion to the jury.

20 And if there are no more questions, I'll  
21 reserve.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 Mr. Fisher. We'll give you your full rebuttal time.

24 General Coakley.

25 ORAL ARGUMENT OF MARTHA COAKLEY

1 ON BEHALF OF THE RESPONDENT

2 MS. COAKLEY: Mr. Chief Justice, and may it  
3 please the Court:

4 The drug analysis certificates at issue in  
5 this case are not testimonial statements that have been  
6 covered by the Confrontation Clause. That is, they are  
7 not the statement of a percipient witness who has  
8 observed past behavior of the defendant.

9 Indeed, what they are are official records  
10 of objective identified -- it's independently verifiable  
11 facts that are -- that were admissible at common law.

12 JUSTICE SOUTER: What is your answer to  
13 Mr. Fisher's argument that if that proposition of yours  
14 is -- is -- is, in fact, sound in response to this case,  
15 the State can put in its entire case by -- in a  
16 circumstantial evidence case, by way of affidavit and,  
17 in effect, satisfy the Confrontation Clause by saying,  
18 well, you can call the witness as part of the defense  
19 case and cross-examine there?

20 MS. COAKLEY: Because clearly, the kinds of  
21 affidavits that are the subject of Confrontation Clause  
22 analysis could not be submitted by that. I think this  
23 is an exception to that. And so --

24 JUSTICE SOUTER: Well, then that's what you  
25 have got to explain to me. Why is it an exception?

1           MS. COAKLEY:  Because they -- first of all,  
2  although the Court has not addressed it so far with Mr.  
3  Fisher, these are really not testimonial statements.  
4  None of the cases that have dealt with Confrontation  
5  Clause analysis -- before Ohio, through Ohio, through in  
6  fact Giles -- deal with the kind of statement that we  
7  are talking about here.  It's really a report of a  
8  scientist test.

9           JUSTICE SOUTER:  Well, what about the -- the  
10 blue car going down the street statement?  In a  
11 circumstantial evidence case the witness comes in and  
12 says yes, I saw a blue car go down the street at 10  
13 o'clock.  Is that testimonial?

14          MS. COAKLEY:  It is, Your Honor.

15          JUSTICE SOUTER:  And the distinction between  
16 that and the lab report saying the substance that was  
17 shown to me which I analyzed was cocaine, what's the --  
18 what's the distinction?

19          MS. COAKLEY:  In the first instance you have  
20 a witness to an event in a particular case that can be  
21 tied to, perhaps, behavior of the defendant that's  
22 deemed to be criminal.  It's -- it's classic hearsay and  
23 subject to confrontation, if it, you know, is going to  
24 be used by the prosecution.

25                 In this instance, though, we have a protocol

1 set up by a State statute that indeed does test  
2 substances other than those definitely headed for  
3 litigation.

4 JUSTICE SCALIA: I don't see the difference  
5 between the two. I mean, the one, he saw the blue car  
6 going down the street, which through other evidence can  
7 be connected to the defendant; and here the witness says  
8 this is cocaine, which through other evidence is going  
9 to be connected to the defendant. And in both cases  
10 that -- that connected fact is deemed essential by the  
11 prosecution for the conviction. I don't see the  
12 difference between the two.

13 MS. COAKLEY: Well, I think there are  
14 several differences, Your Honor, but one of which is  
15 that it is identifiable and it can be verified outside  
16 of what the scope of the Confrontation Clause is. In  
17 other words, the defendant has a chance to test it ahead  
18 of time, have his own independent witness. This doesn't  
19 change. Whether it is cocaine before, during or after  
20 the trial isn't -- is testable.

21 JUSTICE SOUTER: Well, why --

22 MS. COAKLEY: And it's not true of a witness  
23 statement.

24 JUSTICE SOUTER: Why does that make a  
25 difference? In other words, the -- Justice Scalia said

1 a moment ago, you know, the -- the statement about the  
2 blue car is -- is tied in in the hypothetical case by  
3 another witness who said yes, at -- at 10:01 when I  
4 heard the gun go off there was a blue car there. In  
5 this case the cocaine is tied in by saying, yes, the  
6 cocaine which I delivered to X, about which he has  
7 testified, is cocaine that I took out of the pocket of  
8 the defendant.

9           There is -- there is a temporal and physical  
10 path worked out in both cases. And it seems to me your  
11 attempt to distinguish them is to say well, the temporal  
12 path can be extended by one more step in the cocaine  
13 case because you can take the cocaine or take something  
14 from the cocaine sample and let the defense expert  
15 testify to it; which of course is true, but I don't see  
16 what that has got to do with the Confrontation Clause or  
17 the definition of testimonial evidence.

18           MS. COAKLEY: I -- I think that that's  
19 significant, Your Honor, because it can be tested and  
20 verified and isn't dependent upon a cross examination at  
21 trial.

22           JUSTICE SOUTER: Yes, but aren't you really  
23 saying that the confrontation right is therefore not so  
24 important because you have a greater opportunity in the  
25 cocaine case of coming up with -- with rebutting

1 evidence, if indeed rebutting evidence can be found.

2 In other words, if -- if -- if the State's  
3 witness is wrong, you've got a better shot at proving  
4 him wrong than in the blue car case. But if that is  
5 your argument, I don't see what it's got to do with --  
6 with the basic confrontation right.

7 MR. FISHER: Well, I think I go back, Your  
8 Honor, to looking at all the kinds of statements that  
9 this Court has looked at within the scope of the  
10 Confrontation Clause. This kind of public record,  
11 official record, laboratory report, has never been the  
12 subject of this kind of analysis and indeed it's not  
13 sufficient.

14 JUSTICE SOUTER: Well, have we ever had --  
15 have we ever had a -- a kind of lab report, public  
16 record kind of case in -- in which the record was  
17 prepared expressly for trial?

18 MS. COAKLEY: I think that if you look at  
19 Dutton, for instance, and the concurring opinion by  
20 Justice Harlan talking about laboratory reports deemed  
21 to be whatever the analysis was, a business record, that  
22 would have been --

23 JUSTICE SOUTER: Yes, but Justice Harlan did  
24 not take the majority view. I mean you -- I don't know  
25 where you get authority for the proposition that the

1 public record prepared for the purpose of litigation  
2 would have come in under the -- in effect, the founding  
3 era -- or would have been outside the founding era  
4 definition of testimonial.

5 MS. COAKLEY: Except the public record, for  
6 instance of a coroner's result -- not the coroner's  
7 verdict that involves Marian-type depositions, but the  
8 results of a coroner's verdict that says somebody is  
9 dead and this is the cause and manner and means of  
10 death -- would have been admissible at the time with --  
11 that is this kind of reference --

12 JUSTICE SCALIA: For the indictment, not --  
13 not as -- not as independent evidence in the  
14 prosecution. It would form the basis for the  
15 indictment, as I understand what the history is. It  
16 would not be introduced and -- and -- and shown to the  
17 jury as evidence that -- that indeed the cause of death  
18 was thus and so.

19 MR. FISHER: But autopsy results -- my  
20 understanding, Your Honor, is that autopsy results --  
21 again not a coroner's verdict, which -- in the reply  
22 brief we believe that counsel had conflated what would  
23 be a verdict between the fact of an official record, an  
24 autopsy report of the death, manner and means of  
25 death -- have been and still admissible.

1 JUSTICE KENNEDY: It seems to me -- and tell  
2 me if this is not the way you want to make a -- it seems  
3 to me to make your case you have to say of course this  
4 is hearsay; and the question is whether it's  
5 testimonial.

6 MS. COAKLEY: Yes, Your Honor.

7 JUSTICE KENNEDY: And it's not testimonial  
8 because these are laboratory protocols, subject to  
9 ongoing, objective, repeated standards; that's different  
10 from testimony that it was a blue car, which is specific  
11 to the case. That's the kind of framework of the  
12 argument you have to make.

13 MS. COAKLEY: That's --

14 JUSTICE KENNEDY: And you have to say that  
15 as a result of that it is not testimonial because  
16 "testimonial" is a legal term that's subject to  
17 interpretation. I -- I guess that's the argument you're  
18 making and that you have to make.

19 MS. COAKLEY: Well, that's correct, Your  
20 Honor.

21 JUSTICE KENNEDY: As I see it.

22 MS. COAKLEY: And I think that that is  
23 certainly consistent with the way in which this Court in  
24 looking at the series of cases from Crawford since, have  
25 looked at what a testimonial statement is. Admittedly,

1 you haven't addressed this kind of statement, and I  
2 would argue because it doesn't fall within the principal  
3 evil that the Confrontation Clause is designed to  
4 prevent.

5 JUSTICE KENNEDY: Of course the problem was  
6 in -- I think it was Hammond was the companion case to  
7 David.

8 MS. COAKLEY: Yes.

9 JUSTICE KENNEDY: The -- the 911 call was  
10 done for other -- really other purposes. It wasn't  
11 testimonial because it wasn't really directed to trial.  
12 This does seem more directed to trial, so then you have  
13 to tell us why even if it is, there are some independent  
14 guarantees of -- of reliability that means that we  
15 should say it's not testimonial as a legal matter.

16 MS. COAKLEY: Well, I agree, Your Honor. I  
17 think that you cannot pull one of these qualities out  
18 and say that because it's prepared in anticipation of  
19 trial means that therefore it is testimonial. There  
20 have been several criteria that this Court has looked  
21 at, including -- there are other kinds of analogies to  
22 this that are akin to this kind of record. For  
23 instance, in an assault case, a gun which is the real  
24 evidence -- remember the cocaine is the real evidence  
25 here -- the Commonwealth would introduce a certificate

1 saying this is a working gun, and that is in lieu of the  
2 analyst coming in. When we have to prove public way,  
3 when we have to prove school zone, when we have to prove  
4 in some instances --

5 JUSTICE SCALIA: Ballistics as well? You  
6 would extend this to ballistic tests?

7 MS. COAKLEY: If --

8 JUSTICE SCALIA: You -- you don't have to  
9 bring in the ballistic expert? You can just --

10 MS. COAKLEY: Not to prove it's a working  
11 firearm, Your Honor. In order to make a comparison -- I  
12 would agree with counsel that once you get into the  
13 discretionary areas that you need to make comparisons  
14 and analysis, but this is not that case.

15 JUSTICE SCALIA: I don't understand that  
16 difference.

17 CHIEF JUSTICE ROBERTS: Well, I'm looking at  
18 footnote 10 in your brief on page 30. And you concede  
19 that some interpretation of the machine-generated data  
20 ordinarily is required. Now why isn't that a suggestion  
21 that there is some leeway and subjective interpretation,  
22 and you might have different analysts coming out  
23 differently and so you need to get the fellow there and  
24 ask him well, how often do you -- how often do one of  
25 your fellow analysts disagree with your conclusion?

1                   Or this is subjective; I guess some people  
2 read it one way or the other one way; which way do you  
3 always read it? That kind of stuff.

4                   MS. COAKLEY: Well, interestingly, Your  
5 Honor, that argument wasn't raised in this case below  
6 and really hasn't been raised in this case before the  
7 Court. In fact this is one of the more straightforward  
8 objective tests that says you put this material into the  
9 machine, and the Solicitor General also deals with this.  
10 The 100 percent accuracy by and large from that result  
11 says this is cocaine; this is heroin, this is --

12                   CHIEF JUSTICE ROBERTS: Well, I didn't -- I  
13 didn't go back and read the scientific treatise you  
14 cite, but you say some interpretation is required. So  
15 what type of interpretation?

16                   MS. COAKLEY: The interpretation that  
17 because of the way that the machine works, the chemicals  
18 are separated out. And so a chemist, who is properly  
19 trained, can say by the separation of the chemicals  
20 these three, or four or whatever the elements are, equal  
21 cocaine.

22                   JUSTICE KENNEDY: Well, do you have to have  
23 a machine? I mean, what about -- what about ballistics?  
24 "This bullet came from that gun." Does that involve  
25 sufficient discretion, sufficient judgment that the

1 expert has to be there, while the blood -- blood or drug  
2 testing doesn't?

3           It seems to me that's where you have to draw  
4 the line.

5           MS. COAKLEY: Well, I believe that that's --

6           JUSTICE KENNEDY: And I -- and to say that  
7 that wasn't raised in the case, this is precisely the  
8 question we are going to have to decide if you're going  
9 to prevail. I don't think it helps to say it wasn't  
10 raised in the case.

11           MS. COAKLEY: No, I --

12           JUSTICE KENNEDY: We are raising it.

13           MS. COAKLEY: I agree, Your Honor. But that  
14 has to do with how satisfied the Court is whether here  
15 or in other jurisdictions that that is a reliable  
16 result, and I hesitate to use the word "reliable." I  
17 don't mean it in the Ohio v. Roberts sense. We are  
18 talking about the scientific test that is or is not  
19 reliable, and therefore does it require some other test,  
20 whether Confrontation Clause or not?

21           JUSTICE BREYER: How can we administer  
22 something like that? His point I think is, look, you  
23 can't make any distinction either of something that is  
24 evidence was prepared with an eye towards trial or it  
25 wasn't. And if it was prepared with an eye towards

1 trial, well, then call the person and have him testify.  
2 That's it. And if that encompasses every test under the  
3 sun, so be it, because there is no way to draw a  
4 reasonable line.

5           You start talking about reliability and  
6 their amicus brief is filled with horror stories of how  
7 police labs or other labs have really been way off base  
8 and moreover really wrong. And you say, oh, distinguish  
9 between a police lab and University of Massachusetts?  
10 Try going down that road of which one is reliable, which  
11 one isn't reliable. How do we know?

12           MS. COAKLEY: Well, Your Honor --

13           JUSTICE BREYER: That's his point. No  
14 workable way to do it. There can be horrors on both --  
15 in both areas, and so follow what the history was where  
16 there was no history on this being admissible.

17           MS. COAKLEY: Your Honor, I disagree because  
18 the issues around many of those wrongful convictions  
19 related to suggestive identification procedures, other  
20 kinds of issues. I'm not aware of any wrongful  
21 convictions that came about because --

22           JUSTICE BREYER: Aren't there some things I  
23 read in the paper all the time, about these laboratories  
24 in various places, and they lost the results, and they  
25 got it all wrong? That just doesn't happen?

1 MS. COAKLEY: I'm not saying that, Your  
2 Honor, but I'm saying there are certain evils that the  
3 Confrontation Clause is designed to prevent. Either  
4 abuse at the laboratory stage or misconduct by  
5 prosecutors prior to trial or analysts is not one that  
6 the Confrontation Clause is either designed to or is  
7 specifically very good at getting at.

8 JUSTICE SCALIA: Why not? I don't know, I  
9 -- for one thing, the custody. It's very important to  
10 know whether indeed this was the particular substance  
11 that was taken from the defendant. And to establish  
12 that, you have to establish a line of custody. And you  
13 can't do that without getting in the person who did the  
14 test.

15 MS. COAKLEY: Well, Your Honor, I agree the  
16 chain of custody is crucial and it relates to the  
17 careful procedure that a police officer used, who by the  
18 way is the confrontation witness that you worry about  
19 because the behavior is the buying, selling, possession  
20 of drugs. The element of whether it is cocaine or not  
21 really becomes almost secondary to the case. The issue  
22 is was the behavior criminal? So the officer who seized  
23 the drugs is available for confrontation. The drug is  
24 then clearly marked so the Commonwealth has to create  
25 that chain of custody for the court, and indeed if the

1 defendant, who is in the best position to think that  
2 perhaps this is involving something other than cocaine  
3 or heroin, has all the opportunities that he needs to  
4 make sure that he gets a fair trial.

5 JUSTICE SCALIA: He says -- the policeman  
6 says, "And I gave it to the University of Massachusetts  
7 lab."

8 MS. COAKLEY: And they marked it in a  
9 particular way that identified --

10 JUSTICE SCALIA: "And I watched when they  
11 marked it in a particular way."

12 MS. COAKLEY: And the --

13 JUSTICE SCALIA: How do I know that that  
14 thing is the one that got to the desk of the analyst who  
15 wrote this report?

16 MS. COAKLEY: I think that whether you  
17 brought the analyst in or not, you would have the same  
18 establishment of the chain of custody and, indeed, that  
19 piece of evidence as to whether it's the same drug  
20 relates to the officer in this case testified the  
21 packaging. He could identify it. It comes back --

22 JUSTICE SCALIA: So you say you can require  
23 witnesses to show that, right up to the analyst who did  
24 the testing, you can require witnesses to testify? All  
25 the way up to there but not the analyst himself?

1 MS. COAKLEY: I think, Your Honor, that the  
2 issue between chain of custody and whether the  
3 Confrontation Clause is implicated are different issues  
4 --

5 JUSTICE SOUTER: No, but you say that, it  
6 seems to me, because you are -- and I think consistently  
7 -- making a distinction between credibility issues and  
8 reliability issues. And I think you are implicitly  
9 saying the Confrontation Clause is there to test  
10 credibility but not reliability.

11 MS. COAKLEY: I think --

12 JUSTICE SOUTER: The machine is reliable;  
13 therefore, it's outside of confrontation. And I don't  
14 understand the validity of this distinction that is  
15 implicit in your answers.

16 MS. COAKLEY: I think perhaps if the Court  
17 looks at accuracy rather than reliability and gets  
18 outside the realm of the kinds of statements --

19 JUSTICE SOUTER: Well, accuracy --

20 MS. COAKLEY: -- that we looked at.

21 JUSTICE SOUTER: -- is an aspect of it.

22 MS. COAKLEY: But accuracy goes to what this  
23 Court has always allowed in referring to, for instance,  
24 a business records exception or a public records  
25 exception. The reason they are admissible is precisely

1 because we believe them to be accurate, and more  
2 importantly in this case --

3 JUSTICE SCALIA: Well, they are  
4 admissible in criminal cases as far as the Confrontation  
5 Clause is concerned because they are not testimonial.

6 MS. COAKLEY: And they are related, however,  
7 Your Honor, because the roots of whether it's hearsay or  
8 not and the Confrontation Clause arguments come from the  
9 same concern that somebody get a fair trial, that he or  
10 she has the right to confront the witness --

11 JUSTICE SCALIA: We are back to Roberts  
12 then.

13 JUSTICE KENNEDY: I do wish you would  
14 comment on the argument that the State of California --  
15 a huge state with many, many drug prosecutions -- seems  
16 to get along all right under the rule that the  
17 Petitioner proposes.

18 MS. COAKLEY: They've joined the amicus  
19 brief, Your Honor, I believe. And -- so I think it's  
20 too early to tell because I, certainly from my own  
21 experience, know that the number of cases that go to  
22 trial is not an indication of what the work is that is  
23 involved, and I know that in Massachusetts it would --

24 JUSTICE KENNEDY: If the State of California  
25 and other populous States have for, I take it, some

1 number of years been able to function quite effectively  
2 under the rule that the Petitioner proposes, it seems to  
3 me that's something that you have to address.

4 MS. COAKLEY: And I address that, Your  
5 Honor, by saying that for Massachusetts it would be an  
6 undue burden with very little benefit to the defendant.

7 JUSTICE KENNEDY: Why would it be undue for  
8 California and not for -- are you accepting the fact  
9 that in California it's a workable rule and it's caused  
10 no problems?

11 MS. COAKLEY: I -- I can't disagree with  
12 that, Your Honor. I don't have enough information about  
13 the way California works or doesn't work. I know that  
14 as a practical matter --

15 JUSTICE STEVENS: Well, it seems to me it's  
16 a very important point.

17 MS. COAKLEY: Well, as a practical matter in  
18 Massachusetts, it would mean that district court  
19 misdemeanor drug prosecutions would essentially grind to  
20 a halt, and the value to the defendant -- and this Court  
21 has looked at in Inadi and in other situations where  
22 there does not seem to be the real issue involved with  
23 Confrontation Clause.

24 JUSTICE GINSBURG: Well, don't you -- you're  
25 predicting that grind to a halt, but there are going to

1 be a large number that wash out because they are plea  
2 bargained. So they won't get into the picture at all.  
3 There will probably be a goodly number in which defense  
4 counsel will stipulate that the drug quantity -- the  
5 drug type was such and such and quantity such and such.  
6 So you don't know in how many cases the defendant would  
7 take advantage of this confrontation right?

8 MS. COAKLEY: No, and they often will not  
9 stipulate, Your Honor, until the day of trial when they  
10 realize that the chemist is there. That's from my own  
11 experience and that's a commonsensical rule. The  
12 question is --

13 JUSTICE SCALIA: Don't these people have to  
14 appear before the same judge again and again? The point  
15 made: These are repeat attorneys, and I don't think you  
16 make friends and influence people among judges by  
17 insisting upon testimony in criminal cases that is  
18 obviously not needed.

19 MS. COAKLEY: Well, two points, Your Honor:  
20 In Massachusetts, we do have a circuit court and a  
21 superior court so judges move around. And the second  
22 thing is that -- my experience is that defendants,  
23 whether appointed or otherwise, are extremely vigorous  
24 in protecting their rights, and if I were defense  
25 counsel and I had a strategic advantage, I would insist

1 on it.

2 JUSTICE SOUTER: Do you see any reason --

3 CHIEF JUSTICE ROBERTS: I think California  
4 did not join the amicus brief.

5 MS. COAKLEY: Then I misspoke.

6 JUSTICE SOUTER: Do you see any reason why a  
7 notice-and-demand statute wouldn't satisfy your concern?

8 MS. COAKLEY: Well, the -- the Petitioner  
9 agreed that --

10 JUSTICE SOUTER: A bland notice-and-demand  
11 Statute in Mr. Fisher's --

12 MS. COAKLEY: We would argue that  
13 Massachusetts' statute is the functional equivalent of a  
14 notice-and-demand statute and complies with whatever  
15 concerns the Court may have about the right to  
16 confrontation.

17 CHIEF JUSTICE ROBERTS: What if it's the  
18 central issue in the case? The defense says, "That  
19 stuff I was carrying was not cocaine. Either I was  
20 trying -- you know, I was going to stiff the person I  
21 was selling it to or whatever." That's the sole  
22 defense. That's not cocaine. All you've got to do is  
23 submit an affidavit from the lab guy saying, "I tested  
24 it; it is"?

25 MS. COAKLEY: Well, from the prosecution's

1 point of view that would be a bad strategic decision.  
2 That's an instance where you would bring in the analyst  
3 because you want to --

4 JUSTICE KENNEDY: That's a non- answer. We  
5 are asking what's the rule?

6 MS. COAKLEY: The rule --

7 JUSTICE KENNEDY: Can you submit it on the  
8 affidavit, as the Chief Justice said under your theory  
9 of the case?

10 MS. COAKLEY: Yes.

11 JUSTICE KENNEDY: You'd try to have some  
12 different hypothesis?

13 MS. COAKLEY: Yes, because the defendant has  
14 plenty of opportunity to both have an independent exam,  
15 to subpoena the witness in himself, to make sure that if  
16 that is a true issue at trial -- in many instances --  
17 most instances it's not, then he will have the  
18 opportunity to cross-examine.

19 CHIEF JUSTICE ROBERTS: Thank you, General.  
20 Ms. Schertler.

21 ORAL ARGUMENT OF LISA H. SCHERTLER

22 ON BEHALF OF THE UNITED STATES,

23 AS AMICUS CURIAE,

24 SUPPORTING THE RESPONDENT

25 MS. SCHERTLER: Mr. Chief Justice, and may

1 it please the Court:

2           The Confrontation Clause is not implicated  
3 when a human being merely authenticates for trial the  
4 instrument-generated result of a scientific test. That  
5 is because the direct output of an instrument is not  
6 testimonial and human assertions that merely establish  
7 the foundation for admitting nontestimonial evidence do  
8 not themselves trigger Confrontation Clause rights.

9           CHIEF JUSTICE ROBERTS: But suppose --

10           JUSTICE GINSBURG: Well, maybe if you were  
11 just -- if you were just putting in the machine -- the  
12 raw information from the machine. But here what speaks  
13 is the certification by the analyst, so you don't have  
14 simply a machine-generated result; you have a human  
15 person who seems to be testifying: I certify that this  
16 is an accurate report.

17           MS. SCHERTLER: If I could draw an analogy,  
18 Justice Ginsburg, to a historical example that we think  
19 illustrates our point, historically records custodians  
20 -- public records custodians have been permitted to  
21 certify through, when they have express authority at the  
22 common law, and -- and into present day that they did a  
23 records search, that they found a document within the  
24 public records of an agency, and that the document that  
25 they are attaching is a true copy of what they found.

1           Those are statements by humans that really  
2 set forth the conditions for -- under which the evidence  
3 is being presented to the jury.

4           JUSTICE SCALIA: But --

5           MS. SCHERTLER: But those have always been  
6 accepted.

7           JUSTICE SCALIA: It's not material prepared  
8 for trial. It's not material that was generated  
9 precisely in order to prosecute an individual.

10          MS. SCHERTLER: The underlying material in  
11 the public records case is not testimonial because it  
12 was not prepared for trial.

13          JUSTICE SCALIA: Exactly.

14          MS. SCHERTLER: In this case, Justice  
15 Scalia, we would submit that the underlying material is  
16 also not testimonial, albeit for a separate reason; and  
17 that is that it is an instrument-generated result and  
18 therefore not the statement of a witness.

19          JUSTICE SCALIA: Let's -- let's assume that  
20 it's critical to a particular murder prosecution what  
21 time the shot was fired, okay? And you mean to tell me  
22 if -- if somebody says I heard the clock strike 12 at  
23 the time the shot was fired, that would not be  
24 testimony? Yes, the clock is a machine, right?

25          MS. SCHERTLER: No.

1 JUSTICE SCALIA: He is just reciting what  
2 the clock said.

3 MS. SCHERTLER: My analogy would be, Justice  
4 Scalia, if that clock had in itself a trigger mechanism  
5 that would detect when a gunshot was fired; and if that  
6 clock delivered, as you have in the cases of a drug  
7 analysis, a result, a reading that one could submit into  
8 court that says shot detected at 12 p.m., that that  
9 nontestimonial evidence could be submitted consistently  
10 with Confrontation Clause principles, but it would still  
11 require authentication.

12 Some person may have to establish that this  
13 clock was set up, it was operating properly, it was  
14 calibrated the way it had to. Those all go to the same  
15 sorts of foundational facts that are akin to the public  
16 records certificate.

17 JUSTICE BREYER: Well, you make me think the  
18 public certificate. Let's imagine birth and death  
19 records, all right? There is a whole building full of  
20 them; they are on microfiche. Now, I am not sure how  
21 Massachusetts works, but I suppose if you want to  
22 introduce one you call up the -- the keeper and the  
23 keeper looks it up, produces it, and has a separate  
24 piece of paper or maybe written beneath it which says:  
25 "This is a true copy of the," and you don't call in the

1 keeper.

2 Now that statement on a piece of paper,  
3 "this is a true copy of the birth certificate of John  
4 Smith," that was prepared specifically for this trial.

5 MS. SCHERTLER: Yes, Justice Breyer.

6 JUSTICE BREYER: So I take it that has  
7 nothing -- if -- I mean, we'll find out, but if they  
8 win, every one of those cases, every document you have  
9 to bring in the person to make clear that the document  
10 that says that this is a copy of the document --

11 MS. SCHERTLER: Our --

12 JUSTICE BREYER: Is that what -- is that the  
13 point?

14 MS. SCHERTLER: Well, that is -- that is our  
15 point. That it is too -- it is too simplified to say,  
16 as Petitioner does here, that if it's an affidavit or a  
17 certificate, and it's prepared for trial, that's the end  
18 of the analysis.

19 JUSTICE KENNEDY: But you have to have some  
20 boundaries, you have to have some framework, you have to  
21 have some explanation. You started talking about a  
22 machine. There is no machine in Justice Breyer's  
23 hypothetical, so it seems to me you have two different  
24 rationales floating around here and -- and neither are  
25 tethered to a specific rule.

1 MS. SCHERTLER: Well, Justice Kennedy, this  
2 is why I would bring those two rules together. In the  
3 public records example, what you have is underlying  
4 evidence going into the jury that is nontestimonial. In  
5 that instance, it was because it was a public record not  
6 prepared for trial but has always been accepted from --  
7 has always been viewed as nontestimonial.

8 Your Honor is correct. In this case we  
9 don't have that, but what we do have is an underlying  
10 evidentiary item that is nontestimonial for a separate  
11 purpose, and that is that it is a machine-generated  
12 result.

13 JUSTICE KENNEDY: Well --

14 JUSTICE BREYER: You're going to work  
15 either. Because the person -- Sir Walter Raleigh's  
16 accusers wanted to testify about something that was  
17 nontestimonial: what happened on the day. So what we  
18 are looking for -- I mean, I agree with you that it is a  
19 very peculiar result that's going to have every public  
20 document in the United States suddenly have the keeper  
21 of that document having to come into court.

22 On the other hand, I'm having a hard time  
23 figuring out what the distinction is between that and  
24 all these other things.

25 MS. SCHERTLER: Well -- yes, Justice Breyer.

1 Let me just add that in the public records custodian  
2 situation, there is always the possibility that the  
3 public records custodian who is signing that certificate  
4 was careless, is a liar; and those certificates yet have  
5 always been viewed as simply foundational vehicles for  
6 getting to the jury nontestimonial evidence. The  
7 defense is not --

8 JUSTICE STEVENS: Ms. Schertler, please  
9 clarify one thing for me. Is the rule you're seeking  
10 one limited to tests performed by machines?

11 MS. SCHERTLER: The rule that I have  
12 articulated so far, yes. It is -- it would be --

13 JUSTICE STEVENS: So would you agree the  
14 Confrontation Clause would apply if it were an  
15 independent expert's test -- test results and testimony.

16 MS. SCHERTLER: Justice Stevens, we also  
17 have an alternative argument --

18 JUSTICE STEVENS: Just tell me yes or no.

19 MS. SCHERTLER: No. I would not. Because  
20 we have an alternative --

21 JUSTICE STEVENS: Well, then we shouldn't  
22 talk about just machines.

23 MS. SCHERTLER: Well, also rely on one  
24 of the same arguments that Massachusetts does, which is  
25 that there was a broad exception at common law for

1 official records, those created by public officers doing  
2 their duty.

3 JUSTICE KENNEDY: It seems to me you have to  
4 do that because there is all sorts of machines that have  
5 to be interpreted. There -- a chromatic spectrum  
6 analysis; the person has to say what he saw there, what  
7 she saw there.

8 MS. SCHERTLER: I --

9 JUSTICE KENNEDY: So just because the  
10 machine is involved it seems to me we cannot make a  
11 sensible rule based on that.

12 JUSTICE SCALIA: And there was not a broad  
13 exception at common law for public records created in  
14 anticipation of criminal litigation.

15 MS. SCHERTLER: Well, we have -- I mean, we  
16 have looked for that limitation in the authorities and  
17 we simply have not found it.

18 JUSTICE SCALIA: Have you found cases where  
19 the material was admitted as a public record despite the  
20 fact that it was a public record created for  
21 prosecution?

22 MR. FISHER: The difficulty with that,  
23 Justice Scalia, is I don't know of equivalent or  
24 comparable records that were being created at that time  
25 for purposes of litigation.

1 JUSTICE SCALIA: Well --

2 JUSTICE SOUTER: These other records, no,  
3 you haven't found them.

4 MS. SCHERTLER: No. I have -- I have not.

5 Yet, if I could go back to Justice Kennedy's  
6 question, there is no record here about how this test in  
7 particular was done, but there -- there -- I can tell  
8 the Court that actually technology in the controlled  
9 substance area is to the point where an instrument does  
10 in fact provide an answer to the analyst. It provides a  
11 mass spectrum of the unknown and a --

12 JUSTICE STEVENS: Yes but the rule, the  
13 issue is not limited to drug cases. Murder cases, all  
14 sorts of cases where there is scientific evidence.

15 MS. SCHERTLER: Well, the -- the narrower  
16 rule that we are discussing here would be limited to  
17 those situations in which the underlying evidence to be  
18 presented to the jury is nontestimonial because it is  
19 instrument-generated and did not require human analysis.

20 CHIEF JUSTICE ROBERTS: So is your -- what  
21 is your answer to the question I posed to the Attorney  
22 General? The only issue in the case is whether the  
23 powder is or is not cocaine. You think you get by if  
24 the law says you can admit this with an affidavit?

25 MS. SCHERTLER: Yes, Mr. Chief Justice for

1 the following reason. Just as in the case of the  
2 records custodians, a defendant may believe that that is  
3 not an authentic record; and nothing about the rule we  
4 propose would prevent the defense from challenging the  
5 authenticity or the circumstances, the correctness of  
6 the testing procedures that were used.

7 CHIEF JUSTICE ROBERTS: But you can't --

8 MS. SCHERTLER: It's just a question of  
9 whether -- whether the Confrontation Clause requires  
10 that that challenge occur in the Government's case on  
11 cross-examination, or as in these record custodian's  
12 cases, if the defense wants to challenge the  
13 authenticity of the underlying nontestimonial evidence,  
14 he must do so in his case.

15 JUSTICE KENNEDY: Could you comment on the  
16 California experience, please?

17 MS. SCHERTLER: I would -- I would be happy  
18 to, Justice Kennedy.

19 I -- I don't have information about  
20 California. I do have information about the District of  
21 Columbia. And I can tell the court that in the time  
22 period since the District of Columbia Court of Appeals  
23 held that these sorts of certificates of analysis were  
24 testimonial, that the court appearances that have been  
25 required of DEA chemists at the Mid-Atlantic laboratory

1 have increased by 500 percent, from seven to 10  
2 appearances per month to routinely over 50 per month,  
3 and that the corresponding time that it takes to analyze  
4 substance has increased.

5 Thank you, Your Honor.

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

8 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

9 ON BEHALF OF THE PETITIONER

10 MR. FISHER: Let me start, Your Honors: If  
11 there is any doubt remaining about the machine-generated  
12 theory that the Solicitor General was putting forward  
13 today, again I would refer the court back to the  
14 scientific evidence treatise.

15 The raw data of a mass spectrometer looks --  
16 looks something like a heart monitor. It's a printout  
17 of the squiggly line across the page that a person needs  
18 to look at and then analyze as to what it shows about  
19 the molecular composite of the substance that the  
20 machine was operating. We have no objection if  
21 prosecutors in criminal cases want to introduce machine  
22 generated data. They can do that.

23 But what they can't do is introduce --  
24 introduce affidavits certifying as to their -- either  
25 their interpretation of what a machine did or simply

1 what a machine says, because there is no difference --

2 JUSTICE SCALIA: So you say they could  
3 introduce the squiggly line and put on the stand an  
4 analyst who says what that squiggly line shows is that  
5 this was cocaine?

6 MR. FISHER: They could do that, Justice  
7 Scalia.

8 JUSTICE BREYER: What's your distinction  
9 with the recordkeeper?

10 MR. FISHER: Pardon me?

11 JUSTICE BREYER: What's your distinction  
12 from your own theory of the recordkeeper? Does the  
13 recordkeeper all have to -- do they all have to testify  
14 to testify that this is indeed the record?

15 MR. FISHER: My understanding of the common  
16 law on that, as the solicitor general put it, is that  
17 that was a foundational requirement that was not  
18 necessarily considered evidence.

19 JUSTICE BREYER: No, no, there's a  
20 hearsay -- there is a hearsay aspect. I'm not saying  
21 it's the only thing. There is a chain and so forth but,  
22 there is a hearsay aspect to that which you see, okay.  
23 The certificate says this is Joe Jones' birth  
24 certificate. That's what the -- now, that's that person  
25 outside of court who made that little piece of paper for

1 purposes of this case. And moreover, the statement that  
2 it certifies to is directly relevant; indeed, the whole  
3 thing falls without it.

4 So, are you going to say the same thing  
5 applies, your rule, and you have to call the  
6 recordkeeper in or not? And I think you're going to say  
7 not. And if you're going to say not, I want to know  
8 what the distinction is?

9 MR. FISHER: As a general matter, yes, our  
10 rule is consistent. Now, if you look at Wigmore, what  
11 Wigmore says --

12 JUSTICE BREYER: You are going to calling  
13 in -- you're going to --

14 MR. FISHER: I'm trying to answer. What  
15 Wigmore says is that something like a public  
16 recordkeeper's seal was not considered evidence, per se.  
17 It was a foundational requirement to put evidence in.  
18 And so, in this Court's words in the Dowdell case, it's  
19 something like a court reporter's transcript that goes  
20 up to a Court of Appeals and then is looked at. It's  
21 not considered evidence against a criminal defendant.

22 Now, in stark contrast to this case where  
23 the document is expressly citing to a statute of  
24 Massachusetts law and saying this element of the  
25 criminal charge is satisfied. It is a very big

1 difference.

2 JUSTICE KENNEDY: May I -- the graph -- the  
3 spectrograph or -- or -- or the -- the chart is  
4 introduced. Chain of custody is either stipulated or  
5 established. Can a person who did not make the test  
6 testify as to what that line -- what that graph means,  
7 and would that be sufficient to convict?

8 MR. FISHER: So long as chain of custody was  
9 satisfied, yes, Justice Kennedy, that someone could take  
10 the stand and do that. But remember, the reports in  
11 this case do not just report -- even if you accepted the  
12 solicitor's general's version that they are reporting  
13 what the machine said about the substance, they also  
14 have a paragraph before that, and this goes to Justice  
15 Scalia's question, say, these are -- these are the  
16 substances that were taken from the defendant in this  
17 case and given to me by this officer, and so, that is  
18 additional information that is being sworn to in the  
19 affidavit in this case that is also testimony.

20 JUSTICE SOUTER: But why don't you insist,  
21 even in that case, on the confrontation right to examine  
22 the person who actually conducted the test itself and  
23 generated the papers that the later expert testifies on  
24 in order to determine the admissibility of the -- of  
25 the -- the test results themselves?

1           MR. FISHER: I think the defendant may have  
2 that right. I understood Justice Kennedy's hypothetical  
3 to suggest that that chain of custody was stipulated to  
4 or otherwise agreed.

5           JUSTICE SOUTER: Okay. All I wanted to know  
6 was whether you were giving that away or not.

7           JUSTICE KENNEDY: No, but chain of custody  
8 is -- is quite different from the qualitative analysis  
9 and the professional opinion. My question is only chain  
10 of custody has been established, that's gone to the  
11 laboratory, the paper is produced, an outside witness  
12 testifies to what the paper means. I thought you said  
13 that that suffices.

14          MR. FISHER: I did. So I think I'm --  
15 here's what I'm saying.

16          JUSTICE SOUTER: Let me ask you this. There  
17 are -- there are -- there are three possible  
18 subjects: Chain of custody, conduct of test,  
19 significance or meaning of the squiggles. As I  
20 understand it, you have said if the chain of custody is  
21 established and if the squiggles are admitted in  
22 evidence, an expert who did not do the test can testify  
23 about the significance of the squiggles. But that  
24 leaves the question of the -- the evidence about the  
25 conduct of the test itself.

1                   And I understood you to say to me that you  
2 were not conceding that you did not have a -- a  
3 confrontation right to examine the person who did the  
4 test itself in order to determine admissibility.

5                   MR. FISHER: I think what we are doing here  
6 is disagreeing slightly over where chain of custody  
7 begins and ends. To the extent chain of custody gets  
8 you to the point at which the substance is put into the  
9 machine, and that was stipulated to or otherwise not  
10 thought about, then, yes, the printout could be  
11 introduced into evidence and anyone could testify as to  
12 what that printout means. But to the extent that there  
13 was a gap between the drugs getting into the laboratory  
14 and being put into the machine by somebody that the  
15 defendant was not stipulating to, then whoever did  
16 that -- if the State were going to assert this is who  
17 did it and this is the drugs that we had -- that would  
18 be something that would be subject to cross-examination.

19                   JUSTICE SOUTER: Okay.

20                   CHIEF JUSTICE ROBERTS: Thank you, counsel.  
21 The case is submitted.

22                   (Whereupon, at 2:04 p.m., the case in the  
23 above-entitled matter was submitted.)

24  
25

<b>A</b>	<p>56:24  <b>admits</b> 3:23  <b>admitted</b> 15:7  55:19 62:21  <b>Admittedly</b>  35:25  <b>admitting</b> 49:7  <b>advance</b> 9:11,16  <b>advantage</b> 46:7  46:25  <b>adversary</b> 8:16  <b>adverse</b> 7:19  <b>advocate</b> 15:1  <b>affidavit</b> 3:12,19  5:5 29:16  47:23 48:8  52:16 56:24  61:19  <b>affidavits</b> 7:24  10:6,11 29:21  58:24  <b>agency</b> 49:24  <b>agents</b> 13:11  <b>ago</b> 32:1  <b>agree</b> 9:8 10:2  10:21 36:16  37:12 39:13  41:15 53:18  54:13  <b>agreeable</b> 28:4  <b>agreed</b> 47:9 62:4  <b>ahead</b> 14:12  27:13 31:17  <b>ahold</b> 17:20  <b>akin</b> 36:22 51:15  <b>albeit</b> 50:16  <b>alcohol</b> 6:14  <b>ALITO</b> 20:7,13  <b>allow</b> 6:8  <b>allowed</b> 17:18  23:19 43:23  <b>alternative</b>  54:17,20  <b>ambit</b> 13:2  <b>amicus</b> 1:21 2:8  40:6 44:18  47:4 48:23</p>	<p><b>amount</b> 26:5  <b>analogies</b> 36:21  <b>analogy</b> 12:12  49:17 51:3  <b>analyses</b> 26:9  <b>analysis</b> 4:18  11:25 25:18  29:4,22 30:5  33:12,21 37:14  51:7 52:18  55:6 56:19  57:23 62:8  <b>analyst</b> 3:24 4:4  4:5,13 5:9 6:16  7:19,19 13:23  26:14,21,22  28:1,3,4,7,10  37:2 42:14,17  42:23,25 48:2  49:13 56:10  59:4  <b>analysts</b> 37:22  37:25 41:5  <b>analyze</b> 58:3,18  <b>analyzed</b> 30:17  <b>analyzing</b> 6:22  <b>ancient</b> 3:13  18:9  <b>answer</b> 10:5,21  13:14 16:7  19:22 26:17  29:12 48:4  56:10,21 60:14  <b>answered</b> 27:5  27:24  <b>answers</b> 43:15  <b>anticipation</b>  36:18 55:14  <b>apparently</b>  19:23  <b>Appeals</b> 57:22  60:20  <b>appear</b> 46:14  <b>appearances</b>  1:14 57:24  58:2  <b>appears</b> 25:18</p>	<p><b>applies</b> 14:19  60:5  <b>apply</b> 25:5 54:14  <b>appointed</b> 46:23  <b>area</b> 56:9  <b>areas</b> 37:13  40:15  <b>argue</b> 7:7 36:2  47:12  <b>arguing</b> 20:9  <b>argument</b> 1:12  2:2,10 3:3,6  11:14 12:2  16:4 20:8  28:25 29:13  33:5 35:12,17  38:5 44:14  48:21 54:17  58:8  <b>arguments</b> 44:8  54:24  <b>arises</b> 8:15  <b>arrange</b> 8:5  <b>articulated</b>  54:12  <b>asked</b> 13:12  26:16  <b>asking</b> 11:2 48:5  <b>aspect</b> 43:21  59:20,22  <b>assault</b> 36:23  <b>assert</b> 9:10,16  63:16  <b>assertions</b> 12:6  12:22,25 49:6  <b>assistant</b> 1:19  5:18  <b>assume</b> 16:4  18:5 24:16  50:19  <b>assumed</b> 13:17  <b>assuming</b> 26:12  <b>assumptions</b>  18:13  <b>attaching</b> 49:25  <b>attempt</b> 8:25  32:11</p>	<p><b>Attorney</b> 1:17  56:21  <b>attorneys</b> 46:15  <b>authentic</b> 57:3  <b>authenticates</b>  49:3  <b>authentication</b>  51:11  <b>authenticity</b>  57:5,13  <b>authorities</b>  55:16  <b>authority</b> 33:25  49:21  <b>autopsy</b> 34:19  34:20,24  <b>available</b> 17:7  41:23  <b>aware</b> 23:16  40:20</p> <hr/> <p style="text-align: center;"><b>B</b></p> <p><b>back</b> 21:3 33:7  38:13 42:21  44:11 56:5  58:13  <b>backed</b> 22:3  <b>background</b>  19:15  <b>bad</b> 17:10 48:1  <b>ballistic</b> 37:6,9  <b>ballistics</b> 25:10  37:5 38:23  <b>bar</b> 21:8  <b>bargained</b> 46:2  <b>bargaining</b> 21:4  21:6,17  <b>bargains</b> 19:5  <b>base</b> 40:7  <b>based</b> 10:17,22  55:11  <b>basic</b> 33:6  <b>basis</b> 7:11 12:8  24:13 34:14  <b>begins</b> 63:7  <b>behalf</b> 1:15,18  1:21 2:4,6,8,12</p>
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3:7 29:1 48:22 58:9 <b>behavior</b> 29:8 30:21 41:19,22 <b>believe</b> 14:18 18:25 23:17 34:22 39:5 44:1,19 57:2 <b>beneath</b> 51:24 <b>benefit</b> 45:6 <b>best</b> 8:13 9:8 12:1 19:21 23:17,17 42:1 <b>better</b> 33:3 <b>biased</b> 15:11 <b>big</b> 14:3 60:25 <b>billion</b> 22:5,5 <b>birth</b> 51:18 52:3 59:23 <b>bishops</b> 16:25 <b>bland</b> 14:14 47:10 <b>blood</b> 6:14 12:20 25:5 27:17 39:1,1 <b>blue</b> 30:10,12 31:5 32:2,4 33:4 35:10 <b>bolstered</b> 8:6 <b>book</b> 24:22 <b>Boston</b> 1:17 <b>boundaries</b> 52:20 <b>brand-new</b> 11:20 <b>breath</b> 27:17 <b>Breyer</b> 15:4 16:3,9,12,16 17:5,10,13 18:3,5,11 21:2 39:21 40:13,22 51:17 52:5,6 52:12 53:14,25 59:8,11,19 60:12 <b>Breyer's</b> 52:22 <b>brief</b> 3:23 9:7	17:6 19:3,25 34:22 37:18 40:6 44:19 47:4 <b>bring</b> 13:23 14:5 14:8,11 21:22 37:9 48:2 52:9 53:2 <b>broad</b> 54:25 55:12 <b>brought</b> 26:6 42:17 <b>budget</b> 22:4 <b>building</b> 51:19 <b>bullet</b> 38:24 <b>burden</b> 8:25 22:8 45:6 <b>business</b> 10:10 10:12,15 11:8 11:11,15 15:8 15:20,22 16:1 16:7 23:14,22 23:24 24:2,7,9 24:14,19,21 33:21 43:24 <b>business-record</b> 11:19 <b>busy</b> 28:2 <b>buying</b> 41:19	<b>called</b> 3:24 8:22 <b>calling</b> 60:12 <b>calls</b> 22:17 <b>car</b> 30:10,12 31:5 32:2,4 33:4 35:10 <b>care</b> 26:5 <b>careful</b> 10:1 41:17 <b>careless</b> 54:4 <b>carpet</b> 12:20 <b>carrying</b> 47:19 <b>case</b> 3:4,14,19 4:12 6:20 7:5,8 7:24 8:18,23 10:19,22 11:20 11:24 12:13 13:9,18 14:24 16:6 17:6 18:19,20 19:20 20:1 21:24 22:9,15 24:15 26:4,18 27:5 27:10 28:7 29:5,14,15,16 29:19 30:11,20 32:2,5,13,25 33:4,16 35:3 35:11 36:6,23 37:14 38:5,6 39:7,10 41:21 42:20 44:2 47:18 48:9 50:11,14 53:8 56:22 57:1,10 57:14 60:1,18 60:22 61:11,17 61:19,21 63:21 63:22 <b>cases</b> 6:5 11:21 19:5,6 20:9 22:23 25:3 30:4 31:9 32:10 35:24 44:4,21 46:6 46:17 51:6 52:8 55:18	56:13,13,14 57:12 58:21 <b>categories</b> 14:1 <b>category</b> 14:7,13 14:16 19:5,6 <b>cause</b> 18:25 24:24 34:9,17 <b>caused</b> 45:9 <b>central</b> 47:18 <b>certain</b> 12:4 41:2 <b>certainly</b> 13:4,4 35:23 44:20 <b>certificate</b> 36:25 51:16,18 52:3 52:17 54:3 59:23,24 <b>certificates</b> 3:18 29:4 54:4 57:23 <b>certification</b> 49:13 <b>certifies</b> 60:2 <b>certify</b> 26:22 49:15,21 <b>certifying</b> 27:21 58:24 <b>chain</b> 23:7 41:16 41:25 42:18 43:2 59:21 61:4,8 62:3,7,9 62:18,20 63:6 63:7 <b>challenge</b> 19:2 57:10,12 <b>challenging</b> 57:4 <b>chance</b> 31:17 <b>change</b> 31:19 <b>characterized</b> 12:2 <b>charge</b> 21:7 60:25 <b>chart</b> 61:3 <b>checks</b> 15:12 <b>chemical</b> 19:18 <b>chemicals</b> 38:17 38:19	<b>chemist</b> 38:18 46:10 <b>chemists</b> 57:25 <b>Chief</b> 3:3,8 4:3 4:22,25 19:9 19:22 22:25 26:7,18,25 27:12,15 28:22 29:2 37:17 38:12 47:3,17 48:8,19,25 49:9 56:20,25 57:7 58:6 63:20 <b>choice</b> 7:3,5 <b>chromatic</b> 55:5 <b>circuit</b> 46:20 <b>circumstances</b> 57:5 <b>circumstantial</b> 29:16 30:11 <b>cite</b> 26:1 38:14 <b>cited</b> 19:25 23:18 <b>citing</b> 60:23 <b>clarify</b> 54:9 <b>class</b> 11:16 12:9 <b>classic</b> 30:22 <b>Clause</b> 8:7,8,11 8:15 9:14 11:4 12:10,23 13:2 16:24 18:22 23:10,15 29:6 29:17,21 30:5 31:16 32:16 33:10 36:3 39:20 41:3,6 43:3,9 44:5,8 45:23 49:2,8 51:10 54:14 57:9 <b>clauses</b> 8:14 <b>clear</b> 3:11 6:1 12:12 25:2 52:9 <b>clearly</b> 11:13 25:22 29:20
	<b>C</b>			
	<b>C</b> 2:1 3:1 <b>Cal</b> 1:15 <b>calibrated</b> 51:14 <b>California</b> 6:1 14:4,25 15:1 19:4 44:14,24 45:8,9,13 47:3 57:16,20 <b>call</b> 4:5 5:18 7:18 8:1,25 9:3 9:19,21,23 13:4 16:18 17:19 21:10 29:18 36:9 40:1 51:22,25 60:5			

<p>41:24  <b>clock</b> 50:22,24                      51:2,4,6,13  <b>close</b> 18:8  <b>closing</b> 7:7  <b>Coakley</b> 1:17                      2:5 28:24,25                      29:2,20 30:1                      30:14,19 31:13                      31:22 32:18                      33:18 34:5                      35:6,13,19,22                      36:8,16 37:7                      37:10 38:4,16                      39:5,11,13                      40:12,17 41:1                      41:15 42:8,12                      42:16 43:1,11                      43:16,20,22                      44:6,18 45:4                      45:11,17 46:8                      46:19 47:5,8                      47:12,25 48:6                      48:10,13  <b>cocaine</b> 4:6 27:3                      30:17 31:8,19                      32:5,6,7,12,13                      32:14,25 36:24                      38:11,21 41:20                      42:2 47:19,22                      56:23 59:5  <b>color</b> 19:17  <b>Columbia</b> 57:21                      57:22  <b>come</b> 16:1 24:13                      34:2 44:8                      53:21  <b>comes</b> 30:11                      42:21  <b>coming</b> 32:25                      37:2,22  <b>comment</b> 44:14                      57:15  <b>common</b> 23:20                      27:7 29:11                      49:22 54:25                      55:13 59:15</p>	<p><b>commonsensi...</b>                      46:11  <b>Commonwealth</b>                      4:10 5:14 7:9                      26:3 36:25                      41:24  <b>Commonweal...</b>                      25:14  <b>companion</b> 36:6  <b>company</b> 13:19                      15:24  <b>comparable</b>                      55:24  <b>comparison</b>                      37:11  <b>comparisons</b>                      37:13  <b>complex</b> 6:12  <b>complies</b> 47:14  <b>composite</b> 58:19  <b>Compulsory</b> 8:7                      8:7 9:14  <b>concede</b> 37:18  <b>conceding</b> 63:2  <b>concern</b> 44:9                      47:7  <b>concerned</b> 44:5  <b>concerns</b> 47:15  <b>conclusion</b>                      28:19 37:25  <b>concurring</b>                      33:19  <b>conditions</b> 50:2  <b>conduct</b> 62:18                      62:25  <b>conducted</b> 25:13                      61:22  <b>conflated</b> 34:22  <b>confront</b> 44:10  <b>confrontation</b>                      3:11 8:4,6,11                      8:15 10:14                      11:4,22 12:10                      12:23 13:2                      16:8,24 18:22                      23:10,15 24:1                      24:24 29:6,17</p>	<p>29:21 30:4,23                      31:16 32:16,23                      33:6,10 36:3                      39:20 41:3,6                      41:18,23 43:3                      43:9,13 44:4,8                      45:23 46:7                      47:16 49:2,8                      51:10 54:14                      57:9 61:21                      63:3  <b>connected</b> 31:7                      31:9,10  <b>considered</b>                      11:11 15:8                      24:1 59:18                      60:16,21  <b>consistent</b> 35:23                      60:10  <b>consistently</b>                      43:6 51:9  <b>Constitution</b> 8:3                      23:13  <b>constitutional</b>                      9:12,15 10:4  <b>contemplation</b>                      11:10 18:18                      24:2 26:8,13                      26:20  <b>content</b> 23:10  <b>contrast</b> 13:9                      60:22  <b>controlled</b> 56:8  <b>controls</b> 21:7  <b>convict</b> 61:7  <b>conviction</b> 31:11  <b>convictions</b>                      40:18,21  <b>copy</b> 49:25                      51:25 52:3,10  <b>core</b> 3:11 10:13  <b>coroner's</b> 34:6,6                      34:8,21  <b>correct</b> 7:22                      12:25 14:23                      20:3 25:6                      35:19 53:8</p>	<p><b>correctness</b> 57:5  <b>corresponding</b>                      58:3  <b>counsel</b> 7:4,4,13                      34:22 37:12                      46:4,25 58:6                      63:20  <b>counsels</b> 22:7  <b>country</b> 17:17                      22:8  <b>couple</b> 14:20  <b>course</b> 8:21                      10:12 11:16,23                      14:11 16:9                      21:2,21 32:15                      35:3 36:5  <b>court</b> 1:1,12 3:9                      3:10 6:1 8:10                      8:14 9:24                      10:24 11:16                      13:15 17:3                      18:15 23:9                      25:24 27:6,8                      29:3 30:2 33:9                      35:23 36:20                      38:7 39:14                      41:25 43:16,23                      45:18,20 46:20                      46:21 47:15                      49:1 51:8                      53:21 56:8                      57:21,22,24                      58:13 59:25                      60:19,20  <b>courts</b> 7:12                      14:19 22:4,4                      25:9  <b>Court's</b> 7:11                      8:12 9:13                      11:12 12:6                      18:2 28:8                      60:18  <b>cover</b> 15:21  <b>covered</b> 18:6                      27:19,22 29:6  <b>crafted</b> 3:21  <b>Crawford</b> 3:10</p>	<p>7:12 11:17                      12:7 14:17,19                      23:10 35:24  <b>create</b> 13:12                      41:24  <b>created</b> 12:14                      24:2 55:1,13                      55:20,24  <b>creating</b> 27:10  <b>credentials</b> 6:22                      20:5  <b>credibility</b> 43:7                      43:10  <b>crime</b> 12:18  <b>criminal</b> 3:22                      7:5,24 16:6                      18:20 20:23                      22:6,22 24:15                      24:24 27:10                      30:22 41:22                      44:4 46:17                      55:14 58:21                      60:21,25  <b>criteria</b> 36:20  <b>critical</b> 50:20  <b>cross</b> 32:20  <b>cross-examina...</b>                      3:16 17:4                      57:11 63:18  <b>cross-examine</b>                      7:14,19 8:1,21                      29:19 48:18  <b>cross-examini...</b>                      7:10  <b>crucial</b> 41:16  <b>curiae</b> 1:22 2:9                      48:23  <b>custodian</b> 54:1,3  <b>custodians</b>                      49:19,20 57:2  <b>custodian's</b>                      57:11  <b>custody</b> 41:9,12                      41:16,25 42:18                      43:2 61:4,8                      62:3,7,10,18                      62:20 63:6,7</p>
---	---	--	--	--

<b>D</b>				
<b>D</b> 3:1	<b>defendant's</b> 8:4	<b>differences</b>	11:4,10 12:14	<b>empty</b> 20:10,12
<b>damning</b> 20:6	<b>defense</b> 6:10 7:4	31:14	<b>doing</b> 5:20 14:21	<b>enamored</b> 18:7
<b>data</b> 28:16,17,17	7:4,13,25 8:20	<b>different</b> 21:25	27:9 55:1 63:5	<b>encompasses</b>
37:19 58:15,22	8:25 9:10 19:9	25:18 35:9	<b>don't</b> 41:8 45:24	40:2
<b>date</b> 28:5	19:24 20:3	37:22 43:3	<b>door</b> 12:21	<b>ends</b> 63:7
<b>David</b> 36:7	21:8 22:18,24	48:12 52:23	<b>doubt</b> 58:11	<b>enforcement</b>
<b>Davis</b> 13:15 27:8	29:18 32:14	62:8	<b>Dowdell</b> 60:18	26:23 27:1
<b>day</b> 10:2 21:21	46:3,24 47:18	<b>differently</b>	<b>draw</b> 39:3 40:3	<b>enshrined</b> 23:12
25:10 28:11	47:22 54:7	37:23	49:17	<b>entire</b> 29:15
46:9 49:22	57:4,12	<b>difficult</b> 10:4	<b>drops</b> 19:17	<b>entries</b> 23:20
53:17	<b>definitely</b> 31:2	<b>difficulty</b> 55:22	<b>drug</b> 22:9,23	<b>equal</b> 38:20
<b>DEA</b> 57:25	<b>definition</b> 15:19	<b>direct</b> 49:5	25:3 29:4 39:1	<b>equivalent</b> 3:19
<b>dead</b> 34:9	18:16 32:17	<b>directed</b> 36:11	41:23 42:19	47:13 55:23
<b>deal</b> 30:6	34:4	36:12	44:15 45:19	<b>era</b> 34:3,3
<b>deals</b> 38:9	<b>degree</b> 25:18,19	<b>directly</b> 60:2	46:4,5 51:6	<b>error</b> 6:20
<b>dealt</b> 30:4	27:4	<b>disagree</b> 37:25	56:13	<b>especially</b> 22:23
<b>death</b> 34:10,17	<b>delays</b> 17:23	40:17 45:11	<b>drugs</b> 25:4 26:3	<b>ESQ</b> 1:15,17,19
34:24,25 51:18	<b>delivered</b> 32:6	<b>disagreeing</b> 63:6	41:20,23 63:13	2:3,5,7,11
<b>decide</b> 4:5 7:5	51:6	<b>discipline</b> 15:12	63:17	<b>essential</b> 31:10
7:12 12:8 17:3	<b>demand</b> 9:19	15:13	<b>due</b> 12:2	<b>essentially</b> 45:19
17:3 18:16	14:6,9 22:16	<b>discretion</b> 38:25	<b>Dutton</b> 33:19	<b>establish</b> 41:11
39:8	<b>demands</b> 22:15	<b>discretionary</b>	<b>duty</b> 55:2	41:12 49:6
<b>decided</b> 5:4,5	<b>Department</b>	37:13	<b>D.C</b> 1:8,21	51:12
<b>decision</b> 7:12	1:20	<b>discussing</b> 14:15		<b>established</b> 61:5
8:12,21 11:12	<b>dependent</b>	56:16	<b>E</b>	62:10,21
12:7 48:1	32:20	<b>distinction</b>	<b>E</b> 1:3 2:1 3:1,1	<b>establishment</b>
<b>decisions</b> 25:8	<b>depends</b> 5:13	30:15,18 39:23	<b>early</b> 44:20	42:18
<b>deemed</b> 30:22	<b>deposition</b> 28:3	43:7,14 53:23	<b>easiest</b> 26:17	<b>event</b> 30:20
31:10 33:20	28:9	59:8,11 60:8	<b>easily</b> 13:7	<b>evidence</b> 4:1
<b>defendant</b> 6:10	<b>depositions</b> 34:7	<b>distinguish</b> 13:5	<b>educational</b>	5:14 7:6 12:15
6:18,23 7:18	<b>describes</b> 26:4	32:11 40:8	27:2	13:13 18:24
7:18 8:8,9 9:16	<b>describing</b>	<b>distinguished</b>	<b>effect</b> 29:17 34:2	20:6 22:19
9:20,21,22	12:18	13:7	<b>effectively</b> 45:1	24:3,18 25:6
11:2 17:2,18	<b>designed</b> 36:3	<b>distinguishes</b>	<b>effort</b> 20:17	25:25 27:10
18:15 20:14,23	41:3,6	25:15	<b>either</b> 39:23	28:7 29:16
22:1,15 29:8	<b>desk</b> 7:25 42:14	<b>district</b> 45:18	41:3,6 47:19	30:11 31:6,8
30:21 31:7,9	<b>despite</b> 55:19	57:20,22	53:15 58:24	32:17 33:1,1
31:17 32:8	<b>detail</b> 26:4	<b>DNA</b> 6:12 22:3	61:4	34:13,17 36:24
41:11 42:1	<b>detect</b> 51:5	25:5	<b>element</b> 3:22	36:24 39:24
45:6,20 46:6	<b>detected</b> 51:8	<b>document</b> 6:25	18:20 41:20	42:19 49:7
48:13 57:2	<b>determine</b> 61:24	7:2 18:17	60:24	50:2 51:9 53:4
60:21 61:16	63:4	49:23,24 52:8	<b>elements</b> 38:20	54:6 56:14,17
62:1 63:15	<b>Diaz's</b> 19:11	52:9,10 53:20	<b>else's</b> 28:19	57:13 58:14
<b>defendants</b> 14:6	<b>difference</b> 8:14	53:21 60:23	<b>empirical</b> 21:19	59:18 60:16,17
14:9 19:1,8	31:4,12,25	<b>documentary</b>	25:12	60:21 62:22,24
23:1 46:22	37:16 59:1	22:19	<b>empirically</b>	63:11
	61:1	<b>documents</b> 3:20	19:23	<b>evidentiary</b>

24:17 53:10	<b>express</b> 3:21	<b>fired</b> 50:21,23	3:23	26:21 28:17,23
<b>evil</b> 36:3	49:21	51:5	<b>forward</b> 58:12	<b>given</b> 7:8 12:9
<b>evils</b> 41:2	<b>expressly</b> 33:17	<b>first</b> 7:22 16:24	<b>found</b> 33:1	25:19 61:17
<b>exactly</b> 15:16	60:23	19:4,10 21:4	49:23,25 55:17	<b>gives</b> 8:8
50:13	<b>extend</b> 27:17	21:14 24:18	55:18 56:3	<b>giving</b> 11:2 62:6
<b>exam</b> 48:14	37:6	30:1,19	<b>foundation</b> 49:7	<b>go</b> 15:15,16 19:5
<b>examination</b>	<b>extended</b> 25:9	<b>Fisher</b> 1:15 2:3	<b>foundational</b>	19:6 21:3,9
32:20	32:12	2:11 3:5,6,8	51:15 54:5	27:13 30:12
<b>examine</b> 61:21	<b>extent</b> 7:9 9:25	4:9,22 5:11,16	59:17 60:17	32:4 33:7
63:3	16:5 17:25	5:24 6:4,15 7:3	<b>founding</b> 24:10	38:13 44:21
<b>example</b> 12:19	18:23 25:22	7:21 9:5 10:8	24:17,23 34:2	51:14 56:5
25:11 49:18	27:20 63:7,12	10:25 12:1	34:3	<b>goes</b> 5:13 15:24
53:3	<b>extremely</b> 46:23	13:8,20,25	<b>four</b> 38:20	43:22 60:19
<b>exception</b> 10:9	<b>eye</b> 39:24,25	14:10 15:2	<b>framework</b>	61:14
11:18 15:20,21		16:3,11,15,19	35:11 52:20	<b>going</b> 6:3,5,7,9
23:14,23,25,25	<b>F</b>	17:12,25 18:4	<b>friends</b> 46:16	16:17,17 17:21
29:23,25 43:24	<b>facie</b> 9:23	18:10,14 19:21	<b>fruitless</b> 7:10	18:25 19:1,12
43:25 54:25	<b>fact</b> 3:22 4:11	20:11,19 21:19	<b>full</b> 28:23 51:19	20:4,9,21 21:9
55:13	6:25 12:25	22:11 23:2,5,8	<b>function</b> 45:1	21:11,22,24
<b>exceptions</b> 16:1	13:15,23 16:6	23:16,24 24:5	<b>functional</b> 47:13	24:16 30:10,23
<b>exempt</b> 11:22	18:19 20:7,8	24:9,15 25:1,7		31:6,8 39:8,8
12:8 16:25	29:14 30:6	26:17 27:4,14	<b>G</b>	40:10 45:25
<b>exempted</b> 11:15	31:10 34:23	27:20 28:6,12	<b>G</b> 3:1	47:20 53:4,14
12:22	38:7 45:8	28:23 30:3	<b>gap</b> 63:13	53:19 60:4,6,7
<b>exercise</b> 10:20	55:20 56:10	33:7 34:19	<b>general</b> 1:17,20	60:12,13 63:16
20:10,12	<b>facts</b> 10:18	55:22 58:7,8	9:9 10:3 28:24	<b>good</b> 9:22 19:9
<b>exists</b> 22:13	12:19 29:11	58:10 59:6,10	38:9 48:19	41:7
23:17 24:16	51:15	59:15 60:9,14	56:22 58:12	<b>goodly</b> 46:3
<b>exonerates</b>	<b>fair</b> 9:15 42:4	61:8 62:1,14	59:16 60:9	<b>Government</b> 5:4
12:16	44:9	63:5	<b>generally</b> 18:17	<b>Government's</b>
<b>experience</b> 6:22	<b>faith</b> 9:22	<b>Fisher's</b> 29:13	<b>general's</b> 61:12	57:10
44:21 46:11,22	<b>fall</b> 13:1 18:21	<b>Fisher's</b> 47:11	<b>generate</b> 13:13	<b>governs</b> 8:17
57:16	36:2	<b>fit</b> 11:15	<b>generated</b> 50:8	<b>graph</b> 61:2,6
<b>expert</b> 22:10	<b>falls</b> 60:3	<b>five</b> 14:18 58:7	58:22 61:23	<b>great</b> 26:4
32:14 37:9	<b>far</b> 5:13 30:2	<b>floating</b> 52:24	<b>Georgia</b> 14:4	<b>greater</b> 32:24
39:1 61:23	44:4 54:12	<b>follow</b> 40:15	<b>getting</b> 14:12	<b>grew</b> 18:1
62:22	<b>favors</b> 20:4	<b>followed</b> 15:1	20:17 41:7,13	<b>grind</b> 45:19,25
<b>expertise</b> 26:5	<b>Federal</b> 22:4,4	<b>following</b> 57:1	54:6 63:13	<b>guarantee</b> 3:13
<b>experts</b> 22:6	<b>fellow</b> 37:23,25	<b>footnote</b> 13:17	<b>Giannelli</b> 26:1	<b>guarantees</b>
<b>expert's</b> 54:15	<b>fighting</b> 25:3	37:18	<b>Giles</b> 30:6	36:14
<b>explain</b> 17:8	<b>figuring</b> 53:23	<b>forensic</b> 3:17	<b>Ginsburg</b> 7:16	<b>guess</b> 5:1 15:25
29:25	<b>filled</b> 40:6	25:15,20	7:22 9:2,6	35:17 38:1
<b>explained</b> 8:9	<b>find</b> 12:15 15:6	<b>form</b> 34:14	14:15 27:16,24	<b>gun</b> 32:4 36:23
19:24	52:7	<b>formal</b> 3:20	28:10 45:24	37:1 38:24
<b>explanation</b>	<b>fingerprints</b>	<b>forth</b> 6:13 10:11	49:10,18	<b>gunshot</b> 51:5
8:13 28:17	27:18	50:2 59:21	<b>Ginsburg's</b> 11:1	<b>guy</b> 5:3 19:10,12
52:21	<b>firearm</b> 37:11	<b>forthrightly</b>	<b>give</b> 13:23,25	19:19 47:23

<b>H</b>	34:20 35:6,20 36:16 37:11 38:5 39:13 40:12,17 41:2 41:15 43:1 44:7,19 45:5 45:12 46:9,19 53:8 58:5	26:1 <b>Inadi</b> 45:21 <b>incentives</b> 23:6 <b>including</b> 14:3 36:21 <b>increased</b> 58:1,4 <b>incriminates</b> 12:16 <b>independent</b> 13:4 31:18 34:13 36:13 48:14 54:15 <b>independently</b> 29:10 <b>indication</b> 44:22 <b>indictment</b> 34:12,15 <b>individual</b> 13:18 50:9 <b>individuals</b> 13:12 <b>influence</b> 46:16 <b>information</b> 13:24 21:18 45:12 49:12 57:19,20 61:18 <b>Innocence</b> 17:6 <b>insist</b> 7:14 21:10 46:25 61:20 <b>insisting</b> 20:4 22:14,14 46:17 <b>insists</b> 20:23 <b>instance</b> 20:14 30:19,25 33:19 34:6 36:23 43:23 48:2 53:5 <b>instances</b> 17:11 37:4 48:16,17 <b>instrument</b> 49:5 56:9 <b>instrument-ge...</b> 49:4 50:17 56:19 <b>insulation</b> 10:18 <b>interested</b> 17:15 23:8	<b>interestingly</b> 38:4 <b>interpretation</b> 25:19,22 35:17 37:19,21 38:14 38:15,16 58:25 <b>interpreted</b> 55:5 <b>interpretive</b> 25:23 26:5 <b>introduce</b> 8:17 27:21 36:25 51:22 58:21,23 58:24 59:3 <b>introduced</b> 3:24 20:2 34:16 61:4 63:11 <b>Introducing</b> 3:17 <b>involve</b> 38:24 <b>involved</b> 25:19 27:8,9 44:23 45:22 55:10 <b>involves</b> 34:7 <b>involving</b> 42:2 <b>isn't</b> 25:4 31:20 <b>issue</b> 3:18 10:23 16:18 17:24 29:4 41:21 43:2 45:22 47:18 48:16 56:13,22 <b>issues</b> 40:18,20 43:3,7,8 <b>item</b> 53:10	<b>judge's</b> 7:25 <b>judgment</b> 38:25 <b>juries</b> 12:4 <b>jurisdictions</b> 39:15 <b>jurisprudence</b> 9:13 18:2 27:6 28:9 <b>jury</b> 3:15 7:1 8:20 9:14 19:19 28:19 34:17 50:3 53:4 54:6 56:18 <b>justice</b> 1:20 3:3 3:8 4:3,14,25 5:15,17,25 6:2 6:6,24 7:16,21 9:2,6 10:5 11:1 11:23 12:11 13:3,20 14:1,8 14:15,23 15:4 16:3,9,12,14 16:15,16 17:5 17:10,13 18:3 18:5,11 19:9 19:22 20:7,13 21:2 22:2,6,11 22:22,25 23:8 23:22 24:4,6 24:12 25:1,7 26:7,18,25 27:12,15,16,24 28:10,22 29:2 29:12,24 30:9 30:15 31:4,21 31:24,25 32:22 33:14,20,23,23 34:12 35:1,7 35:14,21 36:5 36:9 37:5,8,15 37:17 38:12,22 39:6,12,21 40:13,22 41:8 42:5,10,13,22 43:5,12,19,21 44:3,11,13,24
<b>I</b>	<b>idea</b> 26:15 <b>identifiable</b> 31:15 <b>identification</b> 40:19 <b>identified</b> 29:10 42:9 <b>identify</b> 42:21 <b>Illinois</b> 8:13 14:4 <b>illustrates</b> 49:19 <b>imagine</b> 26:14 51:18 <b>impeach</b> 5:7 <b>implicated</b> 43:3 49:2 <b>implicit</b> 43:15 <b>implicitly</b> 43:8 <b>important</b> 32:24 41:9 45:16 <b>importantly</b> 44:2 <b>Imwinkelried</b>			
		<b>J</b>		
		<b>JEFFREY</b> 1:15 2:3,11 3:6 58:8 <b>Joe</b> 59:23 <b>John</b> 5:18,18 52:3 <b>join</b> 47:4 <b>joined</b> 44:18 <b>Jones</b> 59:23 <b>judge</b> 12:7 46:14 <b>judges</b> 12:3 46:16,21		

45:7,15,24 46:13 47:2,3,6 47:10,17 48:4 48:7,8,11,19 48:25 49:9,10 49:18 50:4,7 50:13,14,19 51:1,3,17 52:5 52:6,12,19,22 53:1,13,14,25 54:8,13,16,18 54:21 55:3,9 55:12,18,23 56:1,2,5,12,20 56:25 57:7,15 57:18 58:6 59:2,6,8,11,19 60:12 61:2,9 61:14,20 62:2 62:5,7,16 63:19,20 <b>Justice's</b> 4:22	30:6 33:10,12 33:15,16 34:11 35:11 36:1,22 38:3 <b>kinds</b> 12:22 29:20 33:8 36:21 40:20 43:18 <b>know</b> 4:16 5:2 6:4,6,9,19 15:16 17:1 19:13,15,18 21:11,18,19 22:3 25:20 26:7,11 27:3 30:23 32:1 33:24 40:11 41:8,10 42:13 44:21,23 45:13 46:6 47:20 55:23 60:7 62:5 <b>knowledge</b> 4:17	<b>Laughter</b> 23:4 <b>law</b> 9:7 14:5 19:3 23:20 26:19,20,22 27:1 29:11 49:22 54:25 55:13 56:24 59:16 60:24 <b>laws</b> 13:23 <b>lawyer</b> 19:10 <b>lawyers</b> 22:24 23:1,3 <b>lays</b> 9:7,7 11:13 26:2 <b>leave</b> 10:2 <b>leaves</b> 62:24 <b>ledger</b> 25:23 <b>ledgers</b> 23:20 <b>leeway</b> 37:21 <b>legal</b> 35:16 36:15 <b>lens</b> 11:7 <b>let's</b> 26:9 50:19 50:19 51:18 <b>level</b> 5:10 <b>liar</b> 54:4 <b>lieu</b> 3:24 37:1 <b>limitation</b> 55:16 <b>limited</b> 25:4 54:10 56:13,16 <b>line</b> 39:4 40:4 41:12 58:17 59:3,4 61:6 <b>lines</b> 15:24 <b>line-drawing</b> 13:6 <b>LISA</b> 1:19 2:7 48:21 <b>litigation</b> 11:11 24:3 26:8,13 31:3 34:1 55:14,25 <b>little</b> 21:5 45:6 59:25 <b>live</b> 3:14 7:14 8:19 9:12 28:13	<b>long</b> 19:14 61:8 <b>look</b> 15:5,19 17:16 19:2 22:12 25:8 33:18 39:22 58:18 60:10 <b>looked</b> 33:9 35:25 36:20 43:20 45:21 55:16 60:20 <b>looking</b> 6:7 33:8 35:24 37:17 53:18 <b>looks</b> 27:3 43:17 51:23 58:15,16 <b>lost</b> 40:24 <b>lot</b> 6:13 <b>love</b> 19:10 <b>lower</b> 21:12 <b>LUIS</b> 1:3	56:11 58:15 <b>Massachusetts</b> 1:6 3:4 4:2 15:11 25:8,9 26:19 40:9 42:6 44:23 45:5,18 46:20 47:13 51:21 54:24 60:24 <b>Massachusetts's</b> 11:19 <b>material</b> 38:8 50:7,8,10,15 55:19 <b>matter</b> 1:11 8:2 8:3 10:23,23 11:9 12:19 23:13 36:15 45:14,17 60:9 63:23 <b>mean</b> 5:9,22 13:22 16:2 19:19 26:9 31:5 33:24 38:23 39:17 45:18 50:21 52:7 53:18 55:15 <b>meaning</b> 62:19 <b>means</b> 34:9,24 36:14,19 61:6 62:12 63:12 <b>meant</b> 15:2 <b>measures</b> 15:24 <b>mechanism</b> 51:4 <b>Melendez-Diaz</b> 1:3 3:4 <b>mention</b> 9:25 <b>merely</b> 49:3,6 <b>methods</b> 26:6 <b>microfiche</b> 51:20 <b>Mid-Atlantic</b> 57:25 <b>mind</b> 17:14 22:21 <b>minimum</b> 5:25
<hr/> <b>K</b> <hr/> <b>keeper</b> 51:22,23 52:1 53:20 <b>keeping</b> 22:21 <b>Kennedy</b> 5:15 5:17,25 6:2,6 6:24 10:5 11:23 12:11 13:3 14:23 16:14 22:2,11 35:1,7,14,21 36:5,9 38:22 39:6,12 44:13 44:24 45:7 48:4,7,11 52:19 53:1,13 55:3,9 57:15 57:18 61:2,9 62:7 <b>Kennedy's</b> 56:5 62:2 <b>kept</b> 15:9 <b>kind</b> 9:22 14:14 25:15 26:6	<hr/> <b>L</b> <hr/> <b>L</b> 1:15 2:3,11 3:6 58:8 <b>lab</b> 4:6 5:2,18 12:13 13:4,10 14:20 15:6 16:21 17:8 19:14 21:11 26:9 28:1 30:16 33:15 40:9 42:7 47:23 <b>laboratories</b> 40:23 <b>laboratory</b> 3:17 13:9 25:5,20 33:11,20 35:8 41:4 57:25 62:11 63:13 <b>labs</b> 15:12 22:3 40:7,7 <b>large</b> 22:22 23:5 38:10 46:1	<hr/> <b>M</b> <hr/> <b>machine</b> 38:9,17 38:23 43:12 49:11,12 50:24 52:22,22 55:10 58:20,21,25 59:1 61:13 63:9,14 <b>machines</b> 54:10 54:22 55:4 <b>machine-gene...</b> 37:19 49:14 53:11 58:11 <b>majority</b> 33:24 <b>making</b> 35:18 43:7 <b>manner</b> 34:9,24 <b>manuals</b> 19:25 <b>Marian-type</b> 34:7 <b>marked</b> 41:24 42:8,11 <b>marks</b> 15:25 <b>MARTHA</b> 1:17 2:5 28:25 <b>mass</b> 1:17 26:2		

<b>minutes</b> 58:7	47:7,10,14	33:19 62:9	<b>path</b> 32:10,12	49:1 54:8
<b>misconduct</b> 41:4	<b>notoriously</b>	<b>opportunities</b>	<b>peculiar</b> 53:19	57:16
<b>misdemeanor</b>	25:11	42:3	<b>people</b> 5:2 21:10	<b>plenty</b> 6:17,23
45:19	<b>November</b> 1:9	<b>opportunity</b>	38:1 46:13,16	9:15 17:6
<b>misspoke</b> 14:10	<b>number</b> 6:7	32:24 48:14,18	<b>percent</b> 19:7	48:14
14:11 47:5	44:21 45:1	<b>oppose</b> 8:24	38:10 58:1	<b>pocket</b> 32:7
<b>modern</b> 3:19	46:1,3	<b>oral</b> 1:11 2:2 3:6	<b>percipient</b> 29:7	<b>point</b> 16:13 21:3
11:18	<b>nuns</b> 16:25	28:25 48:21	<b>performed</b> 6:19	25:24 39:22
<b>molecular</b> 58:19		<b>order</b> 9:23 37:11	6:20 7:2 20:16	40:13 45:16
<b>moment</b> 32:1	<b>O</b>	50:9 61:24	54:10	46:14 48:1
<b>Monday</b> 1:9	<b>O</b> 2:1 3:1	63:4	<b>period</b> 57:22	49:19 52:13,15
<b>monitor</b> 58:16	<b>objection</b> 58:20	<b>ordinarily</b> 37:20	<b>periodically</b>	56:9 63:8
<b>month</b> 58:2,2	<b>objective</b> 12:19	<b>ordinary</b> 10:12	20:24	<b>pointed</b> 19:13
<b>move</b> 46:21	29:10 35:9	14:11 24:2,20	<b>permitted</b> 49:20	<b>points</b> 46:19
<b>murder</b> 50:20	38:8	24:21	<b>person</b> 4:12,20	<b>police</b> 12:12,13
56:13	<b>observe</b> 8:20	<b>ought</b> 18:17	5:5 20:5,16,17	12:18 13:5,10
<b>mutually</b> 28:3	<b>observed</b> 29:8	<b>output</b> 49:5	28:18 40:1	13:11,12,19
	<b>obviously</b> 17:1	<b>outside</b> 13:2	41:13 47:20	26:21 27:2
<b>N</b>	46:18	31:15 34:3	49:15 51:12	40:7,9 41:17
<b>N</b> 2:1,1 3:1	<b>occasionally</b>	43:13,18 59:25	52:9 53:15	<b>policeman</b> 42:5
<b>narrower</b> 56:15	26:9	62:11	55:6 58:17	<b>populous</b> 14:3
<b>nature</b> 8:16	<b>occur</b> 57:10	<b>o'clock</b> 30:13	59:24 61:5,22	44:25
<b>necessarily</b>	<b>offense</b> 3:22		63:3	<b>posed</b> 56:21
17:14 59:18	<b>offered</b> 16:6	<b>P</b>	<b>persuasively</b>	<b>position</b> 4:9,10
<b>need</b> 14:11	<b>offering</b> 25:17	<b>P</b> 3:1	17:8	7:10 27:19
24:17 26:6	<b>officer</b> 26:21	<b>packaging</b> 42:21	<b>Petitioner</b> 1:4	42:1
27:6 37:13,23	41:17,22 42:20	<b>page</b> 2:2 37:18	1:16 2:4,12 3:7	<b>possession</b> 41:19
<b>needed</b> 46:18	61:17	58:17	44:17 45:2	<b>possibility</b> 54:2
<b>needs</b> 4:12 42:3	<b>officers</b> 55:1	<b>Palmer</b> 11:12	47:8 52:16	<b>possible</b> 15:18
58:17	<b>official</b> 29:9	<b>paper</b> 40:23	58:9	62:17
<b>neither</b> 52:24	33:11 34:23	51:24 52:2	<b>phone</b> 22:18	<b>powder</b> 56:23
<b>nervous</b> 21:5	55:1	59:25 62:11,12	<b>physical</b> 32:9	<b>practical</b> 45:14
<b>never</b> 13:1 33:11	<b>oh</b> 24:6 40:8	<b>papers</b> 61:23	<b>picture</b> 46:2	45:17
<b>new</b> 6:12	<b>Ohio</b> 30:5,5	<b>paragraph</b>	<b>piece</b> 24:18	<b>practice</b> 10:23
<b>nine</b> 14:13	39:17	61:14	42:19 51:24	18:1
<b>non</b> 48:4	<b>okay</b> 10:25	<b>Pardon</b> 59:10	52:2 59:25	<b>precisely</b> 39:7
<b>nontestimonial</b>	11:21 27:14	<b>part</b> 8:23 17:23	<b>pieces</b> 18:24	43:25 50:9
24:11,13,25	50:21 59:22	29:18	<b>pile</b> 7:24	<b>predicting</b> 45:25
49:7 51:9 53:4	62:5 63:19	<b>particular</b> 5:10	<b>place</b> 21:14	<b>predominant</b>
53:7,10,17	<b>once</b> 37:12	10:19 17:19	24:18 28:2	15:17
54:6 56:18	<b>ongoing</b> 35:9	30:20 41:10	<b>places</b> 18:24	<b>prepared</b> 11:10
57:13	<b>open</b> 12:21	42:9,11 50:20	40:24	15:8,14,23
<b>notice</b> 9:16,19	<b>opening</b> 8:18	56:7	<b>plain</b> 9:9 11:10	18:18 26:8,12
13:22 22:16	<b>operating</b> 51:13	<b>particularly</b>	<b>players</b> 22:20,24	33:17 34:1
<b>notice-and-de...</b>	58:20	15:11,23 18:8	<b>plea</b> 19:5 21:4	36:18 39:24,25
9:3,6,9 10:1	<b>operator</b> 13:17	<b>parties</b> 26:1	21:17 46:1	50:7,12 52:4
14:14 20:20	<b>opinion</b> 9:25	<b>passive</b> 8:4	<b>please</b> 3:9 29:3	52:17 53:6

<b>presence</b> 21:17	<b>proof</b> 20:24	<b>pull</b> 36:17	13:10 26:24	<b>recordkeeper's</b>
<b>present</b> 28:3	<b>properly</b> 38:18	<b>purpose</b> 3:21	<b>raised</b> 16:14	60:16
49:22	51:13	34:1 53:11	21:13 24:23	<b>records</b> 10:10
<b>presented</b> 50:3	<b>propose</b> 57:4	<b>purposefully</b>	38:5,6 39:7,10	10:12,15 11:11
56:18	<b>proposes</b> 44:17	3:21	<b>raising</b> 39:12	11:15 12:9
<b>preserve</b> 28:6	45:2	<b>purposes</b> 16:4	<b>Raleigh's</b> 53:15	15:9,20,22
<b>press</b> 7:6	<b>proposition</b>	26:10,23 27:1	<b>rate</b> 6:20	16:1 23:14,23
<b>prevail</b> 39:9	29:13 33:25	36:10 55:25	<b>rationales</b> 52:24	23:24 24:2,7
<b>prevent</b> 36:4	<b>prosecute</b> 50:9	60:1	<b>raw</b> 28:16,17,17	24:10,14,19
41:3 57:4	<b>prosecution</b>	<b>put</b> 5:14,16 6:16	49:12 58:15	29:9 43:24,24
<b>price</b> 21:20	3:14 7:7,23 8:5	8:19 9:12	<b>read</b> 38:2,3,13	49:19,20,23,24
<b>prima</b> 9:22	8:17,19,23	19:16 20:16,24	40:23	50:11 51:16,19
<b>primarily</b> 25:3	9:11,23 16:6	29:15 38:8	<b>reading</b> 51:7	53:3 54:1,3
<b>principal</b> 36:2	18:18 20:3,17	59:3,16 60:17	<b>real</b> 36:23,24	55:1,13,24
<b>principle</b> 10:13	20:24 22:15,17	63:8,14	45:22	56:2 57:2
<b>principles</b> 51:10	26:20 27:21	<b>putting</b> 7:24	<b>realize</b> 46:10	<b>refer</b> 58:13
<b>printout</b> 58:16	30:24 31:11	20:25 49:11	<b>really</b> 17:24	<b>reference</b> 14:25
63:10,12	34:14 50:20	58:12	18:6 26:14	34:11
<b>prior</b> 41:5	55:21	<b>p.m</b> 1:13 3:2	30:3,7 32:22	<b>referring</b> 43:23
<b>private</b> 13:10,11	<b>prosecutions</b>	51:8 63:22	36:10,11 38:6	<b>regime</b> 14:15
13:18,18	44:15 45:19		40:7,8 41:21	22:16 24:16
<b>probably</b> 46:3	<b>prosecution's</b>	<b>Q</b>	50:1	<b>regimes</b> 20:20
<b>problem</b> 17:21	7:6 47:25	<b>qualitative</b> 62:8	<b>realm</b> 43:18	<b>related</b> 40:19
19:1 24:24	<b>prosecutor</b> 21:6	<b>qualities</b> 36:17	<b>realms</b> 18:24	44:6
28:15 36:5	21:7,12,13	<b>quantity</b> 46:4,5	<b>reason</b> 18:25	<b>relates</b> 41:16
<b>problems</b> 45:10	<b>prosecutors</b>	<b>question</b> 10:9,15	19:24 21:5	42:20
<b>procedural</b> 3:13	41:5 58:21	11:1,6 13:6,11	43:25 47:2,6	<b>relay</b> 28:19
21:25	<b>protecting</b> 46:24	16:8 18:8	50:16 57:1	<b>relayed</b> 12:20
<b>procedure</b> 41:17	<b>protection</b> 3:12	26:24,25 27:7	<b>reasonable</b> 40:4	<b>relevance</b> 24:20
<b>procedures</b>	<b>protocol</b> 30:25	27:25 35:4	<b>reasons</b> 7:21	<b>relevant</b> 60:2
10:17 40:19	<b>protocols</b> 6:21	39:8 46:12	<b>rebuttal</b> 2:10	<b>reliability</b> 12:3,8
57:6	10:17 35:8	56:6,21 57:8	28:23 58:8	16:22 36:14
<b>proceedings</b>	<b>prove</b> 3:14 4:11	61:15 62:9,24	<b>rebutting</b> 32:25	40:5 43:8,10
8:16	4:11 7:8 18:19	<b>questions</b> 6:17	33:1	43:17
<b>Process</b> 8:7,8	37:2,3,3,10	6:23,25 8:10	<b>recite</b> 20:5,6,6	<b>reliable</b> 4:20
9:14	<b>provide</b> 56:10	10:4 27:11	<b>reciting</b> 51:1	12:5 17:9
<b>processes</b> 12:4	<b>provides</b> 56:10	28:20	<b>record</b> 6:19 11:8	18:24 39:15,16
<b>produce</b> 22:10	<b>proving</b> 3:21	<b>quintessentially</b>	12:9 16:7	39:19 40:10,11
<b>produced</b> 62:11	33:3	4:1	24:22 33:10,11	43:12
<b>produces</b> 51:23	<b>public</b> 12:14	<b>quite</b> 10:8 12:7	33:16,16,21	<b>rely</b> 5:5 28:16
<b>professional</b>	33:10,15 34:1	15:5 17:8,15	34:1,5,23	54:23
62:9	34:5 37:2	45:1 62:8	36:22 53:5	<b>remaining</b> 58:11
<b>professors</b> 9:7	43:24 49:20,24		55:19,20 56:6	<b>remember</b> 5:20
19:3	50:11 51:15,18	<b>R</b>	57:3,11 59:14	5:21 6:16 8:7
<b>programs</b> 27:2	53:3,5,19 54:1	<b>R</b> 3:1	<b>recordkeeper</b>	19:11 22:11,20
<b>Project</b> 17:6	54:3 55:1,13	<b>railroad</b> 11:24	20:15 59:9,12	36:24 61:10
<b>prominent</b> 18:1	55:19,20 60:15	<b>raise</b> 6:24 10:3	59:13 60:6	<b>repeat</b> 22:20,24

46:15 <b>repeated</b> 35:9 <b>reply</b> 34:21 <b>report</b> 4:7 11:24 12:13,17 13:5 20:2 21:12 25:15,20 26:22 27:21 30:7,16 33:11,15 34:24 42:15 49:16 61:11 <b>reporter's</b> 60:19 <b>reporting</b> 27:22 61:12 <b>reports</b> 3:17 12:5,12,13,18 14:20 15:7 16:23 17:8 18:21 25:5 33:20 61:10 <b>require</b> 9:19 39:19 42:22,24 51:11 56:19 <b>required</b> 9:16 10:14 25:22 26:18 37:20 38:14 57:25 <b>requirement</b> 8:19 21:13 26:24 59:17 60:17 <b>requires</b> 3:13 8:5 9:10 57:9 <b>research</b> 26:10 <b>reserve</b> 27:14 28:21 <b>reserved</b> 13:16 <b>resist</b> 20:11 <b>respect</b> 12:2 16:20 <b>Respondent</b> 1:18,22 2:6,9 29:1 48:24 <b>response</b> 29:14 <b>responsive</b> 10:8 10:22 <b>result</b> 34:6	35:15 38:10 39:16 49:4,14 50:17 51:7 53:12,19 <b>results</b> 12:5 27:22 34:8,19 34:20 40:24 54:15 61:25 <b>right</b> 3:11 4:9 5:9,11,12,13 8:3,4,8 9:4,11 9:14 11:2,22 15:5 16:2 17:11 18:11 21:3 23:25 25:7,14 32:23 33:6 42:23 44:10,16 46:7 47:15 50:24 51:19 61:21 62:2 63:3 <b>rights</b> 9:15 21:25 46:24 49:8 <b>rigors</b> 16:21 <b>road</b> 40:10 <b>Roberts</b> 3:3 4:3 4:25 18:2 19:9 22:25 26:7,25 27:12,15 28:22 37:17 38:12 39:17 44:11 47:3,17 48:19 49:9 56:20 57:7 58:6 63:20 <b>rookies</b> 27:3 <b>roots</b> 44:7 <b>routine</b> 10:19 <b>routinely</b> 58:2 <b>rule</b> 8:17 11:16 11:19,20 15:1 17:16,18 23:14 23:19 24:18,20 25:3,10,15,21 44:16 45:2,9 46:11 48:5,6	52:25 54:9,11 55:11 56:12,16 57:3 60:5,10 <b>rules</b> 53:2 <b>run</b> 5:1 <b>runs</b> 4:6 <b>run-of-the-mill</b> 11:21 <hr/> <b>S</b> <hr/> <b>S</b> 2:1 3:1 <b>sample</b> 19:12 26:10,16 32:14 <b>samples</b> 19:13 <b>satisfied</b> 39:14 60:25 61:9 <b>satisfy</b> 29:17 47:7 <b>saw</b> 30:12 31:5 55:6,7 <b>saying</b> 5:1 7:25 29:17 30:16 32:5,23 37:1 41:1,2 43:9 45:5 47:23 59:20 60:24 62:15 <b>says</b> 5:20 12:7 22:18 23:18 26:20 28:1 30:12 31:7 34:8 38:8,11 42:5,6 47:18 50:22 51:8,24 52:10 56:24 59:1,4,23 60:11,15 <b>Scalia</b> 4:14 13:20 14:1,8 23:8,22 24:6 24:12 31:4,25 34:12 37:5,8 37:15 41:8 42:5,10,13,22 44:3,11 46:13 50:4,7,13,15 50:19 51:1,4	55:12,18,23 56:1 59:2,7 <b>Scalia's</b> 61:15 <b>scene</b> 12:18 <b>schedule</b> 28:2 <b>Schertler</b> 1:19 2:7 48:20,21 48:25 49:17 50:5,10,14,25 51:3 52:5,11 52:14 53:1,25 54:8,11,16,19 54:23 55:8,15 56:4,15,25 57:8,17 <b>school</b> 37:3 <b>science</b> 16:21 <b>scientific</b> 10:19 11:25 12:4 15:13 19:15 20:2 25:25 38:13 39:18 49:4 56:14 58:14 <b>scientist</b> 30:8 <b>scope</b> 31:16 33:9 <b>se</b> 60:16 <b>seal</b> 60:16 <b>search</b> 49:23 <b>second</b> 46:21 <b>secondary</b> 41:21 <b>section</b> 26:2 <b>see</b> 7:22 21:3,5 31:4,11 32:15 33:5 35:21 47:2,6 59:22 <b>seeing</b> 18:8 <b>seeking</b> 54:9 <b>seized</b> 41:22 <b>selling</b> 41:19 47:21 <b>sense</b> 27:7 39:17 <b>sensible</b> 55:11 <b>sentence</b> 21:7 <b>separate</b> 50:16 51:23 53:10 <b>separated</b> 38:18	<b>separation</b> 38:19 <b>series</b> 35:24 <b>servants</b> 12:14 <b>set</b> 31:1 50:2 51:13 <b>seven</b> 58:1 <b>shift</b> 8:25 <b>shop</b> 24:22 <b>shop-book</b> 23:19,19 <b>shot</b> 33:3 50:21 50:23 51:8 <b>show</b> 4:8 7:1 28:5 42:23 <b>showed</b> 4:18 <b>showing</b> 9:23 <b>shown</b> 30:17 34:16 <b>shows</b> 58:18 59:4 <b>side</b> 23:7 25:23 <b>sides</b> 23:18 28:4 <b>signature</b> 5:19 <b>significance</b> 62:19,23 <b>significant</b> 32:19 <b>signing</b> 54:3 <b>silent</b> 7:7 <b>simplified</b> 52:15 <b>simply</b> 7:6,24 8:15 20:16 22:17 49:14 54:5 55:17 58:25 <b>Sir</b> 53:15 <b>situation</b> 7:11 13:16 26:14 54:2 <b>situations</b> 45:21 56:17 <b>six</b> 14:2 <b>skill</b> 26:5 <b>slightly</b> 25:17 63:6 <b>Smith</b> 5:18,19
---	--	---	---	---

52:4 <b>sole</b> 47:21 <b>solicitor</b> 1:19 9:9 10:3 38:9 58:12 59:16 <b>solicitor's</b> 61:12 <b>somebody</b> 21:1 28:19 34:8 44:9 50:22 63:14 <b>sorry</b> 14:10 27:13 <b>sorts</b> 25:6 51:15 55:4 56:14 57:23 <b>sound</b> 29:14 <b>source</b> 15:10 23:17 25:25 <b>sources</b> 17:7 <b>SOUTER</b> 29:12 29:24 30:9,15 31:21,24 32:22 33:14,23 43:5 43:12,19,21 47:2,6,10 56:2 61:20 62:5,16 63:19 <b>speaking</b> 18:17 <b>speaks</b> 49:12 <b>special</b> 11:20 14:4 <b>specific</b> 35:10 52:25 <b>specifically</b> 18:19 41:7 52:4 <b>spectrograph</b> 61:3 <b>spectrometer</b> 58:15 <b>spectrometry</b> 26:2 <b>spectrum</b> 55:5 56:11 <b>spend</b> 19:19 <b>spent</b> 22:5 <b>squiggles</b> 62:19	62:21,23 <b>squiggly</b> 58:17 59:3,4 <b>stack</b> 10:6 <b>stage</b> 41:4 <b>stain</b> 12:20 <b>stand</b> 3:25 4:12 8:20 9:12 20:5 28:16,18 59:3 61:10 <b>Standard</b> 6:14 <b>standardized</b> 6:17 <b>standards</b> 35:9 <b>Stanford</b> 1:15 <b>stark</b> 60:22 <b>start</b> 40:5 58:10 <b>started</b> 52:21 <b>state</b> 3:23 10:7 11:17,19 14:19 14:24 17:22 22:8,9 25:9 29:15 31:1 44:14,15,24 63:16 <b>statement</b> 29:7 30:6,10 31:23 32:1 35:25 36:1 50:18 52:2 60:1 <b>statements</b> 3:20 29:5 30:3 33:8 43:18 50:1 <b>States</b> 1:1,12,21 2:8 6:8,9 9:19 13:20,22 14:2 14:3,7,14,18 17:17 19:4 22:12 25:17 28:15 44:25 48:22 53:20 <b>State's</b> 33:2 <b>statistics</b> 19:3 <b>statute</b> 9:3,9 27:5 31:1 47:7 47:11,13,14 60:23	<b>statutes</b> 9:6,18 9:24 10:1 <b>statutory</b> 26:23 <b>stay</b> 7:6 <b>step</b> 32:12 <b>Stevens</b> 24:4 25:1,7 45:15 54:8,13,16,18 54:21 56:12 <b>stiff</b> 47:20 <b>stipulate</b> 46:4,9 <b>stipulated</b> 61:4 62:3 63:9 <b>stipulating</b> 63:15 <b>stipulations</b> 20:20 <b>stop</b> 7:23 <b>stories</b> 40:6 <b>straightforward</b> 38:7 <b>strategic</b> 46:25 48:1 <b>street</b> 15:24 30:10,12 31:6 <b>strike</b> 50:22 <b>strongly</b> 12:7 14:25 <b>structurally</b> 8:6 <b>structure</b> 8:2 <b>studies</b> 25:12 <b>study</b> 21:20 <b>stuff</b> 38:3 47:19 <b>subject</b> 3:15 29:21 30:23 33:12 35:8,16 63:18 <b>subjective</b> 37:21 38:1 <b>subjects</b> 62:18 <b>submit</b> 47:23 48:7 50:15 51:7 <b>submitted</b> 4:7 29:22 51:9 63:21,23 <b>subordinates</b>	4:19 <b>subpoena</b> 6:10 8:9,24 11:3 20:15 48:15 <b>substance</b> 30:16 41:10 56:9 58:4,19 61:13 63:8 <b>substances</b> 31:2 61:16 <b>substantial</b> 10:18 22:8 <b>substantive</b> 5:12 <b>substitute</b> 7:17 28:1,13 <b>suddenly</b> 53:20 <b>suffices</b> 62:13 <b>sufficient</b> 33:13 38:25,25 61:7 <b>suggest</b> 62:3 <b>suggested</b> 12:18 <b>suggestion</b> 23:21 37:20 <b>suggestive</b> 40:19 <b>suggests</b> 15:6 <b>sun</b> 40:3 <b>superior</b> 46:21 <b>supervisor</b> 4:6 4:15,16,23,24 27:25 28:16 <b>support</b> 20:7,8 <b>supporting</b> 1:22 2:9 48:24 <b>suppose</b> 4:4 5:15 5:17 6:13 26:9 28:1 49:9 51:21 <b>supposition</b> 26:15 <b>supreme</b> 1:1,12 14:19 <b>sure</b> 22:2 42:4 48:15 51:20 <b>surely</b> 8:10 <b>sworn</b> 3:20 12:14,15,15 61:18	<b>system</b> 3:12 21:6 21:6 22:22 <hr/> <b>T</b> <hr/> <b>T</b> 2:1,1 <b>take</b> 4:7,12 20:5 28:16,18 32:13 32:13 33:24 44:25 46:7 52:6 61:9 <b>taken</b> 41:11 61:16 <b>takes</b> 58:3 <b>talk</b> 54:22 <b>talking</b> 10:10,11 20:25 22:23,25 23:2 25:2 30:7 33:20 39:18 40:5 52:21 <b>Taylor</b> 8:12 <b>technician</b> 5:18 <b>technology</b> 56:8 <b>tell</b> 4:20 5:21 7:1 12:15 22:8 35:1 36:13 44:20 50:21 54:18 56:7 57:21 <b>telling</b> 17:2 <b>tells</b> 26:3 <b>temporal</b> 32:9 32:11 <b>ten</b> 14:13 <b>term</b> 35:16 <b>terms</b> 5:14 12:5 25:11 <b>test</b> 5:3,8,20 6:15,17,18,19 6:21 19:13,16 20:16 26:4,6 26:11,16 27:1 27:17,18,22 30:8 31:1,17 39:18,19 40:2 41:14 43:9 49:4 54:15,15 56:6 61:5,22
--	---	--	--	--

61:25 62:18,22 62:25 63:4 <b>testable</b> 31:20 <b>tested</b> 32:19 47:23 <b>testified</b> 32:7 42:20 <b>testifies</b> 61:23 62:12 <b>testify</b> 3:15 4:17 5:1 20:18 32:15 40:1 42:24 53:16 59:13,14 61:6 62:22 63:11 <b>testifying</b> 49:15 <b>testimonial</b> 4:1 11:5,7,16 13:13 16:18 18:7,16 24:3,8 29:5 30:3,13 32:17 34:4 35:5,7,15,16 35:25 36:11,15 36:19 44:5 49:6 50:11,16 57:24 <b>testimony</b> 7:14 7:18 10:16 12:5 28:13 35:10 46:17 50:24 54:15 61:19 <b>testing</b> 4:6,24 19:11 20:6 26:3 39:2 42:24 57:6 <b>tests</b> 5:3,17,21 6:12,13 7:1 25:5,10 26:19 37:6 38:8 54:10 <b>tethered</b> 52:25 <b>text</b> 8:2 <b>textual</b> 8:3 <b>Thank</b> 10:25 27:15 28:22	48:19 58:5,6 63:20 <b>theory</b> 10:22 20:1 48:8 58:12 59:12 <b>they'd</b> 24:13 <b>They've</b> 44:18 <b>thing</b> 19:11 20:22 21:4 22:21 25:2 41:9 42:14 46:22 54:9 59:21 60:3,4 <b>things</b> 13:21 15:15,16,17,22 15:25 16:17,17 16:23 40:22 53:24 <b>think</b> 5:12 7:3 8:12 9:7,13,24 10:7,21,24 11:9,13 12:1,4 12:6,11,17 13:6,8,14 15:5 16:15 17:1,7,9 18:4,16 19:20 19:24 20:14,19 22:21 24:9 25:13 28:12 29:22 31:13 32:18 33:7,18 35:22 36:6,17 39:9,22 42:1 42:16 43:1,6,8 43:11,16 44:19 46:15 47:3 49:18 51:17 56:23 60:6 62:1,14 63:5 <b>thought</b> 14:25 21:14 62:12 63:10 <b>thousands</b> 5:21 19:13 <b>three</b> 7:21 19:16 19:19 38:20 62:17	<b>tied</b> 30:21 32:2,5 <b>time</b> 6:9 17:22 19:7 24:10,17 24:21,23 27:14 28:3,8,23 31:18 34:10 40:23 50:21,23 53:22 55:24 57:21 58:3 <b>today</b> 15:20,21 58:13 <b>top</b> 8:11 <b>trained</b> 38:19 <b>transcript</b> 60:19 <b>translators</b> 22:7 <b>tread</b> 15:25 <b>treated</b> 10:16 <b>treatise</b> 23:18 25:25 38:13 58:14 <b>trial</b> 3:12,19 9:11,17 15:8 15:14,23 17:23 19:7 20:23 21:9 22:18 28:5,8,11 31:20 32:21 33:17 36:11,12 36:19 39:24 40:1 41:5 42:4 44:9,22 46:9 48:16 49:3 50:8,12 52:4 52:17 53:6 <b>trigger</b> 49:8 51:4 <b>true</b> 10:13 18:3 31:22 32:15 48:16 49:25 51:25 52:3 <b>truth</b> 12:15 16:22 17:2 <b>try</b> 40:10 48:11 <b>trying</b> 4:11 17:13 47:20 60:14 <b>turns</b> 19:17	<b>two</b> 8:14 16:23 22:18 31:5,12 46:19 52:23 53:2 <b>type</b> 9:3,6 38:15 46:5 <b>types</b> 9:18,24 <b>typical</b> 21:1 24:16 <hr/> <b>U</b> <hr/> <b>unavailable</b> 28:7 <b>uncertain</b> 18:6 <b>underlying</b> 50:10,15 53:3 53:9 56:17 57:13 <b>understand</b> 4:21 18:10 27:9 34:15 37:15 43:14 62:20 <b>understanding</b> 14:3 25:13 34:20 59:15 <b>understood</b> 13:1 62:2 63:1 <b>undoubtedly</b> 27:5 <b>undue</b> 45:6,7 <b>unfairness</b> 17:20 <b>United</b> 1:1,12,21 2:8 25:17 48:22 53:20 <b>University</b> 15:11 40:9 42:6 <b>unknown</b> 56:11 <b>unquestionably</b> 6:5 <b>unreliable</b> 25:11 <b>urge</b> 14:22 <b>urinalysis</b> 27:18 <b>use</b> 4:11 27:2 39:16 <b>useful</b> 17:4	<b>usually</b> 6:3 24:7 26:13 <hr/> <b>V</b> <hr/> <b>v</b> 1:5 3:4,10 11:12,17 39:17 <b>validity</b> 43:14 <b>value</b> 45:20 <b>variety</b> 9:5 15:25 <b>various</b> 40:24 <b>vehicles</b> 54:5 <b>verdict</b> 34:7,8 34:21,23 <b>verifiable</b> 29:10 <b>verified</b> 13:1 31:15 32:20 <b>version</b> 61:12 <b>view</b> 33:24 48:1 <b>viewed</b> 11:7 53:7 54:5 <b>views</b> 17:16 <b>vigorous</b> 46:23 <b>vigorously</b> 8:24 <hr/> <b>W</b> <hr/> <b>wait</b> 24:6 <b>Walter</b> 53:15 <b>want</b> 5:16,23,25 6:18 10:1 16:13,19,20 17:9 18:12 19:1,8 25:1 26:11,11 27:3 35:2 48:3 51:21 58:21 60:7 <b>wanted</b> 27:21 53:16 62:5 <b>wants</b> 4:10 5:14 7:18 8:1 17:19 20:16 57:12 <b>wash</b> 46:1 <b>Washington</b> 1:8 1:20 3:10 11:17 <b>wasn't</b> 28:11
--	--	---	--	---

<p>36:10,11 38:5 39:7,9,25 <b>waste</b> 17:22 <b>watched</b> 42:10 <b>way</b> 5:22 8:17 13:21,21 14:21 15:3,15,16 16:17 26:2 28:14 29:16 35:2,23 37:2 38:2,2,2,17 40:3,7,14 41:18 42:9,11 42:25 45:13 51:14 <b>weapon</b> 21:8,9 <b>weeks</b> 22:18 <b>we'll</b> 3:3 28:3,23 52:7 <b>we've</b> 13:1 <b>whatsoever</b> 14:5 <b>wide</b> 12:21 <b>widely</b> 17:7 <b>Wigmore</b> 23:18 60:10,11,15 <b>willing</b> 16:4 <b>win</b> 52:8 <b>wish</b> 8:23 44:13 <b>wishes</b> 7:13 <b>witness</b> 3:25 6:11 7:20 9:12 9:21,24 11:3 17:19,20 21:23 22:3 29:7,18 30:11,20 31:7 31:18,22 32:3 33:3 41:18 44:10 48:15 50:18 62:11 <b>witnesses</b> 3:14 8:1,10,19,22 8:22 9:1 10:11 14:5,9,12 21:22,23 42:23 42:24 <b>wonder</b> 14:23 <b>word</b> 39:16</p>	<p><b>words</b> 31:17,25 33:2 60:18 <b>work</b> 4:21 6:21 17:14 19:16 28:6 44:22 45:13 53:14 <b>workable</b> 17:16 40:14 45:9 <b>worked</b> 17:18 32:10 <b>working</b> 13:18 19:14 37:1,10 <b>works</b> 21:17 27:6 38:17 45:13 51:21 <b>worry</b> 41:18 <b>worth</b> 22:21 <b>worthwhile</b> 20:15 <b>wouldn't</b> 16:10 27:25 47:7 <b>write</b> 12:17 <b>written</b> 51:24 <b>wrong</b> 14:24 33:3,4 40:8,25 <b>wrongful</b> 40:18 40:20 <b>wrote</b> 42:15</p> <hr/> <p><b>X</b></p> <p>x 1:2,7 32:6</p> <hr/> <p><b>Y</b></p> <p><b>yank</b> 23:7 <b>year</b> 17:15 <b>years</b> 14:21 21:1 45:1 <b>yield</b> 12:4</p> <hr/> <p><b>Z</b></p> <p><b>zone</b> 37:3</p> <hr/> <p><b>\$</b></p> <p><b>\$1</b> 22:5 <b>\$6</b> 22:5</p> <hr/> <p><b>0</b></p> <p><b>07-591</b> 1:5 3:4</p>	<hr/> <p><b>1</b></p> <p><b>1:00</b> 1:13 3:2 <b>10</b> 1:9 19:7 30:12 37:18 58:1 <b>10:01</b> 32:3 <b>100</b> 38:10 <b>1084</b> 17:15 <b>12</b> 50:22 51:8 <b>1943</b> 11:12</p> <hr/> <p><b>2</b></p> <p><b>2:04</b> 63:22 <b>2008</b> 1:9 <b>23.030(c)</b> 26:2 <b>28</b> 2:6</p> <hr/> <p><b>3</b></p> <p><b>3</b> 2:4 <b>30</b> 37:18</p> <hr/> <p><b>4</b></p> <p><b>48</b> 2:9</p> <hr/> <p><b>5</b></p> <p><b>50</b> 58:2 <b>500</b> 58:1 <b>58</b> 2:12</p> <hr/> <p><b>9</b></p> <p><b>911</b> 13:17 36:9</p>		
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