

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA  
DEPARTMENT OF CORRECTIONS, ET AL.,  
Petitioners, v. JOSEPH J. KINDLER.

CASE NO: No. 08-992

PLACE: Washington, D.C.

DATE: Monday, November 2, 2009

PAGES: 1-55

ALDERSON REPORTING COMPANY  
1155 CONNECTICUT AVE., NW  
WASHINGTON, D.C. 20036  
(202) 289-2260

1           IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - x

3   JEFFREY A. BEARD, SECRETARY,           :

4   PENNSYLVANIA DEPARTMENT OF           :

5   CORRECTIONS, ET AL.,                 :

6                           Petitioners                 :

7                           v.                                 :   No. 08-992

8   JOSEPH J. KINDLER.                    :

9   - - - - - x

10                                           Washington, D.C.

11                                           Monday, November 2, 2009

12

13                           The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States  
15 at 1:00 p.m.

16 APPEARANCES:

17 RONALD EISENBERG, ESQ., Deputy District Attorney,  
18 Philadelphia, Pa.; on behalf of the Petitioners.

19 MATTHEW C. LAWRY, ESQ., Philadelphia, Pa.; on behalf  
20 of the Respondent.

21

22

23

24

25

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	RONALD EISENBERG, ESQ.	
4	On behalf of the Petitioners	3
5	MATTHEW C. LAWRY, ESQ.	
6	On behalf of the Respondent	25
7	REBUTTAL ARGUMENT OF	
8	RONALD EISENBERG, ESQ.	
9	On behalf of the Petitioners	50
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this afternoon in Case 08-992, Beard v. Kindler.

Mr. Eisenberg.

ORAL ARGUMENT OF RONALD EISENBERG  
ON BEHALF OF THE PETITIONERS

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

Joseph Kindler, after attacking the judicial process by murdering a witness against him, again repudiated that process by breaking out of prison twice and fleeing the country.

The court of appeals refused to honor the resulting procedural default on the ground that it was inadequate because discretionary. This Court should clarify that the purpose of the adequate State grounds doctrine isn't to strip State courts of their equitable power to excuse procedural defaults, but simply to ensure that they don't discriminate against Federal claims under the guise of a procedural ruling.

JUSTICE GINSBURG: I didn't understand the Third Circuit's rule to equate discretion with inadequacy. I thought their position was -- the

1 assertion was that the rule was mandatory; that is, if  
2 you are a fugitive, you are out forever.

3 But in fact, at the time that Kindler fled,  
4 the rule was discretionary, so the mandatory rule hadn't  
5 been firmly established. That's what I thought the  
6 Third Circuit held. It did not equate discretion with  
7 inadequacy.

8 MR. EISENBERG: That was the -- the argument  
9 presented, but I think what the Third Circuit held was  
10 simply to equate discretion with inadequacy. But in any  
11 case, Justice Ginsburg --

12 JUSTICE SCALIA: Where is that? I mean, why  
13 do we have to guess about it? Where --

14 MR. EISENBERG: Well --

15 JUSTICE SCALIA: Where do you find that in  
16 its opinion? Because I have -- I have the same -- the  
17 same problem.

18 MR. EISENBERG: I don't think we really have  
19 to guess, Your Honor. I think, looking, for example, in  
20 the third appendix at the top of page 22, where the  
21 Third Circuit is characterizing its prior law on this  
22 question:

23 "After surveying decisions of the  
24 Pennsylvania courts, we concluded that Pennsylvania  
25 courts had discretion to hear an appeal filed by a

1 fugitive who had been returned to custody before an  
2 appeal was initiated or dismissed.... Accordingly, the  
3 fugitive-forfeiture rule was not firmly established and,  
4 therefore, is not an independent and adequate procedural  
5 rule."

6 JUSTICE GINSBURG: But the fugitive-  
7 forfeiture rule that they are talking about was the --  
8 the mandatory rule wasn't firmly established.

9 MR. EISENBERG: Well, I don't think that's a  
10 fair reading of this language, in and of itself, Your  
11 Honor. But it really doesn't matter for our position,  
12 and that's because the rule that was applied to this  
13 defendant was a discretionary rule.

14 The Pennsylvania -- the trial court in this  
15 case exercised his discretion not to reinstate  
16 post-verdict motions. The opinion that was written by  
17 the trial court and is in the joint appendix at page --  
18 I believe it's 69, Your Honor -- states that the  
19 question was whether the trial judge abused his  
20 discretion in declining to reinstate post-trial motions.

21 When the case, Your Honor --

22 JUSTICE KENNEDY: Well, I -- I have a number  
23 of problems with the Third Circuit's opinion, but the  
24 question presented, it seems to me, is not really the  
25 dispositive point of the opinion. I don't think the

1 question you presented is really that squarely before  
2 us.

3 MR. EISENBERG: Well, Your Honor --

4 JUSTICE KENNEDY: And I don't see a split,  
5 either. I mean, of course, there is going to be some  
6 discretion. The question is -- the Third Circuit, as I  
7 read the opinion, was concerned that it wasn't firmly  
8 established at the time of the waiver.

9 I have real problems with whether the waiver  
10 should even be -- whether the time of the waiver is  
11 controlling, but that is not the question you asked us  
12 to resolve.

13 MR. EISENBERG: Your Honor, I think the  
14 problem here and the reason that we are at this point is  
15 that, whether the test is stated directly as being a per  
16 se ban on discretion or whether simply the standard is  
17 so high under an interpretation of "firmly established"  
18 that allows for virtually no deviation in results by the  
19 State courts, the effect is the same. It's to drive out  
20 the exercise of discretion by the State courts.

21 JUSTICE SOTOMAYOR: But this wasn't the  
22 ruling by the court in analyzing your cases and  
23 saying -- you know, in six out of the cases -- six out  
24 of the ten cases, discretion was exercised, in four it  
25 wasn't, and so it's not firmly established because the

1 numbers are skewed.

2 Justice Ginsburg -- you pointed Justice  
3 Ginsburg to page 23, and the court very directly there  
4 says, look, we are rejecting the State's argument that  
5 the waiver rule was mandatory.

6 MR. EISENBERG: Justice Sotomayor --

7 JUSTICE SOTOMAYOR: And so it characterized  
8 your argument that way, that you were saying the  
9 district court had no discretion.

10 MR. EISENBERG: Justice Sotomayor, the State  
11 didn't argue in Federal court that the State rule was  
12 mandatory. We were very explicit.

13 JUSTICE SOTOMAYOR: Well, whether you think  
14 you did or didn't, that's how the court described it, so  
15 it understood you to be taking a different position.

16 Are we going to correct it because it  
17 misunderstood you? Or --

18 MR. EISENBERG: The problem is that the  
19 Third Circuit did not engage in any inquiry about the  
20 nature of the rule that was applied to this defendant,  
21 so it was not in any position to say that a different  
22 rule was applied to this defendant than the rule that  
23 should have been applied.

24 That's the problem with the argument that a  
25 new rule was sprung on this defendant. The rule that

1 was applied to this defendant was discretion, and the  
2 Third Circuit never discusses anything other than that.

3 They reject our argument that the underlying  
4 rule was mandatory in that language, but they never  
5 discuss what rule was actually applied to this  
6 defendant. We think it was clearly a discretionary  
7 rule.

8 But the -- the real question is whether, at  
9 the time of the default, the default that occurred by  
10 the extraordinary act of escaping, the defendant was not  
11 fairly apprised of the consequences of his action.

12 And, really, whether or not the rule --

13 JUSTICE GINSBURG: You mean that the  
14 defendant might not have escaped if he knew that the  
15 rule wasn't --

16 MR. EISENBERG: Well, I think that's the  
17 irony of applying this sort of adequacy analysis to this  
18 kind of default, but that, I think, is more of a problem  
19 for Kindler than for the Commonwealth.

20 This Court has consistently held in its  
21 adequacy cases that the litigant must have a reasonable  
22 opportunity to comply with the State's procedure. If he  
23 --

24 JUSTICE KENNEDY: Well, I don't know why you  
25 submit -- why you seem to concede that that applies

1 here. I can understand why we want to look at the time  
2 of the waiver if it's an attorney arguing about jury  
3 instructions and so forth, but the man escapes when the  
4 door is open or when the window is open, and he doesn't  
5 give consideration to these things; and if he does, I  
6 think that's quite irrelevant.

7           It seems to me that the waiver point is --  
8 is something that shouldn't be conceded. I think that  
9 if 10 years elapse between the time of the escape and  
10 the time the State formulates its rules, that he is  
11 bound by those rules when he gets it. But you don't  
12 argue that. That's not what you presented to us.

13           MR. EISENBERG: Well, I think, Your Honor,  
14 what we are presenting is that the nature of the State  
15 rule here was -- was such that the defendant had  
16 reasonable notice of what he was facing by escaping,  
17 whether or not it would have affected his subjective  
18 decision to escape, and therefore that the State ground  
19 can't be thrown out in Federal court on the ground of  
20 adequacy. And really, whether the rule was strictly  
21 mandatory in 1984 or discretionary doesn't much matter  
22 for purposes of putting the defendant on notice that if  
23 he escaped, he was going to run into serious trouble  
24 trying to appeal at the same time that he was trying to  
25 stay in Canada for the rest of his life.

1           That's what this case is really all about.  
2   And yet, the lower courts, I think, have so misconstrued  
3   this Court's adequacy doctrine that they have come to  
4   the point of saying that even in that situation, the  
5   rule is inadequate and can be ignored in Federal court.

6           JUSTICE SOTOMAYOR:  What court has said?  As  
7   I read the Third Circuit, it says:  A procedural rule  
8   that is consistently applied in the vast majority of  
9   cases, even if State courts are willing to occasionally  
10  overlook it and review the merits of a claim, that  
11  that's okay.

12           MR. EISENBERG:  Your Honor --

13           JUSTICE SOTOMAYOR:  So what other circuit  
14  has said that any measure of discretion or even a lot of  
15  use of discretion bars deference to the State rule?

16           MR. EISENBERG:  Justice Sotomayor, I think  
17  if you look at the amicus brief filed on behalf of 25  
18  States, you will see that that there are a great many  
19  cases where that's exactly the analysis that the courts  
20  have applied, and in many of those cases, they have  
21  required the parties to place before them dozens and  
22  sometimes hundreds of other examples of the operation of  
23  a State procedural rule so that the lower Federal court  
24  can decide whether that --

25           JUSTICE SOTOMAYOR:  How many of those cases

1 resulted in the overturning or the grant of habeas --

2 MR. EISENBERG: I think in California, for  
3 example, it's been quite common. The State's rule for  
4 timeliness of post-conviction communications is seldom  
5 enforced in Federal court, as we learned from the amicus  
6 brief. In fact, it virtually doesn't exist. And even  
7 in those cases where the court --

8 JUSTICE SOTOMAYOR: But do we -- what --  
9 what does that tell us about us establishing the rule  
10 that you propose?

11 MR. EISENBERG: I think what it tells us is  
12 that the lower courts are applying a very different  
13 adequacy rule than this Court has been applying. We are  
14 not really asking for some kind of new rule from this  
15 Court as compared to your prior line of cases on  
16 adequacy.

17 JUSTICE SOTOMAYOR: But you are asking us to  
18 take away a part of the inquiry.

19 MR. EISENBERG: Not at all, Your Honor.

20 JUSTICE SOTOMAYOR: Your notice -- your  
21 notice and an opportunity to comply doesn't address a  
22 repeated statement by us, which is that whatever test is  
23 applied has to get to whether the State court is  
24 attempting to evade Federal review of constitutional  
25 questions.

1 MR. EISENBERG: Yes, it does, Your Honor.

2 JUSTICE SOTOMAYOR: All right. And so your  
3 test does nothing to inform that question. For example,  
4 the Flowers situation. There was a clear rule, there  
5 was more than an adequate opportunity to comply, and yet  
6 we said it didn't qualify for deference because it was  
7 clearly, given the circumstances of the State  
8 application of the rule at issue, an attempt to evade a  
9 constitutional right.

10 MR. EISENBERG: The question is what those  
11 circumstances are, Your Honor. And in virtually case  
12 after case, the circumstances that have been identified  
13 by this Court for actually finding a rule inadequate are  
14 that the State rule was some kind of bait and switch,  
15 that it was a -- to use Justice Holmes's classic  
16 formulation, that it was a spring -- a trap that was  
17 sprung on the defendant. One rule existed at the time  
18 that the litigant was proceeding; another rule was  
19 applied when the case reached appeal. And that is  
20 characteristically what has made this Court, not the  
21 lower Federal courts, but this Court, hold that rules  
22 were actually inadequate.

23 So in Ford v. Georgia, for example, where  
24 the defendant raised a Batson claim after the jury was  
25 sworn, because that's what the law was at the time of

1 his trial, when the case reached appeal the appellate --  
2 the State appellate court said: No, no; we have a new  
3 rule now; you have to do it before the jury is sworn.  
4 And they found his claim waived. That rule was  
5 inadequate.

6 In James v. Kentucky, where the defendant  
7 asked for an adverse inference charge and he asked for  
8 an admonition rather than an instruction, and the State  
9 court said, no, no, it was supposed to be an instruction  
10 rather than an admonition, that was a reversal of prior  
11 State law.

12 There are many cases very much like that  
13 where there is a spring set by the State in the sense  
14 that a different rule is applied on appeal than was  
15 before the litigant at the time that he was trying to  
16 comply with the rule.

17 Now, this case obviously is quite far from  
18 that, and that's exactly why this case should have been  
19 the last sort of case where a rule was found inadequate.  
20 The higher the standard that the lower courts apply, the  
21 stricter the standard that the lower Federal courts  
22 apply to analyze the adequacy of State rules, the less  
23 opportunity there will be for discretion on the part of  
24 the States. And the loser in that equation, while it  
25 might not be this defendant, will be the vast majority

1 of defendants who would have been more entitled, more  
2 deserving of discretion, of leniency from the State  
3 courts.

4 The State courts need to be allowed to apply  
5 the kind of discretion in their procedural rulings that  
6 this Court applies, that the Federal courts are allowed  
7 in -- in Federal procedural rulings -- for example,  
8 under the plain error rule, even under the Federal  
9 fugitive-forfeiture rule.

10 In 1876, this Court said that it's within  
11 our discretion to dismiss a case where the defendant is  
12 a fugitive. And since then, while there have been a  
13 number of decisions from this Court concerning fugitive  
14 defendants, none of them have laid out the sort of menu,  
15 the sort of standards and substandards and -- and  
16 subrules that the defendant is now arguing have to be  
17 present in a rule for it to be adequate.

18 JUSTICE GINSBURG: But the question that you  
19 present -- I mean, you state it forthrightly in your  
20 brief, and I'm reading from page 7. You say: "The  
21 court of appeals interpreted this Court's precedent to  
22 compel a finding of inadequacy for any State procedural  
23 rule that permits the State courts to exercise a degree  
24 of discretion. Any discretion is inadequate." That's  
25 what you say the court of appeals interpreted this

1 Court's precedent to say: Discretion, inadequate.

2 Well, I'm looking first at the petition  
3 appendix page 62, which describes the district court's  
4 understanding, which the Third Circuit affirmed. It  
5 says: "An occasional act of grace by a State court in  
6 excusing or disregarding a State procedural rule does  
7 not render the rule inadequate to procedurally bar  
8 advancing a habeas claim in district court."

9 Well, that's saying, yes, you can have a  
10 rule with discretion, not to follow the rule woodenly,  
11 and that doesn't make it inadequate.

12 MR. EISENBERG: Justice Ginsburg, an  
13 occasional act of grace, that level of -- of leniency,  
14 of flexibility that would be allowed by the district  
15 court's view of the law, or the Third Circuit's, is  
16 simply not appropriate in judging the adequacy of State  
17 grounds.

18 It's certainly not the kind of miserly,  
19 crabbed review of the exercise of discretion that occurs  
20 in Federal procedural rulings like the plain error rule.  
21 You don't --

22 JUSTICE GINSBURG: Well, do you want to  
23 modify, then, what you said? You said that the court of  
24 appeals said that any -- any degree of discretion means  
25 that the rule is inadequate.

1           MR. EISENBERG: Justice Ginsburg, we say  
2 that because there was no analysis here of what degree  
3 of discretion or whether discretion was actually applied  
4 by the State court in this case. That's why, in effect,  
5 we say that the Third Circuit's ruling was about the per  
6 se exercise of discretion.

7           But even if it wasn't automatically about  
8 the exercise of discretion, even if it was merely  
9 applying a rule which is so narrow and strict that in  
10 practical effect the State courts have little actual  
11 discretion to exercise, that's still a problem and it's  
12 still inconsistent with the purpose of the adequate  
13 State grounds doctrine, which was never intended to  
14 allow Federal courts or to require lower Federal courts  
15 to engage in the kind of analysis that many of the lower  
16 Federal courts are now undertaking.

17           Basically, they -- they are taking out their  
18 magnifying glasses and starting to split hairs by  
19 looking at every single case, by looking at how those  
20 cases compare to each other, by deciding whether there's  
21 enough of a standard, is there enough of a precedent,  
22 did you tell this little particular little fact to the  
23 defendant before. That sort of analysis is not part of  
24 this Court's inadequacy doctrine.

25           JUSTICE GINSBURG: What makes -- makes

1 this particularly puzzling is you are attributing a rule  
2 to the Third Circuit that that very circuit in Campbell  
3 v. Burris said was not a tool. In the -- in Campbell v.  
4 Burris, the Third Circuit said a State procedural rule  
5 can't be, cannot be rendered per se inadequate merely  
6 because it allows for some exercise of discretion.

7 MR. EISENBERG: And I think if the Third  
8 Circuit had applied that statement in this case, there  
9 might have been a different result, and at the very  
10 least there would have been additional analysis, because  
11 that calls for additional analysis beyond the absolute  
12 lack of analysis in this opinion about the nature of the  
13 rule that was actually applied to this defendant.

14 Without that sort of analysis, you can't say  
15 that the court is looking at whether this -- this  
16 particular exercise of discretion came within the small  
17 window that that court would allow to the States. That  
18 -- that --

19 JUSTICE GINSBURG: Well, it would be really  
20 odd, considering that one member of the panel was on  
21 both cases, Stapleton, and these cases are in the same  
22 year, for at least that judge not to think that what he  
23 said in the one case was in no conflict with what he  
24 said in the other.

25 MR. EISENBERG: And yet we have a result,

1 Your Honor, which is explainable only on the ground that  
2 the State court rule maintains some power of discretion  
3 by the State courts. There is nothing else in the  
4 opinion that explains the result in this case.

5 But I emphasize again that, even if the  
6 court had applied a different rule, the rule that it  
7 said it was applying in some of the Third Circuit's  
8 other panel opinions, we would still be left with a  
9 standard which is far narrower than anything that this  
10 Court has actually applied in its own decisions.

11 There have been a variety of phrases in the  
12 Court's decisions, things like "firmly established,"  
13 "strictly followed," "regularly applied."

14 JUSTICE KENNEDY: But it seems to me that  
15 that's not what the Third -- Third Circuit was saying.  
16 It was saying that adequacy of the rule is determined by  
17 the law in effect at the time of the waiver, and it  
18 wasn't well established then.

19 Now, I have real problems with that as an  
20 opening premise, but that's not what you asked us to  
21 resolve in your petition.

22 MR. EISENBERG: Well, I don't think that  
23 there is an analysis of whether the law was -- was  
24 established at the time of the waiver, Your Honor,  
25 because what the court says, or at least what the

1 precedents it rely on say, is that at the time of the  
2 waiver here, assuming for the moment that that's the  
3 relevant inquiry, the rule was discretionary.

4           The question then has to be, was that rule  
5 applied to the defendant? If a different rule is  
6 applied to the defendant, if the difference is --

7           JUSTICE SOTOMAYOR: Counsel, I don't know  
8 how you say that. Yes, it was clearly established that  
9 the district court had discretion -- none of the  
10 justices below disagreed with this -- to dismiss  
11 post-verdict motions on the basis of flight. The courts  
12 below, themselves, said: What we don't have a rule  
13 about is what we do with respect to a post-judgment  
14 motion to reinstate or how we the appellate court will  
15 treat that waiver once it comes before us. Will we  
16 apply it to the appellate process as well?

17           I understood the Third Circuit to be saying  
18 that it was those two latter components, which the  
19 courts below, themselves, identified as new questions  
20 that it was resolving, that involve new rules.

21           MR. EISENBERG: Your Honor --

22           JUSTICE SOTOMAYOR: That's as simply as I  
23 thought the issue was. Maybe your adversary will  
24 dissuade me and concede your point that what the court  
25 was saying, the discretionary application is what was

1 at issue, but if as I've described things is correct,  
2 how does your position continue to be sustained?

3 MR. EISENBERG: That wasn't State law in  
4 fact, Your Honor. The State courts didn't make the kind  
5 of decision that the Federal court, not actually in this  
6 case, but in the case that it cited, Doctor, tried to  
7 make. That is a distinction that Doctor invented from  
8 State law. It is not a distinction that the State cases  
9 announced themselves. And the --

10 JUSTICE SOTOMAYOR: So what you are  
11 disagreeing with is the Third Circuit's conclusion of  
12 what the status of Pennsylvania law was?

13 MR. EISENBERG: Well, that would have been  
14 clearer, I think, if we were appealing from the Doctor  
15 decision here now rather than from this decision, but I  
16 think that there is at the very least a great degree of  
17 unclarity in exactly what the --

18 JUSTICE SOTOMAYOR: Well, Doctor dealt with  
19 what will the court do with respect to, not post-verdict  
20 motions, but with respect to appeals that are raised  
21 before or after flight.

22 MR. EISENBERG: That is what Doctor said was  
23 a distinction in State law.

24 JUSTICE SOTOMAYOR: And that's what Doctor  
25 said?

1           MR. EISENBERG: Doctor said that. Only that  
2 Federal court said that.

3           JUSTICE SOTOMAYOR: So now the only other --  
4 Kindler now raises a new question: What are we going to  
5 do -- according to the courts below, what are we going  
6 to do with post-verdict motions to reinstate and to  
7 appeals that result after flight and after waiver,  
8 correct?

9           MR. EISENBERG: In fact, not a new question  
10 at all under State law, Your Honor. And we have cited  
11 several State court opinions --

12           JUSTICE SOTOMAYOR: That's where the  
13 disagreement lies.

14           MR. EISENBERG: Well --

15           JUSTICE SOTOMAYOR: Did the Third Circuit  
16 get Pennsylvania law wrong on this issue?

17           MR. EISENBERG: I think that's at least  
18 where the disagreement lie -- lay between the  
19 Commonwealth and Kindler below. As I say, I think  
20 there's a great deal --

21           JUSTICE SOTOMAYOR: All right. Let's assume  
22 the Third Circuit, that we take the hypothetical that  
23 they were right. How do you still win?

24           MR. EISENBERG: Then the question becomes,  
25 Your Honor, whether the alleged discrepancy, difference

1 in the State law or -- or degree of unclarity is  
2 sufficient to meet this Court's adequacy test.

3 And that's where I think we get back to  
4 Federal analogies like the Federal fugitive flight rule.  
5 And I'd like to address that -- that question, and then  
6 reserve the remainder of my time for rebuttal.

7 Under the Federal fugitive flight rule, many  
8 of these kinds of distinctions have never been spelled  
9 out. The courts simply laid out a general rule starting  
10 in the late 1800s that it was within our discretion to  
11 dismiss.

12 But despite the fact that the Court hasn't  
13 basically subdivided the rule with the nit-picking  
14 analysis that the Doctor court tried to impose on the  
15 Pennsylvania cases, that doesn't make the fugitive-  
16 forfeiture rule inadequate and therefore inapplicable to  
17 defendants. In fact, even after this Court's decision  
18 in Ortega-Rodriguez, which overturned an automatic  
19 forfeiture rule on -- applied by the Federal court of  
20 appeals, the Court allowed the district court's  
21 discretion to carry out the fugitive-forfeiture rule as  
22 they saw fit under the circumstances. And the day after  
23 Ortega-Rodriguez, despite the fact that no substandards  
24 had yet been developed, there was still a Federal  
25 fugitive-forfeiture rule --

1 JUSTICE STEVENS: May I ask one question  
2 before your time is gone? Has there ever been a  
3 precedent in Pennsylvania where they have applied the  
4 procedural default rule against a capital defendant who  
5 -- who was guilty of flight?

6 MR. EISENBERG: No, Your Honor, and I think  
7 that that's an excellent example of what I was just  
8 saying. The fact that the general rule of fugitive-  
9 forfeiture hadn't yet addressed the subquestion of  
10 whether there should be an exception for capital  
11 defendants did not render the State rule inadequate.

12 JUSTICE STEVENS: But wasn't there -- wasn't  
13 there a general rule that capital defendants always get  
14 one shot at their constitutional issue?

15 MR. EISENBERG: No, Your Honor. At this  
16 time, there was simply a rule that said that in capital  
17 cases, we will apply a limited form of relaxation of  
18 our -- of our rules to address significant questions.  
19 When you look at that language, it's almost exactly the  
20 same as the Federal plain error rule of --

21 JUSTICE STEVENS: But were there -- were  
22 there Pennsylvania cases in which they had prevented a  
23 capital defendant from raising a Federal constitutional  
24 issue for the first time?

25 MR. EISENBERG: No, Your Honor. There had

1 only been a few capital cases even decided at the time  
2 of the flight here.

3 The point is that the way that the --

4 JUSTICE STEVENS: How about other rules? In  
5 capital cases, had they applied other procedural default  
6 rules at -- for the first time a capital defendant  
7 sought to raise a constitutional issue?

8 MR. EISENBERG: At that time, I think they  
9 had not yet, but really, there were only a handful of  
10 cases.

11 JUSTICE STEVENS: So then how can you have a  
12 firmly established rule?

13 MR. EISENBERG: I don't think you have a  
14 firmly established rule, Your Honor, because you have --  
15 the firmly established rule was the pre-existing rule  
16 requiring preservation of error claims, in the same way  
17 that under the Federal plain error rule, the rule is you  
18 have to preserve your claims.

19 A defendant cannot come along and say: Hey,  
20 in Rule 52(b) it says that if my claim is plain and  
21 significant, it's not waived, and therefore I have no  
22 obligation to ever preserve my claims. The Federal  
23 plain error rule is an exception that might apply to  
24 you, but it doesn't do away with the underlying rule of  
25 issue preservation.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Lawry.

4 ORAL ARGUMENT OF MATTHEW C. LAWRY

5 ON BEHALF OF THE RESPONDENT

6 MR. LAWRY: Mr. Chief Justice, and may it  
7 please the Court:

8 I first want to address what is really at  
9 stake here. The Commonwealth wants this Court to change  
10 the adequate State ground doctrine so that Mr. Kindler  
11 may be executed with no review by any court of his  
12 meritorious claims that his death sentence was  
13 unconstitutional.

14 CHIEF JUSTICE ROBERTS: Well, but that's  
15 because he escaped. He avoided judicial process, and  
16 you would have him be in the same position once he's  
17 captured and returned and captured and returned as he  
18 was before he escaped at all, right?

19 MR. LAWRY: Well, the question is: Was  
20 there a firmly established and consistently applied  
21 State rule that would result in all of his claims being  
22 taken away? And --

23 CHIEF JUSTICE ROBERTS: And you think  
24 that -- and you don't think -- you think you can argue  
25 that a State rule saying, look, if you escape and flee

1 the jurisdiction, you bar -- your claims cannot be  
2 adequate and independent?

3 MR. LAWRY: No, I don't think that, Your  
4 Honor. What -- what -- what this Court has always  
5 required and what we are arguing, this Court has always  
6 required that a State procedural rule be firmly  
7 established and consistently applied in order to take  
8 away a litigant's claims.

9 And our position and what the Third Circuit  
10 below held was that in numerous respects, the -- the  
11 rules that the State court applied here were not firmly  
12 established or consistently applied.

13 JUSTICE SOTOMAYOR: What rules are -- I'm --

14 MR. LAWRY: Well, it's really --

15 JUSTICE SOTOMAYOR: What is -- what is your  
16 position as to what the Third Circuit was saying or  
17 holding? Are you saying, like your adversary, that they  
18 were saying because it was discretionary and there were  
19 a lot of exceptions to it, it wasn't firmly established?  
20 Or were you -- or do you read it as saying, now that you  
21 have made it mandatory, that's a new rule -- the waiver  
22 mandatory, that's a new rule?

23 MR. LAWRY: Well -- well, to begin with,  
24 what we're saying is that --

25 JUSTICE SOTOMAYOR: It's not what you are

1 saying. What do you think the Third Circuit said?

2 MR. LAWRY: What -- what I would suggest the  
3 Third Circuit said is that this case is very like  
4 Doctor. It said Doctor was controlling precedent, and  
5 Doctor involved a defendant who fled pretrial or in the  
6 middle of trial, and at that time there was a sort of  
7 two-part rule in Pennsylvania for dealing with fugitive-  
8 forfeiture.

9 One part was -- and this is in noncapital  
10 cases. One part was if the defendant flees during the  
11 appellate process, then the appeal can be dismissed.  
12 The other part was if it's any time before that, there  
13 is discretion.

14 And -- and so, when Doctor appealed, by the  
15 time his appeal was heard, Pennsylvania had changed its  
16 rule completely to one in which a flight at any time, at  
17 any time at all, was considered a complete forfeiture.  
18 And that was -- it was that change from a discretionary  
19 rule to a forfeiture rule that the Third Circuit said in  
20 Doctor was inadequate. And it said again in Kindler  
21 that the same kind of change was inadequate.

22 JUSTICE SOTOMAYOR: What was the change --

23 MR. LAWRY: The change --

24 JUSTICE SOTOMAYOR: -- that you think the  
25 Third Circuit was identifying?

1                   MR. LAWRY: The change that the Third  
2 Circuit identified was from a -- a situation where there  
3 was complete discretion -- and really more often than  
4 not, even in noncapital cases, the discretion was  
5 exercised to hear the issues. It changed from that to  
6 one where there is essentially a -- a presumption of --  
7 of waiver or forfeiture and some potential way to --

8                   JUSTICE SOTOMAYOR: Let's assume that a  
9 lower court in this case had said: You know, we have  
10 discretion, but we're not going to exercise it because  
11 you escaped twice and were away much longer than most  
12 fugitives. There is a presumption that witnesses'  
13 memories fade, that it's harder for trials that are so  
14 distant from the event, that distant from an event. We  
15 are not going to exercise our discretion.

16                   Is it your view -- because that's the  
17 undertone I'm hearing -- that under firmly established  
18 ground, that the court would have still ruled that that  
19 exercise of discretion was not adequate under --

20                   MR. LAWRY: That the Third Circuit would  
21 have said that?

22                   JUSTICE SOTOMAYOR: Yes.

23                   MR. LAWRY: It's a very -- it's a very  
24 different case. I think if --

25                   JUSTICE SOTOMAYOR: Sure, it is. But what

1 you -- there is a tone to the way you've presented this  
2 case that says because they chose often to exercise  
3 discretion in the past, if they choose not to in any  
4 case, it's no longer an independent State ground.  
5 That's what -- is that the point you are arguing?

6 MR. LAWRY: No.

7 JUSTICE SOTOMAYOR: Because that's the  
8 question presented.

9 MR. LAWRY: That's not the point that we are  
10 arguing. What we are arguing is that there needs to be  
11 consistent application of the rules. And --

12 JUSTICE SOTOMAYOR: Well, that begs your  
13 adversary's question, which is every case has one or  
14 more differences in it. At what point does a lower  
15 court have to -- can it say, you know, yes, because they  
16 exercise discretion sometimes but not others it's still  
17 an independent State ground to find forfeiture?

18 MR. LAWRY: There -- there are several  
19 things that are important in this kind of situation.  
20 One is how -- it's really how is the rule being applied.  
21 And if -- if the rule is -- if there is a situation  
22 where -- where in the vast majority of cases the rule is  
23 being applied to deny review and there are occasional  
24 acts of grace, that's one thing. It's very different  
25 when, almost every time the situation comes up, review

1 is allowed, and then in the occasional exception,  
2 without explanation, it's taken away.

3 CHIEF JUSTICE ROBERTS: Counsel, following  
4 up on that, I'd like your answer to this question: Is a  
5 State procedural rule automatically inadequate and,  
6 therefore, unenforceable when the State rule is  
7 discretionary rather than mandatory? Automatically?

8 MR. LAWRY: No, it's -- it's not  
9 automatically inadequate.

10 CHIEF JUSTICE ROBERTS: So you agree --

11 MR. LAWRY: And that's not our position --

12 CHIEF JUSTICE ROBERTS: So you agree with  
13 the Petitioners' response to that question? Their  
14 point -- their question presented is, is it  
15 automatically inadequate because there is discretion?  
16 They say no; you say no.

17 MR. LAWRY: And we don't think that the --  
18 that the Third Circuit said that --

19 CHIEF JUSTICE ROBERTS: Well, but that was  
20 the same -- that was the position you took in your  
21 opposition to certiorari.

22 MR. LAWRY: Correct.

23 CHIEF JUSTICE ROBERTS: And yet we  
24 nonetheless granted -- granted cert.

25 MR. LAWRY: Correct.

1 CHIEF JUSTICE ROBERTS: Well, if some of  
2 us -- or I suppose if several of us -- think that that  
3 may have been or was what the Third Circuit said, would  
4 you have any objection to us vacating the opinion,  
5 explaining since you both agree that the rule is not  
6 automatically inadequate -- make sure they understand  
7 that, and then they can proceed however they see fit?

8 MR. LAWRY: I would have no objection to  
9 that, Your Honor.

10 JUSTICE KENNEDY: Insofar as the ongoing  
11 rule is concerned, let's assume that as of the time of  
12 Doctor, which was a Third Circuit case, 1996, the  
13 Pennsylvania rule was then clear, Pennsylvania for the  
14 first time having made its rule clear. Would it be  
15 improper to apply it to this defendant, because he  
16 escaped before Doctor made it clear? I -- I just don't  
17 understand why the general rules of -- of -- of waiver  
18 apply in this case. It -- it doesn't affect rational  
19 conduct. It doesn't trap an attorney. Why can't we  
20 take the rule as it was when we heard his case after he  
21 had been returned as a fugitive?

22 MR. LAWRY: Well, part of the problem here  
23 is that -- that Pennsylvania law and what the  
24 Pennsylvania rule is was a moving target throughout this  
25 time period. There was the -- the discretionary sort of

1 regime under Galloway which -- which did hold as Doctor  
2 describes it. Then there was a time period when there  
3 was absolute forfeiture. Then there was another time  
4 period where they backed away from that.

5 And so that -- that kind of shifting, of  
6 turning procedural rules on and off, is the antithesis  
7 of consistent application of rules.

8 JUSTICE SCALIA: Well, that may be, but  
9 where -- where do you get that from the opinion of the  
10 court of appeals here? I find it very easy to get from  
11 the opinion of the court of appeals the proposition that  
12 if there is discretion, it's not a firmly established  
13 rule.

14 Where do you get your theory, that they had  
15 changed it from a discretionary rule to a mandatory rule  
16 at the time that the -- that the State court made this  
17 ruling? Where do you find that in the opinion of the  
18 court of appeals?

19 MR. LAWRY: Well, I -- I would -- I would  
20 acknowledge that it's a bit cryptic, but I think because  
21 the Third Circuit in Kindler said that Doctor is what's  
22 controlling in its analysis, I think you really have to  
23 read it in light of Doctor. And Doctor makes very clear  
24 that what the Third Circuit was looking at there was a  
25 change from a discretionary rule to a mandatory rule.

1           JUSTICE BREYER: So they are going to say, I  
2 imagine below -- I'm not sure -- say: Look, that's  
3 right, and Doctor talked about the shift from mandatory  
4 to discretionary, and the district court -- the State,  
5 in Doctor, said that it was a mandatory -- it's  
6 mandatory.

7           But in this case, the district court said  
8 it's discretionary. So insofar as there are two rules  
9 -- or were at the time, your client got the benefit of  
10 the most liberal, and, therefore, insofar as there is a  
11 difference, it made no difference.

12           MR. LAWRY: Well, actually our client didn't  
13 get the benefit of a number of things that were clearly  
14 established law in Pennsylvania at the time.

15           First off, there was the policy of relaxed  
16 waiver that applied to all capital cases and meant  
17 merits review of all issues. And --

18           JUSTICE SCALIA: Well, that's -- that's a  
19 different issue. Now, your -- your assertion is that  
20 what the court of appeals was based on -- decision  
21 was based -- was not this that you are arguing now, but  
22 rather, it was based on the fact that there had been a  
23 change in the law from discretionary to mandatory.

24           I can't find that, frankly, in the opinion,  
25 except in its reference to Doctor, so I have got to go

1 back and read Doctor and guess that that's what they  
2 meant when they referred to Doctor.

3 But assuming it's true, Justice Breyer says,  
4 even if it is true, what difference does it make?  
5 Because, even if they had changed from a discretionary  
6 to a mandatory, the trial court in the State had not  
7 realized that they had changed and gave him the  
8 discretionary.

9 So what -- what complaint do you have?

10 MR. LAWRY: Well, it's not even clear,  
11 really, what -- what the trial court was applying, but I  
12 think that there -- there are a number of serious  
13 problems with -- with the consistent application in this  
14 case.

15 If you want to look for just the most  
16 obvious ones, Reginald Lewis, a capital defendant, and  
17 Mr. Kindler escaped together, at the same time, the same  
18 day, together. Mr. Lewis got complete full review,  
19 merits review, of all of his issues on direct appeal,  
20 all of his issues in post-conviction. Mr. Kindler got  
21 no review --

22 CHIEF JUSTICE ROBERTS: Right. And that  
23 is -- your objection is that it wasn't fairly applied.  
24 Discretion was abused in this case, to borrow from  
25 Federal law. They didn't treat them the same. They

1 should have treated them the same.

2 But the question is whether the rule is  
3 automatically inadequate if there is discretion. You  
4 are arguing about how it was applied, which I guess  
5 means it's not automatically inadequate because if  
6 they apply it the way you think it should be, then it  
7 would be adequate.

8 MR. LAWRY: I -- I lost your train of  
9 thought there. I apologize.

10 CHIEF JUSTICE ROBERTS: Maybe I did, too.  
11 (Laughter.)

12 MR. LAWRY: No. I do not think --

13 CHIEF JUSTICE ROBERTS: But -- but the point  
14 is you are arguing about the application -- the exercise  
15 of discretion. You say the one guy, Lewis, got the  
16 benefit of the rule; your guy didn't get the benefit of  
17 the rule; and that's unfair, right?

18 MR. LAWRY: That's -- that's part of what  
19 I'm arguing. Yes. And not only --

20 CHIEF JUSTICE ROBERTS: So you are not  
21 arguing -- which would be very odd to argue -- that the  
22 discretion always makes the rule invalid because you're  
23 --

24 MR. LAWRY: No. We're not -- no, we're not  
25 arguing that.

1 CHIEF JUSTICE ROBERTS: Okay.

2 JUSTICE KENNEDY: Do -- do I take it  
3 that Justice -- that Justice Breyer's question,  
4 repeated by Justice Scalia -- just take that fact,  
5 that's the only question before us. If it was  
6 discretionary and it's now mandatory, just focus on that  
7 only.

8 MR. LAWRY: Uh-huh.

9 JUSTICE KENNEDY: Then your client isn't  
10 hurt? If you take --

11 MR. LAWRY: No, he is hurt if it is now  
12 mandatory, yes, because -- because it's -- it's like --  
13 it's like Ford or any of the other cases where -- where  
14 the rules are being changed. If like --

15 JUSTICE SCALIA: If -- if the new rule was  
16 applied to him.

17 MR. LAWRY: Yes.

18 JUSTICE SCALIA: But the point is the new  
19 rule wasn't applied to him. The trial court thought  
20 that it had discretion.

21 MR. LAWRY: Well, yes --

22 JUSTICE SCALIA: That's clear from the trial  
23 court's opinion, isn't it?

24 MR. LAWRY: Okay. But -- but what I'm  
25 focusing on is what the Pennsylvania Supreme Court did,

1 and they did a number of things.

2 Another thing that the Pennsylvania Supreme  
3 Court did was they said, in the direct appeal opinion,  
4 Mr. Kindler's flight makes his case like somebody who  
5 affirmatively goes and gives up his direct appeal  
6 altogether. All right?

7 Now, the people that they mentioned who  
8 affirmatively gave up their direct appeals altogether,  
9 when those defendants went and sought post-conviction  
10 relief, they got full post-conviction review in the  
11 Pennsylvania courts. When Mr. Kindler went, he got no  
12 review.

13 JUSTICE SOTOMAYOR: By whom? I -- I --

14 MR. LAWRY: By any -- I'm sorry. By either  
15 --

16 JUSTICE SOTOMAYOR: No, no. Stop.

17 Is the relaxed waiver rule one that applies  
18 to district court consideration or appellate court  
19 consideration or both?

20 MR. LAWRY: It applies at all levels.

21 JUSTICE SOTOMAYOR: At all levels. What is  
22 your reading of what the new rule that the State was  
23 announcing was announcing? That it was doing away with  
24 the State court's relaxed waiver rule? Was it doing it  
25 away with its own relaxed waiver rule? What's your

1 position in this case?

2 MR. LAWRY: The -- the State courts simply  
3 did not apply relaxed waiver to Mr. Kindler.

4 JUSTICE SOTOMAYOR: None of them, including  
5 the trial court?

6 MR. LAWRY: Including -- including the trial  
7 court, yes. Mr. Kindler asked for relaxed -- in fact,  
8 when the Commonwealth initially moved to dismiss his  
9 post-verdict motions, the Commonwealth said: We know  
10 there is this relaxed waiver out there, so if you -- if  
11 you don't dismiss his post-verdict motions entirely, at  
12 least dismiss the guilt phase and consider his issues  
13 with regard to capital sentencing. Commonwealth said  
14 that.

15 So -- so the -- so there's -- there's no  
16 question that -- that, on the PCRA appeal, what the  
17 Pennsylvania Supreme Court applied was a mandatory rule.  
18 They said it's forfeited, no review whatsoever, and --  
19 and that would be the difference --

20 JUSTICE SOTOMAYOR: By the trial court and  
21 by us, is that what you're --

22 MR. LAWRY: Yes, yes. And --

23 JUSTICE BREYER: How would you fill in this  
24 sentence? I'm beginning where the Chief Justice did.  
25 Say everybody said: Look, this opinion is at least

1 unclear. It's -- everybody agrees that the simple  
2 existence of discretion does not make a State ground  
3 inadequate, so we send it back for you now. And you  
4 will have some good arguments -- I guarantee each side  
5 will have some good arguments -- as to whether they were  
6 being consistent or not, whether there was a consistent  
7 rule or not.

8 MR. LAWRY: Right.

9 JUSTICE BREYER: Now, next sentence, which  
10 maybe would never be written: This is not to say that  
11 discretion automatically means it's adequate, for it  
12 could be applied inconsistently.

13 Now, there could be another sentence,  
14 because that other sentence would have to go on to the  
15 fact that any discretionary rule will never be applied  
16 with perfect consistency or anywhere near it. That  
17 would be true if you give a trial judge the choice in  
18 his discretion to waive a -- a time limit ruling.

19 Some will do it with one. Some will do it  
20 in the other. You can't do it perfectly. So is there  
21 any sentence we could put in there? So you've hedged on  
22 that, and probably they will, too, because it's very  
23 hard to find the right sentence.

24 You don't want the simple application of  
25 discretion, you say -- which inevitably means some

1 inconsistency, to make a State rule inadequate. On the  
2 other hand, they can't go too far. So what is too far?

3 MR. LAWRY: Well, I would -- I would  
4 actually direct you to Justice Harlan's opinion in  
5 Sullivan, where he says: "A court has an obligation to  
6 be reasonably consistent and to explain the decision,  
7 including the reason for according different treatment  
8 to the instant case." But that never happened --

9 JUSTICE BREYER: But, but, but, but, but, a  
10 trial supreme court -- a supreme court in a State is  
11 supervising lots of trial courts, and you will have  
12 different human beings sitting there as judges, and they  
13 will inevitably be inconsistent with each other to some  
14 degree. Have you not noticed that?

15 MR. LAWRY: Certainly.

16 (Laughter.)

17 JUSTICE BREYER: So is there anything we can  
18 say that will improve the situation? That's why I  
19 started out by saying maybe the best thing is to say  
20 nothing.

21 MR. LAWRY: Well, the -- the key is really  
22 consistent application and -- and looking to see whether  
23 the rules are being turned off and on.

24 Like I would -- I would point the Court to  
25 -- to Barr v. City of Columbia, which I think is a very

1 good example, where there is maybe five people who make  
2 the same objection, and four of them get merits review,  
3 and the other person doesn't get merits review. Now,  
4 maybe there's some explanation somewhere for that, but  
5 this Court said: You know, this is not what we call  
6 adequacy; this is not consistent application.

7 CHIEF JUSTICE ROBERTS: Well, the problem --  
8 Justice Stevens's question brought this up. I mean, how  
9 do you address that question if you don't have very many  
10 applications of the rule?

11 MR. LAWRY: Well, it's certainly --

12 CHIEF JUSTICE ROBERTS: Say it's the first  
13 one that comes up.

14 MR. LAWRY: Well, it would certainly help to  
15 give a -- a reasoned explanation of what's happening.  
16 There -- you -- you're not --

17 CHIEF JUSTICE ROBERTS: Well, but your  
18 reasoned explanation --

19 JUSTICE KENNEDY: But all -- all those books  
20 on our wall are the first time it's ever come up. I  
21 mean, that's how the law -- that's how the law is made.  
22 So -- the whole point of the adequate independent State  
23 ground, it seems to me, is part we don't want to affect  
24 rational conduct retroactively -- not applicable here.  
25 Two, we don't want to have the State court use this as a

1 subterfuge or a device to avoid a Federal right. I  
2 don't think that's applicable here. You might want to  
3 argue about that.

4 So it seems to me that the fact that it's a  
5 completely new rule in a case of an escape may mean it  
6 is still an adequate ground.

7 MR. LAWRY: Well, I would -- I certainly  
8 would argue that there -- there is every reason to see a  
9 potential for the State seeking to avoid Federal review.  
10 Look at the relaxed waiver cases in the attachment to  
11 the brief. There are 51 cases over a 20-year period  
12 where the State courts reviewed every single issue on  
13 the merits in a capital case, regardless of what  
14 happened below.

15 JUSTICE SCALIA: And they concluded that was  
16 ridiculous, so they stopped doing it.

17 MR. LAWRY: But -- but during the time  
18 period -- during the relevant time period in Mr.  
19 Kindler's -- from -- from his escape all the way through  
20 his PCRA proceedings, that was the rule. And - and  
21 then they changed it, which is similar to -- to some of  
22 the other things that we see in this case.

23 JUSTICE KENNEDY: But those weren't escape  
24 cases. Were they all escape cases?

25 MR. LAWRY: Oh, no.

1 JUSTICE KENNEDY: No.

2 MR. LAWRY: No.

3 JUSTICE KENNEDY: Well, that's the point.  
4 Why isn't escape sui generis, and how can we ever say  
5 that?

6 MR. LAWRY: Well, but -- but if you want to  
7 look at what the Pennsylvania Supreme Court actually  
8 said here, they said Mr. Kindler's case is in the  
9 category like people who affirmatively waive. Okay,  
10 that's what they said on direct appeal. Then you look  
11 in PCRA, on the PCRA appeal, and they don't treat him  
12 like the people who affirmatively waive. That's not  
13 consistent application.

14 CHIEF JUSTICE ROBERTS: You don't doubt that  
15 it would be an independent and adequate State rule to  
16 say whenever anybody escapes they waive their claims?

17 MR. LAWRY: That -- certainly, going  
18 forward, that's -- that's an adequate rule, yes.

19 Another -- another aspect of --

20 JUSTICE GINSBURG: Well, what's the interest  
21 in not applying this in this case? As you say, that's a  
22 fine rule. If you are a fugitive, you are out. You say  
23 that wasn't the rule at the time he escaped. But you  
24 are not asserting any reliance interest by the escapee,  
25 that, gee, if I knew that the rule was going to be

1 mandatory, I wouldn't have a chance to appeal to the  
2 discretion, I wouldn't have escaped.

3           There's no -- there's no absence of notice  
4 that -- that matters. I mean, if he had notice he would  
5 have still escaped, I assume.

6           MR. LAWRY: Yes, but the -- the issue here  
7 is not solely about notice to Mr. Kindler. There is an  
8 issue also about evasion of Federal review. That goes  
9 right back to Ward, in like 1920, talking about State  
10 courts seeking to take away this Court's jurisdiction by  
11 --

12           JUSTICE GINSBURG: But you just said that it  
13 would be okay to have a rule going forward that if you  
14 are a fugitive, you are out.

15           MR. LAWRY: But that -- but that's if it's  
16 -- if it's a firmly established rule that's consistently  
17 applied. And that's not what we see here. And let me  
18 give you another example of that. Even in a noncapital  
19 case, the Pennsylvania Supreme Court never held that a  
20 presentencing flight meant that the defendant would get  
21 no post-conviction review. They -- they affirmatively  
22 rejected that idea in Commonwealth v. Huff. But for  
23 Mr. Kindler, they said a presentencing flight means no  
24 post-conviction review. It's simply --

25           CHIEF JUSTICE ROBERTS: What is -- what is

1 -- what is the Federal fugitive rule?

2 MR. LAWRY: The Federal fugitive rule is --  
3 that was set in Ortega-Rodriguez -- says that a flight  
4 presentencing does not take away your appellate rights.  
5 It says that the district court has discretion how it  
6 would want to deal with that. It also thought --

7 CHIEF JUSTICE ROBERTS: Has discretion?

8 MR. LAWRY: It has discretion. It says, you  
9 know, the blunderbuss of dismissal is not -- is not an  
10 appropriate -- is not usually an appropriate device,  
11 because there are a lot of other things the district  
12 courts can do short of taking away all appellate rights,  
13 no review by any court anywhere.

14 CHIEF JUSTICE ROBERTS: Does the discretion  
15 that the Pennsylvania courts have here -- is that  
16 similar? Can the Pennsylvania supreme courts exercise  
17 that discretion in a calibrated way, not all or nothing?

18 MR. LAWRY: They -- they certainly could.

19 The -- one of the things that the --

20 JUSTICE KENNEDY: Were you still answering  
21 the Chief Justice's -- I had -- I had one --

22 MR. LAWRY: No.

23 JUSTICE KENNEDY: -- one more question. I  
24 didn't mean to interrupt.

25 You said there was no post-conviction

1 review. I -- I thought they, in this case, went on to  
2 ask -- to exercise a limited review. They didn't reach  
3 the Mills v. Maryland point, but they did give a limited  
4 review to determine the sufficiency of the evidence,  
5 whether the death penalty was a product of passion or  
6 prejudice, whether the evidence fails to support the  
7 finding of the aggravated circumstance, whether the  
8 sentence was extensive or proportional. They did give  
9 post- --

10 MR. LAWRY: -conviction review.

11 JUSTICE KENNEDY: -- post-conviction review  
12 on all those points.

13 MR. LAWRY: Well, now, those were - those  
14 were direct appeal things that they looked at, yes. The  
15 -- the -- those are a part of the statutory appellate  
16 review for capital cases in Pennsylvania.

17 As far as I am aware, nobody has ever gotten  
18 relief from that statutorily mandated direct appeal  
19 review. But in post-conviction, they -- they gave no  
20 review at all to the post-conviction claims, including  
21 the ineffective assistance of counsel claim.

22 JUSTICE GINSBURG: There is a certain irony  
23 that the case he's relying on, on the merits, is Mills,  
24 where if he hadn't escaped, he would have gone through  
25 the whole process before Mills was decided.

1                   MR. LAWRY: Well, but he may well have  
2 gotten relief anyway. He -- he raised -- he actually  
3 raised an objection, a Mills-type objection at trial.  
4 It was raised in the post-verdict motions. It would  
5 presumably have been raised on direct appeal. And --  
6 and if it had so been raised on direct appeal, he  
7 could have -- and he didn't win on direct appeal, he  
8 could have sought post-conviction relief in Pennsylvania  
9 based on the fact that Mills came down later, because  
10 the Pennsylvania retroactivity rule is that you can get  
11 retroactive application of a decision if you -- if you  
12 objected. If you raised the issue earlier and a new  
13 decision comes down that would help you, you can raise  
14 that later.

15                   So the idea of a windfall that was raised in  
16 the Commonwealth's brief doesn't -- he didn't get a  
17 windfall. He didn't get any review in State court, and  
18 there's also of course the ineffective assistance of  
19 counsel claim. The law has not changed on the  
20 ineffective assistance of counsel claim.

21                   CHIEF JUSTICE ROBERTS: Well, he got the  
22 windfall of being free for 8 years, right? And I guess  
23 that gets back to the point of your friend, which is he  
24 is in no worse position because he escaped and spent  
25 8 years on the lam than if he had stayed in prison.

1                   MR. LAWRY: He is in much worse position.  
2 He -- he just -- he just had all -- all review taken  
3 away in the State courts and --

4                   CHIEF JUSTICE ROBERTS: Oh, no, no. He --  
5 obviously, if the State prevails, he's in a worse  
6 position. But under your view, he's in this -- he's in  
7 no worse position. He hasn't waived all his objections  
8 and claims, procedures.

9                   MR. LAWRY: Well, there are certainly other  
10 things that the State can do. They can -- they can  
11 prosecute him criminally for escape. There's  
12 administrative confinement, those kinds of things. But  
13 there is really a --

14                   JUSTICE SCALIA: Before or after his  
15 execution?

16                   (Laughter.)

17                   MR. LAWRY: Well, there -- this -- this  
18 Court said in Ortega-Rodriguez that -- that increasing  
19 somebody's sentence by a number of years based on escape  
20 would introduce an element of arbitrariness and  
21 irrationality, and -- and certainly changing the  
22 sentence from life to death based on disrespect to the  
23 courts seems like a fairly -- a fairly serious  
24 consequence.

25                   CHIEF JUSTICE ROBERTS: Well -- I'm sorry.

1 If I could just nail down the point: As far as his  
2 rights and proceedings in this case, he is in no worse  
3 position under your theory having escaped and been out  
4 for 8 years than if he had stayed put?

5 MR. LAWRY: In -- in Federal court if it's  
6 held, as we argue, that the State court rulings were not  
7 adequate, that's true. And their argument is he should  
8 be executed with no review by any court.

9 I do want to return for a minute to relaxed  
10 waiver because, you know, the primary argument that I  
11 heard was that in 1984 at the time of the escape that  
12 relaxed waiver wasn't that firmly established. That's  
13 simply not true. There are four decisions applying  
14 relaxed waiver prior to 1984, and those decisions held  
15 that a person who affirmatively waived a constitutional  
16 issue -- I see my time is up.

17 CHIEF JUSTICE ROBERTS: You can finish your  
18 sentence.

19 MR. LAWRY: There -- okay. There are four  
20 cases, and in every case, the Pennsylvania Supreme Court  
21 gave full merits review to all issues, even issues that  
22 were only first raised at oral argument.

23 JUSTICE SCALIA: Can I --

24 MR. LAWRY: Sure.

25 JUSTICE SCALIA: -- please. Why do you pick

1 1984 as the time of the escape? I mean, whether it's an  
2 adequate or independent State ground, whether it's been  
3 consistently applied, it seemed to me -- it seems to me  
4 you should look to the time at which the State rule is  
5 applied.

6 Now, as of 1984, I suppose there are some  
7 notice requirements that you can say due process  
8 requires, but I don't know why the adequacy of the State  
9 ground, whether it's consistently applied, should be  
10 judged on the basis of what was the law in 1984, rather  
11 than what was the State law at the time they applied the  
12 rule.

13 MR. LAWRY: Well, there -- there is a  
14 question about whether that's introducing a novel rule.  
15 But -- but I was -- in the comments I was just making, I  
16 was principally addressing the Commonwealth's argument  
17 that relaxed waiver wasn't that well established in  
18 1984.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Eisenberg, you have 4 minutes.

21 REBUTTAL ARGUMENT OF RONALD EISENBERG

22 ON BEHALF OF THE PETITIONERS

23 MR. EISENBERG: Mr. Lawry's answer to the  
24 question about a mandatory forfeiture rule, Your Honors,  
25 I think is the crucial one here. When asked whether an

1 automatic mandatory forfeiture rule would be adequate,  
2 he said yes. And I think that's the problem with just  
3 trying to remand this case without doing more, because  
4 that's where you wind up.

5           If the lower Federal courts continue to  
6 undertake the kind of consistency analysis that they  
7 think consistency requires, it will drive that sort of  
8 discretion out, and you will wind up with forfeiture  
9 rules and other State procedural rules that are all  
10 automatic, because that's the way the Federal courts  
11 will be telling the State courts that their rules will  
12 be found adequate State grounds and enforceable on  
13 Federal habeas corpus review.

14           There was no subterfuge here the -- to avoid  
15 or evade the Federal question. The argument in favor of  
16 that position is: Look at all the other cases where the  
17 State court did address Federal constitutional  
18 questions. Well, exactly. Of course we did in many  
19 other capital cases. And the -- the penalty for trying  
20 to be lenient in those other cases is that now in the  
21 worst case we can't apply any sort of forfeiture, any  
22 sort of procedural bar, even for a guy who breaks out of  
23 jail twice. The State court --

24           JUSTICE SCALIA: What -- what about his --  
25 his colleague who broke out with him? How do you -- how

1 do you explain that?

2 MR. EISENBERG: That -- that defendant was  
3 gone less than 2 weeks. And so we withdrew our motion  
4 to quash his appeal. It's not just that the State court  
5 didn't grant it; we withdrew it because he was  
6 recaptured in New York 2 weeks later.

7 This guy was out for 7 years. After he  
8 was captured the first time in Canada and started to  
9 fight extradition, his post-verdict motions were  
10 dismissed. The motions that he had been -- and told him  
11 that under State law at that time were absolutely  
12 essential to preserving any claims for further review,  
13 and his response to the dismissal of his post-verdict  
14 motions after the first escape was to break out of jail  
15 again a second time.

16 During the second escape, somebody died,  
17 another prisoner fell to his death. During the first  
18 escape, the plan, the diversion that allowed this  
19 defendant to sneak out through the window he sought  
20 through, was to have a riot staged on the part of the  
21 other prisoners, during which they tried to push one of  
22 the prison guards off the third tier of the prison cells  
23 to the floor below. That would -- that caused all the  
24 other guards to rush up. During that time, the  
25 defendant slipped out the window.

1           That's why this was the case where the court  
2 exercised its discretion to impose a procedural bar.  
3 Mr. Lawry says, well, the Commonwealth just wants to  
4 execute him without any sort of review.

5           He did have limited review, as Justice  
6 Kennedy pointed out, but really you are left with only  
7 the two choices of imposing a procedural bar, a bar that  
8 this Court said was longstanding and well established in  
9 American law in *Estelle v. Dorrrough* --

10           JUSTICE STEVENS: May I ask --

11           MR. EISENBERG: -- or else leaving the  
12 defendant better off than he would otherwise have been.

13           JUSTICE STEVENS: May I ask this question?  
14 We have all been somewhat troubled because of some  
15 ambiguity in the opinion below. And what if we - your  
16 -- your opponent answered this question. What if we  
17 were to say that the answer to the question presented,  
18 in italics in your brief, is "no" and send it back to  
19 the court of appeals and tell them whether they -- that  
20 would change their decision or not? Would you agree  
21 that would be a proper disposition?

22           MR. EISENBERG: No, Justice Stevens. I  
23 think the reason the case is worth being here is to  
24 provide greater guidance than that to the lower courts.  
25 I think the reason that so many States have weighed in

1 on this question --

2 JUSTICE STEVENS: The guidance you have  
3 asked us to give is whether there is this automatic  
4 rule. And if you say there isn't, doesn't that give  
5 guidance?

6 MR. EISENBERG: Well, I --

7 JUSTICE STEVENS: And the answer -- would  
8 not that answer the question on which there's a conflict  
9 among the circuits?

10 MR. EISENBERG: I'm afraid it doesn't -- it  
11 doesn't help resolve the -- the path to which the Third  
12 Circuit got to that point. And that's really the  
13 underlying problem.

14 There has been a lot of confusion about this  
15 Court's adequate State grounds doctrine. Not, I would  
16 suggest, so much in the results that this case -- that  
17 this Court has reached, not in the kind of inadequacy  
18 that this Court has found, which by and large deals with  
19 retroactivity or Civil Rights Era cases where the courts  
20 -- the State courts were clearly discriminating against  
21 Black defendants in favor of White defendants.

22 We don't have anything like that here.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 The case is submitted.

25 (Whereupon, at 2:01 p.m., the case in the

1 above-entitled was submitted.)

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

<b>A</b>				
<b>above-entitled</b> 1:13 55:1	<b>affect</b> 31:18 41:23	<b>apologize</b> 35:9	36:16,19 38:17	28:8 31:11 44:5
<b>absence</b> 44:3	<b>affirmatively</b> 37:5,8 43:9,12	<b>appeal</b> 4:25 5:2	39:12,15 44:17	<b>assuming</b> 19:2 34:3
<b>absolute</b> 17:11 32:3	44:21 49:15	9:24 12:19 13:1	50:3,5,9,11	<b>attachment</b> 42:10
<b>absolutely</b> 52:11	<b>affirmed</b> 15:4	13:14 27:11,15	<b>applies</b> 8:25 14:6	<b>attacking</b> 3:11
<b>abused</b> 5:19 34:24	<b>afraid</b> 54:10	34:19 37:3,5	37:17,20	<b>attempt</b> 12:8
<b>acknowledge</b> 32:20	<b>afternoon</b> 3:4	38:16 43:10,11	<b>apply</b> 13:20,22	<b>attempting</b> 11:24
<b>act</b> 8:10 15:5,13	<b>aggravated</b> 46:7	44:1 46:14,18	14:4 19:16	<b>attorney</b> 1:17 9:2 31:19
<b>action</b> 8:11	<b>agree</b> 30:10,12	47:5,6,7 52:4	23:17 24:23	<b>attributing</b> 17:1
<b>acts</b> 29:24	<b>agrees</b> 39:1	<b>appealed</b> 27:14	31:15,18 35:6	<b>automatic</b> 22:18 51:1,10 54:3
<b>actual</b> 16:10	<b>AL</b> 1:5	<b>appealing</b> 20:14	38:3 51:21	<b>automatically</b> 16:7 30:5,7,9
<b>additional</b> 17:10 17:11	<b>alleged</b> 21:25	<b>appeals</b> 3:15	<b>applying</b> 8:17	30:15 31:6 35:3 35:5 39:11
<b>address</b> 11:21 22:5 23:18 25:8	<b>allow</b> 16:14 17:17	14:21,25 15:24	11:12,13 16:9	<b>avoid</b> 42:1,9 51:14
41:9 51:17	<b>allowed</b> 14:4,6 15:14 22:20	20:20 21:7	18:7 34:11	<b>avoided</b> 25:15
<b>addressed</b> 23:9	30:1 52:18	22:20 32:10,11	43:21 49:13	<b>aware</b> 46:17
<b>addressing</b> 50:16	<b>allows</b> 6:18 17:6	32:18 33:20	<b>apprised</b> 8:11	
<b>adequacy</b> 8:17 8:21 9:20 10:3	<b>altogether</b> 37:6,8	37:8 53:19	<b>appropriate</b> 15:16 45:10,10	<b>B</b>
11:13,16 13:22	<b>ambiguity</b> 53:15	<b>APPEARANC...</b> 1:16	<b>arbitrariness</b> 48:20	<b>back</b> 22:3 34:1 39:3 44:9 47:23 53:18
15:16 18:16	<b>American</b> 53:9	<b>appellate</b> 13:1,2 19:14,16 27:11	<b>argue</b> 7:11 9:12	<b>backed</b> 32:4
22:2 41:6 50:8	<b>amicus</b> 10:17 11:5	37:18 45:4,12	25:24 35:21	<b>bait</b> 12:14
<b>adequate</b> 3:18 5:4 12:5 14:17	<b>analogies</b> 22:4	46:15	42:3,8 49:6	<b>ban</b> 6:16
16:12 25:10	<b>analysis</b> 8:17 10:19 16:2,15	<b>appendix</b> 4:20 5:17 15:3	<b>arguing</b> 9:2	<b>bar</b> 15:7 26:1 51:22 53:2,7,7
26:2 28:19 35:7	16:23 17:10,11	<b>applicable</b> 41:24 42:2	14:16 26:5 29:5	<b>Barr</b> 40:25
39:11 41:22	17:12,14 18:23	<b>application</b> 12:8 19:25 29:11	29:10,10 33:21	<b>bars</b> 10:15
42:6 43:15,18	22:14 32:22	32:7 34:13	35:4,14,19,21	<b>based</b> 33:20,21 33:22 47:9 48:19,22
49:7 50:2 51:1	51:6	35:14 39:24	35:25	<b>basically</b> 16:17 22:13
51:12 54:15	<b>analyze</b> 13:22	40:22 41:6	<b>argument</b> 1:14	<b>basis</b> 19:11 50:10
<b>administrative</b> 48:12	<b>analyzing</b> 6:22	43:13 47:11	2:2,7 3:4,7 4:8	<b>Batson</b> 12:24
<b>admonition</b> 13:8 13:10	<b>announced</b> 20:9	<b>applications</b> 41:10	7:4,8,24 8:3	<b>Beard</b> 1:3 3:5
<b>advancing</b> 15:8	<b>announcing</b> 37:23,23	<b>applied</b> 5:12 7:20	25:4 49:7,10,22	<b>beginning</b> 38:24
<b>adversary</b> 19:23 26:17	<b>answer</b> 30:4 50:23 53:17	7:22,23 8:1,5	50:16,21 51:15	<b>begs</b> 29:12
<b>adversary's</b> 29:13	54:7,8	10:8,20 11:23	<b>arguments</b> 39:4 39:5	<b>behalf</b> 1:18,19
<b>adverse</b> 13:7	<b>answered</b> 53:16	12:19 13:14	<b>asked</b> 6:11 13:7	
	<b>answering</b> 45:20	16:3 17:8,13	13:7 18:20 38:7	
	<b>antithesis</b> 32:6	18:6,10,13 19:5	50:25 54:3	
	<b>anybody</b> 43:16	19:6 22:19 23:3	<b>asking</b> 11:14,17	
	<b>anyway</b> 47:2	24:5 25:20 26:7	43:19	
		26:11,12 29:20	<b>asserting</b> 43:24	
		29:23 33:16	<b>assertion</b> 4:1 33:19	
		34:23 35:4	<b>assistance</b> 46:21 47:18,20	
			<b>assume</b> 21:21	

<p>2:4,6,9 3:8 10:17 25:5 50:22 <b>beings</b> 40:12 <b>believe</b> 5:18 <b>benefit</b> 33:9,13 35:16,16 <b>best</b> 40:19 <b>better</b> 53:12 <b>beyond</b> 17:11 <b>bit</b> 32:20 <b>Black</b> 54:21 <b>blunderbuss</b> 45:9 <b>books</b> 41:19 <b>borrow</b> 34:24 <b>bound</b> 9:11 <b>break</b> 52:14 <b>breaking</b> 3:13 <b>breaks</b> 51:22 <b>Breyer</b> 33:1 34:3 38:23 39:9 40:9 40:17 <b>Breyer's</b> 36:3 <b>brief</b> 10:17 11:6 14:20 42:11 47:16 53:18 <b>broke</b> 51:25 <b>brought</b> 41:8 <b>Burris</b> 17:3,4</p> <hr/> <p style="text-align: center;"><b>C</b></p> <p><b>C</b> 1:19 2:1,5 3:1 25:4 <b>calibrated</b> 45:17 <b>California</b> 11:2 <b>call</b> 41:5 <b>calls</b> 17:11 <b>Campbell</b> 17:2,3 <b>Canada</b> 9:25 52:8 <b>capital</b> 23:4,10 23:13,16,23 24:1,5,6 33:16 34:16 38:13 42:13 46:16</p>	<p>51:19 <b>captured</b> 25:17 25:17 52:8 <b>carry</b> 22:21 <b>case</b> 3:4 4:11 5:15,21 10:1 12:11,12,19 13:1,17,18,19 14:11 16:4,19 17:8,23 18:4 20:6,6 27:3 28:9,24 29:2,4 29:13 31:12,18 31:20 33:7 34:14,24 37:4 38:1 40:8 42:5 42:13,22 43:8 43:21 44:19 46:1,23 49:2,20 51:3,21 53:1,23 54:16,24,25 <b>cases</b> 6:22,23,24 8:21 10:9,19,20 10:25 11:7,15 13:12 16:20 17:21,21 20:8 22:15 23:17,22 24:1,5,10 27:10 28:4 29:22 33:16 36:13 42:10,11,24,24 46:16 49:20 51:16,19,20 54:19 <b>category</b> 43:9 <b>caused</b> 52:23 <b>cells</b> 52:22 <b>cert</b> 30:24 <b>certain</b> 46:22 <b>certainly</b> 15:18 40:15 41:11,14 42:7 43:17 45:18 48:9,21 <b>certiorari</b> 30:21 <b>chance</b> 44:1</p>	<p><b>change</b> 25:9 27:18,21,22,23 28:1 32:25 33:23 53:20 <b>changed</b> 27:15 28:5 32:15 34:5 34:7 36:14 42:21 47:19 <b>changing</b> 48:21 <b>characteristica...</b> 12:20 <b>characterized</b> 7:7 <b>characterizing</b> 4:21 <b>charge</b> 13:7 <b>Chief</b> 3:3,9 25:2 25:6,14,23 30:3 30:10,12,19,23 31:1 34:22 35:10,13,20 36:1 38:24 41:7 41:12,17 43:14 44:25 45:7,14 45:21 47:21 48:4,25 49:17 50:19 54:23 <b>choice</b> 39:17 <b>choices</b> 53:7 <b>choose</b> 29:3 <b>chose</b> 29:2 <b>circuit</b> 4:6,9,21 6:6 7:19 8:2 10:7,13 15:4 17:2,2,4,8 18:15 19:17 21:15,22 26:9 26:16 27:1,3,19 27:25 28:2,20 30:18 31:3,12 32:21,24 54:12 <b>circuits</b> 54:9 <b>Circuit's</b> 3:24 5:23 15:15 16:5 18:7 20:11</p>	<p><b>circumstance</b> 46:7 <b>circumstances</b> 12:7,11,12 22:22 <b>cited</b> 20:6 21:10 <b>City</b> 40:25 <b>Civil</b> 54:19 <b>claim</b> 10:10 12:24 13:4 15:8 24:20 46:21 47:19,20 <b>claims</b> 3:22 24:16,18,22 25:12,21 26:1,8 43:16 46:20 48:8 52:12 <b>clarify</b> 3:18 <b>classic</b> 12:15 <b>clear</b> 12:4 31:13 31:14,16 32:23 34:10 36:22 <b>clearer</b> 20:14 <b>clearly</b> 8:6 12:7 19:8 33:13 54:20 <b>client</b> 33:9,12 36:9 <b>colleague</b> 51:25 <b>Columbia</b> 40:25 <b>come</b> 10:3 24:19 41:20 <b>comes</b> 19:15 29:25 41:13 47:13 <b>comments</b> 50:15 <b>common</b> 11:3 <b>Commonwealth</b> 8:19 21:19 25:9 38:8,9,13 44:22 53:3 <b>Commonwealt...</b> 47:16 50:16 <b>communications</b> 11:4</p>	<p><b>compare</b> 16:20 <b>compared</b> 11:15 <b>compel</b> 14:22 <b>complaint</b> 34:9 <b>complete</b> 27:17 28:3 34:18 <b>completely</b> 27:16 42:5 <b>comply</b> 8:22 11:21 12:5 13:16 <b>components</b> 19:18 <b>concede</b> 8:25 19:24 <b>conceded</b> 9:8 <b>concerned</b> 6:7 31:11 <b>concerning</b> 14:13 <b>concluded</b> 4:24 42:15 <b>conclusion</b> 20:11 <b>conduct</b> 31:19 41:24 <b>confinement</b> 48:12 <b>conflict</b> 17:23 54:8 <b>confusion</b> 54:14 <b>consequence</b> 48:24 <b>consequences</b> 8:11 <b>consider</b> 38:12 <b>consideration</b> 9:5 37:18,19 <b>considered</b> 27:17 <b>considering</b> 17:20 <b>consistency</b> 39:16 51:6,7 <b>consistent</b> 29:11 32:7 34:13 39:6 39:6 40:6,22 41:6 43:13</p>
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p><b>consistently</b> 8:20 10:8 25:20 26:7 26:12 44:16 50:3,9 <b>constitutional</b> 11:24 12:9 23:14,23 24:7 49:15 51:17 <b>continue</b> 20:2 51:5 <b>controlling</b> 6:11 27:4 32:22 <b>conviction</b> 46:10 <b>corpus</b> 51:13 <b>correct</b> 7:16 20:1 21:8 30:22,25 <b>CORRECTIO...</b> 1:5 <b>counsel</b> 19:7 25:2 30:3 46:21 47:19,20 50:19 54:23 <b>country</b> 3:14 <b>course</b> 6:5 47:18 51:18 <b>court</b> 1:1,14 3:10 3:15,17 5:14,17 6:22 7:3,9,11 7:14 8:20 9:19 10:5,6,23 11:5 11:7,13,15,23 12:13,20,21 13:2,9 14:6,10 14:13,21,25 15:5,8,23 16:4 17:15,17 18:2,6 18:10,25 19:9 19:14,24 20:5 20:19 21:2,11 22:12,14,19,20 25:7,9,11 26:4 26:5,11 28:9,18 29:15 32:10,11 32:16,18 33:4,7 33:20 34:6,11</p>	<p>36:19,25 37:3 37:18,18 38:5,7 38:17,20 40:5 40:10,10,24 41:5,25 43:7 44:19 45:5,13 47:17 48:18 49:5,6,8,20 51:17,23 52:4 53:1,8,19 54:17 54:18 <b>courts</b> 3:19 4:24 4:25 6:19,20 10:2,9,19 11:12 12:21 13:20,21 14:3,4,6,23 16:10,14,14,16 18:3 19:11,19 20:4 21:5 22:9 37:11 38:2 40:11 42:12 44:10 45:12,15 45:16 48:3,23 51:5,10,11 53:24 54:19,20 <b>court's</b> 10:3 14:21 15:1,3,15 16:24 18:12 22:2,17,20 36:23 37:24 44:10 54:15 <b>crabbed</b> 15:19 <b>criminally</b> 48:11 <b>crucial</b> 50:25 <b>cryptic</b> 32:20 <b>custody</b> 5:1</p>	<p>48:22 52:17 <b>decide</b> 10:24 <b>decided</b> 24:1 46:25 <b>deciding</b> 16:20 <b>decision</b> 9:18 20:5,15,15 22:17 33:20 40:6 47:11,13 53:20 <b>decisions</b> 4:23 14:13 18:10,12 49:13,14 <b>declining</b> 5:20 <b>default</b> 3:16 8:9 8:9,18 23:4 24:5 <b>defaults</b> 3:20 <b>defendant</b> 5:13 7:20,22,25 8:1 8:6,10,14 9:15 9:22 12:17,24 13:6,25 14:11 14:16 16:23 17:13 19:5,6 23:4,23 24:6,19 27:5,10 31:15 34:16 44:20 52:2,19,25 53:12 <b>defendants</b> 14:1 14:14 22:17 23:11,13 37:9 54:21,21 <b>deference</b> 10:15 12:6 <b>degree</b> 14:23 15:24 16:2 20:16 22:1 40:14 <b>deny</b> 29:23 <b>DEPARTME...</b> 1:4 <b>Deputy</b> 1:17 <b>described</b> 7:14</p>	<p>20:1 <b>describes</b> 15:3 32:2 <b>deserving</b> 14:2 <b>despite</b> 22:12,23 <b>determine</b> 46:4 <b>determined</b> 18:16 <b>developed</b> 22:24 <b>deviation</b> 6:18 <b>device</b> 42:1 45:10 <b>died</b> 52:16 <b>difference</b> 19:6 21:25 33:11,11 34:4 38:19 <b>differences</b> 29:14 <b>different</b> 7:15,21 11:12 13:14 17:9 18:6 19:5 28:24 29:24 33:19 40:7,12 <b>direct</b> 34:19 37:3 37:5,8 40:4 43:10 46:14,18 47:5,6,7 <b>directly</b> 6:15 7:3 <b>disagreed</b> 19:10 <b>disagreeing</b> 20:11 <b>disagreement</b> 21:13,18 <b>discrepancy</b> 21:25 <b>discretion</b> 3:24 4:6,10,25 5:15 5:20 6:6,16,20 6:24 7:9 8:1 10:14,15 13:23 14:2,5,11,24 14:24 15:1,10 15:19,24 16:3,3 16:6,8,11 17:6 17:16 18:2 19:9</p>	<p>22:10,21 27:13 28:3,4,10,15 28:19 29:3,16 30:15 32:12 34:24 35:3,15 35:22 36:20 39:2,11,18,25 44:2 45:5,7,8 45:14,17 51:8 53:2 <b>discretionary</b> 3:17 4:4 5:13 8:6 9:21 19:3 19:25 26:18 27:18 30:7 31:25 32:15,25 33:4,8,23 34:5 34:8 36:6 39:15 <b>discriminate</b> 3:21 <b>discriminating</b> 54:20 <b>discuss</b> 8:5 <b>discusses</b> 8:2 <b>dismiss</b> 14:11 19:10 22:11 38:8,11,12 <b>dismissal</b> 45:9 52:13 <b>dismissed</b> 5:2 27:11 52:10 <b>disposition</b> 53:21 <b>dispositive</b> 5:25 <b>disregarding</b> 15:6 <b>disrespect</b> 48:22 <b>dissuade</b> 19:24 <b>distant</b> 28:14,14 <b>distinction</b> 20:7,8 20:23 <b>distinctions</b> 22:8 <b>district</b> 1:17 7:9 15:3,8,14 19:9 22:20 33:4,7 37:18 45:5,11</p>
<b>D</b>				
<p><b>D</b> 3:1 <b>day</b> 22:22 34:18 <b>deal</b> 21:20 45:6 <b>dealing</b> 27:7 <b>deals</b> 54:18 <b>dealt</b> 20:18 <b>death</b> 25:12 46:5</p>				

<b>diversion</b> 52:18	54:10	19:8 24:12,14	<b>existed</b> 12:17	51:17
<b>Doctor</b> 20:6,7,14	<b>either</b> 6:5 37:14	24:15 25:20	<b>existence</b> 39:2	<b>fell</b> 52:17
20:18,22,24	<b>elapse</b> 9:9	26:7,12,19	<b>explain</b> 40:6 52:1	<b>fight</b> 52:9
21:1 22:14 27:4	<b>element</b> 48:20	28:17 32:12	<b>explainable</b> 18:1	<b>filed</b> 4:25 10:17
27:4,5,14,20	<b>emphasize</b> 18:5	33:14 44:16	<b>explaining</b> 31:5	<b>fill</b> 38:23
31:12,16 32:1	<b>enforceable</b>	49:12 50:17	<b>explains</b> 18:4	<b>find</b> 4:15 29:17
32:21,23,23	51:12	53:8	<b>explanation</b> 30:2	32:10,17 33:24
33:3,5,25 34:1	<b>enforced</b> 11:5	<b>establishing</b> 11:9	41:4,15,18	39:23
34:2	<b>engage</b> 7:19	<b>Estelle</b> 53:9	<b>explicit</b> 7:12	<b>finding</b> 12:13
<b>doctrine</b> 3:19	16:15	<b>ET</b> 1:5	<b>extensive</b> 46:8	14:22 46:7
10:3 16:13,24	<b>ensure</b> 3:21	<b>evade</b> 11:24 12:8	<b>extradition</b> 52:9	<b>fine</b> 43:22
25:10 54:15	<b>entirely</b> 38:11	51:15	<b>extraordinary</b>	<b>finish</b> 49:17
<b>doing</b> 37:23,24	<b>entitled</b> 14:1	<b>evasion</b> 44:8	8:10	<b>firmly</b> 4:5 5:3,8
42:16 51:3	<b>equate</b> 3:24 4:6	<b>event</b> 28:14,14	<hr/>	6:7,17,25 18:12
<b>don't</b> 15:21	4:10	<b>everybody</b> 38:25	<b>F</b>	24:12,14,15
<b>door</b> 9:4	<b>equation</b> 13:24	39:1	<b>facing</b> 9:16	25:20 26:6,11
<b>Dorough</b> 53:9	<b>equitable</b> 3:19	<b>evidence</b> 46:4,6	<b>fact</b> 4:3 11:6	26:19 28:17
<b>doubt</b> 43:14	<b>Era</b> 54:19	<b>exactly</b> 10:19	16:22 20:4 21:9	32:12 44:16
<b>dozens</b> 10:21	<b>error</b> 14:8 15:20	13:18 20:17	22:12,17,23	49:12
<b>drive</b> 6:19 51:7	23:20 24:16,17	23:19 51:18	23:8 33:22 36:4	<b>first</b> 15:2 23:24
<b>due</b> 50:7	24:23	<b>example</b> 4:19	38:7 39:15 42:4	24:6 25:8 31:14
<b>D.C</b> 1:10	<b>escape</b> 9:9,18	11:3 12:3,23	47:9	33:15 41:12,20
<hr/>	25:25 42:5,19	14:7 23:7 41:1	<b>fade</b> 28:13	49:22 52:8,14
<b>E</b>	42:23,24 43:4	44:18	<b>fails</b> 46:6	52:17
<hr/>	48:11,19 49:11	<b>examples</b> 10:22	<b>fair</b> 5:10	<b>fit</b> 22:22 31:7
<b>E</b> 2:1 3:1,1	50:1 52:14,16	<b>excellent</b> 23:7	<b>fairly</b> 8:11 34:23	<b>five</b> 41:1
<b>earlier</b> 47:12	52:18	<b>exception</b> 23:10	48:23,23	<b>fled</b> 4:3 27:5
<b>easy</b> 32:10	<b>escaped</b> 8:14	24:23 30:1	<b>far</b> 13:17 18:9	<b>flee</b> 25:25
<b>effect</b> 6:19 16:4	9:23 25:15,18	<b>exceptions</b> 26:19	40:2,2 46:17	<b>fleeing</b> 3:14
16:10 18:17	28:11 31:16	<b>excuse</b> 3:20	49:1	<b>flees</b> 27:10
<b>Eisenberg</b> 1:17	34:17 43:23	<b>excusing</b> 15:6	<b>favor</b> 51:15	<b>flexibility</b> 15:14
2:3,8 3:6,7,9	44:2,5 46:24	<b>execute</b> 53:4	54:21	<b>flight</b> 19:11
4:8,14,18 5:9	47:24 49:3	<b>executed</b> 25:11	<b>Federal</b> 3:21	20:21 21:7 22:4
6:3,13 7:6,10	<b>escapee</b> 43:24	49:8	7:11 9:19 10:5	22:7 23:5 24:2
7:18 8:16 9:13	<b>escapes</b> 9:3	<b>execution</b> 48:15	10:23 11:5,24	27:16 37:4
10:12,16 11:2	43:16	<b>exercise</b> 6:20	12:21 13:21	44:20,23 45:3
11:11,19 12:1	<b>escaping</b> 8:10	14:23 15:19	14:6,7,8 15:20	<b>floor</b> 52:23
12:10 15:12	9:16	16:6,8,11 17:6	16:14,14,16	<b>Flowers</b> 12:4
16:1 17:7,25	<b>ESQ</b> 1:17,19 2:3	17:16 28:10,15	20:5 21:2 22:4	<b>focus</b> 36:6
18:22 19:21	2:5,8	28:19 29:2,16	22:4,7,19,24	<b>focusing</b> 36:25
20:3,13,22 21:1	<b>essential</b> 52:12	35:14 45:16	23:20,23 24:17	<b>follow</b> 15:10
21:9,14,17,24	<b>essentially</b> 28:6	46:2	24:22 34:25	<b>followed</b> 18:13
23:6,15,25 24:8	<b>established</b> 4:5	<b>exercised</b> 5:15	42:1,9 44:8	<b>following</b> 30:3
24:13 50:20,21	5:3,8 6:8,17,25	6:24 28:5 53:2	45:1,2 49:5	<b>Ford</b> 12:23 36:13
50:23 52:2	18:12,18,24	<b>exist</b> 11:6	51:5,10,13,15	<b>forever</b> 4:2
53:11,22 54:6				

<b>forfeited</b> 38:18	8:13 14:18	<b>guy</b> 35:15,16	<b>hypothetical</b>	<b>inevitably</b> 39:25
<b>forfeiture</b> 5:7	15:12,22 16:1	51:22 52:7	21:22	40:13
22:16,19 23:9	16:25 17:19			<b>inference</b> 13:7
27:8,17,19 28:7	43:20 44:12	<b>H</b>	<b>I</b>	<b>inform</b> 12:3
29:17 32:3	46:22	<b>habeas</b> 11:1 15:8	<b>idea</b> 44:22 47:15	<b>initially</b> 38:8
50:24 51:1,8,21	<b>give</b> 9:5 39:17	51:13	<b>identified</b> 12:12	<b>initiated</b> 5:2
<b>form</b> 23:17	41:15 44:18	<b>hairs</b> 16:18	19:19 28:2	<b>inquiry</b> 7:19
<b>formulates</b> 9:10	46:3,8 54:3,4	<b>hand</b> 40:2	<b>identifying</b> 27:25	11:18 19:3
<b>formulation</b>	<b>given</b> 12:7	<b>handful</b> 24:9	<b>ignored</b> 10:5	<b>insofar</b> 31:10
12:16	<b>gives</b> 37:5	<b>happened</b> 40:8	<b>imagine</b> 33:2	33:8,10
<b>forth</b> 9:3	<b>glasses</b> 16:18	42:14	<b>important</b> 29:19	<b>instant</b> 40:8
<b>forthrightly</b>	<b>go</b> 33:25 39:14	<b>happening</b> 41:15	<b>impose</b> 22:14	<b>instruction</b> 13:8
14:19	40:2	<b>hard</b> 39:23	53:2	13:9
<b>forward</b> 43:18	<b>goes</b> 37:5 44:8	<b>harder</b> 28:13	<b>imposing</b> 53:7	<b>instructions</b> 9:3
44:13	<b>going</b> 6:5 7:16	<b>Harlan's</b> 40:4	<b>improper</b> 31:15	<b>intended</b> 16:13
<b>found</b> 13:4,19	9:23 21:4,5	<b>hear</b> 3:3 4:25	<b>improve</b> 40:18	<b>interest</b> 43:20,24
51:12 54:18	28:10,15 33:1	28:5	<b>inadequacy</b> 3:25	<b>interpretation</b>
<b>four</b> 6:24 41:2	43:17,25 44:13	<b>heard</b> 27:15	4:7,10 14:22	6:17
49:13,19	<b>good</b> 39:4,5 41:1	31:20 49:11	16:24 54:17	<b>interpreted</b>
<b>frankly</b> 33:24	<b>gotten</b> 46:17	<b>hearing</b> 28:17	<b>inadequate</b> 3:17	14:21,25
<b>free</b> 47:22	47:2	<b>hedged</b> 39:21	10:5 12:13,22	<b>interrupt</b> 45:24
<b>friend</b> 47:23	<b>grace</b> 15:5,13	<b>held</b> 4:6,9 8:20	13:5,19 14:24	<b>introduce</b> 48:20
<b>fugitive</b> 4:2 5:1,6	29:24	26:10 44:19	15:1,7,11,25	<b>introducing</b>
14:12,13 22:4,7	<b>grant</b> 11:1 52:5	49:6,14	17:5 22:16	50:14
22:15 23:8 27:7	<b>granted</b> 30:24,24	<b>help</b> 41:14 47:13	23:11 27:20,21	<b>invalid</b> 35:22
31:21 43:22	<b>great</b> 10:18	54:11	30:5,9,15 31:6	<b>invented</b> 20:7
44:14 45:1,2	20:16 21:20	<b>Hey</b> 24:19	35:3,5 39:3	<b>involve</b> 19:20
<b>fugitives</b> 28:12	<b>greater</b> 53:24	<b>high</b> 6:17	40:1	<b>involved</b> 27:5
<b>fugitive-forfeit...</b>	<b>ground</b> 3:16 9:18	<b>higher</b> 13:20	<b>inapplicable</b>	<b>irony</b> 8:17 46:22
5:3 14:9 22:21	9:19 18:1 25:10	<b>hold</b> 12:21 32:1	22:16	<b>irrationality</b>
22:25	28:18 29:4,17	<b>holding</b> 26:17	<b>including</b> 38:4,6	48:21
<b>full</b> 34:18 37:10	39:2 41:23 42:6	<b>Holmes's</b> 12:15	38:6 40:7 46:20	<b>irrelevant</b> 9:6
49:21	50:2,9	<b>honor</b> 3:15 4:19	<b>inconsistency</b>	<b>issue</b> 12:8 19:23
<b>further</b> 52:12	<b>grounds</b> 3:18	5:11,18,21 6:3	40:1	20:1 21:16
	15:17 16:13	6:13 9:13 10:12	<b>inconsistent</b>	23:14,24 24:7
<b>G</b>	51:12 54:15	11:19 12:1,11	16:12 40:13	24:25 33:19
<b>G</b> 3:1	<b>guarantee</b> 39:4	18:1,24 19:21	<b>inconsistently</b>	42:12 44:6,8
<b>Galloway</b> 32:1	<b>guards</b> 52:22,24	20:4 21:10,25	39:12	47:12 49:16
<b>gee</b> 43:25	<b>guess</b> 4:13,19	23:6,15,25	<b>increasing</b> 48:18	<b>issues</b> 28:5 33:17
<b>general</b> 22:9	34:1 35:4 47:22	24:14 26:4 31:9	<b>independent</b> 5:4	34:19,20 38:12
23:8,13 31:17	<b>guidance</b> 53:24	<b>Honors</b> 50:24	26:2 29:4,17	49:21,21
<b>generis</b> 43:4	54:2,5	<b>Huff</b> 44:22	41:22 43:15	<b>italics</b> 53:18
<b>Georgia</b> 12:23	<b>guilt</b> 38:12	<b>human</b> 40:12	50:2	<b>it's</b> 30:8,8 44:16
<b>Ginsburg</b> 3:23	<b>guilty</b> 23:5	<b>hundreds</b> 10:22	<b>ineffective</b> 46:21	44:24
4:11 5:6 7:2,3	<b>guise</b> 3:22	<b>hurt</b> 36:10,11	47:18,20	

<p style="text-align: center;"><b>J</b></p> <p><b>J</b> 1:8  <b>jail</b> 51:23 52:14  <b>James</b> 13:6  <b>JEFFREY</b> 1:3  <b>joint</b> 5:17  <b>Joseph</b> 1:8 3:11  <b>judge</b> 5:19 17:22  39:17  <b>judged</b> 50:10  <b>judges</b> 40:12  <b>judging</b> 15:16  <b>judicial</b> 3:11  25:15  <b>jurisdiction</b> 26:1  44:10  <b>jury</b> 9:2 12:24  13:3  <b>Justice</b> 3:3,9,23  4:11,12,15 5:6  5:22 6:4,21 7:2  7:2,6,7,10,13  8:13,24 10:6,13  10:16,25 11:8  11:17,20 12:2  12:15 14:18  15:12,22 16:1  16:25 17:19  18:14 19:7,22  20:10,18,24  21:3,12,15,21  23:1,12,21 24:4  24:11 25:2,6,14  25:23 26:13,15  26:25 27:22,24  28:8,22,25 29:7  29:12 30:3,10  30:12,19,23  31:1,10 32:8  33:1,18 34:3,22  35:10,13,20  36:1,2,3,3,4,9  36:15,18,22  37:13,16,21  38:4,20,23,24</p>	<p>39:9 40:4,9,17  41:7,8,12,17  41:19 42:15,23  43:1,3,14,20  44:12,25 45:7  45:14,20,23  46:11,22 47:21  48:4,14,25  49:17,23,25  50:19 51:24  53:5,10,13,22  54:2,7,23  <b>justices</b> 19:10  <b>Justice's</b> 45:21</p> <p style="text-align: center;"><b>K</b></p> <p><b>Kennedy</b> 5:22  6:4 8:24 18:14  31:10 36:2,9  41:19 42:23  43:1,3 45:20,23  46:11 53:6  <b>Kentucky</b> 13:6  <b>key</b> 40:21  <b>kind</b> 8:18 11:14  12:14 14:5  15:18 16:15  20:4 27:21  29:19 32:5 51:6  54:17  <b>Kindler</b> 1:8 3:5  3:11 4:3 8:19  21:4,19 25:10  27:20 32:21  34:17,20 37:11  38:3,7 44:7,23  <b>Kindler's</b> 37:4  42:19 43:8  <b>kinds</b> 22:8 48:12  <b>knew</b> 8:14 43:25  <b>know</b> 6:23 8:24  19:7 28:9 29:15  38:9 41:5 45:9  49:10 50:8</p>	<p style="text-align: center;"><b>L</b></p> <p><b>lack</b> 17:12  <b>laid</b> 14:14 22:9  <b>lam</b> 47:25  <b>language</b> 5:10  8:4 23:19  <b>large</b> 54:18  <b>late</b> 22:10  <b>Laughter</b> 35:11  40:16 48:16  <b>law</b> 4:21 12:25  13:11 15:15  18:17,23 20:3,8  20:12,23 21:10  21:16 22:1  31:23 33:14,23  34:25 41:21,21  47:19 50:10,11  52:11 53:9  <b>Lawry</b> 1:19 2:5  25:3,4,6,19  26:3,14,23 27:2  27:23 28:1,20  28:23 29:6,9,18  30:8,11,17,22  30:25 31:8,22  32:19 33:12  34:10 35:8,12  35:18,24 36:8  36:11,17,21,24  37:14,20 38:2,6  38:22 39:8 40:3  40:15,21 41:11  41:14 42:7,17  42:25 43:2,6,17  44:6,15 45:2,8  45:18,22 46:10  46:13 47:1 48:1  48:9,17 49:5,19  49:24 50:13  53:3  <b>Lawry's</b> 50:23  <b>lay</b> 21:18  <b>learned</b> 11:5  <b>leaving</b> 53:11</p>	<p><b>left</b> 18:8 53:6  <b>leniency</b> 14:2  15:13  <b>lenient</b> 51:20  <b>let's</b> 21:21 28:8  31:11  <b>level</b> 15:13  <b>levels</b> 37:20,21  <b>Lewis</b> 34:16,18  35:15  <b>liberal</b> 33:10  <b>lie</b> 21:18  <b>lies</b> 21:13  <b>life</b> 9:25 48:22  <b>light</b> 32:23  <b>limit</b> 39:18  <b>limited</b> 23:17  46:2,3 53:5  <b>line</b> 11:15  <b>litigant</b> 8:21  12:18 13:15  <b>litigant's</b> 26:8  <b>little</b> 16:10,22,22  <b>longer</b> 28:11  29:4  <b>longstanding</b>  53:8  <b>look</b> 7:4 9:1  10:17 23:19  25:25 33:2  34:15 38:25  42:10 43:7,10  50:4 51:16  <b>looked</b> 46:14  <b>looking</b> 4:19 15:2  16:19,19 17:15  32:24 40:22  <b>loser</b> 13:24  <b>lost</b> 35:8  <b>lot</b> 10:14 26:19  45:11 54:14  <b>lots</b> 40:11  <b>lower</b> 10:2,23  11:12 12:21  13:20,21 16:14</p>	<p>16:15 28:9  29:14 51:5  53:24</p> <p style="text-align: center;"><b>M</b></p> <p><b>magnifying</b>  16:18  <b>maintains</b> 18:2  <b>majority</b> 10:8  13:25 29:22  <b>making</b> 50:15  <b>man</b> 9:3  <b>mandated</b> 46:18  <b>mandatory</b> 4:1,4  5:8 7:5,12 8:4  9:21 26:21,22  30:7 32:15,25  33:3,5,6,23  34:6 36:6,12  38:17 44:1  50:24 51:1  <b>Maryland</b> 46:3  <b>matter</b> 1:13 5:11  9:21  <b>matters</b> 44:4  <b>MATTHEW</b>  1:19 2:5 25:4  <b>mean</b> 4:12 6:5  8:13 14:19 41:8  41:21 42:5 44:4  45:24 50:1  <b>means</b> 15:24  35:5 39:11,25  44:23  <b>meant</b> 33:16 34:2  44:20  <b>measure</b> 10:14  <b>meet</b> 22:2  <b>member</b> 17:20  <b>memories</b> 28:13  <b>mentioned</b> 37:7  <b>menu</b> 14:14  <b>merely</b> 16:8 17:5  <b>meritorious</b>  25:12</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p><b>merits</b> 10:10 33:17 34:19 41:2,3 42:13 46:23 49:21 <b>middle</b> 27:6 <b>Mills</b> 46:3,23,25 47:9 <b>Mills-type</b> 47:3 <b>minute</b> 49:9 <b>minutes</b> 50:20 <b>misconstrued</b> 10:2 <b>miserly</b> 15:18 <b>misunderstood</b> 7:17 <b>modify</b> 15:23 <b>moment</b> 19:2 <b>Monday</b> 1:11 <b>motion</b> 19:14 52:3 <b>motions</b> 5:16,20 19:11 20:20 21:6 38:9,11 47:4 52:9,10,14 <b>moved</b> 38:8 <b>moving</b> 31:24 <b>murdering</b> 3:12</p> <hr/> <p style="text-align: center;"><b>N</b></p> <p><b>N</b> 2:1,1 3:1 <b>nail</b> 49:1 <b>narrow</b> 16:9 <b>narrower</b> 18:9 <b>nature</b> 7:20 9:14 17:12 <b>near</b> 39:16 <b>need</b> 14:4 <b>needs</b> 29:10 <b>never</b> 8:2,4 16:13 22:8 39:10,15 40:8 44:19 <b>new</b> 7:25 11:14 13:2 19:19,20 21:4,9 26:21,22</p>	<p>36:15,18 37:22 42:5 47:12 52:6 <b>nit-picking</b> 22:13 <b>noncapital</b> 27:9 28:4 44:18 <b>notice</b> 9:16,22 11:20,21 44:3,4 44:7 50:7 <b>noticed</b> 40:14 <b>novel</b> 50:14 <b>November</b> 1:11 <b>number</b> 5:22 14:13 33:13 34:12 37:1 48:19 <b>numbers</b> 7:1 <b>numerous</b> 26:10</p> <hr/> <p style="text-align: center;"><b>O</b></p> <p><b>O</b> 2:1 3:1 <b>objected</b> 47:12 <b>objection</b> 31:4,8 34:23 41:2 47:3 47:3 <b>objections</b> 48:7 <b>obligation</b> 24:22 40:5 <b>obvious</b> 34:16 <b>obviously</b> 13:17 48:5 <b>occasional</b> 15:5 15:13 29:23 30:1 <b>occasionally</b> 10:9 <b>occurred</b> 8:9 <b>occurs</b> 15:19 <b>odd</b> 17:20 35:21 <b>Oh</b> 42:25 48:4 <b>okay</b> 10:11 36:1 36:24 43:9 44:13 49:19 <b>once</b> 19:15 25:16 <b>ones</b> 34:16 <b>ongoing</b> 31:10</p>	<p><b>open</b> 9:4,4 <b>opening</b> 18:20 <b>operation</b> 10:22 <b>opinion</b> 4:16 5:16 5:23,25 6:7 17:12 18:4 31:4 32:9,11,17 33:24 36:23 37:3 38:25 40:4 53:15 <b>opinions</b> 18:8 21:11 <b>opponent</b> 53:16 <b>opportunity</b> 8:22 11:21 12:5 13:23 <b>opposition</b> 30:21 <b>oral</b> 1:13 2:2 3:7 25:4 49:22 <b>order</b> 26:7 <b>Ortega-Rodrig...</b> 22:18,23 45:3 48:18 <b>overlook</b> 10:10 <b>overturned</b> 22:18 <b>overturning</b> 11:1</p> <hr/> <p style="text-align: center;"><b>P</b></p> <p><b>P</b> 3:1 <b>Pa</b> 1:18,19 <b>page</b> 2:2 4:20 5:17 7:3 14:20 15:3 <b>panel</b> 17:20 18:8 <b>part</b> 11:18 13:23 16:23 27:9,10 27:12 31:22 35:18 41:23 46:15 52:20 <b>particular</b> 16:22 17:16 <b>particularly</b> 17:1 <b>parties</b> 10:21 <b>passion</b> 46:5</p>	<p><b>path</b> 54:11 <b>PCRA</b> 38:16 42:20 43:11,11 <b>penalty</b> 46:5 51:19 <b>Pennsylvania</b> 1:4 4:24,24 5:14 20:12 21:16 22:15 23:3,22 27:7,15 31:13 31:13,23,24 33:14 36:25 37:2,11 38:17 43:7 44:19 45:15,16 46:16 47:8,10 49:20 <b>people</b> 37:7 41:1 43:9,12 <b>perfect</b> 39:16 <b>perfectly</b> 39:20 <b>period</b> 31:25 32:2,4 42:11,18 42:18 <b>permits</b> 14:23 <b>person</b> 41:3 49:15 <b>petition</b> 15:2 18:21 <b>Petitioners</b> 1:6 1:18 2:4,9 3:8 30:13 50:22 <b>phase</b> 38:12 <b>Philadelphia</b> 1:18,19 <b>phrases</b> 18:11 <b>pick</b> 49:25 <b>place</b> 10:21 <b>plain</b> 14:8 15:20 23:20 24:17,20 24:23 <b>plan</b> 52:18 <b>please</b> 3:10 25:7 49:25 <b>point</b> 5:25 6:14 9:7 10:4 19:24</p>	<p>24:3 29:5,9,14 30:14 35:13 36:18 40:24 41:22 43:3 46:3 47:23 49:1 54:12 <b>pointed</b> 7:2 53:6 <b>points</b> 46:12 <b>policy</b> 33:15 <b>position</b> 3:25 5:11 7:15,21 20:2 25:16 26:9 26:16 30:11,20 38:1 47:24 48:1 48:6,7 49:3 51:16 <b>post</b> 46:9 <b>post-conviction</b> 11:4 34:20 37:9 37:10 44:21,24 45:25 46:11,19 46:20 47:8 <b>post-judgment</b> 19:13 <b>post-trial</b> 5:20 <b>post-verdict</b> 5:16 19:11 20:19 21:6 38:9,11 47:4 52:9,13 <b>potential</b> 28:7 42:9 <b>power</b> 3:20 18:2 <b>practical</b> 16:10 <b>precedent</b> 14:21 15:1 16:21 23:3 27:4 <b>precedents</b> 19:1 <b>prejudice</b> 46:6 <b>premise</b> 18:20 <b>present</b> 14:17,19 <b>presented</b> 4:9 5:24 6:1 9:12 29:1,8 30:14 53:17 <b>presentencing</b></p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p>44:20,23 45:4  <b>presenting</b> 9:14  <b>preservation</b>                  24:16,25  <b>preserve</b> 24:18                  24:22  <b>preserving</b> 52:12  <b>presumably</b> 47:5  <b>presumption</b>                  28:6,12  <b>pretrial</b> 27:5  <b>prevails</b> 48:5  <b>prevented</b> 23:22  <b>pre-existing</b>                  24:15  <b>primary</b> 49:10  <b>principally</b> 50:16  <b>prior</b> 4:21 11:15                  13:10 49:14  <b>prison</b> 3:13 47:25                  52:22,22  <b>prisoner</b> 52:17  <b>prisoners</b> 52:21  <b>probably</b> 39:22  <b>problem</b> 4:17                  6:14 7:18,24                  8:18 16:11                  31:22 41:7 51:2                  54:13  <b>problems</b> 5:23                  6:9 18:19 34:13  <b>procedural</b> 3:16                  3:20,22 5:4                  10:7,23 14:5,7                  14:22 15:6,20                  17:4 23:4 24:5                  26:6 30:5 32:6                  51:9,22 53:2,7  <b>procedurally</b>                  15:7  <b>procedure</b> 8:22  <b>procedures</b> 48:8  <b>proceed</b> 31:7  <b>proceeding</b>                  12:18</p>	<p><b>proceedings</b>                  42:20 49:2  <b>process</b> 3:12,13                  19:16 25:15                  27:11 46:25                  50:7  <b>product</b> 46:5  <b>proper</b> 53:21  <b>proportional</b>                  46:8  <b>propose</b> 11:10  <b>proposition</b>                  32:11  <b>prosecute</b> 48:11  <b>provide</b> 53:24  <b>purpose</b> 3:18                  16:12  <b>purposes</b> 9:22  <b>push</b> 52:21  <b>put</b> 39:21 49:4  <b>putting</b> 9:22  <b>puzzling</b> 17:1  <b>p.m</b> 1:15 3:2                  54:25</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <p><b>qualify</b> 12:6  <b>quash</b> 52:4  <b>question</b> 4:22                  5:19,24 6:1,6                  6:11 8:8 12:3                  12:10 14:18                  19:4 21:4,9,24                  22:5 23:1 25:19                  29:8,13 30:4,13                  30:14 35:2 36:3                  36:5 38:16 41:8                  41:9 45:23                  50:14,24 51:15                  53:13,16,17                  54:1,8  <b>questions</b> 11:25                  19:19 23:18                  51:18  <b>quite</b> 9:6 11:3</p>	<p>13:17</p> <hr/> <p style="text-align: center;"><b>R</b></p> <p><b>R</b> 3:1  <b>raise</b> 24:7 47:13  <b>raised</b> 12:24                  20:20 47:2,3,4                  47:5,6,12,15                  49:22  <b>raises</b> 21:4  <b>raising</b> 23:23  <b>rational</b> 31:18                  41:24  <b>reach</b> 46:2  <b>reached</b> 12:19                  13:1 54:17  <b>read</b> 6:7 10:7                  26:20 32:23                  34:1  <b>reading</b> 5:10                  14:20 37:22  <b>real</b> 6:9 8:8 18:19  <b>realized</b> 34:7  <b>really</b> 4:18 5:11                  5:24 6:1 8:12                  9:20 10:1 11:14                  17:19 24:9 25:8                  26:14 28:3                  29:20 32:22                  34:11 40:21                  48:13 53:6                  54:12  <b>reason</b> 6:14 40:7                  42:8 53:23,25  <b>reasonable</b> 8:21                  9:16  <b>reasonably</b> 40:6  <b>reasoned</b> 41:15                  41:18  <b>rebuttal</b> 2:7 22:6                  50:21  <b>recaptured</b> 52:6  <b>reference</b> 33:25  <b>referred</b> 34:2  <b>refused</b> 3:15</p>	<p><b>regard</b> 38:13  <b>regardless</b> 42:13  <b>regime</b> 32:1  <b>Reginald</b> 34:16  <b>regularly</b> 18:13  <b>reinstate</b> 5:15,20                  19:14 21:6  <b>reject</b> 8:3  <b>rejected</b> 44:22  <b>rejecting</b> 7:4  <b>relaxation</b> 23:17  <b>relaxed</b> 33:15                  37:17,24,25                  38:3,7,10 42:10                  49:9,12,14                  50:17  <b>relevant</b> 19:3                  42:18  <b>reliance</b> 43:24  <b>relief</b> 37:10                  46:18 47:2,8  <b>rely</b> 19:1  <b>relying</b> 46:23  <b>remainder</b> 22:6  <b>remand</b> 51:3  <b>render</b> 15:7                  23:11  <b>rendered</b> 17:5  <b>repeated</b> 11:22                  36:4  <b>repudiated</b> 3:13  <b>require</b> 16:14  <b>required</b> 10:21                  26:5,6  <b>requirements</b>                  50:7  <b>requires</b> 50:8                  51:7  <b>requiring</b> 24:16  <b>reserve</b> 22:6  <b>resolve</b> 6:12                  18:21 54:11  <b>resolving</b> 19:20  <b>respect</b> 19:13                  20:19,20</p>	<p><b>respects</b> 26:10  <b>Respondent</b> 1:20                  2:6 25:5  <b>response</b> 30:13                  52:13  <b>rest</b> 9:25  <b>result</b> 17:9,25                  18:4 21:7 25:21  <b>resulted</b> 11:1  <b>resulting</b> 3:16  <b>results</b> 6:18                  54:16  <b>retroactive</b>                  47:11  <b>retroactively</b>                  41:24  <b>retroactivity</b>                  47:10 54:19  <b>return</b> 49:9  <b>returned</b> 5:1                  25:17,17 31:21  <b>reversal</b> 13:10  <b>review</b> 10:10                  11:24 15:19                  25:11 29:23,25                  33:17 34:18,19                  34:21 37:10,12                  38:18 41:2,3                  42:9 44:8,21,24                  45:13 46:1,2,4                  46:10,11,16,19                  46:20 47:17                  48:2 49:8,21                  51:13 52:12                  53:4,5  <b>reviewed</b> 42:12  <b>ridiculous</b> 42:16  <b>right</b> 12:2,9                  21:21,23 25:18                  33:3 34:22                  35:17 37:6 39:8                  39:23 42:1 44:9                  47:22  <b>rights</b> 45:4,12                  49:2 54:19</p>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

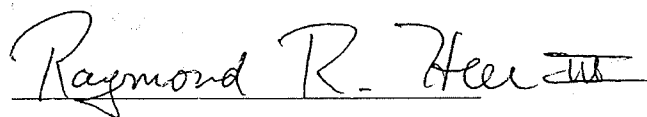
<p><b>riot</b> 52:20  <b>ROBERTS</b> 3:3                  25:2,14,23 30:3                  30:10,12,19,23                  31:1 34:22                  35:10,13,20                  36:1 41:7,12,17                  43:14 44:25                  45:7,14 47:21                  48:4,25 49:17                  50:19 54:23  <b>RONALD</b> 1:17                  2:3,8 3:7 50:21  <b>rule</b> 3:24 4:1,4,4                  5:3,5,7,8,12,13                  7:5,11,20,22                  7:22,25,25 8:4                  8:5,7,12,15                  9:15,20 10:5,7                  10:15,23 11:3,9                  11:13,14 12:4,8                  12:13,14,17,18                  13:3,4,14,16                  13:19 14:8,9,17                  14:23 15:6,7,10                  15:10,20,25                  16:9 17:1,4,13                  18:2,6,6,16                  19:3,4,5,12                  22:4,7,9,13,16                  22:19,21,25                  23:4,8,11,13                  23:16,20 24:12                  24:14,15,15,17                  24:17,20,23,24                  25:21,25 26:6                  26:21,22 27:7                  27:16,19,19                  29:20,21,22                  30:5,6 31:5,11                  31:13,14,20,24                  32:13,15,15,25                  32:25 35:2,16                  35:17,22 36:15                  36:19 37:17,22</p>	<p>37:24,25 38:17                  39:7,15 40:1                  41:10 42:5,20                  43:15,18,22,23                  43:25 44:13,16                  45:1,2 47:10                  50:4,12,14,24                  51:1 54:4  <b>ruled</b> 28:18  <b>rules</b> 9:10,11                  12:21 13:22                  19:20 23:18                  24:4,6 26:11,13                  29:11 31:17                  32:6,7 33:8                  36:14 40:23                  51:9,9,11  <b>ruling</b> 3:22 6:22                  16:5 32:17                  39:18  <b>rulings</b> 14:5,7                  15:20 49:6  <b>run</b> 9:23  <b>rush</b> 52:24</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>S</b> 2:1 3:1  <b>saw</b> 22:22  <b>saying</b> 6:23 7:8                  10:4 15:9 18:15                  18:16 19:17,25                  23:8 25:25                  26:16,17,18,20                  26:24 27:1                  40:19  <b>says</b> 7:4 10:7                  15:5 18:25                  24:20 29:2 34:3                  40:5 45:3,5,8                  53:3  <b>Scalia</b> 4:12,15                  32:8 33:18 36:4                  36:15,18,22                  42:15 48:14                  49:23,25 51:24</p>	<p><b>se</b> 6:16 16:6 17:5  <b>second</b> 52:15,16  <b>SECRETARY</b>                  1:3  <b>see</b> 6:4 10:18                  31:7 40:22 42:8                  42:22 44:17                  49:16  <b>seeking</b> 42:9                  44:10  <b>seldom</b> 11:4  <b>send</b> 39:3 53:18  <b>sense</b> 13:13  <b>sentence</b> 25:12                  38:24 39:9,13                  39:14,21,23                  46:8 48:19,22                  49:18  <b>sentencing</b> 38:13  <b>serious</b> 9:23                  34:12 48:23  <b>set</b> 13:13 45:3  <b>shift</b> 33:3  <b>shifting</b> 32:5  <b>short</b> 45:12  <b>shot</b> 23:14  <b>side</b> 39:4  <b>significant</b> 23:18                  24:21  <b>similar</b> 42:21                  45:16  <b>simple</b> 39:1,24  <b>simply</b> 3:20 4:10                  6:16 15:16                  19:22 22:9                  23:16 38:2                  44:24 49:13  <b>single</b> 16:19                  42:12  <b>sitting</b> 40:12  <b>situation</b> 10:4                  12:4 28:2 29:19                  29:21,25 40:18  <b>six</b> 6:23,23  <b>skewed</b> 7:1</p>	<p><b>slipped</b> 52:25  <b>small</b> 17:16  <b>sneak</b> 52:19  <b>solely</b> 44:7  <b>somebody</b> 37:4                  52:16  <b>somebody's</b>                  48:19  <b>somewhat</b> 53:14  <b>sorry</b> 37:14                  48:25  <b>sort</b> 8:17 13:19                  14:14,15 16:23                  17:14 27:6                  31:25 51:7,21                  51:22 53:4  <b>Sotomayor</b> 6:21                  7:6,7,10,13                  10:6,13,16,25                  11:8,17,20 12:2                  19:7,22 20:10                  20:18,24 21:3                  21:12,15,21                  26:13,15,25                  27:22,24 28:8                  28:22,25 29:7                  29:12 37:13,16                  37:21 38:4,20  <b>sought</b> 24:7 37:9                  47:8 52:19  <b>spelled</b> 22:8  <b>spent</b> 47:24  <b>split</b> 6:4 16:18  <b>spring</b> 12:16                  13:13  <b>sprung</b> 7:25                  12:17  <b>squarely</b> 6:1  <b>staged</b> 52:20  <b>stake</b> 25:9  <b>standard</b> 6:16                  13:20,21 16:21                  18:9  <b>standards</b> 14:15  <b>Stapleton</b> 17:21</p>	<p><b>started</b> 40:19                  52:8  <b>starting</b> 16:18                  22:9  <b>state</b> 3:18,19                  6:19,20 7:10,11                  9:10,14,18 10:9                  10:15,23 11:23                  12:7,14 13:2,8                  13:11,13,22                  14:2,4,19,22                  14:23 15:5,6,16                  16:4,10,13 17:4                  18:2,3 20:3,4,8                  20:8,23 21:10                  21:11 22:1                  23:11 25:10,21                  25:25 26:6,11                  29:4,17 30:5,6                  32:16 33:4 34:6                  37:22,24 38:2                  39:2 40:1,10                  41:22,25 42:9                  42:12 43:15                  44:9 47:17 48:3                  48:5,10 49:6                  50:2,4,8,11                  51:9,11,12,17                  51:23 52:4,11                  54:15,20  <b>stated</b> 6:15  <b>statement</b> 11:22                  17:8  <b>states</b> 1:1,14                  5:18 10:18                  13:24 17:17                  53:25  <b>State's</b> 7:4 8:22                  11:3  <b>status</b> 20:12  <b>statutorily</b> 46:18  <b>statutory</b> 46:15  <b>stay</b> 9:25  <b>stayed</b> 47:25                  49:4</p>
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------



<b>Ward</b> 44:9	x 1:2,9	<b>6</b>		
<b>Washington</b> 1:10		<b>62</b> 15:3		
<b>wasn't</b> 5:8 6:7,21	<b>Y</b>	<b>69</b> 5:18		
6:25 8:15 16:7	<b>year</b> 17:22			
18:18 20:3	<b>years</b> 9:9 47:22	<b>7</b>		
23:12,12 26:19	47:25 48:19	<b>7</b> 14:20 52:7		
34:23 36:19	49:4 52:7			
43:23 49:12	<b>York</b> 52:6	<b>8</b>		
50:17	<b>you're</b> 35:22	<b>8</b> 47:22,25 49:4		
<b>way</b> 7:8 24:3,16	<b>you've</b> 29:1			
28:7 29:1 35:6	39:21			
42:19 45:17				
51:10	<b>0</b>			
<b>weeks</b> 52:3,6	<b>08-992</b> 1:7 3:4			
<b>weighed</b> 53:25				
<b>went</b> 37:9,11	<b>1</b>			
46:1	<b>1:00</b> 1:15 3:2			
<b>weren't</b> 42:23	<b>10</b> 9:9			
<b>we're</b> 35:24,24	<b>1800s</b> 22:10			
<b>we're</b> 26:24	<b>1876</b> 14:10			
28:10	<b>1920</b> 44:9			
<b>whatsoever</b>	<b>1984</b> 9:21 49:11			
38:18	49:14 50:1,6,10			
<b>White</b> 54:21	50:18			
<b>willing</b> 10:9	<b>1996</b> 31:12			
<b>win</b> 21:23 47:7				
<b>wind</b> 51:4,8	<b>2</b>			
<b>windfall</b> 47:15,17	<b>2</b> 1:11 52:3,6			
47:22	<b>2:01</b> 54:25			
<b>window</b> 9:4 17:17	<b>20-year</b> 42:11			
52:19,25	<b>2009</b> 1:11			
<b>withdrew</b> 52:3,5	<b>22</b> 4:20			
<b>witness</b> 3:12	<b>23</b> 7:3			
<b>witnesses</b> 28:12	<b>25</b> 2:6 10:17			
<b>woodenly</b> 15:10				
<b>worse</b> 47:24 48:1	<b>3</b>			
48:5,7 49:2	<b>3</b> 2:4			
<b>worst</b> 51:21				
<b>worth</b> 53:23	<b>4</b>			
<b>wouldn't</b> 44:1,2	<b>4</b> 50:20			
<b>written</b> 5:16				
39:10	<b>5</b>			
<b>wrong</b> 21:16	<b>50</b> 2:9			
	<b>51</b> 42:11			
	<b>52(b)</b> 24:20			
<b>X</b>				

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of; JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL., Petitioners, v. JOSEPH J. KINDLER; and that these attached pages constitute the original transcript of the proceedings for the records of the Court.

Handwritten signature of Raymond R. Heer in cursive script, with a horizontal line underneath the name.

REPORTER