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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES WALKER, WARDEN, ET AL., :

Petitioners : No. 09-996

v. :

CHARLES W. MARTIN :

- - - - - x

Washington, D.C.

Monday, November 29, 2010

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

APPEARANCES:

TODD MARSHALL, ESQ., Deputy Attorney General,  
Sacramento, California; on behalf of  
Petitioners.

MICHAEL R. BIGELOW, ESQ., Sacramento, California;  
appointed by this Court, on behalf of Respondent.

	C O N T E N T S	
		PAGE
1		
2	ORAL ARGUMENT OF	
3	TODD MARSHALL, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	MICHAEL R. BIGELOW, ESQ.	
7	On behalf of the Respondent	26
8	REBUTTAL ARGUMENT OF	
9	TODD MARSHALL, ESQ.	
10	On behalf of the Petitioners	49
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 09-996, Walker v. Martin.

Mr. Marshall.

ORAL ARGUMENT OF TODD MARSHALL  
ON BEHALF OF THE PETITIONERS

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

Charles Martin never adequately explained why he waited more than 5 years to present additional claims to the California Supreme Court. As such, it was no surprise that these claims were rejected as untimely. California employs a habeas corpus timeliness rule that merely requires reasonable diligence and disclosure. The rule is adequate under this Court's longstanding precedents, and the Ninth Circuit's decision to the contrary should be reversed.

JUSTICE GINSBURG: Well, what about the charge that, yes, we can agree with you that in general 5 years seems like a long time, but we have a brief from the Habeas Corpus Resource Center that says that in the 5- to 6-year delay category, 62 percent are dismissed on the merits, and that you can't tell; sometimes they do it on the merits, sometimes they do it as time-barred,

1 and there's no rationale to when they do one or the  
2 other.

3 MR. MARSHALL: Three brief responses, Your  
4 Honor. The first is that to measure summary denials,  
5 you can't tell from a summary denial ruling what the  
6 court was thinking about the time of delay.

7 The second point is that delay in California  
8 is only half the equation. In California, there is the  
9 substantial delay and then there's also the  
10 justification portion. So persons who operate under  
11 substantial delay still have an opportunity to justify  
12 that delay and gain the desired review.

13 CHIEF JUSTICE ROBERTS: What was the third?

14 JUSTICE GINSBURG: Would they have to --  
15 would they have to justify the delay first? I thought  
16 there was something about, well, if the time question is  
17 more difficult and the merits are easy, there's no  
18 merit, so we just decide this.

19 MR. MARSHALL: California's policy is to  
20 take a first look at a habeas petition and determine  
21 whether it is -- has a prima facie case or whether  
22 procedural bars are apparent. A court that's denying a  
23 case on the merits isn't necessarily saying the matter  
24 was timely, and courts should be permitted to reach  
25 whatever is the most judicially efficient method of

1 resolving such a question without it being held against  
2 them.

3 JUSTICE SOTOMAYOR: So basically you're  
4 taking the position or you're conceding that the  
5 California courts are not consistent in their  
6 application of the timeliness rule?

7 MR. MARSHALL: No --

8 JUSTICE SOTOMAYOR: Your brief doesn't even  
9 try to defend that position. Are you conceding that  
10 there is inconsistent application of the rule?

11 MR. MARSHALL: No, Your Honor.

12 The point that we're making is that when you  
13 look at a rule, whether you apply it or not -- or  
14 whether you impose it or not doesn't mean you're not  
15 applying the rule. For example, when trial courts  
16 review matters under the Fourth Amendment, a decision  
17 not to exclude the evidence doesn't mean they didn't  
18 apply the Fourth Amendment.

19 In this case, if the trial court -- or if  
20 the reviewing court looks at the length of delay, and  
21 then they may look at the justification to determine  
22 that the delay was justified.

23 JUSTICE SOTOMAYOR: Well -- I might be  
24 speaking for her, but I thought that the Habeas Corpus  
25 Resource Center brief showed that the court, the

1 California court, did reach some cases where an  
2 explanation had not been proffered. And so it can't be  
3 just a simple rule, that if you don't proffer an  
4 explanation, you won't get heard. So what's the next  
5 step in that? Why do they reach some and not others?

6 MR. MARSHALL: The California Supreme Court,  
7 if a case is patently meritless and perhaps the  
8 procedural question of timeliness is more complex --

9 JUSTICE SOTOMAYOR: How could it be complex  
10 when there's no justification offered?

11 MR. MARSHALL: The question of how long it  
12 was --

13 JUSTICE SOTOMAYOR: Well, they pointed to a  
14 certain number of cases that were 5 years or above in  
15 delay where no justification was offered, and in some  
16 they reached the merits and in others they applied a  
17 procedural bar. So how is that consistent?

18 MR. MARSHALL: Well, the State court has  
19 discretion to determine on the -- on procedural grounds  
20 or on the merits --

21 JUSTICE SCALIA: Is there some Federal rule  
22 that says you have to apply a procedural ground before  
23 you decide the merits?

24 MR. MARSHALL: There is not. There's a --

25 JUSTICE SCALIA: So it's up to California

1 which of the two it wants to use.

2 MR. MARSHALL: That's correct.

3 JUSTICE GINSBURG: And in California, if it  
4 just says "denied," then the presumption is it's denied  
5 on the merits; is that it?

6 MR. MARSHALL: That's correct, a lack of a  
7 prima facie case.

8 JUSTICE GINSBURG: And -- and if -- so if  
9 it's going to be denied on time bar grounds, there has  
10 to be something to indicate that it's for that reason?  
11 Otherwise we assume it's on the merits?

12 MR. MARSHALL: That's correct. Typically,  
13 the citation is to Clark and Robbins, just as it was in  
14 this case.

15 JUSTICE SOTOMAYOR: So how do we know that  
16 the California court just thinks that the Federal  
17 question is too hard and it doesn't want to reach it?  
18 It may be meritorious. How do we know they're not  
19 applying the decision to reach the merits on an  
20 arbitrary and capricious basis or one that seeks to  
21 avoid hard Federal questions?

22 MR. MARSHALL: First is this Court has never  
23 taken the position, when measuring adequacy, of assuming  
24 that the rule is inadequate. The starting position that  
25 this Court has always taken when looking at the adequacy

1 of a State rule is to look for evidence to see that --  
2 if it can be shown to be inadequate. And I posit that  
3 there's no evidence in this case that has been presented  
4 to show that the State court is using their rules as a  
5 pretext of any kind.

6 JUSTICE KENNEDY: Is it arbitrary and  
7 capricious for a court to take the ground of least  
8 resistance, to decide the case on the easiest issue  
9 that's presented? Is that arbitrary and capricious?

10 MR. MARSHALL: I posit that it's not. This  
11 Court endorsed in *Lambrix* that it's all right for courts  
12 to address procedural default after *Teague* if that's a  
13 more judicially efficient method of handling the matter.  
14 *Strickland* cases permit addressing either prong,  
15 whichever is easier under the circumstances.

16 And so the State courts ought to be  
17 permitted to address habeas corpuses on whatever the  
18 easiest, most judicially efficient basis is without  
19 being forced to answer a timeliness question if a case  
20 is patently meritless. And there should be no finding  
21 of inconsistency about that.

22 And, more importantly, summary denials, as  
23 we're discussing here, don't afford any notice to  
24 litigants of what the State's procedures are or what  
25 they're thin king, because you have to guess. You have



1 to guess at how long the delay was, you have to guess at  
2 whether there was any justification offered. So summary  
3 denials do not assist the inquiry. And this Court has  
4 never endorsed using summary denials in its adequacy  
5 measure. This Court has always looked to published  
6 State cases that explicate the rule.

7 This Court is looking to see whether the  
8 rule has been pronounced by the State for a certain  
9 amount of time, and then all of a sudden the litigant  
10 that's receiving the imposition of the rule receives a  
11 rule that was unexpected, either because the rule was  
12 changed or because the rule was novel. Nothing like  
13 that has happened here.

14 JUSTICE KENNEDY: The phrase is "substantial  
15 delay." Are there factors other than temporal factors  
16 that go into whether or not the delay is substantial;  
17 that is to say, the prisoner had difficulty contacting  
18 his counsel and so forth? Is that what the court looks  
19 at --

20 MR. MARSHALL: Those are --

21 JUSTICE KENNEDY: -- when it looks at  
22 "substantial"? And is there -- are there California  
23 cases that tell us what the -- how do we define  
24 "substantial"?

25 MR. MARSHALL: Yes, Your Honor, to both.

1           The kind of circumstances you're describing  
2 are exactly the kind of circumstances which makes  
3 California's rule fair, because it considers how long it  
4 takes a litigant to find his claim, get it prepared, and  
5 get it into court.

6           And there are, in fact, concrete examples.  
7 The Robbins case specifically provided that a 5-month  
8 window from the discovery of triggering facts to the  
9 presentation of the -- of the claim was a reasonable  
10 amount of time. By contrast, the Stankewitz case  
11 provided that 18 months of delay from the discovery of a  
12 declaration was substantial and had to be justified.

13           JUSTICE KAGAN: When does the State think  
14 that Mr. Martin's claim became untimely?

15           MR. MARSHALL: Certainly he hasn't given any  
16 reason why he didn't present his additional claims at  
17 the time of his earlier habeas corpus challenges.  
18 Mr. Martin went through a full round of superior court,  
19 court of appeal, and supreme court challenges, and then  
20 waited some additional years and has never explained why  
21 he didn't include these additional claims in those  
22 earlier challenges.

23           JUSTICE KAGAN: So you think it --

24           JUSTICE KENNEDY: It's supposed to be filed  
25 within 60 days. I don't -- this is along the same lines

1 as Justice Kagan's question. Suppose there's the first  
2 round of habeas, and then he waits 60 days and files the  
3 new claim. Would that be substantial?

4 Because you're indicating that failure to  
5 include it in the first review is a factor to be weighed  
6 against him. And I think that's what the Justice is  
7 inquiring about.

8 MR. MARSHALL: Yes, it does -- it does weigh  
9 against. And it's a rule of reasonableness, and it's a  
10 discretion-based rule. And he would have to offer,  
11 well, why didn't he include those claims earlier? And  
12 if he had a good --

13 JUSTICE SCALIA: Yes, and what -- isn't that  
14 a separate rule? I mean, no matter how soon, if he does  
15 it a week after, doesn't California have a rule that you  
16 can't come back with another habeas with material that  
17 you could have produced in the -- in the former habeas?

18 MR. MARSHALL: That's correct, Your Honor.

19 JUSTICE SCALIA: So time -- time has nothing  
20 to do with that. It's just a separate -- a separate  
21 bar.

22 MR. MARSHALL: California has articulated  
23 that successive petitions are a type of delayed  
24 petition. But you're right, there is a difference in  
25 California between successive petitions and delayed

1 petitions, and the ruling here is that he was delayed  
2 substantially.

3 I was just addressing the point about when  
4 they might have been timely had they been presented  
5 earlier, and it appears that in the earlier -- he didn't  
6 get a timeliness ruling in his earlier challenges. So  
7 it appears that he could have raised them then and did  
8 not.

9 JUSTICE KAGAN: But if we can take out the  
10 second and successive aspect of this and just focus on  
11 the timeliness, when does the State think that this --  
12 that these claims were -- became untimely?

13 MR. MARSHALL: It's a rule of reasonableness  
14 and diligence that's circumstantially based, and --

15 JUSTICE KAGAN: Well, you have the  
16 circumstances here, so -- so under those circumstances,  
17 when did the claims become untimely?

18 MR. MARSHALL: In the Robbins case, it  
19 explains that you have -- a 5-month span from discovery  
20 of the claims to presentation of the claims would be  
21 reasonable.

22 JUSTICE SOTOMAYOR: The claims here --

23 JUSTICE KAGAN: The 5 months would be  
24 reasonable. So is a year unreasonable? Is 5 months the  
25 outer bounds, you know, assuming you don't have a good

1 reason? I understand that if you have a good reason,  
2 that can lengthen it. But suppose you don't have a good  
3 reason. When does the State think, okay, that's too  
4 late?

5 MR. MARSHALL: There isn't -- there isn't a  
6 defined time line. But our position is that a defined  
7 time line is not a necessity for adequacy. This Court  
8 has endorsed reasons of -- rules of reasonableness and  
9 diligence. For example, in the Federal prisoner context  
10 in Johnson v. United States, this Court said diligence  
11 in discovery, while it isn't exact, is good enough.

12 JUSTICE KAGAN: Well, I'm -- I'm trying to  
13 get to even around, not -- not exact. My standard is  
14 not exact. It's just around. Around what? Around 6  
15 months, around 3 years, around someplace in the middle?

16 MR. MARSHALL: The position of the State is  
17 that Robbins has indicated that 5 months is reasonable,  
18 18 months is definitely too long, and that there is a  
19 discretion-based determination in the middle.

20 JUSTICE ALITO: What if it's filed within 6  
21 months and it's -- it's rejected as untimely, and the  
22 petitioner wants to try to demonstrate that this  
23 represents a grave departure from the way these are  
24 normally handled by the California Supreme Court? Is  
25 there any way for the petitioner to do that?

1 MR. MARSHALL: He would point to the  
2 published authority and argue that his case was outside  
3 of the parameters of what the State had done in the  
4 past. However, our position is that, since California's  
5 ruling is adequate, that there would be no evidence of  
6 such available to this particular litigant. A  
7 hypothetical litigant might be able to proffer that  
8 prior cases had treated claims differently.

9 And the other problem with California is  
10 that it would require two exact same litigants, and it's  
11 very rare for two exact same litigants to have the exact  
12 same claims, the exact same bases for their delay, filed  
13 in exactly the same amount of delay. So true comparison  
14 is difficult.

15 JUSTICE SCALIA: You think 5 years is too  
16 long, though?

17 MR. MARSHALL: Yes.

18 JUSTICE SCALIA: Yes.

19 JUSTICE GINSBURG: There -- this was taken  
20 over by California from capital cases, but in the  
21 capital case context, there -- they have a 90-day  
22 presumption of timeliness. And when they extended the  
23 capital framework to non-capital cases, they left out  
24 the presumption that within 90 days is timely. Was  
25 there reason for that?

1 MR. MARSHALL: Respectfully, I must  
2 disagree. It actually is the other way around. The  
3 capital case policies took the timeliness rule -- took  
4 the general timeliness rule for themselves and added the  
5 presumption.

6 JUSTICE GINSBURG: Was there reason for and  
7 then saying, well, in the capital context, we're going  
8 to make it clear that 90 days -- 90 days is timely. Why  
9 didn't they add that to the original rule?

10 MR. MARSHALL: To the other litigant rule?

11 JUSTICE GINSBURG: Yes.

12 MR. MARSHALL: They, I think, felt that the  
13 rule was adequate the way it was, that a  
14 circumstantially based rule, a reasonableness-based  
15 rule, was sufficient to guide the conduct of litigants  
16 to tell them what they needed to do to present their  
17 case.

18 JUSTICE GINSBURG: Well, why would it be  
19 different in the capital context? What was the reason  
20 for adding the 90 days there?

21 MR. MARSHALL: Capital cases are  
22 significantly more complex, the punishments are -- are  
23 more significant, and so additional scrutiny might be  
24 warranted in those contexts.

25 JUSTICE SOTOMAYOR: I'm -- I'm a little bit

1 confused by your response to Justice Scalia. I thought  
2 from your brief that you were positing that there was no  
3 claim of inconsistent application of a rule that could  
4 ever survive.

5 Let's assume for the sake of argument the  
6 following hypothetical, and probably not far off the  
7 mark. Litigants who don't know the law, who claim  
8 they're not educated in it, say that they have just  
9 learned about a new California case that gives them a  
10 ground to challenge their prior sentence. And the  
11 litigants learn about the case anywhere between 3 and 6  
12 months of the issuance of the case by the supreme court.  
13 A dozen litigants apply for this discretionary review,  
14 and half of them are granted review and half are not.  
15 Half of them get a correction of the sentence and half  
16 of them don't. There is no difference between them  
17 that's discernible. They each just claim ignorance.

18 Is that a case where someone would be out of  
19 luck, and why, for a claim of inconsistent application?

20 MR. MARSHALL: I didn't follow the  
21 hypothetical. Was -- were some of the hypothetical  
22 individuals getting time-barred?

23 JUSTICE SOTOMAYOR: Getting time-barred.  
24 Some are time-barred; some --

25 MR. MARSHALL: And some of the individuals



1 were getting relief?

2 JUSTICE SOTOMAYOR: Exactly.

3 MR. MARSHALL: And is there yet a third set  
4 of people who are getting --

5 JUSTICE SOTOMAYOR: No. Some -- all of them  
6 are within that small framework of 3 to 6 months from  
7 the time the supreme court decision was issued. They  
8 all claimed they just learned of it and filed  
9 immediately, and some are getting relief and some are  
10 not.

11 Is that an inconsistent application that  
12 would be cognizable under your view of the rule as it  
13 should be?

14 MR. MARSHALL: That sounds inconsistent to  
15 me, Your Honor. However --

16 JUSTICE SOTOMAYOR: It does. So the  
17 question --

18 MR. MARSHALL: But such a thing would not  
19 occur in California.

20 JUSTICE SOTOMAYOR: I'm sorry. What?

21 MR. MARSHALL: Such a thing would not occur  
22 in California.

23 JUSTICE SOTOMAYOR: Well, that's the issue.

24 MR. MARSHALL: A meritorious --

25 JUSTICE SOTOMAYOR: Which is: What rule do

1 you want us to impose and how does that rule capture  
2 that case?

3 MR. MARSHALL: There's a specific exception  
4 for timeliness in California to preclude fundamental  
5 miscarriages of justice. And anybody that had a  
6 meritorious United States --

7 JUSTICE SOTOMAYOR: You're not answering my  
8 question.

9 MR. MARSHALL: I misunderstood it.

10 JUSTICE SCALIA: Wait. No. Why do you  
11 concede that it would be bad? Can't the State, if it  
12 wishes, give grace to people who did apply late, but  
13 because the case is so meritorious or for any other  
14 reason? The issue is whether those people who filed 5  
15 years later and knew that it was very late, whether  
16 they're entitled to have their cases heard, not whether  
17 the -- the State allows somebody who filed 6 years  
18 earlier to have it heard. How does that do any  
19 injustice to the person who knew that 5 years was, you  
20 know, you're likely to be denied?

21 MR. MARSHALL: I absolutely agree, Your  
22 Honor. The basis for my earlier comments was the -- I  
23 believe the hypothetical was 3 to 6 months, which was a  
24 much shorter period of time.

25 JUSTICE SCALIA: I don't see why the State

1 has to be consistent in it. If -- as a matter of grace,  
2 it can -- it can allow some people, so long as the  
3 people who are denied had every reason to believe that  
4 they were coming in too late, and 5 years is coming in  
5 too late.

6 MR. MARSHALL: Just as occurred in this  
7 case, I absolutely agree, Your Honor.

8 JUSTICE SOTOMAYOR: But it doesn't answer  
9 why inconsistent application among similarly situated  
10 individuals should not provide an avenue of relief.

11 MR. MARSHALL: This Court has never  
12 reversed --

13 JUSTICE SOTOMAYOR: Five years is different.  
14 I'm talking about treatment of similarly situated  
15 individuals differently.

16 MR. MARSHALL: First, this Court has only  
17 looked at the treatment of this individual, not  
18 disparate treatment of prior individuals. The -- the  
19 rule exists for --

20 JUSTICE SOTOMAYOR: Oh, I don't disagree  
21 with you. So that the question I have for your  
22 adversary is whether or not he can point to any case  
23 where a litigant who proffered an -- something that was  
24 evident on the trial record and on the appellate record  
25 was ever granted a merits review after 5 years. Because

1 I don't see them proffering any case that shows that.

2 But -- and I think that may be your argument.

3 MR. MARSHALL: Yes, exactly. That no one --

4 JUSTICE ALITO: Well, I -- I'm not -- I  
5 don't understand your answer, then. You have -- let me  
6 just adapt what Justice Sotomayor said. You have -- a  
7 case, a Supreme Court case is decided. And you have  
8 10 -- 10 habeas petitioners in California who file on  
9 exactly the same day. And five of them, if you were to  
10 get to the merits of their claim under this new decision  
11 of this Court, five of them would be entitled to relief,  
12 five of them would not be entitled to relief on the  
13 merits. And the California Supreme Court holds that the  
14 five who would be entitled to relief are procedurally  
15 barred and the five who were not entitled to relief on  
16 the merits are not, and they are rejected on the merits.  
17 Now, would that be an adequate State ground?

18 MR. MARSHALL: Well, I'm not sure. It  
19 doesn't happen in California that way.

20 JUSTICE ALITO: No, I know --

21 MR. MARSHALL: All right. I'm sorry.

22 JUSTICE ALITO: -- and I'm not suggesting  
23 that it would. But if it were to happen, would that be  
24 adequate?

25 MR. MARSHALL: It doesn't sound like it

1 would be adequate under this Court's prior tests.

2 JUSTICE ALITO: So fair notice is not the  
3 only requirement.

4 MR. MARSHALL: This Court has also required  
5 legitimate State interests, and this Court has used the  
6 legitimate State interests context, like, for example,  
7 in Smith v. Texas, where this Court has declared a  
8 particular kind of violation was a constitutional  
9 violation and the Court exercised its discretion not to  
10 reach the violation, this Court found that the State had  
11 no legitimate State interest in such a ruling.

12 Our point is that --

13 JUSTICE SCALIA: But -- but the cases that  
14 you're using in which we insisted upon adequacy in the  
15 sense of equal treatment of equal people are cases in  
16 which the effect of the State decision was to exclude  
17 the matter from Federal -- from Federal supervision.  
18 The matter could not come before the Federal courts.

19 MR. MARSHALL: Yes, Your Honor.

20 JUSTICE SCALIA: This is something quite  
21 different. This is applying a time limit. I don't see  
22 why we have to apply the same rule and -- and look into  
23 the -- whether it's not discretionary. I mean, to say  
24 it's discretionary always means that sometimes similar  
25 cases may be treated differently.

1 MR. MARSHALL: Yes, Your Honor, exactly.

2 JUSTICE SCALIA: So I don't know why you --  
3 you concede that -- that we take an adequacy rule that's  
4 used for one purpose and should apply it to a totally  
5 different situation.

6 MR. MARSHALL: It was the meritorious nature  
7 of the claims. And in California, meritorious claims  
8 don't receive the time bar because there's exceptions  
9 that take those into consideration.

10 JUSTICE SCALIA: But none of this is -- is a  
11 device as is used in the cases that -- that you are  
12 referring to that go into adequacy, a device to exclude  
13 the Federal courts from the case. That's -- that's not  
14 what's going on here, is it?

15 MR. MARSHALL: That's correct.

16 JUSTICE BREYER: I guess if the situation  
17 were such that a lawyer who is representing a client and  
18 has to figure out has there been too much delay or not,  
19 suppose he looked into the situation thoroughly and he  
20 said, gee, I just have no idea, because half the cases  
21 come out one way and half of them come out the other  
22 way. Could he then go to the California Supreme Court  
23 and say, Court, look what you have been doing? And  
24 would the court then grant a hearing on that and  
25 possibly correct it?

1 MR. MARSHALL: Well, in California, there's  
2 no such evidence, but I suppose that the lawyer could --

3 JUSTICE BREYER: All right. So you're  
4 saying there is no such evidence.

5 MR. MARSHALL: That's correct. In fact --

6 JUSTICE BREYER: That's what I suspected  
7 reading this. But if there were such evidence is there  
8 a route in California that they could deal with it?

9 MR. MARSHALL: Certainly.

10 JUSTICE BREYER: Yes.

11 JUSTICE SCALIA: But that's not a question  
12 of adequacy, is it? It's a question of notice.

13 MR. MARSHALL: That's correct, Your Honor.

14 JUSTICE BREYER: Adequacy of notice, because  
15 no notice might be an inadequate notice.

16 MR. MARSHALL: That's correct.

17 JUSTICE BREYER: And if it's absolutely  
18 divided 50/50, you have no notice. You don't know what  
19 will happen. And it isn't a rule to say, oh, this is  
20 our rule, you don't know what will happen.

21 MR. MARSHALL: Within an area of discretion,  
22 like, for example, the finding of whether a piece of  
23 evidence was hearsay, if the court down the hall finds  
24 the evidence should be excluded and the court in the  
25 next room says it should be admissible, that isn't

1 necessarily an abuse of --

2 JUSTICE BREYER: I agree with you, we are in  
3 hypothetical, never-never land so far. But it's  
4 possible your opponents will convince us it's real land  
5 and not never-never land.

6 CHIEF JUSTICE ROBERTS: And for it to be  
7 real -- just so I understand -- for it to be real, you  
8 have to have a defense counsel, a client comes to him  
9 with a non-frivolous Federal habeas claim, and the  
10 defense counsel says, I can't tell whether we're going  
11 to be barred by this time rule or not. Some courts,  
12 looks like we will; some don't. So -- what?

13 Of course he's going to file the Federal  
14 habeas and see if it's determined to be adequate or  
15 inadequate, correct?

16 MR. MARSHALL: California's rule is  
17 perfectly suited to such a scenario. All that litigant  
18 has to do is explain why they didn't bring the claim  
19 sooner, either from late discovery or some other  
20 impediment, and the substantial delay can be justified  
21 with exactly those sorts of circumstances.

22 JUSTICE KAGAN: What happens if a -- a  
23 person in this position is trying to investigate  
24 multiple claims at once, and some of them are ready to  
25 be put before the court and others are not? How does he



1 know, look, I really better get in there right now and  
2 put whatever I have before the court? Or, look, I have  
3 a little bit more time in order to investigate some of  
4 my claims further? How does he make that determination?

5 MR. MARSHALL: The Gallego case specifically  
6 speaks to that exact circumstance and provides that if  
7 you have a good faith basis in investigating further  
8 triggering facts, you may withhold the claims that  
9 you've already presented -- or prepared, to prevent  
10 piecemeal presentation. And that's a perfectly  
11 acceptable explanation in California.

12 JUSTICE KAGAN: Why is it, Mr. Marshall,  
13 that the -- the California courts have not been a little  
14 bit more transparent about what the presumptive time  
15 limits are? You know, look, it's around a year unless  
16 have you a good reason. You know, at least we're taking  
17 3 years off the table.

18 I mean, why don't we have decisions like  
19 that from the California courts that would -- would help  
20 folks here?

21 MR. MARSHALL: Well, other than the Robbins  
22 decision, which speaks of 5 months as being reasonable,  
23 the court has tried to maintain a discretion-based,  
24 circumstantially driven analysis in which they take  
25 different litigants into consideration. One litigant

1 may be in a maximum security prison and only gets to go  
2 to the library once a month. Another litigant may be in  
3 a minimum security prison; he can go to the library  
4 every day. Those two litigants are going to be  
5 different and should be treated differently.

6 And if I might reserve the remainder of my  
7 time.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
9 Mr. Bigelow.

10 ORAL ARGUMENT OF MICHAEL B. BIGELOW

11 ON BEHALF OF THE RESPONDENT

12 MR. BIGELOW: Mr. Chief Justice, and if it  
13 please the Court:

14 The adequacy inquiry is framed by asking  
15 whether the State rule in question is firmly established  
16 and regularly followed. At its core is the prevention  
17 of State courts from declining to enforce Federal rights  
18 and to maintain Federal authority over the protection of  
19 constitutional rights in the Supremacy Clause. In its  
20 brief at page 7, the State would seem to agree that a  
21 rule is inadequate unless earlier decisions of the State  
22 court are at least consistent.

23 JUSTICE SOTOMAYOR: Well, but what did you  
24 present below, or what has Habeas Corpus Resource Center  
25 presented? A case with a 5-year delay where the claimed

1 errors are apparent on the trial record and the  
2 appellate record, and no justification for the delay is  
3 proffered. Those are the three seminal facts that go to  
4 the requirements of Robbins and the other supreme  
5 court -- other California Supreme Court cases.

6 Do you have one case that's similar where  
7 the court went to the merits?

8 MR. BIGELOW: Sanders was a 5-year case  
9 that's cited in my brief. Jones was --

10 JUSTICE SOTOMAYOR: No. Was that someone  
11 who made a claim based on the trial and appellate record  
12 with no justification?

13 MR. BIGELOW: I'll speak to justification in  
14 just a moment, if I may.

15 JUSTICE SOTOMAYOR: Uh-huh.

16 MR. BIGELOW: And Jones was an 8-year case.  
17 The amicus brief, the Resource Center, cited Cooper,  
18 Duke, and Hardiman. Cooper was a 5-year case. Those  
19 were both IAC claims which appear to -- with respect to  
20 the Sanders and the Jones case, I cannot -- I do not  
21 know specifically what the claim was as I stand here,  
22 and I apologize for that. But let us look at  
23 justification for just a moment. The justification  
24 offered in those cases was that the habeas petitioner  
25 was ignorant and had no counsel. Now, I will represent

1 to you that, in the State of California, 99.9 percent of  
2 the lawyers -- the lawyers -- 99 percent of the  
3 petitioners who file aren't represented by counsel and  
4 aren't lawyers themselves, and I will represent further  
5 that probably 98 percent, 99 percent have no more than a  
6 12th grade education.

7 JUSTICE SCALIA: These cases that you cite,  
8 before you go any further -- are they cases in which the  
9 California Supreme Court came out with an opinion saying  
10 that 6 years was okay? Or are they just cases where,  
11 without an opinion, the California Supreme Court went to  
12 the merits?

13 MR. BIGELOW: They are -- well, in the  
14 Sanders case and in the Jones case, there were -- I  
15 believe that they were decisions in -- they were  
16 decisions. These cases predated the Clark/Robbins  
17 situation. In the Cooper case and the Duke case, those  
18 cases --

19 JUSTICE SCALIA: What -- what do you mean  
20 they were decisions, written opinions or just went to  
21 the merits and decided the merits? Did they say  
22 anything about the delay question?

23 MR. BIGELOW: They did say something about  
24 the delay question in at least two of the cases, well,  
25 at least in one of the cases, the Mitchell case, which

1 was a 2-year delay. They said 2 years is unreasonable,  
2 but I didn't cite those. And I cannot speak to --

3 JUSTICE SCALIA: But the other side says  
4 that, unless there is an opinion, the reason they may  
5 have gone to the merits is it was just a lot easier.

6 MR. BIGELOW: No --

7 JUSTICE SCALIA: They didn't have to worry  
8 about it.

9 MR. BIGELOW: To that extent, it -- it's my  
10 recollection they went to the merits. They're not  
11 silent denials, and they don't cite Clark/Robbins  
12 because they predated Clark/Robbins. With respect to  
13 the Cooper case and Duke case, those I believe were  
14 silent denials. Now -- and that's the interesting thing  
15 about California. We are presuming -- we are presuming  
16 and this Court has reached that presumption -- that they  
17 are merit denials when they are silent, but we really  
18 don't know --

19 JUSTICE BREYER: Well, that's a puzzle to  
20 me. I mean, Justice Scalia's question was courts all  
21 the time -- they -- you used see all the time they don't  
22 decide an issue of whether it's filed too late because  
23 it's the simplest thing just to decide the merits. It's  
24 the same result. And sometimes they don't do that. But  
25 that happens often in a district court on appeal and

1 triple in a supreme court which has hundreds or  
2 thousands of questions for review. So how do we know  
3 that that simple practice, which I've never heard of as  
4 attacked as unconstitutional -- how do we know that that  
5 isn't what's going on?

6 MR. BIGELOW: Well, in -- in any given year  
7 recently, in recent history at least, there are about  
8 800 truly silent denials, no explanation. Now, the  
9 State says we can't consider them because they mean  
10 nothing. From our perspective, they have to mean  
11 something, and they have to count because we don't have  
12 the information that the litigant in this matter is --  
13 doesn't have the same kind of resources, for example,  
14 that the State does.

15 JUSTICE BREYER: All right, but that's --  
16 they -- what's your point? Eight hundred are silent.  
17 What does that show?

18 MR. BIGELOW: That they have got to count in  
19 the adequacy -- in the consistency application, they've  
20 got to count against the Petitioner.

21 JUSTICE BREYER: Why?

22 MR. BIGELOW: Because the Petitioner is the  
23 one who has the resources and has the opportunity --

24 JUSTICE BREYER: Well, I mean, but then you  
25 can make any claim against him. I mean, what I

1 wonder -- maybe this is where I'm leading -- the  
2 California Supreme Court is not the only court in  
3 California where people file for habeas petitions, is  
4 it?

5 MR. BIGELOW: No. The appellate court --

6 JUSTICE BREYER: Yes. So why, if there's  
7 inconsistency in this rule, wouldn't somebody go look at  
8 the decisions of the appellate courts which write their  
9 reasons down, and then you would know whether it is  
10 being decided -- applied inconsistently or not

11 inconsistently. Why look at a blank wall? Why not look  
12 at people who write opinions? And then you'll find out.

13 MR. BIGELOW: Not all -- not all habeas  
14 petitions in California are filed in lower courts.

15 JUSTICE BREYER: No, of course not. But is  
16 your claim -- are you conceding, or are you conceding,  
17 are you denying, are you just saying nothing about  
18 whether the practice in this rule, applying the rule of  
19 substantial unexcused delay, disqualifies you for --  
20 that's the rule, isn't it?

21 MR. BIGELOW: That's the rule.

22 JUSTICE BREYER: All right. Are you saying  
23 it is being applied consistently or inconsistently or  
24 you do not know --

25 MR. BIGELOW: It is being applied --

1 JUSTICE BREYER: -- in all courts below the  
2 California Supreme Court?

3 MR. BIGELOW: In all courts below, I do not  
4 know, but --

5 JUSTICE BREYER: So you don't know. So what  
6 you've come -- what you've done your research on are  
7 questions that cannot be answered due to the fact that a  
8 supreme court normally doesn't say why when it denies  
9 something, but you haven't looked into the research that  
10 is readily obtainable, which is these are courts that  
11 write opinions. Is that -- have I gotten that  
12 correctly?

13 MR. BIGELOW: That's -- .

14 JUSTICE BREYER: Because if that's  
15 correct --

16 MR. BIGELOW: That would be a correct  
17 statement.

18 JUSTICE BREYER: All right. Then I don't  
19 see why you didn't because it would be so easy, if  
20 you're right, to show this from the lower courts, but of  
21 course if you're wrong, it wouldn't be easy, then a  
22 blank wall is better than nothing.

23 Now, what can you say that will disabuse me  
24 of the notion that I just expressed?

25 MR. BIGELOW: The -- the lower appellate



1 courts -- there are six -- there are six district --  
2 district courts. There are six appellate districts, I  
3 guess, within the State -- within the State of  
4 California and who knows how many superior courts. For  
5 a petitioner to examine the holdings, the rulings in  
6 each of those districts would be virtually impossible.  
7 The only one -- for a petitioner who is in prison, who  
8 is unrepresented by counsel, and let's not forget that  
9 non-capital habeas petitioners, and this is a  
10 non-capital habeas petitioner, is not represented by  
11 counsel.

12 JUSTICE BREYER: No, no. But some are --  
13 there's a thing called sampling techniques, and sampling  
14 techniques are designed to limit the burden. I'm not  
15 saying it wouldn't be burdensome, but you have examined  
16 thousands of cases. And so I'm back to my original  
17 question. And statisticians, many of whom would like to  
18 help you perhaps you could find some, could do this for  
19 you, I think.

20 MR. BIGELOW: Amicus did it with respect to  
21 the California Supreme Court.

22 JUSTICE BREYER: The wrong court. And  
23 amicus did it from the time that -- that the case was  
24 filed, while the rule is you start the period of running  
25 from the case it was reasonably -- the person should

1 reasonably have known his issue, which isn't the same  
2 time as the time his case was decided against him. So,  
3 yes.

4 MR. BIGELOW: Well, that's an excellent  
5 point the Court makes. And it is that -- nobody in this  
6 room, nobody in this room can tell this -- this litigant  
7 when his petition was filed late.

8 JUSTICE BREYER: That's true.

9 MR. BIGELOW: And so --

10 CHIEF JUSTICE ROBERTS: Well, but everybody  
11 -- everybody in this room can tell him that he is  
12 obligated to file the petition as promptly as the  
13 circumstances allow. He has complete notice of that.  
14 And if he wants to go and do the research and say, well,  
15 here's one where they let it in after 5 months, but  
16 here's one where they didn't leave it in after 9 months,  
17 and he sits here and decides so I'm going to wait 9  
18 months and put my money on that court -- that -- that is  
19 not a scenario that's likely to happen, right?

20 MR. BIGELOW: That -- that -- it is not a  
21 scenario that is likely to happen, but the construct  
22 that the Court has -- "as promptly as circumstances  
23 would allow" shows up in a footnote in a capital case.  
24 It -- that --

25 CHIEF JUSTICE ROBERTS: You're not

1 challenging that as the State rule, are you?

2 MR. BIGELOW: That is the -- that's the  
3 State rule that they proffer.

4 CHIEF JUSTICE ROBERTS: Right.

5 MR. BIGELOW: That is the rule that the  
6 State proffers. And what I'm suggesting is that that  
7 rule is so vague and unknown, in the context at least of  
8 the habeas litigation, no one understands what that rule  
9 means. How prompt is prompt?

10 JUSTICE KAGAN: Well, Mr. Bigelow, is that  
11 right? I take your point that nobody can say exactly  
12 when Mr. Martin's claims became untimely, but 5 years is  
13 untimely, isn't it?

14 MR. BIGELOW: Five years is not untimely  
15 if --

16 JUSTICE KAGAN: I mean, if there's a very  
17 good reason, but 5 years without an explanation is --  
18 why is that a hard question?

19 MR. BIGELOW: Even with an explanation, 5  
20 years is not beyond the pale of cases that have been  
21 previously decided and with respect to similarly  
22 situated litigants. Other cases in California -- and  
23 don't forget, please, that the -- the Habeas Corpus  
24 Research Center took only a small sample of a single day  
25 and that was the day that Martin's decision came down.

1 CHIEF JUSTICE ROBERTS: And they didn't look  
2 at possible justifications at all, correct?

3 MR. BIGELOW: There was no justification  
4 with respect to Mr. Martin's petition, that's correct.

5 CHIEF JUSTICE ROBERTS: No, no. I'm not  
6 asking about Mr. Martin's.

7 MR. BIGELOW: Oh, I'm sorry.

8 CHIEF JUSTICE ROBERTS: This -- the analysis  
9 that the amicus undertook simply looked at the  
10 chronological time. They did not consider the fact  
11 that, for example, somebody with 3 years might have had  
12 an explanation; somebody with 1 year might have not had  
13 any. And they may view those cases as different cases.

14 MR. BIGELOW: I -- I would disagree. I  
15 think that they did, in fact, look at explanations for  
16 delay, and a curious thing that they did find, which is  
17 in their brief, is that even though -- cases which --

18 CHIEF JUSTICE ROBERTS: Well, how did they  
19 look -- did they look for explanations for delay when  
20 you had the one-sentence denial?

21 MR. BIGELOW: I think the short answer to  
22 that is yes, but they also looked at silent denials as  
23 well. So they found that where there was no explanation  
24 for delay, more of those cases were decided actually on  
25 the merits than cases that did offer a delay. So

1 there's a -- a gross inconsistency, a gross  
2 inconsistency between the need for justification of  
3 delay.

4 JUSTICE GINSBURG: Well, your --

5 CHIEF JUSTICE ROBERTS: Well, how much range  
6 are you willing to give the State? Do they have 3  
7 months' range? I mean, if you come in and say, well,  
8 here they were filed in 9 months and they were allowed,  
9 and here they were filed in 6 months and they weren't  
10 allowed.

11 Is that a problem under our consistency  
12 requirement?

13 MR. BIGELOW: It wouldn't be a problem.  
14 That would be a discretionary rule if there were  
15 guidelines; if there were guidelines --

16 CHIEF JUSTICE ROBERTS: No, it says --

17 MR. BIGELOW: -- some kind of guidelines --

18 CHIEF JUSTICE ROBERTS: It says "as promptly  
19 as the circumstances allow." And then they go back and  
20 say there is a 3-range, a 3-month range.

21 MR. BIGELOW: Oh, if they went back, with  
22 decisional law, decided the range?

23 CHIEF JUSTICE ROBERTS: You do the same sort  
24 of research you've done here, and you find out that --  
25 that there's a 3-month range. Sometimes -- I mean,

1 there are cases and you can show a lot where they are  
2 allowed at 9 months, and then you find cases that are  
3 not allowed under 6 months.

4 MR. BIGELOW: I would be in a lot more  
5 tenuous position arguing this case if there was some  
6 guidance to litigants with respect to what does  
7 constitute a reasonable time period within which to  
8 file. What --

9 JUSTICE GINSBURG: And suppose -- suppose  
10 California had a rule that said that you have to file  
11 within 1 year of the finality of the conviction, absent  
12 good cause for the delay. If that were the rule that  
13 California had, your client certainly would be untimely  
14 and you wouldn't have a leg to stand on, right?

15 MR. BIGELOW: If that were the rule, the  
16 petition would have been filed timely.

17 JUSTICE GINSBURG: Would --

18 MR. BIGELOW: That's my answer. Had that --  
19 that is my answer to that question. Had that time  
20 period been known, the petition would have been filed  
21 timely.

22 JUSTICE GINSBURG: But if there is a  
23 requirement of prompt -- as promptly as circumstances  
24 permit, wouldn't a person know that 5 years is not as  
25 prompt as circumstances permitted?

1 MR. BIGELOW: There has -- my answer is no,  
2 because in California there are no guidelines. That  
3 came in the Clark decision, which was 1993, and nothing  
4 has been decided in the State of California to define,  
5 to clarify, to narrow what constitutes "promptly." What  
6 constitutes "promptly."

7 JUSTICE KAGAN: Why was this petition not  
8 filed for 5 years?

9 MR. BIGELOW: I'm sorry.

10 JUSTICE KAGAN: Why -- why was this petition  
11 not filed for 5 years?

12 MR. BIGELOW: The record is -- does not  
13 speak to that point specifically.

14 JUSTICE GINSBURG: But didn't this come  
15 about because it was returned? This was not -- I'm  
16 thinking about -- he didn't -- he didn't make any claim  
17 that he was -- he was diligent.

18 MR. BIGELOW: I'm sorry.

19 JUSTICE GINSBURG: He didn't make any claim  
20 that he was diligent in filing it 5 years late.

21 MR. BIGELOW: There were no claims made  
22 excusing the -- excusing the filing at that time period.

23 JUSTICE SCALIA: Let's assume that -- that  
24 California had just adopted this -- this rule that  
25 habeas petitions have to be filed as promptly as

1 circumstances permit. They've just brand-new adopted  
2 it, and you're the lawyer for somebody who says, you  
3 know, I think I'm going to wait 5 years.

4 Don't you think that even if there were no  
5 California law on the subject, you would know that his  
6 habeas claim is going to be denied?

7 MR. BIGELOW: If this were a --

8 JUSTICE SCALIA: Do you really need case law  
9 to tell you that 5 years is not as promptly as  
10 circumstances permit when you -- when you have no  
11 justification?

12 MR. BIGELOW: Decisional law is what our  
13 system is all about, Your Honor.

14 JUSTICE SCALIA: Oh, so you can't have a  
15 first case?

16 MR. BIGELOW: No, I think you can. I think  
17 you can have a first case so long as -- so long as the  
18 standard itself is not so vague --

19 JUSTICE SCALIA: Oh, okay.

20 MR. BIGELOW: -- that reasonable -- that  
21 reasonable men are able -- so long as reasonable men are  
22 able to understand the standard.

23 JUSTICE SCALIA: You think reasonable men  
24 differ about 5 years?

25 MR. BIGELOW: Well --



1 JUSTICE KAGAN: Mr. Bigelow, isn't this  
2 similar to the rule that governed Federal habeas review  
3 prior to AEDPA?

4 MR. BIGELOW: Well --

5 JUSTICE KAGAN: A similar kind of delay  
6 standard, whatever "delay" means.

7 MR. BIGELOW: No, if I recall, the standard  
8 was prejudicial delay. If I recall correctly. And  
9 prejudicial delay, if I'm correct, is a quantifiable  
10 standard. It is a standard that had, over the years,  
11 come to be understood. There was a -- a shared  
12 expectation with what prejudice encompassed. And so  
13 yes, it's similar, but it's not exact. It's not the  
14 standard in California.

15 And if I may, California clearly understands  
16 that case law can offer guidance to litigants. In *In re*  
17 *Harris*, a case cited by -- by both of us, by both  
18 parties, the State of California was concerned about the  
19 *Walterus* rule, which is another procedural bar. And it  
20 went on to -- it acknowledged that it wasn't clear at  
21 that time, and it went on to explain what the *Walterus*  
22 rule was all about and why it was needed.

23 In another case, more recently, the State of  
24 California -- a case not cited, the *Kelly* case; it's a  
25 2006 case -- the California Supreme Court directed its

1 lower courts over which it supervises to provide greater  
2 detail in their analysis of Wende briefs, which is the  
3 State's alternative to the Anders brief, in order to  
4 provide guidance to litigants, to provide guidance to  
5 justices, and to -- to provide guidance to the Federal  
6 courts who may be called upon to determine procedural  
7 bars.

8 CHIEF JUSTICE ROBERTS: Now, I understand  
9 that you'd have a much stronger case if you were dealing  
10 with a judge-made rule about timeliness, if the courts,  
11 on their own authority, said, look, we're not going to  
12 look at things that are filed 4 years late because that  
13 prejudices the State, it prejudices us, et cetera.

14 But here you have something different. You  
15 have a rule, right? An established rule: promptly as  
16 the circumstances allow.

17 MR. BIGELOW: Judge-made.

18 CHIEF JUSTICE ROBERTS: Judge-made, but it's  
19 been around for a long time. This isn't a new rule  
20 that's just coming in.

21 MR. BIGELOW: So a rule in a footnote in a  
22 capital case.

23 CHIEF JUSTICE ROBERTS: Well, let me get  
24 back. I tried to -- when you made that point earlier, I  
25 wanted to follow up on it. Your claim is not that you

1 don't know or defendants in California don't know that  
2 the rule is "as promptly as the circumstances allow," do  
3 you?

4 MR. BIGELOW: No.

5 CHIEF JUSTICE ROBERTS: No. I thought you  
6 had fair notice of that rule.

7 MR. BIGELOW: Yes.

8 CHIEF JUSTICE ROBERTS: Okay.

9 MR. BIGELOW: Just not the parameters of the  
10 rule. And the parameters of the rule, the guidelines  
11 which guide judges, which guide litigants, is just  
12 simply not there in California, either with respect to  
13 that rule or with respect to substantial delay.

14 JUSTICE ALITO: Isn't your argument that the  
15 California timeliness rule was never an adequate rule,  
16 never can proceed, never can bar consideration of a  
17 Federal claim?

18 MR. BIGELOW: The -- had the -- never. Had  
19 the rule been applied even-handedly, had the rule been  
20 applied consistently, it would certainly be more  
21 adequate. However, and getting back to Justice Scalia's  
22 point, it has never been fairly defined, so it does not  
23 clearly --

24 JUSTICE ALITO: What if Mr. Walker had  
25 waited 20 years; would it still be inadequate as to him?

1                   MR. BIGELOW: In -- that's not -- that's not  
2 this case. The rule hasn't been -- the rule has not  
3 been thoroughly set out, at -- at least the guidelines  
4 haven't been set, and it might be --

5                   JUSTICE GINSBURG: Well, why can't you take  
6 the brackets of -- what was it, 5 months is reasonable  
7 time; 18 months is not a reasonable time? Mr. Martin  
8 falls outside of the 18 months.

9                   MR. BIGELOW: Certainly, one -- one could do  
10 that, but that hasn't been established as the brackets,  
11 and it is, after all, California's rule. And it is  
12 California that -- which needs to make that  
13 determination. Now, it's -- it's not as if California  
14 hadn't actually tried to do that.

15                   JUSTICE GINSBURG: I thought there was a  
16 decision that said 18 months is too long.

17                   MR. BIGELOW: Not a decision that said that.  
18 These were extrapolated -- no, I beg your pardon.

19                   JUSTICE GINSBURG: There was a decision that  
20 said 18 months is too long.

21                   MR. BIGELOW: There was a decision that said  
22 a 16-month period, but that was pre-Clark. That was a  
23 pre-Clark decision that actually did say 16 months after  
24 all is not a particularly long period of time. And  
25 another decision -- I beg your -- I beg the Court's

1 pardon -- another decision said that 2 years wasn't a  
2 particularly long period of time.

3           But those are -- those are pre-Clark  
4 decisions, if you will, and this case is relying upon --  
5 or the State, rather, is relying on what has come after  
6 -- after Clark with respect to its "as promptly as the  
7 circumstances should allow."

8           But the other point that I would like to  
9 make, it's not as if the State of California doesn't  
10 understand the need for a finite period of time to  
11 provide guidance to -- to all parties. In -- in  
12 Saffold, the State requested this Court presume a filing  
13 period. I think it was -- I want to say 60 days. More  
14 recently in Chavez, a filing period was requested to be  
15 presumed, again by the State.

16           And both occasions, this -- this Court  
17 declined because it isn't this Court's prerogative to  
18 set rules for the State. What this Court did do is it  
19 certified the question to the State of California, or  
20 they asked the Ninth Circuit at least to certify the  
21 question to the State of California. The Ninth Circuit  
22 did exactly as this Court asked it to do and certified  
23 the question, and the State of California said: We're  
24 not going to tell you what a timeliness period is.

25           Now, that does not help pro se litigants

1 with minimal education, without benefit of counsel, who  
2 are the vast majority of habeas petitioners in the State  
3 of California.

4 JUSTICE ALITO: How many --

5 MR. BIGELOW: They --

6 JUSTICE ALITO: How many of these petitions  
7 are filed each year in the California Supreme Court?

8 MR. BIGELOW: Approximately 2,500, give or  
9 take.

10 JUSTICE ALITO: Approximately what?

11 MR. BIGELOW: Approximately 2,500, based on  
12 a LexisNexis kind of search.

13 JUSTICE ALITO: With that many petitions, is  
14 there any possibility that a multifactor test such as  
15 the one that California is applying could be applied  
16 with any degree of regularity, unless there's some sort  
17 of secret internal guidelines that are being applied by  
18 the California Supreme Court in deciding this?

19 MR. BIGELOW: That's the problem. That's  
20 the problem. The test that is applied without  
21 guidelines, without any kind of guidelines. Judicial  
22 discretion -- judicial discretion is informed  
23 discretion; it is not discretion -- it's -- it's  
24 judgment pursuant to known guidelines. It is not a  
25 judgment issued pursuant to inclination.

1           And the concern is that with this kind of  
2 amorphous standard, inconsistent and arbitrary  
3 application is impossible to enforce.

4           JUSTICE BREYER: But it's like having rules;  
5 when you have rules and say 60 days or 90 days, you find  
6 impossible cases that you should have heard because it  
7 was the 91st day or it was the 92nd day, and then you  
8 give the people equitable discretion to depart from it,  
9 and pretty soon you get litigation over that. I mean,  
10 there's no perfect system.

11           MR. BIGELOW: Discretion to depart from a  
12 rule that has been violated is one thing. Here, there  
13 is no quantifiable or known parameters within which  
14 discretion --

15           JUSTICE SOTOMAYOR: So is the solution for  
16 California to say, if you delay more than a year from  
17 when you should have known, you're barred except we'll  
18 excuse it for any number of reasons?

19           MR. BIGELOW: Certainly, and --

20           JUSTICE SOTOMAYOR: That would be a  
21 regularly and consistently applied rule in your mind?

22           MR. BIGELOW: Well --

23           JUSTICE SOTOMAYOR: That would be enough?

24           MR. BIGELOW: It -- it wouldn't necessarily  
25 be consistently applied until we're down the road and we

1 learn how consistently it has, in fact, been applied,  
2 but certainly it would be -- it would be an appropriate  
3 rule.

4 JUSTICE SCALIA: You may be -- you'd better  
5 be careful about what you wish for because I am not sure  
6 that the kind of system that's being proposed is going  
7 to be better for habeas applicants than the one that  
8 California now has. We really don't know that, do we?

9 MR. BIGELOW: We -- if -- if we collectively  
10 screamed and yelled when AEDPA passed with its 1-year  
11 statute of limitations, we've learned to live with it,  
12 and we meet the deadlines because we know what the  
13 deadlines are.

14 JUSTICE SOTOMAYOR: And pro se litigants who  
15 don't know deadlines generally are going to live with  
16 knowing that -- what?

17 MR. BIGELOW: They've got a better chance of  
18 -- they've got a better chance of meeting deadlines if  
19 they know what those deadlines are, and there's nothing  
20 to take -- there is nothing to take the flexibility from  
21 the California Supreme Court if there is a deadline.  
22 But the --

23 JUSTICE BREYER: Well, what about -- that's  
24 why I go back to the lower courts. If there really is a  
25 problem here, why wouldn't the bar look into how well



1 this practice is working in the lower courts and find  
2 out, well, what is the practice? How do they use it?  
3 Do we want more flexibility? Do we want more definite  
4 rules? That's -- I agree that you put your finger on a  
5 problem, an important problem. I'm not at all certain  
6 that the one system is better or required or compulsory.

7 MR. BIGELOW: The red light is going to go  
8 on in an about a minute. Let me answer it this way:  
9 The most powerful court probably in the world requested  
10 clarification of the rule and didn't get it. I don't  
11 know who else is going to.

12 Unless there are other questions --

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Marshall, you have 4 minutes remaining.

15 REBUTTAL ARGUMENT OF TODD MARSHALL

16 ON BEHALF OF THE PETITIONERS

17 MR. MARSHALL: This Court has explained, in  
18 *Dugger v. Adams*, that a handful of inconsistent cases do  
19 not undermine the adequacy inquiry, and unless the  
20 inconsistency becomes so profound that it undermines  
21 fair notice, it should not matter that there are some  
22 different rulings that can be shown. There's no reason  
23 to think that a rule that has a bright deadline and then  
24 takes into considerations after the deadline is somehow  
25 preferable to a rule that takes into considerations

1 discretionary circumstances in the first instance.

2 And unless there are any further  
3 questions --

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
5 The case is submitted.

6 (Whereupon, at 11:59 a.m., the case in the  
7 above-entitled matter was submitted.)

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<p style="text-align: center;"><b>A</b></p> <p><b>able</b> 14:7 40:21,22  <b>above-entitled</b> 1:11 50:7  <b>absent</b> 38:11  <b>absolutely</b> 18:21 19:7 23:17  <b>abuse</b> 24:1  <b>acceptable</b> 25:11  <b>acknowledged</b> 41:20  <b>Adams</b> 49:18  <b>adapt</b> 20:6  <b>add</b> 15:9  <b>added</b> 15:4  <b>adding</b> 15:20  <b>additional</b> 3:11 10:16,20,21 15:23  <b>address</b> 8:12,17  <b>addressing</b> 8:14 12:3  <b>adequacy</b> 7:23,25 9:4 13:7 21:14 22:3,12 23:12,14 26:14 30:19 49:19  <b>adequate</b> 3:16 14:5 15:13 20:17,24 21:1 24:14 43:15 43:21  <b>adequately</b> 3:10  <b>admissible</b> 23:25  <b>adopted</b> 39:24 40:1  <b>adversary</b> 19:22  <b>AEDPA</b> 41:3 48:10  <b>afford</b> 8:23  <b>agree</b> 3:20 18:21 19:7 24:2 26:20 49:4  <b>AL</b> 1:3  <b>ALITO</b> 13:20 20:4 20:20,22 21:2 43:14,24 46:4,6,10 46:13  <b>allow</b> 19:2 34:13,23</p>	<p>37:19 42:16 43:2 45:7  <b>allowed</b> 37:8,10 38:2,3  <b>allows</b> 18:17  <b>alternative</b> 42:3  <b>Amendment</b> 5:16,18  <b>amicus</b> 27:17 33:20 33:23 36:9  <b>amorphous</b> 47:2  <b>amount</b> 9:9 10:10 14:13  <b>analysis</b> 25:24 36:8 42:2  <b>Anders</b> 42:3  <b>answer</b> 8:19 19:8 20:5 36:21 38:18 38:19 39:1 49:8  <b>answered</b> 32:7  <b>answering</b> 18:7  <b>anybody</b> 18:5  <b>apologize</b> 27:22  <b>apparent</b> 4:22 27:1  <b>appeal</b> 10:19 29:25  <b>appear</b> 27:19  <b>APPEARANCES</b> 1:14  <b>appears</b> 12:5,7  <b>appellate</b> 19:24 27:2 27:11 31:5,8 32:25 33:2  <b>applicants</b> 48:7  <b>application</b> 5:6,10 16:3,19 17:11 19:9 30:19 47:3  <b>applied</b> 6:16 31:10 31:23,25 43:19,20 46:15,17,20 47:21 47:25 48:1  <b>apply</b> 5:13,18 6:22 16:13 18:12 21:22 22:4  <b>applying</b> 5:15 7:19 21:21 31:18 46:15</p>	<p><b>appointed</b> 1:19  <b>appropriate</b> 48:2  <b>Approximately</b> 46:8 46:10,11  <b>arbitrary</b> 7:20 8:6,9 47:2  <b>area</b> 23:21  <b>argue</b> 14:2  <b>arguing</b> 38:5  <b>argument</b> 1:12 2:2,5 2:8 3:3,6 16:5 20:2 26:10 43:14 49:15  <b>articulated</b> 11:22  <b>asked</b> 45:20,22  <b>asking</b> 26:14 36:6  <b>aspect</b> 12:10  <b>assist</b> 9:3  <b>assume</b> 7:11 16:5 39:23  <b>assuming</b> 7:23 12:25  <b>attacked</b> 30:4  <b>Attorney</b> 1:15  <b>authority</b> 14:2 26:18 42:11  <b>available</b> 14:6  <b>avenue</b> 19:10  <b>avoid</b> 7:21  <b>a.m</b> 1:13 3:2 50:6</p> <hr/> <p style="text-align: center;"><b>B</b></p> <p><b>B</b> 26:10  <b>back</b> 11:16 33:16 37:19,21 42:24 43:21 48:24  <b>bad</b> 18:11  <b>bar</b> 6:17 7:9 11:21 22:8 41:19 43:16 48:25  <b>barred</b> 20:15 24:11 47:17  <b>bars</b> 4:22 42:7  <b>based</b> 12:14 15:14 27:11 46:11</p>	<p><b>bases</b> 14:12  <b>basically</b> 5:3  <b>basis</b> 7:20 8:18 18:22 25:7  <b>beg</b> 44:18,25,25  <b>behalf</b> 1:16,19 2:4,7 2:10 3:7 26:11 49:16  <b>believe</b> 18:23 19:3 28:15 29:13  <b>benefit</b> 46:1  <b>better</b> 25:1 32:22 48:4,7,17,18 49:6  <b>beyond</b> 35:20  <b>bit</b> 15:25 25:3,14  <b>blank</b> 31:11 32:22  <b>bounds</b> 12:25  <b>brackets</b> 44:6,10  <b>brand-new</b> 40:1  <b>BREYER</b> 22:16 23:3,6,10,14,17 24:2 29:19 30:15 30:21,24 31:6,15 31:22 32:1,5,14,18 33:12,22 34:8 47:4 48:23  <b>brief</b> 3:21 4:3 5:8,25 16:2 26:20 27:9,17 36:17 42:3  <b>briefs</b> 42:2  <b>bright</b> 49:23  <b>bring</b> 24:18  <b>burden</b> 33:14  <b>burdensome</b> 33:15</p> <hr/> <p style="text-align: center;"><b>C</b></p> <p><b>C</b> 2:1 3:1  <b>California's</b> 4:19 10:3 14:4 24:16 44:11  <b>called</b> 33:13 42:6  <b>capital</b> 14:20,21,23 15:3,7,19,21 34:23 42:22</p>	<p><b>capricious</b> 7:20 8:7 8:9  <b>capture</b> 18:1  <b>careful</b> 48:5  <b>cases</b> 6:1,14 8:14 9:6,23 14:8,20,23 15:21 18:16 21:13 21:15,25 22:11,20 27:5,24 28:7,8,10 28:16,18,24,25 33:16 35:20,22 36:13,13,17,24,25 38:1,2 47:6 49:18  <b>category</b> 3:23  <b>cause</b> 38:12  <b>Center</b> 3:22 5:25 26:24 27:17 35:24  <b>certain</b> 6:14 9:8 49:5  <b>certainly</b> 10:15 23:9 38:13 43:20 44:9 47:19 48:2  <b>certified</b> 45:19,22  <b>certify</b> 45:20  <b>cetera</b> 42:13  <b>challenge</b> 16:10  <b>challenges</b> 10:17,19 10:22 12:6  <b>challenging</b> 35:1  <b>chance</b> 48:17,18  <b>changed</b> 9:12  <b>charge</b> 3:20  <b>Charles</b> 1:6 3:10  <b>Chavez</b> 45:14  <b>Chief</b> 3:3,8 4:13 24:6 26:8,12 34:10 34:25 35:4 36:1,5 36:8,18 37:5,16,18 37:23 42:8,18,23 43:5,8 49:13 50:4  <b>chronological</b> 36:10  <b>Circuit</b> 45:20,21  <b>Circuit's</b> 3:17  <b>circumstance</b> 25:6  <b>circumstances</b> 8:15</p>
--	--	--	---	---

<p>10:1,2 12:16,16 24:21 34:13,22 37:19 38:23,25 40:1,10 42:16 43:2 45:7 50:1 <b>circumstantially</b> 12:14 15:14 25:24 <b>citation</b> 7:13 <b>cite</b> 28:7 29:2,11 <b>cited</b> 27:9,17 41:17 41:24 <b>claim</b> 10:4,9,14 11:3 16:3,7,17,19 20:10 24:9,18 27:11,21 30:25 31:16 39:16 39:19 40:6 42:25 43:17 <b>claimed</b> 17:8 26:25 <b>claims</b> 3:12,13 10:16,21 11:11 12:12,17,20,20,22 14:8,12 22:7,7 24:24 25:4,8 27:19 35:12 39:21 <b>clarification</b> 49:10 <b>clarify</b> 39:5 <b>Clark</b> 7:13 39:3 45:6 <b>Clark/Robbins</b> 28:16 29:11,12 <b>Clause</b> 26:19 <b>clear</b> 15:8 41:20 <b>clearly</b> 41:15 43:23 <b>client</b> 22:17 24:8 38:13 <b>cognizable</b> 17:12 <b>collectively</b> 48:9 <b>come</b> 11:16 21:18 22:21,21 32:6 37:7 39:14 41:11 45:5 <b>comes</b> 24:8 <b>coming</b> 19:4,4 42:20 <b>comments</b> 18:22 <b>comparison</b> 14:13 <b>complete</b> 34:13</p>	<p><b>complex</b> 6:8,9 15:22 <b>compulsory</b> 49:6 <b>concede</b> 18:11 22:3 <b>conceding</b> 5:4,9 31:16,16 <b>concern</b> 47:1 <b>concerned</b> 41:18 <b>concrete</b> 10:6 <b>conduct</b> 15:15 <b>confused</b> 16:1 <b>consider</b> 30:9 36:10 <b>consideration</b> 22:9 25:25 43:16 <b>considerations</b> 49:24,25 <b>considers</b> 10:3 <b>consistency</b> 30:19 37:11 <b>consistent</b> 5:5 6:17 19:1 26:22 <b>consistently</b> 31:23 43:20 47:21,25 48:1 <b>constitute</b> 38:7 <b>constitutes</b> 39:5,6 <b>constitutional</b> 21:8 26:19 <b>construct</b> 34:21 <b>contacting</b> 9:17 <b>context</b> 13:9 14:21 15:7,19 21:6 35:7 <b>contexts</b> 15:24 <b>contrary</b> 3:18 <b>contrast</b> 10:10 <b>conviction</b> 38:11 <b>convince</b> 24:4 <b>Cooper</b> 27:17,18 28:17 29:13 <b>core</b> 26:16 <b>corpus</b> 3:14,22 5:24 10:17 26:24 35:23 <b>corpuses</b> 8:17 <b>correct</b> 7:2,6,12 11:18 22:15,25</p>	<p>23:5,13,16 24:15 32:15,16 36:2,4 41:9 <b>correction</b> 16:15 <b>correctly</b> 32:12 41:8 <b>counsel</b> 9:18 24:8 24:10 26:8 27:25 28:3 33:8,11 46:1 49:13 50:4 <b>count</b> 30:11,18,20 <b>course</b> 24:13 31:15 32:21 <b>courts</b> 4:24 5:5,15 8:11,16 21:18 22:13 24:11 25:13 25:19 26:17 29:20 31:8,14 32:1,3,10 32:20 33:1,2,4 42:1,6,10 48:24 49:1 <b>Court's</b> 3:16 21:1 44:25 45:17 <b>curious</b> 36:16</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D</b> 3:1 <b>day</b> 20:9 26:4 35:24 35:25 47:7,7 <b>days</b> 10:25 11:2 14:24 15:8,8,20 45:13 47:5,5 <b>deadline</b> 48:21 49:23,24 <b>deadlines</b> 48:12,13 48:15,18,19 <b>deal</b> 23:8 <b>dealing</b> 42:9 <b>decide</b> 4:18 6:23 8:8 29:22,23 <b>decided</b> 20:7 28:21 31:10 34:2 35:21 36:24 37:22 39:4 <b>decides</b> 34:17 <b>deciding</b> 46:18</p>	<p><b>decision</b> 3:17 5:16 7:19 17:7 20:10 21:16 25:22 35:25 39:3 44:16,17,19 44:21,23,25 45:1 <b>decisional</b> 37:22 40:12 <b>decisions</b> 25:18 26:21 28:15,16,20 31:8 45:4 <b>declaration</b> 10:12 <b>declared</b> 21:7 <b>declined</b> 45:17 <b>declining</b> 26:17 <b>default</b> 8:12 <b>defend</b> 5:9 <b>defendants</b> 43:1 <b>defense</b> 24:8,10 <b>define</b> 9:23 39:4 <b>defined</b> 13:6,6 43:22 <b>definite</b> 49:3 <b>definitely</b> 13:18 <b>degree</b> 46:16 <b>delay</b> 3:23 4:6,7,9 4:11,12,15 5:20,22 6:15 9:1,15,16 10:11 14:12,13 22:18 24:20 26:25 27:2 28:22,24 29:1 31:19 36:16,19,24 36:25 37:3 38:12 41:5,6,8,9 43:13 47:16 <b>delayed</b> 11:23,25 12:1 <b>demonstrate</b> 13:22 <b>denial</b> 4:5 36:20 <b>denials</b> 4:4 8:22 9:3 9:4 29:11,14,17 30:8 36:22 <b>denied</b> 7:4,4,9 18:20 19:3 40:6 <b>denies</b> 32:8 <b>denying</b> 4:22 31:17</p>	<p><b>depart</b> 47:8,11 <b>departure</b> 13:23 <b>Deputy</b> 1:15 <b>describing</b> 10:1 <b>designed</b> 33:14 <b>desired</b> 4:12 <b>detail</b> 42:2 <b>determination</b> 13:19 25:4 44:13 <b>determine</b> 4:20 5:21 6:19 42:6 <b>determined</b> 24:14 <b>device</b> 22:11,12 <b>differ</b> 40:24 <b>difference</b> 11:24 16:16 <b>different</b> 15:19 19:13 21:21 22:5 25:25 26:5 36:13 42:14 49:22 <b>differently</b> 14:8 19:15 21:25 26:5 <b>difficult</b> 4:17 14:14 <b>difficulty</b> 9:17 <b>diligence</b> 3:15 12:14 13:9,10 <b>diligent</b> 39:17,20 <b>directed</b> 41:25 <b>disabuse</b> 32:23 <b>disagree</b> 15:2 19:20 36:14 <b>discernible</b> 16:17 <b>disclosure</b> 3:15 <b>discovery</b> 10:8,11 12:19 13:11 24:19 <b>discretion</b> 6:19 21:9 23:21 46:22,22,23 46:23 47:8,11,14 <b>discretionary</b> 16:13 21:23,24 37:14 50:1 <b>discretion-based</b> 11:10 13:19 25:23 <b>discussing</b> 8:23</p>
---	---	--	---	---

<p><b>dismissed</b> 3:23  <b>disparate</b> 19:18  <b>disqualifies</b> 31:19  <b>district</b> 29:25 33:1,2  <b>districts</b> 33:2,6  <b>divided</b> 23:18  <b>doing</b> 22:23  <b>dozen</b> 16:13  <b>driven</b> 25:24  <b>due</b> 32:7  <b>Dugger</b> 49:18  <b>Duke</b> 27:18 28:17                  29:13  <b>D.C</b> 1:8</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>E</b> 2:1 3:1,1  <b>earlier</b> 10:17,22                  11:11 12:5,5,6                  18:18,22 26:21                  42:24  <b>easier</b> 8:15 29:5  <b>easiest</b> 8:8,18  <b>easy</b> 4:17 32:19,21  <b>educated</b> 16:8  <b>education</b> 28:6 46:1  <b>effect</b> 21:16  <b>efficient</b> 4:25 8:13                  8:18  <b>Eight</b> 30:16  <b>either</b> 8:14 9:11                  24:19 43:12  <b>employs</b> 3:14  <b>encompassed</b> 41:12  <b>endorsed</b> 8:11 9:4                  13:8  <b>enforce</b> 26:17 47:3  <b>entitled</b> 18:16 20:11                  20:12,14,15  <b>equal</b> 21:15,15  <b>equation</b> 4:8  <b>equitable</b> 47:8  <b>errors</b> 27:1  <b>ESQ</b> 1:15,18 2:3,6,9</p>	<p><b>established</b> 26:15                  42:15 44:10  <b>et</b> 1:3 42:13  <b>even-handedly</b>                  43:19  <b>everybody</b> 34:10,11  <b>evidence</b> 5:17 8:1,3                  14:5 23:2,4,7,23                  23:24  <b>evident</b> 19:24  <b>exact</b> 13:11,13,14                  14:10,11,11,12                  25:6 41:13  <b>exactly</b> 10:2 14:13                  17:2 20:3,9 22:1                  24:21 35:11 45:22  <b>examine</b> 33:5  <b>examined</b> 33:15  <b>example</b> 5:15 13:9                  21:6 23:22 30:13                  36:11  <b>examples</b> 10:6  <b>excellent</b> 34:4  <b>exception</b> 18:3  <b>exceptions</b> 22:8  <b>exclude</b> 5:17 21:16                  22:12  <b>excluded</b> 23:24  <b>excuse</b> 47:18  <b>excusing</b> 39:22,22  <b>exercised</b> 21:9  <b>exists</b> 19:19  <b>expectation</b> 41:12  <b>explain</b> 24:18 41:21  <b>explained</b> 3:10                  10:20 49:17  <b>explains</b> 12:19  <b>explanation</b> 6:2,4                  25:11 30:8 35:17                  35:19 36:12,23  <b>explanations</b> 36:15                  36:19  <b>explicate</b> 9:6  <b>expressed</b> 32:24</p>	<p><b>extended</b> 14:22  <b>extent</b> 29:9  <b>extrapolated</b> 44:18</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>facie</b> 4:21 7:7  <b>fact</b> 10:6 23:5 32:7                  36:10,15 48:1  <b>factor</b> 11:5  <b>factors</b> 9:15,15  <b>facts</b> 10:8 25:8 27:3  <b>failure</b> 11:4  <b>fair</b> 10:3 21:2 43:6                  49:21  <b>fairly</b> 43:22  <b>faith</b> 25:7  <b>falls</b> 44:8  <b>far</b> 16:6 24:3  <b>Federal</b> 6:21 7:16                  7:21 13:9 21:17,17                  21:18 22:13 24:9                  24:13 26:17,18                  41:2 42:5 43:17  <b>felt</b> 15:12  <b>figure</b> 22:18  <b>file</b> 20:8 24:13 28:3                  31:3 34:12 38:8,10  <b>filed</b> 10:24 13:20                  14:12 17:8 18:14                  18:17 29:22 31:14                  33:24 34:7 37:8,9                  38:16,20 39:8,11                  39:25 42:12 46:7  <b>files</b> 11:2  <b>filing</b> 39:20,22 45:12                  45:14  <b>finality</b> 38:11  <b>find</b> 10:4 31:12                  33:18 36:16 37:24                  38:2 47:5 49:1  <b>finding</b> 8:20 23:22  <b>finds</b> 23:23  <b>finger</b> 49:4  <b>finite</b> 45:10</p>	<p><b>firmly</b> 26:15  <b>first</b> 4:4,15,20 7:22                  11:1,5 19:16 40:15                  40:17 50:1  <b>five</b> 19:13 20:9,11                  20:12,14,15 35:14  <b>flexibility</b> 48:20                  49:3  <b>focus</b> 12:10  <b>folks</b> 25:20  <b>follow</b> 16:20 42:25  <b>followed</b> 26:16  <b>following</b> 16:6  <b>footnote</b> 34:23                  42:21  <b>forced</b> 8:19  <b>forget</b> 33:8 35:23  <b>former</b> 11:17  <b>forth</b> 9:18  <b>found</b> 21:10 36:23  <b>Fourth</b> 5:16,18  <b>framed</b> 26:14  <b>framework</b> 14:23                  17:6  <b>full</b> 10:18  <b>fundamental</b> 18:4  <b>further</b> 25:4,7 28:4                  28:8 50:2</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>G</b> 3:1  <b>gain</b> 4:12  <b>Gallego</b> 25:5  <b>gee</b> 22:20  <b>general</b> 1:15 3:20                  15:4  <b>generally</b> 48:15  <b>getting</b> 16:22,23                  17:1,4,9 43:21  <b>GINSBURG</b> 3:19                  4:14 7:3,8 14:19                  15:6,11,18 37:4                  38:9,17,22 39:14                  39:19 44:5,15,19</p>	<p><b>give</b> 18:12 37:6 46:8                  47:8  <b>given</b> 10:15 30:6  <b>gives</b> 16:9  <b>go</b> 9:16 22:12,22                  26:1,3 27:3 28:8                  31:7 34:14 37:19                  48:24 49:7  <b>going</b> 7:9 15:7 22:14                  24:10,13 26:4 30:5                  34:17 40:3,6 42:11                  45:24 48:6,15 49:7                  49:11  <b>good</b> 11:12 12:25                  13:1,2,11 25:7,16                  35:17 38:12  <b>gotten</b> 32:11  <b>governed</b> 41:2  <b>grace</b> 18:12 19:1  <b>grade</b> 28:6  <b>grant</b> 22:24  <b>granted</b> 16:14 19:25  <b>grave</b> 13:23  <b>greater</b> 42:1  <b>gross</b> 37:1,1  <b>ground</b> 6:22 8:7                  16:10 20:17  <b>grounds</b> 6:19 7:9  <b>guess</b> 8:25 9:1,1                  22:16 33:3  <b>guidance</b> 38:6 41:16                  42:4,4,5 45:11  <b>guide</b> 15:15 43:11                  43:11  <b>guidelines</b> 37:15,15                  37:17 39:2 43:10                  44:3 46:17,21,21                  46:24</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>habeas</b> 3:14,22 4:20                  5:24 8:17 10:17                  11:2,16,17 20:8                  24:9,14 26:24</p>
--	--	---	--	---

<p>27:24 31:3,13 33:9 33:10 35:8,23 39:25 40:6 41:2 46:2 48:7 <b>half</b> 4:8 16:14,14,15 16:15 22:20,21 <b>hall</b> 23:23 <b>handful</b> 49:18 <b>handled</b> 13:24 <b>handling</b> 8:13 <b>happen</b> 20:19,23 23:19,20 34:19,21 <b>happened</b> 9:13 <b>happens</b> 24:22 29:25 <b>hard</b> 7:17,21 35:18 <b>Hardiman</b> 27:18 <b>Harris</b> 41:17 <b>hear</b> 3:3 <b>heard</b> 6:4 18:16,18 30:3 47:6 <b>hearing</b> 22:24 <b>hearsay</b> 23:23 <b>held</b> 5:1 <b>help</b> 25:19 33:18 45:25 <b>history</b> 30:7 <b>holdings</b> 33:5 <b>holds</b> 20:13 <b>Honor</b> 4:4 5:11 9:25 11:18 17:15 18:22 19:7 21:19 22:1 23:13 40:13 <b>hundred</b> 30:16 <b>hundreds</b> 30:1 <b>hypothetical</b> 14:7 16:6,21,21 18:23 24:3</p> <hr/> <p style="text-align: center;"><b>I</b></p> <p><b>IAC</b> 27:19 <b>idea</b> 22:20 <b>ignorance</b> 16:17 <b>ignorant</b> 27:25</p>	<p><b>immediately</b> 17:9 <b>impediment</b> 24:20 <b>important</b> 49:5 <b>importantly</b> 8:22 <b>impose</b> 5:14 18:1 <b>imposition</b> 9:10 <b>impossible</b> 33:6 47:3,6 <b>inadequate</b> 7:24 8:2 23:15 24:15 26:21 43:25 <b>inclination</b> 46:25 <b>include</b> 10:21 11:5 11:11 <b>inconsistency</b> 8:21 31:7 37:1,2 49:20 <b>inconsistent</b> 5:10 16:3,19 17:11,14 19:9 47:2 49:18 <b>inconsistently</b> 31:10 31:11,23 <b>indicate</b> 7:10 <b>indicated</b> 13:17 <b>indicating</b> 11:4 <b>individual</b> 19:17 <b>individuals</b> 16:22,25 19:10,15,18 <b>information</b> 30:12 <b>informed</b> 46:22 <b>injustice</b> 18:19 <b>inquiring</b> 11:7 <b>inquiry</b> 9:3 26:14 49:19 <b>insisted</b> 21:14 <b>instance</b> 50:1 <b>interest</b> 21:11 <b>interesting</b> 29:14 <b>interests</b> 21:5,6 <b>internal</b> 46:17 <b>investigate</b> 24:23 25:3 <b>investigating</b> 25:7 <b>issuance</b> 16:12 <b>issue</b> 8:8 17:23</p>	<p>18:14 29:22 34:1 <b>issued</b> 17:7 46:25</p> <hr/> <p style="text-align: center;"><b>J</b></p> <p><b>JAMES</b> 1:3 <b>Johnson</b> 13:10 <b>Jones</b> 27:9,16,20 28:14 <b>judges</b> 43:11 <b>judge-made</b> 42:10 42:17,18 <b>judgment</b> 46:24,25 <b>judicial</b> 46:21,22 <b>judicially</b> 4:25 8:13 8:18 <b>justices</b> 42:5 <b>justification</b> 4:10 5:21 6:10,15 9:2 27:2,12,13,23,23 36:3 37:2 40:11 <b>justifications</b> 36:2 <b>justified</b> 5:22 10:12 24:20 <b>justify</b> 4:11,15</p> <hr/> <p style="text-align: center;"><b>K</b></p> <p><b>KAGAN</b> 10:13,23 12:9,15,23 13:12 24:22 25:12 35:10 35:16 39:7,10 41:1 41:5 <b>Kagan's</b> 11:1 <b>Kelly</b> 41:24 <b>KENNEDY</b> 8:6 9:14,21 10:24 <b>kind</b> 8:5 10:1,2 21:8 30:13 37:17 41:5 46:12,21 47:1 48:6 <b>king</b> 8:25 <b>knew</b> 18:15,19 <b>know</b> 7:15,18 12:25 16:7 18:20 20:20 22:2 23:18,20 25:1 25:15,16 27:21</p>	<p>29:18 30:2,4 31:9 31:24 32:4,5 38:24 40:3,5 43:1,1 48:8 48:12,15,19 49:11 <b>knowing</b> 48:16 <b>known</b> 34:1 38:20 46:24 47:13,17 <b>knows</b> 33:4</p> <hr/> <p style="text-align: center;"><b>L</b></p> <p><b>lack</b> 7:6 <b>Lambrix</b> 8:11 <b>land</b> 24:3,4,5 <b>late</b> 13:4 18:12,15 19:4,5 24:19 29:22 34:7 39:20 42:12 <b>law</b> 16:7 37:22 40:5 40:8,12 41:16 <b>lawyer</b> 22:17 23:2 40:2 <b>lawyers</b> 28:2,2,4 <b>leading</b> 31:1 <b>learn</b> 16:11 48:1 <b>learned</b> 16:9 17:8 48:11 <b>leave</b> 34:16 <b>left</b> 14:23 <b>leg</b> 38:14 <b>legitimate</b> 21:5,6,11 <b>length</b> 5:20 <b>lengthen</b> 13:2 <b>let's</b> 16:5 33:8 39:23 <b>LexisNexis</b> 46:12 <b>library</b> 26:2,3 <b>light</b> 49:7 <b>limit</b> 21:21 33:14 <b>limitations</b> 48:11 <b>limits</b> 25:15 <b>line</b> 13:6,7 <b>lines</b> 10:25 <b>litigant</b> 9:9 10:4 14:6 14:7 15:10 19:23 24:17 25:25 26:2 30:12 34:6</p>	<p><b>litigants</b> 8:24 14:10 14:11 15:15 16:7 16:11,13 25:25 26:4 35:22 38:6 41:16 42:4 43:11 45:25 48:14 <b>litigation</b> 35:8 47:9 <b>little</b> 15:25 25:3,13 <b>live</b> 48:11,15 <b>long</b> 3:21 6:11 9:1 10:3 13:18 14:16 19:2 40:17,17,21 42:19 44:16,20,24 45:2 <b>longstanding</b> 3:16 <b>look</b> 4:20 5:13,21 8:1 21:22 22:23 25:1,2,15 27:22 31:7,11,11 36:1,15 36:19,19 42:11,12 48:25 <b>looked</b> 9:5 19:17 22:19 32:9 36:9,22 <b>looking</b> 7:25 9:7 <b>looks</b> 5:20 9:18,21 24:12 <b>lot</b> 29:5 38:1,4 <b>lower</b> 31:14 32:20 32:25 42:1 48:24 49:1 <b>luck</b> 16:19</p> <hr/> <p style="text-align: center;"><b>M</b></p> <p><b>maintain</b> 25:23 26:18 <b>majority</b> 46:2 <b>making</b> 5:12 <b>mark</b> 16:7 <b>Martin</b> 1:6 3:4,10 10:18 44:7 <b>Martin's</b> 10:14 35:12,25 36:4,6 <b>material</b> 11:16 <b>matter</b> 1:11 4:23</p>
---	---	---	--	---

<p>8:13 11:14 19:1 21:17,18 30:12 49:21 50:7 <b>matters</b> 5:16 <b>maximum</b> 26:1 <b>mean</b> 5:14,17 11:14 21:23 25:18 28:19 29:20 30:9,10,24 30:25 35:16 37:7 37:25 47:9 <b>means</b> 21:24 35:9 41:6 <b>measure</b> 4:4 9:5 <b>measuring</b> 7:23 <b>meet</b> 48:12 <b>meeting</b> 48:18 <b>men</b> 40:21,21,23 <b>merely</b> 3:15 <b>merit</b> 4:18 29:17 <b>meritless</b> 6:7 8:20 <b>meritorious</b> 7:18 17:24 18:6,13 22:6 22:7 <b>merits</b> 3:24,25 4:17 4:23 6:16,20,23 7:5,11,19 19:25 20:10,13,16,16 27:7 28:12,21,21 29:5,10,23 36:25 <b>method</b> 4:25 8:13 <b>MICHAEL</b> 1:18 2:6 26:10 <b>middle</b> 13:15,19 <b>mind</b> 47:21 <b>minimal</b> 46:1 <b>minimum</b> 26:3 <b>minute</b> 49:8 <b>minutes</b> 49:14 <b>miscarriages</b> 18:5 <b>misunderstood</b> 18:9 <b>Mitchell</b> 28:25 <b>moment</b> 27:14,23 <b>Monday</b> 1:9 <b>money</b> 34:18</p>	<p><b>month</b> 26:2 <b>months</b> 10:11 12:23 12:24 13:15,17,18 13:21 16:12 17:6 18:23 25:22 34:15 34:16,18 37:7,8,9 38:2,3 44:6,7,8,16 44:20,23 <b>morning</b> 3:4 <b>multifactor</b> 46:14 <b>multiple</b> 24:24</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>N</b> 2:1,1 3:1 <b>narrow</b> 39:5 <b>nature</b> 22:6 <b>necessarily</b> 4:23 24:1 47:24 <b>necessity</b> 13:7 <b>need</b> 37:2 40:8 45:10 <b>needed</b> 15:16 41:22 <b>needs</b> 44:12 <b>never</b> 3:10 7:22 9:4 10:20 19:11 30:3 43:15,16,16,18,22 <b>never-never</b> 24:3,5 <b>new</b> 11:3 16:9 20:10 42:19 <b>Ninth</b> 3:17 45:20,21 <b>non-capital</b> 14:23 33:9,10 <b>non-frivolous</b> 24:9 <b>normally</b> 13:24 32:8 <b>notice</b> 8:23 21:2 23:12,14,15,15,18 34:13 43:6 49:21 <b>notion</b> 32:24 <b>novel</b> 9:12 <b>November</b> 1:9 <b>number</b> 6:14 47:18</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>O</b> 2:1 3:1</p>	<p><b>obligated</b> 34:12 <b>obtainable</b> 32:10 <b>occasions</b> 45:16 <b>occur</b> 17:19,21 <b>occurred</b> 19:6 <b>offer</b> 11:10 36:25 41:16 <b>offered</b> 6:10,15 9:2 27:24 <b>oh</b> 19:20 23:19 36:7 37:21 40:14,19 <b>okay</b> 13:3 28:10 40:19 43:8 <b>once</b> 24:24 26:2 <b>one-sentence</b> 36:20 <b>operate</b> 4:10 <b>opinion</b> 28:9,11 29:4 <b>opinions</b> 28:20 31:12 32:11 <b>opponents</b> 24:4 <b>opportunity</b> 4:11 30:23 <b>oral</b> 1:11 2:2,5 3:6 26:10 <b>order</b> 25:3 42:3 <b>original</b> 15:9 33:16 <b>ought</b> 8:16 <b>outer</b> 12:25 <b>outside</b> 14:2 44:8</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>P</b> 3:1 <b>page</b> 2:2 26:20 <b>pale</b> 35:20 <b>parameters</b> 14:3 43:9,10 47:13 <b>pardon</b> 44:18 45:1 <b>particular</b> 14:6 21:8 <b>particularly</b> 44:24 45:2 <b>parties</b> 41:18 45:11 <b>passed</b> 48:10 <b>patently</b> 6:7 8:20 <b>people</b> 17:4 18:12</p>	<p>18:14 19:2,3 21:15 31:3,12 47:8 <b>percent</b> 3:23 28:1,2 28:5,5 <b>perfect</b> 47:10 <b>perfectly</b> 24:17 25:10 <b>period</b> 18:24 33:24 38:7,20 39:22 44:22,24 45:2,10 45:13,14,24 <b>permit</b> 8:14 38:24 40:1,10 <b>permitted</b> 4:24 8:17 38:25 <b>person</b> 18:19 24:23 33:25 38:24 <b>persons</b> 4:10 <b>perspective</b> 30:10 <b>petition</b> 4:20 11:24 34:7,12 36:4 38:16 38:20 39:7,10 <b>petitioner</b> 13:22,25 27:24 30:20,22 33:5,7,10 <b>petitioners</b> 1:4,17 2:4,10 3:7 20:8 28:3 33:9 46:2 49:16 <b>petitions</b> 11:23,25 12:1 31:3,14 39:25 46:6,13 <b>phrase</b> 9:14 <b>piece</b> 23:22 <b>piecemeal</b> 25:10 <b>please</b> 3:9 26:13 35:23 <b>point</b> 4:7 5:12 12:3 14:1 19:22 21:12 30:16 34:5 35:11 39:13 42:24 43:22 45:8 <b>pointed</b> 6:13 <b>policies</b> 15:3</p>	<p><b>policy</b> 4:19 <b>portion</b> 4:10 <b>posit</b> 8:2,10 <b>positing</b> 16:2 <b>position</b> 5:4,9 7:23 7:24 13:6,16 14:4 24:23 38:5 <b>possibility</b> 46:14 <b>possible</b> 24:4 36:2 <b>possibly</b> 22:25 <b>powerful</b> 49:9 <b>practice</b> 30:3 31:18 49:1,2 <b>precedents</b> 3:17 <b>preclude</b> 18:4 <b>predated</b> 28:16 29:12 <b>preferable</b> 49:25 <b>prejudice</b> 41:12 <b>prejudices</b> 42:13,13 <b>prejudicial</b> 41:8,9 <b>prepared</b> 10:4 25:9 <b>prerogative</b> 45:17 <b>present</b> 3:11 10:16 15:16 26:24 <b>presentation</b> 10:9 12:20 25:10 <b>presented</b> 8:3,9 12:4 25:9 26:25 <b>presume</b> 45:12 <b>presumed</b> 45:15 <b>presuming</b> 29:15,15 <b>presumption</b> 7:4 14:22,24 15:5 29:16 <b>presumptive</b> 25:14 <b>pretext</b> 8:5 <b>pretty</b> 47:9 <b>prevent</b> 25:9 <b>prevention</b> 26:16 <b>previously</b> 35:21 <b>pre-Clark</b> 44:22,23 45:3 <b>prima</b> 4:21 7:7</p>
--	---	---	--	---

<p><b>prior</b> 14:8 16:10 19:18 21:1 41:3 <b>prison</b> 26:1,3 33:7 <b>prisoner</b> 9:17 13:9 <b>pro</b> 45:25 48:14 <b>probably</b> 16:6 28:5 49:9 <b>problem</b> 14:9 37:11 37:13 46:19,20 48:25 49:5,5 <b>procedural</b> 4:22 6:8 6:17,19,22 8:12 41:19 42:6 <b>procedurally</b> 20:14 <b>procedures</b> 8:24 <b>proceed</b> 43:16 <b>produced</b> 11:17 <b>proffer</b> 6:3 14:7 35:3 <b>proffered</b> 6:2 19:23 27:3 <b>proffering</b> 20:1 <b>proffers</b> 35:6 <b>profound</b> 49:20 <b>prompt</b> 35:9,9 38:23 38:25 <b>promptly</b> 34:12,22 37:18 38:23 39:5,6 39:25 40:9 42:15 43:2 45:6 <b>prong</b> 8:14 <b>pronounced</b> 9:8 <b>proposed</b> 48:6 <b>protection</b> 26:18 <b>provide</b> 19:10 42:1 42:4,4,5 45:11 <b>provided</b> 10:7,11 <b>provides</b> 25:6 <b>published</b> 9:5 14:2 <b>punishments</b> 15:22 <b>purpose</b> 22:4 <b>pursuant</b> 46:24,25 <b>put</b> 24:25 25:2 34:18 49:4 <b>puzzle</b> 29:19</p>	<hr/> <p><b>Q</b></p> <hr/> <p><b>quantifiable</b> 41:9 47:13 <b>question</b> 4:16 5:1 6:8,11 7:17 8:19 11:1 17:17 18:8 19:21 23:11,12 26:15 28:22,24 29:20 33:17 35:18 38:19 45:19,21,23 <b>questions</b> 7:21 30:2 32:7 49:12 50:3 <b>quite</b> 21:20</p> <hr/> <p><b>R</b></p> <hr/> <p><b>R</b> 1:18 2:6 3:1 <b>raised</b> 12:7 <b>range</b> 37:5,7,20,22 37:25 <b>rare</b> 14:11 <b>rationale</b> 4:1 <b>reach</b> 4:24 6:1,5 7:17,19 21:10 <b>reached</b> 6:16 29:16 <b>readily</b> 32:10 <b>reading</b> 23:7 <b>ready</b> 24:24 <b>real</b> 24:4,7,7 <b>really</b> 25:1 29:17 40:8 48:8,24 <b>reason</b> 7:10 10:16 13:1,1,3 14:25 15:6,19 18:14 19:3 25:16 29:4 35:17 49:22 <b>reasonable</b> 3:15 10:9 12:21,24 13:17 25:22 38:7 40:20,21,21,23 44:6,7 <b>reasonableness</b> 11:9 12:13 13:8 <b>reasonableness-b...</b> 15:14</p>	<p><b>reasonably</b> 33:25 34:1 <b>reasons</b> 13:8 31:9 47:18 <b>REBUTTAL</b> 2:8 49:15 <b>recall</b> 41:7,8 <b>receive</b> 22:8 <b>receives</b> 9:10 <b>receiving</b> 9:10 <b>recollection</b> 29:10 <b>record</b> 19:24,24 27:1,2,11 39:12 <b>red</b> 49:7 <b>referring</b> 22:12 <b>regularity</b> 46:16 <b>regularly</b> 26:16 47:21 <b>rejected</b> 3:13 13:21 20:16 <b>relief</b> 17:1,9 19:10 20:11,12,14,15 <b>relying</b> 45:4,5 <b>remainder</b> 26:6 <b>remaining</b> 49:14 <b>represent</b> 27:25 28:4 <b>represented</b> 28:3 33:10 <b>representing</b> 22:17 <b>represents</b> 13:23 <b>requested</b> 45:12,14 49:9 <b>require</b> 14:10 <b>required</b> 21:4 49:6 <b>requirement</b> 21:3 37:12 38:23 <b>requirements</b> 27:4 <b>requires</b> 3:15 <b>research</b> 32:6,9 34:14 35:24 37:24 <b>reserve</b> 26:6 <b>resistance</b> 8:8 <b>resolving</b> 5:1</p>	<p><b>Resource</b> 3:22 5:25 26:24 27:17 <b>resources</b> 30:13,23 <b>respect</b> 27:19 29:12 33:20 35:21 36:4 38:6 43:12,13 45:6 <b>Respectfully</b> 15:1 <b>Respondent</b> 1:19 2:7 26:11 <b>response</b> 16:1 <b>responses</b> 4:3 <b>result</b> 29:24 <b>returned</b> 39:15 <b>reversed</b> 3:18 19:12 <b>review</b> 4:12 5:16 11:5 16:13,14 19:25 30:2 41:2 <b>reviewing</b> 5:20 <b>right</b> 8:11 11:24 20:21 23:3 25:1 30:15 31:22 32:18 32:20 34:19 35:4 35:11 38:14 42:15 <b>rights</b> 26:17,19 <b>road</b> 47:25 <b>Robbins</b> 7:13 10:7 12:18 13:17 25:21 27:4 <b>ROBERTS</b> 3:3 4:13 24:6 26:8 34:10,25 35:4 36:1,5,8,18 37:5,16,18,23 42:8 42:18,23 43:5,8 49:13 50:4 <b>room</b> 23:25 34:6,6 34:11 <b>round</b> 10:18 11:2 <b>route</b> 23:8 <b>rules</b> 8:4 13:8 45:18 47:4,5 49:4 <b>ruling</b> 4:5 12:1,6 14:5 21:11 <b>rulings</b> 33:5 49:22 <b>running</b> 33:24</p>	<hr/> <p><b>S</b></p> <hr/> <p><b>S</b> 2:1 3:1 <b>Sacramento</b> 1:16,18 <b>Saffold</b> 45:12 <b>sake</b> 16:5 <b>sample</b> 35:24 <b>sampling</b> 33:13,13 <b>Sanders</b> 27:8,20 28:14 <b>saying</b> 4:23 15:7 23:4 28:9 31:17,22 33:15 <b>says</b> 3:22 6:22 7:4 23:25 24:10 29:3 30:9 37:16,18 40:2 <b>Scalia</b> 6:21,25 11:13 11:19 14:15,18 16:1 18:10,25 21:13,20 22:2,10 23:11 28:7,19 29:3 29:7 39:23 40:8,14 40:19,23 48:4 <b>Scalia's</b> 29:20 43:21 <b>scenario</b> 24:17 34:19,21 <b>screamed</b> 48:10 <b>scrutiny</b> 15:23 <b>se</b> 45:25 48:14 <b>search</b> 46:12 <b>second</b> 4:7 12:10 <b>secret</b> 46:17 <b>security</b> 26:1,3 <b>see</b> 8:1 9:7 18:25 20:1 21:21 24:14 29:21 32:19 <b>seeks</b> 7:20 <b>seminal</b> 27:3 <b>sense</b> 21:15 <b>sentence</b> 16:10,15 <b>separate</b> 11:14,20 11:20 <b>set</b> 17:3 44:3,4 45:18 <b>shared</b> 41:11</p>
---	--	---	--	--



<p><b>short</b> 36:21  <b>shorter</b> 18:24  <b>show</b> 8:4 30:17            32:20 38:1  <b>showed</b> 5:25  <b>shown</b> 8:2 49:22  <b>shows</b> 20:1 34:23  <b>side</b> 29:3  <b>significant</b> 15:23  <b>significantly</b> 15:22  <b>silent</b> 29:11,14,17            30:8,16 36:22  <b>similar</b> 21:24 27:6            41:2,5,13  <b>similarly</b> 19:9,14            35:21  <b>simple</b> 6:3 30:3  <b>simplest</b> 29:23  <b>simply</b> 36:9 43:12  <b>single</b> 35:24  <b>sits</b> 34:17  <b>situated</b> 19:9,14            35:22  <b>situation</b> 22:5,16,19            28:17  <b>six</b> 33:1,1,2  <b>small</b> 17:6 35:24  <b>Smith</b> 21:7  <b>solution</b> 47:15  <b>somebody</b> 18:17            31:7 36:11,12 40:2  <b>someplace</b> 13:15  <b>soon</b> 11:14 47:9  <b>sooner</b> 24:19  <b>sorry</b> 17:20 20:21            36:7 39:9,18  <b>sort</b> 37:23 46:16  <b>sorts</b> 24:21  <b>Sotomayor</b> 5:3,8,23            6:9,13 7:15 12:22            15:25 16:23 17:2,5            17:16,20,23,25            18:7 19:8,13,20            20:6 26:23 27:10</p>	<p>27:15 47:15,20,23            48:14  <b>sound</b> 20:25  <b>sounds</b> 17:14  <b>span</b> 12:19  <b>speak</b> 27:13 29:2            39:13  <b>speaking</b> 5:24  <b>speaks</b> 25:6,22  <b>specific</b> 18:3  <b>specifically</b> 10:7            25:5 27:21 39:13  <b>stand</b> 27:21 38:14  <b>standard</b> 13:13            40:18,22 41:6,7,10            41:10,14 47:2  <b>Stankewitz</b> 10:10  <b>start</b> 33:24  <b>starting</b> 7:24  <b>State</b> 6:18 8:1,4,16            9:6,8 10:13 12:11            13:3,16 14:3 18:11            18:17,25 20:17            21:5,6,10,11,16            26:15,17,20,21            28:1 30:9,14 33:3            33:3 35:1,3,6 37:6            39:4 41:18,23            42:13 45:5,9,12,15            45:18,19,21,23            46:2  <b>statement</b> 32:17  <b>States</b> 1:1,12 13:10            18:6  <b>State's</b> 8:24 42:3  <b>statisticians</b> 33:17  <b>statute</b> 48:11  <b>step</b> 6:5  <b>Strickland</b> 8:14  <b>stronger</b> 42:9  <b>subject</b> 40:5  <b>submitted</b> 50:5,7  <b>substantial</b> 4:9,11            9:14,16,22,24</p>	<p>10:12 11:3 24:20            31:19 43:13  <b>substantially</b> 12:2  <b>successive</b> 11:23,25            12:10  <b>sudden</b> 9:9  <b>sufficient</b> 15:15  <b>suggesting</b> 20:22            35:6  <b>suited</b> 24:17  <b>summary</b> 4:4,5 8:22            9:2,4  <b>superior</b> 10:18 33:4  <b>supervises</b> 42:1  <b>supervision</b> 21:17  <b>suppose</b> 11:1 13:2            22:19 23:2 38:9,9  <b>supposed</b> 10:24  <b>Supremacy</b> 26:19  <b>supreme</b> 1:1,12 3:12            6:6 10:19 13:24            16:12 17:7 20:7,13            22:22 27:4,5 28:9            28:11 30:1 31:2            32:2,8 33:21 41:25            46:7,18 48:21  <b>sure</b> 20:18 48:5  <b>surprise</b> 3:13  <b>survive</b> 16:4  <b>suspected</b> 23:6  <b>system</b> 40:13 47:10            48:6 49:6</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>T</b> 2:1,1  <b>table</b> 25:17  <b>take</b> 4:20 8:7 12:9            22:3,9 25:24 35:11            44:5 46:9 48:20,20  <b>taken</b> 7:23,25 14:19  <b>takes</b> 10:4 49:24,25  <b>talking</b> 19:14  <b>Teague</b> 8:12  <b>techniques</b> 33:13,14</p>	<p><b>tell</b> 3:24 4:5 9:23            15:16 24:10 34:6            34:11 40:9 45:24  <b>temporal</b> 9:15  <b>tenuous</b> 38:5  <b>test</b> 46:14,20  <b>tests</b> 21:1  <b>Texas</b> 21:7  <b>Thank</b> 26:8 49:13            50:4  <b>thin</b> 8:25  <b>thing</b> 17:18,21 29:14            29:23 33:13 36:16            47:12  <b>things</b> 42:12  <b>think</b> 10:13,23 11:6            12:11 13:3 14:15            15:12 20:2 33:19            36:15,21 40:3,4,16            40:16,23 45:13            49:23  <b>thinking</b> 4:6 39:16  <b>thinks</b> 7:16  <b>third</b> 4:13 17:3  <b>thoroughly</b> 22:19            44:3  <b>thought</b> 4:15 5:24            16:1 43:5 44:15  <b>thousands</b> 30:2            33:16  <b>three</b> 4:3 27:3  <b>time</b> 3:21 4:6,16 7:9            9:9 10:10,17 11:19            11:19 13:6,7 17:7            18:24 21:21 22:8            24:11 25:3,14 26:7            29:21,21 33:23            34:2,2 36:10 38:7            38:19 39:22 41:21            42:19 44:7,7,24            45:2,10  <b>timeliness</b> 3:14 5:6            6:8 8:19 12:6,11            14:22 15:3,4 18:4</p>	<p>42:10 43:15 45:24  <b>timely</b> 4:24 12:4            14:24 15:8 38:16            38:21  <b>time-barred</b> 3:25            16:22,23,24  <b>TODD</b> 1:15 2:3,9            3:6 49:15  <b>totally</b> 22:4  <b>transparent</b> 25:14  <b>treated</b> 14:8 21:25            26:5  <b>treatment</b> 19:14,17            19:18 21:15  <b>trial</b> 5:15,19 19:24            27:1,11  <b>tried</b> 25:23 42:24            44:14  <b>triggering</b> 10:8 25:8  <b>triple</b> 30:1  <b>true</b> 14:13 34:8  <b>truly</b> 30:8  <b>try</b> 5:9 13:22  <b>trying</b> 13:12 24:23  <b>two</b> 7:1 14:10,11            26:4 28:24  <b>type</b> 11:23  <b>Typically</b> 7:12</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>Uh-huh</b> 27:15  <b>unconstitutional</b>            30:4  <b>undermine</b> 49:19  <b>undermines</b> 49:20  <b>understand</b> 13:1            20:5 24:7 40:22            42:8 45:10  <b>understands</b> 35:8            41:15  <b>understood</b> 41:11  <b>undertook</b> 36:9  <b>unexcused</b> 31:19  <b>unexpected</b> 9:11</p>
---	--	---	--	---

<p><b>United</b> 1:1,12 13:10 18:6 <b>unknown</b> 35:7 <b>unreasonable</b> 12:24 29:1 <b>unrepresented</b> 33:8 <b>untimely</b> 3:13 10:14 12:12,17 13:21 35:12,13,14 38:13 <b>use</b> 7:1 49:2</p>	<p><b>week</b> 11:15 <b>weigh</b> 11:8 <b>weighed</b> 11:5 <b>Wende</b> 42:2 <b>went</b> 10:18 27:7 28:11,20 29:10 37:21 41:20,21 <b>weren't</b> 37:9 <b>we'll</b> 3:3 47:17 <b>we're</b> 5:12 8:23 15:7 24:10 25:16 42:11 45:23 47:25 <b>we've</b> 48:11 <b>whichever</b> 8:15 <b>willing</b> 37:6 <b>window</b> 10:8 <b>wish</b> 48:5 <b>wishes</b> 18:12 <b>withhold</b> 25:8 <b>wonder</b> 31:1 <b>working</b> 49:1 <b>world</b> 49:9 <b>worry</b> 29:7 <b>wouldn't</b> 31:7 32:21 33:15 37:13 38:14 38:24 47:24 48:25 <b>write</b> 31:8,12 32:11 <b>written</b> 28:20 <b>wrong</b> 32:21 33:22</p>	<p>40:3,9,24 41:10 42:12 43:25 45:1 <b>yelled</b> 48:10</p> <hr/> <p><b>0</b></p> <hr/> <p><b>09-996</b> 1:4 3:4</p> <hr/> <p><b>1</b></p> <hr/> <p><b>1</b> 36:12 38:11 <b>1-year</b> 48:10 <b>10</b> 20:8,8 <b>11:03</b> 1:13 3:2 <b>11:59</b> 50:6 <b>12th</b> 28:6 <b>16</b> 44:23 <b>16-month</b> 44:22 <b>18</b> 10:11 13:18 44:7 44:8,16,20 <b>1993</b> 39:3</p>	<p>19:4,25 25:22 34:15 35:12,17,19 38:24 39:8,11,20 40:3,9,24 44:6 <b>5-month</b> 10:7 12:19 <b>5-year</b> 26:25 27:8 27:18 <b>50/50</b> 23:18</p>
<hr/> <p><b>V</b></p> <hr/> <p><b>v</b> 1:5 3:4 13:10 21:7 49:18 <b>vague</b> 35:7 40:18 <b>vast</b> 46:2 <b>view</b> 17:12 36:13 <b>violated</b> 47:12 <b>violation</b> 21:8,9,10 <b>virtually</b> 33:6</p>	<hr/> <p><b>X</b></p> <hr/> <p><b>x</b> 1:2,7</p>	<hr/> <p><b>2</b></p> <hr/> <p><b>2</b> 29:1 45:1 <b>2,500</b> 46:8,11 <b>2-year</b> 29:1 <b>20</b> 43:25 <b>2006</b> 41:25 <b>2010</b> 1:9 <b>26</b> 2:7 <b>29</b> 1:9</p>	<hr/> <p><b>6</b></p> <hr/> <p><b>6</b> 13:14,20 16:11 17:6 18:17,23 28:10 37:9 38:3 <b>6-year</b> 3:23 <b>60</b> 10:25 11:2 45:13 47:5 <b>62</b> 3:23</p>
<hr/> <p><b>W</b></p> <hr/> <p><b>W</b> 1:6 <b>wait</b> 18:10 34:17 40:3 <b>waited</b> 3:11 10:20 43:25 <b>waits</b> 11:2 <b>Walker</b> 1:3 3:4 43:24 <b>wall</b> 31:11 32:22 <b>Walterus</b> 41:19,21 <b>want</b> 7:17 18:1 45:13 49:3,3 <b>wanted</b> 42:25 <b>wants</b> 7:1 13:22 34:14 <b>WARDEN</b> 1:3 <b>warranted</b> 15:24 <b>Washington</b> 1:8 <b>wasn't</b> 41:20 45:1 <b>way</b> 13:23,25 15:2 15:13 20:19 22:21 22:22 49:8</p>	<hr/> <p><b>Y</b></p> <hr/> <p><b>year</b> 12:24 25:15 30:6 36:12 38:11 46:7 47:16 <b>years</b> 3:11,21 6:14 10:20 13:15 14:15 18:15,17,19 19:4 19:13,25 25:17 28:10 29:1 35:12 35:14,17,20 36:11 38:24 39:8,11,20</p>	<hr/> <p><b>3</b></p> <hr/> <p><b>3</b> 2:4 13:15 16:11 17:6 18:23 25:17 36:11 37:6 <b>3-month</b> 37:20,25 <b>3-range</b> 37:20</p> <hr/> <p><b>4</b></p> <hr/> <p><b>4</b> 42:12 49:14 <b>49</b> 2:10</p> <hr/> <p><b>5</b></p> <hr/> <p><b>5</b> 3:11,21,23 6:14 12:23,24 13:17 14:15 18:14,19</p>	<hr/> <p><b>7</b></p> <hr/> <p><b>7</b> 26:20</p> <hr/> <p><b>8</b></p> <hr/> <p><b>8-year</b> 27:16 <b>800</b> 30:8</p> <hr/> <p><b>9</b></p> <hr/> <p><b>9</b> 34:16,17 37:8 38:2 <b>90</b> 14:24 15:8,8,20 47:5 <b>90-day</b> 14:21 <b>91st</b> 47:7 <b>92nd</b> 47:7 <b>98</b> 28:5 <b>99</b> 28:2,5 <b>99.9</b> 28:1</p>