

| | C O N T E N T S | |
|----|-------------------------------------------|------|
| 1 | | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | STEPHEN R. McALLISTER, ESQ. | |
| 4 | On behalf of the Petitioner | 3 |
| 5 | NICOLE A. SAHARSKY, ESQ. | |
| 6 | On behalf of the United States, as amicus | |
| 7 | curiae, supporting the Petitioner | 14 |
| 8 | MATTHEW J. EDGE, ESQ. | |
| 9 | On behalf of the Respondent | 24 |
| 10 | REBUTTAL ARGUMENT OF | |
| 11 | STEPHEN R. McALLISTER, ESQ. | |
| 12 | On behalf of the Petitioner | 38 |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
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P R O C E E D I N G S

(11:15 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 07-1356, Kansas v. Ventris. General McAllister.

ORAL ARGUMENT OF STEPHEN R. McALLISTER
ON BEHALF OF THE PETITIONER

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

The Court has always held that the defendant's voluntary statements obtained in violation of constitutional standards may be used for impeachment purposes when the defendant testifies at trial.

The Court has excluded statements for all purposes only when they are involuntary or have been compelled. The question in this case is whether voluntary statements obtained in violation of the rule of Massiah v. United States should be treated differently than all other voluntary statements.

The answer is "no" for at least three reasons. First, permitting the impeachment use of voluntary statements obtained in violation of constitutional standards is necessary to prevent perjury by criminal defendants.

Second, in terms of the effect at trial,

1 there is no basis for distinguishing a voluntary
2 statement obtained in violation of the Massiah rule from
3 Fourth Amendment violations, Miranda violations, or
4 violations of the rule of Michigan v. Jackson.

5 In all of those situations the resulting
6 evidence may limit defense counsel's options at trial,
7 but there is no basis in that respect for distinguishing
8 a Massiah violation. It has no different effect than
9 those others. Also, the Sixth Amendment right to
10 counsel does not include a right to commit perjury or to
11 have the assistance of counsel in presenting false
12 testimony.

13 JUSTICE SCALIA: When does -- when does the
14 Sixth Amendment violation occur?

15 MR. McALLISTER: That question, Your Honor,
16 as you realize, is debated a bit in the briefs, it's --
17 Kansas for purposes of deciding this case, is willing to
18 accept the position of the United States and the
19 Respondent that it occurs when the statement is admitted
20 at trial, although the cases have not necessarily
21 definitively resolved that question. We, frankly, think
22 it is unnecessary to answer the question, because it's a
23 minimal point in terms of potential deterrence --
24 deterrence that operate in this segment --

25 JUSTICE SCALIA: Do you -- do we have any

1 other situation in which, for purposes of impeaching
2 testimony, a constitutional violation results?

3 MR. McALLISTER: Well, that's the -- that is
4 one of the intricacies of this particular question,
5 although arguably in the Fifth Amendment context
6 certainly the Miranda warnings are given. The police
7 don't do that. And if that is the completion of the
8 violation, it's analogous in many ways, if one looks
9 back at the cases.

10 The Court has suggested that the actual
11 violation is the use of the statement at trial against
12 the defendant, not simply obtaining it without the
13 necessary warnings being given. So we would argue that
14 is, in fact --

15 JUSTICE SCALIA: It's parallel to the Fifth.

16 MR. McALLISTER: It's parallel to the Fifth
17 in this respect, and certainly, it's distinct from the
18 Fourth in that respect. But we don't think it matters
19 at the end of the day. If one were to treat it like the
20 Fourth Amendment, so that the violation is complete when
21 the police send in an informant and he works hard to
22 elicit statements in violation of the Messiah law, if
23 it's complete at that time, then all of the analysis
24 from the Fourth Amendment cases is equally applicable
25 here.

1 If the violation does not occur until it's
2 presented at trial, then it's analogous more to the
3 Fifth Amendment and also to the Michigan v. Jackson and
4 Michigan v. Harvey cases, which were Sixth Amendment
5 right to counsel violations, in which case the Court
6 said it was wrong for the police to initiate
7 interrogation after he invoked his right but will let
8 the statement be admitted for impeachment purposes. So
9 it is exactly analogous to what the Court did in Harvey
10 itself.

11 JUSTICE GINSBURG: Would it make no
12 difference, I take it, General McAllister, if this had
13 been a police officer who was pretending to be a
14 cellmate? In this case it was a snitch, but it could be
15 a police officer doing inside the cell what he couldn't
16 do outside; that is, the police officer outside wants to
17 interrogate, must inform the arrestee of his Miranda
18 rights, but inside the cell, the police could pretend to
19 be a jailbird and they can get the information that way.
20 Is that --

21 MR. McALLISTER: Well, Justice Ginsburg, I
22 believe that is correct if -- if it's for example, an
23 undercover officer, someone has gone in -- in fact,
24 there are cases such as Weatherford v. Bursey that
25 involved an undercover agent who was present for

1 meetings with the defendant and his counsel, and the
2 Court indicated that the presence alone would not
3 violate the right to counsel. It's the deliberate
4 solicitation and use of statements obtained from the
5 defendant that would violate the Sixth Amendment.

6 So if a cellmate, another defendant, is the
7 informant who listens and hears, it wouldn't make any
8 difference under the Court's cases if, in fact, it was a
9 police officer pretending to be a cellmate who listens
10 and hears. Just as it wouldn't make -- it wouldn't be a
11 violation if there were a recording device in the cell
12 and the defendant talked to himself, which there are
13 cases of that, and it was picked up on the recording
14 device. The mere listening, that goes to whether there
15 is a violation at all. But the who, there is -- it
16 wouldn't matter for our purposes.

17 JUSTICE GINSBURG: So, the police know that
18 they can get around the clear prohibition of their
19 questioning without Miranda warnings by pretending to be
20 a jailbird?

21 MR. McALLISTER: Potentially, yes. But,
22 again, the violation would go to what happens in the
23 cell. So if the police officer is pretending to be
24 another defendant and sits in the cell and the defendant
25 starts telling the officer things, that would not

1 violate the Sixth Amendment at all under the --

2 JUSTICE GINSBURG: No, I am assuming we are
3 not in the area where the jail mate is simply passive.
4 In this case, the jail mate made a statement that
5 encouraged the defendant. He wasn't just passive. He
6 was encouraging the defendant to speak.

7 MR. McALLISTER: There was certainly
8 testimony about what he was told to do and what he did.
9 It does not suggest aggressive efforts, certainly, to
10 find out. He may not have been completely silent, but
11 he certainly didn't say, tell me what you did, let's
12 talk about your crimes. But he did make one arguably
13 suggestive statement to the --

14 JUSTICE GINSBURG: Anyway, your answer is
15 the police officer could affirmatively elicit testimony?

16 MR. McALLISTER: No, not that he could
17 affirmatively elicit. That's the dividing line between
18 the Massiah and Kuhlmann case. He was in the cell --
19 well, I guess what I'm suggesting is --

20 JUSTICE GINSBURG: And for your -- you are
21 talking about impeachment only. We are not talking
22 about the case in chief. So if the police -- he
23 can't -- outside, when he questions the defendant and
24 gives no Miranda warnings, that is inadmissible, right?

25 MR. McALLISTER: Outside -- well, it would

1 still be admissible for impeachment. We are asking for
2 basically the same rule. It would be the same thing if
3 he were in the cell, deliberately elicits, knows he is
4 violating Massiah, it couldn't be used in the government
5 case in chief, but it could be used for impeachment
6 purposes. But that would be true of Miranda, if the
7 officer deliberately failed to give the warnings, got a
8 statement, they would not be admissible in the case in
9 chief; but the Court cases are very clearly, it would be
10 admissible for impeachment purposes.

11 So we are asking for a precise parallel
12 rule.

13 JUSTICE GINSBURG: You are making no
14 distinction, then, between the Fifth and Sixth
15 Amendment?

16 MR. McALLISTER: Well, there may be
17 distinctions, and there is an distinction in the text of
18 the Fifth Amendment that suggests actually a rule of
19 exclusion when you truly have -- when there truly is a
20 compelled statement. And the Court has recognized that
21 in cases such as Portash, where the witness has given
22 use immunity, testifies before the grand jury and the
23 government later tries to use it against him. The Court
24 says, no, you cannot use that testimony for any purpose.

25 So there is a difference between the Sixth

1 Amendment and Fifth Amendment in that respect.

2 But what I was suggesting is the way Massiah
3 and Miranda operate is similar in this context, that a
4 violation results in suppression of the evidence from
5 the government's case in chief, but it remains available
6 for use as impeachment.

7 JUSTICE GINSBURG: What about the argument
8 that essentially this is like taking a pretrial
9 deposition, only one side isn't represented?

10 MR. McALLISTER: Well, with all due respect
11 to that argument, Your Honor, we disagree with that.
12 There are strong incentives for the police, frankly, not
13 to do this. And in part one of the reasons -- well,
14 there is two. One is the police know if this is truly
15 in violation of the Sixth Amendment, then nothing can be
16 used in the case in chief. So, at most, it is
17 impeachment if the defendant testifies and if the
18 defendant testifies inconsistently with whatever is
19 elicited.

20 But furthermore, given the line the court
21 has drawn between Massiah and Kuhlmann and what goes on
22 with the informant in the cell, if they can hear the
23 statements without deliberately eliciting them, if you
24 will, if the informant is present, the defendant wants
25 to talk, starts chatting, they discuss the crime, those

1 statements, the Court has held in Kuhlmann, are
2 admissible for all purposes, because they are not a
3 Sixth Amendment violation at all.

4 So, the police do have some strong
5 incentives to actually try to gather the evidence, if
6 they are going to, in a way that makes it usable in the
7 prosecution's case in chief. It's much less value to
8 having it solely for impeachment, which is always going
9 to be speculative if it were ever going to be used. It
10 would depend on if the defendant testifies and if he
11 testifies inconsistently with what he has told an
12 informant.

13 And in that regard, there are other
14 deterrents I would like to mention here as well. The
15 informant in this case, for example, in jail recognized
16 that he did not want to be an aggressive questioner or
17 obvious as a government agent. In fact, he said, I
18 didn't really want to ask him questions because I was
19 afraid if he felt I was being too nosey, I might get
20 hurt. So, the informants have their own incentives to
21 be careful here.

22 And in this case, it's also important to
23 remember that deterrence is simply one side of the
24 balance. And the Court has said many times even if
25 there would be some deterrent effect to extending the

1 rule to include impeachment, that doesn't answer the
2 question whether it should, in fact, be excluded. That
3 still must be weighed against the costs on the other
4 side.

5 And the Court has numerous cases emphasizing
6 the costs that are present on the other side of this
7 case. Perjury by criminal defendants is a primary one,
8 but also cases talking about the importance of allowing
9 the jury to hear the truth and to search for truth.

10 The jury here gets to evaluate and did, I
11 would argue, quite effectively from Mr. Ventris's
12 standpoint, evaluate the defendant's credibility. The
13 jury was informed, cross-examination, of the informant's
14 circumstances, what benefit he received, who he was, all
15 the things they might want to know in deciding whether
16 to believe him. His testimony went not solely but
17 primarily to the question of who was the shooter in the
18 murder in the case, and the jury acquitted Mr. Ventris
19 of the murder charge, so they did not believe, at least
20 beyond a reasonable doubt, that he in fact was the
21 shooter. And that is precisely how this should work.

22 We are not saying informants are always
23 100 percent reliable, but we are saying the court has a
24 long tradition, the country has a long tradition, of
25 putting this evidence in front of a jury. It's tested

1 by cross-examination, knowledge of what the incentives
2 are, bringing that out in front of the jury, and then
3 the jury decides. There are many of these cases where
4 -- this was a typical, one codefendant saying, "he was
5 the shooter," the other defendant saying, "no, she was
6 the shooter."

7 And the informant simply had information
8 that was relevant to the credibility. And that's the
9 way it was used in this case, was as impeachment on
10 rebuttal to evaluate Mr. Ventris's testimony in whether
11 the jury believed him or not.

12 The other thing I would remind the Court is
13 we are simply saying that the rule should be no
14 exclusion under the Sixth Amendment for impeachment
15 purposes, but that does not mean that the normal rules
16 of evidence and other rules of trial procedure do not
17 apply. They do. And they might well result in the
18 exclusion of some potential informant's testimony. So
19 if the government were to want to put on an informant
20 who had been convicted many times of perjury and the
21 judge said, no, I just do not think this evidence is
22 credible enough to even put in front of the jury, not
23 this person, the ordinary rules of evidence and trial
24 procedure would operate. Furthermore, as happened in
25 this case, the judge can, and often will, give

1 cautionary instructions, limiting instructions. All of
2 that remains appropriate, but there is simply no reason
3 to exclude the evidence as a matter of the Sixth
4 Amendment right to counsel.

5 It would be inconsistent, frankly, with --
6 with, really, the general tone and holdings of the cases
7 in the Fourth Amendment, Miranda, and even Sixth
8 Amendment territory, including primarily
9 Michigan v. Harvey and Nix v. Williams.

10 Unless the Court has further questions, I
11 will reserve the remainder of my time for rebuttal.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Ms. Saharsky.

14 ORAL ARGUMENT OF NICOLE A. SAHARSKY

15 ON BEHALF OF THE UNITED STATES,

16 AS AMICUS CURIAE,

17 SUPPORTING THE PETITIONER

18 MS. SAHARSKY: Mr. Chief Justice, and may it
19 please the Court:

20 This Court has consistently allowed the use
21 of voluntary statements obtained in violation of
22 constitutional standards for impeachment purposes, and
23 that same rule should apply here. There is no question
24 that Respondent's statements were voluntary, and the
25 substantial societal cost of allowing him to commit

1 perjury unchecked greatly outweighs any speculative
2 deterrence benefit that would flow from a per se rule of
3 exclusion.

4 The purpose of the right to counsel is to
5 provide an adversary process to ensure that the
6 defendant gets a fair trial. And to effectuate that
7 right, the Court has excluded deliberately elicited
8 statements from the government's case-in-chief. But not
9 allowing the statements for impeachment purposes doesn't
10 further that right. Instead, what it does is allow the
11 defendant to distort the truth-seeking process, and
12 that's just too high a price to pay.

13 CHIEF JUSTICE ROBERTS: Well, you say there
14 is no deterrent value, since the police are -- are not
15 going to do this if they know they are not going to be
16 able to use this in their case-in-chief. But there is
17 also no down side, is there?

18 I mean, you say it's only for impeachment
19 purposes, but, you know, why not? He -- he may take the
20 stand. He may lie. It is better to have this in the
21 bank instead of not.

22 MS. SAHARSKY: But there is a down side. I
23 mean, as this Court recognized in cases versus -- like
24 Hudson v. Michigan, for example, the police have their
25 own codes of conduct. They have training on

1 constitutional rules and standards. And if they violate
2 those constitutional rules and standards, it has real
3 effect for the police. It has effect in terms of
4 internal discipline, in -- in terms of limiting their
5 career opportunities.

6 JUSTICE GINSBURG: Is that internal
7 discipline verifiable? Do police officers who engage
8 snitches, do they get disciplined, especially if they
9 are then able to accomplish what was accomplished here?
10 That is, the -- the testimony -- the snitch is then able
11 to testify after the defendant testifies.

12 MS. SAHARSKY: I don't think that there is
13 any evidence in the briefs, and I am not aware of
14 specific instances of discipline, but I think that that
15 is because this situation arises pretty infrequently.
16 You know, when this came up in the Kansas Supreme Court
17 it was a case of first impression. And as General
18 McAllister noted, there are a lot of reasons why the
19 police would want to follow the rule in Kuhlman and send
20 the informant in to be a passive listening post.
21 Because if --

22 JUSTICE GINSBURG: On the Federal level is
23 there anything one way or another, any manual that
24 instructs a U.S. Attorney about the use of snitches to
25 extract confessions?

1 MS. SAHARSKY: I think the Department of
2 Justice Manual sets out this Court's rules in terms of
3 the Kuhlman case and the Henry case. And then, of
4 course, there are also State and the Model Professional
5 Ethics Rules that talk about when a prosecutor can
6 contact a person who is represented by counsel. And
7 there are limitations there as well, both in terms of
8 the prosecutor contacting a person represented or using
9 an agent contacting a person represented.

10 But I mean, those are -- those are
11 deterrents. I think the police discipline is a
12 deterrent. But I think we also need to -- to focus on
13 this Court's cases in the Fourth and Fifth and Sixth
14 Amendment Jackson context that taking the evidence and
15 making it unavailable in the government's case-in-chief
16 is a substantial deterrent.

17 This Court said in each of those previous
18 case that not having the evidence available in the
19 government's case-in-chief is a very high price to pay,
20 because that means that the government has to come up
21 with other evidence that can meet its burden of proving
22 all of the elements of the case beyond a reasonable
23 doubt.

24 And, as General McAllister noted, it is
25 really very speculative, and the police certainly

1 wouldn't know at the time they are asking questions of
2 the defendant, whether this rebuttal impeachment
3 evidence could ever be used. It's entirely within the
4 control of the defendant. It is only if the defendant
5 -- if the government first meets its burden of proof
6 with other evidence at trial, and then the defendant
7 decides to testify, and then he testifies inconsistently
8 with his prior statements.

9 And our position is at that point that the
10 jury should hear the conflicting evidence just as it has
11 heard it in all of these other previous cases and be
12 allowed to make a decision about who is telling the
13 truth.

14 JUSTICE STEVENS: It seems to me you are
15 just confirming the answer to the Chief Justice's
16 question. There really isn't any down side. The worst
17 that -- the worst that happens is maybe they can't use
18 the stuff. But what -- what is the down side?

19 MS. SAHARSKY: Again, I -- I think that
20 there is a down side in terms of police discipline and
21 the deterrence --

22 JUSTICE STEVENS: Has any police officer
23 ever been disciplined for doing this; do you know?

24 MS. SAHARSKY: I -- I --

25 JUSTICE STEVENS: I would find it rather

1 amazing if he has.

2 MS. SAHARSKY: Again, I think that most
3 police officers just follow the rule that this Court set
4 forth in Kuhlman, so that this issue has not arisen
5 frequently. But, you know, even if you thought that
6 there would be some type of minimal deterrence benefit
7 that would arise from -- from not making the evidence
8 available for impeachment purposes, you have to balance
9 it against the cost to the truth-seeking process that
10 would be incurred if the defendant could --

11 JUSTICE STEVENS: The defendant could
12 sometimes lie. But sometimes people who are in this
13 position in prison are not the most trustworthy people,
14 either.

15 MS. SAHARSKY: I think --

16 JUSTICE STEVENS: You could bring that out
17 on cross-examination. I understand that.

18 MS. SAHARSKY: That -- that is what I was
19 going to say. I mean, as General McAllister noted, that
20 -- that happened in this case. The prosecutor himself
21 got up and talked about the -- the informant's prior
22 offenses, why the informant was in jail, whether the
23 informant received anything in exchange for his
24 testimony, the fact that the informant had actually gone
25 back to jail after testifying -- or after serving as an

1 informant in this case.

2 JUSTICE STEVENS: It seems to me that that
3 all confirms the fact, well, they have nothing to lose.
4 Maybe we have one witness who is not very persuasive,
5 but no harm in giving it a try.

6 MS. SAHARSKY: I think that the -- the fact
7 that the evidence would be unavailable in the
8 government's case-in-chief really is a strong price that
9 the government pays. And -- and this Court recognized
10 it in in Havens, in Walder, in Harris, in Hass, in
11 Harvey, and in all of those prior cases. And there is
12 just -- there is not any reason to depart from them,
13 because the -- the other side of the balance is that,
14 you know, you are letting a defendant to get up and take
15 the stand and -- and not subject himself to this prior
16 statement.

17 And this -- this prior statement, if
18 believed by the jury, is incredibly important to his
19 credibility, probative with respect to whether the
20 crimes were committed and the defendant is telling the
21 truth.

22 JUSTICE STEVENS: If it is truthfully
23 reported. Of course, that is always -- that is an issue
24 of credibility in all of these cases.

25 MS. SAHARSKY: Yes, every case has a

1 question about someone's credibility, some witness's
2 credibility, and that's for the jury to decide. And in
3 -- in this case there was ample cross-examination, and
4 there was the limiting instruction that the State
5 mentioned.

6 I mean, clearly the jury did its job here
7 because it went back and it considered all this
8 information. And it didn't come back with a -- a
9 verdict -- although you, of course, never know exactly
10 what the jury is thinking, it didn't come back with a
11 verdict suggesting it just reflexively believed the
12 informant's testimony.

13 JUSTICE SCALIA: Ms. Saharsky, I am still a
14 little hung up on -- on whether we would be allowing a
15 constitutional violation. General McAllister said that
16 in the Fifth Amendment area we -- we indeed allow --
17 allow it to be introduced in rebuttal even though that
18 is the actual constitutional violation. Isn't that the
19 case other than in the Miranda situation? I mean,
20 suppose you have a generally coerced confession. Would
21 we -- would we permit that to go in?

22 MS. SAHARSKY: Certainly not. In the Fifth
23 Amendment context, the text of the amendment itself
24 would prohibit the use of that statement for any
25 purposes.

1 JUSTICE SCALIA: Exactly, but why -- why is
2 not that the case with the right to counsel?

3 MS. SAHARSKY: Because the text of the Sixth
4 Amendment doesn't say anything about the exclusion of
5 evidence at trial. What it does is it guarantees counsel
6 for a purpose, and that purpose is to ensure an
7 adversary process at trial. And if counsel is not
8 afforded, then it's up to the court to determine what
9 the remedy is --

10 JUSTICE SCALIA: But its real meaning is
11 that counsel is guaranteed at trial; isn't that right?

12 MS. SAHARSKY: I'm sorry. I missed the
13 first --

14 JUSTICE SCALIA: Its root purpose is that
15 counsel is guaranteed at trial. And here we're saying
16 it's okay not to have counsel at trial so long as it's
17 refuting a lie by the defendant.

18 MS. SAHARSKY: That's not true. I mean,
19 certainly counsel is available at trial. The question is
20 just whether statements that were obtained without
21 counsel prior to trial can be used for impeachment
22 purposes. The answer --

23 JUSTICE SCALIA: So you say that -- you say
24 the Sixth Amendment violation occurs before trial?

25 MS. SAHARSKY: I'm sorry if I suggested

1 that. No, the Sixth Amendment violation occurs when the
2 statements are introduced in the government's case in
3 chief at trial.

4 JUSTICE SCALIA: That's right.

5 MS. SAHARSKY: And that's because the
6 government should not be allowed to go behind counsel
7 prior to trial and gather up statements, and then use
8 them to prove guilt at trial. That subverts the
9 adversary process. When you are talking about
10 impeachment, you are not talking about proving guilt at
11 trial. You are not talking about the government
12 distorting the adversary process. If there is any
13 distortion of the adversary process, it's with the
14 defendant attempting to commit perjury at that point.

15 The Sixth Amendment is different from the
16 Fifth Amendment in that it doesn't say anything about
17 statements that are obtained and if it can be used at
18 trial. And that means it's up to courts to balance the
19 cost and benefit of exclusion of evidence. And in the
20 case of the government's case in chief, that balance
21 means that that the statements cannot come in because it
22 would be too much of a cost to the adversary process
23 that the Sixth Amendment guarantees to allow the
24 statements in.

25 But, when you switch over in looking at

1 impeachment, this Court said 50 years ago impeachment is
2 a very different story than the government's case in
3 chief. The interest that you are talking about
4 furthering there, the adversary process interest, would
5 not be furthered by allowing the defendant to take the
6 stand and be able to commit perjury unchecked. It would
7 not be furthered, and it would not lead to greater
8 deterrence by simply allowing the statements to be
9 unavailable for impeachment purposes, because the great
10 deterrent comes with the statements being unavailable in
11 the government's case in chief.

12 We just don't think there's any reason to
13 depart from this Court's rule that, so long as
14 statements are not involuntary, they can be used for
15 impeachment purposes.

16 If there are no further questions, we submit
17 the judgment below should be reversed.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Edge.

20 ORAL ARGUMENT OF MATTHEW J. EDGE

21 ON BEHALF OF THE RESPONDENT

22 MR. EDGE: Mr. Chief Justice, and may it
23 please the Court:

24 I guess I have basically three arguments
25 with the -- or problems with the State's position. First

1 of all, what we are dealing with in the Sixth Amendment
2 case here is a violation of a core enumerated trial
3 right, and this makes it a very different animal from
4 all the other cases that we are talking about. If we are
5 talking about the Fourth Amendment, we are talking about
6 something that isn't a trial right. It's a right of the
7 people to be secure in their homes and possessions. The
8 violation occurs when the police commit whatever
9 misconduct makes the search of the evidence illegal. But
10 the use of that evidence at trial doesn't work any
11 further constitutional --

12 JUSTICE BREYER: Wasn't this individual
13 represented by counsel? Was he represented by counsel?

14 MR. EDGE: Yes, he was.

15 JUSTICE BREYER: And he was represented by
16 counsel at the time that the informant took the
17 statement, got the statement elicited? Is that right?

18 MR. EDGE: No, I don't think so --

19 JUSTICE BREYER: I have my memo that I
20 haven't looked through carefully, but I would be quite
21 interested. I thought he asked for counsel. He was
22 given counsel, and subsequent to that, this statement
23 was elicited. I would like to know that because the
24 Sixth Amendment says you have right to assistance of
25 counsel in your defense, period. And I guess, if he had

1 a lawyer, the lawyer could have told him, "Don't talk to
2 informants in the jailhouse." He could have said, "I'm
3 going to talk to who I want." Or he might not have. But
4 I would be interested in knowing, did he have assistance
5 of counsel at the time the statement was elicited? It's
6 one thing to me if he did, and another if he didn't.
7 Don't know?

8 MR. EDGE: No.

9 JUSTICE BREYER: How can I find out?

10 MR. EDGE: No, the -- I don't know exactly
11 the day that this happened. I do know that he was
12 arrested on the 16th of January of 2004, and there was a
13 search of his cell on January 20th. And we know from
14 that testimony that -- why that's relevant that he was
15 cellmates with Mr. Doser by that time, and Mr. Doser
16 testified that he was the cellmate of Mr. Ventris for
17 two days. And on the second day, Mr. Ventris supposedly
18 made these statements.

19 So my best guess is that the -- this
20 conversation occurred sometime between the 17th and the
21 20th. Now, the order of appointing counsel was entered
22 on January 21st, and counsel doesn't enter his
23 appearance until January 27th.

24 JUSTICE BREYER: So it might be he asked for
25 counsel but hadn't yet received counsel?

1 MR. EDGE: Correct, Your Honor.

2 CHIEF JUSTICE ROBERTS: Counsel, do I
3 understand the first sentence on page 6 of your brief to
4 concede that there's no deterrent value from prohibiting
5 the introduction of these statements for impeachment?
6 The sentence says, "A Sixth Amendment exclusionary rule
7 that allowed use of uncounseled statements for
8 impeachment would not deter violations of the right to
9 counsel."

10 MR. EDGE: That's correct, Your Honor. And
11 the reason I believe this is that, as long as there's
12 some kind of incentive for the prosecutor to use
13 informants in this manner, then the only -- then even if
14 they are not usable in the case in chief, there is still
15 an incentive to use this kind of evidence, and the
16 prosecutor and the police will attempt to obtain it.
17 There's simply very little downside. The prosecutor
18 instructs the informant not to deliberately elicit the
19 statement. The prosecutor is still responsible for the
20 informant, because the informant is his agent, so even
21 if -- when the informant goes ahead and deliberately
22 elicits the statement, it's still a constitutional
23 violation. But so long as you allow it for some kind of
24 purpose, then there isn't a deterrent effect, and to --

25 JUSTICE ALITO: So in a situation like we

1 have here, where the law enforcement officers do not
2 instruct the informant to do anything that would violate
3 the Sixth Amendment and in fact, according to their
4 testimony, instruct him to engage in conduct that is
5 consistent with the Sixth Amendment, there's no
6 deterrent value in later suppressing the use of the
7 statements for impeachment purposes?

8 MR. EDGE: I mean -- I guess, maybe I am
9 confused. There is a deterrent -- there is a deterrent
10 effect from suppressing it in the case in chief, but
11 it's not sufficient unless it's also extended to use in
12 rebuttal as well.

13 JUSTICE ALITO: But what do you want to
14 deter? You want to deter them from using informants at
15 all, even in a manner that is consistent with the Sixth
16 Amendment?

17 MR. EDGE: No, Your Honor. What I am
18 attempting to deter is the sort of up-ending of the
19 adversarial system that this represents. There was a
20 question that was presented earlier about when does this
21 violation occur? And I think that gets to the manner of
22 -- or the nature of the Sixth Amendment violation. Our
23 contention is that the violation occurs when the
24 statement is extracted, and then it's further aggravated
25 when it's used at trial. When the police obtain these

1 kinds of statements, even if they are not used at trial,
2 it does work a harm on the defendant and his
3 relationship with counsel. It affects defendant's --

4 JUSTICE BREYER: I see the problem. I wonder
5 if you have an answer to another question. You may not.
6 I can't find it. It seems to me it's been 20 years since
7 this -- nearly 20 -- since the Court decided the
8 Michigan case. The other cases were decided even
9 earlier. And it's just surprising to me that it has
10 never come up or rarely, rarely come up that the
11 question of whether the State can introduce into
12 evidence a statement made when the State questioned an
13 individual who'd asked for counsel or had counsel out of
14 the presence of the counsel.

15 I mean, does that normally happen, or does
16 it never happen? Why is there so little law on it? Do
17 you have any idea?

18 MR. EDGE: I do not, Your Honor. And I am
19 really at a loss to speculate as to why that would be.

20 CHIEF JUSTICE ROBERTS: You agree with the
21 representations on -- from your friends on the other
22 side that there is no case of ours where we have
23 excluded a statement of evidence submitted for
24 impeachment, even though it would have been excluded in
25 this case in chief? If you prevail here, it would be

1 the first time that any evidence or statement has been
2 excluded when submitted for purposes of impeachment?

3 MR. EDGE: It would be a very different
4 rule. I think the only rule that this would be the case
5 so far is in Portash, the self-incrimination clause. We
6 are saying that the same type of rule should apply to
7 the Sixth Amendment. Otherwise, no, that's correct,
8 whenever you are talking about the Fourth Amendment or
9 one of the prophylactic rules like Miranda or Jackson,
10 then they are admissible for impeachment purposes. What
11 makes this case different is that it -- it involves a
12 violation of an enumerated Constitutional trial right.

13 JUSTICE BREYER: That's what I'm not certain
14 about. And this is why I ask -- have been asking these
15 questions and what I can't figure out in my own mind is
16 this.

17 I ask for a lawyer. The State has some
18 period of time to give me a lawyer. Now it's one thing
19 if what's going on is once I ask for a lawyer, the State
20 should deal with me through my lawyer; that's how they
21 are supposed to do it. But that isn't as basic --
22 that's like a rule of ethics in most States in civil
23 context and other contexts -- that's not as basic as if
24 I ask for a lawyer and then the State just doesn't give
25 me one, though it should.

1 That's a different violation, a different
2 kind of violation. One is a kind of a rule of ethics
3 incorporated in the Constitution. The second is what
4 the case is -- is what the Constitution is really about,
5 give him a lawyer when he asks for one. And which is
6 this case? That -- that's why I'm having hard time. Is
7 it the first or the second?

8 MR. EDGE: Well, in -- I think one of the
9 complicating factors here, Your Honor, is that the State
10 in this particular case didn't try a straightforward
11 interrogation. They sent in an undercover informant.

12 JUSTICE BREYER: No, no, no. I will
13 amalgamate that for you. I will say they are exactly
14 the same thing. But what I want to know is what rule is
15 violated, what Sixth Amendment rule. The rule -- you
16 heard what I said, the rule "don't talk to a guy who
17 wants a lawyer until you talk to the lawyer." No
18 communications with a client. It's a communication with
19 the lawyer. That's one thing.

20 And the other rule is he has asked for a
21 lawyer but you never gave him one. Now which is this
22 case? I mean, I first thought well if he didn't have a
23 lawyer at all, then it must be the second; but then I
24 thought they must have a reasonable time to give him a
25 lawyer, and they haven't violated that second.

1 If you have any view on that, it would be
2 helpful to me.

3 MR. EDGE: I don't know whether he had asked
4 for a lawyer or not. I know that he was entitled to one
5 at the time, and one would be appointed for him. But
6 otherwise--

7 JUSTICE GINSBURG: But we do know that
8 unlike the police giving Miranda warnings, there's no
9 warning here at all. I mean, he thinks he is talking to
10 a cellmate. Nobody tells him, "remember you've got a
11 right to be represented by counsel," and he's
12 essentially giving a statement without the Miranda
13 warnings.

14 MR. EDGE: That's correct, Your Honor.

15 JUSTICE GINSBURG: But the other side says
16 well, practically, the defendant is much more likely to
17 say something that's really involuntary when he is
18 confronting police officers, that the reason that we
19 exclude in the case of a police officer is this
20 intimidating setting, when the defendant is in the
21 police station or in the cell and there are these police
22 officers. Now he thinks he's just with a cellmate, so
23 there isn't -- there isn't the coercive atmosphere that
24 there is when the police do the questioning.

25 MR. EDGE: Well, Your Honor, I think that

1 there certainly can be a coercive atmosphere even if you
2 are not talking to a known police agent. Now, those are
3 not the facts of this particular case and there is no
4 claim that the statement was involuntary. However, one
5 of the advantages of speaking to known police officers
6 is that a defendant can simply end the interrogation by
7 invoking his right to counsel, and that is not
8 necessarily a course of action that is available to him
9 if he thinks he is merely talking to a cellmate,
10 somebody who whether he wants to speak to him or not is
11 going to be in the cell with him for some time.

12 CHIEF JUSTICE ROBERTS: Counsel, you've --
13 you've emphasized that what distinguishes this case from
14 the other ones where we have allowed evidence that would
15 be excluded from the case in chief and for impeachment
16 purposes is that this is a trial right. But the Sixth
17 Amendment says in criminal prosecutions you have a right
18 to the assistance of counsel. Well, he had assistance
19 of counsel here, and one of the things that counsel did
20 was point out the problems with relying on the snitch's
21 evidence and all the bad things that he did.

22 But -- but just like in the case of a Fourth
23 Amendment violation where we allow the evidence to be
24 admitted at trial, this Sixth Amendment problem, you
25 know, it doesn't -- I just don't see the -- the strength

1 of that distinction.

2 MR. EDGE: Your Honor, I think it goes to
3 the nature of the harm that comes from a Sixth Amendment
4 violation. The Sixth Amendment simply doesn't limit
5 itself to the trial. The exact wording of the -- the
6 constitutional provision is in all criminal
7 prosecutions.

8 CHIEF JUSTICE ROBERTS: Well, it seems to me
9 you are getting away from the basis for your
10 distinction, then. Saying well, it's not just at trial.
11 Well, these other constitutional rights where we have
12 allowed the evidence to come in for impeachment are
13 indistinguishable from the Sixth Amendment right,
14 outside of trial.

15 MR. EDGE: Well, because the harm isn't
16 something that just affects the outcome of the trial, it
17 also affects the -- it affects the litigation in a much,
18 much deeper way. It affects counsel's trial strategy,
19 it affects the defendant's decision whether or not to
20 testify. It also --

21 CHIEF JUSTICE ROBERTS: Just to pause on
22 that, it affects his decision to testify because it
23 makes it more likely that he will testify truthfully if
24 he is going to testify.

25 MR. EDGE: Not necessarily.

1 CHIEF JUSTICE ROBERTS: The focus -- the
2 focus on the context is at least a double-edged sword
3 because the harm that we are facilitating under your
4 rule is to allow perjured testimony.

5 MR. EDGE: Yes, Your Honor, in some contexts
6 it would. I think one of the underlying assumptions of
7 the State's argument with regard to perjury is that the
8 mere existence of a prior inconsistent statement is
9 necessarily indicative of perjury, and we know there are
10 many reasons why the defendant may have given a prior
11 inconsistent statement.

12 CHIEF JUSTICE ROBERTS: Yeah, and if he has
13 the assistance at trial consistent with the Sixth
14 Amendment, those -- those problems could be pointed out.
15 He was -- he was he is not lying now. The reason he
16 said something different then was, you know, he likes to
17 brag in prison or whatever the basis is.

18 MR. EDGE: In some cases it will be possible
19 for counsel to vigorously cross-examine the informant.
20 In others it may not. But in addition to that, Your
21 Honor, I would also say that it doesn't simply affect
22 the decision whether or not to go to trial or whether or
23 not to testify at trial; it also affects the litigation
24 in a very deep way, inasmuch as the defendant is
25 burdened in trying to negotiate a favorable plea deal.

1 Every statement or every piece of evidence
2 that the State has affects their willingness to plea
3 bargain, and when the State obtains this kind of
4 evidence illegally, it puts the defendant in a bind for
5 -- puts the defendant's counsel in a bind.

6 CHIEF JUSTICE ROBERTS: I think -- I think
7 that's quite right. But I don't see how excluding the
8 evidence even on impeachment helps that. I mean,
9 they've still got the statement, and they -- I mean, you
10 know -- I guess your point, you know, maybe they will
11 get some leads from it even if they can't use it. But
12 excluding the evidence for impeachment purposes doesn't
13 eliminate that harm.

14 MR. EDGE: It would, Your Honor, inasmuch it
15 would remove any disincentive for the police to obtain
16 this evidence by this manner in the first place. So
17 there would be that marginal deterrent factor.

18 JUSTICE ALITO: Which of the things that
19 you've just said result from the use of this for
20 impeachment would not be true with respect to the other
21 situations where illegally obtained evidence has been
22 used for impeachment purposes? Take the Fourth
23 Amendment, for example.

24 MR. EDGE: I think they would be largely the
25 same, Your Honor. The difference would be in the

1 interest protected. The self-incrimination clause in
2 the Fifth Amendment is aimed primarily at coercion of
3 the defendant; whereas, the Sixth Amendment aims
4 primarily at the preservation of an adversarial process,
5 the relationship between counsel and his attorney.

6 JUSTICE ALITO: You don't dispute that there
7 was a Sixth Amendment violation at the time this
8 statement was taken, do you?

9 MR. EDGE: No, I do not.

10 JUSTICE GINSBURG: You urged a -- a
11 fall-back, and you said at least that there may -- there
12 should be a determination by the judge that the
13 defendant intentionally testified falsely. And I was
14 wondering how that would operate. You are here in the
15 -- the heat of the trial, and the prosecutor says, I
16 want to call snitch so-and-so. And then what do we do,
17 just interrupt the trial and have kind of a mini trial
18 to test the credibility of the -- the informant?

19 MR. EDGE: Yes, you could, Your Honor.
20 Also, you could have it as part of the pretrial
21 suppression hearings. I would anticipate that even if
22 the -- if the Court were to adopt our position, these
23 kinds of Sixth Amendment cases are still going to be
24 litigated. The issue is simply going to be whether or
25 not the States or the police agent is deliberately

1 eliciting the statement or not.

2 So there is -- there is likely going to be
3 some kind of pretrial litigation regarding the
4 admissibility of the statements, and it could be handled
5 at that time.

6 If there are no further questions, I will
7 reserve the remainder of my time.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. McAllister, you have six minutes remaining.

10 REBUTTAL ARGUMENT OF STEPHEN R. McALLISTER
11 ON BEHALF OF THE PETITIONER

12 MR. McALLISTER: Two points by way of
13 rebuttal. The balancing of the interests here is
14 sprinkling water under the bridge even in the Sixth
15 Amendment context. In both Nix versus Williams and
16 Michigan versus Harvey where the Court was dealing with
17 Sixth Amendment interests and the Sixth Amendment right
18 to counsel violations, the bulk of those cases make
19 clear that the question of what exclusionary effect to
20 give a violation is subject to a balancing analysis.
21 And that's what we are asking for here. That's why it's
22 treated for these purposes like the Fourth Amendment in
23 the Miranda context.

24 And Nicks itself, to paraphrase the Court,
25 makes a fundamental point which I think illustrates how

1 this works, and it worked effectively to defendant's
2 advantage in this case.

3 In Nix v. Williams, the Court said the Sixth
4 Amendment right to counsel -- and I am paraphrasing
5 slightly -- protects against unfairness by assuring an
6 adversary process in which proffered evidence is tested
7 by cross-examination. And it's done in front of a jury.
8 It is not about requiring the exclusion of entire
9 categories of witnesses or types of evidence for all
10 purposes.

11 So the right to counsel was exercised. It
12 was exercised effectively in this case when Mr. Doser
13 was strongly cross-examined by defense counsel.

14 JUSTICE STEVENS: Would that apply equally
15 for statements under oath?

16 MR. McALLISTER: It could, Your Honor. I
17 realize a logical extension is you could say just test
18 all of it. But that is where the -- the police here and
19 prosecutor pay the price of the way in which the
20 evidence was obtained. It's excluded from the
21 government's case-in-chief.

22 Unless there are further questions, we would
23 respectfully ask that this Court reverse the decision
24 below.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 The case is submitted.

2 (Whereupon, at 12:01 p.m., the case in the
3 above-entitled matter was submitted.)

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|----------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------|----------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| A | ALITO 27:25 28:13 36:18 37:6 | anticipate 37:21 | assuring 39:5 | brag 35:17 |
| able 15:16 16:9 16:10 24:6 | allow 15:10 21:16,17 23:23 27:23 33:23 35:4 | Anyway 8:14 | atmosphere 32:23 33:1 | BREYER 25:12 25:15,19 26:9 26:24 29:4 30:13 31:12 |
| above-entitled 1:11 40:3 | allowed 14:20 18:12 23:6 27:7 33:14 34:12 | appearance 26:23 | attempt 27:16 | bridge 38:14 |
| accept 4:18 | allowing 12:8 14:25 15:9 21:14 24:5,8 | APPEARAN... 1:14 | attempting 23:14 28:18 | brief 27:3 |
| accomplish 16:9 | amalgamate 31:13 | Appellate 1:21 | attorney 16:24 37:5 | briefs 4:16 16:13 |
| accomplished 16:9 | amazing 19:1 | applicable 5:24 | available 10:5 17:18 19:8 22:19 33:8 | bring 19:16 |
| acquitted 12:18 | amendment 4:3 4:9,14 5:5,20 5:24 6:3,4 7:5 8:1 9:15,18 10:1,1,15 11:3 13:14 14:4,7,8 17:14 21:16,23 21:23 22:4,24 23:1,15,16,23 25:1,5,24 27:6 28:3,5,16,22 30:7,8 31:15 33:17,23,24 34:3,4,13 35:14 36:23 37:2,3,7,23 38:15,17,17,22 39:4 | apply 13:17 14:23 30:6 39:14 | aware 16:13 | bringing 13:2 |
| action 33:8 | amicus 1:19 2:6 14:16 | appointed 32:5 | a.m. 1:13 3:2 | bulk 38:18 |
| actual 5:10 21:18 | ample 21:3 | appointing 26:21 | B | burden 17:21 18:5 |
| addition 35:20 | analogous 5:8 6:2,9 | appropriate 14:2 | back 5:9 19:25 21:7,8,10 | burdened 35:25 |
| admissibility 38:4 | analysis 5:23 38:20 | area 8:3 21:16 | bad 33:21 | Bursey 6:24 |
| admissible 9:1,8 9:10 11:2 30:10 | animal 25:3 | arguably 5:5 8:12 | balance 11:24 19:8 20:13 23:18,20 | C |
| admitted 4:19 6:8 33:24 | answer 3:20 4:22 8:14 12:1 18:15 22:22 29:5 | argue 5:13 12:11 | balancing 38:13 38:20 | C 2:1 3:1 |
| adopt 37:22 | | argument 1:12 2:2,10 3:4,6 10:7,11 14:14 24:20 35:7 38:10 | bank 15:21 | call 37:16 |
| advantage 39:2 | | arguments 24:24 | bargain 36:3 | career 16:5 |
| advantages 33:5 | | arisen 19:4 | basic 30:21,23 | careful 11:21 |
| adversarial 28:19 37:4 | | arises 16:15 | basically 9:2 24:24 | carefully 25:20 |
| adversary 15:5 22:7 23:9,12 23:13,22 24:4 39:6 | | arrested 26:12 | basis 4:1,7 34:9 35:17 | case 3:4,16 4:17 6:5,14 8:4,18 8:22 9:5,8 10:5 10:16 11:7,15 11:22 12:7,18 13:9,25 16:17 17:3,3,18,22 19:20 20:1,25 21:3,19 22:2 23:2,20,20 24:2,11 25:2 27:14 28:10 29:8,22,25 30:4,11 31:4,6 31:10,22 32:19 33:3,13,15,22 39:2,12 40:1,2 |
| affect 35:21 | | arrestee 6:17 | behalf 1:16,19 1:22 2:4,6,9,12 3:7 14:15 24:21 38:11 | cases 4:20 5:9 5:24 6:4,24 7:8 7:13 9:9,21 12:5,8 13:3 14:6 15:23 17:13 18:11 20:11,24 25:4 |
| affirmatively 8:15,17 | | asked 25:21 26:24 29:13 31:20 32:3 | believe 6:22 12:16,19 27:11 | |
| afforded 22:8 | | asking 9:1,11 18:1 30:14 38:21 | believed 13:11 20:18 21:11 | |
| afraid 11:19 | | asks 31:5 | benefit 12:14 15:2 19:6 23:19 | |
| agent 6:25 11:17 17:9 27:20 33:2 37:25 | | assistance 4:11 25:24 26:4 33:18,18 35:13 | best 26:19 | |
| aggravated 28:24 | | Assistant 1:17 1:21 | better 15:20 | |
| aggressive 8:9 11:16 | | assuming 8:2 | beyond 12:20 17:22 | |
| ago 24:1 | | assumptions 35:6 | bind 36:4,5 | |
| agree 29:20 | | | bit 4:16 | |
| ahead 27:21 | | | | |
| aimed 37:2 | | | | |
| aims 37:3 | | | | |

| | | | | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>29:8 35:18 37:23 38:18 case-in-chief 15:8,16 17:15 17:19 20:8 39:21 categories 39:9 cautionary 14:1 cell 6:15,18 7:11 7:23,24 8:18 9:3 10:22 26:13 32:21 33:11 cellmate 6:14 7:6,9 26:16 32:10,22 33:9 cellmates 26:15 certain 30:13 certainly 5:6,17 8:7,9,11 17:25 21:22 22:19 33:1 charge 12:19 chatting 10:25 chief 3:3,8 8:22 9:5,9 10:5,16 11:7 14:12,18 15:13 18:15 23:3,20 24:3 24:11,18,22 27:2,14 28:10 29:20,25 33:12 33:15 34:8,21 35:1,12 36:6 38:8 39:25 circumstances 12:14 civil 30:22 claim 33:4 clause 30:5 37:1 clear 7:18 38:19 clearly 9:9 21:6 client 31:18 codefendant 13:4 codes 15:25 coerced 21:20</p> | <p>coercion 37:2 coercive 32:23 33:1 come 17:20 21:8 21:10 23:21 29:10,10 34:12 comes 24:10 34:3 commit 4:10 14:25 23:14 24:6 25:8 committed 20:20 communication 31:18 communicatio... 31:18 compelled 3:16 9:20 complete 5:20 5:23 completely 8:10 completion 5:7 complicating 31:9 concede 27:4 conduct 15:25 28:4 confession 21:20 confessions 16:25 confirming 18:15 confirms 20:3 conflicting 18:10 confronting 32:18 confused 28:9 considered 21:7 consistent 28:5 28:15 35:13 consistently 14:20 Constitution 31:3,4 constitutional</p> | <p>3:12,23 5:2 14:22 16:1,2 21:15,18 25:11 27:22 30:12 34:6,11 contact 17:6 contacting 17:8 17:9 contention 28:23 context 5:5 10:3 17:14 21:23 30:23 35:2 38:15,23 contexts 30:23 35:5 control 18:4 conversation 26:20 convicted 13:20 core 25:2 correct 6:22 27:1,10 30:7 32:14 cost 14:25 19:9 23:19,22 costs 12:3,6 counsel 4:10,11 6:5 7:1,3 14:4 14:12 15:4 17:6 22:2,5,7 22:11,15,16,19 22:21 23:6 24:18 25:13,13 25:16,21,22,25 26:5,21,22,25 26:25 27:2,9 29:3,13,13,14 32:11 33:7,12 33:18,19,19 35:19 36:5 37:5 38:8,18 39:4,11,13,25 counsel's 4:6 34:18 country 12:24 course 17:4</p> | <p>20:23 21:9 33:8 court 1:1,12 3:9 3:10,14 5:10 6:5,9 7:2 9:9 9:20,23 10:20 11:1,24 12:5 12:23 13:12 14:10,19,20 15:7,23 16:16 17:17 19:3 20:9 22:8 24:1 24:23 29:7 37:22 38:16,24 39:3,23 courts 23:18 Court's 7:8 17:2 17:13 24:13 credibility 12:12 13:8 20:19,24 21:1,2 37:18 credible 13:22 crime 10:25 crimes 8:12 20:20 criminal 3:24 12:7 33:17 34:6 cross-examina... 12:13 13:1 19:17 21:3 39:7 cross-examine 35:19 cross-examined 39:13 curiae 1:20 2:7 14:16</p> <hr/> <p>D</p> <p>D 3:1 day 5:19 26:11 26:17 days 26:17 deal 30:20 35:25 dealing 25:1 38:16</p> | <p>debated 4:16 decide 21:2 decided 29:7,8 decides 13:3 18:7 deciding 4:17 12:15 decision 18:12 34:19,22 35:22 39:23 deep 35:24 deeper 34:18 defendant 3:13 5:12 7:1,5,6,12 7:24,24 8:5,6 8:23 10:17,18 10:24 11:10 13:5 15:6,11 16:11 18:2,4,4 18:6 19:10,11 20:14,20 22:17 23:14 24:5 29:2 32:16,20 33:6 35:10,24 36:4 37:3,13 defendants 3:24 12:7 defendant's 3:11 12:12 29:3 34:19 36:5 39:1 Defender 1:21 defense 4:6 25:25 39:13 definitively 4:21 deliberate 7:3 deliberately 9:3 9:7 10:23 15:7 27:18,21 37:25 depart 20:12 24:13 Department 1:18 17:1 depend 11:10 deposition 10:9 deter 27:8 28:14 28:14,18</p> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

| | | | | |
|-----------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------|----------------------------------------------------------------------------------------|
| determination 37:12 | double-edged 35:2 | encouraging 8:6 | exclude 14:3 32:19 | find 8:10 18:25 26:9 29:6 |
| determine 22:8 | doubt 12:20 17:23 | enforcement 28:1 | excluded 3:14 12:2 15:7 29:23,24 30:2 33:15 39:20 | first 3:21 16:17 18:5 22:13 24:25 27:3 30:1 31:7,22 36:16 |
| deterrence 4:23 4:24 11:23 15:2 18:21 19:6 24:8 | downside 27:17 | engage 16:7 28:4 | excluding 36:7 36:12 | flow 15:2 |
| deterrent 11:25 15:14 17:12,16 24:10 27:4,24 28:6,9,9 36:17 | drawn 10:21 | ensure 15:5 22:6 | exclusion 9:19 13:14,18 15:3 22:4 23:19 39:8 | focus 17:12 35:1 35:2 |
| deterrents 11:14 17:11 | due 10:10 | enter 26:22 | exclusionary 27:6 38:19 | follow 16:19 19:3 |
| determine 15:14 17:12,16 24:10 27:4,24 28:6,9,9 36:17 | D.C 1:8,19 | entered 26:21 | exercised 39:11 39:12 | forth 19:4 |
| deterrents 11:14 17:11 | <hr/> E <hr/> | entire 39:8 | existence 35:8 | Fourth 4:3 5:18 5:20,24 14:7 17:13 25:5 30:8 33:22 36:22 38:22 |
| device 7:11,14 | E 2:1 3:1,1 | entirely 18:3 | extended 28:11 | frankly 4:21 10:12 14:5 |
| difference 6:12 7:8 9:25 36:25 | earlier 28:20 29:9 | entitled 32:4 | extending 11:25 | frequently 19:5 |
| different 4:8 23:15 24:2 25:3 30:3,11 31:1,1 35:16 | Edge 1:21 2:8 24:19,20,22 25:14,18 26:8 26:10 27:1,10 28:8,17 29:18 30:3 31:8 32:3 32:14,25 34:2 34:15,25 35:5 35:18 36:14,24 37:9,19 | enumerated 25:2 30:12 | extension 39:17 | friends 29:21 |
| differently 3:19 | effect 3:25 4:8 11:25 16:3,3 27:24 28:10 38:19 | equally 5:24 39:14 | extract 16:25 | front 12:25 13:2 13:22 39:7 |
| disagree 10:11 | effectively 12:11 39:1,12 | especially 16:8 | extracted 28:24 | fundamental 38:25 |
| disagree 10:11 | effectuate 15:6 | ESQ 1:15,17,21 2:3,5,8,11 | <hr/> F <hr/> | further 14:10 15:10 24:16 25:11 28:24 38:6 39:22 |
| discipline 16:4,7 16:14 17:11 18:20 | efforts 8:9 | essentially 10:8 32:12 | facilitating 35:3 | furthered 24:5,7 furthering 24:4 furthermore 10:20 13:24 |
| disciplined 16:8 18:23 | either 19:14 | ethics 17:5 30:22 31:2 | fact 5:14 6:23 7:8 11:17 12:2 12:20 19:24 20:3,6 28:3 | gather 11:5 23:7 |
| discuss 10:25 | elements 17:22 | evaluate 12:10 12:12 13:10 | factor 36:17 | general 1:15,18 3:5 6:12 14:6 16:17 17:24 19:19 21:15 |
| disincentive 36:15 | elicit 5:22 8:15 8:17 27:18 | evidence 4:6 10:4 11:5 12:25 13:16,21 13:23 14:3 16:13 17:14,18 17:21 18:3,6 18:10 19:7 20:7 22:5 23:19 25:9,10 27:15 29:12,23 30:1 33:14,21 33:23 34:12 36:1,4,8,12,16 36:21 39:6,9 39:20 | facts 33:3 | getting 34:9 |
| dispute 37:6 | elicited 10:19 15:7 25:17,23 26:5 | ethically 16:8 | failed 9:7 | Ginsburg 6:11 6:21 7:17 8:2 8:14,20 9:13 |
| distinct 5:17 | eliciting 10:23 38:1 | ESQ 1:15,17,21 2:3,5,8,11 | fair 15:6 | |
| distinction 9:14 9:17 34:1,10 | elicits 9:3 27:22 | essentially 10:8 32:12 | fall-back 37:11 | |
| distinctions 9:17 9:17 34:1,10 | eliminate 36:13 | exchange 19:23 | false 4:11 | |
| distinguishes 33:13 | emphasized 33:13 | | falsely 37:13 | |
| distinguishing 4:1,7 | emphasizing 12:5 | | far 30:5 | |
| distort 15:11 | encouraged 8:5 | | favorable 35:25 | |
| distorting 23:12 | | | Federal 16:22 | |
| distortion 23:13 | | | felt 11:19 | |
| dividing 8:17 | | | Fifth 5:5,15,16 6:3 9:14,18 10:1 17:13 21:16,22 23:16 37:2 | |
| doing 6:15 18:23 | | | figure 30:15 | |
| DONNIE 1:6 | | | | |
| Doser 26:15,15 39:12 | | | | |

| | | | | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 10:7 16:6,22 32:7,15 37:10 give 9:7 13:25 30:18,24 31:5 31:24 38:20 given 5:6,13 9:21 10:20 25:22 35:10 gives 8:24 giving 20:5 32:8 32:12 go 7:22 21:21 23:6 35:22 goes 7:14 10:21 27:21 34:2 going 11:6,8,9 15:15,15 19:19 26:3 30:19 33:11 34:24 37:23,24 38:2 government 9:4 9:23 11:17 13:19 17:20 18:5 20:9 23:6 23:11 government's 10:5 15:8 17:15,19 20:8 23:2,20 24:2 24:11 39:21 grand 9:22 great 24:9 greater 24:7 greatly 15:1 guaranteed 22:11,15 guarantees 22:5 23:23 guess 8:19 24:24 25:25 26:19 28:8 36:10 guilt 23:8,10 guy 31:16 | happened 13:24 19:20 26:11 happens 7:22 18:17 hard 5:21 31:6 harm 20:5 29:2 34:3,15 35:3 36:13 Harris 20:10 Harvey 6:4,9 14:9 20:11 38:16 Hass 20:10 Havens 20:10 hear 3:3 10:22 12:9 18:10 heard 18:11 31:16 hearings 37:21 hears 7:7,10 heat 37:15 held 3:10 11:1 helpful 32:2 helps 36:8 Henry 17:3 high 15:12 17:19 holdings 14:6 homes 25:7 Honor 4:15 10:11 27:1,10 28:17 29:18 31:9 32:14,25 34:2 35:5,21 36:14,25 37:19 39:16 Hudson 15:24 hung 21:14 hurt 11:20 | 3:12,21 6:8 8:21 9:1,5,10 10:6,17 11:8 12:1 13:9,14 14:22 15:9,18 18:2 19:8 22:21 23:10 24:1,1,9,15 27:5,8 28:7 29:24 30:2,10 33:15 34:12 36:8,12,20,22 importance 12:8 important 11:22 20:18 impression 16:17 inadmissible 8:24 inasmuch 35:24 36:14 incentive 27:12 27:15 incentives 10:12 11:5,20 13:1 include 4:10 12:1 including 14:8 inconsistent 14:5 35:8,11 inconsistently 10:18 11:11 18:7 incorporated 31:3 incredibly 20:18 incurred 19:10 indicated 7:2 indicative 35:9 indistinguishable... 34:13 individual 25:12 29:13 inform 6:17 informant 5:21 7:7 10:22,24 11:12,15 13:7 | 13:19 16:20 19:22,23,24 20:1 25:16 27:18,20,20,21 28:2 31:11 35:19 37:18 informants 11:20 12:22 26:2 27:13 28:14 informant's 12:13 13:18 19:21 21:12 information 6:19 13:7 21:8 informed 12:13 infrequently 16:15 initiate 6:6 inside 6:15,18 instances 16:14 instruct 28:2,4 instruction 21:4 instructions 14:1,1 instructs 16:24 27:18 intentionally 37:13 interest 24:3,4 37:1 interested 25:21 26:4 interests 38:13 38:17 internal 16:4,6 interrogate 6:17 interrogation 6:7 31:11 33:6 interrupt 37:17 intimidating 32:20 intricacies 5:4 introduce 29:11 introduced 21:17 23:2 introduction | 27:5 invoked 6:7 invoking 33:7 involuntary 3:15 24:14 32:17 33:4 involved 6:25 involves 30:11 issue 19:4 20:23 37:24 |
| <hr/> J <hr/> | | | | |
| J 1:21 2:8 24:20 Jackson 4:4 6:3 17:14 30:9 jail 8:3,4 11:15 19:22,25 jailbird 6:19 7:20 jailhouse 26:2 January 1:9 26:12,13,22,23 job 21:6 judge 13:21,25 37:12 judgment 24:17 jury 9:22 12:9 12:10,13,18,25 13:2,3,11,22 18:10 20:18 21:2,6,10 39:7 Justice 1:18 3:3 3:8 4:13,25 5:15 6:11,21 7:17 8:2,14,20 9:13 10:7 14:12,18 15:13 16:6,22 17:2 18:14,22,25 19:11,16 20:2 20:22 21:13 22:1,10,14,23 23:4 24:18,22 25:12,15,19 26:9,24 27:2 27:25 28:13 29:4,20 30:13 | | | | |

| | | | | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 31:12 32:7,15 33:12 34:8,21 35:1,12 36:6 36:18 37:6,10 38:8 39:14,25 Justice's 18:15 | level 16:22 lie 15:20 19:12 22:17 likes 35:16 limit 4:6 34:4 limitations 17:7 limiting 14:1 16:4 21:4 line 8:17 10:20 listening 7:14 16:20 listens 7:7,9 litigated 37:24 litigation 34:17 35:23 38:3 little 21:14 27:17 29:16 logical 39:17 long 12:24,24 22:16 24:13 27:11,23 looked 25:20 looking 23:25 looks 5:8 lose 20:3 loss 29:19 lot 16:18 lying 35:15 | 1:15 2:3,11 3:5 3:6,8 4:15 5:3 5:16 6:12,21 7:21 8:7,16,25 9:16 10:10 16:18 17:24 19:19 21:15 38:9,10,12 39:16 mean 13:15 15:18,23 17:10 19:19 21:6,19 22:18 28:8 29:15 31:22 32:9 36:8,9 meaning 22:10 means 17:20 23:18,21 meet 17:21 meetings 7:1 meets 18:5 memo 25:19 mention 11:14 mentioned 21:5 mere 7:14 35:8 merely 33:9 Messiah 5:22 Michigan 4:4 6:3,4 14:9 15:24 29:8 38:16 mind 30:15 mini 37:17 minimal 4:23 19:6 minutes 38:9 Miranda 4:3 5:6 6:17 7:19 8:24 9:6 10:3 14:7 21:19 30:9 32:8,12 38:23 misconduct 25:9 missed 22:12 Model 17:4 murder 12:18 12:19 | <hr/> N <hr/> N 2:1,1 3:1 nature 28:22 34:3 nearly 29:7 necessarily 4:20 33:8 34:25 35:9 necessary 3:23 5:13 need 17:12 negotiate 35:25 never 21:9 29:10 29:16 31:21 Nicks 38:24 NICOLE 1:17 2:5 14:14 Nix 14:9 38:15 39:3 normal 13:15 normally 29:15 nosey 11:19 noted 16:18 17:24 19:19 numerous 12:5 | 6:16,23 7:9,23 7:25 8:15 9:7 18:22 32:19 officers 16:7 19:3 28:1 32:18,22 33:5 okay 22:16 once 30:19 ones 33:14 operate 4:24 10:3 13:24 37:14 opportunities 16:5 options 4:6 oral 1:11 2:2 3:6 14:14 24:20 order 26:21 ordinary 13:23 outcome 34:16 outside 6:16,16 8:23,25 34:14 outweighs 15:1 |
| <hr/> K <hr/> Kan 1:16,22 Kansas 1:3 3:4 4:17 16:16 kind 27:12,15 27:23 31:2,2 36:3 37:17 38:3 kinds 29:1 37:23 know 7:17 10:14 12:15 15:15,19 16:16 18:1,23 19:5 20:14 21:9 25:23 26:7,10,11,13 31:14 32:3,4,7 33:25 35:9,16 36:10,10 knowing 26:4 knowledge 13:1 known 33:2,5 knows 9:3 Kuhlman 16:19 17:3 19:4 Kuhlmann 8:18 10:21 11:1 | <hr/> M <hr/> making 9:13 17:15 19:7 manner 27:13 28:15,21 36:16 manual 16:23 17:2 marginal 36:17 Massiah 3:18 4:2,8 8:18 9:4 10:2,21 mate 8:3,4 matter 1:11 7:16 14:3 40:3 matters 5:18 MATTHEW 1:21 2:8 24:20 McALLISTER | <hr/> O <hr/> O 2:1 3:1 oath 39:15 obtain 27:16 28:25 36:15 obtained 3:11 3:17,22 4:2 7:4 14:21 22:20 23:17 36:21 39:20 obtaining 5:12 obtains 36:3 obvious 11:17 occur 4:14 6:1 28:21 occurred 26:20 occurs 4:19 22:24 23:1 25:8 28:23 offenses 19:22 officer 6:13,15 | <hr/> P <hr/> P 3:1 page 2:2 27:3 parallel 5:15,16 9:11 paraphrase 38:24 paraphrasing 39:4 part 10:13 37:20 particular 5:4 31:10 33:3 passive 8:3,5 16:20 pause 34:21 pay 15:12 17:19 39:19 pays 20:9 people 19:12,13 25:7 percent 12:23 period 25:25 30:18 | |

| | | | | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>perjured 35:4 perjury 3:23 4:10 12:7 13:20 15:1 23:14 24:6 35:7,9 permit 21:21 permitting 3:21 person 13:23 17:6,8,9 persuasive 20:4 Petitioner 1:4 1:16,20 2:4,7 2:12 3:7 14:17 38:11 picked 7:13 piece 36:1 place 36:16 plea 35:25 36:2 please 3:9 14:19 24:23 point 4:23 18:9 23:14 33:20 36:10 38:25 pointed 35:14 points 38:12 police 5:6,21 6:6 6:13,15,16,18 7:9,17,23 8:15 8:22 10:12,14 11:4 15:14,24 16:3,7,19 17:11,25 18:20 18:22 19:3 25:8 27:16 28:25 32:8,18 32:19,21,21,24 33:2,5 36:15 37:25 39:18 Portash 9:21 30:5 position 4:18 18:9 19:13 24:25 37:22 possessions 25:7 possible 35:18 post 16:20</p> | <p>potential 4:23 13:18 Potentially 7:21 practically 32:16 precise 9:11 precisely 12:21 presence 7:2 29:14 present 6:25 10:24 12:6 presented 6:2 28:20 presenting 4:11 preservation 37:4 pretend 6:18 pretending 6:13 7:9,19,23 pretrial 10:8 37:20 38:3 pretty 16:15 prevail 29:25 prevent 3:23 previous 17:17 18:11 price 15:12 17:19 20:8 39:19 primarily 12:17 14:8 37:2,4 primary 12:7 prior 18:8 19:21 20:11,15,17 22:21 23:7 35:8,10 prison 19:13 35:17 probative 20:19 problem 29:4 33:24 problems 24:25 33:20 35:14 procedure 13:16 13:24 process 15:5,11 19:9 22:7 23:9</p> | <p>23:12,13,22 24:4 37:4 39:6 Professional 17:4 proffered 39:6 prohibit 21:24 prohibiting 27:4 prohibition 7:18 proof 18:5 prophylactic 30:9 prosecutions 33:17 34:7 prosecution's 11:7 prosecutor 17:5 17:8 19:20 27:12,16,17,19 37:15 39:19 protected 37:1 protects 39:5 prove 23:8 provide 15:5 proving 17:21 23:10 provision 34:6 purpose 9:24 15:4 22:6,6,14 27:24 purposes 3:13 3:15 4:17 5:1 6:8 7:16 9:6,10 11:2 13:15 14:22 15:9,19 19:8 21:25 22:22 24:9,15 28:7 30:2,10 33:16 36:12,22 38:22 39:10 put 13:19,22 puts 36:4,5 putting 12:25 p.m 40:2</p> | <p>12:2,17 14:23 18:16 21:1 22:19 28:20 29:5,11 38:19 questioned 29:12 questioner 11:16 questioning 7:19 32:24 questions 8:23 11:18 14:10 18:1 24:16 30:15 38:6 39:22 quite 12:11 25:20 36:7</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 1:15 2:3,11 3:1,6 38:10 rarely 29:10,10 RAY 1:6 real 16:2 22:10 realize 4:16 39:17 really 11:18 14:6 17:25 18:16 20:8 29:19 31:4 32:17 reason 14:2 20:12 24:12 27:11 32:18 35:15 reasonable 12:20 17:22 31:24 reasons 3:21 10:13 16:18 35:10 rebuttal 2:10 13:10 14:11 18:2 21:17 28:12 38:10,13 received 12:14 19:23 26:25</p> | <p>recognized 9:20 11:15 15:23 20:9 recording 7:11 7:13 reflexively 21:11 refuting 22:17 regard 11:13 35:7 regarding 38:3 relationship 29:3 37:5 relevant 13:8 26:14 reliable 12:23 relying 33:20 remainder 14:11 38:7 remaining 38:9 remains 10:5 14:2 remedy 22:9 remember 11:23 32:10 remind 13:12 remove 36:15 reported 20:23 representations 29:21 represented 10:9 17:6,8,9 25:13,13,15 32:11 represents 28:19 requiring 39:8 reserve 14:11 38:7 resolved 4:21 respect 4:7 5:17 5:18 10:1,10 20:19 36:20 respectfully 39:23 Respondent 1:22 2:9 4:19</p> |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

| | | | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 24:21 Respondent's 14:24 responsible 27:19 result 13:17 36:19 resulting 4:5 results 5:2 10:4 reverse 39:23 reversed 24:17 right 4:9,10 6:5 6:7 7:3 8:24 14:4 15:4,7,10 22:2,11 23:4 25:3,6,6,17,24 27:8 30:12 32:11 33:7,16 33:17 34:13 36:7 38:17 39:4,11 rights 6:18 34:11 ROBERTS 3:3 14:12 15:13 24:18 27:2 29:20 33:12 34:8,21 35:1 35:12 36:6 38:8 39:25 root 22:14 rule 3:17 4:2,4 9:2,12,18 12:1 13:13 14:23 15:2 16:19 19:3 24:13 27:6 30:4,4,6 30:22 31:2,14 31:15,15,16,20 35:4 rules 13:15,16 13:23 16:1,2 17:2,5 30:9 | 2:5 14:13,14 14:18 15:22 16:12 17:1 18:19,24 19:2 19:15,18 20:6 20:25 21:13,22 22:3,12,18,25 23:5 saying 12:22,23 13:4,5,13 22:15 30:6 34:10 says 9:24 25:24 27:6 32:15 33:17 37:15 SCALIA 4:13 4:25 5:15 21:13 22:1,10 22:14,23 23:4 se 15:2 search 12:9 25:9 26:13 second 3:25 26:17 31:3,7 31:23,25 secure 25:7 see 29:4 33:25 36:7 segment 4:24 self-incrimina... 30:5 37:1 send 5:21 16:19 sent 31:11 sentence 27:3,6 serving 19:25 set 19:3 sets 17:2 setting 32:20 shooter 12:17,21 13:5,6 side 10:9 11:23 12:4,6 15:17 15:22 18:16,18 18:20 20:13 29:22 32:15 silent 8:10 similar 10:3 | simply 5:12 8:3 11:23 13:7,13 14:2 24:8 27:17 33:6 34:4 35:21 37:24 sits 7:24 situation 5:1 16:15 21:19 27:25 situations 4:5 36:21 six 38:9 Sixth 4:9,14 6:4 7:5 8:1 9:14,25 10:15 11:3 13:14 14:3,7 17:13 22:3,24 23:1,15,23 25:1,24 27:6 28:3,5,15,22 30:7 31:15 33:16,24 34:3 34:4,13 35:13 37:3,7,23 38:14,17,17 39:3 slightly 39:5 snitch 6:14 16:10 37:16 snitches 16:8,24 snitch's 33:20 societal 14:25 solely 11:8 12:16 solicitation 7:4 Solicitor 1:15,17 somebody 33:10 someone's 21:1 sorry 22:12,25 sort 28:18 so-and-so 37:16 speak 8:6 33:10 speaking 33:5 specific 16:14 speculate 29:19 speculative 11:9 15:1 17:25 | sprinkling 38:14 stand 15:20 20:15 24:6 standards 3:12 3:23 14:22 16:1,2 standpoint 12:12 starts 7:25 10:25 State 17:4 21:4 29:11,12 30:17 30:19,24 31:9 36:2,3 statement 4:2,19 5:11 6:8 8:4,13 9:8,20 20:16 20:17 21:24 25:17,17,22 26:5 27:19,22 28:24 29:12,23 30:1 32:12 33:4 35:8,11 36:1,9 37:8 38:1 statements 3:11 3:14,17,19,22 5:22 7:4 10:23 11:1 14:21,24 15:8,9 18:8 22:20 23:2,7 23:17,21,24 24:8,10,14 26:18 27:5,7 28:7 29:1 38:4 39:15 States 1:1,12,19 2:6 3:18 4:18 14:15 30:22 37:25 State's 24:25 35:7 station 32:21 STEPHEN 1:15 2:3,11 3:6 38:10 STEVENS 18:14,22,25 | 19:11,16 20:2 20:22 39:14 story 24:2 straightforward 31:10 strategy 34:18 strength 33:25 strong 10:12 11:4 20:8 strongly 39:13 stuff 18:18 subject 20:15 38:20 submit 24:16 submitted 29:23 30:2 40:1,3 subsequent 25:22 substantial 14:25 17:16 subverts 23:8 sufficient 28:11 suggest 8:9 suggested 5:10 22:25 suggesting 8:19 10:2 21:11 suggestive 8:13 suggests 9:18 supporting 1:20 2:7 14:17 suppose 21:20 supposed 30:21 supposedly 26:17 suppressing 28:6,10 suppression 10:4 37:21 Supreme 1:1,12 16:16 surprising 29:9 switch 23:25 sword 35:2 system 28:19 |
| <hr/> S <hr/> S 2:1 3:1 Saharsky 1:17 | | | | <hr/> T <hr/> |

| | | | | |
|-------------------------|--------------------------|-------------------------|--------------------------|-------------------------|
| T 2:1,1 | thing 9:2 13:12 | 25:6,10 28:25 | up-ending 28:18 | 30:12 31:1,2 |
| take 6:12 15:19 | 26:6 30:18 | 29:1 30:12 | urged 37:10 | 33:23 34:4 |
| 20:14 24:5 | 31:14,19 | 33:16,24 34:5 | usable 11:6 | 37:7 38:20 |
| 36:22 | things 7:25 | 34:10,14,16,18 | 27:14 | violations 4:3,3 |
| taken 37:8 | 12:15 33:19,21 | 35:13,22,23 | use 3:21 5:11 | 4:4 6:5 27:8 |
| talk 8:12 10:25 | 36:18 | 37:15,17,17 | 7:4 9:22,23,24 | 38:18 |
| 17:5 26:1,3 | think 4:21 5:18 | tries 9:23 | 10:6 14:20 | voluntary 3:11 |
| 31:16,17 | 13:21 16:12,14 | true 9:6 22:18 | 15:16 16:24 | 3:17,19,22 4:1 |
| talked 7:12 | 17:1,11,12 | 36:20 | 18:17 21:24 | 14:21,24 |
| 19:21 | 18:19 19:2,15 | truly 9:19,19 | 23:7 25:10 | |
| talking 8:21,21 | 20:6 24:12 | 10:14 | 27:7,12,15 | W |
| 12:8 23:9,10 | 25:18 28:21 | trustworthy | 28:6,11 36:11 | Walder 20:10 |
| 23:11 24:3 | 30:4 31:8 | 19:13 | 36:19 | want 11:16,18 |
| 25:4,5,5 30:8 | 32:25 34:2 | truth 12:9,9 | U.S 16:24 | 12:15 13:19 |
| 32:9 33:2,9 | 35:6 36:6,6,24 | 18:13 20:21 | | 16:19 26:3 |
| tell 8:11 | 38:25 | truthfully 20:22 | V | 28:13,14 31:14 |
| telling 7:25 | thinking 21:10 | 34:23 | v 1:5 3:4,18 4:4 | 37:16 |
| 18:12 20:20 | thinks 32:9,22 | truth-seeking | 6:3,4,24 14:9,9 | wants 6:16 |
| tells 32:10 | 33:9 | 15:11 19:9 | 15:24 39:3 | 10:24 31:17 |
| terms 3:25 4:23 | thought 19:5 | try 11:5 20:5 | value 11:7 15:14 | 33:10 |
| 16:3,4 17:2,7 | 25:21 31:22,24 | 31:10 | 27:4 28:6 | warning 32:9 |
| 18:20 | three 3:20 24:24 | trying 35:25 | Ventris 1:6 3:4 | warnings 5:6,13 |
| territory 14:8 | time 5:23 14:11 | two 10:14 26:17 | 12:18 26:16,17 | 7:19 8:24 9:7 |
| test 37:18 39:17 | 18:1 25:16 | 38:12 | Ventris's 12:11 | 32:8,13 |
| tested 12:25 | 26:5,15 30:1 | type 19:6 30:6 | 13:10 | Washington 1:8 |
| 39:6 | 30:18 31:6,24 | types 39:9 | verdict 21:9,11 | 1:18 |
| testified 26:16 | 32:5 33:11 | typical 13:4 | verifiable 16:7 | wasn't 8:5 25:12 |
| 37:13 | 37:7 38:5,7 | U | versus 15:23 | water 38:14 |
| testifies 3:13 | times 11:24 | unavailable | 38:15,16 | way 6:19 10:2 |
| 9:22 10:17,18 | 13:20 | 17:15 20:7 | view 32:1 | 11:6 13:9 |
| 11:10,11 16:11 | told 8:8 11:11 | 24:9,10 | vigorously | 16:23 34:18 |
| 18:7 | 26:1 | unchecked 15:1 | 35:19 | 35:24 38:12 |
| testify 16:11 | tone 14:6 | 24:6 | violate 7:3,5 8:1 | 39:19 |
| 18:7 34:20,22 | Topeka 1:16,22 | uncounseled | 16:1 28:2 | ways 5:8 |
| 34:23,24 35:23 | tradition 12:24 | 27:7 | violated 31:15 | Weatherford |
| testifying 19:25 | 12:24 | undercover 6:23 | 31:25 | 6:24 |
| testimony 4:12 | training 15:25 | 6:25 31:11 | violating 9:4 | Wednesday 1:9 |
| 5:2 8:8,15 9:24 | treat 5:19 | underlying 35:6 | violation 3:11 | weighed 12:3 |
| 12:16 13:10,18 | treated 3:18 | 19:17 27:3 | 3:17,22 4:2,8 | went 12:16 21:7 |
| 16:10 19:24 | 38:22 | understand | 4:14 5:2,8,11 | we're 22:15 |
| 21:12 26:14 | trial 3:13,25 4:6 | 19:17 27:3 | 5:20,22 6:1 | Williams 14:9 |
| 28:4 35:4 | 4:20 5:11 6:2 | unfairness 39:5 | 7:11,15,22 | 38:15 39:3 |
| text 9:17 21:23 | 13:16,23 15:6 | United 1:1,12,19 | 10:4,15 11:3 | willing 4:17 |
| 22:3 | 18:6 22:5,7,11 | 2:6 3:18 4:18 | 14:21 21:15,18 | willingness 36:2 |
| Thank 14:12 | 22:15,16,19,21 | 14:15 | 22:24 23:1 | witness 9:21 |
| 24:18 38:8 | 22:24 23:3,7,8 | unnecessary | 25:2,8 27:23 | 20:4 |
| 39:25 | 23:11,18 25:2 | 4:22 | 28:21,22,23 | witnesses 39:9 |

| | | | | |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------|--|--|--|
| <p>witness's 21:1 wonder 29:4 wondering 37:14 wording 34:5 work 12:21 25:10 29:2 worked 39:1 works 5:21 39:1 worst 18:16,17 wouldn't 7:7,10 7:10,16 18:1 wrong 6:6</p> | <hr/> <p style="text-align: center;">6</p> <hr/> | | | |
| <p>6 27:3</p> | | | | |
| <hr/> <p style="text-align: center;">X</p> <hr/> | | | | |
| <p>x 1:2,7</p> | | | | |
| <hr/> <p style="text-align: center;">Y</p> <hr/> | | | | |
| <p>Yeah 35:12</p> | | | | |
| <p>years 24:1 29:6</p> | | | | |
| <hr/> <p style="text-align: center;">0</p> <hr/> | | | | |
| <p>07-1356 1:5 3:4</p> | | | | |
| <hr/> <p style="text-align: center;">1</p> <hr/> | | | | |
| <p>100 12:23</p> | | | | |
| <p>11:15 1:13 3:2</p> | | | | |
| <p>12:01 40:2</p> | | | | |
| <p>14 2:7</p> | | | | |
| <p>16th 26:12</p> | | | | |
| <p>17th 26:20</p> | | | | |
| <hr/> <p style="text-align: center;">2</p> <hr/> | | | | |
| <p>20 29:6,7</p> | | | | |
| <p>20th 26:13,21</p> | | | | |
| <p>2004 26:12</p> | | | | |
| <p>2009 1:9</p> | | | | |
| <p>21 1:9</p> | | | | |
| <p>21st 26:22</p> | | | | |
| <p>24 2:9</p> | | | | |
| <p>27th 26:23</p> | | | | |
| <hr/> <p style="text-align: center;">3</p> <hr/> | | | | |
| <p>3 2:4</p> | | | | |
| <p>38 2:12</p> | | | | |
| <hr/> <p style="text-align: center;">5</p> <hr/> | | | | |
| <p>50 24:1</p> | | | | |