1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - - - - - - - - - - - - - - x

3 KEVAN BRUMFIELD, :

4 Petitioner : No. 13-1433

5 v. :

6 BURL CAIN, WARDEN. :

7 - - - - - - - - - - - - - - - - - - x

8 Washington, D.C.

9 Monday, March 30th, 2015

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:04 a.m.

14 APPEARANCES:

15 MICHAEL B. DeSANCTIS, ESQ., Washington, D.C.; on behalf

16 of Petitioner.

17 PREMILA BURNS, ESQ., Baton Rouge, La.; on behalf of

18 Respondent.

19

20

21

22

23

24

25

1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE
3 MICHAEL B. DeSANCTIS, ESQ.
4 On behalf of the Petitioner 3
5 ORAL ARGUMENT OF
6 PREMILA BURNS, ESQ.
7 On behalf of the Respondent 28
8 REBUTTAL ARGUMENT OF
9 MICHAEL B. DeSANCTIS, ESQ.
10 On behalf of the Petitioner 54
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 P R O C E E D I N G S
2 (10:04 a.m.)
3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in Case 13-1433, Brumfield v. Cain.
5 Mr. DeSanctis.
6 ORAL ARGUMENT OF MICHAEL B. DeSANCTIS
7 ON BEHALF OF PETITIONER
8 MR. DeSANCTIS: Mr. Chief Justice, and may
9 it please the Court:
10 The decision of the State court in this case
11 was to not -- to deny Kevan Brumfield a hearing on his
12 claim of intellectual disability. That decision was
13 based on an entirely unreasonable determination of the
14 facts of Brumfield's mental condition. The court
15 specifically -- the court expressly stated in its decision
16 to deny a hearing was, quote, "based on the three bases"
17 that it laid out in its oral ruling at Page 172 of the
18 Pet App. And I'd like to discuss each of those in turn.
19 The first basis given by the State court was
20 that Brumfield scored a 75 on the Wechsler IQ Test.
21 That's not just suggestive of intellectual disability;
22 that's actual evidence of intellectual disability, and
23 there was no testimony in the record to the contrary.
24 This Court made it clear in Atkins, all of the clinical
25 texts on which this Court relied on in Atkins make it

1 clear, and the Louisiana Supreme Court had made it clear
2 in Williams and in Dunn.
3 The second basis for the State court's
4 decision was that the defendant has not, quote,
5 "demonstrated impairment based on this record in
6 adaptive skills." To demand or even expect that blood
7 from the stone of the pre-Atkins record where neither
8 intellectual disability nor adaptive skills were even
9 raised, is completely unreasonable. --
10 JUSTICE SOTOMAYOR: I -- I'm sorry, but
11 isn't -- I -- I don't -- whether I agree with you or
12 not, isn't it your burden to prove that he had some
13 deficits in adaptive ability? You have to make the
14 threshold showing.
15 MR. DeSANCTIS: Yes. There's a threshold
16 showing under Louisiana law.
17 JUSTICE SOTOMAYOR: So what did you show
18 that met that prong in any way?
19 MR. DeSANCTIS: Sure. The standard under
20 the Louisiana law is a low one. It's a burden of coming
21 forward with some evidence of objective facts that put
22 the movant's intellectual disability at issue.
23 CHIEF JUSTICE ROBERTS: Well, how is it --
24 MR. DeSANCTIS: It's not --
25 CHIEF JUSTICE ROBERTS: How is that

1 determination under State law pertinent to the question
2 here?
3 MR. DeSANCTIS: I was -- I was merely
4 answering Justice Sotomayor's question as to what facts
5 were put into evidence before the State court. I was
6 setting the stage for the standard.
7 CHIEF JUSTICE ROBERTS: Well, I understand
8 that. But given -- given the facts that were
9 presented -- and this is what the language of the law
10 is, of course. The evidence presented in the State
11 court proceeding, how is that pertinent on the
12 Federal -- Federal question?
13 MR. DeSANCTIS: We're --
14 CHIEF JUSTICE ROBERTS: In other words, I
15 don't think it would be a different -- your burden, I
16 don't think, would be different on the question that's
17 presented here if the State law required a higher
18 threshold or -- or not.
19 MR. DeSANCTIS: And we're not requiring --
20 we're not challenging the State law in this part of
21 our --
22 JUSTICE KENNEDY: But in your answer to
23 Justice Sotomayor, I -- I thought you said, well, if the
24 State has a very low standard. What difference does
25 that make? Are you saying that if the State with its

1 regular processes takes a Federal rule and misinterprets
2 the rule as part of its process, then there's a Federal
3 violation? Is that your point?
4 MR. DeSANCTIS: No. There -- there could be
5 in that case, but that's not our --
6 JUSTICE KENNEDY: What -- what --
7 MR. DeSANCTIS: -- but that's not our
8 argument.
9 JUSTICE KENNEDY: I mean, what -- what
10 difference does it make -- and I think this was what the
11 Chief Justice was concerned with as well. What difference
12 does it make that Louisiana has a low bar or a high bar?
13 MR. DeSANCTIS: It -- it may not make a
14 difference, Your Honor. And -- and it's not a --
15 JUSTICE KENNEDY: All right.
16 MR. DeSANCTIS: -- critical part of our
17 argument. I will --
18 JUSTICE KENNEDY: And then while -- while
19 you're on -- on this: Suppose at the trial, in the
20 sentencing phase, an expert -- medical expert testified,
21 in my view, this defendant does not have an intellectual
22 disability as we define that in medical terms.
23 Would you be here?
24 MR. DeSANCTIS: We'd still be --
25 JUSTICE KENNEDY: That's a hypothetical of

1 course.

2 MR. DeSANCTIS: It's a hypothetical;

3 obviously, that wasn't this case. There was no

4 testimony at the State trial or sentencing about

5 intellectual disability. But in that case, we probably

6 still would be here because that's what happened in

7 Williams. In the -- in Williams 1, the defense's own

8 expert at trial, prior to Atkins, had testified that the

9 defendant was not intellectually disabled, and yet the

10 Louisiana Supreme Court sent it back for an Atkins

11 hearing because Atkins had entirely changed the legal

12 landscape. Now here --

13 JUSTICE ALITO: Well, the first question --

14 the first question presented in your petition is

15 "Whether a State court that considers the evidence

16 presented at a petitioner's penalty phase proceeding as

17 determinative of the petitioner's claim of intellectual

18 disability under Atkins... has based its decision on an

19 unreasonable determination of the facts."

20 So suppose that at the penalty phase

21 proceeding there is evidence of 5 IQ tests, all above

22 140. Would it be wrong to say that that's

23 determinative?

24 MR. DeSANCTIS: Again, obviously not our

25 case, but in that situation, we address that in our blue

1 brief. For the purpose of making clear that we are not
2 asking for a bright-line rule, in a situation where
3 there is uncontested -- uncontested evidence in the
4 pre-Atkins record that disqualifies the individual from
5 intellectual ability, if that were the case --
6 JUSTICE ALITO: So the answer to the first
7 question is no, it is not necessarily unconstitutional
8 to regard the penalty phase evidence as determinative.
9 MR. DeSANCTIS: It is in this case on this
10 record, and Section (d)(2) is by its very nature a
11 factual inquiry.
12 JUSTICE GINSBURG: Is -- is your point --
13 MR. DeSANCTIS: So --
14 JUSTICE GINSBURG: Is your point that we are
15 involved in a wholly different inquiry once Atkins is on
16 the books? Because when you were before the State court
17 at the sentencing hearing, you weren't talking about
18 intellectual disability.
19 MR. DeSANCTIS: That's --
20 JUSTICE GINSBURG: You were talking about
21 some mitigating factors. So the State court never had
22 before it an Atkins claim. An Atkins claim is raised
23 for the first time on post-conviction review.
24 MR. DeSANCTIS: That -- that's exactly
25 right. It's -- it's similar to the reasoning that this

1 Court adopted in Bobby v. Bies. And in precisely this
2 setting, the Louisiana Supreme Court held -- or it
3 explained that prior to Atkins, as Your Honor just
4 explained, a defendant only had to show diminished
5 capacity as a mitigating factor and wasn't called upon
6 to marshal demonstrations of intellectual disability or
7 impairment in adaptive skills.
8 JUSTICE SCALIA: Do you not think it would
9 have been ineffective assistance of counsel pre-Atkins
10 for a lawyer who had a client who was severely mentally
11 disabled not to bring that fact forward in the -- in the
12 sentencing hearing for consideration by the jury?
13 MR. DeSANCTIS: Your Honor --
14 JUSTICE SCALIA: Even -- even though it
15 wasn't, you know, a mandatory Federal basis for -- for
16 exempting him from the death penalty, surely you would
17 want the jury to consider that kind of evidence,
18 wouldn't you?
19 MR. DeSANCTIS: Your Honor, this Court in
20 Henry and again in Atkins recognized that putting on a
21 defense of, quote-unquote, "mental retardation," as the
22 term was used at that time, is a double-edged sword.
23 It's a much higher burden typically than the lower
24 burden of putting on mitigating evidence of one's mental
25 condition.

1 And -- which brings me to answer Justice --

2 JUSTICE SCALIA: Well, I don't find that

3 persuasive. It seems to me you -- you have the burden

4 to show that there was some basis for the State Supreme

5 Court coming out the other way, and that basis should

6 have been in the record, according to the Federal

7 statute, and your only defense is, well, we didn't put

8 anything in the record because Atkins had not yet been

9 decided.

10 MR. DeSANCTIS: No, Your Honor. And that

11 goes to Justice Sotomayor's question as well. There was

12 overwhelming evidence of impairment of -- in adaptive

13 skills and intellectual disability in the State court

14 record --

15 JUSTICE SCALIA: All right.

16 MR. DeSANCTIS: -- before the State court

17 judge. First --

18 JUSTICE SCALIA: Fine. So let's get

19 rid of that argument that Atkins had not been decided.

20 That -- that had nothing to do with the case, right?

21 MR. DeSANCTIS: Okay. Turning to the

22 evidence in this case, first, it was evidence before

23 the State court judge that Mr. Brumfield had a fourth

24 grade reading level in terms of mere word recognition,

25 not even comprehension. That's, again, actual evidence

1 of impairment in adaptive skills.

2 It was in the record before the State court

3 that Mr. Brumfield, quote, "has a basic deficit

4 somewhere in his brain." It was in the record in the

5 State court that he had a very low birth weight that put

6 him at risk of neurological trauma, and it was in the

7 record from Dr. Bolter that Mr. Brumfield was in trouble

8 many, many, many years ago.

9 The second expert before the State court,

10 this is in the State court record, was Dr. Guin. She

11 was a social worker. She didn't perform any tests of

12 her own, but she found that Mr. Brumfield was sent to,

13 quote, "special education from the third grade; that he

14 had been placed in and out of mental hospitals because

15 no one knew what to do with him throughout his childhood

16 and youth; that his main problem was that he cannot

17 process information the way normal people do." And

18 that's -- that -- that is a key indicator of

19 intellectual disability that this Court recognized twice

20 in Atkins.

21 She testified that Brumfield -- before the

22 State court, she testified that Brumfield needed someone

23 to, quote, "help him function." That he did poorly even

24 at recess as a child because he couldn't function with a

25 lot of chaos around him. That age -- at age 11, one of

1 the mental institutions in which he had been placed,
2 quote, "questioned his intellectual functions and noted
3 his slowness in motor development." And that the
4 nurses, literally from his birth, recognized that there
5 was something wrong with him and that he was slower than
6 normal babies.
7 JUSTICE SCALIA: Am I wrong in my
8 understanding that the record included an expert report
9 stating that Brumfield possessed, quote, "a normal
10 capacity to learn and acquire information" and that he
11 had, quote, "adequate problem and" -- "and reasoning
12 skill" -- "problem-solving and reasoning skills." Is --
13 is -- is that correct?
14 MR. DeSANCTIS: Your Honor, if -- that's --
15 I believe that's from the report of Dr. Jordan.
16 Dr. Jordan did not testify in the State court
17 proceeding. It's --
18 JUSTICE SCALIA: It -- it was not in the
19 record?
20 MR. DeSANCTIS: It's actually an issue of
21 debate whether Dr. Jordan's report was in the record.
22 At the Federal hearing, the State conceded that it was
23 not. And the -- and the judge doesn't -- the State
24 court judge doesn't say he read it, although it was
25 discussed by some of the experts, though not the -- the

1 portion you just read.

2 JUSTICE SCALIA: Well, if it was in it, it's

3 pretty categorical, you know. I would think that's

4 enough for the State court to hang its hat on. I don't

5 think we -- we can possibly find that it was

6 unreasonable evidentiary finding, if -- if that was

7 indeed in the record.

8 MR. DeSANCTIS: Your Honor, it -- it is,

9 because, again, the burden --

10 JUSTICE GINSBURG: Did -- did the State put

11 it in the record?

12 MR. DeSANCTIS: No, there's no evidence,

13 Your Honor, that the State put it in the record. They

14 have claimed at various points in the proceeding --

15 JUSTICE GINSBURG: And you didn't, but

16 another -- another expert referred to it.

17 MR. DeSANCTIS: That's correct. Bolter --

18 Dr. Bolter referenced Dr. Jordan's report regarding his

19 IQ testing, that it was merely a screening test and he

20 was dismissive of it.

21 JUSTICE GINSBURG: But the State wasn't --

22 didn't put it in evidence, so it wasn't --

23 MR. DeSANCTIS: And they didn't -- and they

24 did not --

25 JUSTICE KENNEDY: And -- and are we talking

1 about the trial record now?

2 MR. DeSANCTIS: We're talking about the

3 State trial record.

4 JUSTICE KENNEDY: At the sentencing -- at

5 the sentencing hearing.

6 MR. DeSANCTIS: At the sentencing, that's

7 correct.

8 Second, it -- it -- it is very relevant that

9 the State court ignored all of the objective facts after

10 the defendant had been required only to come on with

11 some evidence. There's no indication in the State

12 court's decision, which he explains precisely was based

13 on the three factors that he just laid out.

14 JUSTICE GINSBURG: Did you ask --

15 MR. DeSANCTIS: The State court did not --

16 JUSTICE GINSBURG: Did you ask the State

17 court for funds as a matter of Federal right? The other

18 side says, did you ask for funds for State habeas only

19 under State law and not under Federal law; is that true?

20 MR. DeSANCTIS: We requested funds

21 repeatedly in -- in every petition before the court.

22 And in doing so, at least six times we cited the

23 Louisiana court of Deboue v. Whitley. That case

24 discusses Ake and is based exclusively on Ake and

25 Federal law. And this Court has made clear that if --

1 that a claim is preserved by citing a case that relies
2 on the appropriate Federal law. So, yes.
3 JUSTICE SOTOMAYOR: Mr. DeSanctis, I -- I
4 will perhaps talk about what is a little confusing; if
5 not confusing, disconcerting in this case. There seems
6 to be an inequity that one could perceive that says you
7 can use the penalty phase record, but the other side
8 can't to challenge your conclusions. Because that's
9 basically what you're saying. And so and that was, I
10 think, Justice Alito's point, which is you concede on
11 some -- in some circumstances the State might.
12 What makes your case different? Now, I do
13 know that this -- in this case you're saying you
14 provided some -- a sufficient amount of some evidence.
15 MR. DeSANCTIS: Correct.
16 JUSTICE SOTOMAYOR: And the State was
17 unreasonable by not giving you a hearing to determine
18 the merits of your claim.
19 MR. DeSANCTIS: Correct.
20 JUSTICE SOTOMAYOR: All right. We don't
21 even get to the issue of whether you were entitled to
22 funds at that hearing, but I don't even think under
23 Louisiana you wouldn't be, once you've made the
24 threshold showing.
25 MR. DeSANCTIS: It's a distinct issue that

1 our question --

2 JUSTICE SOTOMAYOR: Right.

3 MR. DESANCTIS: -- one does not depend on.

4 JUSTICE SOTOMAYOR: All right. So answer my

5 question, because it's -- it's a bit of a takeoff from

6 Justice Alito's question, which is what is -- why in

7 your case can't the State rely on the evidence in the

8 penalty phase, if that's what you're relying on to make

9 your sum showing?

10 MR. DeSANCTIS: There really is no inequity

11 there, Your Honor. And I'm glad you asked. The

12 Louisiana Supreme Court explained it in Dunn, which

13 predated the State court's decision in this case by

14 almost a year. The court explained that although the

15 defendant was not called upon to offer proof of

16 intellectual disability on -- at the trial prior to

17 Atkins, the defendant did offer evidence of intellectual

18 disability through that record. It was far less than

19 the evidence that I just articulated.

20 From there, the court explained that it was

21 improper for the State court to then weigh any contrary

22 evidence without the guidance of experts and essentially

23 make a diagnosis itself as to where -- whether the facts

24 in the record are consistent or inconsistent with

25 intellectual disability.

1 JUSTICE SCALIA: The court always has to do
2 it itself, even when there are experts. I mean, I don't
3 understand that.
4 MR. DeSANCTIS: Once the defendant comes
5 forward with -- with some evidence, which Mr. Brumfield
6 did here overwhelmingly, if there's contrary evidence in
7 the record, that's what the hearing is for. And that's
8 all we were asking. We weren't asking for --
9 JUSTICE KENNEDY: Put this -- put this in
10 perspective for a moment. Suppose we're in the district
11 court on a petition for habeas.
12 MR. DeSANCTIS: Federal district court.
13 JUSTICE KENNEDY: Federal -- United States
14 district court, and the question is: Is the defendant
15 entitled to a hearing? This petitioner entitled to a
16 hearing?
17 what is the standard that the district
18 court must find -- met before the district court has a
19 hearing on the facts? Before the district court can
20 have its experts. Does he have to find that the State
21 collateral decision was clearly erroneous? Or that
22 there was a prima facie evidence of -- of disability
23 that the State collateral court ignored? What's the
24 district court have to do before it decides it's going
25 to have a hearing and call its own experts?

1 MR. DeSANCTIS: So --
2 JUSTICE KENNEDY: What standard must it meet
3 and did it meet that standard here?
4 MR. DeSANCTIS: The answer to the final part
5 of your question is yes. I would break it down this
6 way: The -- the question of whether an individual is
7 intellectually disabled this Court left to the States
8 under Atkins. So the State standard is what applies for
9 the showing that a defendant must make in order to prove
10 his intellectual disability at the hearing.
11 If that occurs pre-Atkins as it did in this
12 case and we get to Federal habeas, under 2254(d)(2), the
13 Federal habeas judge looks at whether the factual
14 determinations in this case of the defendant's mental
15 condition were unreasonable. And here they were. The
16 judge articulated three grounds, one of which was
17 evidence of intellectual disability, one of which was
18 irrelevant to the question of intellectual disability,
19 and ignored a plethora of evidence in the record putting
20 Mr. Brumfield's intellectual disability --
21 JUSTICE KENNEDY: So are you saying --
22
23 JUSTICE KENNEDY: -- that the district
24 court, the United States district court decided to have
25 a hearing because it found that the State court's

1 collateral review determination was, fill in the blank,
2 clearly erroneous?
3 MR. DeSANCTIS: Was unreasonable.
4 Unreasonable.
5 JUSTICE KENNEDY: That's the AEDPA standard.
6 MR. DeSANCTIS: That's the AEDPA standard
7 and (d)(2) --
8 JUSTICE KENNEDY: Unreasonable because there
9 were some open questions, or because no one could read
10 the record to say that there was evidence that he had no
11 disability?
12 MR. DeSANCTIS: Because the -- the State
13 court judge in this case expressly indicated what his
14 decision was based on. It was based on three bases, all
15 of which are entirely unreasonable and no one could --
16 no one could say that they support a claim that the
17 defendant is not intellectually --
18 CHIEF JUSTICE ROBERTS: Also, we've heard --
19 heard a lot of discussion on the evidence at issue in
20 this particular case. What -- what is the broader
21 significance of that discussion here? I'm concerned
22 your answer to Justice Alito was that the answer to
23 your -- your first question was no, it's not necessarily
24 the case that it's unreasonable determination in a
25 situation where the State considers the evidence blah

1 blah. But you're saying now that in this case it was?
2 MR. DeSANCTIS: Correct.
3 CHIEF JUSTICE ROBERTS: So what is the
4 broader significance of the question you want us to
5 decide? Since you've conceded that the question -- the
6 answer to the first question presented is no.
7 MR. DeSANCTIS: No. I'm sorry, I certainly
8 did not mean to concede that the answer to the first
9 question presented is no. My answer to Justice Alito's
10 hypothetical was if there is uncontested evidence in the
11 record --
12 CHIEF JUSTICE ROBERTS: Right, right. But I
13 mean --
14 MR. DeSANCTIS: -- disqualifying
15 intellectual disability, then --
16 CHIEF JUSTICE ROBERTS: Right. But you --
17 your question is: If it's determinative, is it
18 unreasonable? And Justice Alito --
19 MR. DeSANCTIS: That's right.
20 CHIEF JUSTICE ROBERTS: -- gave you an
21 example of where it was determinative and you said it
22 was not unreasonable. So as a general rule, the
23 question is -- the answer to the question is no. And in
24 terms of what we're going to decide, I just need to know
25 whether it is simply whether the facts in your

1 particular case lead to a particular result, or if there
2 is some more general legal rule that you're arguing for.
3 MR. DeSANCTIS: Section 2254(d)(2) is, on
4 its face and by its text, a factual inquiry. And this
5 Court need do nothing more than rule that what this
6 judge did in this proceeding on this pre-Atkins record
7 was unreasonable.
8 JUSTICE SOTOMAYOR: Can you go back to
9 Justice Kennedy's question? And -- and either working
10 it backwards or working it forward, but you're not
11 taking it step by step, okay? Atkins I believe says
12 that a State doesn't have to give you a hearing if you
13 haven't met a threshold.
14 MR DeSANCTIS: That's correct.
15 JUSTICE SOTOMAYOR: And that's -- and that
16 threshold definition is a reasonable --
17 MR. DeSANCTIS: No. The threshold
18 definition in Louisiana --
19 JUSTICE SOTOMAYOR: Not Louisiana, Atkins.
20 What did Atkins say?
21 MR. DeSANCTIS: Atkins doesn't -- Atkins
22 doesn't articulate.
23 JUSTICE SOTOMAYOR: It doesn't, but it does
24 articulate that there has to be a threshold and it has
25 to be some doubt as to mental capacity, correct?

1 MR. DeSANCTIS: Some reason to believe that
2 the individual is intellectually disabled.
3 JUSTICE SOTOMAYOR: Some reason to believe.
4 So that was the standard. Some reason to believe that
5 an individual's mental capacity is -- is compromised,
6 correct?
7 MR. DeSANCTIS: Correct.
8 JUSTICE SOTOMAYOR: So is your first
9 argument that there was enough evidence to have -- for
10 you to have been entitled to a hearing?
11 MR. DeSANCTIS: That certainly is part of
12 our argument, but it doesn't explain the entirety of the
13 Federal error -- of the error recognized -- cognizable
14 under Federal law --
15 JUSTICE SOTOMAYOR: Okay.
16 MR. DeSANCTIS: -- under Section (d)(2).
17 JUSTICE GINSBURG: Why don't you tell us the
18 three -- you said that in the State habeas, there were
19 three things that were unreasonable.
20 MR. DeSANCTIS: Correct.
21 JUSTICE GINSBURG: So tell us what they
22 were.
23 MR. DeSANCTIS: So the first -- this is on
24 pages 171 and 172 of the Petition Appendix. The first
25 was that Mr. Brumfield had an IQ score of 75. We know

1 as a matter of clinical fact that that is evidence of
2 intellectual disability. The second --
3 JUSTICE ALITO: There was a second. Was
4 there not testimony about a second IQ test that was a
5 little bit higher?
6 JUSTICE SCALIA: 75 I thought.
7 JUSTICE ALITO: There was one that was 75.
8 Was there another one that was higher than 75?
9 MR. DeSANCTIS: Not -- that came from
10 Dr. Jordan who did not testify. And his report actually
11 doesn't say what he scored there. And the evidence at
12 trial that came out about it was Dr. Bolter saying what
13 Dr, Jordan did was merely a screening test, which is not
14 reliable anyway. So there is no other number in the
15 record.
16 The second prong articulated by the State
17 court was that Mr. Brumfield had not demonstrated
18 impairment in adaptive skills. This Court, the
19 Louisiana Supreme Court have all indicated that because
20 Atkins changed the playing field, it is unjust and
21 unreasonable to look to a pre-Atkins record for that
22 determination. However, the record from that -- from
23 that pre-Atkins trial and sentencing was replete with
24 evidence which the -- which the State court never
25 mentions in his decision.

1 JUSTICE SCALIA: I thought the former --
2 MR. DeSANCTIS: Third --
3 JUSTICE SCALIA: I thought the former was
4 that the question you sought to bring before us; namely,
5 that the State court couldn't use it at all, period. I
6 mean, question one that you -- you presented in your
7 petition is as follows: "Whether a State court that
8 considers the evidence presented at a Petitioner's
9 penalty phase proceeding as determinative of the
10 Petitioner's claim of intellectual disability under
11 Atkins has based its decision on an unreasonable
12 determination of the facts." Whether a State court, any
13 State court, not this particular State court, but
14 whether any State court that makes its decision based
15 upon a pre-Atkins penalty phase hearing is
16 automatically -- has automatically made an unreasonable
17 determination of the facts. Wasn't that the question
18 you presented?
19 MR. DeSANCTIS: We did not intend that
20 the -- the question presented to be -- to sound more
21 like a legal question that would become a matter of law.
22 JUSTICE SCALIA: Oh, fine. That's what it
23 sounds like.
24 JUSTICE BREYER: I thought your case
25 included the following: Atkins says you cannot sentence

1 to death and execute an intellectually disabled person.
2 So Mr. Smith, whose case is not final, says to the
3 judge, Judge, I would like to produce evidence I am
4 intellectually disabled. The State says, no, you can't.
5 That would clearly violate Atkins. Wouldn't it?
6 MR. DeSANCTIS: Correct.
7 JUSTICE BREYER: Now, suppose it says, yes,
8 you can -- now, we don't have an Atkins. A standard
9 which says when you do and when you don't have to state,
10 let this person present evidence. We don't say it. But
11 the State has found one. The State of Louisiana has a
12 standard, and I take it if that's a good enough
13 standard, that's what we should follow.
14 And that standard from State v. Williams
15 says, we will give you a hearing, if you, Mr. Smith,
16 provide objective factors that will put at issue -- put
17 at issue, the fact of mental retardation. If you will
18 come forward with some evidence to put your mental
19 condition at issue. And so I guess, unless we think
20 Louisiana can't use that standard, that that standard is
21 good enough for Federal purposes. And, therefore, the
22 issue is did your client and you put forward some
23 evidence to put your mental condition at issue.
24 And as long as you came forward with some
25 evidence, then unless we're prepared to write some new

1 Federal standard for when you have to give a hearing and
2 when not, that's the question. And you're saying, among
3 other things, of course, Judges -- you're telling us --
4 of course we put forward some evidence. In fact, we
5 think we put forward a lot more, and we would have put
6 forward a lot more if the hearing hadn't been
7 pre-Atkins. Isn't that your argument?
8 MR. DeSANCTIS: That is correct.
9 JUSTICE BREYER: Thank you.
10 MR. DeSANCTIS: That is our argument.
11 (Laughter.)
12 JUSTICE SOTOMAYOR: So let's get -- so let's
13 get to --
14 JUSTICE SCALIA: Thank you for putting it so
15 clearly.
16 JUSTICE BREYER: Well, I think that's
17 important that that be your argument--
18 MR. DeSANCTIS: Well, I don't want to --
19 JUSTICE BREYER: -- whether you say -- I
20 mean, it's important if it really is your argument.
21 (Laughter.)
22 JUSTICE BREYER: And it is, isn't it?
23 MR. DeSANCTIS: I think it really is our
24 argument.
25 JUSTICE ALITO: I don't want to intrude too

1 much on your rebuttal time, but as the case has been
2 argued, I think you're making a strong argument that is
3 purely a factual argument about this case, that you are
4 not making an argument about the categorical --
5 categorical rule about not considering evidence at a
6 pre-Atkins penalty phase proceeding.
7 And unless you can point to precedent that
8 shows that it was clearly established that you had a
9 right to funding, then your -- your inability to put in
10 evidence via the funding is not to be considered. And
11 all that is before us is whether, on the evidence that
12 was in the record at the State -- at a post-conviction
13 proceeding, it was an unreasonable application of
14 Federal -- of constitutional law. That's the question;
15 right?
16 MR. DeSANCTIS: No, Your Honor.
17 Respectfully, that would be under (d)(1). Under (d)(2)
18 the question --
19 JUSTICE ALITO: All right. An unreasonable
20 determination of fact.
21 MR. DeSANCTIS: Correct.
22 JUSTICE ALITO: But it's purely fact-bound.
23 MR. DeSANCTIS: Yes. That's the nature of
24 (d)(2) and that's the question on which the this Court
25 granted cert.

1 JUSTICE ALITO: There's no broader legal
2 issue involved here?
3 MR. DeSANCTIS: Not on (d)(1). Not on --
4 JUSTICE ALITO: No cross-cutting legal
5 issue?
6 MR. DeSANCTIS: Not on our first question
7 presented.
8 JUSTICE ALITO: On -- in the whole case?
9 MR. DeSANCTIS: Our -- our second question
10 presented is a question of whether the State court
11 application of Federal law was unreasonable contrary to
12 Federal law. We think it was, as spelled out in our
13 brief. But our first question presented does not depend
14 on that.
15 Mr. Chief Justice, I'll reserve my time for
16 rebuttal.
17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 Ms. Burns.
19 ORAL ARGUMENT OF PREMILA BURNS
20 ON BEHALF OF RESPONDENT
21 MS. BURNS: Mr. Chief Justice, and may it
22 please the Court:
23 I would like to just begin by recapping that
24 what is at issue here is whether the ultimate factual
25 conclusion that was made by the State habeas court, was

1 it reasonable and entitled to AEDPA deference under
2 whatever viable support was available in that record?
3 The magistrate judge, on April the 15th of
4 2008, in her recommendation to the district court, which
5 was in fact adopted and signed off on by the district
6 court, found that there was, in fact, failure to put
7 forth objective factors in this case and that he should
8 not been given an Atkins hearing.
9 JUSTICE BREYER: All right. But that's the
10 standard. That's what I think -- the quest -- of course
11 you can't know whether it's unreasonable or not
12 unreasonable unless you know what standard you're trying
13 to meet. And my impression is -- and that's why I went
14 on at length, and you heard what I said -- and the --
15 and it's really to you; I want to be sure he adopts
16 it -- the standards seem to be the standard you are
17 entitled to a hearing, says Louisiana, indeed a new one,
18 if you meet the standard of State v. Williams.
19 MS. BURNS: If --
20 JUSTICE BREYER: And that seemed to me good
21 enough to be a Federal standard in the absence of any
22 other.
23 Now, am I right about that or wrong?
24 MS. BURNS: The -- the court -- the cases
25 have held that for funding or for --

1 JUSTICE BREYER: Forget funding for the
2 moment.
3 MS. BURNS: There must be sufficient factors
4 set forth, objective factors, not mere conclusive.
5 JUSTICE BREYER: No. I agree with that. I
6 just want to know factors to show what. And am I right
7 in saying in the absence in Atkins of any standard about
8 when you have to have a hearing, that the State standard
9 is good enough. What he wants is a hearing. He doesn't
10 want us -- he'd like it -- but he doesn't want -- we
11 don't have to say whether this person is intellectually
12 disabled or not. He wants a hearing. And there is
13 nothing in Atkins that says what the standard is to give
14 him a hearing. Therefore, I looked at the State
15 standard from Williams and thought that's good enough to
16 serve as a Federal standard. Now, am I right or wrong?
17 MS. BURNS: The standard is, under deference
18 to the State, and to the State of Louisiana and to our
19 mental retardation intellectual disability statute, that
20 there are three prongs --
21 JUSTICE BREYER: No. No. You're not
22 answering my question. Of course we defer to the State,
23 and we defer to the State when it makes what judgment?
24 The judgment you, Mr. Defendant, are not entitled to a
25 hearing. So what's the standard under which they decide

1 whether he's entitled to a hearing or not?

2 MS. BURNS: The standard --

3 JUSTICE BREYER: And I thought it's State v.

4 Williams. Am I right, or am I wrong?

5 MS. BURNS: The -- the -- the failure to

6 meet an adaptive prong -- you have to put some evidence

7 forward of this prong.

8 JUSTICE SOTOMAYOR: Excuse me. Are we going

9 around in a circle, a little bit of a circle? It seems

10 to me that if what happened here was the right thing,

11 the Federal court went back and said, did the State

12 properly preclude this Petitioner from putting on or

13 discovering evidence? Did it improperly fail to hold a

14 hearing? And the court there said, by the -- the

15 courts -- by any standard, there was some

16 evidence -- certainly by the State standard, but even by

17 a constitutional standard, there was some evidence of

18 incompetency. He was entitled to a hearing. They

19 didn't give it to him, so now I will give him the

20 hearing, because this is Federal habeas. And, in fact,

21 we have said if a State improperly precludes you from

22 developing a claim, then there is no deference owed to

23 the State.

24 So what we're really looking at was, was the

25 Federal hearing properly granted? You did not argue

1 that on the basis of the evidence produced at the
2 Federal hearing, that this man was not intellectually
3 disabled. You have put all your eggs in the basket of,
4 on the record that didn't permit a hearing, he didn't
5 make out a threshold finding. That's been your only
6 defense so far.
7 MS. BURNS: But the two issues that were
8 presented to the Fifth Circuit were both that there
9 should have been -- there should never have been a
10 hearing in this case, which is still our position, for
11 failure to give deference under AEDPA; and secondly --
12 JUSTICE SOTOMAYOR: So if we disagree with
13 that -- if we disagree with that, what are you left
14 with?
15 MS. BURNS: Well, then it -- it needs to
16 be -- if you find that there should have been a hearing,
17 then you need to remand it back to the Fifth -- the
18 Fifth Circuit for review of the facts.
19 JUSTICE SOTOMAYOR: Why? Ah, to -- to view
20 the conclusion from the facts developed there?
21 MS. BURNS: Absolutely. And, of course, our
22 position to the Fifth Circuit was you should look at
23 both of these issues. You look at AEDPA, and if you
24 should find that there should have been a Federal
25 hearing, then at that point we ask you to look to the

1 fact that he did not make a preponderance case, which
2 they made a preliminary finding of in footnote 8.
3 JUSTICE BREYER: But that isn't -- that
4 isn't -- at this moment, I'll put it once more, and see
5 if I get an absolute, definite answer from you, and I'm
6 overstating, but if I had to decide at this moment
7 whether there is enough evidence for you to win on the
8 point is he intellectually disabled, I would say you
9 win. If I decide -- have to decide whether or not he
10 presented enough evidence to get a hearing, I would say
11 you lose.
12 Now, that's why it's important to me to
13 know. Are we trying to decide here whether there was
14 enough evidence, such that the State under Federal law
15 was unreasonable in not granting him a hearing, there I
16 look at the standards of Williams, and I think you lose.
17 If we're deciding something else, like whether he's
18 intellectually disabled, and I'm repeating myself, I
19 think you win.
20 That's why I want your answer to the
21 question of which are we deciding, or both.
22 MS. BURNS: The point is that no evidence,
23 not one adaptive deficit was ever presented at State
24 habeas.
25 JUSTICE KAGAN: But Ms. Burns -- Ms. Burns,

1 I think what Justice Breyer is driving at is just this,
2 and reasonable people might disagree on the answer to
3 this, but I think, you know, the determination that the
4 State court was making at that moment was whether to
5 have a hearing. And under Louisiana law, I don't think
6 you disagree with this, I don't think anybody could
7 disagree with this, under Louisiana law, you have a
8 hearing when the defendant has come forward, and it's --
9 the burden is on the defendant -- but when the defendant
10 has come forward with some evident -- some evidence that
11 raises a reasonable doubt as to his mental capacity.
12 That's the standard that's in Williams, it's repeated
13 again in Dunn. You don't agree -- disagree with that.
14 MS. BURNS: I do not, Your Honor.
15 JUSTICE KAGAN: And -- and so what Justice
16 Breyer is suggesting is that when we -- when we realize
17 that that's the determination that the State court is
18 making, whether the defendant has come forward with some
19 evidence putting his mental capacity at issue, it looks
20 awfully like an unreasonable determination of facts to
21 say that this record does not meet that standard.
22 That's all that the case is about, isn't it?
23 MS. BURNS: I disagree. I disagree. This
24 is almost a reverse Hall situation in the -- in the
25 States looking at. Because if you look at Hall, Hall

1 was trying to rest totally on an IQ. Here he's trying
2 to do the same thing to say, oh, there's a 75, possibly
3 we concede a higher IQ than that. But Hall -- in Hall,
4 there was a preclusion of the adaptive, as this Court
5 has said is -- is integral to the showing, not one
6 adaptive deficit --
7 JUSTICE KAGAN: Well, I think what --
8 JUSTICE GINSBURG: But the -- but
9 adaptive -- adaptive was not relevant to the -- the
10 determination at the sentencing hearing, because there
11 was no Atkins. They were trying to show mental deficit,
12 but they adapted something when we're making an Atkins
13 determination. And there was -- that was never before
14 the sentencing court. It's only after Atkins is decided
15 that adaptive becomes -- becomes relevant.
16 But I didn't -- I wanted to ask you
17 something in this record that's disturbing, and maybe
18 you can explain it. There is a brief -- you know it;
19 it's by Justice Calogero -- that says there were 18
20 people who were sentenced to death and -- and before
21 Atkins. Then Atkins is decided. Every one except for
22 this Petitioner got a hearing in the State court; is
23 that true?
24 MS. BURNS: That is not true. And if Your
25 Honor will indulge me, I can go case by case. It will

1 eat into my time, but I'll be glad to do that. In
2 Dunn --
3 JUSTICE SCALIA: Please don't.
4 (Laughter.)
5 MS. BURNS: In many of those cases, there
6 was either a pretrial showing of mental retardation,
7 something in the record that was serious, a diagnosis
8 which was never present in this case. There was no
9 mention of the word "intellectual disability" in Kevan
10 Brumfield's case until June 16th of 2003, after Atkins
11 was decided -- and that is the first time -- after
12 Atkins was decided that he made this claim that says I
13 have a 75 IQ, I have adaptive deficits without
14 specifying one of them.
15 JUSTICE KAGAN: But --
16 MS. BURNS: And they were onset prior to 18.
17 He did not meet his standard under Atkins.
18 JUSTICE KAGAN: But Ms. Dunn, if we could go
19 back, just on this point: You said he didn't meet the
20 standard. And the standard is, as Justice Breyer
21 suggested and you agreed, the one that comes from Dunn.
22 And what I understand Mr. Brumfield to be saying is,
23 look, all I need is some evidence. The evidence that
24 was in the trial record, even though it was pre-Atkins,
25 the evidence was -- that was in the trial record was, I

1 had a very low IQ, 75. In addition, there was some
2 evidence of -- of adaptive deficits, even -- even though
3 they weren't trying to prove this point, evidence came
4 in that he didn't read very well, he didn't write very
5 well, he had problems processing information. So that
6 there was all that evidence.
7 And then you sort of top -- when you look at
8 the -- what the court said, I mean, basically, each one
9 of the three things that the court said was just wrong.
10 You know, the 75 is evidence of disability, there was
11 evidence of adaptive functioning, and this idea that the
12 court had that evidence relating to an antisocial
13 personality somehow precluded the finding of mental
14 disability is wrong as well.
15 So I guess the question that Justice
16 Breyer's question really leads to is like: What's not
17 some evidence here? And didn't the court just
18 misunderstand what -- what record it was looking at and
19 what it was doing?
20 MS. BURNS: I -- I would disagree,
21 respectfully, and I would also ask this Court to
22 remember that the court here looked at the entire record
23 and that --
24 JUSTICE SCALIA: Well, that's the point. It
25 seems to me --

1 MS. BURNS: That is the --
2 JUSTICE SCALIA: That's the point you have
3 to attack. Does the State saying that there has to be
4 some evidence, does that mean if there is one item of
5 evidence -- even though it's outweighed by everything
6 else, it's contradicted by other -- by other
7 witnesses -- if there's one little peppercorn of
8 evidence, you have to go on to a hearing? Is that what
9 the State rule means? Or does it mean when you consider
10 the entirety, including the rebuttal evidence -- - --
11 MS. BURNS: It is --
12 JUSTICE SCALIA: -- is there reasonably some
13 evidence of his mental disability?
14 MS. BURNS: Justice Scalia, it is the
15 entirety of the record.
16 JUSTICE SCALIA: I thought that's what it
17 was.
18 MS. BURNS: I am not --
19 JUSTICE KAGAN: Oh, sure, I consider the --
20 JUSTICE SOTOMAYOR: Then -- then --
21 MS. BURNS: I cannot underscore that -- the
22 first thing that the State did at the sentencing hearing
23 was to reintroduce the 41 witnesses who testified, their
24 testimony, as well as the 159 exhibits that went into
25 the very sophisticated premeditated --

1 JUSTICE SOTOMAYOR: But wait a minute. Wait
2 a minute.
3 MS. BURNS: -- planning in this prong.
4 JUSTICE SOTOMAYOR: But wait a minute. Then
5 there is a legal question here. And the legal question
6 is: Can a State make the final determination of -- of
7 mental incapacity, or lack thereof, based on a trial
8 record that did not address the issue? That was the
9 question presented. And you're saying it can, and what
10 your adversary is saying, if there is some evidence of
11 mental incapacity, then I'm entitled to a separate
12 hearing that addresses that question alone; I can put in
13 additional evidence and contradict whatever happened at
14 the penalty stage. That's what his point is. Why is he
15 wrong?
16 MS. BURNS: He's wrong because that would
17 require -- if mental retardation was not raised, which
18 it could have been in this case as a mitigator, there's
19 any other relevant mitigating circumstances if you --
20 JUSTICE SOTOMAYOR: You don't disagree that
21 in Williams and Dunn, your own supreme court said, it's
22 a double-edged sword, and we don't expect counsel to
23 raise an issue that doesn't get them off.
24 MS. BURNS: Justice Sotomayor, if I may
25 disagree with that: The rationale of this Court in

1 Atkins is that we are an evolving, decent society that
2 will not have a consensus to execute mentally retarded
3 people.
4 JUSTICE BREYER: We're all on the same page.
5 MS. BURNS: That falls in the face -- that
6 falls in the face of saying that juries, then, are
7 inclined to execute them if they show some evidence of
8 mental retardation.
9 JUSTICE BREYER: No, no. I think we're all
10 on the same page here, and I think we've made some
11 progress in this, because I agree with you, and I agree
12 with Justice Scalia that what we have to do –and there
13 isn't to - is to look at the whole record and see, keeping
14 in mind the fact that it was a pre-Atkins record, and they
15 didn't know about Atkins, but looking at the whole record,
16 is the Louisiana court clearly wrong? Is it unreasonable
17 in saying there wasn't enough evidence, even though there
18 has to be some, which is up to them pretty much how they
19 say the some, but they're unreasonable in saying that
20 there wasn't some evidence justifying a hearing. And
21 the only way to do that is for us to read it. Is -- is
22 that right?
23 MS. BURNS: The record has to be read.
24 JUSTICE BREYER: Would you agree with that?
25 MS. BURNS: I would agree that the --

1 JUSTICE BREYER: I agree with that.
2 MS. BURNS: -- entirety of the record has
3 got to be read. It cannot be taken in a vacuum as
4 counsel would have you believe that this judge was
5 myopic.
6 JUSTICE SCALIA: I haven't read the whole
7 record, you know, and I doubt that I'm going to. And --
8 and I doubt that this Court is going to read the whole
9 record in all of these Atkins cases in the future. I
10 mean, what -- what you're saying is -- is -- you don't
11 think it's -- it's fantastical?
12 MS. BURNS: I do, Your Honor. And that's --
13 that's my whole point, is if you make the argument that
14 in every one of these cases where mental retardation was
15 not raised as an issue, it opens the floodgates for
16 every pre-Atkins case to have to be reexamined, to have
17 to be given a hearing.
18 JUSTICE SCALIA: No. No.
19 JUSTICE BREYER: Not every one. They want
20 to do this one, and I --
21 JUSTICE KENNEDY: The Petitioner -- the
22 Petitioner's counsel conceded that if in this hearing,
23 at the sentencing hearing, medical evidence was that in
24 the opinion of the expert witness, this defendant, it --
25 has no intellectual disability, this would be a

1 different case. That's not in this case. And what is
2 in this case -- and you have still not answered Justice
3 Breyer's question echoed by Justice Kagan. Don't we
4 look at Dunn and Williams to see what the standard is?
5 MS. BURNS: Absolutely.
6 JUSTICE KENNEDY: And you have not said yes,
7 and you have not said no.
8 MS. BURNS: Yes. That is the law.
9 JUSTICE KENNEDY: All right.
10 MS. BURNS: But that still requires him to
11 come forward with not just some evidence, but
12 significant factors, significant objective factors to
13 trigger that hearing.
14 JUSTICE GINSBURG: But he had no money to do
15 it. He said, if I had money I would investigate and I
16 would come up with a lot more than I did at the
17 sentencing hearing, but the State won't give me any
18 money.
19 MS. BURNS: Justice Ginsburg, if I may
20 address this issue, because unlike the majority of cases
21 that this Court has analyzed in an AEDPA deference,
22 although under a Strickland umbrella normally in terms
23 of mitigation and ineffectiveness of counsel, by filing
24 separate claims for funding, this man was awarded at --
25 at the time of this trial, approximately $10,000 in

1 funding, which would be approximately $30,000 today, for
2 investigators, for investigative services, for a
3 sociologist who was board certified for two
4 neuropsychologists.
5 And Dr. Guin testified she conducted 28 to
6 32 interviews. She procured every medical, school
7 record that included prior psychiatric and psychological
8 analyses of this defendant --
9 JUSTICE GINSBURG: What addition --
10 MS. BURNS: -- including what was --
11 JUSTICE GINSBURG: What was there in
12 addition that was put in? He did get funding when he
13 was in Federal court.
14 MS. BURNS: No. He got funding in the
15 State. This is in the State court to flesh out any
16 possible defense --
17 JUSTICE GINSBURG: I'm not talking about the
18 sentencing hearing. I'm talking about the Federal
19 habeas. What -- what, was there additional evidence?
20 MS. BURNS: That was just -- apparently that
21 they just showed up and they had the money. There was
22 never -- there was never a hearing. He showed up one
23 day, he got the -- he got the experts, and I don't know
24 how the funding was granted, because he just showed up
25 with those reports, filed them into -- as an amended

1 habeas, in -- in State -- in district court, and as a
2 result of the reports that he got independently, that's
3 what triggered --
4 CHIEF JUSTICE ROBERTS: Didn't counsel --
5 MS. BURNS: -- in the court hearing.
6 JUSTICE ALITO: In the State --
7 CHIEF JUSTICE ROBERTS: Go ahead.
8 JUSTICE ALITO: In the State court, did
9 Petitioner say, give me a hearing, and if you do, I will
10 produce additional evidence without having funding? Or
11 did he say, give me a hearing and if you -- and provide
12 me with funding so that I can put in additional
13 evidence?
14 MS. BURNS: He made a vague -- in his very
15 first habeas petition, and this went on for a period of
16 44 months. The first petition says, I need about 10
17 different types of experts and probably will need money.
18 Then he filed four motions to continue, saying, I am
19 still reviewing this record and I do not know what
20 experts I will be needing.
21 Then when he came in on the hearing, there
22 was never -- although there was a claim at the very,
23 very end; claim 105, which was the last claim -- he
24 never -- he never filed a separate Ake motion as had
25 been done in everything pre-trial in this case. He just

1 came in, he sat mute, he didn't say to the judge which
2 was -- which would be the Louisiana standard, Your
3 Honor, you -- you need to rule on this ahead of time, I
4 still need time to investigate. There was never any
5 kind of objection, any kind of moving for the funds or
6 any kind of specificity. And as a result of that, the
7 reviewing State habeas court dismissed those claims with
8 prejudice for failure to make them out with
9 particularity.
10 JUSTICE ALITO: Well, I see a -- unless we
11 know the answer to that question, I don't know how we
12 can answer the question of whether there should have
13 been a hearing. If he wasn't going to produce anything
14 more at the hearing, then what was already in the
15 record, there would be no point in granting a hearing.
16 And so if the only purpose of the hearing was to allow
17 him to put in additional evidence with funding, case
18 comes down to the question whether it was
19 unconstitutional -- whether under AEDPA it was clearly
20 established that it was unconstitutional for the State
21 court to deny funding for this purpose.
22 MS. BURNS: There was never -- my -- and my
23 point again, is just as he did not make the threshold
24 for the Atkins hearing, he did not make any kind of
25 threshold and showing of specificity for any expert

1 funding. You just -- you just don't have --
2 JUSTICE KAGAN: Because, Ms. Burns, wouldn't
3 it be right to think, sure, he'd rather have had
4 funding, but he wanted the hearing regardless of whether
5 he was going to get funding. And he can go out and seek
6 pro bono support. He could try to go back to the same
7 experts that he had used at the sentencing.
8 So even without funding, the opportunity for
9 a hearing might have been worth something to him. And
10 what's clear, isn't it, this is the -- you said
11 that there is questions as to whether he asked for
12 funding or didn't ask for funding. What's clear is that
13 he asked for a hearing, isn't that right?
14 MS. BURNS: He did ask for a hearing. But
15 to get a hearing, again, you have to meet a threshold.
16 And I might add to the Court that it would have been, as
17 in many other cases, a relatively simple matter to go
18 back, to have approached Dr. Bolter, Dr. Jordan, Dr.
19 Guin and just said, look, a case named Atkins has come
20 out in 2002. You have previously evaluated this
21 defendant; would it now make any difference to you, in
22 view of the holding in that case, would you, just say in
23 a letter --
24 JUSTICE ALITO: Well, often in -- often, in
25 order to obtain, a hearing a party whom is moving for a

1 hearing has to make a proffer of what will be shown at
2 the hearing. It makes no sense to say we're going to
3 have a hearing and I want a hearing and I have the
4 burden of proving at the hearing that I'm entitled to
5 something, but I don't have any evidence to prove the --
6 the point that I need to prove.
7 MS. BURNS: And my --
8 JUSTICE ALITO: So it does seem to come down
9 to funding, unless there is something in the -- in the
10 record, and maybe you or your counsel can point to
11 something in the record that shows that he wanted a
12 hearing, even if he wasn't going to have funding.
13 MS. BURNS: He proceeded with the hearing
14 that day with -- without making any type of objection
15 and proceeded to the merits. He -- he, first of all,
16 did not file any separate Ake claim. I -- I'd consider
17 that very important, because that -- that was the
18 procedure that was followed --
19 JUSTICE SCALIA: You're saying he doesn't
20 want funding. He didn't want funding, you're saying,
21 right?
22 MS. BURNS: No. He -- he made a nebulous
23 claim for funding, and said, Well, you know I'm
24 reviewing this, I don't know what experts I --
25 JUSTICE SCALIA: You say he proceeded

1 without it, so --

2 MS. BURNS: Yes, he did.

3 JUSTICE SCALIA: So he didn't want funding.

4 Ms. BURNS: He --

5 JUSTICE SCALIA: That doesn't help your

6 case. It hurts your case.

7 MS. BURNS: He proceeded to the hearing that

8 day.

9 CHIEF JUSTICE ROBERTS: Counsel, in looking

10 at the record, what are we supposed to do with

11 Dr. Jordan's report?

12 MS. BURNS: Might I -- might I direct this

13 Court to the magistrate judge's recommendation which is

14 found -- it's document 37, page 17, footnote 7, where

15 she references a certain page of Dr. Jordan's report.

16 And it's -- we don't know. It -- it is a defendant's

17 burden when we file for discovery to at least file

18 whatever reports are going to be used --

19 JUSTICE SOTOMAYOR: Counsel, that's a bit of

20 a copout. You're the prosecutor. Was it admitted at

21 trial -- at the sentencing?

22 MS. BURNS: It was not admitted --

23 JUSTICE SOTOMAYOR: At the sentencing

24 hearing?

25 MS. BURNS: -- as evidence.

1 JUSTICE SOTOMAYOR: Right.
2 MS. BURNS: But she had a copy of it and as
3 Dr. --
4 JUSTICE SOTOMAYOR: But it was not before
5 the State court?
6 MS. BURNS: Apparently it -- it was viewed
7 by the judge. You can still have -- if it's not
8 introduced as evidence by either party during the trial,
9 it can still be filed as part of an answer and be part
10 of that trial record which the court reviews.
11 CHIEF JUSTICE ROBERTS: There was -- it was
12 discussed during -- I gather, during cross-examination
13 several times. What is the status of documents that are
14 the subject of cross-examination under Louisiana law?
15 Are they part of the record? Are they simply extraneous
16 material that can be consulted? What -- what are they?
17 MS. BURNS: If -- of course, the rule -- the
18 rule is, if someone has relied upon a report as both
19 Dr. Bolter and -- and Dr. Guin did in this case, and the
20 report had been tendered to maybe -- the Jordan report,
21 we had the right --
22 CHIEF JUSTICE ROBERTS: The report had been
23 tendered what?
24 MS. BURNS: The report had been tendered to
25 the State, after -- after much argument. They did not

1 want to tender that report. But we had a copy of it,
2 because I very -- I think, very repletely cross-examined
3 Dr. Guin.
4 JUSTICE SCALIA: I'm waiting for the last
5 half of your sentence. If -- right? -- if a witness
6 testified about it and if it was tendered to the court,
7 then what is the conclusion?
8 MS. BURNS: You can -- you can, of course,
9 use that report.
10 JUSTICE SCALIA: And it becomes part of the
11 record?
12 MS. BURNS: Yes, it does.
13 JUSTICE SCALIA: Okay.
14 MS. BURNS: Absolutely. Absolutely.
15
16 JUSTICE GINSBURG: We were told that the
17 three reasons given by the State habeas court, that all
18 of those, the three, were wrong. That's what the
19 counsel for the Petitioner told us.
20 And what is your -- your response to that?
21 75, we know that it isn't an absolute, that you can have
22 a 75 score and still be intellectually disabled.
23 MS. BURNS: 75 is, of course, within the
24 range, and what's noticeably been -- been absent from
25 this record in reply brief is that everything's been

1 taken down the five points by the SEM. But we never
2 hear in these cases that truly are argued that the SEM
3 can go up the five points. The first test that this
4 defendant was administered, when he was 11, which was a
5 WISC, there was -- there was no number put down, but the
6 doctor opined that it was a dull normal, which would be
7 an 80 to an 89, which is more consistent, if we took the
8 five points up from -- from the 75 that Dr. --
9 Dr. Jordan -- Dr. Bolter did.
10 And additionally, we also -- well, there
11 was -- there was additional evidence, of course, at the
12 Federal hearing that would put it more in that upper
13 range, I believe.
14 JUSTICE SOTOMAYOR: All right. Could I go
15 back to your answer to Justice Scalia?
16 It -- I've practiced elsewhere, and if
17 anything's made a part of the record, you give it an
18 evidence number. Louisiana is different; it's not --
19 it's not introduced into evidence?
20 MS. BURNS: No.
21 JUSTICE SOTOMAYOR: You just --
22 MS. BURNS: No. Not necessarily. No. The
23 Guin report was not introduced by the defense into
24 evidence. I will refer to coroner's reports, crime lab
25 reports. I do not necessarily file them into evidence.

1 What I do is, as part of the answer to discovery, we
2 attach them. They are part of the record. That is --
3 that is Louisiana procedure.
4 JUSTICE SOTOMAYOR: As the answer -- but how
5 do we know the trial judge read it?
6 MS. BURNS: Because he said so. First of
7 all, under Harrington v. Richter, it is the ultimate
8 conclusion, the factual conclusion reached by the court,
9 not necessarily the language that he used. It does not
10 require that each and every ground that he relied on be
11 articulated.
12 And the court stated in his rulings that, I
13 have examined this record. It says, I've looked at the
14 application, the response, the record, which in this
15 case, just to educate the Court as to Louisiana habeas
16 procedure, if a habeas judge is reviewing, he would get
17 the 16 initial volumes of the case. There were four
18 additional supplemental volumes. That includes
19 everything from indictment to pretrial discovery, any
20 answers, documents that were filed in answer to that.
21 It includes the testimony during any suppression or
22 funding hearings. It includes the voir dire, which in
23 this case was 13 days. It includes the guilt phase,
24 which was six days. And the penalty phase --
25 JUSTICE GINSBURG: Can we go back to --

1 you're answering my question, and then -- and you told
2 me the 75 IQ, but there were two others.
3 MS. BURNS: Yes.
4 JUSTICE GINSBURG: There was nothing on
5 adaptive behavior, but in fact, there was evidence --
6 some evidence of adaptive behavior. And then the third
7 point, antisocial behavior, there's nothing inconsistent
8 about being antisocial and having an intellectual
9 disability.
10 MS. BURNS: There is. And it was simply --
11 I think -- I don't think you can necessarily fault the
12 court for saying that. He's just simply reciting that
13 there was a finding in this case, because every
14 doctor -- every --
15 JUSTICE GINSBURG: But the finding is
16 perfectly consistent with -- with intellectual
17 disability.
18 MS. BURNS: This individual was examined
19 five times prior to the age of 18. He was given a WISC.
20 Nobody found the words "intellectual disability." In
21 fact --
22 JUSTICE GINSBURG: Because Atkins wasn't
23 decided?
24 MS. BURNS: No. Mental -- mental
25 retardation has existed since the beginning of time. It

1 does not require the Atkins case to come into play.
2 Nobody found him to be intellectually
3 disabled. What they did find was conduct disorder,
4 hyperactivity, under-socialized, aggressive, and then as
5 an adult, that morphed into antisocial personality
6 behavior. They are two -- also two separate and
7 distinct items. And that is -- that is contained in the
8 Louisiana statute on intellectual disability, that
9 certain things like learning disabilities,
10 environmental, cultural, or economic disadvantage,
11 emotional stress in the home or school, difficulty in
12 adjusting to school, behavioral disorders, and other
13 mental types of behavior, psychoses, are not necessarily
14 indicative.
15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 Mr. DeSanctis, you have two minutes
17 remaining.
18 MS. BURNS: Thank you, Your Honor.
19 REBUTTAL ARGUMENT OF MR. DeSANCTIS
20 ON BEHALF OF PETITIONER
21 MR. DeSANCTIS: Thank you, Mr. Chief
22 Justice.
23 First, the -- Dr. Jordan's report was not in
24 the record, and that is made clear at the Petition
25 Appendix 39a, note 13, where the court noted that

1 counsel recognized that it was not in the record.
2 Second, counsel articulated that there were
3 scores -- IQ scores in the -- in the 80s and 90s.
4 That's not correct. Federal -- volume I of the Federal
5 hearing at page 57 shows that there were two other
6 tests: One a 75, and one a 54.
7 Finally, I want to emphasize that this Court
8 recently recognized that it's unconstitutional to create
9 an unacceptable risk that persons with intellectual
10 disability will be executed. The State court's
11 determination of the facts in this case created
12 precisely that risk. And now that we're here, it's not
13 just risk; it's certainty. The only court to provide
14 Mr. Brumfield with a hearing found that he is
15 intellectually disabled, and unless this Court reverses
16 the Fifth Circuit's erroneous ruling, an intellectually
17 disabled person will be executed.
18 Thank you.
19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 The case is submitted.
21 (Whereupon, at 11:03 a.m., the case in the
22 above-entitled matter was submitted.)
23
24
25

A

ability 4:13 8:5
aboveentitled 1:11 55:22
absence 29:21 30:7
absent 50:24
absolute 33:5 50:21
absolutely 32:21 42:5 50:14,14
acquire 12:10
actual 3:22 10:25
adapted 35:12
adaptive 4:6,8,13 9:7 10:12 11:1 23:18 31:6 33:23 35:4,6,9,9,15 36:13 37:2,11 53:5,6
add 46:16
addition 37:1 43:9 43:12
additional 39:13 43:19 44:10,12 45:17 51:11 52:18
additionally 51:10
address 7:25 39:8 42:20
addresses 39:12
adequate 12:11
adjusting 54:12
administered 51:4
admitted 48:20,22
adopted 9:1 29:5
adopts 29:15
adult 54:5
adversary 39:10
aedpa 19:5,6 29:1 32:11,23 42:21 45:19
age 11:25,25 53:19
aggressive 54:4
ago 11:8
agree 4:11 30:5 34:13 40:11,11,24 40:25 41:1
agreed 36:21
ah 32:19
ahead 44:7 45:3
ake 14:24,24 44:24 47:16
alito 7:13 8:6 19:22 20:18 23:3,7 26:25 27:19,22 28:1,4,8 44:6,8 45:10 46:24 47:8
alitos 15:10 16:6 20:9
allow 45:16
amended 43:25
amount 15:14
analyses 43:8
analyzed 42:21
answer 5:22 8:6 10:1 16:4 18:4 19:22,22 20:6,8,9 20:23 33:5,20 34:2 45:11,12 49:9 51:15 52:1,4 52:20
answered 42:2
answering 5:4 30:22 53:1
answers 52:20
antisocial 37:12 53:7,8 54:5
anybody 34:6
anythings 51:17
anyway 23:14
app 3:18
apparently 43:20 49:6
appearances 1:14
appendix 22:24 54:25
application 27:13 28:11 52:14
applies 18:8
approached 46:18
appropriate 15:2
approximately 42:25 43:1
april 29:3
argue 31:25
argued 27:2 51:2
arguing 21:2
argument 1:12 2:2 2:5,8 3:3,6 6:8,17 10:19 22:9,12 26:7,10,17,20,24 27:2,3,4 28:19 41:13 49:25 54:19
articulate 21:22,24
articulated 16:19 18:16 23:16 52:11 55:2
asked 16:11 46:11 46:13
asking 8:2 17:8,8
assistance 9:9
atkins 3:24,25 7:8 7:10,11,18 8:15 8:22,22 9:3,20 10:8,19 11:20 16:17 18:8 21:11 21:19,20,21,21 23:20 24:11,25 25:5,8 29:8 30:7 30:13 35:11,12,14 35:21,21 36:10,12 36:17 40:1,15 41:9 45:24 46:19 53:22 54:1
attach 52:2
attack 38:3
automatically 24:16,16
available 29:2
awarded 42:24
awfully 34:20

B

b 1:15 2:3,9 3:6
babies 12:6
back 7:10 21:8 31:11 32:17 36:19 46:6,18 51:15 52:25
backwards 21:10
bar 6:12,12
based 3:13,16 4:5 7:18 14:12,24 19:14,14 24:11,14 39:7
bases 3:16 19:14
basic 11:3
basically 15:9 37:8
basis 3:19 4:3 9:15 10:4,5 32:1
basket 32:3
baton 1:17
beginning 53:25
behalf 1:15,17 2:4 2:7,10 3:7 28:20 54:20
behavior 53:5,6,7 54:6,13
behavioral 54:12
believe 12:15 21:11 22:1,3,4 41:4 51:13
bies 9:1
birth 11:5 12:4
bit 16:5 23:5 31:9 48:19
blah 19:25 20:1
blank 19:1
blood 4:6
blue 7:25
board 43:3
bobby 9:1
bolter 11:7 13:17 13:18 23:12 46:18 49:19 51:9
bono 46:6
books 8:16
brain 11:4
break 18:5
breyer 24:24 25:7 26:9,16,19,22 29:9,20 30:1,5,21 31:3 33:3 34:1,16 36:20 40:4,9,24 41:1,19
breyers 37:16 42:3
brief 8:1 28:13 35:18 50:25
brightline 8:2
bring 9:11 24:4
brings 10:1
broader 19:20 20:4 28:1
brumfield 1:3 3:4 3:11,20 10:23 11:3,7,12,21,22 12:9 17:5 22:25 23:17 36:22 55:14
brumfields 3:14 18:20 36:10
burden 4:12,20 5:15 9:23,24 10:3 13:9 34:9 47:4 48:17
burl 1:6
burns 1:17 2:6 28:18,19,21 29:19 29:24 30:3,17 31:2,5 32:7,15,21 33:22,25,25 34:14 34:23 35:24 36:5 36:16 37:20 38:1 38:11,14,18,21 39:3,16,24 40:5 40:23,25 41:2,12 42:5,8,10,19 43:10,14,20 44:5 44:14 45:22 46:2 46:14 47:7,13,22 48:2,4,7,12,22,25 49:2,6,17,24 50:8 50:12,14,23 51:20 51:22 52:6 53:3 53:10,18,24 54:18

C

c 1:8,15 2:1 3:1
cain 1:6 3:4
call 17:25
called 9:5 16:15
calogero 35:19
cant 15:8 16:7 25:4

25:20 29:11
capacity 9:5 12:10 21:25 22:5 34:11 34:19
case 3:4,10 6:5 7:3 7:5,25 8:5,9 10:20 10:22 14:23 15:1 15:5,12,13 16:7 16:13 18:12,14 19:13,20,24 20:1 21:1 24:24 25:2 27:1,3 28:8 29:7 32:10 33:1 34:22 35:25,25 36:8,10 39:18 41:16 42:1 42:1,2 44:25 45:17 46:19,22 48:6,6 49:19 52:15,17,23 53:13 54:1 55:11,20,21
cases 29:24 36:5 41:9,14 42:20 46:17 51:2
categorical 13:3 27:4,5
cert 27:25
certain 48:15 54:9
certainly 20:7 22:11 31:16
certainty 55:13
certified 43:3
challenge 15:8
challenging 5:20
changed 7:11 23:20
chaos 11:25
chief 3:3,8 4:23,25 5:7,14 6:11 19:18 20:3,12,16,20 28:15,17,21 44:4 44:7 48:9 49:11 49:22 54:15,21 55:19
child 11:24
childhood 11:15
circle 31:9,9
circuit 32:8,18,22
circuits 55:16
circumstances 15:11 39:19
cited 14:22
citing 15:1
claim 3:12 7:17 8:22,22 15:1,18 19:16 24:10 31:22 36:12 44:22,23,23 47:16,23
claimed 13:14
claims 42:24 45:7
clear 3:24 4:1,1 8:1 14:25 46:10,12 54:24
clearly 17:21 19:2 25:5 26:15 27:8 40:16 45:19
client 9:10 25:22
clinical 3:24 23:1
cognizable 22:13
collateral 17:21,23 19:1
come 14:10 25:18 34:8,10,18 42:11 42:16 46:19 47:8 54:1
comes 17:4 36:21 45:18
coming 4:20 10:5
completely 4:9
comprehension 10:25
compromised 22:5
concede 15:10 20:8 35:3
conceded 12:22 20:5 41:22
concerned 6:11 19:21
conclusion 28:25 32:20 50:7 52:8,8
conclusions 15:8
conclusive 30:4
condition 3:14 9:25 18:15 25:19,23
conduct 54:3
conducted 43:5
confusing 15:4,5
consensus 40:2
consider 9:17 38:9 38:19 47:16
consideration 9:12
considered 27:10
considering 27:5
considers 7:15 19:25 24:8
consistent 16:24 51:7 53:16
constitutional 27:14 31:17
consulted 49:16
contained 54:7
continue 44:18
contradict 39:13
contradicted 38:6
contrary 3:23 16:21 17:6 28:11
copout 48:20
copy 49:2 50:1
coroners 51:24
correct 12:13 13:17 14:7 15:15,19 20:2 21:14,25 22:6,7,20 25:6 26:8 27:21 55:4
couldnt 11:24 24:5
counsel 9:9 28:17 39:22 41:4,22 42:23 44:4 47:10 48:9,19 50:19 54:15 55:1,2,19
course 5:10 7:1 26:3,4 29:10 30:22 32:21 49:17 50:8,23 51:11
court 1:1,12 3:9,10 3:14,15,19,24,25 4:1 5:5,11 7:10,15 8:16,21 9:1,2,19 10:5,13,16,23 11:2,5,9,10,19,22 12:16,24 13:4 14:9,15,17,21,23 14:25 16:12,14,20 16:21 17:1,11,12 17:14,18,18,19,23 17:24 18:7,24,24 19:13 21:5 23:17 23:18,19,24 24:5 24:7,12,13,13,14 27:24 28:10,22,25 29:4,6,24 31:11 31:14 34:4,17 35:4,14,22 37:8,9 37:12,17,21,22 39:21,25 40:16 41:8 42:21 43:13 43:15 44:1,5,8 45:7,21 46:16 48:13 49:5,10 50:6,17 52:8,12 52:15 53:12 54:25 55:7,13,15
courts 4:3 14:12 16:13 18:25 31:15 55:10
create 55:8
created 55:11
crime 51:24
critical 6:16
crosscutting 28:4
crossexamination 49:12,14
crossexamined 50:2
cultural 54:10

D

d 1:8,15 3:1 8:10 18:12 19:7 21:3 22:16 27:17,17,24 28:3
day 43:23 47:14 48:8
days 52:23,24
death 9:16 25:1 35:20
debate 12:21
deboue 14:23
decent 40:1
decide 20:5,24 30:25 33:6,9,9,13
decided 10:9,19 18:24 35:14,21 36:11,12 53:23
decides 17:24
deciding 33:17,21
decision 3:10,12,15 4:4 7:18 14:12 16:13 17:21 19:14 23:25 24:11,14
defendant 4:4 6:21 7:9 9:4 14:10 16:15,17 17:4,14 18:9 19:17 30:24 34:8,9,9,18 41:24 43:8 46:21 51:4
defendants 18:14 48:16
defense 9:21 10:7 32:6 43:16 51:23
defenses 7:7
defer 30:22,23
deference 29:1 30:17 31:22 32:11 42:21
deficit 11:3 33:23 35:6,11
deficits 4:13 36:13 37:2
define 6:22
definite 33:5
definition 21:16,18
demand 4:6
demonstrated 4:5 23:17
demonstrations 9:6
deny 3:11,16 45:21
depend 16:3 28:13
desanctis 1:15 2:3 2:9 3:5,6,8 4:15 4:19,24 5:3,13,19 6:4,7,13,16,24 7:2

7:24 8:9,13,19,24 9:13,19 10:10,16 10:21 12:14,20 13:8,12,17,23 14:2,6,15,20 15:3 15:15,19,25 16:3 16:10 17:4,12 18:1,4 19:3,6,12 20:2,7,14,19 21:3 21:14,17,21 22:1 22:7,11,16,20,23 23:9 24:2,19 25:6 26:8,10,18,23 27:16,21,23 28:3 28:6,9 54:16,19 54:21
determination 3:13 5:1 7:19 19:1,24 23:22 24:12,17 27:20 34:3,17,20 35:10,13 39:6 55:11
determinations 18:14
determinative 7:17 7:23 8:8 20:17,21 24:9
determine 15:17
developed 32:20
developing 31:22
development 12:3
diagnosis 16:23 36:7
didnt 10:7 11:11 13:15,22,23 31:19 32:4,4 35:16 36:19 37:4,4,17 40:15 44:4 45:1 46:12 47:20 48:3
difference 5:24 6:10,11,14 46:21
different 5:15,16 8:15 15:12 42:1 44:17 51:18
difficulty 54:11
diminished 9:4
dire 52:22
direct 48:12
disabilities 54:9
disability 3:12,21 3:22 4:8,22 6:22 7:5,18 8:18 9:6 10:13 11:19 16:16 16:18,25 17:22 18:10,17,18,20 19:11 20:15 23:2 24:10 30:19 36:9 37:10,14 38:13 41:25 53:9,17,20 54:8 55:10
disabled 7:9 9:11 18:7 22:2 25:1,4 30:12 32:3 33:8 33:18 50:22 54:3 55:15,17
disadvantage 54:10
disagree 32:12,13 34:2,6,7,13,23,23 37:20 39:20,25
disconcerting 15:5
discovering 31:13
discovery 48:17 52:1,19
discuss 3:18
discussed 12:25 49:12
discusses 14:24
discussion 19:19,21
dismissed 45:7
dismissive 13:20
disorder 54:3
disorders 54:12
disqualifies 8:4
disqualifying 20:14
distinct 15:25 54:7
district 17:10,12,14 17:17,18,19,24 18:23,24 29:4,5 44:1
disturbing 35:17
doctor 51:6 53:14
document 48:14
documents 49:13 52:20
doesnt 12:23,24 21:12,21,22,23 22:12 23:11 30:9 30:10 39:23 47:19 48:5
doing 14:22 37:19
dont 4:11 5:15,16 10:2 13:4 15:20 15:22 17:2 22:17 25:8,9,10 26:18 26:25 30:11 34:5 34:6,13 36:3 39:20,22 41:10 42:3 43:23 45:11 46:1 47:5,24 48:16 53:11
doubleedged 9:22 39:22
doubt 21:25 34:11 41:7,8
dr 11:7,10 12:15,16 12:21 13:18,18 23:10,12,13 43:5 46:18,18,18 48:11 48:15 49:3,19,19 50:3 51:8,9,9 54:23
driving 34:1
dull 51:6
dunn 4:2 16:12 34:13 36:2,18,21 39:21 42:4

E

e 2:1 3:1,1
eat 36:1
echoed 42:3
economic 54:10
educate 52:15
education 11:13
eggs 32:3
either 21:9 36:6 49:8
emotional 54:11
emphasize 55:7
entire 37:22
entirely 3:13 7:11 19:15
entirety 22:12 38:10,15 41:2
entitled 15:21 17:15,15 22:10 29:1,17 30:24 31:1,18 39:11 47:4
environmental 54:10
erroneous 17:21 19:2 55:16
error 22:13,13
esq 1:15,17 2:3,6,9
essentially 16:22
established 27:8 45:20
evaluated 46:20
everythings 50:25
evidence 3:22 4:21 5:5,10 7:15,21 8:3 8:8 9:17,24 10:12 10:22,22,25 13:12 13:22 14:11 15:14 16:7,17,19,22 17:5,6,22 18:17 18:19 19:10,19,25 20:10 22:9 23:1 23:11,24 24:8 25:3,10,18,23,25 26:4 27:5,10,11 31:6,13,16,17 32:1 33:7,10,14 33:22 34:10,19 36:23,23,25 37:2 37:3,6,10,11,12 37:17 38:4,5,8,10 38:13 39:10,13 40:7,17,20 41:23 42:11 43:19 44:10 44:13 45:17 47:5 48:25 49:8 51:11 51:18,19,24,25 53:5,6
evident 34:10
evidentiary 13:6
evolving 40:1
exactly 8:24
examined 52:13 53:18
example 20:21
exclusively 14:24
excuse 31:8
execute 25:1 40:2,7
executed 55:10,17
exempting 9:16
exhibits 38:24
existed 53:25
expect 4:6 39:22
expert 6:20,20 7:8 11:9 12:8 13:16 41:24 45:25
experts 12:25 16:22 17:2,20,25 43:23 44:17,20 46:7 47:24
explain 22:12 35:18
explained 9:3,4 16:12,14,20
explains 14:12
expressly 3:15 19:13
extraneous 49:15

F

face 21:4 40:5,6
facie 17:22
fact 9:11 23:1 25:17 26:4 27:20 29:5,6 31:20 33:1 40:14 53:5,21
factbound 27:22
factor 9:5
factors 8:21 14:13 25:16 29:7 30:3,4 30:6 42:12,12
facts 3:14 4:21 5:4 5:8 7:19 14:9 16:23 17:19 20:25

24:12,17 32:18,20 34:20 55:11
factual 8:11 18:13 21:4 27:3 28:24 52:8
fail 31:13
failure 29:6 31:5 32:11 45:8
falls 40:5,6
fantastical 41:11
far 16:18 32:6
fault 53:11
federal 5:12,12 6:1 6:2 9:15 10:6 12:22 14:17,19,25 15:2 17:12,13 18:12,13 22:13,14 25:21 26:1 27:14 28:11,12 29:21 30:16 31:11,20,25 32:2,24 33:14 43:13,18 51:12 55:4,4
field 23:20
fifth 32:8,17,18,22 55:16
file 47:16 48:17,17 51:25
filed 43:25 44:18 44:24 49:9 52:20
filing 42:23
fill 19:1
final 18:4 25:2 39:6
finally 55:7
find 10:2 13:5 17:18,20 32:16,24 54:3
finding 13:6 32:5 33:2 37:13 53:13 53:15
fine 10:18 24:22
first 3:19 7:13,14 8:6,23 10:17,22 19:23 20:6,8 22:8 22:23,24 28:6,13 36:11 38:22 44:15 44:16 47:15 51:3 52:6 54:23
five 51:1,3,8 53:19
flesh 43:15
floodgates 41:15
follow 25:13
followed 47:18
following 24:25
follows 24:7
footnote 33:2 48:14
forget 30:1
former 24:1,3
forth 29:7 30:4
forward 4:21 9:11 17:5 21:10 25:18 25:22,24 26:4,5,6 31:7 34:8,10,18 42:11
found 11:12 18:25 25:11 29:6 48:14 53:20 54:2 55:14
four 44:18 52:17
fourth 10:23
function 11:23,24
functioning 37:11
functions 12:2
funding 27:9,10 29:25 30:1 42:24 43:1,12,14,24 44:10,12 45:17,21 46:1,4,5,8,12,12 47:9,12,20,20,23 48:3 52:22
funds 14:17,18,20 15:22 45:5
future 41:9

G

g 3:1
gather 49:12
general 20:22 21:2
ginsburg 8:12,14 8:20 13:10,15,21 14:14,16 22:17,21 35:8 42:14,19 43:9,11,17 50:16 52:25 53:4,15,22
give 21:12 25:15 26:1 30:13 31:19 31:19 32:11 42:17 44:9,11 51:17
given 3:19 5:8,8 29:8 41:17 50:17 53:19
giving 15:17
glad 16:11 36:1
go 21:8 35:25 36:18 38:8 44:7 46:5,6 46:17 51:3,14 52:25
goes 10:11
going 17:24 20:24 31:8 41:7,8 45:13 46:5 47:2,12 48:18
good 25:12,21 29:20 30:9,15
grade 10:24 11:13
granted 27:25 31:25 43:24
granting 33:15 45:15
ground 52:10
grounds 18:16
guess 25:19 37:15
guidance 16:22
guilt 52:23
guin 11:10 43:5 46:19 49:19 50:3 51:23

H

habeas 14:18 17:11 18:12,13 22:18 28:25 31:20 33:24 43:19 44:1,15 45:7 50:17 52:15 52:16
hadnt 26:6
half 50:5
hall 34:24,25,25 35:3,3
hang 13:4
happened 7:6 31:10 39:13
harrington 52:7
hat 13:4
havent 21:13 41:6
hear 3:3 51:2
heard 19:18,19 29:14
hearing 3:11,16 7:11 8:17 9:12 12:22 14:5 15:17 15:22 17:7,15,16 17:19,25 18:10,25 21:12 22:10 24:15 25:15 26:1,6 29:8 29:17 30:8,9,12 30:14,25 31:1,14 31:18,20,25 32:2 32:4,10,16,25 33:10,15 34:5,8 35:10,22 38:8,22 39:12 40:20 41:17 41:22,23 42:13,17 43:18,22 44:5,9 44:11,21 45:13,14 45:15,16,24 46:4 46:9,13,14,15,25 47:1,2,3,3,4,12,13 48:7,24 51:12 55:5,14
hearings 52:22
hed 30:10 46:3
held 9:2 29:25
help 11:23 48:5
henry 9:20
hes 31:1 33:17 35:1 39:16 53:12
high 6:12
higher 5:17 9:23 23:5,8 35:3
hold 31:13
holding 46:22
home 54:11
honor 6:14 9:3,13 9:19 10:10 12:14 13:8,13 16:11 27:16 34:14 35:25 41:12 45:3 54:18
hospitals 11:14
hurts 48:6
hyperactivity 54:4
hypothetical 6:25 7:2 20:10

I

id 3:18 47:16
idea 37:11
ignored 14:9 17:23 18:19
ill 28:15 33:4 36:1
im 4:10 16:11 19:21 20:7 33:5 33:18 39:11 41:7 43:17,18 47:4,23 50:4
impairment 4:5 9:7 10:12 11:1 23:18
important 26:17,20 33:12 47:17
impression 29:13
improper 16:21
improperly 31:13 31:21
inability 27:9
incapacity 39:7,11
inclined 40:7
included 12:8 24:25 43:7
includes 52:18,21 52:22,23
including 38:10 43:10
incompetency 31:18
inconsistent 16:24 53:7
independently 44:2
indicated 19:13 23:19
indication 14:11
indicative 54:14

indicator 11:18
indictment 52:19
individual 8:4 18:6 22:2 53:18
individuals 22:5
indulge 35:25
ineffective 9:9
ineffectiveness 42:23
inequity 15:6 16:10
information 11:17 12:10 37:5
initial 52:17
inquiry 8:11,15 21:4
institutions 12:1
integral 35:5
intellectual 3:12,21 3:22 4:8,22 6:21 7:5,17 8:5,18 9:6 10:13 11:19 12:2 16:16,17,25 18:10 18:17,18,20 20:15 23:2 24:10 30:19 36:9 41:25 53:8 53:16,20 54:8 55:9
intellectually 7:9 18:7 19:17 22:2 25:1,4 30:11 32:2 33:8,18 50:22 54:2 55:15,16
intend 24:19
interviews 43:6
introduced 49:8 51:19,23
intrude 26:25
investigate 42:15 45:4
investigative 43:2
investigators 43:2
involved 8:15 28:2
iq 3:20 7:21 13:19 22:25 23:4 35:1,3 36:13 37:1 53:2 55:3
irrelevant 18:18
isn 40:13
isnt 4:11,12 26:7,22 33:3,4 34:22 46:10,13 50:21
issue 4:22 12:20 15:21,25 19:19 25:16,17,19,22,23 28:2,5,24 34:19 39:8,23 41:15 42:20
issues 32:7,23
item 38:4
items 54:7
ive 51:16 52:13

J

jordan 12:15,16 23:10,13 46:18 49:20 51:9
jordans 12:21 13:18 48:11,15 54:23
judge 10:17,23 12:23,24 18:13,16 19:13 21:6 25:3,3 29:3 41:4 45:1 49:7 52:5,16
judges 26:3 48:13
judgment 30:23,24
june 36:10
juries 40:6
jury 9:12,17
justice 3:3,8 4:10 4:17,23,25 5:4,7 5:14,22,23 6:6,9 6:11,15,18,25 7:13 8:6,12,14,20 9:8,14 10:1,2,11 10:15,18 12:7,18 13:2,10,15,21,25 14:4,14,16 15:3 15:10,16,20 16:2 16:4,6 17:1,9,13 18:2,21,23 19:5,8 19:18,22 20:3,9 20:12,16,18,20 21:8,9,15,19,23 22:3,8,15,17,21 23:3,6,7 24:1,3,22 24:24 25:7 26:9 26:12,14,16,19,22 26:25 27:19,22 28:1,4,8,15,17,21 29:9,20 30:1,5,21 31:3,8 32:12,19 33:3,25 34:1,15 34:15 35:7,8,19 36:3,15,18,20 37:15,24 38:2,12 38:14,16,19,20 39:1,4,20,24 40:4 40:9,12,24 41:1,6 41:18,19,21 42:2 42:3,6,9,14,19 43:9,11,17 44:4,6 44:7,8 45:10 46:2 46:24 47:8,19,25 48:3,5,9,19,23 49:1,4,11,22 50:4 50:10,13,16 51:14 51:15,21 52:4,25 53:4,15,22 54:15 54:22 55:19
justifying 40:20

K

kagan 33:25 34:15 35:7 36:15,18 38:19 42:3 46:2
keeping 40:13
kennedy 5:22 6:6,9 6:15,18,25 13:25 14:4 17:9,13 18:2 18:21,23 19:5,8 41:21 42:6,9
kennedys 21:9
kevan 1:3 3:11 36:9
key 11:18
kind 9:17 45:5,5,6 45:24
knew 11:15
know 9:15 13:3 15:13 20:24 22:25 29:11,12 30:6 33:13 34:3 35:18 37:10 40:15 41:7 43:23 44:19 45:11 45:11 47:23,24 48:16 50:21 52:5

L

la 1:17
lab 51:24
lack 39:7
laid 3:17 14:13
landscape 7:12
language 5:9 52:9
laughter 26:11,21 36:4
law 4:16,20 5:1,9 5:17,20 14:19,19 14:25 15:2 22:14 24:21 27:14 28:11 28:12 33:14 34:5 34:7 42:8 49:14
lawyer 9:10
lead 21:1
leads 37:16
learn 12:10
learning 54:9
left 18:7 32:13
legal 7:11 21:2 24:21 28:1,4 39:5 39:5
length 29:14
letter 46:23
level 10:24
literally 12:4
little 15:4 23:5 31:9 38:7
long 25:24
look 23:21 32:22,23 32:25 33:16 34:25 36:23 37:7 40:13 42:4 46:19
looked 30:14 37:22 52:13
looking 31:24 34:25 37:18 40:15 48:9
looks 18:13 34:19
lose 33:11,16
lot 11:25 19:19 26:5,6 42:16
louisiana 4:1,16,20 6:12 7:10 9:2 14:23 15:23 16:12 21:18,19 23:19 25:11,20 29:17 30:18 34:5,7 40:16 45:2 49:14 51:18 52:3,15 54:8
low 4:20 5:24 6:12 11:5 37:1
lower 9:23

M

m 1:13 3:2 55:21
magistrate 29:3 48:13
main 11:16
majority 42:20
making 8:1 27:2,4 34:4,18 35:12 47:14
man 32:2 42:24
mandatory 9:15
march 1:9
marshal 9:6
material 49:16
matter 1:11 14:17 23:1 24:21 46:17 55:22
mean 6:9 17:2 20:8 20:13 24:6 26:20 37:8 38:4,9 41:10
means 38:9
medical 6:20,22 41:23 43:6
meet 18:2,3 29:13 29:18 31:6 34:21 36:17,19 46:15

mental 3:14 9:21 9:24 11:14 12:1 18:14 21:25 22:5 25:17,18,23 30:19 34:11,19 35:11 36:6 37:13 38:13 39:7,11,17 40:8 41:14 53:24,24 54:13
mentally 9:10 40:2
mention 36:9
mentions 23:25
mere 10:24 30:4
merely 5:3 13:19 23:13
merits 15:18 47:15
met 4:18 17:18 21:13
michael 1:15 2:3,9 3:6
mind 40:14
minute 39:1,2,4
minutes 54:16
misinterprets 6:1
misunderstand 37:18
mitigating 8:21 9:5 9:24 39:19
mitigation 42:23
mitigator 39:18
moment 17:10 30:2 33:4,6 34:4
monday 1:9
money 42:14,15,18 43:21 44:17
months 44:16
morning 3:4
morphed 54:5
motion 44:24
motions 44:18
motor 12:3
movants 4:22
moving 45:5 46:25
mute 45:1
myopic 41:5

N

n 2:1,1 3:1
named 46:19
nature 8:10 27:23
nebulous 47:22
necessarily 8:7 19:23 51:22,25 52:9 53:11 54:13
need 20:24 21:5 32:17 36:23 44:16 44:17 45:3,4 47:6
needed 11:22
needing 44:20
needs 32:15
neither 4:7
neurological 11:6
neuropsychologi... 43:4
never 8:21 23:24 32:9 35:13 36:8 43:22,22 44:22,24 44:24 45:4,22 51:1
new 25:25 29:17
normal 11:17 12:6 12:9 51:6
normally 42:22
note 54:25
noted 12:2 54:25
noticeably 50:24
number 23:14 51:5 51:18
nurses 12:4

O

o 2:1 3:1
objection 45:5 47:14
objective 4:21 14:9 25:16 29:7 30:4 42:12
obtain 46:25
obviously 7:3,24
occurs 18:11
offer 16:15,17
oh 24:22 35:2 38:19
okay 10:21 21:11 22:15 50:13
once 8:15 15:23 17:4 33:4
ones 9:24
onset 36:16
open 19:9
opens 41:15
opined 51:6
opinion 41:24
opportunity 46:8
oral 1:11 2:2,5 3:6 3:17 28:19
order 18:9 46:25
outweighed 38:5
overstating 33:6
overwhelming 10:12
overwhelmingly 17:6
owed 31:22

P

p 3:1
page 2:2 3:17 40:4 40:10 48:14,15 55:5
pages 22:24
part 5:20 6:2,16 18:4 22:11 49:9,9 49:15 50:10 51:17 52:1,2
particular 19:20 21:1,1 24:13
particularity 45:9
party 46:25 49:8
penalty 7:16,20 8:8 9:16 15:7 16:8 24:9,15 27:6 39:14 52:24
people 11:17 34:2 35:20 40:3
peppercorn 38:7
perceive 15:6
perfectly 53:16
perform 11:11
period 24:5 44:15
permit 32:4
person 25:1,10 30:11 55:17
personality 37:13 54:5
persons 55:9
perspective 17:10
persuasive 10:3
pertinent 5:1,11
pet 3:18
petition 7:14 14:21 17:11 22:24 24:7 44:15,16 54:24
petitioner 1:4,16 2:4,10 3:7 17:15 31:12 35:22 41:21 44:9 50:19 54:20
petitioners 7:16,17 24:8,10 41:22
phase 6:20 7:16,20 8:8 15:7 16:8 24:9,15 27:6 52:23,24
placed 11:14 12:1
planning 39:3
play 54:1
playing 23:20
please 3:9 28:22 36:3
plethora 18:19
point 6:3 8:12,14 15:10 27:7 32:25 33:8,22 36:19 37:3,24 38:2 39:14 41:13 45:15 45:23 47:6,10 53:7
points 13:14 51:1,3 51:8
poorly 11:23
portion 13:1
position 32:10,22
possessed 12:9
possible 43:16
possibly 13:5 35:2
postconviction 8:23 27:12
practiced 51:16
preatkins 4:7 8:4 9:9 18:11 21:6 23:21,23 24:15 26:7 27:6 36:24 40:14 41:16
precedent 27:7
precisely 9:1 14:12 55:12
preclude 31:12
precluded 37:13
precludes 31:21
preclusion 35:4
predated 16:13
prejudice 45:8
preliminary 33:2
premeditated 38:25
premila 1:17 2:6 28:19
prepared 25:25
preponderance 33:1
present 25:10 36:8
presented 5:9,10 5:17 7:14,16 20:6 20:9 24:6,8,18,20 28:7,10,13 32:8 33:10,23 39:9
preserved 15:1
pretrial 36:6 44:25 52:19
pretty 13:3 40:18
previously 46:20
prima 17:22
prior 7:8 9:3 16:16 36:16 43:7 53:19
pro 46:6
probably 7:5 44:17
problem 11:16 12:11
problems 37:5
problemsolving 12:12

procedure 47:18 52:3,16
proceeded 47:13,15 47:25 48:7
proceeding 5:11 7:16,21 12:17 13:14 21:6 24:9 27:6,13
process 6:2 11:17
processes 6:1
processing 37:5
procured 43:6
produce 25:3 44:10 45:13
produced 32:1
proffer 47:1
progress 40:11
prong 4:18 23:16 31:6,7 39:3
prongs 30:20
proof 16:15
properly 31:12,25
prosecutor 48:20
prove 4:12 18:9 37:3 47:5,6
provide 25:16 44:11 55:13
provided 15:14
proving 47:4
psychiatric 43:7
psychological 43:7
psychoses 54:13
purely 27:3,22
purpose 8:1 45:16 45:21
purposes 25:21
put 4:21 5:5 10:7 11:5 13:10,13,22 17:9,9 25:16,16 25:18,22,23 26:4 26:5,5 27:9 29:6 31:6 32:3 33:4 39:12 43:12 44:12 45:17 51:5,12
putting 9:20,24 18:19 26:14 31:12 34:19

Q

quest 29:10
question 5:1,4,12 5:16 7:13,14 8:7 10:11 16:1,5,6 17:14 18:5,6,18 19:23 20:4,5,6,9 20:17,23,23 21:9 24:4,6,17,20,21 26:2 27:14,18,24 28:6,9,10,13 30:22 33:21 37:15 37:16 39:5,5,9,12 42:3 45:11,12,18 53:1
questioned 12:2
questions 19:9 46:11
quote 3:16 4:4 11:3 11:13,23 12:2,9 12:11
quoteunquote 9:21

R

r 3:1
raise 39:23
raised 4:9 8:22 39:17 41:15
raises 34:11
range 50:24 51:13
rationale 39:25
reached 52:8
read 12:24 13:1 19:9 37:4 40:21 40:23 41:3,6,8 52:5
reading 10:24
realize 34:16
really 16:10 26:20 26:23 29:15 31:24 37:16
reason 22:1,3,4
reasonable 21:16 29:1 34:2,11
reasonably 38:12
reasoning 8:25 12:11,12
reasons 50:17
rebuttal 2:8 27:1 28:16 38:10 54:19
recapping 28:23
recess 11:24
reciting 53:12
recognition 10:24
recognized 9:20 11:19 12:4 22:13 55:1,8
recommendation 29:4 48:13
record 3:23 4:5,7 8:4,10 10:6,8,14 11:2,4,7,10 12:8 12:19,21 13:7,11 13:13 14:1,3 15:7 16:18,24 17:7 18:19 19:10 20:11 21:6 23:15,21,22 27:12 29:2 32:4 34:21 35:17 36:7 36:24,25 37:18,22 38:15 39:8 40:13 40:14,15,23 41:2 41:7,9 43:7 44:19 45:15 47:10,11 48:10 49:10,15 50:11,25 51:17 52:2,13,14 54:24 55:1
reexamined 41:16
refer 51:24
referenced 13:18
references 48:15
referred 13:16
regard 8:8
regarding 13:18
regardless 46:4
regular 6:1
reintroduce 38:23
relating 37:12
relatively 46:17
relevant 14:8 35:9 35:15 39:19
reliable 23:14
relied 3:25 49:18 52:10
relies 15:1
rely 16:7
relying 16:8
remaining 54:17
remand 32:17
remember 37:22
repeated 34:12
repeatedly 14:21
repeating 33:18
replete 23:23
repletely 50:2
reply 50:25
report 12:8,15,21 13:18 23:10 48:11 48:15 49:18,20,20 49:22,24 50:1,9 51:23 54:23
reports 43:25 44:2 48:18 51:24,25
requested 14:20
require 39:17 52:10 54:1
required 5:17 14:10
requires 42:10
requiring 5:19
reserve 28:15
respectfully 27:17 37:21
respondent 1:18 2:7 28:20
response 50:20 52:14
rest 35:1
result 21:1 44:2 45:6
retardation 9:21 25:17 30:19 36:6 39:17 40:8 41:14 53:25
retarded 40:2
reverse 34:24
reverses 55:15
review 8:23 19:1 32:18
reviewing 44:19 45:7 47:24 52:16
reviews 49:10
richter 52:7
rid 10:19
right 6:15 8:25 10:15,20 14:17 15:20 16:2,4 20:12,12,16,19 27:9,15,19 29:9 29:23 30:6,16 31:4,10 40:22 42:9 46:3,13 47:21 49:1,21 50:5 51:14
risk 11:6 55:9,12 55:13
roberts 3:3 4:23,25 5:7,14 19:18 20:3 20:12,16,20 28:17 44:4,7 48:9 49:11 49:22 54:15 55:19
rouge 1:17
rule 6:1,2 8:2 20:22 21:2,5 27:5 38:9 45:3 49:17,18
ruling 3:17 55:16
rulings 52:12

S

s 2:1 3:1
sat 45:1
saying 5:25 15:9,13 18:21 20:1 23:12 26:2 30:7 36:22 38:3 39:9,10 40:6 40:17,19 41:10 44:18 47:19,20 53:12
says 14:18 15:6 21:11 24:25 25:2 25:4,7,9,15 29:17

30:13 35:19 36:12 44:16 52:13
scalia 9:8,14 10:2 10:15,18 12:7,18 13:2 17:1 23:6 24:1,3,22 26:14 36:3 37:24 38:2 38:12,14,16 40:12 41:6,18 47:19,25 48:3,5 50:4,10,13 51:15
school 43:6 54:11 54:12
score 22:25 50:22
scored 3:20 23:11
scores 55:3,3
screening 13:19 23:13
second 4:3 11:9 14:8 23:2,3,4,16 28:9 55:2
secondly 32:11
section 8:10 21:3 22:16
see 33:4 40:13 42:4 45:10
seek 46:5
sem 51:1,2
sense 47:2
sent 7:10 11:12
sentence 24:25 50:5
sentenced 35:20
sentencing 6:20 7:4 8:17 9:12 14:4,5,6 23:23 35:10,14 38:22 41:23 42:17 43:18 46:7 48:21 48:23
separate 39:11 42:24 44:24 47:16 54:6
serious 36:7
serve 30:16
services 43:2
set 30:4
setting 5:6 9:2
severely 9:10
show 4:17 9:4 10:4 30:6 35:11 40:7
showed 43:21,22 43:24
showing 4:14,16 15:24 16:9 18:9 35:5 36:6 45:25
shown 47:1
shows 27:8 47:11 55:5
side 14:18 15:7
signed 29:5
significance 19:21 20:4
significant 42:12 42:12
similar 8:25
simple 46:17
simply 20:25 49:15 53:10,12
situation 7:25 8:2 19:25 34:24
six 14:22 52:24
skill 12:12
skills 4:6,8 9:7 10:13 11:1 12:12 23:18
slower 12:5
slowness 12:3
smith 25:2,15
social 11:11
society 40:1
sociologist 43:3
sophisticated 38:25
sorry 4:10 20:7
sort 37:7
sotomayor 4:10,17 5:23 15:3,16,20 16:2,4 21:8,15,19 21:23 22:3,8,15 26:12 31:8 32:12 32:19 38:20 39:1 39:4,20,24 48:19 48:23 49:1,4 51:14,21 52:4
sotomayors 5:4 10:11
sought 24:4
sound 24:20
sounds 24:23
special 11:13
specifically 3:15
specificity 45:6,25
specifying 36:14
spelled 28:12
stage 5:6 39:14
standard 4:19 5:6 5:24 17:17 18:2,3 18:8 19:5,6 22:4 25:8,12,13,14,20 25:20 26:1 29:10 29:12,16,18,21 30:7,8,13,15,16 30:17,25 31:2,15 31:16,17 34:12,21 36:17,20,20 42:4 45:2
standards 29:16 33:16
state 3:10,19 4:3 5:1,5,10,17,20,24 5:25 7:4,15 8:16 8:21 10:4,13,16 10:23 11:2,5,9,10 11:22 12:16,22,23 13:4,10,13,21 14:3,9,11,15,16 14:18,19 15:11,16 16:7,13,21 17:20 17:23 18:8,25 19:12,25 21:12 22:18 23:16,24 24:5,7,12,13,13 24:14 25:4,9,11 25:11,14 27:12 28:10,25 29:18 30:8,14,18,18,22 30:23 31:3,11,16 31:21,23 33:14,23 34:4,17 35:22 38:3,9,22 39:6
42:17 43:15,15 44:1,6,8 45:7,20 49:5,25 50:17 55:10
stated 3:15 52:12
states 1:1,12 17:13 18:7,24 34:25
stating 12:9
status 49:13
statute 10:7 30:19 54:8
step 21:11,11
stone 4:7
stress 54:11
strickland 42:22
strong 27:2
subject 49:14
submitted 55:20,22
sufficient 15:14 30:3
suggested 36:21
suggesting 34:16
suggestive 3:21
sum 16:9
supplemental 52:18
support 19:16 29:2 46:6
suppose 6:19 7:20 17:10 25:7
supposed 48:10
suppression 52:21
supreme 1:1,12 4:1 7:10 9:2 10:4 16:12 23:19 39:21
sure 4:19 29:15 38:19 46:3
surely 9:16
sword 9:22 39:22

T

t 2:1,1 40:13
take 25:12
taken 41:3 51:1
takeoff 16:5
takes 6:1
talk 15:4
talking 8:17,20 13:25 14:2 43:17 43:18
tell 22:17,21
telling 26:3
tender 50:1
tendered 49:20,23 49:24 50:6
term 9:22
terms 6:22 10:24 20:24 42:22
test 3:20 13:19 23:4 23:13 51:3
testified 6:20 7:8 11:21,22 38:23 43:5 50:6
testify 12:16 23:10
testimony 3:23 7:4 23:4 38:24 52:21
testing 13:19
tests 7:21 11:11 55:6
text 21:4
texts 3:25
thank 26:9,14 28:17 54:15,18,21 55:18,19
thats 3:21,22 5:16 6:5,7,25 7:6,22 8:19,24 10:25 11:18 12:14,15 13:3,17 14:6 15:8 16:8 17:7,7 19:5,6 20:19 21:14,15 24:22 25:12,13 26:2,16 27:14,23 27:24 29:9,10,13 30:15 32:5 33:12 33:20 34:12,12,17 34:22 35:17 37:24 38:2,16 39:14 41:12,13 42:1 44:2 48:19 50:18 55:4
thereof 39:7

theres 4:15 6:2 13:12 14:11 17:6 28:1 35:2 38:7 39:18 53:7
theyre 40:19
thing 31:10 35:2 38:22
things 22:19 26:3 37:9 54:9
think 5:15,16 6:10 9:8 13:3,5 15:10 15:22 25:19 26:5 26:16,23 27:2 28:12 29:10 33:16 33:19 34:1,3,5,6 35:7 40:9,10 41:11 46:3 50:2 53:11,11
third 11:13 24:2 53:6
thought 5:23 23:6 24:1,3,24 30:15 31:3 38:16
three 3:16 14:13 18:16 19:14 22:18 22:19 30:20 37:9 50:17,18
threshold 4:14,15 5:18 15:24 21:13 21:16,17,24 32:5 45:23,25 46:15
time 8:23 9:22 27:1 28:15 36:1,11 42:25 45:3,4 53:25
times 14:22 49:13 53:19
today 43:1
told 50:16,19 53:1
top 37:7
totally 35:1
trauma 11:6
trial 6:19 7:4,8 14:1 14:3 16:16 23:12 23:23 36:24,25 39:7 42:25 48:21 49:8,10 52:5
trigger 42:13
triggered 44:3
trouble 11:7
true 14:19 35:23,24
truly 51:2
try 46:6
trying 29:12 33:13 35:1,1,11 37:3
turn 3:18
turning 10:21
twice 11:19
two 32:7 43:3 53:2 54:6,6,16 55:5
type 47:14
types 44:17 54:13
typically 9:23

U

ultimate 28:24 52:7
umbrella 42:22
unacceptable 55:9
unconstitutional 8:7 45:19,20 55:8
uncontested 8:3,3 20:10
underscore 38:21
undersocialized 54:4
understand 5:7 17:3 36:22
understanding 12:8
united 1:1,12 17:13 18:24
unjust 23:20
unreasonable 3:13 4:9 7:19 13:6 15:17 18:15 19:3 19:4,8,15,24 20:18,22 21:7 22:19 23:21 24:11 24:16 27:13,19 28:11 29:11,12 33:15 34:20 40:16 40:19
upper 51:12
use 15:7 24:5 25:20 50:9

V

v 1:5 3:4 9:1 14:23 25:14 29:18 31:3 52:7
vacuum 41:3
vague 44:14
various 13:14
viable 29:2
view 6:21 32:19 46:22
viewed 49:6
violate 25:5
violation 6:3
voir 52:22
volume 55:4
volumes 52:17,18

W

wait 39:1,1,4
waiting 50:4
want 9:17 20:4 26:18,25 29:15 30:6,10,10 33:20 41:19 47:3,20,20 48:3 50:1 55:7
wanted 35:16 46:4 47:11
wants 30:9,12
warden 1:6
washington 1:8,15
wasnt 7:3 9:5,15 13:21,22 24:17 40:17,20 45:13 47:12 53:22
way 4:18 10:5 11:17 18:6 40:21
wechsler 3:20
wed 6:24
weigh 16:21
weight 11:5
went 29:13 31:11 38:24 44:15
weve 19:18 40:10
whats 17:23 30:25 37:16 46:10,12 50:24
whitley 14:23
wholly 8:15
williams 4:2 7:7,7 25:14 29:18 30:15 31:4 33:16 34:12 39:21 42:4
win 33:7,9,19
wisc 51:5 53:19
witness 41:24 50:5
witnesses 38:7,23
wont 42:17
word 10:24 36:9
words 5:14 53:20
worker 11:11
working 21:9,10
worth 46:9
wouldnt 9:18 15:23 25:5 46:2
write 25:25 37:4
wrong 7:22 12:5,7 29:23 30:16 31:4 37:9,14 39:15,16 40:16 50:18

X

x 1:2,7

Y

year 16:14
years 11:8
youre 6:19 15:9,13 16:8 20:1 21:2,10 26:2,3 27:2 29:12 30:21 39:9 41:10 47:19,20 48:20 53:1
youth 11:16
youve 15:23 20:5

Z

0

000 42:25 43:1
03 55:21
04 1:13 3:2

1

1 7:7 27:17 28:3
10 1:13 3:2 42:25 44:16
105 44:23
11 11:25 51:4 55:21
13 52:23 54:25
131433 1:4 3:4
140 7:22
159 38:24
15th 29:3
16 52:17
16th 36:10
17 48:14
171 22:24
172 3:17 22:24
18 35:19 36:16 53:19

2

2 8:10 18:12 19:7 21:3 22:16 27:17 27:24
2002 46:20
2003 36:10
2008 29:4
2015 1:9
2254 18:12 21:3
28 2:7 43:5

3

3 2:4
30 43:1
30th 1:9
32 43:6
37 48:14
39a 54:25

4

41 38:23
44 44:16

5

5 7:21

54 2:10 55:6
57 55:5

6

7

7 48:14
75 3:20 22:25 23:6 23:7,8 35:2 36:13 37:1,10 50:21,22 50:23 51:8 53:2 55:6

8

8 33:2
80 51:7
80s 55:3
89 51:7

9

90s 55:3