

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

RUSSELL BUCKLEW,)
)
) Petitioner,)
)
) v.) No. 17-8151
)
) ANNE L. PRECYTHE, DIRECTOR,)
)
) MISSOURI DEPARTMENT OF)
)
) CORRECTIONS, ET AL.,)
)
) Respondents.)

Pages: 1 through 70
Place: Washington, D.C.
Date: November 6, 2018

HERITAGE REPORTING CORPORATION

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7 MISSOURI DEPARTMENT OF)

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11 Washington, D.C.

12 Tuesday, November 6, 2018

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14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 10:09 a.m.

17

18 APPEARANCES:

19

20 ROBERT HOCHMAN, ESQ., Chicago, Illinois; on behalf
21 of the Petitioner.

22 D. JOHN SAUER, State Solicitor, Jefferson City,
23 Missouri; on behalf of the Respondents.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	ROBERT HOCHMAN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	D. JOHN SAUER, ESQ.	
7	On behalf of the Respondents	32
8	REBUTTAL ARGUMENT OF:	
9	ROBERT HOCHMAN, ESQ.	
10	On behalf of the Petitioner	66
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 17-8151, Bucklew versus Precythe.

Mr. Hochman.

ORAL ARGUMENT OF ROBERT HOCHMAN
ON BEHALF OF THE PETITIONER

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

Missouri intends to carry out Mr. Bucklew's lethal injection execution without informing medical members of the execution team of the well-documented and extremely uncommon medical condition that will very likely cause his execution to involve severe harm and suffering from the time they begin to gain venous access all the way through his eventual death.

JUSTICE SOTOMAYOR: Mr. Hochman, can you tell me the current condition of your client in light of Footnote 2 of your opening brief? And in particular but not exclusively, does he still have a trach in his throat? And if he does, doesn't that moot out certain of

1 your claims, particularly I thought much of the
2 prep work and dangers related to him choking on
3 his own blood. Doesn't the trach minimize that
4 now?

5 MR. HOCHMAN: Yeah. So, first, to
6 answer your question, as you know, we've --
7 we've requested leave to lodge the medical
8 records from the summer. I'm happy to answer.
9 It's obviously outside the record. I just want
10 to make that clear.

11 Right now, as far as I know, he still
12 has a trach in. There is no indication about
13 how long he's going to continue to have the
14 trach. The trach could be removed at any time
15 that the medical people determine it's
16 appropriate to do so.

17 I don't think it can moot out the case
18 because without -- if -- if the trach is
19 removed, all of the problems return. As for
20 what would happen if the trach wasn't removed,
21 I think there would still be complications that
22 would need to be investigated. It's a
23 completely different set of circumstances.

24 It's certainly true the core --

25 JUSTICE SOTOMAYOR: So we may be -- we

1 may be issuing a decision on -- an advisory
2 decision because, if the trach stays, it's a
3 totally different case than if it is removed.

4 MR. HOCHMAN: I don't think it's an
5 advisory decision, Your Honor. I think -- I
6 think the problem is you have a judgment right
7 now that says Missouri can go ahead and execute
8 Mr. Bucklew according to the protocol that they
9 have in place. And we don't -- at this point,
10 we cannot say he certainly is in imminent
11 danger if that protocol is used at a -- yet
12 there is no pending execution date. If that
13 protocol is used in the future, I don't know
14 whether the bleeding problems complicate the
15 trach for him. That's just never been
16 investigated.

17 And I also don't know if the trach's
18 even going to be there. And if the trach isn't
19 going to be there, Justice Sotomayor --

20 JUSTICE SOTOMAYOR: How long has he
21 had it now?

22 MR. HOCHMAN: It was put in in June.
23 Part of the reason he may --

24 JUSTICE SOTOMAYOR: Isn't it your job
25 to find out if it can be removed now?

1 MR. HOCHMAN: Well, it -- it certainly
2 can be removed. The question is -- it's -- is
3 he's -- he's got a progressive condition
4 that's, you know, discussed in the record.

5 JUSTICE SOTOMAYOR: I -- I -- I --

6 MR. HOCHMAN: And so --

7 JUSTICE SOTOMAYOR: -- I'm a little
8 bit upset that you would come in and lodge
9 medical records without having secured the
10 information of whether he's physically capable
11 of having the trach removed or not.

12 MR. HOCHMAN: So the -- this is what
13 we know about why -- I don't know whether this
14 is the precise reason, but he is scheduled to
15 have dental surgery for a -- for a tooth issue
16 that, you know, because his mouth is so prone
17 to infection. So he's going to have dental
18 surgery.

19 My suspicion is that they're leaving
20 the trach in for the surgery. They don't want
21 to take the trach out --

22 JUSTICE SOTOMAYOR: I really don't
23 like suspicion.

24 MR. HOCHMAN: -- prior to the surgery.

25 JUSTICE SOTOMAYOR: But go ahead.

1 Assuming nothing, because I don't know what's
2 going to happen, it appears that your Dr. Zivot
3 was misreading the horse study, that his
4 four-minute estimate had to do with a different
5 study having to do with a dog and a different
6 agent, not the agent at issue here.

7 Given that without that study there's
8 no basis to believe that this -- that
9 pentobarbital would take four minutes to -- to
10 take effect, it would likely be -- I think it
11 was -- the figures were at maximum 52 and the
12 average is 20 to 30 seconds. That's the only
13 evidence in the record.

14 Is there anything left to your case
15 once that information is eliminated --

16 MR. HOCHMAN: So --

17 JUSTICE SOTOMAYOR: -- that factual
18 misstatement?

19 MR. HOCHMAN: Yes, there is, Your
20 Honor. Two things to say about that.

21 First, in fact, the maximum period of
22 time in that study, if you -- if you actually
23 time it from the beginning of the infusion all
24 the way through the -- the time that the EEG
25 reads zero, is 161 seconds, almost three

1 minutes.

2 It is true that he missed -- that --
3 that he misremembered the time. That you --

4 JUSTICE SOTOMAYOR: But the --

5 MR. HOCHMAN: What you have to do is
6 you have to look at the study. I went back and
7 we looked at the study. There's a wide range
8 of infusion times in that study, 28 seconds to
9 115 seconds.

10 And that, just for reference, Your
11 Honor, the infusion times in the study referred
12 to are at, I think -- I think it's about --
13 yeah, it's JA 265, appendix page 265. And it
14 talks about the -- the infusion rate.

15 The other thing that study indicates,
16 which is also confirmed by Dr. Antognini's
17 testimony at page 316, is that the slower you
18 infuse, the longer it will take for the drug to
19 take effect.

20 Now here's what happened in the horse
21 study: There was -- for the slowest horse,
22 that -- the slowest infusion rate, 115 seconds,
23 that horse took the longest time, which is
24 exactly what you'd expect. Right?

25 That -- the horses were infused with

1 four times, four times, the amount of
2 pentobarbital. They're much bigger than their
3 -- than human beings and so they -- they take
4 about four times.

5 Dr. Antognini testified that he would
6 expect 100 seconds, just -- you know, about one
7 second per cc, so something a little bit more
8 than 100 seconds for Mr. -- for Mr. Bucklew's
9 infusion to take place.

10 So it's the same amount of infusion
11 time for the horse, except it's four times as
12 much. So --

13 CHIEF JUSTICE ROBERTS: That's to --
14 your termination point at that is when the EEG
15 is zero, right?

16 MR. HOCHMAN: That's correct, on those
17 studies.

18 CHIEF JUSTICE ROBERTS: But -- but,
19 for major surgery, they don't wait until the
20 EEG is zero. It's, what, 40 or 50, something
21 like that?

22 MR. HOCHMAN: That's right, Your
23 Honor.

24 CHIEF JUSTICE ROBERTS: So why are we
25 concerned about the time to get to zero?

1 MR. HOCHMAN: Well, because there's no
2 -- there's no way to measure exactly when --
3 there is no studies and there's no way to
4 measure exactly when you pass through the
5 various stages of consciousness. And so --

6 CHIEF JUSTICE ROBERTS: Well, I don't
7 know, but they're -- they -- they undertake
8 major surgery with the EEG at a much --

9 MR. HOCHMAN: But --

10 CHIEF JUSTICE ROBERTS: -- higher
11 level than you're talking about --

12 MR. HOCHMAN: But there's no -- but
13 there's no particular reason to believe that
14 you get -- it's -- well, that -- first of all,
15 that -- that -- that reading, those -- those
16 ranges are somewhat disputed in the science,
17 but, regardless, the point is there's no reason
18 to believe that it takes very long to get from
19 the level at which you're -- you're -- you're
20 -- you're prepped for surgery, so to speak, and
21 all the way to zero. And that --

22 JUSTICE ALITO: Why is that? Why is
23 there no reason to believe that?

24 MR. HOCHMAN: Why is there no reason
25 to believe that?

1 JUSTICE ALITO: Yeah.

2 MR. HOCHMAN: Because it -- there's --
3 well, at this point, there's nothing in the
4 record, but there's also no --

5 JUSTICE ALITO: Well, there's nothing
6 in the record --

7 MR. HOCHMAN: -- there's no real way
8 to measure that.

9 JUSTICE ALITO: -- to show one way or
10 the other.

11 MR. HOCHMAN: There's -- but -- and
12 there's -- it's -- it's a difficult situation
13 to measure for obvious reasons. We don't do --
14 we don't conduct experiments in this sort -- in
15 this sort of field. And so we're working with
16 the information as best we can.

17 And what I'm trying to emphasize here
18 is that the infusion rate for Mr. Bucklew,
19 especially compared to the horse study, is
20 substantially slower as a proportional matter.
21 And that's good reason to believe that
22 Dr. Zivot's fundamental estimate that there's
23 going to be a prolonged period of suffering, he
24 -- he admittedly wasn't precise.

25 And -- and, Justice Sotomayor, you're

1 absolutely right that I think he just crossed
2 up the numbers in his head from the study. But
3 that doesn't change the fact that there's going
4 to be several minutes. And that's only
5 counting after they gain venous access.

6 The -- the -- a -- a large part of the
7 claim here is what's going to happen before
8 they gain venous access, and that's very, very
9 important.

10 And note, Judge Colloton's dissent
11 specifically talked about the trial, the -- one
12 of the things he thought needed to be hashed
13 out at a trial is not only, you know, this
14 debate between Drs. Zivot and Antognini but
15 also whether he'll be required to lie flat,
16 which we've now learned new information about
17 since Judge Colloton wrote that opinion, and
18 whether his airway will --

19 JUSTICE SOTOMAYOR: I'm sorry, what --
20 what new facts?

21 MR. HOCHMAN: Well, that's the -- the
22 -- at page 882 of the appendix, the statement
23 from Ms. Boyles that he will lie flat, he will
24 not lie fully supine at the time they
25 administer the lethal drug, which I take to be

1 strong evidence, actually. They had time to
2 think about this, they had time to make a
3 decision about what they wanted to represent,
4 and what they chose to say is we'll make sure
5 he's not lying flat at the time they begin the
6 -- the infusion.

7 That's critical, because a large part
8 -- if we must prove, as -- as Judge Colloton
9 observed, if we must prove that the available
10 alternative method will substantially reduce
11 Mr. Bucklew's risk of suffering -- and, as you
12 know, we don't -- we don't think that's
13 necessary -- but if we must, we will explain
14 that the risk arises early in the execution
15 process and remains high throughout, through
16 the period that Dr. Zivot talked about.

17 CHIEF JUSTICE ROBERTS: Is that
18 because of the injection difficulties?

19 MR. HOCHMAN: That's -- right. It --
20 it -- it --

21 CHIEF JUSTICE ROBERTS: Well, does
22 that include the femoral injection option, or
23 are you only talking about the regular veins?

24 MR. HOCHMAN: We're talking about the
25 femoral. I -- I -- I think -- I think it's

1 more or less agreed that at this sum --
2 remember, this is summary judgment -- so, at
3 this posture of the case, there's substantial
4 reason why a fact-finder would conclude that
5 the peripheral access is going to fail.

6 And as I read the Respondent's brief,
7 I mean they make nods in -- in -- in the other
8 direction, but, essentially, they accept, the
9 district court accepted, the court of appeals
10 accepted that there's going to be -- they're
11 going to access the femoral vein. We do not
12 deny -- we do not deny that they can access the
13 femoral vein. That's going to happen.

14 We're not denying that. The question
15 is how horrible is that going to be for him.
16 The last time they accessed the femoral vein of
17 an inmate because they failed to gain venous
18 access -- and this is at page 611 and 612 of
19 the appendix -- they did it through this
20 cut-down procedure.

21 And the cut-down procedure, they have
22 the kit in the room, that's page 615 to 616,
23 this is entirely within the contemplation, what
24 they expect to do.

25 They are dealing with inmates after

1 all. Compromised veins is hardly an unusual
2 circumstance for them. So -- so they're going
3 to have to access the femoral vein, and the
4 cut-down procedure --

5 JUSTICE ALITO: Well, do they have a
6 -- do they have a certified anesthesiologist
7 available and did Dr. Antognini testify that
8 any board certified anesthesiologist would be
9 able in -- in most instances, is able to access
10 the femoral vein without a cut-down procedure?

11 MR. HOCHMAN: Dr. Antognini did say
12 that, but then -- but the board certified
13 anesthesiologist --

14 JUSTICE ALITO: Is there contrary --
15 is there contrary evidence?

16 MR. HOCHMAN: Yes, because the board
17 certified anesthesiologist that I'm referring
18 to who previously accessed the femoral vein via
19 cut-down is the same person who's going to
20 do Mr. Bucklew's execution. Unless they've
21 changed and haven't told us, it's the same
22 person.

23 So whatever, generally speaking, and
24 what Dr. Antognini said -- let's be absolutely
25 clear about this -- Dr. Antognini explained in

1 his -- in his deposition, he said everyone
2 who's board certified is trained to access the
3 femoral vein.

4 But, when asked point blank does
5 everyone have experience doing it, he said no.
6 He said you can go decades without doing it at
7 all and you could lose the ability to do it.

8 And now we have -- of course, we
9 haven't had discovery of M2 and M3, a separate
10 issue that I'll get to in a moment, but what we
11 know, given what we've had access to, is that
12 this person did a cut-down. And a cut-down,
13 the testimony is, can take 15 minutes and maybe
14 more.

15 And it's carving into his leg. So
16 let's paint the whole picture here. He's lying
17 fat -- flat. That's what the Boyles affidavit
18 says. They're carving into his leg, causing a
19 tremendous amount of stress. It's the worst
20 possible set of circumstances.

21 There's little doubt in my mind, if he
22 doesn't have a trach -- and that's absolutely
23 true, Justice Sotomayor -- if he doesn't have a
24 trach, he would -- he would be suffering
25 enormously, suffocating, having difficulty

1 breathing, and it -- this is not a short period
2 of time. If you look, I can't state in open
3 court --

4 JUSTICE SOTOMAYOR: Is there another
5 alternative to the cut-down --

6 MR. HOCHMAN: I --

7 JUSTICE SOTOMAYOR: -- to access the
8 femoral vein?

9 MR. HOCHMAN: So -- so it may -- if we
10 had discovery of M2 and M3, we could have a
11 conversation with them about whether they would
12 use an alternative, some other procedure. But
13 we haven't had the chance to talk with them.

14 JUSTICE SOTOMAYOR: Are there any?

15 MR. HOCHMAN: I -- I believe there
16 are, Your Honor. I do -- I believe that some
17 people who are skilled and have -- and have a
18 lot of experience with this can -- can -- you
19 know, just can do it, sort of visualize where
20 the femoral vein is, and effectively do it.

21 The best way to do it that you would
22 use in a surgical setting, according to the
23 testimony, is you bring an ultrasound in.
24 There's no suggestion that there be an
25 ultrasound in this case.

1 But I -- I want to emphasize that when
2 they -- what -- what the record shows is when
3 they sit -- when they start this process,
4 they're not going to be aware of the breathing
5 issues. That's what happened last time. They
6 got a one-page summary of his condition. It
7 mentioned that he has cavernous hemangioma on
8 the face and lip. It didn't mention the tumor
9 in his throat. It did not indicate any
10 breathing issues.

11 Nothing in the record indicates they
12 would check Mr. Bucklew's airway. Nothing in
13 the record indicates they normally, in the
14 normal course, would monitor an inmate's
15 respiration. Nothing in the record suggests
16 they would have the equipment present in the
17 room to deal with an airway collapse while he's
18 on the -- the -- the table waiting for the drug
19 to be infused, which is a very long period of
20 time.

21 And I was about to say before, if you
22 look at pages 978 and 979 of the appendix,
23 you'll see how far in advance of the time they
24 administer the lethal drug that they begin the
25 efforts to gain venous access. He's lying flat

1 that entire time, the Boyles affidavit tells
2 us. He's struggled through a cut-down
3 procedure. He's probably bleeding from his
4 tumor. The risk of a airway collapse is very
5 high. And there's nothing in the room to deal
6 with it.

7 So I don't think -- I -- I think
8 there's a question -- the trach -- if they had
9 come to us, Justice Sotomayor, and said, you
10 know what, we'll give you access, you -- you
11 can talk to M2 and M3, and what we think
12 they're going to -- they're going to do is
13 we're going to give them the information that
14 they need to know what problems are very likely
15 to arise. We're going to let them think about
16 it, you can talk to them, and maybe what
17 they'll be able to do is, at the start of the
18 process, we'll adjust the protocol and put a
19 trach in.

20 JUSTICE SOTOMAYOR: May I --

21 MR. HOCHMAN: And that might -- that
22 would have gone --

23 JUSTICE SOTOMAYOR: Let me -- let me
24 stop you right there.

25 MR. HOCHMAN: Yeah.

1 JUSTICE SOTOMAYOR: Let's assume --
2 and they're going to -- I'm going to ask them
3 this directly.

4 MR. HOCHMAN: Sure.

5 JUSTICE SOTOMAYOR: It does seem very
6 logical that the state would give an affidavit
7 a lot better than the one they did through Mr.
8 Boyles that would say, no, we're not going to
9 put him sublime, from the minute he's laid
10 down, the gurney will have the top part raised,
11 we've talked to the medical team, they have
12 experience by their own requirements, they have
13 training, education, and experience with two or
14 three different ways to reach a femoral line.
15 There's at least one of the two people who do.

16 We've told them about the breathing
17 problem. It's not going to be the same as the
18 -- the last time. And they're prepared.

19 Assume they came in with that. No,
20 we're not going to let you talk to them. No,
21 we are not going to permit discovery in a
22 traditional way. But we are making these
23 affirmative representations to the Court.

24 Would you have a case left at that
25 point?

1 MR. HOCHMAN: I think -- I think if
2 the judgment were based on that kind -- on
3 those kinds of assurances, I would probably
4 want to add a few. I think, given the passage
5 of time and the progressive nature of his
6 illness, I think, to be adequately informed, I
7 mean, one of the -- as -- as you -- as you --
8 as you've pointed out, you know, adequate
9 information is critical here.

10 To be adequately informed, you
11 probably have to do imaging studies at some
12 reasonable time in advance of -- of the
13 execution.

14 I'd -- I'd want to know -- I -- I -- I
15 -- I'd want to know what kind of experience
16 they have, not only with the cut-down, but,
17 remember, Dr. Zivot was very clear that he
18 would not want to just intubate on the fly
19 someone in Mr. Bucklew's condition. Why?
20 Because that tumor is extremely sensitive.

21 And if you've got a struggling, maybe
22 convulsing person even strapped down, and
23 you're trying to put a tube down his throat so
24 that he can breathe, the chances of a
25 catastrophic hemorrhage are very, very high.

1 CHIEF JUSTICE ROBERTS: Could I ask --

2 MR. HOCHMAN: So this has to be taken
3 care of, thought through in advance, I think
4 it's very complicated, and the judgment we have
5 right now just doesn't do it for us, and -- and
6 I think you have to vacate and remand.

7 What you are proposing, Justice
8 Sotomayor, is entirely sensible and could
9 happen on remand before the trial court, and
10 that's where it should happen, where it should
11 have happened before.

12 CHIEF JUSTICE ROBERTS: Could I ask
13 you to address the reasonable alternative
14 question? I know you think it's not required
15 in your case, but it -- assuming that it is,
16 how can it be a reasonable alternative if it's
17 never been used before?

18 MR. HOCHMAN: Yeah, Your Honor, I
19 think -- I think there are a couple reasons why
20 that's so.

21 First, I don't think that this Court
22 ever said in Baze that it has to have been used
23 before for it to be a reasonably available
24 alternative. What I understand the language of
25 Baze to say is -- its -- it -- the -- the key

1 passage is at page 57 of the opinion -- no
2 other state has adopted the method that was
3 being proposed in Baze.

4 And Petitioner's proffered no showing
5 that is an equally effective manner of imposing
6 a death sentence. Well, what do we have?
7 Oklahoma, Mississippi, Alabama, have adopted
8 lethal gas as -- as -- as methods of execution,
9 in addition now to Missouri, and it's not only
10 -- not only have we shown that it's an equally
11 effective manner of imposing a death sentence.
12 Dr. Antognini said so. That's his -- that's
13 his opinion. That's the evidence in the case.

14 There's the study from Oklahoma which
15 was done which went through the process that
16 would be involved in some -- in some detail,
17 talked about the right to die community's
18 favorable experiences with lethal gas.

19 Now it doesn't mean there's nothing to
20 be worked out. Of course, there are details to
21 be worked out.

22 I -- I don't -- I don't doubt that it
23 would have to be 100 percent pure nitrogen,
24 because you -- you'd -- I think it's actually
25 potentially horrible if you have either a leak

1 in the -- in the -- in the system or --

2 CHIEF JUSTICE ROBERTS: Well, but one
3 of the things we see often in the Eighth
4 Amendment cases is the point or allegation that
5 things can go wrong regardless of the method of
6 execution.

7 And it seems to me that if you have a
8 method that no state has ever used, that that
9 danger is magnified.

10 MR. HOCHMAN: Possibly, Your Honor,
11 but --

12 CHIEF JUSTICE ROBERTS: And yet your
13 claim is that this is a better -- a better
14 alternative?

15 MR. HOCHMAN: Yeah, because here's --
16 here's why: I mean, when you -- think about
17 what our claim is, this as-applied claim. Our
18 claim is that the officials in Missouri are
19 going to do everything that their protocol
20 directs them to do.

21 I'm not assuming that there's going to
22 be a mishap. I'm not assuming that something's
23 going to go haywire. I'm assuming everything's
24 going to go exactly the way they intend it and
25 that the process of things playing out exactly

1 that way is going to be severe suffering for
2 Mr. Bucklew.

3 So now we move to a situation where a
4 method -- where I -- where I think it's made
5 substantially less, the risk is substantially
6 lower of that kind of severe suffering, and
7 this Court's cases have made clear that mishaps
8 in protocol --

9 CHIEF JUSTICE ROBERTS: Well, but that
10 gets to the -- the point -- I mean, you
11 understand the theory between Baze and Glossip,
12 which is what the Eighth Amendment prohibits is
13 the unnecessary infliction of pain. If the
14 death -- death penalty is constitutional, as it
15 now is, there must be a way to administer it.
16 But, if you can show that there's another way
17 that is less painful, then the -- the theory
18 is, again, that it's an Eighth Amendment claim
19 because it's unnecessary pain.

20 But, again, it seems to me that you
21 can't make that showing with respect to
22 something that's never been -- never been used
23 by any other state.

24 MR. HOCHMAN: I -- I don't think that
25 -- I don't think that's true, Your Honor. I

1 think what happened in Baze was you had a
2 method that, assuming it went well -- that's
3 what the background, the basis was.

4 Remember, the -- the analysis was
5 comparative. You start with the background
6 assumption in Baze that if everything goes
7 according to plan, there's -- there's not
8 constitutionally significant suffering.

9 Here, the -- it's exactly the
10 opposite. If everything goes according to
11 plan, there is constitutionally significant
12 suffering. So the -- the -- the relative risk
13 of the just unknown, you know, not quite sure
14 because it's never been played out before,
15 which has no purchase against the background in
16 Baze, has enormous purchase here. It's --

17 JUSTICE BREYER: What do you do with
18 the -- do I understand where we are is that the
19 district court and the court of appeals assumed
20 that you'd shown enough to deny summary
21 judgment to the state, you'd shown enough that
22 this method, because of his special condition
23 and the terrible tumors and so forth, could
24 cause serious suffering, and now they
25 overturned you on the second part and said:

1 But you haven't shown that that serious
2 suffering wouldn't occur anyway, even with your
3 new method. All right? That's where we are.

4 So, as of this moment, though, we've
5 been talking about the first part, and even you
6 say a lot of conditions have changed. And some
7 had changed. And some might have changed. And
8 we're missing a piece of evidence about an
9 affidavit that says, hey, the nurses and so
10 forth do what they're supposed to do. Okay?

11 Now, as to the second part, which is
12 pretty hard to look at alone without the first
13 part, as to the second part, what in your
14 opinion should we do? Because the only -- the
15 evidence in the record said, yeah, if we use
16 nitrogen, Doctor -- the doctor that you
17 mentioned said you use nitrogen 20 seconds, 30
18 seconds, he'll -- he'll be unconscious.

19 Okay. The Chief Justice -- I mean,
20 that is a point; it's never been used before.
21 And the -- even their doctors, they're
22 listening and -- and -- or knows about all this
23 and it all is on an assumption that now seems
24 not to be accurate in your own view. It's --
25 the horse study's misread. And so -- so what

1 in your opinion should the Court do?

2 MR. HOCHMAN: I have a proposal.

3 JUSTICE BREYER: Yes.

4 MR. HOCHMAN: Thank you, Justice
5 Breyer, because I have a proposal. I think it
6 will address Justice Sotomayor's concern as
7 well.

8 If you look at the appendix, at the
9 fourth amended complaint, page 85 of the
10 appendix and page 90 of the appendix, among the
11 allegations in the complaint is not only do we
12 think lethal gas would be a viable alternative
13 method, but we also say, if after adequate
14 discovery it turns out it might be possible, we
15 just don't know, but it might be possible to
16 alter a lethal injection protocol in a way that
17 would satisfy constitutional standards.

18 So, if you vacate the judgment, if you
19 remand it to the district court, in part
20 because circumstances have changed, we don't
21 know whether this changed circumstances will
22 prevail at the time an execution is scheduled,
23 but in part because circumstances have changed,
24 if you vacate and remand, then we can go back,
25 we cannot only look into the question of what's

1 -- what -- what -- how the comparison in light
2 of any new circumstances would be to the lethal
3 -- unknown aspects of lethal gas, but we can
4 also figure out whether there are other ways to
5 modify a lethal injection protocol that
6 alleviate this grave concern.

7 JUSTICE ALITO: What is your basis for
8 arguing that there would be a shorter twilight
9 period with lethal gas?

10 MR. HOCHMAN: So this --

11 JUSTICE ALITO: Are you relying on
12 Dr. Antognini's testimony for that?

13 MR. HOCHMAN: So -- no. So just to be
14 clear --

15 JUSTICE ALITO: You're not? Okay. So
16 what are you relying on?

17 MR. HOCHMAN: So -- so the way I
18 understand it is the issue is not that there
19 would be a shorter twilight period. The issue
20 is, what's the degree of suffering that takes
21 place during the twilight period? It's the
22 twilight period is what it is.

23 In the period, there's a period of
24 time where you're unconscious. Dr. Zivot
25 thinks there's a period of time even where

1 EK -- EEG readings are very, very, low, but you
2 can still -- from his experience sitting by
3 patients for 20 years, you can still sense
4 things. And there is -- so there's -- there's
5 possibility for the -- the subjective
6 experience of suffering.

7 The problem is that, with
8 pentobarbital, part of what happens, and this
9 is -- you have a very narrow -- you have an
10 obstructed airway, and Dr. -- Dr. Zivot -- and
11 I'll -- I'll be very quick here -- Dr. Zivot
12 just explains you could have laminar flow,
13 which is normal flow, or turbulent flow.
14 Turbulent flow is a real big problem for -- for
15 -- for Mister --

16 JUSTICE ALITO: But you're making this
17 very complicated. Isn't the question for what
18 period of time will Petitioner be -- not be
19 insensate but may have difficulty breathing?

20 MR. HOCHMAN: I think it's several
21 minutes, Your Honor. It's several.

22 JUSTICE ALITO: All right. And how do
23 you get to that figure with respect -- the
24 figure that applies there with respect to
25 lethal gas?

1 MR. HOCHMAN: I -- I -- no, it would
2 be less with lethal gas.

3 JUSTICE ALITO: Yeah. Okay. What are
4 the numbers? And where does that come from --

5 MR. HOCHMAN: Well, the --

6 JUSTICE ALITO: -- is what I'm asking.

7 MR. HOCHMAN: -- the -- the testimony
8 from lethal gas is twofold. One -- this is in
9 the Oklahoma studies at page 736 through 747 of
10 the appendix -- very, very quick onset of
11 unconsciousness; and, two, one of the things
12 that lethal gas has is it's about twice as
13 fast --

14 JUSTICE ALITO: So you're relying on
15 -- on the Oklahoma study for that?

16 MR. HOCHMAN: The Oklahoma information
17 and Dr. Antognini's testimony.

18 JUSTICE ALITO: Okay. But what did --
19 didn't -- Dr. Antognini said that it would be
20 the same for lethal gas and for --

21 MR. HOCHMAN: He said it would be the
22 same as he thought pentobarbital would produce.
23 And that was --

24 JUSTICE ALITO: All right. So your --
25 you reject his testimony. He says it's the

1 same. So you want to accept him -- you want to
2 accept his number -- I mean, maybe there's
3 more. That's why I'm asking this.

4 Do you want to accept his number for
5 lethal gas but reject his number for
6 pentobarbital -- for -- for the current
7 protocol?

8 MR. HOCHMAN: Yes, Your --

9 JUSTICE ALITO: Even though what he
10 said was that they are the same.

11 MR. HOCHMAN: Yes, Your Honor. I
12 think we're entitled to do that. And Judge --
13 and that was the basis of Judge Colloton's
14 dissent.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Mr. Hochman.

18 MR. HOCHMAN: I'd like to reserve the
19 remainder of my time.

20 CHIEF JUSTICE ROBERTS: Sure.

21 Mr. Sauer.

22 ORAL ARGUMENT OF D. JOHN SAUER

23 ON BEHALF OF THE RESPONDENTS

24 MR. SAUER: Mr. Chief Justice, and may
25 it please the Court:

1 Missouri's single-drug protocol using
2 pentobarbital is the most humane and effective
3 method of execution that is currently known.
4 Missouri has used it 20 times without any
5 significant incident. Petitioner offers a
6 extremely --

7 JUSTICE SOTOMAYOR: How many people
8 have had the same condition as Mr. Bucklew?

9 MR. SAUER: Zero, Your Honor. I'm not
10 aware of anyone --

11 JUSTICE SOTOMAYOR: All right. So
12 let's go to his unique circumstance. You don't
13 deny that he has this condition?

14 MR. SAUER: Absolutely not.

15 JUSTICE SOTOMAYOR: You don't deny
16 that he has a small tumor but a tumor in his
17 throat?

18 MR. SAUER: The evidence is it's quite
19 sizable, in fact.

20 JUSTICE SOTOMAYOR: All right. Very
21 sizable. You -- so answer my earlier question.
22 It doesn't -- I don't believe, and I would hate
23 to think that a -- any state would intend to
24 gratuitously subject a prisoner to untoward
25 pain because they don't want to get a gurney

1 that moves the head up or that they don't want
2 to have personnel -- you require it in your own
3 regulations. You need -- I think the words are
4 that you have to have someone -- I read them
5 earlier -- with the training, education, and
6 experience to do everything that's necessary to
7 reach the veins, et cetera.

8 So I'm assuming you're looking for
9 those people and have them in place.

10 MR. SAUER: Correct, Your Honor.

11 JUSTICE SOTOMAYOR: So why haven't you
12 represented that you're going to take the basic
13 steps necessary to avoid the horrific
14 circumstances that your adversary says can and
15 will happen?

16 MR. SAUER: We vigorously dispute that
17 horrific circumstances will arise, but I
18 believe we have made those representations.

19 JUSTICE SOTOMAYOR: How do you -- how
20 -- why do you dispute that?

21 MR. SAUER: Because there's -- every
22 -- every stage -- every stage of the
23 predictions that are made by the Petitioner is
24 contradicted by evidence in the record.

25 JUSTICE SOTOMAYOR: All right.

1 MR. SAUER: I -- I do want to address
2 the question about what representations we have
3 made. At 531 of the Joint Appendix, the
4 director of Adult Institutions testified --
5 this is in the record. It's not a supplemental
6 affidavit that we submitted in opposition to a
7 stay motion. In the record is testimony that
8 the gurney is adjustable and that the
9 anesthesiologist has the discretion to adjust
10 the gurney to the position that would play --
11 that would be in the inmate's most appropriate
12 medical interest.

13 And that is consistent with what the
14 execution protocol says, which is that the
15 anesthesiologist has the discretion, for
16 example, to locate the appropriate veins and so
17 forth. I don't think there's any --

18 JUSTICE SOTOMAYOR: But that -- I'm
19 hard pressed. As I understand the protocol,
20 they get that one-page -- that one-page
21 discussion that only listed his condition. The
22 anesthesiologist -- no representation has been
23 made that the anesthesiologist knows of his
24 history of breathing difficulty or anything
25 else.

1 MR. SAUER: I disagree with that. The
2 evidence in the record from the warden of the
3 institution is that I know he receives his
4 complete medical records, and I will supplement
5 that right now by representing to the Court
6 that the anesthesiologist has access to all the
7 medical records.

8 The one-page summary, the director of
9 Adult Institutions -- it's at the higher level
10 in the Department of Corrections -- said that's
11 the only thing that I give them. But the
12 warden testified that he has -- he has access
13 to the entire medical records.

14 And the one-page summary does say he
15 has cavernous hemangioma in the lower maxilla,
16 in the jaw, so it actually flags the issue, so
17 to speak, for the anesthesiologist.

18 JUSTICE KAVANAUGH: Do we know --

19 JUSTICE BREYER: That seems to be --
20 what do you recommend that we do? I mean, the
21 difficulty with the discussion to me that
22 you're having right now is a legal difficulty,
23 that -- that you have the district judge and
24 the court of appeals both assuming he's made
25 his case on this point for summary judgment

1 purposes.

2 And -- and you may be right, he
3 hasn't, but it's unusual for us to go into a
4 record like this, I think, and then reverse
5 both courts on that.

6 So then we're stuck with the other
7 part of it, which we don't know all that about
8 -- much about. And -- and the nitrogen, they
9 have a good reason for thinking that the
10 nitrogen won't be painful, that it works in a
11 different way, and yet it isn't quite there in
12 the record and -- and -- and you can argue it
13 and that's why there was a dissent.

14 So that strikes me as -- at that part
15 -- at that point, you should go deal with this
16 as -- as -- as a person rather than a lawyer.
17 Go back and hold a full hearing on it. Go back
18 and find out if this man really is special, if
19 there really is a special problem, what we know
20 about the alternatives, all the questions that
21 you've pointed out and that they've pointed
22 out, which we don't have answers to.

23 Now I -- I -- why not?

24 MR. SAUER: I would say two things in
25 response to that, Justice Breyer.

1 First, the State of Missouri has a
2 compelling interest in seeing this just and
3 lawful sentence -- sentence is carried out as
4 quickly as possible. A remand for further
5 fact-finding, which is the principal request of
6 the Petitioner here, would interject yet more
7 delay before the execution of a sentence that's
8 been in place for 22 years now.

9 Secondly, the evidence in the record
10 decisively -- decisively supports an affirmance
11 on either of the two alternative grounds,
12 either of the Glossip elements, and I'll --
13 I'll -- I'll address, if I may, the one that
14 you raised, which is the second Glossip
15 element, about a feasible readily implemented
16 alternative solution.

17 Nitrogen hypoxia has never been tried
18 by any state. At this time, no protocol exists
19 for execution by nitrogen hypoxia. No state
20 has ever tried it. In the controlling opinion
21 in Baze, this Court said six times, including
22 twice in the opening three paragraphs of that
23 opinion, that an alternative method of
24 execution that is untried and untested, that no
25 state has ever used, that no study supports

1 showing its efficacy, is not a -- an
2 alternative that's reasonable.

3 JUSTICE BREYER: It could. I mean, I
4 -- my reaction to that is a question mark. I
5 mean, that it hasn't been tried, it's -- it's
6 certainly a strike against it, but is it a
7 fatal strike against it?

8 And the other thing that's going on in
9 the back of my mind is -- is, of course, what
10 people do think very often is, look, once we
11 send it back on this, then they'll think of
12 something else. And really what's going on is
13 endless delay because they think that the death
14 penalty is -- is not appropriate. Okay?

15 So can that be guarded against here?
16 They -- they've sworn up and down, no, we're
17 not going to do that. I mean, we're -- we're
18 -- this is really an unusual case. And, you
19 know, you've read all that stuff.

20 So do you have anything you want to
21 say about that?

22 MR. SAUER: Absolutely, Your Honor.
23 What I would say is that it is -- the holding
24 of Baze could not be clearer -- that if it's
25 completely untested and untried, it is not --

1 JUSTICE SOTOMAYOR: I'm sorry. I -- I
2 -- Baze had to do with a generalized attack to
3 a system of execution, and it basically said,
4 if you don't like this system, you've got to
5 get another because -- you have to propose
6 another because, otherwise, what you're trying
7 to do is to abolish the death penalty. Your
8 intent is to do away with the death penalty,
9 and we're not going to let you do that.

10 I don't actually know where in the
11 Eighth Amendment and its history the Court made
12 up this alternative remedy idea because the
13 Constitution certainly doesn't prohibit cruel
14 and unusual punishment, unless we can -- unless
15 we can't kill you at all.

16 But putting it aside, this is -- an
17 as-applied challenge is not going to abolish
18 the death penalty with respect to everybody.
19 It's going to tell the state: If you have an
20 individual with a unique circumstance in which
21 a method of execution is going to cause that
22 person excruciating pain, cruel and unusual
23 pain, you better find a different way.

24 I don't understand why we would extend
25 Baze to an as-applied challenge to start with.

1 Number two, if a statute, your
2 statute, the Court hasn't made it up, lists
3 available alternatives, it's your job to find
4 them and your job to put them into place. It's
5 not the inmate's job to do that, putting aside
6 that he neither has the resources to do it or
7 the expertise to do it.

8 But I'm wondering why we're assuming
9 that Baze should be extended to an as-applied
10 challenge at all.

11 MR. SAUER: I -- I don't --

12 JUSTICE SOTOMAYOR: Secondly, address
13 the question of why feasibility -- there are
14 some courts who have now held the only feasible
15 alternative is an alternative mentioned in a
16 state statute, so now we're in a Hobbesian
17 circle. The State gives us an option. I can't
18 point to it. The state doesn't give me an
19 option. Now there's no alternative.

20 We're really in a circle that you
21 can't get out of. Why don't we just simply
22 say, once the first prong is met, and the
23 courts below didn't -- they assumed it, they
24 said there were material issues of fact, you
25 should have gone on trial for that, I don't

1 think the trial would have taken very long, and
2 once that happened, you figure out how to kill
3 him.

4 MR. SAUER: There was a lot there.
5 I'd like to address first, if I may, the
6 question of whether -- why the second element
7 in Baze should apply in an as-applied
8 challenge, and I'd offer four reasons for the
9 Court's consideration.

10 The first reason is that it is
11 dictated by the holding and the reasoning of
12 the Baze case. Keep in mind that Baze was
13 decided two years after Hill against McDonough.
14 And in Hill against McDonough, the argument was
15 a challenge to a method of execution is really
16 a challenge -- it's a -- a -- an attempt to
17 seek a de facto exemption from the death
18 penalty and, therefore, it ought to be treated
19 as a second or successive habeas petition.

20 And this Court in -- in Hill said no,
21 no, no, this petitioner is actually leaving
22 open the option that he could be executed by a
23 different method; therefore, it's not a de
24 facto attack on the validity of the -- the
25 sentence.

1 But then, when Baze came around two
2 years later, this Court held that we're
3 adopting a second element in part because we do
4 not want petitioners to be able to seek a de
5 facto exemption from the death penalty or
6 engage in --

7 JUSTICE SOTOMAYOR: We exempt certain
8 people from the death penalty: the mentally
9 ill, the incompetent, people who are young. We
10 haven't seen that as abolishing the death
11 penalty. We see it as -- as an as-applied
12 exemption to a particular person or individual
13 for whom this method is cruel and unusual.

14 MR. SAUER: In all or virtually all of
15 those contexts, the person who is exempted from
16 the death penalty possesses a characteristic
17 that undermines the penological objectives of
18 the death penalty. That is the holding of
19 Roper and Atkins, Ford against Wainwright, and
20 every one of those cases.

21 JUSTICE SOTOMAYOR: How about the
22 constitutional --

23 MR. SAUER: This Court held that there
24 would be no deterrence or retributive purpose
25 to that.

1 JUSTICE SOTOMAYOR: How about the
2 constitutional principle against unusual --
3 cruel and unusual punishment?

4 MR. SAUER: In --

5 JUSTICE SOTOMAYOR: I -- I think every
6 individual has that Eighth Amendment right.

7 MR. SAUER: That is correct. And the
8 scope of that Eighth Amendment right is what is
9 set forth in Baze and in Glossip.

10 JUSTICE KAVANAUGH: Are you saying,
11 even if the method creates gruesome and brutal
12 pain, you can still do it because there's no
13 alternative?

14 MR. SAUER: I believe that any
15 petitioner who is claiming that it would create
16 gruesome and brutal pain must, under Baze and
17 Glossip, offer an alternative method that
18 significantly reduces the pain.

19 JUSTICE KAVANAUGH: So you're saying
20 that even if the method imposes gruesome,
21 brutal pain --

22 MR. SAUER: That is -- I --

23 JUSTICE KAVANAUGH: -- you can still
24 go forward?

25 MR. SAUER: Well, I would say again

1 that that petitioner has to if they want to --

2 JUSTICE KAVANAUGH: Is that a yes?

3 MR. SAUER: Yes, it is, Your Honor.

4 And that is the holding of Glossip. The

5 holding of Glossip was -- I mean, the -- the --

6 these kinds of predictions were made in

7 Glossip. The closest facts of the case -- the

8 closest facts to that hypothetical were the

9 facts of Glossip. In Glossip, the argument was

10 that everyone who was subjected --

11 JUSTICE KAVANAUGH: Is there any limit

12 on that? Is there any limit to the degree of

13 --

14 MR. SAUER: There is a limit, Your

15 Honor. I think there -- the limit would occur

16 if the method of execution were viewed as

17 superadding terror, pain, or disgrace within

18 the meaning of the Court's earlier method of

19 execution cases.

20 So if the method of execution was so

21 gruesome and brutal or -- or -- or -- or was

22 even relevantly similar to the historical

23 gruesome methods of execution that are

24 categorically prohibited by the Eighth

25 Amendment, there would certainly be a claim in

1 that context where -- or, in the words of Baze
2 and Glossip, there is an attempt to
3 deliberately inflict pain for the sake of pain,
4 that would be categorically exempted. In that
5 context, the alternative method is not
6 required.

7 But if a petitioner claims that, well,
8 I'm predicting that I will suffer under these
9 circumstances, that petitioner must, under the
10 logic of Baze and Glossip, plead and prove an
11 alternative method. And one of the compelling
12 reasons that this Court offered for that was
13 that this Court recognized that it is -- to
14 eliminate the risk of pain completely is
15 impossible. And that's why the Baze and
16 Glossip context is very different than this
17 context.

18 JUSTICE KAVANAUGH: Doesn't the first
19 prong deal with that? Namely, that you have to
20 have a substantial showing of severe pain?
21 Doesn't that get at the concern you just
22 identified, which is there's always going to be
23 some degree, but it has to be a substantial
24 risk of severe pain?

25 MR. SAUER: I don't think it gets all

1 the way to it. And I believe that is why Baze
2 and Glossip adopted this as, in the words of
3 Baze, a -- or in the words of Glossip, a
4 substantive element of this particular claim.
5 So --

6 JUSTICE BREYER: I thought -- I'm
7 trying to get back to my question, which is
8 asking you as a prosecutor, but, look, I guess
9 you would agree that some -- X has a -- a rare
10 medical condition that makes the method of
11 execution to him feel exactly like being burned
12 at the stake. Okay?

13 Would -- the Constitution would rule
14 that out, wouldn't it?

15 MR. SAUER: The Constitution would
16 rule out burning at the stake, absolutely, Your
17 Honor.

18 JUSTICE BREYER: And -- but, yeah, he
19 doesn't -- he has a mental condition of some
20 kind. It makes it exactly the same.

21 MR. SAUER: That is --

22 JUSTICE BREYER: He feels exactly the
23 same.

24 MR. SAUER: I -- I would have to know
25 more about the hypothetical.

1 JUSTICE BREYER: Well, that's it. I'm
2 making it up as I go along.

3 (Laughter.)

4 JUSTICE BREYER: Okay?

5 MR. SAUER: I -- because I --

6 JUSTICE BREYER: But what I want is --
7 it's exactly the same to him as if you burned
8 him at the stake. And I guess if you're going
9 to rule out the one, you'd rule out the other.
10 That's my thought, because I'm going to say
11 next he, this particular individual, will,
12 because of his rare medical condition, feel
13 exactly the same as if he'd been drowned to
14 death over -- slowly over a period of time.
15 Okay?

16 So that's why I think Justice
17 Kavanaugh brought that up. But my -- my -- my
18 -- my -- and I -- and that seems to me to be
19 the factual issue that's underlying your first
20 point.

21 But now we're back in the weeds with
22 this individual. So I'm interested in your
23 experience and as far as you read about it and
24 know about it, what do we do about, in your
25 opinion, 42 years in prison, 20 years in

1 prison, 30 years in prison, and people
2 thinking: Well, the reason is it's the courts
3 that don't like the death penalty and,
4 therefore, there's one thing after another and
5 it goes on and on and on, and when we send it
6 back here, we'll see that they'll think of a
7 new one after this one and -- and so forth.

8 So I -- I -- I think it's a serious
9 question. And -- and I would like to know what
10 you think.

11 MR. SAUER: If I may, Your Honor, I
12 understand the question to be if -- if there is
13 an exceptional delay before the implementation
14 of the death penalty, does that raise a
15 question as to whether or not the passage of --

16 JUSTICE BREYER: No, I'm not doing it
17 that technically. I'm -- I'm doing it because
18 this case really exhibits, as I said -- it's --
19 as a special case, and I think of the burning
20 at the stakes example. And then I know that
21 other people think that's just something
22 they're going to bring up and lose or win and
23 then they go on to the next one after that and
24 the next one after that. And -- and I've --
25 I've written and said: Well, it's because it's

1 very hard to do this because you want to give
2 them basic fairness. You don't want to burn
3 someone at the stake. And that takes time.

4 MR. SAUER: It --

5 JUSTICE BREYER: So -- so what is your
6 take on that?

7 MR. SAUER: If this --

8 JUSTICE BREYER: My general argument.

9 MR. SAUER: If this Petitioner were to
10 predict that he would experience a sensation
11 like burning at the stake, he would be the
12 third petitioner or the third set of
13 petitioners in the last 10 years to make that
14 prediction. That was the precise prediction
15 that was made in Baze and Glossip. Those
16 petitioners predicted that midazolam, for
17 example, in Glossip would not suppress the
18 feeling that would be akin to being burned at
19 the stake.

20 And this Court held twice that these
21 people must show that this is sure or very
22 likely to happen, and they must show that
23 there's an alternative method of execution that
24 is readily feasible.

25 And, of course, these hypotheticals

1 about being burned at the stake aren't really
2 implemented in the real world. What's
3 implemented in the real world is a situation
4 where capital petitioners have every incentive
5 to engage in interminable litigation,
6 interminable litigation, multiple challenges.

7 So, absent that second element, absent
8 that second Baze element, what would almost
9 certainly happen in every case is, once the
10 petitioner had made a threshold showing on the
11 first element and the state came up with an
12 alternative, there would be a subsequent
13 lawsuit or an amendment of the petition,
14 resulting in a second attack. And that's
15 exactly what we have here.

16 We have a petitioner --

17 JUSTICE SOTOMAYOR: That may well be,
18 but the reality is that there are alternatives.
19 Many of them have not been implemented because
20 people want -- don't want to see them: the
21 firing squad, electrocution. There's a whole
22 lot of things that people don't want to accept
23 the reality of, but they're there.

24 And if you're going to make the person
25 find a choice of how to kill himself, I simply

1 haven't answered -- my question is, if the
2 statute permits it, why shouldn't they be able
3 to choose it, if they have proven -- and I
4 understand that's a big debate here -- if they
5 have proven that the method you've initially
6 chosen will create cruel and unusual pain?

7 MR. SAUER: I believe statutory
8 authorization alone is insufficient to
9 demonstrate that something is readily
10 implemented or known and available within the
11 meaning of Baze.

12 Now, if there were a petitioner --
13 some capital petitioners, for example, in Ohio
14 have been pleading things like firing squad and
15 hanging as alternative methods of execution.
16 Where there is a historical pedigree to it,
17 this Court has previously affirmed that that is
18 a viable method of execution that is
19 constitutional.

20 There is a dispute in the courts of
21 appeals about whether or not statutory
22 authorization is a necessary condition to show
23 that things are readily available, but right
24 now, in the Eighth Circuit, statutory
25 authorization is not required. In the McGehee

1 case last year, the -- the Eighth Circuit said
2 we do not say that statutory authorization is
3 required.

4 So there are options available. If
5 someone really thought that I will suffer,
6 experience like burning at the stake,
7 presumably that person would plead, you know,
8 lethal gas, would plead --

9 JUSTICE KAGAN: So are you saying,
10 Mr. Sauer, that we would be in a different
11 situation in this case right now if the
12 Petitioner had instead requested an
13 electrocution or a firing squad?

14 MR. SAUER: It would certainly have
15 been a stronger case. Now what actually
16 happened was, in the second page of his
17 complaint, he dropped a footnote saying, I'm
18 not asking for firing squad. He mentioned
19 firing squad, but he did not ask for it saying
20 that because it is not statutorily authorized.
21 So he, for strategic or inadvertent reasons,
22 has never presented the issue in this case, and
23 Missouri's never taken a position on it, as to
24 whether or not statutory authorization is a
25 alternative -- is required.

1 JUSTICE KAVANAUGH: General --

2 MR. SAUER: And Missouri takes no
3 position on that now.

4 JUSTICE KAGAN: May I ask a -- a -- a
5 different question? Which, you know, one of
6 the things that strike me -- strikes me, when I
7 went back and -- and looked at Baze, there's a
8 lot about a kind of deference to a state
9 legislature and state officials about
10 determining the appropriate method of
11 execution, about giving a kind of considered
12 judgment to the sort of pain that would be
13 expected from an execution, as well as their
14 interests in carrying out legitimate sentences
15 and making decisions on that basis.

16 But what strikes me is that when we
17 think about that, those officials really are
18 thinking in gross, if you know what I mean.
19 They're thinking about a -- a method of
20 execution as applied to the general class of
21 people and deciding that it's appropriate.

22 And what, of course, makes this case
23 very different is that it's not in gross. It's
24 a particular person that says I have a highly
25 unusual condition that will make the execution

1 highly unusual, that will have me suffer highly
2 unusual pain.

3 And in that context, I think all of
4 that stuff that we talked about in Baze about
5 why we should refer to state-considered
6 judgments really falls away because there's
7 been no considered judgment, surely by the
8 legislature and, in general, by officials,
9 about -- about one particular person.

10 And it strikes me that because that's
11 true, the way we look at a case like this has
12 to change. So I'm -- I'm wondering, you know,
13 what your response to that is.

14 MR. SAUER: I think what I would say
15 to that is the deference that Baze and Glossip,
16 as you described, gave to sort of the
17 legislature, you know, as to the generalized
18 method of execution, it would be appropriate.
19 It would be deeply consistent with this Court's
20 precedents to give that same kind of deference
21 to the state officials who are implementing the
22 -- the execution in the concrete, in this
23 individual case.

24 Missouri has a board-certified
25 anesthesiologist who will be in charge of

1 putting IVs into this particular person.

2 JUSTICE KAGAN: See, I'm not sure that
3 that's true, because those officials are
4 working within a system. They're working
5 within a set of legislative rules that have
6 been made in this sort of general sense. And
7 for them to go outside that system would be an
8 -- you know, and say it's not appropriate for
9 this particular person would be an
10 extraordinary person for -- an extraordinary
11 thing for an individual person to do.

12 So I don't think we could
13 realistically give the same kind of deference
14 to that sort of decision.

15 MR. SAUER: I think the deference that
16 I had in mind is deference to the
17 determinations that are made on the site as the
18 execution is going forward, where there's
19 uncontradicted evidence in the record in this
20 case that the -- the medical team is making all
21 the medically relevant judgments.

22 JUSTICE KAVANAUGH: On -- on -- on
23 that point, do we know that he will not be
24 lying flat, or are you saying that doesn't
25 matter?

1 MR. SAUER: Both of those. We know
2 that, first of all, it was established by the
3 pleadings, as the majority held in the Eighth
4 Circuit, that he pled that the state has
5 offered to adjust the gurney to the most
6 appropriate position, and we admitted that in
7 our answer.

8 In addition to that, uncontradicted
9 testimony at page 531 of the Joint Appendix
10 says the gurney is adjustable and it can be
11 adjusted to the position that the
12 anesthesiologist deems the most appropriate.

13 JUSTICE KAVANAUGH: And related to
14 that, the -- your opposing counsel said, even
15 if everything goes according to plan, there
16 will still be significant suffering.

17 Can you respond to that?

18 MR. SAUER: I absolutely, absolutely
19 disagree with that. The testimony about this,
20 of Dr. Antognini, is that the only suffering
21 that would occur in this execution that could
22 be medically predicted was the suffering
23 associated with the actual entry of the IV, in
24 other words, the pinpricks or the cut-down
25 procedure.

1 Now I -- I say cut-down procedure, and
2 truth in fact, the record decisively shows that
3 a cut-down procedure is not done in the femoral
4 vein. The only evidence of this is the
5 testimony of Dr. Antognini, who says a cut-down
6 is done on the saphenous, which is much lower
7 down in the leg, in the angle.

8 A cut-down is not done on a femoral
9 vein. The evidence from the warden, who's not
10 a -- a medical person, about the one time a
11 cut-down was done, describes it as being done
12 in the leg.

13 So the -- there's no evidence and, in
14 fact, Dr. Antognini said there is no need to do
15 a cut-down on the femoral because it is "easily
16 accessed." And, in fact, it is not standard of
17 care to use an ultrasound in accessing the
18 femoral.

19 So -- and the holding of the district
20 court on this very point was that, not only has
21 he put in no evidence that there will be any
22 difficulty at all accessing the femoral, but in
23 addition to that, that he had presented no
24 argument in opposing summary judgment about any
25 difficulty that would happen on any vein other

1 than the peripheral veins in his arms.

2 So there's really nothing in the
3 summary judgment record that supports the
4 predictions that are being made on the --

5 JUSTICE SOTOMAYOR: I'm sorry, there
6 was a prior execution where a cut-down was done
7 by, he says, the same person who's going to do
8 this one, and there was problems then.

9 Why isn't it a predictive -- a
10 reliable predictive tool to show that the same
11 person who's going to do it now botched it
12 earlier?

13 MR. SAUER: There is no evidence of
14 problems. And the only testimony in the record
15 is from the warden, who is not a medical
16 person, who said that a local anesthetic was
17 given and a cut-down was done in the leg.

18 The testimony of the doctor is that a
19 cut-down is typically not done in the femoral,
20 which is high in the leg, but is typically done
21 in the saphenous, which is low in the leg.

22 So there's no evidence in the record
23 that any cut-down has ever been done on the
24 femoral.

25 JUSTICE GORSUCH: Mr. Sauer, I believe

1 some time ago you said there were four reasons
2 why you thought at step 2 a -- a -- a defendant
3 should be required to show an alternative. I'm
4 -- I'm not sure we got past the first of those
5 four. I'm not even sure we got the first one
6 out there, actually. And I'm curious what --
7 what -- what all four are.

8 MR. SAUER: The first reason is that
9 the logic and the holding of Baze and Glossip
10 requires -- it holds that this is a substantive
11 element of any method of execution challenge.

12 The second one is that, as Baze and
13 Glossip both said, the death penalty is
14 constitutional and there must be a means of
15 carrying it out. And that reasoning applies
16 just as much in the microcosm as to the
17 individual petitioner who's seeking a de facto
18 exemption from the death penalty as it does in
19 the macro -- macrocosm.

20 In fact, the concerns of undue
21 suffering that were presented in Baze and
22 Glossip were much greater and much more
23 sweeping than had been presented in this case
24 because they would have applied to every single
25 petitioner who is subjected to the two, three

1 drug protocols that were disputed in that case.

2 Here, we're talking about the
3 suffering of a single petitioner. The exactly
4 the same balance that the Court struck by
5 adopting the second element applies in this
6 particular case.

7 In addition to that, both Baze and
8 Glossip relied on Farmer and Wilson, going back
9 to Estelle, which itself relied on Weisweber,
10 for the proposition that there must be a
11 showing of subjective blameworthiness in this
12 context for there to be an Eighth Amendment
13 violation. And Wilson said that one critical
14 factor in whether or not there is subjectively
15 blameworthiness is a constraint facing the
16 official.

17 If there is no alternative method of
18 execution available, and the official is under
19 a directive from a jury verdict that there is a
20 just and lawful sentence that must be carried
21 out, then the -- there -- it is very difficult,
22 if not impossible, to draw the inference that
23 there is subjective blameworthiness in that
24 particular case.

25 CHIEF JUSTICE ROBERTS: You -- you'd

1 better get to three quickly.

2 MR. SAUER: That was three, Your
3 Honor.

4 CHIEF JUSTICE ROBERTS: That was
5 three?

6 JUSTICE GORSUCH: I'm waiting for four
7 still.

8 MR. SAUER: And number four, of
9 course, is the risk, as we have discussed, that
10 there is a risk of interminable litigation.

11 And, Justice Gorsuch, I would direct
12 your attention to the way that the alternative
13 method was pled and proven in this particular
14 case. We have a petitioner who said lethal gas
15 with no further specification in his complaint,
16 and in the course of discovery said nothing
17 more specific than nitrogen and possibly a hood
18 or mask.

19 If Missouri came up with anything
20 specific, anything specific, any way to do this
21 --

22 JUSTICE KAVANAUGH: Then wouldn't the
23 first prong of Baze deal with your second,
24 third, and fourth arguments that you just
25 listed?

1 MR. SAUER: I don't think it deals
2 with them very effectively.

3 JUSTICE KAVANAUGH: If properly
4 applied, in other words, substantial risk of
5 severe harm.

6 MR. SAUER: I don't think it does so
7 effectively. And one of the reasons is that
8 this Court in Baze and Glossip was keenly aware
9 of this fourth concern, which is the concern of
10 adopting a rule that would leave open the
11 possibility of challenge after challenge after
12 challenge.

13 JUSTICE BREYER: Challenge after
14 challenge, that's -- I see that. But here is a
15 person who has some evidence anyway that, when
16 you execute him, it's going to be like slowly
17 drowning him to death and there's a good chance
18 of that.

19 So, in your opinion, should the
20 person, given the Eighth Amendment, not even
21 have the right to make that argument?

22 MR. SAUER: This Court --

23 JUSTICE BREYER: And if he has the
24 right to make that argument, then how do we
25 avoid the situation that we're in of having to

1 decide it? And if he has the right to make the
2 argument, that I want this alternative, how do
3 we avoid the situation of 15 years of testing
4 every possible method of execution?

5 MR. SAUER: I would say two things in
6 response to that. First, we vigorously dispute
7 the suggestion that he's presented any
8 competent evidence that he actually will
9 experience something like a prolonged drowning.
10 If you get into the details of the record,
11 there is no evidence, competent evidence, that
12 supports that.

13 Secondly, if you really thought that
14 he was going to suffer this excruciatingly, he
15 has an option available. He can plead all
16 kinds of alternative methods of execution that
17 are not completely untested and completely
18 unknown.

19 He can plead hanging. He can plead
20 firing squad. He was aware he could plead
21 firing squad, but he strategically decided not
22 to do that. Of course, if he had plead --
23 pleaded firing squad, it's possible that
24 Missouri could have executed him by firing
25 squad, but his litigation conduct indicates

1 that that is not the goal here.

2 The goal is to have challenge after
3 challenge after challenge. This is his third
4 method of execution challenge. He had two
5 prior challenges going back to 2012: the Ringo
6 litigation, bringing a preemption challenge, to
7 Missouri's protocol; the Zink litigation,
8 bringing in a facial challenge to Missouri's
9 protocol.

10 And now, 14 days before his first
11 scheduled execution, for the very first time,
12 he comes forward with an as-applied challenge
13 that is based on a medical condition that he
14 has had since birth and that has been for
15 decades presented the same --

16 JUSTICE SOTOMAYOR: Can we define --
17 can you define foreseeability -- or
18 feasibility, I'm sorry? Does the statute have
19 to authorize it for it to be feasible?

20 MR. SAUER: The Missouri --

21 JUSTICE SOTOMAYOR: Does any statute
22 in a particular state have to authorize the
23 method you choose?

24 MR. SAUER: Missouri has never taken a
25 position on that question.

1 JUSTICE SOTOMAYOR: Take it now.

2 MR. SAUER: I don't -- I -- I do -- I
3 do not believe I'm compelled to do so by the
4 way the record is presented. However, there
5 are compelling arguments, there are strong
6 arguments that that shouldn't be a requirement.

7 Your Honor, I see my time has expired.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Three minutes, Mr. Hochman.

11 REBUTTAL ARGUMENT OF ROBERT HOCHMAN

12 ON BEHALF OF THE PETITIONER

13 MR. HOCHMAN: Thank you, Mr. Chief
14 Justice. I'd like to make two points, first
15 about the alternative method requirement, and
16 second about the disposition in this case.

17 Starting with the alternative method
18 requirement, Justice Kagan, I think you have it
19 exactly right, that if you imagine that the
20 State of Missouri thought about how to build a
21 method of execution that was going to create
22 the subjective experience that the record
23 indicates here for everyone, that the record
24 indicates here Mr. Bucklew would experience,
25 nobody would do it.

1 They wouldn't do that. I -- I don't
2 think so ill of Missouri or -- or -- or counsel
3 on the other side to imagine they would do
4 that. Yet, the alternative method requirement
5 as it plays out imagines that because they were
6 thinking about something else, and because
7 there's a way to carry out executions for lots
8 of people, which this case doesn't call into
9 question at all, that you can nonetheless do it
10 in that way to this person, unless this person
11 is able to come up with what they consider to
12 be a specifically highly detailed way to manage
13 their own and -- and -- and propose their own
14 execution.

15 Respectfully, I don't think that makes
16 any sense. And I'll tell you why it doesn't
17 make any sense.

18 Nobody doubts -- nobody doubts that
19 when he's in his cell and he's got trouble
20 breathing, they give him a biohazard bag. They
21 give him gauze. They put him on a soft diet
22 because eating hard food can cause his throat
23 to bleed. Of course, they take into
24 consideration his physical condition, his --
25 his concerns. And if they didn't, the Eighth

1 Amendment would require them to do it in his
2 cell.

3 Their view of the alternative method
4 requirement is, as soon as he walks into the
5 execution chamber, the Eighth Amendment
6 changes, and now they don't, unless -- unless
7 he has some idea, unless he's the one who comes
8 forward. The obligation, not that -- that --
9 the language of the Eighth Amendment is clear:
10 Cruel and unusual punishments shall not be
11 inflicted. That's all we're saying here.

12 And, Justice Kavanaugh, you're right,
13 the first -- the threshold issue in -- in Baze,
14 that takes care of this. That is a demanding
15 standard. There has to be a substantial risk,
16 severe suffering. And --

17 JUSTICE ALITO: Doesn't this -- isn't
18 the role of the second prong at least in part,
19 and maybe in full, what has been called by the
20 lower courts as the second prong, something
21 that informs the first prong?

22 So you determine whether something is
23 severe and substantial in relation to other
24 known methods of execution on the assumption
25 that any execution can cause pain.

1 Certainly, it's going to cause a lot
2 of emotional pain that's probably going to
3 exceed the physical pain.

4 MR. HOCHMAN: I think that's true when
5 you're talking about a facial challenge
6 because, remember, in a facial challenge,
7 you're trying to figure out, as this Court
8 said, all methods of execution involve some
9 degree of pain and suffering. Right?

10 So you need something to compare it
11 to. Was this too much? Well, compare it to --
12 tell me what you want to compare it to. Here,
13 we have a ready comparator. It's a healthy
14 inmate. It's what the people of Missouri had
15 in mind when they designed this protocol.

16 Mr. Bucklew's experience is going to
17 be nothing at all like that, and miserably so.

18 JUSTICE GORSUCH: But why -- why --
19 why wouldn't we want to do the comparison, if
20 we're going to do it in gross on a facial
21 challenge, why wouldn't we do the comparison,
22 if you concede it's valid there, why wouldn't
23 we want to do the same comparison specifically
24 when it comes to your client? Perhaps we have
25 to look outside the -- what Missouri has

1 authorized, but -- a firing squad or whatever,
2 but why wouldn't we do that exact same analysis
3 in specific?

4 MR. HOCHMAN: May -- may I answer?

5 CHIEF JUSTICE ROBERTS: Yes.

6 MR. HOCHMAN: Because -- because, Your
7 Honor, the -- the issue in Baze and Glossip was
8 a concern, you have prior rulings of this Court
9 that make clear that the Constitution, in
10 general, does not define death, the death
11 penalty, as cruel. And so there has to be a
12 way to carry it out.

13 This claim about this individual
14 person doesn't call that into question at all.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. The case is submitted.

17 (Whereupon, at 11:10 a.m., the case
18 was submitted.)

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Official

1	A	6 27:9 35:6	antognini [11] 9:5 12:14 15:7,11,24,25 23:12 31:19 57:20 58:5,14
10 [1] 50:13	ability [1] 16:7	affirmance [1] 38:10	antognini's [3] 8:16 29:12 31:17
100 [3] 9:6,8 23:23	able [6] 15:9,9 19:17 43:4 52:2 67:11	affirmative [1] 20:23	anyway [2] 27:2 63:15
115 [2] 8:9,22	abolish [2] 40:7,17	affirmed [1] 52:17	appeals [4] 14:9 26:19 36: 24 52:21
14 [1] 65:10	abolishing [1] 43:10	agent [2] 7:6,6	appears [1] 7:2
15 [2] 16:13 64:3	absent [2] 51:7,7	ago [1] 60:1	appendix [10] 8:13 12:22 14:19 18:22 28:8,10,10 31: 10 35:3 57:9
161 [1] 7:25	absolutely [8] 12:1 15:24 16:22 33:14 39:22 47:16 57:18,18	agree [1] 47:9	applied [3] 54:20 60:24 63: 4
2	accepted [2] 14:9,10	agreed [1] 14:1	applies [3] 30:24 60:15 61: 5
2 [1] 60:2	access [15] 12:5,8 14:5,11, 12,18 15:3,9 16:2,11 17:7 18:25 19:10 36:6,12	ahead [1] 6:25	apply [1] 42:7
20 [5] 7:12 27:17 30:3 33:4 48:25	accessed [3] 14:16 15:18 58:16	airway [5] 12:18 18:12,17 19:4 30:10	appropriate [9] 35:11,16 39:14 54:10,21 55:18 56:8 57:6,12
2012 [1] 65:5	accessing [2] 58:17,22	akin [1] 50:18	argue [1] 37:12
22 [1] 38:8	according [4] 17:22 26:7, 10 57:15	alabama [1] 23:7	arguing [1] 29:8
265 [2] 8:13,13	accurate [1] 27:24	alito [18] 10:22 11:1,5,9 15: 5,14 29:7,11,15 30:16,22 31:3,6,14,18,24 32:9 68:17	argument [9] 32:22 42:14 45:9 50:8 58:24 63:21,24 64:2 66:11
28 [1] 8:8	actual [1] 57:23	allegation [1] 24:4	arguments [3] 62:24 66:5, 6
3	actually [9] 7:22 13:1 23: 24 36:16 40:10 42:21 53: 15 60:6 64:8	allegations [1] 28:11	arise [2] 19:15 34:17
30 [3] 7:12 27:17 49:1	add [1] 21:4	alleviate [1] 29:6	arises [1] 13:14
316 [1] 8:17	addition [4] 23:9 57:8 58: 23 61:7	almost [2] 7:25 51:8	arms [1] 59:1
4	address [6] 22:13 28:6 35: 1 38:13 41:12 42:5	alone [2] 27:12 52:8	around [1] 43:1
40 [1] 9:20	adequate [2] 21:8 28:13	alter [1] 28:16	as-applied [7] 24:17 40: 17,25 41:9 42:7 43:11 65: 12
42 [1] 48:25	adequately [2] 21:6,10	alternative [33] 13:10 17: 5,12 22:13,16,24 24:14 28: 12 38:11,16,23 39:2 40:12 41:15,15,19 44:13,17 46:5, 11 50:23 51:12 52:15 53: 25 60:3 61:17 62:12 64:2, 16 66:15,17 67:4 68:3	aside [2] 40:16 41:5
5	adjust [3] 19:18 35:9 57:5	alternatives [3] 37:20 41: 3 51:18	aspects [1] 29:3
50 [1] 9:20	adjustable [2] 35:8 57:10	amended [1] 28:9	associated [1] 57:23
52 [1] 7:11	adjusted [1] 57:11	amendment [13] 24:4 25: 12,18 40:11 44:6,8 45:25 51:13 61:12 63:20 68:1,5,9	assume [2] 20:1,19
531 [2] 35:3 57:9	administer [3] 12:25 18: 24 25:15	among [1] 28:10	assumed [2] 26:19 41:23
57 [1] 23:1	admitted [1] 57:6	amount [3] 9:1,10 16:19	assuming [9] 7:1 22:15 24:21,22,23 26:2 34:8 36: 24 41:8
6	admittedly [1] 11:24	analysis [1] 26:4	assumption [3] 26:6 27: 23 68:24
611 [1] 14:18	adopted [3] 23:2,7 47:2	anesthesiologist [12] 15: 6,8,13,17 35:9,15,22,23 36: 6,17 55:25 57:12	assurances [1] 21:3
612 [1] 14:18	adopting [3] 43:3 61:5 63: 10	anesthetic [1] 59:16	atkins [1] 43:19
615 [1] 14:22	adult [2] 35:4 36:9	angle [1] 58:7	attack [3] 40:2 42:24 51:14
616 [1] 14:22	advance [3] 18:23 21:12 22:3	another [5] 17:4 25:16 40: 5,6 49:4	
7	adversary [1] 34:14	answer [2] 33:21 57:7	
736 [1] 31:9	affidavit [5] 16:17 19:1 20: 22	answered [1] 52:1	
747 [1] 31:9		answers [1] 37:22	
8			
85 [1] 28:9			
882 [1] 12:22			
9			
90 [1] 28:10			
978 [1] 18:22			
979 [1] 18:22			

Official

<p>attempt [2] 42:16 46:2 attention [1] 62:12 authorization [5] 52:8,22, 25 53:2,24 authorize [2] 65:19,22 authorized [1] 53:20 available [9] 13:9 15:7 22: 23 41:3 52:10,23 53:4 61: 18 64:15 average [1] 7:12 avoid [3] 34:13 63:25 64:3 aware [4] 18:4 33:10 63:8 64:20 away [2] 40:8 55:6</p>	<p>biohazard [1] 67:20 birth [1] 65:14 bit [2] 6:8 9:7 blameworthiness [3] 61: 11,15,23 blank [1] 16:4 bleed [1] 67:23 bleeding [1] 19:3 board [4] 15:8,12,16 16:2 board-certified [1] 55:24 botched [1] 59:11 both [5] 36:24 37:5 57:1 60: 13 61:7 boyles [4] 12:23 16:17 19: 1 20:8 breathe [1] 21:24 breathing [7] 17:1 18:4,10 20:16 30:19 35:24 67:20 breyer [17] 26:17 28:3,5 36: 19 37:25 39:3 47:6,18,22 48:1,4,6 49:16 50:5,8 63: 13,23 brief [1] 14:6 bring [2] 17:23 49:22 bringing [2] 65:6,8 brought [1] 48:17 brutal [4] 44:11,16,21 45: 21 bucklew [4] 11:18 25:2 33: 8 66:24 bucklew's [6] 9:8 13:11 15:20 18:12 21:19 69:16 build [1] 66:20 burn [1] 50:2 burned [4] 47:11 48:7 50: 18 51:1 burning [4] 47:16 49:19 50:11 53:6</p>	<p>carry [1] 67:7 carrying [2] 54:14 60:15 carving [2] 16:15,18 case [28] 7:14 14:3 17:25 20:24 22:15 23:13 36:25 39:18 42:12 45:7 49:18,19 51:9 53:1,11,15,22 54:22 55:11,23 56:20 60:23 61:1, 6,24 62:14 66:16 67:8 cases [4] 24:4 25:7 43:20 45:19 catastrophic [1] 21:25 categorically [2] 45:24 46:4 cause [5] 26:24 40:21 67: 22 68:25 69:1 causing [1] 16:18 cavernous [2] 18:7 36:15 cc [1] 9:7 cell [2] 67:19 68:2 certain [1] 43:7 certainly [7] 6:1 39:6 40: 13 45:25 51:9 53:14 69:1 certified [5] 15:6,8,12,17 16:2 cetera [1] 34:7 challenge [22] 40:17,25 41:10 42:8,15,16 60:11 63: 11,11,12,13,14 65:2,3,3,4,6, 8,12 69:5,6,21 challenges [2] 51:6 65:5 chamber [1] 68:5 chance [2] 17:13 63:17 chances [1] 21:24 change [2] 12:3 55:12 changed [7] 15:21 27:6,7, 7 28:20,21,23 changes [1] 68:6 characteristic [1] 43:16 charge [1] 55:25 check [1] 18:12 chief [20] 9:13,18,24 10:6, 10 13:17,21 22:1,12 24:2, 12 25:9 27:19 32:16,20,24 61:25 62:4 66:8,13 choice [1] 51:25 choose [2] 52:3 65:23 chose [1] 13:4</p>	<p>chosen [1] 52:6 circle [2] 41:17,20 circuit [3] 52:24 53:1 57:4 circumstance [3] 15:2 33:12 40:20 circumstances [8] 16:20 28:20,21,23 29:2 34:14,17 46:9 claim [8] 12:7 24:13,17,17, 18 25:18 45:25 47:4 claiming [1] 44:15 claims [1] 46:7 class [1] 54:20 clear [5] 15:25 21:17 25:7 29:14 68:9 clearer [1] 39:24 client [1] 69:24 closest [2] 45:7,8 collapse [2] 18:17 19:4 colloton [2] 12:17 13:8 colloton's [2] 12:10 32:13 come [4] 6:8 19:9 31:4 67: 11 comes [3] 65:12 68:7 69: 24 community's [1] 23:17 comparative [1] 26:5 comparator [1] 69:13 compare [3] 69:10,11,12 compared [1] 11:19 comparison [4] 29:1 69: 19,21,23 compelled [1] 66:3 compelling [3] 38:2 46:11 66:5 competent [2] 64:8,11 complaint [4] 28:9,11 53: 17 62:15 complete [1] 36:4 completely [4] 39:25 46: 14 64:17,17 complicated [2] 22:4 30: 17 compromised [1] 15:1 concede [1] 69:22 concern [5] 28:6 29:6 46: 21 63:9,9 concerned [1] 9:25</p>
B		C	
<p>back [12] 8:6 28:24 37:17, 17 39:9,11 47:7 48:21 49:6 54:7 61:8 65:5 background [3] 26:3,5,15 bag [1] 67:20 balance [1] 61:4 based [2] 21:2 65:13 basic [2] 34:12 50:2 basically [1] 40:3 basis [5] 7:8 26:3 29:7 32: 13 54:15 baze [36] 22:22,25 23:3 25: 11 26:1,6,16 38:21 39:24 40:2,25 41:9 42:7,12,12 43: 1 44:9,16 46:1,10,15 47:1,3 50:15 51:8 52:11 54:7 55:4, 15 60:9,12,21 61:7 62:23 63:8 68:13 begin [2] 13:5 18:24 beginning [1] 7:23 behalf [2] 32:23 66:12 beings [1] 9:3 believe [15] 7:8 10:13,18, 23,25 11:21 17:15,16 33:22 34:18 44:14 47:1 52:7 59: 25 66:3 below [1] 41:23 best [2] 11:16 17:21 better [5] 20:7 24:13,13 40: 23 62:1 between [2] 12:14 25:11 big [2] 30:14 52:4 bigger [1] 9:2</p>	<p>call [1] 67:8 called [1] 68:19 came [4] 20:19 43:1 51:11 62:19 cannot [1] 28:25 capable [1] 6:10 capital [2] 51:4 52:13 care [3] 22:3 58:17 68:14 carried [2] 38:3 61:20</p>		

Official

<p>concerns [2] 60:20 67:25 conclude [1] 14:4 concrete [1] 55:22 condition [14] 6:3 18:6 21:19 26:22 33:8,13 35:21 47:10,19 48:12 52:22 54:25 65:13 67:24 conditions [1] 27:6 conduct [2] 11:14 64:25 confirmed [1] 8:16 consciousness [1] 10:5 consider [1] 67:11 consideration [2] 42:9 67:24 considered [2] 54:11 55:7 consistent [2] 35:13 55:19 constitution [3] 40:13 47:13,15 constitutional [6] 25:14 28:17 43:22 44:2 52:19 60:14 constitutionally [2] 26:8,11 constraint [1] 61:15 contemplation [1] 14:23 context [6] 46:1,5,16,17 55:3 61:12 contexts [1] 43:15 contradicted [1] 34:24 contrary [2] 15:14,15 controlling [1] 38:20 conversation [1] 17:11 convulsing [1] 21:22 correct [3] 9:16 34:10 44:7 corrections [1] 36:10 counsel [3] 57:14 66:9 67:2 counting [1] 12:5 couple [1] 22:19 course [10] 16:8 18:14 23:20 39:9 50:25 54:22 62:9,16 64:22 67:23 court [28] 14:9,9 17:3 20:23 22:9,21 26:19,19 28:1,19 32:25 36:5,24 38:21 40:11 41:2 42:20 43:2,23 46:</p>	<p>12,13 50:20 52:17 58:20 61:4 63:8,22 69:7 courts [6] 37:5 41:14,23 49:2 52:20 68:20 court's [4] 25:7 42:9 45:18 55:19 create [3] 44:15 52:6 66:21 creates [1] 44:11 critical [3] 13:7 21:9 61:13 crossed [1] 12:1 cruel [6] 40:13,22 43:13 44:3 52:6 68:10 curious [1] 60:6 current [1] 32:6 currently [1] 33:3 cut-down [21] 14:20,21 15:4,10,19 16:12,12 17:5 19:2 21:16 57:24 58:1,3,5,8,11,15 59:6,17,19,23</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>danger [1] 24:9 days [1] 65:10 de [4] 42:17,23 43:4 60:17 deal [5] 18:17 19:5 37:15 46:19 62:23 dealing [1] 14:25 deals [1] 63:1 death [20] 23:6,11 25:14,14 39:13 40:7,8,18 42:17 43:5,8,10,16,18 48:14 49:3,14 60:13,18 63:17 debate [2] 12:14 52:4 decades [2] 16:6 65:15 decide [1] 64:1 decided [2] 42:13 64:21 deciding [1] 54:21 decision [2] 13:3 56:14 decisions [1] 54:15 decisively [3] 38:10,10 58:2 deems [1] 57:12 deeply [1] 55:19 defendant [1] 60:2 deference [6] 54:8 55:15,20 56:13,15,16 define [2] 65:16,17 degree [4] 29:20 45:12 46:</p>	<p>23 69:9 delay [3] 38:7 39:13 49:13 deliberately [1] 46:3 demanding [1] 68:14 demonstrate [1] 52:9 dental [2] 6:15,17 deny [5] 14:12,12 26:20 33:13,15 denying [1] 14:14 department [1] 36:10 deposition [1] 16:1 described [1] 55:16 describes [1] 58:11 designed [1] 69:15 detail [1] 23:16 detailed [1] 67:12 details [2] 23:20 64:10 determinations [1] 56:17 determine [1] 68:22 determining [1] 54:10 deterrence [1] 43:24 dictated [1] 42:11 die [1] 23:17 diet [1] 67:21 different [10] 7:4,5 20:14 37:11 40:23 42:23 46:16 53:10 54:5,23 difficult [2] 11:12 61:21 difficulties [1] 13:18 difficulty [7] 16:25 30:19 35:24 36:21,22 58:22,25 direct [1] 62:11 direction [1] 14:8 directive [1] 61:19 directly [1] 20:3 director [2] 35:4 36:8 directs [1] 24:20 disagree [2] 36:1 57:19 discovery [5] 16:9 17:10 20:21 28:14 62:16 discretion [2] 35:9,15 discussed [2] 6:4 62:9 discussion [2] 35:21 36:21 disgrace [1] 45:17 disposition [1] 66:16 dispute [4] 34:16,20 52:20 64:6</p>	<p>disputed [2] 10:16 61:1 dissent [3] 12:10 32:14 37:13 district [5] 14:9 26:19 28:19 36:23 58:19 doctor [3] 27:16,16 59:18 doctors [1] 27:21 dog [1] 7:5 doing [4] 16:5,6 49:16,17 done [11] 23:15 58:3,6,8,11,11 59:6,17,19,20,23 doubt [2] 16:21 23:22 doubts [2] 67:18,18 down [5] 20:10 21:22,23 39:16 58:7 draw [1] 61:22 dropped [1] 53:17 drowned [1] 48:13 drowning [2] 63:17 64:9 drs [1] 12:14 drug [5] 8:18 12:25 18:18,24 61:1 during [1] 29:21</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>earlier [4] 33:21 34:5 45:18 59:12 early [1] 13:14 easily [1] 58:15 eating [1] 67:22 education [2] 20:13 34:5 eeg [5] 7:24 9:14,20 10:8 30:1 effect [2] 7:10 8:19 effective [3] 23:5,11 33:2 effectively [3] 17:20 63:2,7 efficacy [1] 39:1 efforts [1] 18:25 eighth [15] 24:3 25:12,18 40:11 44:6,8 45:24 52:24 53:1 57:3 61:12 63:20 67:25 68:5,9 either [3] 23:25 38:11,12 ek [1] 30:1 electrocution [2] 51:21 53:13 element [9] 38:15 42:6 43:3 47:4 51:7,8,11 60:11 61:</p>
---	--	---	---

Official

<p>5 elements [1] 38:12 eliminate [1] 46:14 eliminated [1] 7:15 emotional [1] 69:2 emphasize [2] 11:17 18:1 endless [1] 39:13 engage [2] 43:6 51:5 enormous [1] 26:16 enormously [1] 16:25 enough [2] 26:20,21 entire [2] 19:1 36:13 entirely [2] 14:23 22:8 entitled [1] 32:12 entry [1] 57:23 equally [2] 23:5,10 equipment [1] 18:16 especially [1] 11:19 essentially [1] 14:8 established [1] 57:2 estelle [1] 61:9 estimate [2] 7:4 11:22 et [1] 34:7 even [12] 21:22 27:2,5,21 29:25 32:9 44:11,20 45:22 57:14 60:5 63:20 everybody [1] 40:18 everyone [4] 16:1,5 45:10 66:23 everything [5] 24:19 26:6, 10 34:6 57:15 everything's [1] 24:23 evidence [21] 7:13 13:1 15:15 23:13 27:8,15 33:18 34:24 36:2 38:9 56:19 58:4, 9,13,21 59:13,22 63:15 64: 8,11,11 exactly [14] 8:24 10:2,4 24: 24,25 26:9 47:11,20,22 48: 7,13 51:15 61:3 66:19 example [4] 35:16 49:20 50:17 52:13 exceed [1] 69:3 except [1] 9:11 exceptional [1] 49:13 excruciating [1] 40:22 excruciatingly [1] 64:14 execute [1] 63:16</p>	<p>executed [2] 42:22 64:24 execution [43] 13:14 15: 20 21:13 23:8 24:6 28:22 33:3 35:14 38:7,19,24 40:3, 21 42:15 45:16,19,20,23 47: 11 50:23 52:15,18 54:11,13, 20,25 55:18,22 56:18 57:21 59:6 60:11 61:18 64:4,16 65:4,11 66:21 67:14 68:5, 24,25 69:8 executions [1] 67:7 exempt [1] 43:7 exempted [2] 43:15 46:4 exemption [4] 42:17 43:5, 12 60:18 exhibits [1] 49:18 exists [1] 38:18 expect [3] 8:24 9:6 14:24 expected [1] 54:13 experience [15] 16:5 17: 18 20:12,13 21:15 30:2,6 34:6 48:23 50:10 53:6 64:9 66:22,24 69:16 experiences [1] 23:18 experiments [1] 11:14 expertise [1] 41:7 expired [1] 66:7 explain [1] 13:13 explained [1] 15:25 explains [1] 30:12 extend [1] 40:24 extended [1] 41:9 extraordinary [2] 56:10, 10 extremely [2] 21:20 33:6</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face [1] 18:8 facial [4] 65:8 69:5,6,20 facing [1] 61:15 fact [8] 7:21 12:3 33:19 41: 24 58:2,14,16 60:20 fact-finder [1] 14:4 fact-finding [1] 38:5 facto [4] 42:17,24 43:5 60: 17 factor [1] 61:14 facts [4] 12:20 45:7,8,9 factual [2] 7:17 48:19</p>	<p>fail [1] 14:5 failed [1] 14:17 fairness [1] 50:2 falls [1] 55:6 far [2] 18:23 48:23 farmer [1] 61:8 fast [1] 31:13 fat [1] 16:17 fatal [1] 39:7 favorable [1] 23:18 feasibility [2] 41:13 65:18 feasible [4] 38:15 41:14 50:24 65:19 feel [2] 47:11 48:12 feeling [1] 50:18 feels [1] 47:22 femoral [19] 13:22,25 14: 11,13,16 15:3,10,18 16:3 17:8,20 20:14 58:3,8,15,18, 22 59:19,24 few [1] 21:4 field [1] 11:15 figure [5] 29:4 30:23,24 42: 2 69:7 figures [1] 7:11 find [4] 37:18 40:23 41:3 51:25 firing [9] 51:21 52:14 53: 13,18,19 64:20,21,23,24 first [23] 7:21 10:14 22:21 27:5,12 38:1 41:22 42:5,10 46:18 48:19 51:11 57:2 60: 4,5,8 62:23 64:6 65:10,11 66:14 68:13,21 flags [1] 36:16 flat [6] 12:15,23 13:5 16:17 18:25 56:24 flow [4] 30:12,13,13,14 fly [1] 21:18 food [1] 67:22 footnote [1] 53:17 ford [1] 43:19 foreseeability [1] 65:17 forth [5] 26:23 27:10 35:17 44:9 49:7 forward [4] 44:24 56:18 65:12 68:8 four [11] 7:9 9:1,1,4,11 42:</p>	<p>8 60:1,5,7 62:6,8 four-minute [1] 7:4 fourth [3] 28:9 62:24 63:9 full [2] 37:17 68:19 fully [1] 12:24 fundamental [1] 11:22 further [2] 38:4 62:15</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gain [4] 12:5,8 14:17 18:25 gas [13] 23:8,18 28:12 29:3, 9 30:25 31:2,8,12,20 32:5 53:8 62:14 gauze [1] 67:21 gave [1] 55:16 general [5] 50:8 54:1,20 55:8 56:6 generalized [2] 40:2 55: 17 generally [1] 15:23 gets [2] 25:10 46:25 give [10] 19:10,13 20:6 36: 11 41:18 50:1 55:20 56:13 67:20,21 given [5] 7:7 16:11 21:4 59: 17 63:20 gives [1] 41:17 giving [1] 54:11 gossip [23] 25:11 38:12, 14 44:9,17 45:4,5,7,9,9 46: 2,10,16 47:2,3 50:15,17 55: 15 60:9,13,22 61:8 63:8 goal [2] 65:1,2 gorsuch [4] 59:25 62:6,11 69:18 got [7] 6:3 18:6 21:21 40:4 60:4,5 67:19 gratuitously [1] 33:24 grave [1] 29:6 greater [1] 60:22 gross [3] 54:18,23 69:20 grounds [1] 38:11 gruesome [5] 44:11,16,20 45:21,23 guarded [1] 39:15 guess [2] 47:8 48:8 gurney [6] 20:10 33:25 35: 8,10 57:5,10</p>
---	--	---	---

Official

H			J
habeas [1] 42:19	honor [18] 7:20 8:11 9:23 17:16 22:18 24:10 25:25 30:21 32:11 33:9 34:10 39:22 45:3,15 47:17 49:11 62:3 66:7	infection [1] 6:17	ja [1] 8:13
hanging [2] 52:15 64:19	hood [1] 62:17	inference [1] 61:22	jaw [1] 36:16
happen [9] 7:2 12:7 14:13 22:9,10 34:15 50:22 51:9 58:25	horrible [2] 14:15 23:25	inflict [1] 46:3	job [3] 41:3,4,5
happened [6] 8:20 18:5 22:11 26:1 42:2 53:16	horrific [2] 34:13,17	inflicted [1] 68:11	john [1] 32:22
happens [1] 30:8	horse [7] 7:3 8:20,21,23 9:11 11:19 27:25	infliction [1] 25:13	joint [2] 35:3 57:9
hard [4] 27:12 35:19 50:1 67:22	horses [1] 8:25	information [7] 6:10 7:15 11:16 12:16 19:13 21:9 31:16	judge [6] 12:10,17 13:8 32:12,13 36:23
hardly [1] 15:1	however [1] 66:4	informed [2] 21:6,10	judgment [10] 14:2 21:2 22:4 26:21 28:18 36:25 54:12 55:7 58:24 59:3
harm [1] 63:5	human [1] 9:3	informs [1] 68:21	judgments [2] 55:6 56:21
hashed [1] 12:12	humane [1] 33:2	infuse [1] 8:18	jury [1] 61:19
hate [1] 33:22	hypothetical [2] 45:8 47:25	infused [2] 8:25 18:19	K
haywire [1] 24:23	hypotheticals [1] 50:25	infusion [9] 7:23 8:8,11,14,22 9:9,10 11:18 13:6	kagan [4] 53:9 54:4 56:2 66:18
head [2] 12:2 34:1	hypoxia [2] 38:17,19	initially [1] 52:5	kavanaugh [14] 36:18 44:10,19,23 45:2,11 46:18 48:17 54:1 56:22 57:13 62:22 63:3 68:12
healthy [1] 69:13	I	injection [4] 13:18,22 28:16 29:5	keenly [1] 63:8
hearing [1] 37:17	idea [2] 40:12 68:7	inmate [2] 14:17 69:14	keep [1] 42:12
held [5] 41:14 43:2,23 50:20 57:3	identified [1] 46:22	inmates [1] 14:25	key [1] 22:25
he'll [3] 12:15 27:18,18	ill [2] 43:9 67:2	inmate's [3] 18:14 35:11 41:5	kill [3] 40:15 42:2 51:25
hemangioma [2] 18:7 36:15	illness [1] 21:6	insensate [1] 30:19	kind [8] 21:2,15 25:6 47:20 54:8,11 55:20 56:13
hemorrhage [1] 21:25	imagine [2] 66:19 67:3	instances [1] 15:9	kinds [3] 21:3 45:6 64:16
high [4] 13:15 19:5 21:25 59:20	imagines [1] 67:5	instead [1] 53:12	kit [1] 14:22
higher [2] 10:10 36:9	imaging [1] 21:11	institution [1] 36:3	known [3] 33:3 52:10 68:24
highly [4] 54:24 55:1,1 67:12	implementation [1] 49:13	institutions [2] 35:4 36:9	knows [2] 27:22 35:23
hill [3] 42:13,14,20	implemented [5] 38:15 51:2,3,19 52:10	insufficient [1] 52:8	L
himself [1] 51:25	implementing [1] 55:21	intend [2] 24:24 33:23	laid [1] 20:9
historical [2] 45:22 52:16	important [1] 12:9	intent [1] 40:8	laminar [1] 30:12
history [2] 35:24 40:11	imposes [1] 44:20	interest [2] 35:12 38:2	language [2] 22:24 68:9
hobbesian [1] 41:16	imposing [2] 23:5,11	interested [1] 48:22	large [2] 12:6 13:7
hochman [52] 6:1,6,12,24 7:16,19 8:5 9:16,22 10:1,9,12,24 11:2,7,11 12:21 13:19,24 15:11,16 17:6,9,15 19:21,25 20:4 21:1 22:2,18 24:10,15 25:24 28:2,4 29:10,13,17 30:20 31:1,5,7,16,21 32:8,11,17,18 66:10,11,13 69:4	impossible [2] 46:15 61:22	interests [1] 54:14	last [5] 14:16 18:5 20:18 50:13 53:1
hold [1] 37:17	inadvertent [1] 53:21	interject [1] 38:6	later [1] 43:2
holding [7] 39:23 42:11 43:18 45:4,5 58:19 60:9	incentive [1] 51:4	interminable [3] 51:5,6 62:10	laughter [1] 48:3
holds [1] 60:10	incident [1] 33:5	intubate [1] 21:18	lawful [2] 38:3 61:20
	include [1] 13:22	involve [1] 69:8	lawsuit [1] 51:13
	including [1] 38:21	involved [1] 23:16	lawyer [1] 37:16
	incompetent [1] 43:9	isn't [4] 30:17 37:11 59:9 68:17	leak [1] 23:25
	indicate [1] 18:9	issue [9] 6:15 7:6 16:10 29:18,19 36:16 48:19 53:22 68:13	learned [1] 12:16
	indicates [6] 8:15 18:11,13 64:25 66:23,24	issues [3] 18:5,10 41:24	least [2] 20:15 68:18
	individual [8] 40:20 43:12 44:6 48:11,22 55:23 56:11 60:17	itself [1] 61:9	
		iv [1] 57:23	
		ivs [1] 56:1	

Official

<p>leave [1] 63:10 leaving [2] 6:19 42:21 left [2] 7:14 20:24 leg [7] 16:15,18 58:7,12 59:17,20,21 legal [1] 36:22 legislative [1] 56:5 legislature [3] 54:9 55:8,17 legitimate [1] 54:14 less [4] 14:1 25:5,17 31:2 lethal [18] 12:25 18:24 23:8,18 28:12,16 29:2,3,5,9 30:25 31:2,8,12,20 32:5 53:8 62:14 level [3] 10:11,19 36:9 lie [3] 12:15,23,24 light [1] 29:1 likely [3] 7:10 19:14 50:22 limit [4] 45:11,12,14,15 line [1] 20:14 lip [1] 18:8 listed [2] 35:21 62:25 listening [1] 27:22 lists [1] 41:2 litigation [6] 51:5,6 62:10 64:25 65:6,7 little [3] 6:7 9:7 16:21 local [1] 59:16 locate [1] 35:16 lodge [1] 6:8 logic [2] 46:10 60:9 logical [1] 20:6 long [3] 10:18 18:19 42:1 longer [1] 8:18 longest [1] 8:23 look [10] 8:6 17:2 18:22 27:12 28:8,25 39:10 47:8 55:11 69:25 looked [2] 8:7 54:7 looking [1] 34:8 lose [2] 16:7 49:22 lot [7] 17:18 20:7 27:6 42:4 51:22 54:8 69:1 lots [1] 67:7 low [2] 30:1 59:21 lower [4] 25:6 36:15 58:6 68:20</p>	<p>lying [4] 13:5 16:16 18:25 56:24</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>m2 [3] 16:9 17:10 19:11 m3 [3] 16:9 17:10 19:11 macro [1] 60:19 macrocosm [1] 60:19 made [15] 25:4,7 34:18,23 35:3,23 36:24 40:11 41:2 45:6 50:15 51:10 56:6,17 59:4 magnified [1] 24:9 major [2] 9:19 10:8 majority [1] 57:3 man [1] 37:18 manage [1] 67:12 manner [2] 23:5,11 many [2] 33:7 51:19 mark [1] 39:4 mask [1] 62:18 material [1] 41:24 matter [2] 11:20 56:25 maxilla [1] 36:15 maximum [2] 7:11,21 mcdonough [2] 42:13,14 mcgehee [1] 52:25 mean [13] 14:7 21:7 23:19 24:16 25:10 27:19 32:2 36:20 39:3,5,17 45:5 54:18 meaning [2] 45:18 52:11 means [1] 60:14 measure [4] 10:2,4 11:8,13 medical [12] 6:9 20:11 35:12 36:4,7,13 47:10 48:12 56:20 58:10 59:15 65:13 medically [2] 56:21 57:22 mental [1] 47:19 mentally [1] 43:8 mention [1] 18:8 mentioned [4] 18:7 27:17 41:15 53:18 met [1] 41:22 method [41] 13:10 23:2 24:5,8 25:4 26:2,22 27:3 28:13 33:3 38:23 40:21 42:15,23 43:13 44:11,17,20 45:16,18,20 46:5,11 47:10 50:23</p>	<p>52:5,18 54:10,19 55:18 60:11 61:17 62:13 64:4 65:4,23 66:15,17,21 67:4 68:3 methods [6] 23:8 45:23 52:15 64:16 68:24 69:8 microcosm [1] 60:16 midazolam [1] 50:16 might [4] 19:21 27:7 28:14,15 mind [5] 16:21 39:9 42:12 56:16 69:15 minute [1] 20:9 minutes [6] 7:9 8:1 12:4 16:13 30:21 66:10 miserably [1] 69:17 mishap [1] 24:22 mishaps [1] 25:7 misread [1] 27:25 misreading [1] 7:3 misremembered [1] 8:3 missed [1] 8:2 missing [1] 27:8 mississippi [1] 23:7 missouri [14] 23:9 24:18 33:4 38:1 54:2 55:24 62:19 64:24 65:20,24 66:20 67:2 69:14,25 missouri's [4] 33:1 53:23 65:7,8 misstatement [1] 7:18 mister [1] 30:15 modify [1] 29:5 moment [2] 16:10 27:4 monitor [1] 18:14 most [5] 15:9 33:2 35:11 57:5,12 motion [1] 35:7 mouth [1] 6:16 move [1] 25:3 moves [1] 34:1 ms [1] 12:23 much [9] 9:2,12 10:8 37:8 58:6 60:16,22,22 69:11 multiple [1] 51:6 must [11] 13:8,9,13 25:15 44:16 46:9 50:21,22 60:14 61:10,20</p>	<hr/> <p style="text-align: center;">N</p> <hr/> <p>namely [1] 46:19 narrow [1] 30:9 nature [1] 21:5 necessary [4] 13:13 34:6,13 52:22 need [4] 19:14 34:3 58:14 69:10 needed [1] 12:12 neither [1] 41:6 never [9] 22:17 25:22,22 26:14 27:20 38:17 53:22,23 65:24 new [5] 12:16,20 27:3 29:2 49:7 next [3] 48:11 49:23,24 nitrogen [8] 23:23 27:16,17 37:8,10 38:17,19 62:17 nobody [3] 66:25 67:18,18 nods [1] 14:7 nonetheless [1] 67:9 normal [2] 18:14 30:13 normally [1] 18:13 note [1] 12:10 nothing [11] 7:1 11:3,5 18:11,12,15 19:5 23:19 59:2 62:16 69:17 number [5] 32:2,4,5 41:1 62:8 numbers [2] 12:2 31:4 nurses [1] 27:9</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>objectives [1] 43:17 obligation [1] 68:8 observed [1] 13:9 obstructed [1] 30:10 obvious [1] 11:13 occur [3] 27:2 45:15 57:21 offer [2] 42:8 44:17 offered [2] 46:12 57:5 offers [1] 33:5 official [2] 61:16,18 officials [6] 24:18 54:9,17 55:8,21 56:3 often [2] 24:3 39:10 ohio [1] 52:13 okay [9] 27:10,19 29:15 31:</p>
---	---	--	---

Official

<p>3,18 39:14 47:12 48:4,15 oklahoma [5] 23:7,14 31: 9,15,16 once [5] 7:15 39:10 41:22 42:2 51:9 one [27] 9:6 11:9 12:11 20: 7,15 21:7 24:2 31:8,11 38: 13 43:20 46:11 48:9 49:4,7, 7,23,24 54:5 55:9 58:10 59: 8 60:5,12 61:13 63:7 68:7 one-page [5] 18:6 35:20, 20 36:8,14 only [17] 7:12 12:4,13 13: 23 21:16 23:9,10 27:14 28: 11,25 35:21 36:11 41:14 57:20 58:4,20 59:14 onset [1] 31:10 open [3] 17:2 42:22 63:10 opening [1] 38:22 opinion [9] 12:17 23:1,13 27:14 28:1 38:20,23 48:25 63:19 opposing [2] 57:14 58:24 opposite [1] 26:10 opposition [1] 35:6 option [5] 13:22 41:17,19 42:22 64:15 options [1] 53:4 oral [1] 32:22 other [16] 8:15 11:10 14:7 17:12 23:2 25:23 29:4 37:6 39:8 48:9 49:21 57:24 58: 25 63:4 67:3 68:23 otherwise [1] 40:6 ought [1] 42:18 out [26] 6:21 12:13 21:8 23: 20,21 24:25 26:14 28:14 29:4 37:18,21,22 38:3 41: 21 42:2 47:14,16 48:9,9 54: 14 60:6,15 61:21 67:5,7 69: 7 outside [2] 56:7 69:25 over [2] 48:14,14 overturned [1] 26:25 own [5] 20:12 27:24 34:2 67:13,13</p>	<p>18,22 23:1 28:9,10 31:9 53: 16 57:9 pages [1] 18:22 pain [22] 25:13,19 33:25 40: 22,23 44:12,16,18,21 45:17 46:3,3,14,20,24 52:6 54:12 55:2 68:25 69:2,3,9 painful [2] 25:17 37:10 paint [1] 16:16 paragraphs [1] 38:22 part [15] 12:6 13:7 20:10 26:25 27:5,11,13,13 28:19, 23 30:8 37:7,14 43:3 68:18 particular [12] 10:13 43: 12 47:4 48:11 54:24 55:9 56:1,9 61:6,24 62:13 65:22 pass [1] 10:4 passage [3] 21:4 23:1 49: 15 past [1] 60:4 patients [1] 30:3 pedigree [1] 52:16 penalty [15] 25:14 39:14 40:7,8,18 42:18 43:5,8,11, 16,18 49:3,14 60:13,18 penological [1] 43:17 pentobarbital [6] 7:9 9:2 30:8 31:22 32:6 33:2 people [15] 17:17 20:15 33: 7 34:9 39:10 43:8,9 49:1, 21 50:21 51:20,22 54:21 67:8 69:14 per [1] 9:7 percent [1] 23:23 perhaps [1] 69:24 period [14] 7:21 11:23 13: 16 17:1 18:19 29:9,19,21, 22,23,23,25 30:18 48:14 peripheral [2] 14:5 59:1 permit [1] 20:21 permits [1] 52:2 person [24] 15:19,22 16: 12 21:22 37:16 40:22 43: 12,15 51:24 53:7 54:24 55: 9 56:1,9,10,11 58:10 59:7, 11,16 63:15,20 67:10,10 personnel [1] 34:2 petition [2] 42:19 51:13</p>	<p>petitioner [20] 30:18 33:5 34:23 38:6 42:21 44:15 45: 1 46:7,9 50:9,12 51:10,16 52:12 53:12 60:17,25 61:3 62:14 66:12 petitioners [5] 43:4 50:13, 16 51:4 52:13 petitioner's [1] 23:4 physical [2] 67:24 69:3 physically [1] 6:10 picture [1] 16:16 piece [1] 27:8 pinpricks [1] 57:24 place [5] 9:9 29:21 34:9 38: 8 41:4 plan [3] 26:7,11 57:15 play [1] 35:10 played [1] 26:14 playing [1] 24:25 plays [1] 67:5 plead [8] 46:10 53:7,8 64: 15,19,19,20,22 pleaded [1] 64:23 pleading [1] 52:14 pleadings [1] 57:3 please [1] 32:25 pled [2] 57:4 62:13 point [14] 9:14 10:17 11:3 16:4 20:25 24:4 25:10 27: 20 36:25 37:15 41:18 48: 20 56:23 58:20 pointed [3] 21:8 37:21,21 points [1] 66:14 position [6] 35:10 53:23 54:3 57:6,11 65:25 possesses [1] 43:16 possibility [2] 30:5 63:11 possible [6] 16:20 28:14, 15 38:4 64:4,23 possibly [2] 24:10 62:17 posture [1] 14:3 potentially [1] 23:25 precedents [1] 55:20 precise [3] 6:14 11:24 50: 14 predict [1] 50:10 predicted [2] 50:16 57:22 predicting [1] 46:8</p>	<p>prediction [2] 50:14,14 predictions [3] 34:23 45: 6 59:4 predictive [2] 59:9,10 preemption [1] 65:6 prepared [1] 20:18 prepped [1] 10:20 present [1] 18:16 presented [7] 53:22 58:23 60:21,23 64:7 65:15 66:4 pressed [1] 35:19 presumably [1] 53:7 pretty [1] 27:12 prevail [1] 28:22 previously [2] 15:18 52: 17 principal [1] 38:5 principle [1] 44:2 prior [3] 6:24 59:6 65:5 prison [3] 48:25 49:1,1 prisoner [1] 33:24 probably [4] 19:3 21:3,11 69:2 problem [4] 20:17 30:7,14 37:19 problems [3] 19:14 59:8, 14 procedure [9] 14:20,21 15:4,10 17:12 19:3 57:25 58:1,3 process [5] 13:15 18:3 19: 18 23:15 24:25 produce [1] 31:22 proffered [1] 23:4 progressive [2] 6:3 21:5 prohibit [1] 40:13 prohibited [1] 45:24 prohibits [1] 25:12 prolonged [2] 11:23 64:9 prone [1] 6:16 prong [6] 41:22 46:19 62: 23 68:18,20,21 properly [1] 63:3 proportional [1] 11:20 proposal [2] 28:2,5 propose [2] 40:5 67:13 proposed [1] 23:3 proposing [1] 22:7</p>
<p style="text-align: center;">P</p> <p>page [11] 8:13,17 12:22 14:</p>			

Official

<p>proposition [1] 61:10 prosecutor [1] 47:8 protocol [13] 19:18 24:19 25:8 28:16 29:5 32:7 33:1 35:14,19 38:18 65:7,9 69: 15 protocols [1] 61:1 prove [3] 13:8,9 46:10 proven [3] 52:3,5 62:13 punishment [2] 40:14 44: 3 punishments [1] 68:10 purchase [2] 26:15,16 pure [1] 23:23 purpose [1] 43:24 purposes [1] 37:1 put [6] 19:18 20:9 21:23 41: 4 58:21 67:21 putting [3] 40:16 41:5 56:1</p>	<p>real [4] 11:7 30:14 51:2,3 realistically [1] 56:13 reality [2] 51:18,23 really [14] 6:22 37:18,19 39:12,18 41:20 42:15 49: 18 51:1 53:5 54:17 55:6 59: 2 64:13 reason [11] 6:14 10:13,17, 23,24 11:21 14:4 37:9 42: 10 49:2 60:8 reasonable [4] 21:12 22: 13,16 39:2 reasonably [1] 22:23 reasoning [2] 42:11 60:15 reasons [7] 11:13 22:19 42:8 46:12 53:21 60:1 63:7 rebuttal [1] 66:11 receives [1] 36:3 recognized [1] 46:13 recommend [1] 36:20 record [25] 6:4 7:13 11:4,6 18:2,11,13,15 27:15 34:24 35:5,7 36:2 37:4,12 38:9 56:19 58:2 59:3,14,22 64: 10 66:4,22,23 records [4] 6:9 36:4,7,13 reduce [1] 13:10 reduces [1] 44:18 refer [1] 55:5 reference [1] 8:10 referred [1] 8:11 referring [1] 15:17 regardless [2] 10:17 24:5 regular [1] 13:23 regulations [1] 34:3 reject [2] 31:25 32:5 related [1] 57:13 relation [1] 68:23 relative [1] 26:12 relevant [1] 56:21 relevantly [1] 45:22 reliable [1] 59:10 relied [2] 61:8,9 relying [3] 29:11,16 31:14 remainder [1] 32:19 remains [1] 13:15 remand [5] 22:6,9 28:19, 24 38:4</p>	<p>remedy [1] 40:12 remember [4] 14:2 21:17 26:4 69:6 removed [2] 6:2,11 represent [1] 13:3 representation [1] 35:22 representations [3] 20: 23 34:18 35:2 represented [1] 34:12 representing [1] 36:5 request [1] 38:5 requested [1] 53:12 require [2] 34:2 68:1 required [7] 12:15 22:14 46:6 52:25 53:3,25 60:3 requirement [5] 66:6,15, 18 67:4 68:4 requirements [1] 20:12 requires [1] 60:10 reserve [1] 32:18 resources [1] 41:6 respect [4] 25:21 30:23,24 40:18 respectfully [1] 67:15 respiration [1] 18:15 respond [1] 57:17 respondents [1] 32:23 respondent's [1] 14:6 response [3] 37:25 55:13 64:6 resulting [1] 51:14 retributive [1] 43:24 reverse [1] 37:4 ringo [1] 65:5 risk [11] 13:11,14 19:4 25:5 26:12 46:14,24 62:9,10 63: 4 68:15 robert [1] 66:11 roberts [17] 9:13,18,24 10: 6,10 13:17,21 22:1,12 24:2, 12 25:9 32:16,20 61:25 62: 4 66:8 role [1] 68:18 room [3] 14:22 18:17 19:5 roper [1] 43:19 rule [5] 47:13,16 48:9,9 63: 10 rules [1] 56:5</p>	<p style="text-align: center;">S</p> <p>sake [1] 46:3 same [20] 9:10 15:19,21 20: 17 31:20,22 32:1,10 33:8 47:20,23 48:7,13 55:20 56: 13 59:7,10 61:4 65:15 69: 23 saphenous [2] 58:6 59:21 satisfy [1] 28:17 sauer [53] 32:21,22,24 33: 9,14,18 34:10,16,21 35:1 36:1 37:24 39:22 41:11 42: 4 43:14,23 44:4,7,14,22,25 45:3,14 46:25 47:15,21,24 48:5 49:11 50:4,7,9 52:7 53:10,14 54:2 55:14 56:15 57:1,18 59:13,25 60:8 62:2, 8 63:1,6,22 64:5 65:20,24 66:2 saying [7] 44:10,19 53:9, 17,19 56:24 68:11 says [9] 16:18 27:9 31:25 34:14 35:14 54:24 57:10 58:5 59:7 scheduled [3] 6:14 28:22 65:11 science [1] 10:16 scope [1] 44:8 second [18] 9:7 26:25 27: 11,13 38:14 42:6,19 43:3 51:7,8,14 53:16 60:12 61:5 62:23 66:16 68:18,20 secondly [3] 38:9 41:12 64:13 seconds [9] 7:12,25 8:8,9, 22 9:6,8 27:17,18 secured [1] 6:9 see [8] 18:23 24:3 43:11 49: 6 51:20 56:2 63:14 66:7 seeing [1] 38:2 seek [2] 42:17 43:4 seeking [1] 60:17 seem [1] 20:5 seems [5] 24:7 25:20 27: 23 36:19 48:18 seen [1] 43:10 send [2] 39:11 49:5 sensation [1] 50:10</p>
<p style="text-align: center;">Q</p> <p>question [19] 6:2 14:14 19: 8 22:14 28:25 30:17 33:21 35:2 39:4 41:13 42:6 47:7 49:9,12,15 52:1 54:5 65:25 67:9 questions [1] 37:20 quick [2] 30:11 31:10 quickly [2] 38:4 62:1 quite [3] 26:13 33:18 37:11</p> <p style="text-align: center;">R</p> <p>raise [1] 49:14 raised [2] 20:10 38:14 range [1] 8:7 ranges [1] 10:16 rare [2] 47:9 48:12 rate [3] 8:14,22 11:18 rather [1] 37:16 reach [2] 20:14 34:7 reaction [1] 39:4 read [4] 14:6 34:4 39:19 48: 23 readily [4] 38:15 50:24 52: 9,23 reading [1] 10:15 readings [1] 30:1 reads [1] 7:25 ready [1] 69:13</p>			

Official

<p>sense [4] 30:3 56:6 67:16, 17</p> <p>sensible [1] 22:8</p> <p>sensitive [1] 21:20</p> <p>sentence [7] 23:6,11 38:3, 3,7 42:25 61:20</p> <p>sentences [1] 54:14</p> <p>separate [1] 16:9</p> <p>serious [3] 26:24 27:1 49: 8</p> <p>set [4] 16:20 44:9 50:12 56: 5</p> <p>setting [1] 17:22</p> <p>several [3] 12:4 30:20,21</p> <p>severe [7] 25:1,6 46:20,24 63:5 68:16,23</p> <p>shall [1] 68:10</p> <p>short [1] 17:1</p> <p>shorter [2] 29:8,19</p> <p>shouldn't [2] 52:2 66:6</p> <p>show [7] 11:9 25:16 50:21, 22 52:22 59:10 60:3</p> <p>showing [6] 23:4 25:21 39: 1 46:20 51:10 61:11</p> <p>shown [4] 23:10 26:20,21 27:1</p> <p>shows [2] 18:2 58:2</p> <p>side [1] 67:3</p> <p>significant [4] 26:8,11 33: 5 57:16</p> <p>significantly [1] 44:18</p> <p>similar [1] 45:22</p> <p>simply [2] 41:21 51:25</p> <p>since [2] 12:17 65:14</p> <p>single [2] 60:24 61:3</p> <p>single-drug [1] 33:1</p> <p>sit [1] 18:3</p> <p>site [1] 56:17</p> <p>sitting [1] 30:2</p> <p>situation [6] 11:12 25:3 51:3 53:11 63:25 64:3</p> <p>six [1] 38:21</p> <p>sizable [2] 33:19,21</p> <p>skilled [1] 17:17</p> <p>slower [2] 8:17 11:20</p> <p>slowest [2] 8:21,22</p> <p>slowly [2] 48:14 63:16</p> <p>small [1] 33:16</p>	<p>soft [1] 67:21</p> <p>solution [1] 38:16</p> <p>someone [4] 21:19 34:4 50:3 53:5</p> <p>something's [1] 24:22</p> <p>somewhat [1] 10:16</p> <p>soon [1] 68:4</p> <p>sorry [4] 12:19 40:1 59:5 65:18</p> <p>sort [7] 11:14,15 17:19 54: 12 55:16 56:6,14</p> <p>sotomayor [37] 6:5,7,22, 25 7:17 8:4 11:25 12:19 16: 23 17:4,7,14 19:9,20,23 20: 1,5 22:8 33:7,11,15,20 34: 11,19,25 35:18 40:1 41:12 43:7,21 44:1,5 51:17 59:5 65:16,21 66:1</p> <p>sotomayor's [1] 28:6</p> <p>speaking [1] 15:23</p> <p>special [4] 26:22 37:18,19 49:19</p> <p>specific [3] 62:17,20,20</p> <p>specifically [3] 12:11 67: 12 69:23</p> <p>specification [1] 62:15</p> <p>squad [9] 51:21 52:14 53: 13,18,19 64:20,21,23,25</p> <p>stage [2] 34:22,22</p> <p>stages [1] 10:5</p> <p>stake [8] 47:12,16 48:8 50: 3,11,19 51:1 53:6</p> <p>stakes [1] 49:20</p> <p>standard [2] 58:16 68:15</p> <p>standards [1] 28:17</p> <p>start [4] 18:3 19:17 26:5 40: 25</p> <p>starting [1] 66:17</p> <p>state [22] 17:2 20:6 23:2 24:8 25:23 26:21 33:23 38: 1,18,19,25 40:19 41:16,17, 18 51:11 54:8,9 55:21 57:4 65:22 66:20</p> <p>state-considered [1] 55: 5</p> <p>statement [1] 12:22</p> <p>statute [6] 41:1,2,16 52:2 65:18,21</p>	<p>statutorily [1] 53:20</p> <p>statutory [5] 52:7,21,24 53:2,24</p> <p>stay [1] 35:7</p> <p>step [1] 60:2</p> <p>steps [1] 34:13</p> <p>still [6] 30:2,3 44:12,23 57: 16 62:7</p> <p>stop [1] 19:24</p> <p>strapped [1] 21:22</p> <p>strategic [1] 53:21</p> <p>strategically [1] 64:21</p> <p>stress [1] 16:19</p> <p>strike [3] 39:6,7 54:6</p> <p>strikes [4] 37:14 54:6,16 55:10</p> <p>strong [2] 13:1 66:5</p> <p>stronger [1] 53:15</p> <p>struck [1] 61:4</p> <p>struggled [1] 19:2</p> <p>struggling [1] 21:21</p> <p>stuck [1] 37:6</p> <p>studies [4] 9:17 10:3 21: 11 31:9</p> <p>study [15] 7:3,5,7,22 8:6,7, 8,11,15,21 11:19 12:2 23: 14 31:15 38:25</p> <p>study's [1] 27:25</p> <p>stuff [2] 39:19 55:4</p> <p>subject [1] 33:24</p> <p>subjected [2] 45:10 60:25</p> <p>subjective [4] 30:5 61:11, 23 66:22</p> <p>subjectively [1] 61:14</p> <p>sublime [1] 20:9</p> <p>submitted [1] 35:6</p> <p>subsequent [1] 51:12</p> <p>substantial [6] 14:3 46:20, 23 63:4 68:15,23</p> <p>substantially [4] 11:20 13:10 25:5,5</p> <p>substantive [2] 47:4 60: 10</p> <p>successive [1] 42:19</p> <p>suffer [4] 46:8 53:5 55:1 64:14</p> <p>suffering [18] 11:23 13:11 16:24 25:1,6 26:8,12,24 27: 2 29:20 30:6 57:16,20,22 60:21 61:3 68:16 69:9</p>	<p>suffocating [1] 16:25</p> <p>suggestion [2] 17:24 64: 7</p> <p>suggests [1] 18:15</p> <p>sum [1] 14:1</p> <p>summary [8] 14:2 18:6 26: 20 36:8,14,25 58:24 59:3</p> <p>superadding [1] 45:17</p> <p>supine [1] 12:24</p> <p>supplement [1] 36:4</p> <p>supplemental [1] 35:5</p> <p>supports [4] 38:10,25 59: 3 64:12</p> <p>supposed [1] 27:10</p> <p>suppress [1] 50:17</p> <p>surely [1] 55:7</p> <p>surgery [7] 6:15,18,20,24 9:19 10:8,20</p> <p>surgical [1] 17:22</p> <p>suspicion [2] 6:19,23</p> <p>sweeping [1] 60:23</p> <p>sworn [1] 39:16</p> <p>system [5] 24:1 40:3,4 56: 4,7</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table [1] 18:18</p> <p>talked [5] 12:11 13:16 20: 11 23:17 55:4</p> <p>talks [1] 8:14</p> <p>team [2] 20:11 56:20</p> <p>technically [1] 49:17</p> <p>tells [1] 19:1</p> <p>termination [1] 9:14</p> <p>terrible [1] 26:23</p> <p>terror [1] 45:17</p> <p>testified [3] 9:5 35:4 36:12</p> <p>testify [1] 15:7</p> <p>testimony [13] 8:17 16:13 17:23 29:12 31:7,17,25 35: 7 57:9,19 58:5 59:14,18</p> <p>testing [1] 64:3</p> <p>theory [2] 25:11,17</p> <p>therefore [3] 42:18,23 49: 4</p> <p>there's [51] 7:7 8:7 10:1,2, 3,12,13,17 11:2,3,4,5,7,11,</p>
--	---	---	---

Official

<p>12,22 12:3 14:3,10 16:21 17:24 19:5,8 20:15 23:14, 19 24:21 25:16 26:7,7 29: 23,25 30:4,4 32:2 34:21 35: 17 41:19 44:12 46:22 49:4 50:23 51:21 54:7 55:6 56: 18 58:13 59:2,22 63:17 67: 7 they'll [3] 19:17 39:11 49:6 they've [3] 15:20 37:21 39: 16 thinking [5] 37:9 49:2 54: 18,19 67:6 thinks [1] 29:25 third [4] 50:12,12 62:24 65: 3 though [2] 27:4 32:9 three [8] 7:25 20:14 38:22 60:25 62:1,2,5 66:10 threshold [2] 51:10 68:13 throat [4] 18:9 21:23 33:17 67:22 throughout [1] 13:15 took [1] 8:23 tool [1] 59:10 tooth [1] 6:15 top [1] 20:10 trach [7] 6:11,20,21 16:22, 24 19:8,19 traditional [1] 20:22 trained [1] 16:2 training [2] 20:13 34:5 treated [1] 42:18 tremendous [1] 16:19 trial [5] 12:11,13 22:9 41: 25 42:1 tried [3] 38:17,20 39:5 trouble [1] 67:19 true [6] 8:2 16:23 25:25 55: 11 56:3 69:4 truth [1] 58:2 trying [5] 11:17 21:23 40:6 47:7 69:7 tube [1] 21:23 tumor [5] 18:8 19:4 21:20 33:16,16 tumors [1] 26:23 turbulent [2] 30:13,14</p>	<p>turns [1] 28:14 twice [3] 31:12 38:22 50: 20 twilight [4] 29:8,19,21,22 two [13] 7:20 20:13,15 31: 11 37:24 38:11 41:1 42:13 43:1 60:25 64:5 65:4 66:14 twofold [1] 31:8 typically [2] 59:19,20</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultrasound [3] 17:23,25 58:17 unconscious [2] 27:18 29:24 unconsciousness [1] 31:11 uncontradicted [2] 56: 19 57:8 under [4] 44:16 46:8,9 61: 18 underlying [1] 48:19 undermines [1] 43:17 understand [8] 22:24 25: 11 26:18 29:18 35:19 40: 24 49:12 52:4 undertake [1] 10:7 undue [1] 60:20 unique [2] 33:12 40:20 unknown [3] 26:13 29:3 64:18 unless [7] 15:20 40:14,14 67:10 68:6,6,7 unnecessary [2] 25:13, 19 untested [3] 38:24 39:25 64:17 until [1] 9:19 untoward [1] 33:24 untried [2] 38:24 39:25 unusual [13] 15:1 37:3 39: 18 40:14,22 43:13 44:2,3 52:6 54:25 55:1,2 68:10 up [11] 12:2 34:1 39:16 40: 12 41:2 48:2,17 49:22 51: 11 62:19 67:11 upset [1] 6:8 using [1] 33:1</p>	<p style="text-align: center;">V</p> <hr/> <p>vacate [3] 22:6 28:18,24 valid [1] 69:22 validity [1] 42:24 various [1] 10:5 vein [12] 14:11,13,16 15:3, 10,18 16:3 17:8,20 58:4,9, 25 veins [5] 13:23 15:1 34:7 35:16 59:1 venous [4] 12:5,8 14:17 18:25 verdict [1] 61:19 via [1] 15:18 viable [2] 28:12 52:18 view [2] 27:24 68:3 viewed [1] 45:16 vigorously [2] 34:16 64:6 violation [1] 61:13 virtually [1] 43:14 visualize [1] 17:19</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wainwright [1] 43:19 wait [1] 9:19 waiting [2] 18:18 62:6 walks [1] 68:4 wanted [1] 13:3 warden [4] 36:2,12 58:9 59:15 way [24] 7:24 10:2,3,21 11: 7,9 17:21 20:22 24:24 25:1, 15,16 28:16 29:17 37:11 40:23 47:1 55:11 62:12,20 66:4 67:7,10,12 ways [2] 20:14 29:4 weeds [1] 48:21 weisweber [1] 61:9 whatever [1] 15:23 whether [13] 6:10,13 12: 15,18 17:11 28:21 29:4 42: 6 49:15 52:21 53:24 61:14 68:22 whole [2] 16:16 51:21 whom [1] 43:13 who's [6] 15:19 16:2 58:9 59:7,11 60:17 wide [1] 8:7</p>	<p>will [24] 8:18 12:18,23,23 13:10,13 20:10 28:6,21 30: 18 34:15,17 36:4 46:8 48: 11 52:6 53:5 54:25 55:1,25 56:23 57:16 58:21 64:8 wilson [2] 61:8,13 win [1] 49:22 within [5] 14:23 45:17 52: 10 56:4,5 without [6] 6:9 7:7 15:10 16:6 27:12 33:4 wondering [2] 41:8 55:12 words [6] 34:3 46:1 47:2,3 57:24 63:4 worked [2] 23:20,21 working [3] 11:15 56:4,4 works [1] 37:10 world [2] 51:2,3 worst [1] 16:19 written [1] 49:25 wrote [1] 12:17</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year [1] 53:1 years [9] 30:3 38:8 42:13 43:2 48:25,25 49:1 50:13 64:3 young [1] 43:9</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zero [6] 7:25 9:15,20,25 10: 21 33:9 zink [1] 65:7 zivot [7] 7:2 12:14 13:16 21:17 29:24 30:10,11 zivot's [1] 11:22</p>
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