SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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MARION WILSON,)

Petitioner,)

v.) No. 16-6855

ERIC SELLERS, WARDEN,)

Respondent.)

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Pages: 1 through 62

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3 MARION WILSON,)

4 Petitioner,)

5 v.) No. 16-6855

6 ERIC SELLERS, WARDEN,)

7 Respondent.)

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9

10 Washington, D.C.

11 Monday, October 30, 2017

12

13 The above-entitled matter came on for oral

14 argument before the Supreme Court of the United States

15 at 11:04 a.m.

16

17 APPEARANCES:

18 MARK E. OLIVE, Tallahassee, Florida; on behalf

19 of the Petitioner.

20 SARAH HAWKINS WARREN, Solicitor General of Georgia,

21 Atlanta, Georgia; on behalf of the Respondent.

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1 C O N T E N T S

2 ORAL ARGUMENT OF: PAGE:
3 MARK E. OLIVE
4 On behalf of the Petitioner 3
5 ORAL ARGUMENT OF:
6 SARAH HAWKINS WARREN
7 On behalf of the Respondent 30
8 REBUTTAL ARGUMENT OF:
9 MARK E. OLIVE
10 On behalf of the Petitioner 58
11
12
13
14
15
16
17
18
19
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21
22
23
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1 P R O C E E D I N G S
2 (11:04 a.m.)
3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 16-6855, Wilson against
5 Sellers.
6 Mr. Olive.
7 ORAL ARGUMENT OF MARK E. OLIVE
8 ON BEHALF OF THE PETITIONER
9 MR. OLIVE: Mr. Chief Justice, and may
10 it please the Court:
11 When a court in 2254 proceedings
12 reviews a state court's summary denial of
13 appeal from a lower court's reasoned
14 post-conviction opinion, the federal court
15 should look through the appellate cited order
16 to that last reasoned decision, as this Court
17 does, as all the circuits have done, other than
18 the Eleventh. A look-through like this best
19 fits the history of AEDPA, it best fits the
20 plain reading of 2254(d), and it best fits this
21 Court's precedents.
22 The ruling in Richter was a necessary
23 ruling and a narrow ruling. The question posed
24 in Richter was what to do "where a state
25 court's decision is unaccompanied by an

1 explanation."
2 This Court's choice was either to
3 require de novo review of that, utterly
4 inconsistent with the purpose and the history
5 of AEDPA, or to accommodate AEDPA and 2254(d).
6 JUSTICE ALITO: Suppose that the --
7 the Georgia Supreme Court in this case had
8 issued an order saying we affirm the decision
9 below; our decision should not be taken as
10 necessarily agreeing or disagreeing with the
11 reasoning in the lower court's opinion.
12 Would look-through be appropriate in
13 that situation?
14 MR. OLIVE: Your Honor, it depends.
15 The Ylst presumption is rebuttable, as Justice
16 Scalia explained in the 1991 opinion, and he
17 also explained that there's no gold standard
18 for how it is rebutted. He gave some examples
19 of how it could be rebutted.
20 JUSTICE ALITO: Well, what if -- if
21 that --
22 MR. OLIVE: And I think that would be
23 something to consider, but whether it would --
24 JUSTICE ALITO: So you --
25 MR. OLIVE: -- ultimately rebut, I

1 couldn't say.
2 JUSTICE ALITO: You can't say?
3 MR. OLIVE: Right. I know that it --
4 that it --
5 JUSTICE ALITO: So we -- we would --
6 we would presume that the state supreme court
7 had adopted the reasoning of the lower court
8 even though the supreme court said specifically
9 that it didn't?
10 MR. OLIVE: I think that it goes a
11 long way toward rebutting, but whether it
12 ultimately would rebut could depend on other
13 facts and circumstances in the case.
14 For example, there could be a reason
15 for that decision because the state briefs
16 things that weren't presented as bases for the
17 decision below. It could be that the court, as
18 Justice Scalia said in Ylst in '91, asked for
19 further briefing on some items and got that
20 further briefing on some items. And I agree
21 that a court saying that, it is a significant
22 circumstance to consider. And the Georgia
23 Supreme Court is quite capable of saying that.
24 And --
25 JUSTICE GINSBURG: Suppose it said it

1 in every case. Suppose you win here and then
2 the Georgia Supreme Court says now we're going
3 to add, as boilerplate to every decision, we
4 are not relying on the reasoning of the lower
5 court.
6 MR. OLIVE: That -- that would seem
7 like a ruse, Your Honor, to do it, and how
8 could they know in every single case that
9 that's what they're going to do and why would
10 they intend in every single case --
11 JUSTICE KENNEDY: Well, you could play
12 with the words. They could say we do -- we
13 affirm not necessarily for the reasons below.
14 You know, they could have a formulation.
15 MR. OLIVE: Yes, I -- you know, the --
16 Justice -- even the dissent below said that
17 that was a possibility. And it gets around the
18 critique that this is judging opinions by lower
19 courts --
20 JUSTICE ALITO: Well, why would it
21 be --
22 MR. OLIVE: -- or for having an
23 opinion --
24 JUSTICE ALITO: -- why would it be a
25 ruse? I -- it seems to me that there is a

1 general -- that that is the general practice of
2 appellate courts in the United States. When a
3 court summarily affirms the decision of the
4 lower court, the summary affirmance is not
5 taken as necessarily adopting the reasoning of
6 the lower court.
7 That's the meaning of our summary
8 affirmances. That is the meaning, the
9 established meaning of thousands and thousands
10 of summary affirmances by federal district
11 courts -- by federal courts of appeals.
12 MR. OLIVE: Well, we know that --
13 JUSTICE SOTOMAYOR: That might be the
14 reasoning, correct, on merits decisions. Is it
15 necessarily what courts do in granting or not
16 granting a COA?
17 MR. OLIVE: Granting or not granting?
18 JUSTICE SOTOMAYOR: A COA, which is
19 what's at issue here, correct?
20 MR. OLIVE: Right. That's correct.
21 We -- we actually know that it --
22 CHIEF JUSTICE ROBERTS: I'm sorry, I
23 lost -- what -- what's correct?
24 MR. OLIVE: Would you repeat it?
25 JUSTICE SOTOMAYOR: What I said was

1 it's true that on summary affirmances, where
2 there's been full argument by both sides --
3 MR. OLIVE: Right.
4 JUSTICE SOTOMAYOR: -- that you don't
5 know the basis for a lower court's decision.
6 MR. OLIVE: Right.
7 JUSTICE SOTOMAYOR: But is that the
8 uniform -- the same thing, a uniform practice
9 in granting or denying a COA?
10 MR. OLIVE: I don't know the answer to
11 that question.
12 JUSTICE SOTOMAYOR: Well, we do know
13 in this case because we have a former chief
14 judge of Georgia and a bunch of other --
15 MR. OLIVE: That's correct.
16 JUSTICE SOTOMAYOR: -- judges from
17 Georgia telling us that that's not the standard
18 in Georgia, correct?
19 MR. OLIVE: Correct. That is correct.
20 The summary affirmance --
21 JUSTICE ALITO: But that's a question
22 of -- that's a question of Georgia law. That's
23 not a question of Ylst --
24 MR. OLIVE: Well, we know that this
25 Court doesn't consider the denial of a

1 certificate of probable cause to appeal not to
2 adopt the decision of the habeas court. In
3 both Sears and in Foster, this Court looked at
4 a CPC denial and concluded not that it was
5 precedent or that it said anything, but instead
6 looked through it to the -- to the habeas
7 corpus court and the -- and the state.
8 JUSTICE ALITO: Well, that's a very
9 debatable -- that's a very debatable and --
10 and, I think, a dubious reading of both of
11 those decisions. There's nothing in any of
12 those decisions that says in determining, like
13 in Foster, was the -- was -- was there a Batson
14 violation. We didn't say we're going to
15 consider only the things that were said by the
16 lower state court; we're not going to consider
17 anything else.
18 Did we say that?
19 MR. OLIVE: That's what the Court
20 focused its attention on.
21 JUSTICE ALITO: Did it say that,
22 though?
23 MR. OLIVE: It didn't -- you didn't --
24 no, sir, you didn't say that expressly, but
25 that's exactly what you looked to. You didn't

1 say, oh, well, the state supreme court had a
2 better reason or a different reason; we ought
3 to defer to it. You --
4 CHIEF JUSTICE ROBERTS: Well, but if
5 you have it -- I think in Foster it was
6 pertinent in the analysis of the -- the lower
7 state court determination was certainly
8 evidence of what the issues were and were not
9 decided. But I've read the footnote carefully,
10 and I don't see anything in there that
11 suggested that that was a -- an absolute rule
12 of law.
13 MR. OLIVE: Looking at what the
14 practice that the court undertook and the
15 procedure the court undertook, you looked at
16 the reasons given by the state habeas court.
17 I agree that the state would never
18 cite a CPC denial as precedent for anything in
19 Georgia, and they haven't and we wouldn't
20 either. But it -- it is clear that, in this
21 case and in most cases, except when the court
22 says otherwise, the court is adopting the facts
23 as set forth in the lower court's opinion.
24 The state -- the state, in its brief
25 to the Georgia Supreme Court in support of the

1 denial of CPC, argued strictly the bases that
2 were in the order that was entered in the lower
3 court, which they wrote, by the way, with some
4 alterations -- minor alterations by the court.
5 And in the brief -- in that brief,
6 they cited 52 times this court should deny the
7 CPC on the basis of what the lower court did.
8 There was no --
9 JUSTICE ALITO: Suppose -- suppose
10 that there is a decision by a state
11 intermediate court of appeals, and the majority
12 rejects a claim for certain reasons, and
13 there's a concurrence in the judgment that says
14 we would also reject the claim -- or I would
15 also reject the claim for a different reason,
16 and then that decision is summarily affirmed by
17 the state supreme court. What happens there?
18 MR. OLIVE: I think it would be
19 look-through.
20 JUSTICE ALITO: To what?
21 MR. OLIVE: To the majority.
22 JUSTICE ALITO: Just to the majority?
23 MR. OLIVE: Decision. Pardon me?
24 JUSTICE ALITO: You would assume that
25 the state supreme court relied on the reasoning

1 of the majority and not the reasoning of the
2 concurrence.
3 MR. OLIVE: Correct.
4 JUSTICE ALITO: And that -- and based
5 on what? What would be the basis of that?
6 MR. OLIVE: Just based on the
7 commonsense workable, well-known, well-used
8 rule of Ylst, is --
9 JUSTICE ALITO: What about the
10 commonsense, well-known, well-used --
11 well-understood rule that a summary affirmance
12 by an appellate court is not interpreted in
13 this country as an adoption of the reasoning of
14 the lower court?
15 MR. OLIVE: According to Ylst, where
16 there's been one reasoned state judgment --
17 judgment rejecting a federal claim, federal
18 habeas courts should presume later unexplained
19 orders rest upon the same ground. That's the
20 rule of Ylst, and it's been applied by all the
21 circuits.
22 JUSTICE GINSBURG: Except that that
23 was a procedural default question.
24 MR. OLIVE: It -- it -- it was. But
25 the logic is the same. The logic is most --

1 most narrowly reflects the role such orders are
2 ordinarily intended to play, except --
3 CHIEF JUSTICE ROBERTS: Well, I
4 thought the logic -- the logic would be,
5 though, that it is unusual for a court
6 reviewing a procedural determination, if you
7 can't tell, because it's silent, you would
8 normally not assume the court went on to the
9 merits when the lower court said there was a
10 procedural bar.
11 But when it's simply merits decisions
12 in both cases, the -- the argument anyway is
13 that that's a different situation.
14 MR. OLIVE: Well, the circuits haven't
15 ruled that way, and I know you're wanting to
16 resolve the issue for all of us now. This
17 Court has looked through on merits rulings as
18 well without citing Ylst. Just last term the
19 Court in LeBlanc looked through and denied
20 relief in --
21 JUSTICE GINSBURG: But when -- when --
22 when --
23 MR. OLIVE: -- in McWilliams.
24 JUSTICE GINSBURG: -- when the
25 question is -- this question will arise only if

1 that lower court decision was unreasonable.
2 MR. OLIVE: That's correct.
3 JUSTICE GINSBURG: So why shouldn't a
4 court of appeals -- why don't we assume that a
5 court of appeals would not adopt a badly
6 reasoned decision?
7 MR. OLIVE: Well, I think that
8 probably that is a good assumption and that in
9 most instances state courts get it right, but
10 in the situation where a order is palpably
11 unreasonable, what Congress directs us to do is
12 apply de novo review.
13 And so the individuals who will be
14 injured by this rule, Respondent's rule and the
15 lower court's rule, are the people whose very
16 judgments ought to be viewed -- ought to be
17 getting greater review.
18 JUSTICE GORSUCH: Mr. Olive, if we're
19 talking about consequences of the ruling here,
20 it seems to me it's possible that by adopting a
21 look-through rule, we would encourage state
22 supreme courts to say more, perhaps very little
23 more, maybe as little as we're -- we're
24 agreeing with the result but not necessarily
25 the reasoning.

1 But equally possible would be to
2 encourage state intermediate courts to say less
3 and perhaps take advantage of Harrington, so
4 that no state court says anything and achieves
5 maximum deference from federal courts, like
6 California has, for example.
7 Should we be concerned that a ruling
8 in favor of look-through might actually yield
9 if states are rational and look for the least
10 cost and the most deference adverse
11 consequences to your -- your -- your clients?
12 MR. OLIVE: You know, there was an
13 assertion of that in Richter. And the response
14 was there are no -- there is no merit to the
15 assertion that our decision will encourage
16 state courts to withhold explanations. Opinion
17 writing practices are influenced by
18 considerations other than avoiding scrutiny by
19 federal courts. And that's at 562 West at 99.
20 JUSTICE GORSUCH: I'm asking you, do
21 you agree with that? I mean, do you think
22 that's right?
23 MR. OLIVE: Yeah, I don't agree with
24 that. I think that federal -- I mean state
25 court judges are not nearly as concerned with

1 federal review as some say.
2 JUSTICE GORSUCH: I understand they
3 are, but perhaps state legislatures are. And
4 they may for altruistic reasons, as in Georgia
5 -- very, very altruistic reasons, insist on a
6 practice of some reasoned decision-making, but
7 couldn't you see other state legislators making
8 other decisions, say like California has,
9 because of the cost of analyzing these cases?
10 MR. OLIVE: We note just as -- as an
11 aside, that's changed now in California under
12 Proposition 66, all capital cases start in the
13 lower court and will go through the appeals
14 process, when that's eventually implemented.
15 But, no, I don't think the
16 legislatures or the courts after AEDPA are
17 losing ground when it comes to federal habeas.
18 And they have reasons for structuring their --
19 their processes in whatever way they please.
20 And in Georgia, it's a serious opinion
21 writing endeavor by a trial court that then is
22 looked through, or has been for years, until
23 two, about two years ago, by the appellate
24 court.
25 JUSTICE BREYER: So how seriously

1 should we take a word that you read from Ylst
2 which was "presume," it says the -- the habeas
3 court should presume that this simple, one-word
4 statement of the state supreme court means that
5 the decision that's keeping the person in
6 prison is, in fact, the decision of the
7 intermediate appellate court?
8 Now, then if it's a presumption, the
9 state could refute it. And I guess is this
10 right? The state would be free to say, well,
11 look, here, Your Honor, to federal judges,
12 look, this decision of the intermediate court
13 is so obviously wrong, in any event, it's so
14 obviously a procedural ground, an adequate
15 state ground, and look at what they argued to
16 the state supreme court and bring out the
17 briefs, and say under these circumstances you
18 shouldn't presume that that lower court
19 decision is what the supreme court decided on.
20 Indeed, nobody even claimed in the
21 supreme court that they ought to just decide on
22 that ground. I mean, would you be free to do
23 such -- would they be free to do that kind of
24 thing?
25 MR. OLIVE: I think they would, but

1 the state has never in Georgia disagreed that
2 it's most improbable that the Georgia Supreme
3 Court's decisions did not rely on --
4 JUSTICE BREYER: Well, it's -- in
5 Georgia, I take it, the adequate state ground
6 is not really one -- it's not in play in this
7 kind of situation, but there are states where
8 it are -- it is.
9 I don't know how well, but what --
10 what I've just said and what you said it would
11 be free, is that basically the situation that
12 most of the states use, as that's what's going
13 on right now in the country.
14 MR. OLIVE: The circumstances under
15 which the presumption can be rebutted are
16 probably innumerable. And how the briefing
17 went in the lower court and -- and other
18 indicia are important.
19 Again, the court in Georgia is
20 perfectly free to, knows how to, and does issue
21 orders denying CPC for bases other than the
22 briefs of the parties or other than what was in
23 the lower court.
24 JUSTICE GINSBURG: Did the -- did the
25 lower court in this case that we looked-through

1 to, did it say anything at all about why it
2 found no prejudice?
3 MR. OLIVE: It did, Your Honor. It
4 said that much of the evidence that had been
5 proffered in post-conviction was cumulative,
6 which it really -- there's an argument that it
7 wasn't that I can make.
8 And also that the neuropsychological
9 testing omissions could not be considered
10 prejudicial, but didn't really give reasons,
11 other than the evidence of guilt and the
12 evidence in aggravation.
13 JUSTICE ALITO: Well, it said --
14 didn't it -- I mean, it said a lot. I think it
15 devoted about 30 pages to this.
16 And I -- I suspect you think that some
17 of the things that it said were wrong, but is
18 it fair to say that in general it said, in
19 fact, said over and over one of the reasons why
20 we find no -- why -- why the judge found no
21 prejudice is that taking into account all the
22 evidence that it suggested is mitigating and
23 all of the aggravating evidence -- and there
24 was a lot of it here -- the addition of this
25 mitigating evidence wouldn't change the

1 outcome? Didn't the court say that?
2 MR. OLIVE: The court did say that.
3 But it wasn't -- it didn't consider all of the
4 mitigating evidence. There was a -- a swath of
5 mitigating evidence that had to do with this
6 19-year-old who had not, in the defense of the
7 case, killed anyone with respect to this crime
8 and whose lawyer said he's just been bad and
9 led a bad life.
10 There was, in fact, presentation at
11 post-conviction proceedings of evidence of
12 redeemability for this person and his good
13 acts. And --
14 JUSTICE ALITO: No, it wasn't, all
15 right, it wasn't presented at trial, but it was
16 presented to the habeas court.
17 MR. OLIVE: And it was not mentioned
18 by the habeas court.
19 JUSTICE ALITO: It wasn't mentioned.
20 MR. OLIVE: Right.
21 JUSTICE ALITO: But does that mean it
22 wasn't considered? I mean, it does seem
23 like --
24 MR. OLIVE: Well --
25 JUSTICE ALITO: What is your answer to

1 the argument that what you're asking the
2 federal habeas court to do really is to grade
3 the quality of the opinion that was written?
4 MR. OLIVE: Well, the evidence that
5 was offered was of institutional failure and
6 also things like he was creative and
7 intelligent and was struggling to break away
8 from his past.
9 And -- and the redeemability, this
10 Court knows, with an 18-year-old, a
11 17-year-old, a 19-year-old is serious
12 mitigation. But, Your Honor, they -- they --
13 it's not a grading of what the judge did or the
14 opinion that was written. 2254 works this way.
15 The Court says federal habeas judges
16 must train their attention on what was actually
17 involved -- this is a quote -- "in the
18 application of this Court's law to facts."
19 That's kind of a grading, but you can get a D
20 and pass under 2254.
21 It's just egregious actions outside
22 the realm that no one would consider
23 reasonable.
24 JUSTICE ALITO: I mean, so what if
25 the -- what the habeas court did was this?

1 They said this is all the evidence that is --
2 is proffered in mitigation, and this is all the
3 evidence that was provided by the state in
4 aggravation, and taking into account all the --
5 all the mitigation and all the aggravation, we
6 conclude that there's no reasonable probability
7 that a jury would have returned anything other
8 than a sentence of death?
9 Now, would that be -- would that be
10 unreasonable because there isn't a detailed
11 explanation?
12 MR. OLIVE: In -- in this case, we
13 think it would be unreasonable. Again, the
14 state wrote this order. The -- there's nothing
15 wrong with that. There's orders for both
16 sides, and the judge takes it and amends it in
17 whatever way they think necessary. And it was
18 a very minimal way in this case.
19 And the order that was written and the
20 order that was signed reduced to irrelevancy,
21 it went through item by item various things,
22 but when it got to the institutional failure
23 and to the positive characteristics and traits
24 of this 19-year-old, you can't find it. So you
25 can't reduce to irrelevancy under Porter

1 important mitigating evidence, and that's what
2 the --
3 JUSTICE ALITO: That does sound
4 like grading --
5 MR. OLIVE: -- that's what this order
6 did.
7 JUSTICE ALITO: -- so let me modify
8 what I -- my hypothetical where there's no
9 explanation, there's just a citation -- there's
10 just a listing of mitigation and aggravation.
11 There's a little bit of explanation. There are
12 three sentences of explanation or there's a
13 half a page of explanation.
14 At what point does it become, would
15 you say, okay, well, that's enough, it's
16 reasonable?
17 MR. OLIVE: Well, that's -- the level
18 of abstraction there is difficult for me to
19 give an answer to, but this Court has given an
20 answer in Williams and Wiggins and Rompilla and
21 Porter where the Court painstakingly went
22 through the evidence on aggravation and
23 mitigation, especially on the prejudice prong.
24 So grading is a bad label for it, but
25 the AEDPA says take a look at what they said

1 and analyze it and see if it's reasonable.
2 And the second prong of 2254(d), which
3 I didn't mention before, the court has to grade
4 in that you look at what the state fact
5 findings were based upon. So you do have to
6 look at the opinion, you do have to analyze the
7 opinion. If that's called grading, it doesn't
8 take much to get a high enough grade to pass
9 2254 muster for the courts.
10 And going back to the limited holding
11 in Richter, this Court's language shows its
12 fealty really to 2254. The Court says, "Under
13 2254(d), a habeas court must determine what
14 arguments or theories supported" -- and so, if
15 there's a written opinion, you can see what
16 arguments or theories supported -- "or, as
17 here, could have supported the state court's
18 decision."
19 And so, if you know the reasons, and
20 with look-through, our argument is you do know
21 the reasons, if you know the reasons for the
22 decision under Brumfeld, quoting Richter, you
23 follow Richter where there is no opinion
24 explaining the reasons relief has been denied.
25 And under Wetzel, this Court says

1 taking out the second clause, a habeas --
2 habeas court must determine what -- or --
3 arguments or theories supported the state
4 court's decision.
5 In this case, it's -- it is clear and
6 has been clear for years that the arguments
7 that support -- to support the Georgia Supreme
8 Court's denial of CPC are those arguments that
9 are in the state post-conviction reasoned
10 order.
11 And if the Court wishes to -- to go
12 beyond that, it's quite capable of doing it.
13 It can issue three or four pages in denying
14 CPC, and it does.
15 It can issue a paragraph in denying
16 CPC, explaining reasons beyond the lower court,
17 and it does. The Court -- if the Court wants
18 to do it, it can do it. It knows how to do it.
19 Otherwise, the presumption in Ylst should be
20 respected.
21 JUSTICE KENNEDY: Have there been any
22 commentary or can the bar offer us any
23 experience as to whether or not the Richter
24 rule, in the cases where it has applied has
25 proven to be workable and administratable or

1 unworkable and unadministratable?
2 MR. OLIVE: In Ylst --
3 JUSTICE KENNEDY: And -- is there any
4 commentary on how Richter has worked out.
5 MR. OLIVE: I'm not aware of any
6 commentary on how it has worked out. It no
7 longer really is applicable in California with
8 respect to death penalty cases. And the truth
9 is in non-capital cases, they're almost all
10 indigent, and they almost all start in the
11 trial court and work up and they have the Ylst
12 presumption.
13 The workability of -- of Richter in
14 its application in other jurisdictions, I'm not
15 seeing commentary on, but it is, again, cabined
16 to the unique situation which otherwise the
17 Court might have had to order de novo review
18 with respect to the unique situation that there
19 be no reasons given by a court.
20 JUSTICE SOTOMAYOR: Now, Richter does
21 require a habeas court, a federal habeas court
22 to imagine all of the conceivable arguments
23 that could have supported a state court
24 decision, correct?
25 MR. OLIVE: Yes, ma'am.

1 JUSTICE SOTOMAYOR: So it, by
2 definition, requires more work.
3 MR. OLIVE: I mean, it's an incredible
4 situation to -- it would be difficult for
5 federal district court judges, if I were one,
6 to imagine a set of considerations that might
7 lead to a constitutional violation, determine
8 whether there was a constitutional violation,
9 then determine whether it would be unreasonable
10 to find there wasn't a constitutional
11 violation.
12 So it's an interesting process to go
13 through. Right now, the administrability is
14 courts around the country that are looking at
15 decisions from all states, including death
16 penalty states, know the drill.
17 They understand Ylst. It hasn't
18 caused any problems. It's imminently workable.
19 It makes common sense. Everyone knows how to
20 do it.
21 JUSTICE SOTOMAYOR: It's much simpler.
22 MR. OLIVE: Pardon?
23 JUSTICE SOTOMAYOR: It's much simpler?
24 MR. OLIVE: Much simpler and
25 well-known.

1 JUSTICE SOTOMAYOR: Because you're not
2 really granting habeas relief that will result
3 in -- necessarily in the release of a defendant
4 because, once it goes back down, the state
5 court can then decide which among the many
6 possibilities there are to still affirm the
7 conviction, couldn't it?
8 MR. OLIVE: That's correct. And, you
9 know, all that happens when you do an analysis
10 of a reasoned decision, if you find it to be
11 unreasonable, you get de novo review. You
12 don't get relief, you get de novo review, and
13 you may lose under de novo review.
14 I mean, what the AEDPA has
15 accomplished is removing from federal judges
16 the power to unilaterally, by exercising de
17 novo review and not paying any attention
18 necessarily to what the state court ruling was,
19 violate comity and federalism.
20 What the AEDPA did was say: No, you
21 have to look at what the state court did and
22 give it credit where credit's due. And to
23 apply Richter in states where there is a state
24 seeking credit for its reasonable decision, to
25 just ignore it creates -- creates sort of two

1 polar opposites.
2 Before the AEDPA, federal courts could
3 pay no attention to what a state court did and
4 grant relief. And the state's rule now is
5 federal courts should pay no attention to what
6 state courts did and deny relief.
7 And I think the AEDPA strikes the
8 right balance. It's between those two. I
9 respect what the state court has done. If it's
10 reasonable, then there's no de novo review. If
11 it's unreasonable, there is de novo review.
12 And whether you win under that review one way
13 or the other is a separate question.
14 There's no circuit having any trouble
15 with this other than the lower court. This
16 Court doesn't have any trouble with it when it
17 looks through decisions and looks at the facts
18 in the lower court.
19 And I think the rule of all the
20 circuits, other than the Eleventh, ought to be
21 the rule for everyone. If I could reserve my
22 time?
23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.
25 Ms. Warren.

1 ORAL ARGUMENT OF SARAH HAWKINS WARREN
2 ON BEHALF OF THE RESPONDENT
3 MS. WARREN: Mr. Chief Justice, and
4 may it please the Court:
5 A federal habeas court must apply 28
6 U.S.C. 2254(d)'s standard to the last state
7 court merits decision whether that decision is
8 summary and whether or not that decision is
9 preceded by a lower state court's opinion.
10 Put another way, federal habeas courts
11 conducting a 2254(d) inquiry are not required
12 to look-through a later summary state court
13 merits decision to review only the specific
14 reasoning of a lower state court opinion.
15 JUSTICE KAGAN: Ms. Warren, can I just
16 ask a question about the breadth of your
17 position? It's a little bit confusing to me
18 from the briefs.
19 You spent a lot of time talking about
20 the word "decision" and how habeas review is
21 only available for decisions, not for opinions.
22 So does your argument go that even
23 when the -- a state court, the higher state
24 court has issued a reasoned decision, that even
25 there the habeas court is not limited to that

1 decision but can and should decide whether
2 there are other grounds?
3 MS. WARREN: Justice Kagan, our
4 position is that 2254(d) always applies to the
5 decision, but when that last state court
6 adjudication on the merits is reasoned, there
7 is a textual basis in 2254(d) for the federal
8 habeas court to look at those reasons to help
9 assess whether the decision itself is contrary
10 to or involved in unreasonable application of
11 this Court's precedents.
12 JUSTICE KAGAN: I'm not sure I
13 understand the question. But suppose you said
14 that the reasoned decision is -- is not -- is
15 just completely wrong.
16 Could you substitute, you know, so I
17 think the way I've understood that that goes is
18 that's completely wrong, so now we don't -- we
19 don't give deference to it, right? It's taken
20 itself out of AEDPA because it's completely
21 wrong.
22 Are you saying, no, there's a second
23 step where you have to say, well, if I were the
24 judge, I could have written a better decision
25 that would receive AEDPA deference?

1 MS. WARREN: No, Justice Kagan, I
2 don't think that's what our position is here.
3 So we would say that looking to the reasoning
4 as part of the analysis of the decision is part
5 and parcel of ascertaining whether that last
6 state court decision on the merits was contrary
7 to or involved in a reasonable application.
8 That, of course, is a very different
9 situation than we have here where the last
10 state court decision is summary and there is no
11 evidence of what that last state court actually
12 reasoned. There is only the decision.
13 JUSTICE SOTOMAYOR: So aren't we
14 attributing to them --
15 JUSTICE GINSBURG: What about the --
16 we were told that it was a matter of practice
17 in Georgia, I think Petitioner said, the
18 Georgia Supreme Court's practice is to issue a
19 reasoned denial of -- of a CPC whenever it
20 disagrees with the lower court reasoning.
21 So, if it disagrees, it's its practice
22 to tell us.
23 MS. WARREN: Your Honor, I would
24 disagree that it always issues a reasoned
25 decision when it disagrees. It is certainly

1 true that there are instances, a handful of
2 instances that Petitioner points to where a
3 reasoned denial has issued.
4 But I don't think it is fair to
5 characterize it or to presume that those are
6 the only instances in which the Georgia Supreme
7 Court would disagree with reasoning for that.
8 JUSTICE SOTOMAYOR: I'm sorry, you're
9 disavowing the statements of a former Supreme
10 Court Justice of a Georgia court and all the
11 judges that signed onto that amici brief?
12 MS. WARREN: Well, respectfully, Your
13 Honor, we -- we -- we disagree with the
14 characterization --
15 JUSTICE SOTOMAYOR: Well, then, but
16 you don't know, do you?
17 MS. WARREN: We -- we don't --
18 JUSTICE SOTOMAYOR: You don't know --
19 you don't, but they do because they actually
20 did the work.
21 MS. WARREN: Your Honor, we don't
22 know. And, similarly, the rest of us don't
23 know when the justice --
24 JUSTICE BREYER: Why do we not know?
25 I mean, what he quotes in his brief, is this

1 wrong? He says that Supreme Court Rule 36 says
2 when somebody files an application for a cause,
3 for a certificate of probable cause, the
4 application, quote -- he's quoting from the
5 rule -- "will be issued where there is arguable
6 merit."
7 And here we have denied. And,
8 therefore, there is no arguable merit. Now,
9 that seems like Euclid, or whoever, I don't
10 know, who was it? Aristotle or something.
11 (Laughter.)
12 JUSTICE BREYER: But, you see, that's
13 their point.
14 So -- so how can you get up and say we
15 don't know what they do? We do know they
16 thought there was no arguable merit.
17 So I guess what you're asking us to do
18 is to think of ways that nobody, has yet
19 occurred to anybody, that there was no arguable
20 merit, not necessarily because it's a good
21 opinion below, but because we've thought of one
22 of your assistants, a bright young graduate,
23 has walked into your office with a case from
24 Georgia law of 1812. And judging from the
25 dust, nobody's ever seen it before, but it was

1 written by Oglethorpe's second cousin twice
2 removed. And there we are. And it's
3 brilliant. Nobody's thought of it. You say
4 how do we know that wasn't their reason?
5 Now, that's extreme, but you see my
6 point. Okay? What's the answer to my point?
7 MS. WARREN: Justice Breyer, I'm --
8 I'm not sure exactly what the -- what the
9 question was.
10 JUSTICE BREYER: Well, the point of
11 the question --
12 (Laughter.)
13 JUSTICE BREYER: Sorry. Well, from
14 your pleasant expression, it sounded to me as
15 if you were understanding my obscure question.
16 My -- I had two separate questions.
17 One, I quoted the rule, which seemed to me what
18 Justice Sotomayor said, must be correct.
19 Then I asked a separate question, that
20 the problem looking at it practically is that
21 you're asking us to take on a burden. The only
22 person who will have a greater burden is you
23 because you, in your job, when faced with a
24 decision of an intermediate appellate court and
25 a denial of CPC, will have to sit there making

1 up reasons that are not present in anybody's
2 opinion.
3 And I use Oglethorpe as a comic
4 example of that. But it's that kind of thing
5 that you'll have to do.
6 So my question is obviously why should
7 we take a system that works fairly well and
8 throw this practical monkey wrench, which means
9 a lot more work for you, into the gears?
10 MS. WARREN: A few answers to your
11 question, Your Honor.
12 The first is we agree with the way
13 that you stated the arguable merits standard
14 and I do think that is the correct way to view
15 Rule 36 from the Georgia Supreme Court.
16 As to the second point, a few
17 different answers.
18 As to the process, that process
19 exactly -- is exactly what the California
20 courts do with Richter already, so it is not a
21 novel process.
22 But on the practical side of things,
23 and as the Eleventh Circuit explained below, I
24 think in practice the federal habeas court when
25 assessing the Georgia Supreme Court summary

1 denial on the merits will first look to the
2 lower court to see if the lower court's
3 reasoned opinion offers any reasonable basis.
4 And so, in many cases, the process
5 would be very similar. The problem here, and I
6 think the problem that -- the thread that runs
7 through the Petitioner's argument that is
8 problematic is presuming that the lower state
9 courts' reasons are the reasons of the Georgia
10 Supreme Court.
11 JUSTICE KAGAN: So, Ms. Warren, I take
12 that, but it seems to me that that's the
13 question, right? What should we presume about
14 what the Georgia Supreme Court is doing here in
15 -- in exactly the way you said?
16 So let me give you a hypothetical.
17 Let's say we have a Batson case and there was a
18 denial of relief in the Batson case. And --
19 but it was based on a very clear error of law.
20 So somebody said -- it's a Hispanic defendant,
21 and somebody said Hispanic defendants are not
22 entitled to raise Batson claims. All right?
23 And -- and then the -- the supreme
24 court, the state supreme court just says
25 affirmed. All right? So what should we

1 understand about that?

2 Why -- why is the state court doing

3 that? What -- what -- what's the reasonable

4 assumption about what the state court is doing?

5 MS. WARREN: I think there are two

6 reasonable assumptions. The first is that they

7 have, presuming that that claim was properly

8 preserved for merits review at the certificate

9 for probable cause stage, we can presume that

10 they have denied that claim on the merits.

11 But then I think that the -- the other

12 presumption we must make, according to this

13 Court's precedents and admonitions, we should

14 presume that the Georgia Supreme Court knew and

15 followed the law.

16 JUSTICE KAGAN: You see, this is -- it

17 seems a very odd thing to say the Georgia

18 Supreme Court looked at an opinion and said

19 that is such a bad opinion, it has such a clear

20 error of federal constitutional law, but we are

21 not going to explain that to anybody. Instead

22 we're just going to affirm. Now, that's one

23 option.

24 The other option is that the Georgia

25 Supreme Court had a bad day, and it too made an

1 error. And the question is, and I suppose, you
2 know, Ylst answered this question, but it
3 seemed to me to answer it in a pretty
4 reasonable way. It's like we just don't expect
5 state supreme courts to say that's a clear
6 error of federal constitutional law and we are
7 not going to tell anybody about it.
8 MS. WARREN: Well, the example you
9 give, Justice Kagan, there are a few things
10 about it. The first is if there is a clear
11 error of law below and there is no other
12 reasonable basis on which the Georgia Supreme
13 Court could have denied relief, then habeas
14 relief will ensue.
15 Because even when the federal --
16 JUSTICE KAGAN: No, no, no. Here
17 there is, there's another basis, but -- but you
18 have to believe that what the state court is
19 saying, even though this -- this lower state
20 court made an error of federal constitutional
21 law, because we can dream up something better,
22 we'll just affirm it. We won't tell anybody
23 what we're -- what we think is an alternative
24 basis. We won't do anything. We'll just let
25 it be out there. That judge will think that

1 he's done a fine job. Everybody else will
2 think that he's done a fine job. We'll just
3 leave it out there because, what, because we
4 can't be bothered to write two sentences
5 saying, you know, we're affirming on a ground
6 where, you know, yes, of course, he's entitled
7 to make a Batson claim, but he had a bad Batson
8 claim?
9 MS. WARREN: But, Justice Kagan, the
10 situation you describe is exactly the situation
11 where the approach we're describing is most
12 important for reasons of federalism and comity,
13 because we must start with the proposition that
14 this Court has reiterated time and time again,
15 that the Georgia Supreme Court did know and
16 follow the law, and to resist the readiness to
17 attribute error that this Court described in
18 Woodford versus Visciotti.
19 But in those situations --
20 JUSTICE KAGAN: I mean, it seems to me
21 that that just makes a bizarre assumption about
22 state courts, that they're so uninterested in
23 errors of federal constitutional law that
24 they're just going to say, well, as long as we
25 have something in our heads that suggests that

1 the ultimate judgment was right, we're not
2 going to tell anybody about them. We're going
3 to leave them out there as -- as something that
4 the judge and the parties and -- and future
5 judges and future parties will think was right
6 when we know it's wrong.
7 MS. WARREN: That -- that may be so,
8 Justice Kagan, but, of course, 2254(d) does not
9 require by its text reasoning. It does not
10 require statement of opinions. And this Court
11 has already found based on that very textual
12 interpretation the reasons are not required.
13 And that is exactly what this Court has --
14 JUSTICE SOTOMAYOR: I'm sorry, that's
15 the problem, which is it does require it,
16 because when you read 2254(d), it talks about
17 "resulted in a decision that was based on an
18 unreasonable determination of the facts in
19 light of the evidence presented in the state
20 court proceedings."
21 So it requires us to look at the
22 reasoning. So does (a) when it talks to us
23 about involved an unreasonable application of
24 clearly established federal law.
25 So you're right. There's nothing that

1 says you have to write an opinion in a
2 particular way, but we do have to look at what
3 they say. You even admit that.
4 MS. WARREN: Justice Sotomayor, I
5 think we have to look at what they say when
6 they say something. And in a (d)(1) inquiry,
7 looking at the "involved in an unreasonable
8 application," I think that language points to
9 the situation I described with -- with Justice
10 Kagan earlier, where there is a reasoned
11 opinion.
12 JUSTICE SOTOMAYOR: All right. Let's
13 take -- and let me just deviate to that
14 question.
15 Let's assume that there's an argument
16 below. The state court denies the habeas
17 petition summarily. Can the state now come in
18 to a habeas court and present an argument that
19 wasn't made below and argue that that is an
20 alternative ground to deny the habeas, even
21 though it wasn't presented below?
22 MS. WARREN: Let me make sure I
23 understand your hypothetical. Are you
24 suggesting that the lower state court did not
25 issue a reasoned opinion?

1 JUSTICE SOTOMAYOR: No -- exactly.
2 MS. WARREN: Okay.
3 JUSTICE SOTOMAYOR: No reasoned
4 opinion. But we know for a fact that this
5 particular argument was not raised below.
6 MS. WARREN: Well, in Georgia, by law,
7 the lower state court, the state habeas court,
8 is required to issue a reasoned opinion. So
9 that is not a situation --
10 JUSTICE SOTOMAYOR: I'm asking you
11 what happens on hab -- on federal habeas
12 review. Can the state come in, in this
13 imagining that -- that we have the state doing
14 in every court, not only do we have to imagine;
15 the lawyers have to come in and set forth every
16 potential constitutional violation and set
17 forth every interpretation of the facts that
18 are potentially available, decide which ones
19 would be an unreasonable application of federal
20 law or -- or unreasonable finding to grant a
21 habeas -- you have to do the same thing to deny
22 one. All right? Could the state come in with
23 a totally new argument that wasn't made to the
24 state court at all and say you should deny
25 habeas on this totally new argument?

1 MS. WARREN: I'm not sure that it
2 would be precluded from doing so. And,
3 certainly, that's the inquiry that the federal
4 habeas court would be --
5 JUSTICE SOTOMAYOR: So why do we
6 bother having state habeas anymore? Why don't
7 we just say don't -- have federal habeas only
8 and --
9 MS. WARREN: Well, I think --
10 JUSTICE SOTOMAYOR: -- and assume that
11 the state will deny every habeas?
12 MS. WARREN: I think -- I think an --
13 an important point to -- to show where there is
14 not much daylight between the Petitioner's
15 argument and ours is that we are not suggesting
16 that that state habeas court lower opinion is
17 outlawed from consideration or that it has no
18 role in the process whatsoever.
19 In many cases, the very first place
20 and in many cases perhaps the very last place
21 the federal habeas court will look is to that
22 reasoned decision below, but not because it
23 presumes those lower court reasons are the
24 reasons of the last court that's adjudicated
25 the claim on the merits, but simply to see

1 whether a reasonable basis exists to sustain
2 the denial of relief.
3 JUSTICE SOTOMAYOR: You don't think
4 that there's more respect for a state court, to
5 let them make their own decisions? Because
6 what we're doing is imagining what they would
7 have said, instead of just asking them.
8 MS. WARREN: Your Honor, to the extent
9 there's any discomfort with the imagining or
10 the hypotheticals, that line has already been
11 drawn by this Court in Richter. But Georgia,
12 to the respect point, has --
13 JUSTICE SOTOMAYOR: There was
14 absolutely no reasoned decision anywhere there.
15 We had to do something.
16 MS. WARREN: That is correct. But the
17 textual analysis that this Court engaged as to
18 2254 applies equally here. It's the same --
19 text, of the same statute, and there's no
20 principled basis for deviating from that
21 textual analysis when it is applied to the
22 summary denial on the merits by the Georgia
23 Supreme Court.
24 As to your point about respect for
25 state courts, Georgia has a two-tiered habeas

1 system. There are two courts that will always
2 pass on a habeas claim that is properly
3 exhausted, first in the lower state court,
4 where a reasoned opinion will ensue, and then
5 the Georgia Supreme Court, which will analyze
6 the application for CPC.
7 And so to suggest that the Georgia
8 Supreme Court should be written out altogether,
9 I think, is also an affront to federalism and
10 to comity. And to -- to require a presumption
11 that the Georgia Supreme Court has adopted
12 those lower state court reasonings similarly is
13 an affront to federalism.
14 JUSTICE ALITO: Where is the question
15 of -- of Georgia law that is implicated here?
16 It would be one thing if it were generally
17 understood in Georgia that a summary affirmance
18 by the state supreme court does not necessarily
19 adopt the reasoning of the lower court. It
20 would be another thing if it was the rule in
21 Georgia or generally understood in Georgia that
22 the opposite is true.
23 So what do we do with that?
24 MS. WARREN: Because there is no
25 explicit rule in Georgia?

1 JUSTICE ALITO: Yeah.
2 MS. WARREN: I think what --
3 JUSTICE ALITO: Because there is no --
4 is there a specific rule in Georgia? Is there
5 a well-known practice in Georgia?
6 MS. WARREN: Well, Justice Alito,
7 there -- there is none that we are aware of.
8 There is no, for example, court rule that
9 explains it or -- or --
10 JUSTICE GINSBURG: But where did --
11 where did Petitioner get it from? Petitioner
12 said that is the Georgia Supreme Court's
13 practice when it disagrees with the court
14 below. It so states. It doesn't adopt its
15 reasoning. If it disagrees with the lower
16 court, it will issue a decision saying so.
17 MS. WARREN: Justice --
18 JUSTICE GINSBURG: Where does that
19 come from?
20 MS. WARREN: Justice Ginsburg, I
21 believe that's based on Petitioner's practice.
22 I would characterize that as anecdotal. The
23 fact that five or six of these reasoned denials
24 have issued over the hundreds or thousands of
25 CPC applications the Georgia Supreme Court has

1 reviewed I do not think stands for the
2 proposition that every time the Georgia Supreme
3 Court disagrees with the lower court's
4 reasoning, it takes the time to issue a
5 reasoned dissent.
6 JUSTICE KAGAN: Well, didn't Ylst tell
7 us what we should generally draw from silence?
8 It just says the maxim is that silence implies
9 consent, not the opposite. Courts generally
10 behave accordingly, not always, but generally
11 affirming when -- without further discussion
12 when they agree, not when they disagree, with
13 the reasons given below.
14 And that was -- you know, there was a
15 different context. As you say, it was
16 procedural versus merits. But that basic
17 reasoning was not limited to -- to the context.
18 It was -- it was a more general understanding
19 of what silence means, or generally should be
20 taken to mean, with respect to state supreme
21 courts. Why wasn't it right?
22 MS. WARREN: Well, Justice Kagan, a
23 few reasons. First, this was a pre-AEDPA
24 determination. It's a judge-made prudential
25 doctrine that is restricted to help federal

1 courts ascertain whether it can hear federal
2 claims, not how to conduct substantive habeas
3 review.
4 And so it very well may be the case
5 that in that context -- in that context that
6 it's helping federal habeas courts ascertain
7 whether later state summary adjudications have
8 vitiated a state court bar, that silence does
9 imply consent. That is not the case here.
10 CHIEF JUSTICE ROBERTS: What do you do
11 when you're presenting an argument in these
12 cases? Do you just -- you, the -- the state,
13 respond primarily or only to the state court
14 decision, or do you say we've got four more
15 good arguments, and so we're going to put all
16 those in our brief?
17 MS. WARREN: Mr. Chief Justice, I am
18 not exactly sure of the practice. I don't
19 think that it is limited to exactly what the
20 state court has said below, but I cannot say
21 for sure.
22 JUSTICE KAGAN: What if the -- the
23 state supreme court says, you know, we think
24 that this opinion is clearly wrong, but we're
25 going to -- we're good lawyers and we're going

1 to think of another opinion that could have
2 been written. It wasn't, but it could have
3 been. And -- and we're going to affirm on that
4 ground. Of course, we're not going to say
5 this; we're just going to say affirm. But --
6 but the thing that I'm thinking is this habeas
7 petitioner has never been presented with this
8 alternative argument.
9 So it might be that this habeas
10 petitioner would have a really good response to
11 this alternative argument, but he doesn't even
12 know that it's in the case. That seems quite
13 unfair to the habeas petitioner, to say your
14 petition is denied, not to tell him why, even
15 though he's never been given the chance to
16 respond to this new reasoning.
17 MS. WARREN: Well, I think Harrington
18 versus Richter already says that the -- the
19 petitioner's burden still remains the same,
20 which is to say that there is no reasonable
21 basis on which that court could have based its
22 denial of relief.
23 JUSTICE ALITO: Do we --
24 JUSTICE GORSUCH: Counsel --
25 JUSTICE ALITO: -- go that far in this

1 case? I mean, this is not a case where
2 anybody's arguing that the decision of the
3 Georgia Supreme Court is a reasonable one based
4 on some ground that was never raised by anybody
5 below. The -- the contours of the dispute here
6 are very well known. Deficient performance,
7 which has largely dropped out, and the question
8 of prejudice. So it's all about whether there
9 was prejudice under Strickland.
10 MS. WARREN: And so -- and so do we
11 have to go so far as to make a rule?
12 JUSTICE ALITO: Do we have to have a
13 -- do we have to decide in this case what would
14 be the situation where the issue, the ground
15 for affirmance was never raised at all below or
16 where the ground for affirmance that -- that is
17 attributed to the state supreme court is
18 different from the basic ground for affirmance
19 that was addressed by the district court -- by
20 the -- by the lower state court?
21 MS. WARREN: Well, I think that all
22 this Court has to do is apply what it has
23 already found in Harrington versus Richter, and
24 then that has laid out the process for how the
25 federal habeas court would treat the Georgia

1 Supreme Court's summary adjudication on the
2 merits there.
3 JUSTICE GORSUCH: Counsel, you know,
4 of course, in this Court, we say our summary
5 affirmances are not necessarily an endorsement
6 of the -- of the lower court's reasoning.
7 That's well established in this Court's
8 jurisprudence.
9 And as I understood Mr. Olive, he said
10 it might be a different case if that were
11 clearer in Georgia. So let's say we are going
12 to now confront 50 states or X number of states
13 with rules or something in their precedents or
14 a footnote saying we do not necessarily endorse
15 all the lower court reasoning, just exactly as
16 this Court has done for itself.
17 Then what?
18 MS. WARREN: I think if a state has a
19 clear rule, either by case law or a rule by its
20 court, that -- that gives further direction as
21 to how to treat summary affirmances, that those
22 would be honored. But where --
23 JUSTICE BREYER: Well --
24 MS. WARREN: Whereas here the Georgia
25 Supreme Court has no rule, has -- has no clear

1 binding practice that is consistently
2 indicative of what it intends by summary
3 affirmances, that the summary affirmance of the
4 Georgia Supreme Court should not be treated the
5 exact opposite as the way this Court and other
6 federal courts treat their own summary
7 affirmances.
8 JUSTICE BREYER: Well, there is a big
9 difference. I mean, first, Harrison is
10 different because in Harrison there was no
11 decision of the state court that you could look
12 to.
13 Obviously, the federal habeas court
14 has to try to figure out some theory as to what
15 they were holding. That isn't the question
16 here where there is a decision of the court.
17 And where a habeas court later takes
18 that decision as being the decision from the
19 state that led to this person's being deprived
20 of liberty, what does that say about whether
21 the summary affirmance should be treated as
22 precedent for state law? It says nothing, I
23 think.
24 When you have us saying ours should
25 not be treated that way, of course, we don't

1 want it as a precedent binding every court in
2 the nation. When a federal appeals court says
3 our summary affirmance does not mean that we
4 agree, of course, they don't want it to be
5 binding throughout the circuit.
6 But this decision before us has
7 nothing to do with that. We can say this
8 district could set -- the appeals court in
9 Georgia has made the decision that is leading
10 to his deprivation of liberty and ignore the
11 summary affirmance without saying anything
12 about whether the summary affirmance is
13 precedent or not, a matter not before us.
14 Isn't that so?
15 MS. WARREN: Justice Breyer, you're
16 correct that I don't think this Court has to
17 make a judgment as to what the summary
18 affirmances mean in Georgia, but at that point
19 I would -- I would ask the Court to go back to
20 the text because the text requires application
21 of 2254(d) to the adjudication of the claim
22 that resulted in a decision.
23 The decision under review is the
24 decision by the Georgia Supreme Court. And the
25 text of AEDPA does not authorize habeas relief,

1 de novo, or ultimate relief, based on the lower
2 court's reasoning that are not attributed to
3 the --
4 JUSTICE SOTOMAYOR: I -- I just have
5 so much trouble. It starts with what Justice
6 Kagan said.
7 You admit that if the -- if it's a
8 reasoned decision in the supreme court, we have
9 to look at the reasoned decision, correct?
10 MS. WARREN: Yes -- yes, Your Honor, I
11 think that is --
12 JUSTICE SOTOMAYOR: All right. And
13 there is nothing in the language of 2254(d)
14 that says that. It just says you have to look
15 at the reasoning and determine whether they are
16 -- it's contrary to federal law.
17 So I'm not sure how that gets you to
18 where you're going. We're looking at a
19 decision. We're looking at the one court that
20 the state system has designated as the court
21 that is required to take the evidence and give
22 a full, reasoned decision. So we are looking
23 at the full, reasoned decision and deciding
24 whether that reasoned decision stands or not.
25 MS. WARREN: Your Honor is correct

1 that the lower state court will always have
2 reasons, but the Georgia legislature has not
3 said by law that those reasons are the reasons
4 attributable to the Georgia Supreme Court.
5 And looking to the text, as Your Honor
6 was, there is --
7 JUSTICE SOTOMAYOR: Well, we're not
8 saying it either.
9 MS. WARREN: But that --
10 JUSTICE SOTOMAYOR: All -- all we're
11 saying is that these reasons don't stand up to
12 habeas scrutiny. And we would send it back for
13 the court to properly -- and it -- because it
14 is its decision, it shouldn't be ours --
15 MS. WARREN: Well, in --
16 JUSTICE SOTOMAYOR: -- to see if there
17 is another ground for it to affirm.
18 MS. WARREN: In those set of
19 circumstances, however, Your Honor, where the
20 lower state court's reasoning contains an
21 infirmity because the lower state court's
22 reasoning shows that the decision below was
23 contrary to or an unreasonable application of
24 this Court's precedence.
25 It is not the most probable, it is not

1 the most pragmatic, and it is not the correct
2 presumption to presume that those lower state
3 court's reasons are imputed on the Georgia
4 Supreme Court, the last state court to
5 adjudicate the claim on the merits.
6 That is what --
7 JUSTICE SOTOMAYOR: It's okay for you
8 when we say you do that to find the procedural
9 bar, because you like that.
10 MS. WARREN: Well --
11 JUSTICE SOTOMAYOR: But if we're going
12 to do it, why don't we do it in every
13 situation, other than that you like one part of
14 it and not the other?
15 MS. WARREN: Well, I would certainly
16 resist that characterization, but I would say
17 that Ylst's purpose, as it was originally
18 conceived, is consistent with and complementary
19 to the inquiry that this Court later set out in
20 Harrington versus Richter.
21 And so using Ylst for the purpose that
22 Ylst was originally intended, which is to
23 identify the state court bars and to preserve
24 them, which is a probable assumption, where
25 silence may very well equal consent, that --

1 that respects comity in its own way by ensuring
2 that state court procedural bars are not
3 vitiated by later state court summary opinions.
4 Here, asking this Court to make sure
5 that the Georgia Supreme Court or any higher
6 state court of the land does not have infirm
7 reasoning imputed on it when they are faced
8 with both reasonable and unreasonable bases on
9 which to sustain the denial of relief also
10 serves comity and is the best -- and is in
11 service of federalism and comity in that set of
12 cases where it matters the most, when that
13 lower state court may contain an infirmity.
14 And for that reason, the presumption
15 that is the thread running throughout
16 Petitioner's argument, the presumption that the
17 lower state court's reasons are the same as the
18 last state court's decision cannot stand.
19 If the Court has no further questions.
20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.
22 Three minutes, Mr. Olive.
23 REBUTTAL ARGUMENT BY MARK E. OLIVE
24 ON BEHALF OF THE PETITIONER
25 MR. OLIVE: Thank you, Mr. Chief

1 Justice.
2 Until about a year ago, the state was
3 well aware of what the state process was in
4 Georgia. The state process in Georgia is the
5 parties submit a proposed order and the state's
6 order in this case is at Docket Number 18-1 in
7 the record.
8 And then a final order is entered.
9 And in this case, it's Docket 18-4 in the
10 record. Fairly changed.
11 And, Mr. Chief Justice, if they had
12 four more good arguments to make, they would
13 have been in their proposed order that they
14 submitted to the court to begin with.
15 Does the court say when it disagrees
16 with the lower court judgment? Dissenting
17 Judge Jill Pryor below at Joint Appendix 380 --
18 JUSTICE GORSUCH: Mr. Olive, we've
19 spent -- we're spending a lot of time arguing
20 about Georgia specific law, and I -- I guess
21 I'm wondering if -- if it all turns on what the
22 state court practice is, and we're going to
23 create a huge incentive for a state court to
24 simply adopt different orders that say, we
25 adopt more or less the reasoning of the

1 appellate court but -- but not necessarily all
2 of it, and there may be other reasons, what
3 have we accomplished in -- in this?
4 Presumably, we're going to defer to
5 those final decisions of the state courts and
6 not look behind those. I mean, I haven't heard
7 an argument that we'd look behind that kind of
8 ruling.
9 So what exactly have we accomplished
10 here?
11 MR. OLIVE: I think what the state's
12 rule creates is a maze trying to figure out
13 what a summary affirmance means in a state,
14 what a discretionary denial of an appeal means,
15 what a -- you know, what do any of them mean
16 when the -- when the Ylst rule applies across
17 the board?
18 The Ylst rule says a silence means
19 agreement.
20 JUSTICE GORSUCH: So even if a state
21 supreme court says we affirm the judgment, and
22 -- and uses language exactly like this Court
23 uses, but not necessarily all the reasonings,
24 and there may be additional reasons beyond
25 those that the lower court provided, we would

1 look behind that? Is that -- is that the
2 suggestion? And how does that fit with
3 federalism and comity?
4 MR. OLIVE: What Ylst holds is that
5 we're trying to figure out what's most
6 probable, not necessarily what is absolutely
7 right, what is most probable.
8 And we think the court said what's
9 most probable is agreement with the lower
10 court. It can --
11 JUSTICE GORSUCH: Even when the court
12 -- supreme court disclaims --
13 MR. OLIVE: -- be rebutted in your
14 example --
15 JUSTICE GORSUCH: -- that?
16 MR. OLIVE: Pardon? In your example,
17 that is a circumstance which could lead to
18 rebuttal.
19 JUSTICE GORSUCH: Okay.
20 MR. OLIVE: And in the Georgia Supreme
21 --
22 JUSTICE GORSUCH: And -- and in that
23 case then, what have we accomplished is my
24 question, if you could answer that?
25 MR. OLIVE: You mean by just having a

1 rubber stamp that says "not for the same
2 reasons"?
3 JUSTICE GORSUCH: It's just going to
4 be a slightly different rubber stamp.
5 MR. OLIVE: Well, I think --
6 JUSTICE SOTOMAYOR: We've created a
7 simple rule and states could decide what they
8 want to do. Correct?
9 MR. OLIVE: I see my time is up. I'd
10 love to say "correct" to that.
11 (Laughter.)
12 CHIEF JUSTICE ROBERTS: Well, since --
13 JUSTICE GORSUCH: I'd say correct and
14 stop if I were you.
15 CHIEF JUSTICE ROBERTS: I would least
16 -- at least like to give you the final word.
17 You can take a sentence.
18 MR. OLIVE: Yes, Your Honor.
19 (Laughter.)
20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel. The case is submitted.
22 (Whereupon, at 12:02 p.m., the case
23 was submitted.)
24
25

1

11:04 [2] 1:15 3:2
12:02 [1] 62:22
16-6855 [1] 3:4
17-year-old [1] 21:11
18-1 [1] 59:6
18-4 [1] 59:9
18-year-old [1] 21:10
1812 [1] 34:24
19-year-old [3] 20:6 21:11 22:24
1991 [1] 4:16

2

2017 [1] 1:11
2254 [6] 3:11 21:14,20 24:9,12 45:18
2254(d [11] 3:20 4:5 24:2,13 30:11 31:4,7 41:8,16 54:21 55:13
2254(d)'s [1] 30:6
28 [1] 30:5

3

3 [1] 2:4
30 [3] 1:11 2:7 19:15
36 [2] 34:1 36:15
380 [1] 59:17

5

50 [1] 52:12
52 [1] 11:6
562 [1] 15:19
58 [1] 2:10

6

66 [1] 16:12

9

91 [1] 5:18
99 [1] 15:19

A

a.m [2] 1:15 3:2
above-entitled [1] 1:13
absolute [1] 10:11
absolutely [2] 45:14 61:6
abstraction [1] 23:18
accommodate [1] 4:5
accomplished [4] 28:15 60:3,9 61:23
According [2] 12:15 38:12
accordingly [1] 48:10
account [2] 19:21 22:4
achieves [1] 15:4
across [1] 60:16
actions [1] 21:21
acts [1] 20:13
actually [5] 7:21 15:8 21:16 32:11 33:19
add [1] 6:3
addition [1] 19:24
additional [1] 60:24
addressed [1] 51:19
adequate [2] 17:14 18:5
adjudicate [1] 57:5
adjudicated [1] 44:24
adjudication [3] 31:6 52:1 54:21
adjudications [1] 49:7
administratable [1] 25:25
adminstrability [1] 27:13
admit [2] 42:3 55:7
admonitions [1] 38:13
adopt [6] 9:2 14:5 46:19 47:14 59:24,25
adopted [2] 5:7 46:11
adopting [3] 7:5 10:22 14:20
adoption [1] 12:13
advantage [1] 15:3
adverse [1] 15:10
AEDPA [12] 3:19 4:5,5 16:16 23:25 28:14,20 29:2,7 31:20,25 54:25
affirm [9] 4:8 6:13 28:6 38:22 39:22 50:3,5 56:17 60:21
affirmance [13] 7:4 8:20 12:11 46:17 51:15,16,18 53:3,21 54:3,11,12 60:13
affirmances [8] 7:8,10 8:1 52:5,21 53:3,7 54:18
affirmed [2] 11:16 37:25
affirming [2] 40:5 48:11
affirms [1] 7:3
affront [2] 46:9,13
aggravating [1] 19:23
aggravation [5] 19:12 22:4,5 23:10,22
ago [2] 16:23 59:2
agree [7] 5:20 10:17 15:21,23 36:12 48:12 54:4
agreeing [2] 4:10 14:24
agreement [2] 60:19 61:9
ALITO [31] 4:6,20,24 5:2,5 6:20,24 8:21 9:8,21 11:9,20,22,24 12:4,9 19:13 20:14,19,21,25 21:24 23:3,7 46:14 47:1,3,6 50:23,25 51:12
almost [2] 26:9,10
already [5] 36:20 41:11 45:10 50:18 51:23
alterations [2] 11:4,4
alternative [4] 39:23 42:20 50:8,11
altogether [1] 46:8
altruistic [2] 16:4,5
amends [1] 22:16
amici [1] 33:11
among [1] 28:5
analysis [5] 10:6 28:9 32:4 45:17,21
analyze [3] 24:1,6 46:5
analyzing [1] 16:9
anecdotal [1] 47:22
another [5] 30:10 39:17 46:20 50:1 56:17
answer [7] 8:10 20:25 23:19,20 35:6 39:3 61:24
answered [1] 39:2
answers [2] 36:10,17
anybody [6] 34:19 38:21 39:7,22 41:2 51:4
anybody's [2] 36:1 51:2
anyway [1] 13:12
appeal [3] 3:13 9:1 60:14
appeals [7] 7:11 11:11 14:4,5 16:13 54:2,8
APPEARANCES [1] 1:17
appellate [7] 3:15 7:2 12:12 16:23 17:7 35:24 60:1
Appendix [1] 59:17
applicable [1] 26:7
application [12] 21:18 26:14 31:10 32:7 34:2,4 41:23 42:8 43:19 46:6 54:20 56:23
applications [1] 47:25
applied [3] 12:20 25:24 45:21
applies [3] 31:4 45:18 60:16
apply [4] 14:12 28:23 30:5 51:22
approach [1] 40:11
appropriate [1] 4:12
aren't [1] 32:13
arguable [5] 34:5,8,16,19 36:13
argue [1] 42:19
argued [2] 11:1 17:15
arguing [2] 51:2 59:19
argument [26] 1:14 2:2,5,8 3:4,7 8:2 13:12 19:6 21:1 24:20 30:1,22 37:7 42:15,18 43:5,23,25 44:15 49:11 50:8,11 58:16,23 60:7
arguments [8] 24:14,16 25:3,6,8 26:22 49:15 59:12
arise [1] 13:25
Aristotle [1] 34:10
around [2] 6:17 27:14
ascertain [2] 49:1,6
ascertaining [1] 32:5
aside [1] 16:11
assertion [2] 15:13,15
assess [1] 31:9
assessing [1] 36:25
assistants [1] 34:22
assume [5] 11:24 13:8 14:4 42:15 44:10
assumption [4] 14:8 38:4 40:21 57:24
assumptions [1] 38:6
Atlanta [1] 1:21
attention [5] 9:20 21:16 28:17 29:3,5
attributable [1] 56:4
attribute [1] 40:17
attributed [2] 51:17 55:2
attributing [1] 32:14
authorize [1] 54:25
available [2] 30:21 43:18
avoiding [1] 15:18
aware [3] 26:5 47:7 59:3
away [1] 21:7

B

back [4] 24:10 28:4 54:19 56:12
bad [6] 20:8,9 23:24 38:19,25 40:7
badly [1] 14:5
balance [1] 29:8
bar [4] 13:10 25:22 49:8 57:9
bars [2] 57:23 58:2
based [10] 12:4,6 24:5 37:19 41:11,17 47:21 50:21 51:3 55:1
bases [4] 5:16 11:1 18:21 58:8
basic [2] 48:16 51:18
basically [1] 18:11
basis [11] 8:5 11:7 12:5 31:7 37:3 39:12,17,24 45:1,20 50:21
Batson [6] 9:13 37:17,18,22 40:7,7
become [1] 23:14
begin [1] 59:14
behalf [8] 1:18,21 2:4,7,10 3:8 30:2 58:24
behave [1] 48:10
behind [3] 60:6,7 61:1
believe [2] 39:18 47:21
below [19] 4:9 5:17 6:13,16 34:21 36:23 39:11 42:16,19,21 43:5 44:22 47:14 48:13 49:20 51:5,15 56:22 59:17
best [4] 3:18,19,20 58:10
better [3] 10:2 31:24 39:21
between [2] 29:8 44:14
beyond [3] 25:12,16 60:24
big [1] 53:8
binding [3] 53:1 54:1,5
bit [2] 23:11 30:17
bizarre [1] 40:21
board [1] 60:17
boilerplate [1] 6:3
both [6] 8:2 9:3,10 13:12 22:15 58:8
bother [1] 44:6
bothered [1] 40:4
breadth [1] 30:16
break [1] 21:7
BREYER [10] 16:25 18:4 33:24 34:12 35:7,10,13 52:23 53:8 54:15
brief [6] 10:24 11:5,5 33:11,25 49:16
briefing [3] 5:19,20 18:16
briefs [4] 5:15 17:17 18:22 30:18
bright [1] 34:22
brilliant [1] 35:3
bring [1] 17:16
Brumfeld [1] 24:22
bunch [1] 8:14
burden [3] 35:21,22 50:19

C

cabined [1] 26:15
California [5] 15:6 16:8,11 26:7 36:19
called [1] 24:7
came [1] 1:13
cannot [2] 49:20 58:18
capable [2] 5:23 25:12
capital [1] 16:12
carefully [1] 10:9
Case [29] 3:4 4:7 5:13 6:1,8,10 8:13 10:21 18:25 20:7 22:12,18 25:5 34:23 37:17,18 49:4,9 50:12 51:1,1,13 52:10,19 59:6,9 61:23 62:21,22

cases [12] **10:**21 **13:**12 **16:**9,12 **25:** 24 **26:**8,9 **37:**4 **44:**19,20 **49:**12 **58:** 12
cause [4] **9:**1 **34:**2,3 **38:**9
caused [1] **27:**18
certain [1] **11:**12
certainly [4] **10:**7 **32:**25 **44:**3 **57:** 15
certificate [3] **9:**1 **34:**3 **38:**8
chance [1] **50:**15
change [1] **19:**25
changed [2] **16:**11 **59:**10
characteristics [1] **22:**23
characterization [2] **33:**14 **57:**16
characterize [2] **33:**5 **47:**22
CHIEF [16] **3:**3,9 **7:**22 **8:**13 **10:**4 **13:** 3 **29:**23 **30:**3 **49:**10,17 **58:**20,25 **59:**11 **62:**12,15,20
choice [1] **4:**2
circuit [3] **29:**14 **36:**23 **54:**5
circuits [4] **3:**17 **12:**21 **13:**14 **29:** 20
circumstance [2] **5:**22 **61:**17
circumstances [4] **5:**13 **17:**17 **18:** 14 **56:**19
citation [1] **23:**9
cite [1] **10:**18
cited [2] **3:**15 **11:**6
citing [1] **13:**18
claim [12] **11:**12,14,15 **12:**17 **38:**7, 10 **40:**7,8 **44:**25 **46:**2 **54:**21 **57:**5
claimed [1] **17:**20
claims [2] **37:**22 **49:**2
clause [1] **25:**1
clear [9] **10:**20 **25:**5,6 **37:**19 **38:**19 **39:**5,10 **52:**19,25
clearer [1] **52:**11
clearly [2] **41:**24 **49:**24
clients [1] **15:**11
COA [3] **7:**16,18 **8:**9
come [5] **42:**17 **43:**12,15,22 **47:**19
comes [1] **16:**17
comic [1] **36:**3
comity [7] **28:**19 **40:**12 **46:**10 **58:**1, 10,11 **61:**3
commentary [4] **25:**22 **26:**4,6,15
common [1] **27:**19
commonsense [2] **12:**7,10
complementary [1] **57:**18
completely [3] **31:**15,18,20
conceivable [1] **26:**22
conceived [1] **57:**18
concerned [2] **15:**7,25
conclude [1] **22:**6
concluded [1] **9:**4
concurrence [2] **11:**13 **12:**2
conduct [1] **49:**2
conducting [1] **30:**11
confront [1] **52:**12
confusing [1] **30:**17
Congress [1] **14:**11
consent [3] **48:**9 **49:**9 **57:**25
consequences [2] **14:**19 **15:**11
consider [7] **4:**23 **5:**22 **8:**25 **9:**15, 16 **20:**3 **21:**22
consideration [1] **44:**17
considerations [2] **15:**18 **27:**6
considered [2] **19:**9 **20:**22
consistent [1] **57:**18
consistently [1] **53:**1
constitutional [8] **27:**7,8,10 **38:**20 **39:**6,20 **40:**23 **43:**16
contain [1] **58:**13
contains [1] **56:**20
context [4] **48:**15,17 **49:**5,5
contours [1] **51:**5
contrary [4] **31:**9 **32:**6 **55:**16 **56:**23
conviction [1] **28:**7
corpus [1] **9:**7
correct [22] **7:**14,19,20,23 **8:**15,18, 19,19 **12:**3 **14:**2 **26:**24 **28:**8 **35:**18 **36:**14 **45:**16 **54:**16 **55:**9,25 **57:**1 **62:**8,10,13
cost [2] **15:**10 **16:**9
couldn't [3] **5:**1 **16:**7 **28:**7
counsel [5] **29:**24 **50:**24 **52:**3 **58:** 21 **62:**21
country [3] **12:**13 **18:**13 **27:**14
course [7] **32:**8 **40:**6 **41:**8 **50:**4 **52:** 4 **53:**25 **54:**4
COURT [227] **1:**1,14 **3:**10,11,14,16 **4:**7 **5:**6,7,8,17,21,23 **6:**2,5 **7:**3,4,6 **8:**25 **9:**2,3,7,16,19 **10:**1,7,14,15,16, 21,22,25 **11:**3,4,6,7,11,17,25 **12:** 12,14 **13:**5,8,9,17,19 **14:**1,4,5 **15:**4, 25 **16:**13,21,24 **17:**3,4,7,12,16,18, 19,21 **18:**17,19,23,25 **20:**1,2,16,18 **21:**2,10,15,25 **23:**19,21 **24:**3,12,13, 25 **25:**2,11,16,17,17 **26:**11,17,19, 21,21,23 **27:**5 **28:**5,18,21 **29:**3,9, 15,16,18 **30:**4,5,7,12,14,23,24,25 **31:**5,8 **32:**6,10,11,20 **33:**7,10,10 **34:**1 **35:**24 **36:**15,24,25 **37:**2,10, 14,24,24 **38:**2,4,14,18,25 **39:**13,18, 20 **40:**14,15,17 **41:**10,13,20 **42:**16, 18,24 **43:**7,7,14,24 **44:**4,16,21,23, 24 **45:**4,11,17,23 **46:**3,5,8,11,12, 18,19 **47:**8,13,16,25 **48:**3 **49:**8,13, 20,23 **50:**21 **51:**3,17,19,20,22,25 **52:**4,15,16,20,25 **53:**4,5,11,13,16, 17 **54:**1,2,8,16,19,24 **55:**8,19,20 **56:**1,4,13 **57:**4,4,19,23 **58:**2,3,4,5, 6,13,19 **59:**14,15,16,22,23 **60:**1,21, 22,25 **61:**8,10,11,12
court's [32] **3:**12,13,21,25 **4:**2,11 **8:** 5 **10:**23 **14:**15 **18:**3 **21:**18 **24:**11, 17 **25:**4,8 **30:**9 **31:**11 **32:**18 **37:**2 **38:**13 **47:**12 **48:**3 **52:**1,6,7 **55:**2 **56:** 20,21,24 **57:**3 **58:**17,18
courts [30] **6:**19 **7:**2,11,11,15 **12:** 18 **14:**9,22 **15:**2,5,16,19 **16:**16 **24:** 9 **27:**14 **29:**2,5,6 **30:**10 **36:**20 **39:**5 **40:**22 **45:**25 **46:**1 **48:**9,21 **49:**1,6 **53:**6 **60:**5
courts' [1] **37:**9
cousin [1] **35:**1
CPC [12] **9:**4 **10:**18 **11:**1,7 **18:**21 **25:** 8,14,16 **32:**19 **35:**25 **46:**6 **47:**25
create [1] **59:**23
created [1] **62:**6
creates [3] **28:**25,25 **60:**12
creative [1] **21:**6
credit [2] **28:**22,24
credit's [1] **28:**22
crime [1] **20:**7
critique [1] **6:**18
cumulative [1] **19:**5

D

d)(1 [1] **42:**6
D.C [1] **1:**10
day [1] **38:**25
daylight [1] **44:**14
de [10] **4:**3 **14:**12 **26:**17 **28:**11,12,13, 16 **29:**10,11 **55:**1
death [3] **22:**8 **26:**8 **27:**15
debatable [2] **9:**9,9
decide [6] **17:**21 **28:**5 **31:**1 **43:**18 **51:**13 **62:**7
decided [2] **10:**9 **17:**19
deciding [1] **55:**23
decision [67] **3:**16,25 **4:**8,9 **5:**15, 17 **6:**3 **7:**3 **8:**5 **9:**2 **11:**10,16,23 **14:** 1,6 **15:**15 **17:**5,6,12,19 **24:**18,22 **25:**4 **26:**24 **28:**10,24 **30:**7,7,8,13, 20,24 **31:**1,5,9,14,24 **32:**4,6,10,12, 25 **35:**24 **41:**17 **44:**22 **45:**14 **47:**16 **49:**14 **51:**2 **53:**11,16,18,18 **54:**6,9, 22,23,24 **55:**8,9,19,22,23,24 **56:**14, 22 **58:**18
decision-making [1] **16:**6
decisions [11] **7:**14 **9:**11,12 **13:**11 **16:**8 **18:**3 **27:**15 **29:**17 **30:**21 **45:**5 **60:**5
default [1] **12:**23
defendant [2] **28:**3 **37:**20
defendants [1] **37:**21
defense [1] **20:**6
defer [2] **10:**3 **60:**4
deference [4] **15:**5,10 **31:**19,25
Deficient [1] **51:**6
definition [1] **27:**2
denial [16] **3:**12 **8:**25 **9:**4 **10:**18 **11:** 1 **25:**8 **32:**19 **33:**3 **35:**25 **37:**1,18 **45:**2,22 **50:**22 **58:**9 **60:**14
denials [1] **47:**23
denied [6] **13:**19 **24:**24 **34:**7 **38:**10 **39:**13 **50:**14
denies [1] **42:**16
deny [6] **11:**6 **29:**6 **42:**20 **43:**21,24 **44:**11
denying [4] **8:**9 **18:**21 **25:**13,15
depend [1] **5:**12
depends [1] **4:**14
deprivation [1] **54:**10
deprived [1] **53:**19
describe [1] **40:**10
described [2] **40:**17 **42:**9
describing [1] **40:**11
designated [1] **55:**20
detailed [1] **22:**10
determination [4] **10:**7 **13:**6 **41:** 18 **48:**24
determine [5] **24:**13 **25:**2 **27:**7,9 **55:**15
determining [1] **9:**12
deviate [1] **42:**13
deviating [1] **45:**20
devoted [1] **19:**15
difference [1] **53:**9
different [11] **10:**2 **11:**15 **13:**13 **32:** 8 **36:**17 **48:**15 **51:**18 **52:**10 **53:**10 **59:**24 **62:**4
difficult [2] **23:**18 **27:**4
direction [1] **52:**20
directs [1] **14:**11
disagree [4] **32:**24 **33:**7,13 **48:**12
disagreed [1] **18:**1
disagreeing [1] **4:**10
disagrees [7] **32:**20,21,25 **47:**13, 15 **48:**3 **59:**15
disavowing [1] **33:**9
disclaims [1] **61:**12
discomfort [1] **45:**9
discretionary [1] **60:**14
discussion [1] **48:**11
dispute [1] **51:**5
dissent [2] **6:**16 **48:**5
Dissenting [1] **59:**16
district [4] **7:**10 **27:**5 **51:**19 **54:**8
Docket [2] **59:**6,9
doctrine [1] **48:**25
doing [7] **25:**12 **37:**14 **38:**2,4 **43:**13 **44:**2 **45:**6
done [5] **3:**17 **29:**9 **40:**1,2 **52:**16
down [1] **28:**4
draw [1] **48:**7
drawn [1] **45:**11
dream [1] **39:**21
drill [1] **27:**16
dropped [1] **51:**7
dubious [1] **9:**10
due [1] **28:**22
dust [1] **34:**25

E

earlier [1] **42:**10
egregious [1] **21:**21
either [4] **4:**2 **10:**20 **52:**19 **56:**8
Eleventh [3] **3:**18 **29:**20 **36:**23
encourage [3] **14:**21 **15:**2,15
endeavor [1] **16:**21
endorse [1] **52:**14
endorsement [1] **52:**5
engaged [1] **45:**17
enough [2] **23:**15 **24:**8
ensue [2] **39:**14 **46:**4
ensuring [1] **58:**1
entered [2] **11:**2 **59:**8
entitled [2] **37:**22 **40:**6
equal [1] **57:**25
equally [2] **15:**1 **45:**18
ERIC [1] **1:**6
error [7] **37:**19 **38:**20 **39:**1,6,11,20 **40:**17
errors [1] **40:**23

especially [1] 23:23
established [3] 7:9 41:24 52:7
Euclid [1] 34:9
even [13] 5:8 6:16 17:20 30:22,24 39:15,19 42:3,20 50:11,14 60:20 61:11
event [1] 17:13
eventually [1] 16:14
Everybody [1] 40:1
Everyone [2] 27:19 29:21
evidence [18] 10:8 19:4,11,12,22, 23,25 20:4,5,11 21:4 22:1,3 23:1, 22 32:11 41:19 55:21
exact [1] 53:5
exactly [13] 9:25 35:8 36:19,19 37:15 40:10 41:13 43:1 49:18,19 52:15 60:9,22
example [7] 5:14 15:6 36:4 39:8 47:8 61:14,16
examples [1] 4:18
except [3] 10:21 12:22 13:2
exercising [1] 28:16
exhausted [1] 46:3
exists [1] 45:1
expect [1] 39:4
experience [1] 25:23
explain [1] 38:21
explained [3] 4:16,17 36:23
explaining [2] 24:24 25:16
explains [1] 47:9
explanation [6] 4:1 22:11 23:9,11, 12,13
explanations [1] 15:16
explicit [1] 46:25
expression [1] 35:14
expressly [1] 9:24
extent [1] 45:8
extreme [1] 35:5

F

faced [2] 35:23 58:7
fact [6] 17:6 19:19 20:10 24:4 43:4 47:23
facts [6] 5:13 10:22 21:18 29:17 41:18 43:17
failure [2] 21:5 22:22
fair [2] 19:18 33:4
fairly [2] 36:7 59:10
far [2] 50:25 51:11
favor [1] 15:8
fealty [1] 24:12
federal [41] 3:14 7:10,11 12:17,17 15:5,19,24 16:1,17 17:11 21:2,15 26:21 27:5 28:15 29:2,5 30:5,10 31:7 36:24 38:20 39:6,15,20 40:23 41:24 43:11,19 44:3,7,21 48:25 49:1,6 51:25 53:6,13 54:2 55:16
federalism [6] 28:19 40:12 46:9, 13 58:11 61:3
few [4] 36:10,16 39:9 48:23
figure [3] 53:14 60:12 61:5
files [1] 34:2
final [3] 59:8 60:5 62:16
find [5] 19:20 22:24 27:10 28:10 57:8
finding [1] 43:20
findings [1] 24:5
fine [2] 40:1,2
first [8] 36:12 37:1 38:6 39:10 44:19 46:3 48:23 53:9
fit [1] 61:2
fits [3] 3:19,19,20
five [1] 47:23
Florida [1] 1:18
focused [1] 9:20
follow [2] 24:23 40:16
followed [1] 38:15
footnote [2] 10:9 52:14
former [2] 8:13 33:9
formulation [1] 6:14
forth [3] 10:23 43:15,17
Foster [3] 9:3,13 10:5
found [4] 19:2,20 41:11 51:23
four [3] 25:13 49:14 59:12
free [5] 17:10,22,23 18:11,20
full [3] 8:2 55:22,23
further [5] 5:19,20 48:11 52:20 58:19
future [2] 41:4,5

G

gave [1] 4:18
gears [1] 36:9
General [5] 1:20 7:1,1 19:18 48:18
generally [6] 46:16,21 48:7,9,10, 19
Georgia [65] 1:20,21 4:7 5:22 6:2 8:14,17,18,22 10:19,25 16:4,20 18:1,2,5,19 25:7 32:17,18 33:6,10 34:24 36:15,25 37:9,14 38:14,17, 24 39:12 40:15 43:6 45:11,22,25 46:5,7,11,15,17,21,21,25 47:4,5, 12,25 48:2 51:3,25 52:11,24 53:4 54:9,18,24 56:2,4 57:3 58:5 59:4, 4,20 61:20
gets [2] 6:17 55:17
getting [1] 14:17
GINSBURG [10] 5:25 12:22 13:21, 24 14:3 18:24 32:15 47:10,18,20
give [8] 19:10 23:19 28:22 31:19 37:16 39:9 55:21 62:16
given [5] 10:16 23:19 26:19 48:13 50:15
gives [1] 52:20
gold [1] 4:17
GORSUCH [13] 14:18 15:20 16:2 50:24 52:3 59:18 60:20 61:11,15, 19,22 62:3,13
got [3] 5:19 22:22 49:14
grade [3] 21:2 24:3,8
grading [5] 21:13,19 23:4,24 24:7
graduate [1] 34:22
grant [2] 29:4 43:20
granting [6] 7:15,16,17,17 8:9 28:2
greater [2] 14:17 35:22
ground [14] 12:19 16:17 17:14,15, 22 18:5 40:5 42:20 50:4 51:4,14, 16,18 56:17
grounds [1] 31:2
guess [3] 17:9 34:17 59:20
guilt [1] 19:11

H

hab [1] 43:11
habeas [49] 9:2,6 10:16 12:18 16:17 17:2 20:16,18 21:2,15,25 24:13 25:1,2 26:21,21 28:2 30:5,10, 20,25 31:8 36:24 39:13 42:16,18, 20 43:7,11,21,25 44:4,6,7,11,16, 21 45:25 46:2 49:2,6 50:6,9,13 51:25 53:13,17 54:25 56:12
half [1] 23:13
handful [1] 33:1
happens [3] 11:17 28:9 43:11
Harrington [4] 15:3 50:17 51:23 57:20
Harrison [2] 53:9,10
HAWKINS [3] 1:20 2:6 30:1
heads [1] 40:25
hear [2] 3:3 49:1
heard [1] 60:6
help [2] 31:8 48:25
helping [1] 49:6
high [1] 24:8
higher [2] 30:23 58:5
Hispanic [2] 37:20,21
history [2] 3:19 4:4
holding [2] 24:10 53:15
holds [1] 61:4
Honor [15] 4:14 6:7 17:11 19:3 21:12 32:23 33:13,21 36:11 45:8 55:10,25 56:5,19 62:18
honored [1] 52:22
however [1] 56:19
huge [1] 59:23
hundreds [1] 47:24
hypothetical [3] 23:8 37:16 42:23
hypotheticals [1] 45:10

I

identify [1] 57:23
ignore [2] 28:25 54:10
imagine [3] 26:22 27:6 43:14
imagining [3] 43:13 45:6,9
imminently [1] 27:18
implemented [1] 16:14
implicated [1] 46:15
implies [1] 48:8
imply [1] 49:9
important [4] 18:18 23:1 40:12 44:13
improbable [1] 18:2
imputed [2] 57:3 58:7
incentive [1] 59:23
including [1] 27:15
inconsistent [1] 4:4
incredible [1] 27:3
Indeed [1] 17:20
indicative [1] 53:2
indicia [1] 18:18
indigent [1] 26:10
individuals [1] 14:13
infirm [1] 58:6
infirmity [2] 56:21 58:13
influenced [1] 15:17
injured [1] 14:14
innumerable [1] 18:16
inquiry [4] 30:11 42:6 44:3 57:19
insist [1] 16:5
instances [4] 14:9 33:1,2,6
instead [3] 9:5 38:21 45:7
institutional [2] 21:5 22:22
intelligent [1] 21:7
intend [1] 6:10
intended [2] 13:2 57:22
intends [1] 53:2
interesting [1] 27:12
intermediate [5] 11:11 15:2 17:7, 12 35:24
interpretation [2] 41:12 43:17
interpreted [1] 12:12
involved [5] 21:17 31:10 32:7 41:23 42:7
irrelevancy [2] 22:20,25
isn't [3] 22:10 53:15 54:14
issue [11] 7:19 13:16 18:20 25:13, 15 32:18 42:25 43:8 47:16 48:4 51:14
issued [5] 4:8 30:24 33:3 34:5 47:24
issues [2] 10:8 32:24
item [2] 22:21,21
items [2] 5:19,20
itself [3] 31:9,20 52:16

J

Jill [1] 59:17
job [3] 35:23 40:1,2
Joint [1] 59:17
judge [8] 8:14 19:20 21:13 22:16 31:24 39:25 41:4 59:17
judge-made [1] 48:24
judges [8] 8:16 15:25 17:11 21:15 27:5 28:15 33:11 41:5
judging [2] 6:18 34:24
judgment [7] 11:13 12:16,17 41:1 54:17 59:16 60:21
judgments [1] 14:16
jurisdictions [1] 26:14
jurisprudence [1] 52:8
jury [1] 22:7
JUSTICE [139] 3:3,9 4:6,15,20,24 5:2,5,18,25 6:11,16,20,24 7:13,18, 22,25 8:4,7,12,16,21 9:8,21 10:4 11:9,20,22,24 12:4,9,22 13:3,21, 24 14:3,18 15:20 16:2,25 18:4,24 19:13 20:14,19,21,25 21:24 23:3, 7 25:21 26:3,20 27:1,21,23 28:1 29:23 30:3,15 31:3,12 32:1,13,15 33:8,10,15,18,23,24 34:12 35:7,10, 13,18 37:11 38:16 39:9,16 40:9, 20 41:8,14 42:4,9,12 43:1,3,10 44:5,10 45:3,13 46:14 47:1,3,6,10,17, 18,20 48:6,22 49:10,17,22 50:23,

24,25 **51**:12 **52**:3,23 **53**:8 **54**:15 **55**:4,5,12 **56**:7,10,16 **57**:7,11 **58**: 20 **59**:1,11,18 **60**:20 **61**:11,15,19, 22 **62**:3,6,12,13,15,20

K

KAGAN [16] **30**:15 **31**:3,12 **32**:1 **37**: 11 **38**:16 **39**:9,16 **40**:9,20 **41**:8 **42**: 10 **48**:6,22 **49**:22 **55**:6
keeping [1] **17**:5
KENNEDY [3] **6**:11 **25**:21 **26**:3
killed [1] **20**:7
kind [5] **17**:23 **18**:7 **21**:19 **36**:4 **60**: 7
known [1] **51**:6
knows [4] **18**:20 **21**:10 **25**:18 **27**: 19

L

label [1] **23**:24
laid [1] **51**:24
land [1] **58**:6
language [4] **24**:11 **42**:8 **55**:13 **60**: 22
largely [1] **51**:7
last [11] **3**:16 **13**:18 **30**:6 **31**:5 **32**:5, 9,11 **44**:20,24 **57**:4 **58**:18
later [6] **12**:18 **30**:12 **49**:7 **53**:17 **57**: 19 **58**:3
Laughter [4] **34**:11 **35**:12 **62**:11,19
law [21] **8**:22 **10**:12 **21**:18 **34**:24 **37**: 19 **38**:15,20 **39**:6,11,21 **40**:16,23 **41**:24 **43**:6,20 **46**:15 **52**:19 **53**:22 **55**:16 **56**:3 **59**:20
lawyer [1] **20**:8
lawyers [2] **43**:15 **49**:25
lead [2] **27**:7 **61**:17
leading [1] **54**:9
least [3] **15**:9 **62**:15,16
leave [2] **40**:3 **41**:3
LeBlanc [1] **13**:19
led [2] **20**:9 **53**:19
legislators [1] **16**:7
legislature [1] **56**:2
legislatures [2] **16**:3,16
less [2] **15**:2 **59**:25
level [1] **23**:17
liberty [2] **53**:20 **54**:10
life [1] **20**:9
light [1] **41**:19
limited [4] **24**:10 **30**:25 **48**:17 **49**: 19
line [1] **45**:10
listing [1] **23**:10
little [4] **14**:22,23 **23**:11 **30**:17
logic [4] **12**:25,25 **13**:4,4
long [2] **5**:11 **40**:24
longer [1] **26**:7
look [21] **3**:15 **15**:9 **17**:11,12,15 **23**: 25 **24**:4,6 **28**:21 **31**:8 **37**:1 **41**:21 **42**:2,5 **44**:21 **53**:11 **55**:9,14 **60**:6,7 **61**:1
look-through [7] **3**:18 **4**:12 **11**:19 **14**:21 **15**:8 **24**:20 **30**:12
looked [8] **9**:3,6,25 **10**:15 **13**:17,19 **16**:22 **38**:18
looked-through [1] **18**:25
Looking [9] **10**:13 **27**:14 **32**:3 **35**: 20 **42**:7 **55**:18,19,22 **56**:5
looks [2] **29**:17,17
lose [1] **28**:13
losing [1] **16**:17
lost [1] **7**:23
lot [5] **19**:14,24 **30**:19 **36**:9 **59**:19
love [1] **62**:10
lower [54] **3**:13 **4**:11 **5**:7 **6**:4,18 **7**:4, 6 **8**:5 **9**:16 **10**:6,23 **11**:2,7 **12**:14 **13**:9 **14**:1,15 **16**:13 **17**:18 **18**:17, 23,25 **25**:16 **29**:15,18 **30**:9,14 **32**: 20 **37**:2,2,8 **39**:19 **42**:24 **43**:7 **44**: 16,23 **46**:3,12,19 **47**:15 **48**:3 **51**: 20 **52**:6,15 **55**:1 **56**:1,20,21 **57**:2 **58**:13,17 **59**:16 **60**:25 **61**:9

M

ma'am [1] **26**:25
made [5] **38**:25 **39**:20 **42**:19 **43**:23 **54**:9
majority [4] **11**:11,21,22 **12**:1
many [4] **28**:5 **37**:4 **44**:19,20
MARION [1] **1**:3
MARK [5] **1**:18 **2**:3,9 **3**:7 **58**:23
matter [3] **1**:13 **32**:16 **54**:13
matters [1] **58**:12
maxim [1] **48**:8
maximum [1] **15**:5
maze [1] **60**:12
McWilliams [1] **13**:23
mean [19] **15**:21,24 **17**:22 **19**:14 **20**: 21,22 **21**:24 **27**:3 **28**:14 **33**:25 **40**: 20 **48**:20 **51**:1 **53**:9 **54**:3,18 **60**:6, 15 **61**:25
meaning [3] **7**:7,8,9
means [6] **17**:4 **36**:8 **48**:19 **60**:13, 14,18
mention [1] **24**:3
mentioned [2] **20**:17,19
merit [5] **15**:14 **34**:6,8,16,20
merits [17] **7**:14 **13**:9,11,17 **30**:7, 13 **31**:6 **32**:6 **36**:13 **37**:1 **38**:8,10 **44**:25 **45**:22 **48**:16 **52**:2 **57**:5
might [6] **7**:13 **15**:8 **26**:17 **27**:6 **50**: 9 **52**:10
minimal [1] **22**:18
minor [1] **11**:4
minutes [1] **58**:22
mitigating [5] **19**:22,25 **20**:4,5 **23**: 1
mitigation [5] **21**:12 **22**:2,5 **23**:10, 23
modify [1] **23**:7
Monday [1] **1**:11
monkey [1] **36**:8
most [14] **10**:21 **12**:25 **13**:1 **14**:9 **15**:10 **18**:2,12 **40**:11 **56**:25 **57**:1 **58**:12 **61**:5,7,9
Ms [45] **29**:25 **30**:3,15 **31**:3 **32**:1,23 **33**:12,17,21 **35**:7 **36**:10 **37**:11 **38**: 5 **39**:8 **40**:9 **41**:7 **42**:4,22 **43**:2,6 **44**:1,9,12 **45**:8,16 **46**:24 **47**:2,6,17, 20 **48**:22 **49**:17 **50**:17 **51**:10,21 **52**: 18,24 **54**:15 **55**:10,25 **56**:9,15,18 **57**:10,15
much [7] **19**:4 **24**:8 **27**:21,23,24 **44**: 14 **55**:5
must [7] **21**:16 **24**:13 **25**:2 **30**:5 **35**: 18 **38**:12 **40**:13
muster [1] **24**:9

N

narrow [1] **3**:23
narrowly [1] **13**:1
nation [1] **54**:2
nearly [1] **15**:25
necessarily [14] **4**:10 **6**:13 **7**:5,15 **14**:24 **28**:3,18 **34**:20 **46**:18 **52**:5, 14 **60**:1,23 **61**:6
necessary [2] **3**:22 **22**:17
neuropsychological [1] **19**:8
never [6] **10**:17 **18**:1 **50**:7,15 **51**:4, 15
new [3] **43**:23,25 **50**:16
next [1] **3**:4
nobody [2] **17**:20 **34**:18
nobody's [2] **34**:25 **35**:3
non-capital [1] **26**:9
none [1] **47**:7
normally [1] **13**:8
note [1] **16**:10
nothing [6] **9**:11 **22**:14 **41**:25 **53**: 22 **54**:7 **55**:13
novel [1] **36**:21
novo [10] **4**:3 **14**:12 **26**:17 **28**:11,12, 13,17 **29**:10,11 **55**:1
number [2] **52**:12 **59**:6

O

obscure [1] **35**:15
obviously [4] **17**:13,14 **36**:6 **53**:13
occurred [1] **34**:19
October [1] **1**:11
odd [1] **38**:17
offer [1] **25**:22
offered [1] **21**:5
offers [1] **37**:3
office [1] **34**:23
Oglethorpe [1] **36**:3
Oglethorpe's [1] **35**:1
okay [5] **23**:15 **35**:6 **43**:2 **57**:7 **61**: 19
OLIVE [74] **1**:18 **2**:3,9 **3**:6,7,9 **4**:14, 22,25 **5**:3,10 **6**:6,15,22 **7**:12,17,20, 24 **8**:3,6,10,15,19,24 **9**:19,23 **10**: 13 **11**:18,21,23 **12**:3,6,15,24 **13**:14, 23 **14**:2,7,18 **15**:12,23 **16**:10 **17**: 25 **18**:14 **19**:3 **20**:2,17,20,24 **21**:4 **22**:12 **23**:5,17 **26**:2,5,25 **27**:3,22, 24 **28**:8 **52**:9 **58**:22,23,25 **59**:18 **60**:11 **61**:4,13,16,20,25 **62**:5,9,18
omissions [1] **19**:9
once [1] **28**:4
one [14] **12**:16 **18**:6 **19**:19 **21**:22 **27**: 5 **29**:12 **34**:21 **35**:17 **38**:22 **43**:22 **46**:16 **51**:3 **55**:19 **57**:13
one-word [1] **17**:3
ones [1] **43**:18
only [10] **9**:15 **13**:25 **30**:13,21 **32**: 12 **33**:6 **35**:21 **43**:14 **44**:7 **49**:13
opinion [29] **3**:14 **4**:11,16 **6**:23 **10**: 23 **15**:16 **16**:20 **21**:3,14 **24**:6,7,15, 23 **30**:9,14 **34**:21 **36**:2 **37**:3 **38**:18, 19 **42**:1,11,25 **43**:4,8 **44**:16 **46**:4 **49**:24 **50**:1
opinions [4] **6**:18 **30**:21 **41**:10 **58**: 3
opposite [3] **46**:22 **48**:9 **53**:5
opposites [1] **29**:1
option [2] **38**:23,24
oral [5] **1**:13 **2**:2,5 **3**:7 **30**:1
order [14] **3**:15 **4**:8 **11**:2 **14**:10 **22**: 14,19,20 **23**:5 **25**:10 **26**:17 **59**:5,6, 8,13
orders [5] **12**:19 **13**:1 **18**:21 **22**:15 **59**:24
ordinarily [1] **13**:2
originally [2] **57**:17,22
other [23] **3**:17 **5**:12 **8**:14 **15**:18 **16**: 7,8 **18**:17,21,22 **19**:11 **22**:7 **26**:14 **29**:13,15,20 **31**:2 **38**:11,24 **39**:11 **53**:5 **57**:13,14 **60**:2
otherwise [3] **10**:22 **25**:19 **26**:16
ought [5] **10**:2 **14**:16,16 **17**:21 **29**: 20
out [15] **17**:16 **25**:1 **26**:4,6 **31**:20 **39**: 25 **40**:3 **41**:3 **46**:8 **51**:7,24 **53**:14 **57**:19 **60**:12 **61**:5
outcome [1] **20**:1
outlawed [1] **44**:17
outside [1] **21**:21
over [3] **19**:19,19 **47**:24
own [3] **45**:5 **53**:6 **58**:1

P

p.m [1] **62**:22
PAGE [2] **2**:2 **23**:13
pages [2] **19**:15 **25**:13
painstakingly [1] **23**:21
palpably [1] **14**:10
paragraph [1] **25**:15
parcel [1] **32**:5
Pardon [3] **11**:23 **27**:22 **61**:16
part [3] **32**:4,4 **57**:13
particular [2] **42**:2 **43**:5
parties [4] **18**:22 **41**:4,5 **59**:5
pass [3] **21**:20 **24**:8 **46**:2
past [1] **21**:8
pay [2] **29**:3,5
paying [1] **28**:17
penalty [2] **26**:8 **27**:16
people [1] **14**:15
perfectly [1] **18**:20
performance [1] **51**:6
perhaps [4] **14**:22 **15**:3 **16**:3 **44**:20
person [3] **17**:5 **20**:12 **35**:22
person's [1] **53**:19
pertinent [1] **10**:6

petition [2] 42:17 50:14
Petitioner [13] 1:4,19 2:4,10 3:8 32:17 33:2 47:11,11 50:7,10,13 58:24
Petitioner's [5] 37:7 44:14 47:21 50:19 58:16
place [2] 44:19,20
plain [1] 3:20
play [3] 6:11 13:2 18:6
pleasant [1] 35:14
please [3] 3:10 16:19 30:4
point [10] 23:14 34:13 35:6,6,10 36:16 44:13 45:12,24 54:18
points [2] 33:2 42:8
polar [1] 29:1
Porter [2] 22:25 23:21
posed [1] 3:23
position [3] 30:17 31:4 32:2
positive [1] 22:23
possibilities [1] 28:6
possibility [1] 6:17
possible [2] 14:20 15:1
post-conviction [4] 3:14 19:5 20:11 25:9
potential [1] 43:16
potentially [1] 43:18
power [1] 28:16
practical [2] 36:8,22
practically [1] 35:20
practice [14] 7:1 8:8 10:14 16:6 32:16,18,21 36:24 47:5,13,21 49:18 53:1 59:22
practices [1] 15:17
pragmatic [1] 57:1
pre-AEDPA [1] 48:23
preceded [1] 30:9
precedence [1] 56:24
precedent [5] 9:5 10:18 53:22 54:1,13
precedents [4] 3:21 31:11 38:13 52:13
precluded [1] 44:2
prejudice [5] 19:2,21 23:23 51:8,9
prejudicial [1] 19:10
present [2] 36:1 42:18
presentation [1] 20:10
presented [6] 5:16 20:15,16 41:19 42:21 50:7
presenting [1] 49:11
preserve [1] 57:23
preserved [1] 38:8
Presumably [1] 60:4
presume [10] 5:6 12:18 17:2,3,18 33:5 37:13 38:9,14 57:2
presumes [1] 44:23
presuming [2] 37:8 38:7
presumption [10] 4:15 17:8 18:15 25:19 26:12 38:12 46:10 57:2 58:14,16
pretty [1] 39:3
primarily [1] 49:13
principled [1] 45:20
prison [1] 17:6
probability [1] 22:6
probable [8] 9:1 34:3 38:9 56:25 57:24 61:6,7,9
probably [2] 14:8 18:16
problem [4] 35:20 37:5,6 41:15
problematic [1] 37:8
problems [1] 27:18
procedural [7] 12:23 13:6,10 17:14 48:16 57:8 58:2
procedure [1] 10:15
proceedings [3] 3:11 20:11 41:20
process [10] 16:14 27:12 36:18,18,21 37:4 44:18 51:24 59:3,4
processes [1] 16:19
proffered [2] 19:5 22:2
prong [2] 23:23 24:2
properly [3] 38:7 46:2 56:13
proposed [2] 59:5,13
Proposition [3] 16:12 40:13 48:2
proven [1] 25:25
provided [2] 22:3 60:25
prudential [1] 48:24
Pryor [1] 59:17
purpose [3] 4:4 57:17,21
Put [2] 30:10 49:15

Q

quality [1] 21:3
question [25] 3:23 8:11,21,22,23 12:23 13:25,25 29:13 30:16 31:13 35:9,11,15,19 36:6,11 37:13 39:1,2 42:14 46:14 51:7 53:15 61:24
questions [2] 35:16 58:19
quite [3] 5:23 25:12 50:12
quote [2] 21:17 34:4
quoted [1] 35:17
quotes [1] 33:25
quoting [2] 24:22 34:4

R

raise [1] 37:22
raised [3] 43:5 51:4,15
rational [1] 15:9
read [3] 10:9 17:1 41:16
readiness [1] 40:16
reading [2] 3:20 9:10
really [8] 18:6 19:6,10 21:2 24:12 26:7 28:2 50:10
realm [1] 21:22
reason [6] 5:14 10:2,2 11:15 35:4 58:14
reasonable [16] 21:23 22:6 23:16 24:1 28:24 29:10 32:7 37:3 38:3,6 39:4,12 45:1 50:20 51:3 58:8
reasoned [29] 3:13,16 12:16 14:6 16:6 25:9 28:10 30:24 31:6,14 32:12,19,24 33:3 37:3 42:10,25 43:3,8 44:22 45:14 46:4 47:23 48:5 55:8,9,22,23,24
reasoning [28] 4:11 5:7 6:4 7:5,14 11:25 12:1,13 14:25 30:14 32:3,20 33:7 41:9,22 46:19 47:15 48:4,17 50:16 52:6,15 55:2,15 56:20,22 58:7 59:25
reasonings [2] 46:12 60:23
reasons [33] 6:13 10:16 11:12 16:4,5,18 19:10,19 24:19,21,21,24 25:16 26:19 31:8 36:1 37:9,9 40:12 41:12 44:23,24 48:13,23 56:2,3,3,11 57:3 58:17 60:2,24 62:2
rebut [2] 4:25 5:12
rebuttable [1] 4:15
REBUTTAL [3] 2:8 58:23 61:18
rebutted [4] 4:18,19 18:15 61:13
rebutting [1] 5:11
receive [1] 31:25
record [2] 59:7,10
redeemability [2] 20:12 21:9
reduce [1] 22:25
reduced [1] 22:20
reflects [1] 13:1
refute [1] 17:9
reiterated [1] 40:14
reject [2] 11:14,15
rejecting [1] 12:17
rejects [1] 11:12
release [1] 28:3
relied [1] 11:25
relief [14] 13:20 24:24 28:2,12 29:4,6 37:18 39:13,14 45:2 50:22 54:25 55:1 58:9
rely [1] 18:3
relying [1] 6:4
remains [1] 50:19
removed [1] 35:2
removing [1] 28:15
repeat [1] 7:24
require [6] 4:3 26:21 41:9,10,15 46:10
required [4] 30:11 41:12 43:8 55:21
requires [3] 27:2 41:21 54:20
reserve [1] 29:21
resist [2] 40:16 57:16
resolve [1] 13:16
respect [8] 20:7 26:8,18 29:9 45:4,12,24 48:20
respected [1] 25:20
respectfully [1] 33:12
respects [1] 58:1
respond [2] 49:13 50:16
Respondent [4] 1:7,21 2:7 30:2
Respondent's [1] 14:14
response [2] 15:13 50:10
rest [2] 12:19 33:22
restricted [1] 48:25
result [2] 14:24 28:2
resulted [2] 41:17 54:22
returned [1] 22:7
review [18] 4:3 14:12,17 16:1 26:17 28:11,12,13,17 29:10,11,12 30:13,20 38:8 43:12 49:3 54:23
reviewed [1] 48:1
reviewing [1] 13:6
reviews [1] 3:12
Richter [16] 3:22,24 15:13 24:11,22,23 25:23 26:4,13,20 28:23 36:20 45:11 50:18 51:23 57:20
ROBERTS [10] 3:3 7:22 10:4 13:3 29:23 49:10 58:20 62:12,15,20
role [2] 13:1 44:18
Rompilla [1] 23:20
rubber [2] 62:1,4
rule [28] 10:11 12:8,11,20 14:14,14,15,21 25:24 29:4,19,21 34:1,5 35:17 36:15 46:20,25 47:4,8 51:11 52:19,19,25 60:12,16,18 62:7
ruled [1] 13:15
rules [1] 52:13
ruling [7] 3:22,23,23 14:19 15:7 28:18 60:8
rulings [1] 13:17
running [1] 58:15
runs [1] 37:6
ruse [2] 6:7,25

S

same [9] 8:8 12:19,25 43:21 45:18,19 50:19 58:17 62:1
SARAH [3] 1:20 2:6 30:1
saying [12] 4:8 5:21,23 31:22 39:19 40:5 47:16 52:14 53:24 54:11 56:8,11
says [24] 6:2 9:12 10:22 11:13 15:4 17:2 21:15 23:25 24:12,25 34:1,1 37:24 42:1 48:8 49:23 50:18 53:22 54:2 55:14,14 60:18,21 62:1
Scalia [2] 4:16 5:18
scrutiny [2] 15:18 56:12
Sears [1] 9:3
second [5] 24:2 25:1 31:22 35:1 36:16
see [11] 10:10 16:7 24:1,15 34:12 35:5 37:2 38:16 44:25 56:16 62:9
seeing [1] 26:15
seeking [1] 28:24
seem [2] 6:6 20:22
seemed [2] 35:17 39:3
seems [7] 6:25 14:20 34:9 37:12 38:17 40:20 50:12
seen [1] 34:25
SELLERS [2] 1:6 3:5
send [1] 56:12
sense [1] 27:19
sentence [2] 22:8 62:17
sentences [2] 23:12 40:4
separate [3] 29:13 35:16,19
serious [2] 16:20 21:11
seriously [1] 16:25
serves [1] 58:10
service [1] 58:11
set [8] 10:23 27:6 43:15,16 54:8 56:18 57:19 58:11
shouldn't [3] 14:3 17:18 56:14
show [1] 44:13
shows [2] 24:11 56:22
side [1] 36:22
sides [2] 8:2 22:16
signed [2] 22:20 33:11
significant [1] 5:21
silence [6] 48:7,8,19 49:8 57:25 60:18
silent [1] 13:7

similar [1] **37:**5
similarly [2] **33:**22 **46:**12
simple [2] **17:**3 **62:**7
simpler [3] **27:**21,23,24
simply [3] **13:**11 **44:**25 **59:**24
since [1] **62:**12
single [2] **6:**8,10
sir [1] **9:**24
sit [1] **35:**25
situation [15] **4:**13 **13:**13 **14:**10 **18:** 7,11 **26:**16,18 **27:**4 **32:**9 **40:**10,10 **42:**9 **43:**9 **51:**14 **57:**13
situations [1] **40:**19
six [1] **47:**23
slightly [1] **62:**4
Solicitor [1] **1:**20
somebody [3] **34:**2 **37:**20,21
sorry [4] **7:**22 **33:**8 **35:**13 **41:**14
sort [1] **28:**25
SOTOMAYOR [35] **7:**13,18,25 **8:**4, 7,12,16 **26:**20 **27:**1,21,23 **28:**1 **32:** 13 **33:**8,15,18 **35:**18 **41:**14 **42:**4, 12 **43:**1,3,10 **44:**5,10 **45:**3,13 **55:**4, 12 **56:**7,10,16 **57:**7,11 **62:**6
sound [1] **23:**3
sounded [1] **35:**14
specific [3] **30:**13 **47:**4 **59:**20
specifically [1] **5:**8
spending [1] **59:**19
spent [2] **30:**19 **59:**19
stage [1] **38:**9
stamp [2] **62:**1,4
stand [2] **56:**11 **58:**18
standard [4] **4:**17 **8:**17 **30:**6 **36:**13
stands [2] **48:**1 **55:**24
start [3] **16:**12 **26:**10 **40:**13
starts [1] **55:**5
state [115] **3:**12,24 **5:**6,15 **9:**7,16 **10:**1,7,16,17,24,24 **11:**10,17,25 **12:** 16 **14:**9,21 **15:**2,4,16,24 **16:**3,7 **17:** 4,9,10,15,16 **18:**1,5 **22:**3,14 **24:**4, 17 **25:**3,9 **26:**23 **28:**4,18,21,23 **29:** 3,6,9 **30:**6,9,12,14,23,23 **31:**5 **32:**6, 10,11 **37:**8,24 **38:**2,4 **39:**5,18,19 **40:**22 **41:**19 **42:**16,17,24 **43:**7,7, 12,13,22,24 **44:**6,11,16 **45:**4,25 **46:** 3,12,18 **48:**20 **49:**7,8,12,13,20,23 **51:**17,20 **52:**18 **53:**11,19,22 **55:**20 **56:**1,20,21 **57:**2,4,23 **58:**2,3,6,13, 17,18 **59:**2,3,4,22,23 **60:**5,13,20
state's [3] **29:**4 **59:**5 **60:**11
stated [1] **36:**13
statement [2] **17:**4 **41:**10
statements [1] **33:**9
STATES [13] **1:**1,14 **7:**2 **15:**9 **18:**7, 12 **27:**15,16 **28:**23 **47:**14 **52:**12,12 **62:**7
statute [1] **45:**19
step [1] **31:**23
still [2] **28:**6 **50:**19
stop [1] **62:**14
Strickland [1] **51:**9
strictly [1] **11:**1
strikes [1] **29:**7
structuring [1] **16:**18
struggling [1] **21:**7
submit [1] **59:**5
submitted [3] **59:**14 **62:**21,23
substantive [1] **49:**2
substitute [1] **31:**16
suggest [1] **46:**7
suggested [2] **10:**11 **19:**22
suggesting [2] **42:**24 **44:**15
suggestion [1] **61:**2
suggests [1] **40:**25
summarily [3] **7:**3 **11:**16 **42:**17
summary [27] **3:**12 **7:**4,7,10 **8:**1,20 **12:**11 **30:**8,12 **32:**10 **36:**25 **45:**22 **46:**17 **49:**7 **52:**1,4,21 **53:**2,3,6,21 **54:**3,11,12,17 **58:**3 **60:**13
support [3] **10:**25 **25:**7,7
supported [5] **24:**14,16,17 **25:**3 **26:**23
Suppose [7] **4:**6 **5:**25 **6:**1 **11:**9,9 **31:**13 **39:**1
SUPREME [57] **1:**1,14 **4:**7 **5:**6,8, 23 **6:**2 **10:**1,25 **11:**17,25 **14:**22 **17:** 4,16,19,21 **18:**2 **25:**7 **32:**18 **33:**6,9 **34:**1 **36:**15,25 **37:**10,14,23,24 **38:** 14,18,25 **39:**5,12 **40:**15 **45:**23 **46:** 5,8,11,18 **47:**12,25 **48:**2,20 **49:**23 **51:**3,17 **52:**1,25 **53:**4 **54:**24 **55:**8 **56:**4 **57:**4 **58:**5 **60:**21 **61:**12,20
suspect [1] **19:**16
sustain [2] **45:**1 **58:**9
swath [1] **20:**4
system [3] **36:**7 **46:**1 **55:**20

T

talks [2] **41:**16,22
Tallahassee [1] **1:**18
term [1] **13:**18
testing [1] **19:**9
text [6] **41:**9 **45:**19 **54:**20,20,25 **56:** 5
textual [4] **31:**7 **41:**11 **45:**17,21
theories [3] **24:**14,16 **25:**3
theory [1] **53:**14
there's [24] **4:**17 **8:**2 **9:**11 **11:**13 **12:** 16 **19:**6 **22:**6,14,15 **23:**8,9,9,11,12 **24:**15 **29:**10,14 **31:**22 **39:**17 **41:**25 **42:**15 **45:**4,9,19
therefore [1] **34:**8
thinking [1] **50:**6
though [6] **5:**8 **9:**22 **13:**5 **39:**19 **42:** 21 **50:**15
thousands [3] **7:**9,9 **47:**24
thread [2] **37:**6 **58:**15
three [3] **23:**12 **25:**13 **58:**22
throughout [2] **54:**5 **58:**15
throw [1] **36:**8
totally [2] **43:**23,25
toward [1] **5:**11
train [1] **21:**16
traits [1] **22:**23
treat [3] **51:**25 **52:**21 **53:**6
treated [3] **53:**4,21,25
trial [3] **16:**21 **20:**15 **26:**11
trouble [3] **29:**14,16 **55:**5
true [3] **8:**1 **33:**1 **46:**22
truth [1] **26:**8
try [1] **53:**14
trying [2] **60:**12 **61:**5
turns [1] **59:**21
twice [1] **35:**1
two [8] **16:**23,23 **28:**25 **29:**8 **35:**16 **38:**5 **40:**4 **46:**1
two-tiered [1] **45:**25

U

U.S.C [1] **30:**6
ultimate [2] **41:**1 **55:**1
ultimately [2] **4:**25 **5:**12
unaccompanied [1] **3:**25
unadministratable [1] **26:**1
under [12] **16:**11 **17:**17 **18:**14 **21:** 20 **22:**25 **24:**12,22,25 **28:**13 **29:**12 **51:**9 **54:**23
understand [5] **16:**2 **27:**17 **31:**13 **38:**1 **42:**23
understanding [2] **35:**15 **48:**18
understood [4] **31:**17 **46:**17,21 **52:** 9
undertook [2] **10:**14,15
unexplained [1] **12:**18
unfair [1] **50:**13
uniform [2] **8:**8,8
unilaterally [1] **28:**16
uninterested [1] **40:**22
unique [2] **26:**16,18
UNITED [3] **1:**1,14 **7:**2
unreasonable [15] **14:**1,11 **22:**10, 13 **27:**9 **28:**11 **29:**11 **31:**10 **41:**18, 23 **42:**7 **43:**19,20 **56:**23 **58:**8
until [2] **16:**22 **59:**2
unusual [1] **13:**5
unworkable [1] **26:**1
up [6] **26:**11 **34:**14 **36:**1 **39:**21 **56:** 11 **62:**9
uses [2] **60:**22,23
using [1] **57:**21
utterly [1] **4:**3

V

various [1] **22:**21
versus [5] **40:**18 **48:**16 **50:**18 **51:** 23 **57:**20
view [1] **36:**14
viewed [1] **14:**16
violate [1] **28:**19
violation [5] **9:**14 **27:**7,8,11 **43:**16
Visciotti [1] **40:**18
vitiated [2] **49:**8 **58:**3

W

walked [1] **34:**23
wanting [1] **13:**15
wants [1] **25:**17
WARDEN [1] **1:**6
WARREN [48] **1:**20 **2:**6 **29:**25 **30:**1, 3,15 **31:**3 **32:**1,23 **33:**12,17,21 **35:** 7 **36:**10 **37:**11 **38:**5 **39:**8 **40:**9 **41:**7 **42:**4,22 **43:**2,6 **44:**1,9,12 **45:**8,16 **46:**24 **47:**2,6,17,20 **48:**22 **49:**17 **50:**17 **51:**10,21 **52:**18,24 **54:**15 **55:** 10,25 **56:**9,15,18 **57:**10,15
Washington [1] **1:**10
way [18] **5:**11 **11:**3 **13:**15 **16:**19 **21:** 14 **22:**17,18 **29:**12 **30:**10 **31:**17 **36:** 12,14 **37:**15 **39:**4 **42:**2 **53:**5,25 **58:** 1
ways [1] **34:**18
well-known [4] **12:**7,10 **27:**25 **47:** 5
well-understood [1] **12:**11
well-used [2] **12:**7,10
West [1] **15:**19
Wetzel [1] **24:**25
whatever [2] **16:**19 **22:**17
whatsoever [1] **44:**18
whenever [1] **32:**19
Whereas [1] **52:**24
Whereupon [1] **62:**22
whether [19] **4:**23 **5:**11 **25:**23 **27:**8, 9 **29:**12 **30:**7,8 **31:**1,9 **32:**5 **45:**1 **49:**1,7 **51:**8 **53:**20 **54:**12 **55:**15,24
whoever [1] **34:**9
Wiggins [1] **23:**20
will [20] **13:**25 **14:**13 **15:**15 **16:**13 **28:**2 **34:**5 **35:**22,25 **37:**1 **39:**14,25 **40:**1 **41:**5 **44:**11,21 **46:**1,4,5 **47:**16 **56:**1
Williams [1] **23:**20
WILSON [2] **1:**3 **3:**4
win [2] **6:**1 **29:**12
wishes [1] **25:**11
withhold [1] **15:**16
without [3] **13:**18 **48:**11 **54:**11
wondering [1] **59:**21
Woodford [1] **40:**18
word [3] **17:**1 **30:**20 **62:**16
words [1] **6:**12
work [4] **26:**11 **27:**2 **33:**20 **36:**9
workability [1] **26:**13
workable [3] **12:**7 **25:**25 **27:**18
worked [2] **26:**4,6
works [2] **21:**14 **36:**7
wrench [1] **36:**8
write [2] **40:**4 **42:**1
writing [2] **15:**17 **16:**21
written [8] **21:**3,14 **22:**19 **24:**15 **31:** 24 **35:**1 **46:**8 **50:**2
wrote [2] **11:**3 **22:**14

Y

year [1] **59:**2
years [3] **16:**22,23 **25:**6
yield [1] **15:**8
Ylst [19] **4:**15 **5:**18 **8:**23 **12:**8,15,20 **13:**18 **17:**1 **25:**19 **26:**2,11 **27:**17 **39:**2 **48:**6 **57:**21,22 **60:**16,18 **61:**4
Ylst's [1] **57:**17
young [1] **34:**22