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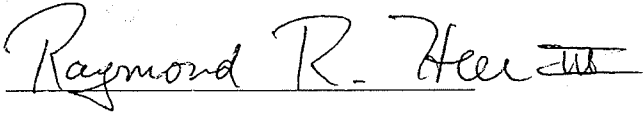
**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: MARYLAND, Petitioner, v. MICHAEL BLAINE
SHATZER, SR.
CASE NO: No. 08-680
PLACE: Washington, D.C.
DATE: Monday, October 5, 2009
PAGES: 1-63

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of; MARYLAND, Petitioner, v. MICHAEL BLAINE SHATZER, SR.; and that these attached pages constitute the original transcript of the proceedings for the records of the Court.

Handwritten signature of Raymond R. Heer in cursive script, underlined.

REPORTER

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARYLAND, :

4 Petitioner :

5 v. : No. 08-680

6 MICHAEL BLAINE SHATZER, SR. :

7 - - - - - x

8 Washington, D.C.

9 Monday, October 5, 2009

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:05 a.m.

14 APPEARANCES:

15 GEN. DOUGLAS F. GANSLER, ESQ., Attorney General,
16 Baltimore, Md.; on behalf of the Petitioner.

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19 behalf of the United States, as amicus curiae,
20 supporting the Petitioner.

21 CELIA A. DAVIS, ESQ., Assistant Public Defender,
22 Baltimore, Md.; on behalf of the Respondent.

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| | C O N T E N T S | |
|----|---|------|
| 1 | | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | GEN. DOUGLAS F. GANSLER, ESQ. | |
| 4 | On behalf of the Petitioner | 3 |
| 5 | TOBY J. HEYTENS, ESQ. | |
| 6 | On behalf of the United States, as amicus | |
| 7 | curiae, supporting the Petitioner | 21 |
| 8 | CELIA A. DAVIS, ESQ. | |
| 9 | On behalf of the Respondent | 32 |
| 10 | REBUTTAL ARGUMENT OF | |
| 11 | GEN. DOUGLAS F. GANSLER, ESQ. | |
| 12 | On behalf of the Petitioner | 60 |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
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| 21 | | |
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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this term in Case 08-680, Maryland v. Shatzer.

General Gansler.

ORAL ARGUMENT OF DOUGLAS F. GANSLER

ON BEHALF OF THE PETITIONER

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

This case is here from the Maryland Court of Appeals. In that case, the court of appeals suppressed a statement that was given by Respondent following what the trial court found to be a valid waiver of his Miranda rights and following a free and voluntary confession.

The reason why the court did so is because, 2 years and 7 months prior to that, the defendant was in a different custodial interrogation and at that time invoked his right to counsel. We ask that this Court reverse the Maryland Court of Appeals.

It is our position that a break in custody from custodial interrogation should be the bright line that this Court adopts in order to end the irrebuttable presumption that this Court created in the Edwards case.

1 CHIEF JUSTICE ROBERTS: Without regard to
2 the time? A break in custody of 1 day -- do you think
3 that should be enough?

4 MR. GANSLER: Your Honor, we do think 1
5 day should be enough, as long as it is not in the
6 pretrial detention category. Obviously, the three cases
7 that have come before this Court, Edwards, Minnick and,
8 Roberson, all -- two of them were 3 days, and one of
9 them was 1 day, but those defendants were in the
10 pretrial detention status.

11 So if in fact a defendant is brought in,
12 questioned, and then released back to his or her daily
13 routine, and away from the isolation of a custodial
14 interrogation, we feel that should be the bright
15 line for a break in custody.

16 CHIEF JUSTICE ROBERTS: So, what if it's
17 repeatedly done? You know, you -- you bring him in, you
18 give him his Miranda rights. He says, I don't want to
19 talk. You let him go. You bring him in, give him his
20 Miranda rights. He says, I don't want to talk. You
21 know, just sort of catch and release, until he finally
22 breaks down and says, all right, I'll talk.

23 MR. GANSLER: Well -- there is a parade of
24 horrors of catch and release. Your Honor just went
25 through one of them, and there are obviously a number of

1 hypotheticals that one could posit. We would suggest
2 that the break of custody would be the end of the
3 Edwards irrebuttable presumption. However, there are
4 still three responses to that. The first would be the
5 defendant could still say that his or her Miranda rights
6 were not given voluntarily and willfully. Secondly, the
7 due process jurisprudence that this Court had prior to
8 Miranda still is in existence, and therefore the
9 defendant could argue that that confession was given in
10 an overborne way, that his will was overborne.

11 But finally and I think most relevantly,
12 because this is sort of the other side of this case, is
13 that there has been -- since 1982, 8 Federal circuits
14 and over 20 States have had the break in custody rule in
15 effect. And in fact this Court in the McNeil case,
16 albeit in dicta and parenthetically, assumed a break in
17 custody as the rule. There has been not one published
18 opinion that, at least we could find, that has this -
19 - that has that scenario and is founded in the caselaw --

20 JUSTICE KENNEDY: Is the rationale for the
21 break in custody that there is a likelihood of
22 non-coercion? Is that the reason that you offer for the
23 rule?

24 MR. GANSLER: Your Honor, it goes to --
25 yes, it goes -- this Court has said, most recently again

1 in Montejo, that the reason for Edwards is that we want to
2 prevent badgering.

3 JUSTICE KENNEDY: All right. But this
4 person was in custody in the sense he was in prison and
5 the brief said, oh, he was released to the general
6 population. But the possibilities for coercion or
7 pressure are very substantial in the prison. The warden
8 comes in and says: Oh, your cell doesn't have a window.
9 I mean, there's countless way in which a prisoner in the
10 general prison population would consider that he is --
11 that there has been no break in custody. I think that's
12 a very difficult rule that you are proposing.

13 MR. GANSLER: Well, the courts -- the lower
14 courts have shown that there is a difference between
15 police interrogational custody and correctional custody.
16 What we are suggesting is once the person -- in our
17 case, for example, in the second interview, the
18 defendant was in what's called -- what was called a
19 maintenance room in the record, with, you know, a metal
20 table and the two chairs. It was clearly an interrogation
21 context. When that person is released from that, some
22 people are habitual criminals and they're put back into
23 the general population. They are, you know, amongst --
24 that's where they live for that time period. Other people
25 go home. But the break in custody for Edwards purposes

1 ought to end at the end of the interrogation.

2 Now, could there be an interrogational
3 situation while the person is in prison? Absolutely.
4 You can envision a correctional officer coming to the
5 cafeteria when there's -- the public is there, the public
6 being other inmates, and that would not be deemed to be an
7 interrogation atmosphere. If, however, they cleared the
8 cafeteria and had officers standing by the doors and
9 blocking the doors and saying no one's allowed to come in
10 here, that could then become interrogation custody.

11 And this Court and other courts -- the courts
12 all the time have to decide in the Edwards context
13 whether or not the defendant was in custody when the
14 statement was given, whether --

15 JUSTICE GINSBURG: But if the defendant goes
16 home, he can contact a lawyer. In prison, he can't do
17 that. So, if the whole idea is to protect his right to
18 counsel, then it makes a big difference whether he's at
19 home or in prison.

20 MR. GANSLER: Your Honor -- well, first of
21 all, the defendant while they're in prison can contact a
22 lawyer in some circumstances. For example, during the
23 2 years and 7 months between these two interrogations he
24 could have written, he could have called. But let's say
25 that that was unavailable to that particular defendant.

1 It's our position that what Edwards does --
2 Miranda, Edwards, Roberson, Minnick -- it provides the
3 opportunity to consult counsel. But the -- the -- what we
4 are talking about here is the custodial interrogation
5 situation. In other words, the police don't have to get
6 somebody a lawyer. Whether or not somebody has the
7 opportunity to consult a lawyer or not, as long as they
8 are provided with their Miranda rights, the Miranda rights
9 themselves are the protection that the defendant has.

10 We know, for example, in this case --

11 JUSTICE STEVENS: Do we know exactly what
12 the Miranda warning in this case was?

13 MR. GANSLER: The Miranda warnings in this
14 case the judge, the trial judge, found was exactly
15 comported with the Miranda warnings that --

16 JUSTICE STEVENS: But what did it tell the
17 person in prison he could do about a lawyer?

18 MR. GANSLER: That he had the right to a
19 lawyer and --

20 JUSTICE STEVENS: And did it tell him how he
21 could get a lawyer?

22 MR. GANSLER: It didn't -- it said --

23 JUSTICE STEVENS: Well, what -- if you're in
24 prison and they give you the Miranda warnings, what would
25 that tell the average prisoner with respect to access to a

1 lawyer?

2 MR. GANSLER: It would tell them they have a
3 right to counsel and if they couldn't get one, one would
4 be provided to them.

5 JUSTICE STEVENS: And would they have
6 provided a lawyer to him right away if they had -- he
7 had asked for it?

8 MR. GANSLER: Well, had he asked for one,
9 which he did the first time, what they would -- what did
10 there --

11 JUSTICE STEVENS: No, when he is in prison, I
12 mean.

13 MR. GANSLER: Yes. It's unclear from the
14 record whether they would have or not. That would be
15 conjecture. What they do do -- what the bright line of
16 Edwards says is they have to stop asking questions.

17 JUSTICE STEVENS: Well, I understand that.

18 MR. GANSLER: Right.

19 JUSTICE STEVENS: I'm just wondering if he
20 thinks, well, I'd like a lawyer, what can he do?

21 MR. GANSLER: He could -- during those 2
22 years and 7 months in this case, he could have tried
23 to get a lawyer through -- either his own lawyer in the
24 case --

25 JUSTICE STEVENS: Right on the spot, when he

1 is in the room there and they give him the Miranda
2 warning, he says, that sounds like a good idea. What
3 would happen?

4 MR. GANSLER: He would not be given a lawyer
5 by the police at that time. There's not a lawyer sort
6 of waiting outside.

7 JUSTICE STEVENS: So the Miranda warning is
8 a little misleading, isn't it, in that context?

9 MR. GANSLER: Well, I would argue that it is
10 not, because he is given the right. He is said, if you
11 want a lawyer before talking to us, that's fine; you
12 have to invoke your right to counsel. He invokes the
13 right to counsel, they stop talking to him. What he
14 can --

15 JUSTICE STEVENS: And do they also say it will
16 be provided to you?

17 MR. GANSLER: Yes, but he can -- there's a
18 number of --

19 JUSTICE STEVENS: And it's not going to be
20 provided to him.

21 MR. GANSLER: Well, it would be, Your Honor,
22 if, for example, the lawyer in his underlying case came,
23 he could say, look, I need a lawyer, they're asking me
24 questions about this other case; can you represent me on
25 that case?

1 JUSTICE SOTOMAYOR: What if he asks for a
2 lawyer? He said: I don't want to talk to you without a
3 lawyer, correct?

4 MR. GANSLER: Yes. In 2003, yes.

5 JUSTICE SOTOMAYOR: And the State doesn't
6 provide him with a lawyer, correct?

7 MR. GANSLER: That's correct.

8 JUSTICE SOTOMAYOR: All right. So what
9 gives him an understanding that one will be provided the
10 next time he's questioned?

11 MR. GANSLER: Well, he -- what he does
12 understand from the first time he is questioned -- and he
13 understood the rights because he himself invoked that
14 right to counsel. So he knew that he could say "I want
15 a lawyer," and he did. What -- and what he understands is
16 the police will stop questioning him at that point.

17 There is no -- as far as I can tell from the
18 jurisprudence in this Court's holdings, there is no
19 obligation for the police to actually go out -- nor would
20 I suggest you want to have that rule, to go out and
21 actually ascertain, get a lawyer.

22 JUSTICE SOTOMAYOR: No, because we tell the
23 police they have to stop.

24 MR. GANSLER: Right.

25 JUSTICE SOTOMAYOR: So presumably they

1 wouldn't re-engage until a lawyer is present,
2 correct? That's what Edwards tells them not to do.

3 MR. GANSLER: Well, Edwards tells them to
4 stop questioning. Minnick says that if they have the
5 opportunity to consult with a lawyer, they still can't
6 start without the lawyer being there. But that's a
7 different analysis than this because had they asked him
8 on the second time, after they read his rights and he
9 said, I want a lawyer, they couldn't keep going until
10 there was a lawyer present. He chose during -- during
11 that time -- 2 years and 7 months when he had a mental
12 reset that he didn't need a lawyer.

13 JUSTICE SOTOMAYOR: Well, this is a
14 different part of your argument. This is not the
15 custody or break in custody. This is the time and the
16 fact that such a prolonged period of time has minimized
17 any coercive effect, correct?

18 MR. GANSLER: No, Your Honor. We would
19 still argue that the break -- well, in this case,
20 obviously both exist, and you could -- the Court could
21 fashion a bright-line rule. This Court has shown an
22 interest in bright-line rules in this area.
23 And this Court could adopt a bright-line rule of a
24 particular time period. We are arguing the better
25 bright-line rule would be a break in custody. Obviously

1 a break in custody plus --

2 JUSTICE SOTOMAYOR: Catch and release then

3 no longer -- catch and release is unimportant to you?

4 There is no meaning to Edwards in that situation,

5 because every prisoner, because he is a captive, is

6 questioned in a place and then told to go back to his

7 room. His room happens to be a locked cell. So he

8 doesn't have the freedom to leave and he doesn't have

9 the freedom necessarily to make calls to discuss his

10 choice with anyone.

11 MR. GANSLER: Well, in this case --

12 JUSTICE SOTOMAYOR: This is a very different

13 situation than someone who is free to go home.

14 MR. GANSLER: I'm not sure -- the question

15 sort of posits two different scenarios. One scenario is

16 when the defendant is arrested, they are questioned and

17 then they are put into a cell. That's a different

18 scenario. That would be a pretrial detention analysis,

19 which in Minnick, Roberson, and Edwards extended up to

20 3 days, which is -- what we would argue is sort of the end

21 of the time line right as exists today.

22 The different scenario, which is in this

23 case, is, yes, he is -- he is locked up in the general

24 population, he comes in for the interrogation, he is

25 then released back to his daily routine. And at that

1 point our view is the irrebuttable presumption of
2 Edwards ends. And -- and, you know --

3 JUSTICE SOTOMAYOR: Because he is not in
4 custody?

5 MR. GANSLER: He is not in --

6 JUSTICE SOTOMAYOR: He is in jail that -- when
7 he can't leave, he can't necessarily use a phone and can't
8 confer with anyone, he's no long in custody?

9 MR. GANSLER: He's in custody in the sense that
10 he is not free to leave the jail, but as to the Miranda
11 cases, he is -- he can still be questioned. He's not in
12 correctional custody, and he's certainly not under
13 interrogation --

14 CHIEF JUSTICE ROBERTS: You mean he's not -- I
15 assume you mean he's not free to leave the prison --

16 MR. GANSLER: Right.

17 CHIEF JUSTICE ROBERTS: -- as I understand the
18 terms.

19 MR. GANSLER: Yes.

20 CHIEF JUSTICE ROBERTS: Perhaps it's
21 inaccurate. Jail is where you are when they are still
22 questioning you, figuring out what's going to happen to
23 you. Your argument is when he's sent to prison, he's no
24 longer in custody for Edwards purposes.

25 MR. GANSLER: That's exactly right.

1 JUSTICE BREYER: If I can't --

2 JUSTICE STEVENS: Does that mean that he's free
3 to leave the interrogation room?

4 MR. GANSLER: I'm sorry, Your Honor.

5 JUSTICE STEVENS: Was he free to leave the
6 interrogation room?

7 MR. GANSLER: No, and we do not -- we accept
8 that he was in police interrogational status both in 2003
9 and in 2006, when -- when he was read his Miranda rights.

10 JUSTICE KENNEDY: I have to say that the break
11 in custody, I think, has many more problems than time, but
12 you don't seem to place much emphasis on time.
13 True, we have to reach out and find some arbitrary number,
14 but after all, Edwards is an arbitrary rule.

15 MR. GANSLER: The reason why I think break
16 in custody is not as problematic -- and this goes to the
17 Justice's earlier question as well -- is because literally
18 the year after Edwards, 1982, was the first of the eight
19 Federal circuits that found the break in custody rule. And
20 there is no -- they have been able to work with
21 this. This --

22 JUSTICE SOTOMAYOR: What -- there is no
23 small --

24 JUSTICE GINSBURG: In those cases, was there
25 a considerable interval between --

1 MR. GANSLER: Not --

2 JUSTICE GINSBURG: It was just the break in
3 custody? A week --

4 MR. GANSLER: Yes, Your Honor.

5 JUSTICE GINSBURG: -- was enough?

6 MR. GANSLER: Yes, Your Honor. Obviously,
7 in different cases there's different lengths of time.
8 But if -- in Justice Kennedy's question, if we were
9 going to adopt a time limit, I -- we would suggest,
10 like, for example, a 7-day time limit. The Court
11 suggests that is arbitrary. The reason why I would pick
12 7 days is, right now the rule is 3 days, and you
13 cannot envision the situation, at least I can't, where
14 somebody would be held without being presented for more
15 than 3 or 4 days, so --

16 JUSTICE SCALIA: Why -- why do you say the
17 rule is 3 days? What rule is that?

18 MR. GANSLER: Because right now, if you look
19 at Edwards being the next day, Minnick and Roberson
20 being 3 days, that -- that is the only cases from this
21 Court which says when the Edwards presumption goes. So
22 we don't have -- whether -- what Respondent's rule would
23 do is, in our view, extend it right now from the
24 3-day limit -- now, there -- Minnick suggested that's in
25 perpetuity.

1 JUSTICE SCALIA: Yes, but you -- you are
2 not arguing for a 7-day limit no matter what, even
3 if he is held in jail, are you?

4 MR. GANSLER: If he is held in jail on his
5 own case -- see, the most difficult scenario, in our
6 view, is one that we don't think the Court needs to
7 reach here, which is actually the Green case from the
8 District of Columbia, where he is held on his own case
9 in a pretrial detention --

10 JUSTICE SCALIA: Right.

11 MR. GANSLER: -- scenario, because then he
12 does have different incentives to cooperate or not
13 cooperate with the police, and then the question would
14 be, well, does that -- would it end -- is the break of
15 custody there at conviction or at sentencing? And we
16 could quibble about that.

17 We don't need to get to that in this case.
18 But if he is held in jail on another case, that's where
19 he lives. He is there for 10, 15, 20 years, and there's -
20 - he is brought in, away from the life that he is
21 accustomed to and put there with different officers in a
22 metal room --

23 JUSTICE GINSBURG: Suppose it's the same
24 officer. Does -- you -- you said in your brief and just
25 now it was a different officer. Suppose it were the same

1 officer.

2 MR. GANSLER: Well, I actually think for --
3 with -- in this case, with Detective Blankenship and
4 Detective Hoover, the Court should assume it's one and the
5 same. In fact, Roberson said just that, that within the
6 same department -- but it is instructive in this sense.
7 In Respondent's -- if Respondent's rule were to be
8 adopted, there is no way that one police department can
9 know what happened in front of another police department,
10 in front of another police department, while that person
11 is being detained --

12 JUSTICE GINSBURG: Well, you could limit it
13 to the same police department, the same investigation,
14 so you are not covering the waterfront of every
15 interrogation about any crime, any place.

16 MR. GANSLER: Except for right now, we live
17 in a world of Roberson, where we do. So, in other words,
18 if he -- if a defendant invokes in California for a
19 shoplifting case and then is -- is transported to Iowa and
20 then to Maryland, the Maryland authorities have no idea
21 whether he invoked in one of the other two.

22 What is worse is right now, since we don't
23 have a break in custody rule, this defendant, Shatzer
24 himself, could have invoked counsel 20, 25 years ago in
25 some other State.

1 JUSTICE SOTOMAYOR: Counsel --

2 MR. GANSLER: We have no way of knowing that.

3 JUSTICE SOTOMAYOR: The hypothetical you are
4 positing is an investigation about unrelated crimes. We
5 are talking about -- and I think it's what Justice
6 Ginsburg was pointing to, it was an invocation on this
7 crime, on this criminal activity, not one in another State
8 or another police department. And so that's a
9 substantially different question.

10 MR. GANSLER: It is, though he is not being
11 held on -- on that crime. He is being held on a
12 completely unrelated sexual abuse case. I mean, it's
13 related in the sense it's the same crime, but it's a
14 different case.

15 CHIEF JUSTICE ROBERTS: So I thought
16 Roberson told us it's not a different question, that
17 it's the same question. Roberson did not draw a
18 distinction between what crime he was being questioned
19 on the second time.

20 MR. GANSLER: That's exactly right, and
21 that's what creates the problem that if defendant -- if
22 we don't have a break in custody rule, a defendant who
23 invokes anywhere at any time is forever immune from
24 being questioned by the police, regardless of what would
25 be a sort of a wholly irrational view of -- an absurd

1 result, which I think is where we live right now.

2 And it becomes, obviously, greater in a
3 world where we have DNA. Obviously, there was no DNA in
4 1981, but with these cold cases coming back 15, 20, 25
5 years later --

6 JUSTICE STEVENS: Well, I wonder if you're
7 right about that premise. Supposing the prison had a
8 rule that the inmate does not have to see visitors and
9 they say there's somebody here wants to talk to you. And
10 he said, I don't want to talk to him. And if he
11 refused to talk, then if he did talk, it would be
12 voluntary, rather than the situation you described. Do
13 I make myself clear?

14 MR. GANSLER: Yes, Your Honor, and I don't
15 know sort of what the protocol of each of the prisons
16 would be, but I would think that if a prisoner did not
17 want to speak with the officers that came to see him
18 about a crime, the prisoner would be able to say so and
19 has. And this defendant has -- has actually been able
20 to invoke that himself. And if there's --

21 JUSTICE SOTOMAYOR: What is the shortest
22 time period that any circuit court has found a break in
23 custody in a similar situation?

24 MR. GANSLER: A break in custody that --

25 JUSTICE SOTOMAYOR: Between the invocation

1 of counsel and a questioning. You said a number of
2 circuit courts have recognized this break in custody
3 theory.

4 MR. GANSLER: Actually, all -- eight Federal
5 circuits. I don't know what the shortest is. But there
6 are cases that are weeks rather than years that they
7 have --

8 JUSTICE SOTOMAYOR: Which are days?

9 MR. GANSLER: What's that?

10 JUSTICE SOTOMAYOR: Any are days?

11 MR. GANSLER: Not that I am aware of, Your
12 Honor.

13 And with that, I will reserve -- if there
14 are no further questions, I will reserve the remainder
15 of my time.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 Mr. Heytens.

18 ORAL ARGUMENT OF TOBY J. HEYTENS

19 ON BEHALF OF THE UNITED STATES,

20 AS AMICUS CURIAE,

21 SUPPORTING THE PETITIONER

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

24 This Court has repeatedly made clear that
25 Edwards v. Arizona is a prophylactic rule designed to

1 implement the protections of *Miranda v. Arizona*, and it
2 does so by operating as an anti-badgering rule. On the
3 facts of this case, I don't think there is any colorable
4 argument that Mr. Shatzer was badgered into waiving his
5 Sixth Amendment rights.

6 JUSTICE BREYER: I know that you're
7 going to go into the question of how we shape a rule,
8 and I would like you, and perhaps on rebuttal your --
9 other counsel, to comment on the following: I don't see -
10 - as Justice Kennedy had a problem, so do I have a problem
11 with anything that just says break in custody, and
12 taking time seems fairly arbitrary.

13 Suppose you -- could you try to shape a rule
14 on the civil situation, the codes of ethics, where you
15 are not supposed to talk to a client who is represented
16 by a lawyer? That's where my mind is going. And the
17 best I could do at the moment is you would say: When,
18 due to a breach in custody and the passage of time, the
19 questioner did not and would not reasonably believe that
20 the suspect was looking for or was represented by
21 counsel?

22 What I've tried to do is take the purpose of
23 the civil rule, the ordinary ethical rule, and then use
24 it to shape a standard. So I would appreciate any
25 comments on that thought.

1 MR. HEYTENS: Justice Breyer, I think there
2 is a few problems with that approach. First of all,
3 this case is not about the Sixth Amendment right to the
4 assistance of counsel. It's about the Fifth Amendment
5 right against compulsory self-incrimination, and this
6 Court has said several times that rules of legal ethics
7 are not relevant to the Fifth Amendment
8 self-incrimination rule. It said that in the Burbine
9 case, for example. That is the case where, although the
10 questioner knew that the suspect had an attorney who was
11 trying to reach him, the Court said that is not a Fifth
12 Amendment self-incrimination problem, because we have to
13 look at things from the perspective of the suspect.

14 The question is whether the --

15 JUSTICE BREYER: Quite a lot of what I read
16 was about the problems of counsel. Counsel has nothing
17 to do with this, nothing at all?

18 MR. HEYTENS: Counsel has something to do
19 with it, but the Court has made clear going back to
20 Miranda that when we're talking about the Fifth
21 Amendment right to counsel, the only reason that counsel
22 matters is to help to make sure that --

23 JUSTICE BREYER: All right. If -- are we
24 interested in counsel or not? If we are interested in
25 whether he's represented by counsel, and Miranda covers

1 both, then I would repeat my question.

2 MR. HEYTENS: We are not --

3 JUSTICE BREYER: If we are not interested in
4 representation by counsel, then I would withdraw my
5 question and you don't have to answer it.

6 MR. HEYTENS: We have -- in the Fifth
7 Amendment context, we are interested in counsel only as
8 a derivative of his right not to be forced to
9 incriminate himself. It is in this context a purely
10 derivative right, and we need to look at it from his
11 perspective.

12 I think the reason that this case matters in
13 an intensely practical way is there are approximately a
14 million and a half prison inmates in this country right
15 now, many of whom are serving extremely long sentences.

16 JUSTICE ALITO: Well, could we say that
17 in -- in the situation where there is a change from
18 pretrial status to post-conviction status, the Edwards
19 rule is no longer an irrebuttable presumption, but it's
20 simply a rebuttable presumption? And that there -- that
21 the rule would not apply if the prosecution could show
22 that under the circumstances the reason for the rule,
23 the concern about law enforcement badgering, was not
24 present?

25 MR. HEYTENS: That would certainly be open

1 to the Court to say that, Justice Alito. Ultimately,
2 this is a -- a second-order --

3 JUSTICE SCALIA: Would it be a good idea to
4 say that?

5 MR. HEYTENS: I don't think it would be a
6 good idea.

7 JUSTICE SCALIA: I thought we liked clear
8 lines in this. I mean, the police won't know what to
9 do.

10 MR. HEYTENS: And, Justice Scalia, that's
11 precisely why we think the break in custody exception,
12 though admittedly --

13 JUSTICE STEVENS: But carrying -- carrying
14 that analysis one step further, if you are just talking
15 about people who were inmates pursuant to a prior
16 conviction, why wouldn't the better rule be that if the
17 inmate is given the opportunity to say no, I don't want
18 a visitor today, and then if he accepts the visitor, you
19 would say he is no longer in custody? But if he says, I
20 don't want to, then he -- then he is in custody, then
21 you'd preserve the presumption.

22 MR. HEYTENS: Well, Justice Stevens, I
23 suspect that's what the police would do, if you ruled
24 against the State in this case. But I think the reason
25 that you shouldn't do that is you have to ask yourself

1 what is the benefit that such a rule is trying to
2 accomplish? The Court has made clear again --

3 JUSTICE STEVENS: Well, that -- such a rule
4 would accomplish the benefit when he really wants --
5 willing to talk, he would say: I would be glad to talk
6 to the officer.

7 MR. HEYTENS: Well, Justice Stevens --

8 JUSTICE STEVENS: If he doesn't want to, he
9 can just say no.

10 MR. HEYTENS: Justice Stevens, if he didn't
11 want to talk to the officer, there was nothing to
12 prevent him from invoking his Fifth Amendment right to
13 counsel.

14 JUSTICE STEVENS: But it's a little
15 different when the man first comes, says, will you talk
16 to the officer. He can very clearly say no. But if he
17 is in the room with two or three people around in a
18 different setting, then he is still in custody.

19 MR. HEYTENS: He is in custody, Justice
20 Stevens, but the premise of Miranda is that a person who
21 is given the Miranda warnings can choose to decide
22 whether to talk or not to talk. That's

23 JUSTICE ALITO: If the change --

24 JUSTICE SCALIA: You started to tell us why
25 this case was important. Would you -- would you finish

1 that? You said there were --

2 MR. HEYTENS: Certainly. The reason this
3 case is important, Justice Scalia, is that because under
4 the Maryland Court of Appeals decision, no police
5 officer, no corrections official, can approach any
6 prisoner without first attempting to determine if at
7 some point, to someone, at some place, during the period
8 of continuous incarceration, he has ever invoked his
9 Fifth Amendment right to counsel.

10 JUSTICE STEVENS: But that's not true, because
11 my hypothetical -- if you told him you don't have to talk
12 to the officer, and you could produce -- they could
13 question every -- everybody in jail all over the
14 country.

15 MR. HEYTENS: Well, they can't approach him
16 for questioning.

17 JUSTICE STEVENS: They can't force him to
18 attend the questioning. But if they give him an
19 opportunity to say, I -- I'm a prisoner, I just want to
20 stay in the prison population and not go to an
21 interrogation room, and if he is willing to go, you
22 could question him. You do not have the example of no
23 possibility.

24 MR. HEYTENS: Justice Stevens, the problem
25 in that situation, again, though, is that ultimately the

1 only basis for applying this presumption at all is if
2 it's appropriate to apply an irrebuttable presumption
3 that, even though we gave him the Miranda warnings and
4 even though he said, I am happy to talk to you, we
5 should presume that when he said that, that wasn't true.

6 JUSTICE SCALIA: I -- I thought that you
7 couldn't approach him. I thought that once he has invoked
8 his right to counsel, you can't approach him and say,
9 would you like to talk now? Right? Isn't that -- isn't
10 that the rule?

11 MR. HEYTENS: Well, under Rhode Island v.
12 Ennis, you are entitled to -- to update him on the
13 status of the interrogation, but you are not entitled to
14 resume custodial interrogation unless there has been a
15 break in custody or something has terminated Edwards.

16 JUSTICE SCALIA: Well, if -- if the
17 incarceration is a continuation of custodial custody, to
18 be redundant -- if it is a continuation of the custody,
19 then why wouldn't asking him whether he would like to see
20 visitors who want to ask him about a particular crime,
21 why wouldn't that be a violation of Edwards?

22 MR. HEYTENS: I think defendants may well
23 argue that it was --

24 JUSTICE SCALIA: I'm sure they would.

25 MR. HEYTENS: -- Justice Scalia, and --

1 JUSTICE SCALIA: So the -- the -- the scheme
2 that Justice Stevens proposes wouldn't work. You would
3 be violating Edwards when you asked him if he wanted to
4 see interrogators.

5 MR. HEYTENS: I think there would be a risk
6 of that happening. I think the other reason is --
7 again, this is a second-order prophylactic rule that the
8 Court has adopted solely in order to prevent people from
9 being coerced -- coerced into incriminating themselves
10 when they don't want to.

11 JUSTICE KENNEDY: You join the counsel for the
12 State in just not wanting to argue for a time rule,
13 which seems to me the only thing that would work.

14 MR. HEYTENS: We -- we think the break in
15 custody approach is the more appropriate one that will
16 lead to fewer line-drawing problems. It is certainly
17 open to --

18 JUSTICE KENNEDY: That's become apparent,
19 and I'm indicating that I think the time rule might have
20 some benefits.

21 MR. HEYTENS: Well, we certainly don't
22 oppose the Court adopting a time rule in the event that
23 it rejects our primary submission. In *United States v.*
24 *Green*, the government argued for a raw passage of time
25 approach, and we think, ultimately, this is the Court's

1 rule, it's a second-order prophylactic rule that is
2 designed to implement the Fifth Amendment, and it would
3 certainly be open to the Court if it thought necessary
4 to --

5 JUSTICE KENNEDY: But you don't give us
6 any -- any suggestions. As -- you know, the State opens
7 the bidding with 7 days.

8 (Laughter.)

9 JUSTICE KENNEDY: But I -- the Speedy Trial
10 Act, with many exceptions, requires that you go to trial
11 within 70 days. Would that be a benchmark?

12 MR. HEYTENS: Well, I think as a practical
13 matter, though, there are so -- as you point out,
14 Justice Kennedy, there are so many exceptions to that.
15 We think that would be far longer than would be
16 necessary or appropriate under the circumstances. I
17 mean --

18 JUSTICE GINSBURG: In this -- in this case
19 it's 2 years and 7 months. Why should the Court
20 take that -- a period of that length and say, well, we
21 are going to now rule for all future cases it should be,
22 say, 6 months.

23 MR. HEYTENS: Well, I think that is another
24 potential defect in adopting a pure passage of time
25 approach, though I think this case is particularly easy.

1 And I think the fact that the Maryland Court
2 of Appeals in this case concluded that 2 years and
3 7 months is covered by an anti-badgering rule just
4 shows at some point how far this has departed from the
5 original purposes of Edwards in the first place.

6 So, I do think -- I mean, the Court could
7 simply say this case is too long, though at that point
8 the Court isn't providing a great deal of guidance to
9 the lower courts that have to deal with these problems
10 on a day-to-day basis.

11 JUSTICE SCALIA: Or to the police who have
12 to decide whether they can interrogate or not.

13 MR. HEYTENS: Absolutely. The -- it would
14 also not provide very much guidance to the police to just
15 say 2 years and 7 months is too long. And that's, again,
16 why we think an approach that is either -- either
17 tethered to the break in custody, which as I think I
18 have said, we think better maps on to the concern that
19 motivated Edwards --

20 Let me address for a moment the catch and
21 release situation.

22 JUSTICE SOTOMAYOR: I don't want to
23 interrupt that, but there were two aspects to Edwards.
24 One was the coercion, but the other was the respect for
25 the advisement of counsel. And so the test that you are

1 proposing only addresses the coercion prong of it, not
2 the respect for the invocation of counsel.

3 MR. HEYTENS: The Court has mentioned
4 respecting the choice. I think, with respect,
5 ultimately though, that can't be the basis for the
6 Edwards rule. The Court has made clear repeatedly that
7 the Fifth Amendment prohibits only compelling someone to
8 be a witness against himself.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Ms. Davis.

11 ORAL ARGUMENT OF CELIA A. DAVIS
12 ON BEHALF OF THE RESPONDENT

13 MS. DAVIS: Mr. Chief Justice, and may it
14 please the Court:

15 Creating exceptions to the rule of Edwards
16 means a clear rule is lost. It introduces uncertainty
17 into the determinations of what constitutes custody and
18 what length of time might be adequate to excuse the
19 protection.

20 JUSTICE ALITO: This is an area where it's
21 very difficult to draw lines, at least I find it
22 difficult to draw lines. So let me start you out with
23 an extreme hypothetical, and I would like you tell me
24 whether you think the Edwards rule reaches this far.
25 And if it doesn't, then I would like you to tell me why

1 it doesn't and what limitations, if any, on the rule
2 you would be willing to defend as consistent with the
3 rationale for the rule.

4 Someone is taken into custody in Maryland in
5 1999 and questioned for joy-riding, released from
6 custody, and then in 2009 is taken into custody and
7 questioned for murder in Montana.

8 Now, at the time of the first questioning,
9 the -- the suspect invokes the Fifth Amendment right to
10 counsel. Now, does the Edwards rule apply to the second
11 interrogation?

12 MS. DAVIS: Yes, it does, Justice Alito.
13 The Edwards rule provides two ending points as it stands
14 right now.

15 JUSTICE ALITO: And you don't think that's a
16 ridiculous application of the rule? First of all, how
17 are the authorities in Montana possibly going to know
18 whether this person was interrogated previously on a
19 crime for which the person was never convicted in
20 Maryland, and that invoked the right not to be
21 questioned without -- without an attorney? And you
22 think there is badgering in that situation?

23 MS. DAVIS: Yes, Justice Alito, because
24 badgering in this context has become a term of art. It
25 is used in quotation marks in the Montejo opinion, and --

1 JUSTICE SCALIA: It doesn't mean badgering.

2 MS. DAVIS: It means an attempt by --

3 JUSTICE SCALIA: We ought to get another
4 term for it then.

5 (Laughter.)

6 JUSTICE SCALIA: Questioning?

7 MS. DAVIS: I think it means returning in an
8 attempt to get a suspect to change his or her mind. And
9 in this case, the suspect said, when first questioned, I
10 --

11 JUSTICE SCALIA: There was no attempt in
12 this hypothetical to get him to change his mind. They
13 didn't know he had made up his mind.

14 MS. DAVIS: Well, first of all, I didn't
15 answer the question properly. But the police, I think,
16 can run a rap sheet and find out from prior arrests if a
17 person has been taken into custody. And that would
18 alert a police officer that that person may have invoked
19 their right, and they should do more to find out. And
20 second --

21 JUSTICE ALITO: So, all right, they run the
22 rap sheet and they find out, if they do, that the person
23 was arrested 10 years earlier in Maryland and then
24 what?

25 MS. DAVIS: Contact --

1 JUSTICE ALITO: They try to find the detective
2 that questioned the -- the suspect in 1999 in Maryland?
3 And they find out that the detective is retired and is
4 now, you know, fishing down in the Florida Keys. They have
5 to track this person down and say, now do you recall
6 whether this person -- that's the rule you are arguing
7 for?

8 MS. DAVIS: Well, the police officer should
9 attempt to do so. But I understand that under certain
10 circumstances --

11 CHIEF JUSTICE ROBERTS: I'm sorry to
12 interrupt you -- interrupt there, and I will let you get
13 back to the answer. They should attempt to do so. The
14 rule here does not allow the police to approach that
15 person, a murder suspect. And you are saying he cannot
16 even be approached to see if he would waive his rights
17 10 years later because he was -- invoked the right in
18 connection with joy-riding?

19 MS. DAVIS: Yes. Because --

20 CHIEF JUSTICE ROBERTS: Okay.

21 MS. DAVIS: -- if they have invoked the
22 right, then the second approach means an attempt to -- to
23 persuade the person to change their mind about having
24 counsel. And where they haven't done so in the interim,
25 that amounts to coercion.

1 JUSTICE ALITO: Let me pose you my
2 hypothetical again, the same joy-riding questioning, and
3 then 40 years later, after the person has gotten a law
4 degree and become an entrepreneur and made \$20 million,
5 he's taken into custody and questioned by the Federal
6 authorities for stock fraud. Forever -- you know, this
7 right that was invoked back in adolescence continues
8 forever?

9 MS. DAVIS: It should. But let's look at
10 this case, Your Honor, because here this suspect was
11 questioned about the same allegations by detectives from
12 the same police department and while he was in custody
13 continuously. And under those circumstances Edwards and
14 the rationale of Edwards should apply strongly.

15 JUSTICE BREYER: Just in case -- just in
16 case we don't put -- we want to put a time limit on it,
17 which I know you don't want us to do, I'm now thinking
18 and I would like your comment, if you want, of a
19 combination of what Justice Alito said and what I said,
20 that is, there are two parts to the Edwards thing:
21 One is the lawyer part, and the other is the
22 incriminating self part.

23 Now, the lawyer part would be handled by
24 shaping a rule based on the rules of ethics, along the
25 lines I suggested. And that would give you a time. And

1 then the Miranda part could be handled by saying: But
2 the suspect retains the right to show that this
3 questioning is badgering without the question marks. In
4 other words, what they are really up to is to try to get
5 him to change his mind. Now, would that work?

6 MS. DAVIS: I -- I believe the Court could
7 adopt a type of rebuttable presumption under those
8 circumstances, but it shows the difficulty that courts
9 would have and police officers, too, in measuring
10 degrees -- degrees of coercion or degrees of custody. I
11 think the foregoing discussion has illustrated that
12 prisoners may be under different types of coercion in
13 their prison environment. And just --

14 JUSTICE SOTOMAYOR: Could I ask something?
15 What does that have to do with the hypothetical Justice
16 Alito gave you, which is the person is not in custody,
17 right?

18 MS. DAVIS: Well--

19 JUSTICE SOTOMAYOR: He is arrested for joy-
20 riding; he is let go; and you are saying that for 20,
21 40 years he is now immunized from being re-approached by
22 the police under the Edwards rule.

23 MS. DAVIS: Yes --

24 JUSTICE SOTOMAYOR: So you are advocating
25 that no break in custody ever stops the Edwards clock.

1 MS. DAVIS: Right. The problems with the
2 break in custody are a break will exist in almost every
3 case, and even in Edwards there was a change in
4 custody --

5 CHIEF JUSTICE ROBERTS: No, but not --

6 MS. DAVIS: -- between the police to a State
7 or county jail. So there is a change in -- a break in
8 custody right there. The prisoner was removed from the
9 police department and taken to the county jail.

10 CHIEF JUSTICE ROBERTS: It was 1 day. He
11 said he wanted the --

12 MS. DAVIS: Yes.

13 CHIEF JUSTICE ROBERTS: -- to remain silent
14 in the evening, and at 9:00 the next morning they were
15 back.

16 MS. DAVIS: But a -- a release from custody
17 does not signal that a person who has asked for counsel
18 has changed his or her mind.

19 JUSTICE SOTOMAYOR: But you are now -- you
20 are now accepting your adversary's point that somehow a
21 -- a change from a locked room in a prison to a
22 different locked room is a release from custody.

23 MS. DAVIS: No, I don't --

24 JUSTICE SOTOMAYOR: If we don't -- if we
25 don't accept that proposition, isn't there a clear break

1 when someone is let to go home? When someone is
2 released and permitted to go home?

3 MS. DAVIS: There is more of a break,
4 Justice Sotomayor, but it doesn't say anything about
5 that person's choice to proceed with counsel, and if
6 counsel is not provided, then the attorney is excluded
7 from the adversary system of criminal justice.

8 JUSTICE STEVENS: May I ask you about a
9 different approach? We are dealing in this case with
10 somebody who was constantly in custody but for a
11 different reason than during the pretrial situation.
12 He is in the general prison population. What -- what
13 would be wrong with the rule that said that a person in
14 that situation should be advised that somebody wants to
15 question him, and he has a right to say I do or do not
16 want to talk to the visitor, and if he is willing to
17 talk to the visitor, then you -- you have to give him new
18 Miranda warnings and you start from scratch?

19 But have the -- have the focus on whether he
20 is in custody at the time of the questioning, and say
21 that an inability -- an ability to refuse to go to the
22 interrogation room would be not treated as custody. It
23 would be treated as in the general prison population.
24 What would be wrong with such a rule?

25 MS. DAVIS: I don't think anything's wrong,

1 and I don't think a new rule is needed to cover that
2 situation, because it is conceivable that a person, even
3 in a prison environment, if they have control, say, if
4 they were to telephone out or to be free to refuse
5 visitors, might not be considered in custody.

6 But in this case, Michael Shatzer lived in a
7 prison environment. He was not free to shut his door --

8 JUSTICE STEVENS: But the record doesn't
9 tell us --

10 MS. DAVIS: -- and walk away.

11 JUSTICE STEVENS: -- whether he was given an
12 opportunity to say, I don't want any visitors today.

13 MS. DAVIS: No, it does not, but I think the
14 State has the burden to show the circumstances --

15 JUSTICE STEVENS: No, it's a question who
16 has the burden of showing he's in custody or is he free
17 to leave. If he has the burden, he didn't carry
18 the burden in this case.

19 MS. DAVIS: Well, the record does show that
20 he lived in a maximum security prison --

21 JUSTICE STEVENS: Correct.

22 MS. DAVIS: -- and does not show that he
23 was free to refuse.

24 JUSTICE STEVENS: But he could still live in
25 a maximum security prison and say, I don't want any

1 visitors.

2 MS. DAVIS: We don't know that he could have
3 refused under the record --

4 JUSTICE STEVENS: As far as the records
5 show.

6 MS. DAVIS: Right, we don't know that. But
7 Justice Stevens --

8 JUSTICE SCALIA: Do -- do we have to ask
9 him, you know, what visitors? I mean, is that the
10 question?

11 MS. DAVIS: Well, this shows --

12 JUSTICE SCALIA: Do you want to have any
13 visitors today?

14 MS. DAVIS: This shows --

15 JUSTICE SCALIA: He says, I don't know. Is
16 it my mother?

17 (Laughter.)

18 JUSTICE SCALIA: Or -- or do you ask him,
19 are you willing to speak to investigators about a crime?
20 And he says what crime? I mean, how specific does --
21 does the request for permission to have visitors have to
22 be --

23 MS. DAVIS: Well, I think --

24 JUSTICE SCALIA: -- for this rule to cut in?

25 MS. DAVIS: This discussion shows the

1 problems with allowing such a determination in the first
2 place. Our position is the definition of custody for
3 Miranda purposes must be the same for Edwards purposes,
4 for a prisoner lives within confined space under
5 constant surveillance and with no freedoms and limited
6 expectation of privacy.

7 CHIEF JUSTICE ROBERTS: So then I don't
8 understand why your answer to Justice Alito's
9 hypothetical was what it was, because that person
10 obviously was not in custody.

11 MS. DAVIS: It -- all I'm saying is that if
12 we were to adopt the language that this Court in Montejo
13 utilized, if a person is in control -- if a person is not
14 in custody, they are in control and can shut the door or
15 walk away, if that's an operable definition, then it
16 did not apply in this case, because Michael Shatzer did
17 not have such freedom of --

18 JUSTICE BREYER: Well, if you're --

19 MS. DAVIS: -- ability --

20 JUSTICE BREYER: If you are going to use the
21 Edwards, which I think is a good idea, as the counsel
22 part, which I think is a good starting place, you and
23 every other member of the bar deals with this problem
24 every day of the week. Not every day of the week, but
25 very often. You know somebody's represented in a case,

1 and you know you are supposed to talk to the lawyer. But
2 eventually time passes, and then you are probably free to
3 talk to him, because the whole thing's gone away.

4 Now, that's a pretty vague rule. You could
5 make it more specific, but the -- the bar has lived with
6 that kind of situation, I guess, for years.

7 MS. DAVIS: Well --

8 JUSTICE BREYER: So why can't we here?

9 MS. DAVIS: We -- I think we should. The
10 police officers have lived with the Edwards decision
11 which says you --

12 JUSTICE BREYER: No, no, that's not what I
13 mean. I mean that the obligation to deal with counsel
14 you don't have, after enough time passes, that it's no
15 longer reasonable to think that that individual either
16 has or wants counsel.

17 MS. DAVIS: Well, in this case, there is no
18 reason to think that this suspect changed his mind.
19 When first given his Miranda rights --

20 JUSTICE SCALIA: Excuse me, what is the
21 ethical rule about counsel? I thought if -- if there's
22 counsel in a particular case and you want to approach
23 the client about that case, you can't do it without
24 going to counsel.

25 MS. DAVIS: I think, though, there's a --

1 JUSTICE SCALIA: But if there is an
2 entirely different case, there is totally different
3 litigation, you can't approach the fellow without going
4 back to the counsel whom he hired for a different case?
5 I don't think that's the ethical rule. But that's the
6 effect of Edwards. Even if it's a different crime, you
7 have to go back to the counsel whom he hired for a
8 different prosecution? That bears no relationship to
9 the ethical rules of -- of counsel.

10 MS. DAVIS: Well, this Court could adopt a
11 rule that the Edwards protection -- an alternative that
12 was raised in United States v. Green, that the Edwards
13 protection extends to the same case for which the police
14 initially questioned the suspect and for which he asked
15 for counsel. That's one alternative, and I submit that
16 would be more clear than --

17 JUSTICE GINSBURG: Does it make a
18 difference? Does it make a difference if -- we can
19 limit it to the same case? But here, the reason that
20 the police came back is that they had additional
21 evidence, and so they wanted to ask him -- confront him
22 with the new evidence. It's not the same situation that
23 it was when he was initially questioned.

24 MS. DAVIS: Well, I think from the suspect's
25 point of view, it is the same situation. He was in the

1 same position facing the police in 2003 as he was in
2 2006, in that he was accused of committing crime, and in
3 the interim he had no access to counsel. And I think that
4 this is significant in this case, because it's not clear
5 that even if he had been able to call out of the prison he
6 would have had representation, because the Public
7 Defender's Office was under no constitutional or
8 statutory duty to provide counsel for a person who's not
9 presently being questioned and who has not yet been
10 charged.

11 JUSTICE SCALIA: What if -- what if we
12 limited Edwards to the same crime? That would -- that
13 would really make it much easier for the police to --

14 MS. DAVIS: I agree.

15 JUSTICE SCALIA: -- to know whether this
16 person in fact invoked the right to counsel.

17 MS. DAVIS: It would be easier, yes; and it
18 would apply to this case because it was the same crime.

19 JUSTICE SCALIA: So that would --

20 JUSTICE KENNEDY: Would that require us to
21 overrule Roberson?

22 MS. DAVIS: Well, it does present some
23 tensions with Roberson. However, this case, since it
24 is limited to the same crime, doesn't extend as far as
25 Roberson does. And I would like to answer Justice

1 Stevens's question.

2 In this case, the suspect was told -- he was
3 advised of his rights and said, "I have the right to
4 talk to a lawyer and have him present with me while I'm
5 being questioned. If I cannot afford to hire a lawyer,
6 one will be appointed to represent -- represent me before
7 any questioning, if I wish."

8 Those rights were never fulfilled in the 2
9 years and 7 months that passed.

10 CHIEF JUSTICE ROBERTS: Well, but the
11 Miranda Rights do not require the police to provide
12 counsel. They have to -- mean you have to stop
13 questioning --

14 MS. DAVIS: Yes.

15 CHIEF JUSTICE ROBERTS: -- until the person has
16 right to counsel.

17 MS. DAVIS: They have to.

18 CHIEF JUSTICE ROBERTS: And the one thing
19 this person knew from the prior Miranda situation -- was
20 it 2003?

21 MS. DAVIS: Yes.

22 CHIEF JUSTICE ROBERTS: Is that, if he said,
23 I don't want to talk without counsel, the one thing he
24 knew is the police would stop questioning, because
25 that's what they did.

1 MS. DAVIS: But that's not the same, Chief
2 Justice Roberts, as having the counsel present during
3 questioning.

4 CHIEF JUSTICE ROBERTS: Well, Miranda
5 doesn't require --

6 MS. DAVIS: If the Miranda advice --

7 CHIEF JUSTICE ROBERTS: Go ahead.

8 MS. DAVIS: -- says that you have a right
9 to have a counsel present during questioning, and all
10 that advice means, after time, is we will stop
11 questioning you, then the right has been diminished over
12 time.

13 JUSTICE ALITO: Why is there a greater risk
14 of badgering when the questioning is about a different
15 offense?

16 MS. DAVIS: I think the risk is the same.
17 The risk --

18 JUSTICE ALITO: I thought you just said we
19 could -- you were suggesting an -- as an alternative,
20 that -- that Edwards be limited to situations where the
21 questioning is about the same offense.

22 MS. DAVIS: Well, that's possible. It's --
23 well, the rationale that was extended in the -- in the
24 Green case is that, if questioning is about a different
25 time, the perception, from the suspect's point of view,

1 that the police are badgering him would be less.

2 JUSTICE ALITO: And this isn't fanciful.

3 We just were asked to take a case involving a statute of
4 limitations issue for a murder that was committed like
5 30 years ago. And suppose somebody is questioned
6 by State authorities for a murder and taken into custody
7 and then released, and then, 30 years later, taken into
8 custody by Federal authorities and questioned for a civil
9 rights violation, based on the same underlying
10 transaction. You would say the Edwards rule applies in
11 that situation?

12 MS. DAVIS: Yes, it does. Now, a police
13 officer in that situation really has three
14 alternatives. One, they could wait until counsel was
15 present, to be sure of obtaining a statement admissible
16 in the State's case-in-chief.

17 Number 2, they could take a chance, as
18 happened in this case, where Detective Hoover never
19 opened the case file and didn't know that the suspect had
20 ever invoked his rights, take a statement anyway and run
21 the risk that it may have to be excluded. Or, three --

22 JUSTICE SCALIA: Well, you are being very
23 unrealistic. Have you ever known defense counsel who
24 says, oh, yes, do -- do submit to the interrogation? I
25 mean -- you know, once they are lawyered up, they are

1 not going to talk. You know that.

2 MS. DAVIS: Yes. I know that, but that --
3 this Court, in Miranda, was concerned with the limits
4 that society must impose, consistent with the
5 Constitution, in prosecuting crimes, and I think Edwards
6 strikes the balance between the individual faced -- in
7 captivity questioned by interrogators and the State.

8 CHIEF JUSTICE ROBERTS: Well, you say, "in
9 captivity," but you think the rule applies, whether they
10 are in captivity or not. In -- in Justice Alito's
11 hypothetical, the person was free for 40 years, so
12 captivity is not a limitation on your -- your proposed
13 rule.

14 MS. DAVIS: Well, a person is going to be in
15 custody in each Edwards scenario at the time they are
16 questioned, so the question is the intervening time
17 period. I want to say --

18 JUSTICE STEVENS: Well, you agree that, if
19 he is questioned and he is not in custody when he is
20 being questioned -- if you stop him on the street or is in
21 his living room, they can question him there.

22 MS. DAVIS: Yes, because Edwards only
23 applies to custodial interrogation. And, under these
24 circumstances, Edwards strikes a balance in a familiar
25 and predictable way. The facts of these case -- this

1 case does not -- does not --

2 JUSTICE SOTOMAYOR: Counsel, we --

3 MS. DAVIS: -- permit an exception.

4 JUSTICE SOTOMAYOR: We don't have a case.

5 None of the cases in this area, where we have applied

6 Edwards, has dealt with a situation with -- where a

7 prisoner has been released from custody, in any sense of

8 that word, i.e., sent home.

9 In all of the three situations that I am
10 aware of, in which the Edwards rule has applied, the
11 prisoner has stayed in jail -- some form of jail.

12 Correct?

13 MS. DAVIS: Yes, some form of jail. But
14 there is -- you know, Chief Justice Roberts referred to
15 the difference between the -- a police station and a
16 prison. There are also pretrial detention centers,
17 and there is a range of custodial scenarios that -- that
18 police officers might encounter. And advancing an
19 exception to the rule for a break in custody presents
20 practical problems.

21 JUSTICE SOTOMAYOR: Well --

22 CHIEF JUSTICE ROBERTS: Well, I suppose, if
23 they are in a pretrial detention center, they know they
24 are still being looked at for the crime as to which they
25 have invoked the Miranda warnings.

1 MS. DAVIS: Yes.

2 CHIEF JUSTICE ROBERTS: So you wouldn't call
3 that -- and I don't understand the other side to argue
4 that that is -- there's a break in custody there.

5 MS. DAVIS: But a transfer within -- look, if
6 it doesn't, then -- then it doesn't, but there should
7 not be a break there. Otherwise, there would have been
8 a break in Edwards and in Minnick as well.

9 CHIEF JUSTICE ROBERTS: Oh, no, no. I agree
10 with you. There shouldn't be a break there, but here
11 the situation is quite different. There is a break
12 between jail for questioning and prison for 15 years,
13 or whatever your sentence is.

14 MS. DAVIS: But, from the suspect's point of
15 view, the only thing that changed is the State agents
16 who temporarily held him in a room for questioning. He
17 was still under custody.

18 JUSTICE STEVENS: Yes, but -- but wouldn't
19 it make sense to treat the -- the change from a pretrial
20 detention to a general prison population as, by itself,
21 a -- a no longer custody, provided he is told that he
22 doesn't have to talk to people who want to pay him a
23 visit. He can say -- they could have a rule, say
24 that the prisoner does not have to talk to everybody who
25 comes -- comes around. And then you could treat that as

1 the functional equivalent of not being in custody.

2 Wouldn't that be a sensible rule?

3 MS. DAVIS: It's -- it's one possibility,
4 but I don't think it's a workable rule. The
5 circumstances of custody within an institution can
6 change dramatically, and --

7 JUSTICE STEVENS: They can, but, if you say,
8 as a condition to -- to questioning, he just has to know
9 that he doesn't have to see visitors he doesn't want to
10 see, which doesn't seem, to me, a very hard rule to
11 administer.

12 MS. DAVIS: It doesn't, Justice Stevens, but
13 I think the problem is it's a hard rule for police
14 officers to know. If they go to an institution to
15 question someone, how do they know if that rule is
16 applicable to that prison? They --

17 JUSTICE STEVENS: Well --

18 JUSTICE SCALIA: But doesn't -- doesn't the
19 beginning of the Miranda warning tell him that he
20 doesn't have to --

21 JUSTICE STEVENS: They visit the prisoner
22 there and they tell him that he doesn't -- and he shows
23 up, and they -- that's the end of it.

24 MS. DAVIS: I still think it presents
25 difficulties.

1 JUSTICE SCALIA: I --

2 JUSTICE SOTOMAYOR: Could I have a
3 clarification of the facts for a moment?

4 In 2003, he was in one State facility, a
5 sentenced prisoner. Correct?

6 MS. DAVIS: Correct.

7 JUSTICE SOTOMAYOR: And he was just moved
8 from one State prison to another. He wasn't in pretrial
9 detention in either of these time frames. Correct?

10 MS. DAVIS: That's correct.

11 JUSTICE SOTOMAYOR: We are just talking
12 about a change in facility, not in status?

13 MS. DAVIS: Exactly. And, Justice
14 Sotomayor, I wanted to answer your question about the
15 time period, where the circuit courts have sanctioned a
16 break in custody. One is cited in the Respondent's
17 brief, at page 27, is Holman versus Kemna, and a 1-day
18 break was -- was authorized in that case. That's a very
19 short time period.

20 JUSTICE SOTOMAYOR: What were the
21 circumstances? I don't recall the case.

22 MS. DAVIS: Well, that was a case that is
23 not entirely analogous, but it's close, where the
24 question was whether a statement was tainted by an
25 Edwards' violation. It also involved the Sixth

1 Amendment, I believe. So --

2 JUSTICE SOTOMAYOR: Was the prisoner in a
3 prison the entire 24 hours? Or was the individual
4 released home, that sort of --

5 MS. DAVIS: I think it was a release home.
6 If I recall correctly, I would have to double-check, but
7 there was a 1-day period that the Court recognized.

8 JUSTICE SCALIA: Do I misunderstand Miranda
9 warnings? Isn't he told, at the very outset of the
10 Miranda warning, that he doesn't have to talk, if he
11 doesn't want to talk?

12 Is that -- is that any less strong than --
13 than asking him whether he wants to receive visitors, in
14 general? Or, in particular, a visitor who wants to ask
15 him about a particular crime?

16 I mean, he is -- he is told that with the
17 Miranda warning, which he is given the second time. If
18 you don't want to talk, you don't have to. If you want
19 a lawyer to be present, you are entitled to a lawyer,
20 or -- and -- and or else we terminate.

21 I don't know why that isn't enough.

22 MS. DAVIS: It isn't enough, Justice Scalia,
23 because -- and I think this came out of Arizona v.
24 Roberson. Merely repeating advice, when the right to
25 counsel has not been fulfilled, is not enough because

1 the person, over time, might lose hope of ever seeing an
2 attorney, and, certainly, a prisoner has less means than
3 someone on the street to hire an attorney.

4 JUSTICE SCALIA: He doesn't care whether he
5 gets an attorney, so long as he doesn't have to talk to
6 investigators. That's the issue, whether he must talk
7 to these investigators. And he is told, right up front,
8 you don't have to do it, and if -- if you want an
9 attorney for it, we will get you an attorney.
10 Otherwise, we -- we will terminate the interview.

11 MS. DAVIS: But, if he has asked for an
12 attorney in the past and, over 2 years and 7
13 months, has never seen the right fulfilled, I think that
14 the -- that the pressure to cooperate with interrogators
15 has increased.

16 CHIEF JUSTICE ROBERTS: That's a -- isn't
17 that a Sixth Amendment question? That's not a Miranda
18 question, if he has not been provided a lawyer.

19 MS. DAVIS: Well, in this case, Chief
20 Justice Roberts, the Sixth Amendment never attached --

21 CHIEF JUSTICE ROBERTS: Right.

22 MS. DAVIS: -- because this suspect had never
23 been charged.

24 CHIEF JUSTICE ROBERTS: Right. And
25 it's the Fifth Amendment we are worried about, and that

1 is directed to coercion --

2 MS. DAVIS: Yes.

3 CHIEF JUSTICE ROBERTS: -- and that is
4 addressed, if you stop questioning him. You don't even
5 start questioning him. He says, look, I don't want to
6 talk without a lawyer.

7 MS. DAVIS: But I think prisoners --

8 CHIEF JUSTICE ROBERTS: Talking stopped, as
9 it did the very -- the first time he was approached.

10 MS. DAVIS: It did, but for a prisoner in
11 custody questioned about the same offense, the coercive
12 pressures that were present in Miranda are present for
13 him as well. And that's why we think that the core
14 holding, the core rationale, of Edwards applies very
15 strongly in this case.

16 JUSTICE GINSBURG: Why wouldn't he think, I
17 invoked my right to remain silent without a lawyer two
18 years and 7 months ago, I will do it again; they
19 will have to stop questioning? Why wouldn't that be the
20 most likely mind-set of the defendant? He knew that it
21 worked the first time. Why should it not work the
22 second time?

23 MS. DAVIS: I think it -- it's possible.
24 But in this case, where the right to counsel went
25 unfulfilled for that period of time, a person might lose

1 hope that that advice that he asked for help would ever
2 be fulfilled.

3 CHIEF JUSTICE ROBERTS: So if he says -- I'm
4 sorry --

5 MS. DAVIS: Go ahead.

6 CHIEF JUSTICE ROBERTS: Are you done
7 answering?

8 So if he said -- instead of I want to talk to
9 a lawyer, if he said, I want to remain silent, your case
10 comes out differently? He doesn't say anything about a
11 lawyer. He says, look, I don't want to talk to you.

12 MS. DAVIS: I think it would come out the
13 same way -- well, in --

14 CHIEF JUSTICE ROBERTS: Well, but all your
15 arguments about he hasn't been provided a lawyer, there
16 is an ethical obligation to provide a lawyer -- those --
17 those are off the table.

18 MS. DAVIS: Well, what's different is -- and
19 this Court, I think, made it clear in Michigan v. Mosley:
20 Asking for help from an attorney is materially different
21 than saying, I choose to remain silent. And the reason is
22 a person who invokes the right to silence while
23 questioned in custody is in control and chooses to stop
24 the questioning --

25 JUSTICE SCALIA: He doesn't ask for an

1 attorney. He just says, I don't want to talk without an
2 attorney. That's what he says. He doesn't demand an
3 attorney. He says, I don't want to talk without an
4 attorney. And the investigators say, okay, in that
5 case, we won't talk to you.

6 MS. DAVIS: Well, and they treated it as a
7 clear invocation of the right to counsel by documenting
8 it in two places and putting that in the case file.

9 JUSTICE SCALIA: The right to counsel in the
10 course of interrogation.

11 MS. DAVIS: Yes. I -- I think what he said
12 was, "I won't speak to you without an attorney" -- is the
13 same as asking for an attorney.

14 JUSTICE ALITO: I can think of -- I can
15 think of at least one situation in which the Court has
16 held that there is a time limit in which something has
17 to be done in order to comply with a constitutional
18 requirement. If we were to choose a time period here,
19 what would -- what would you propose?

20 MS. DAVIS: Oh, anything over 2 years and
21 7 months.

22 (Laughter.)

23 JUSTICE ALITO: What would be --

24 MS. DAVIS: That still doesn't solve the
25 problem --

1 JUSTICE ALITO: What would be a serious --

2 (Laughter.)

3 JUSTICE ALITO: what would be a serious answer
4 to that question?

5 MS. DAVIS: We -- we've argued that Edwards
6 continues to the end, and the reason is --

7 JUSTICE ALITO: All or nothing.

8 MS. DAVIS: It's all or nothing, Justice
9 Alito, because -- because this Court has already said in
10 Edwards, we will allow the police to come back if the
11 suspect changes his or her mind or if an attorney is
12 present. And those two -- those two alternatives are
13 available every day and they are easy for the police to
14 ascertain. And that's --

15 JUSTICE SOTOMAYOR: Your adversary says that
16 they -- he can't change his mind. It has to be a
17 spontaneous, you know -- somehow they have to be in a room
18 together that wasn't planned and he has to come up and
19 say, I am confessing out of the kindness of my heart.
20 The police can't even approach him, according to you,
21 once he has invoked counsel, to ask him whether he wants
22 to change his mind.

23 MS. DAVIS: That's right. That --

24 JUSTICE SOTOMAYOR: That's the point.

25 MS. DAVIS: That is the badgering. That is

1 the specter of coercion that is inconsistent with the
2 constitutional right related to Miranda to have counsel
3 present. And that is the reason why an issue --

4 JUSTICE SOTOMAYOR: So there is no
5 termination point, really?

6 MS. DAVIS: It's not confined to time,
7 Justice Sotomayor, but the termination point is,
8 especially for a prisoner -- it's easy for the prisoner to
9 contact the police. Just tell the jail guard that you'd
10 like to talk to the police about that investigation.
11 They'll make arrangements quickly for that to happen,
12 I'm quite sure, or counsel could be present and
13 questioning can proceed in that instance, and those are
14 the reasons I would ask this Court to affirm the
15 judgment of the Court of Appeals of Maryland.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 Ms. Davis.

19 General Gansler, you have 2 minutes
20 remaining.

21 REBUTTAL ARGUMENT OF GEN. DOUGLAS F. GANSLER
22 ON BEHALF OF THE PETITIONER

23 MR. GANSLER: In response to Justice
24 Breyer's question, the ethics rules do not apply to the
25 police, only to lawyers, and I think Justice Scalia hit

1 it right, exactly right, where this -- he's actually --
2 in this case, he is not represented at all. He's in
3 custody because his case has been concluded.

4 JUSTICE BREYER: My thought is: Can you use
5 the rule for lawyers, which has worked, to help shape a
6 rule that would work here?

7 MR. GANSLER: Yes, and I'll get to that in
8 one second. And I agree -- and that's exactly right.
9 The visitors in jail theory that Justice Stevens brought
10 up -- the defendant could say, I told them I don't want
11 to talk to any visitors, no matter what. I don't want
12 to talk to any visitors. They dragged me up there, made
13 me go into this room and answer questions. Then you
14 have -- while Edwards, in our view, would have already
15 been terminated, you have still the argument that my --
16 my Miranda warnings were not waived voluntarily and
17 freely, and moreover, I was denied due process.

18 In terms of the time limits of the cases, in
19 the State of Maine -- State v. Alley was 6 hours, and the
20 following day -- Dunkins v. Thigpen in the Eleventh
21 Circuit was the next day, following a break in custody.
22 Now, in those cases -- the guy basically went home in
23 those scenarios.

24 The confusion seems to be, in a lot of the
25 questions, regarding what is custody? We will not -- we

1 don't argue -- we are talking about interrogational
2 police custody, which is different than being in jail,
3 lying on your cot, watching cable television. We --
4 this is -- in our scenario, the 3 days that now
5 exist -- whereas no one questions in the Roberson,
6 Minnick, and Edwards cases, those 3 days were
7 pretrial police custody situations. There is no break
8 in custody --

9 JUSTICE SOTOMAYOR: But they -- but there was
10 no difference in those cases, as I understand it. Each of
11 the prisoners was in a particular room being questioned,
12 and then he was released into a more general room later.

13 MR. GANSLER: My understanding of this case
14 --

15 JUSTICE SOTOMAYOR: And brought back.

16 MR. GANSLER: My understanding of those cases,
17 they were in the -- sort of "the box," as we call it, and
18 then they were put back into a holding cell, a cell, and
19 then brought back to the box. Very different --

20 JUSTICE SOTOMAYOR: What's difference
21 between that and a holding cell, a maintenance room, and
22 being put back into general prison to go sleep?

23 MR. GANSLER: The latter -- the latter
24 scenario is very different, because that's where they
25 live. That's their daily routine. Through no fault of

1 the state, they are habitual offenders. They live in
2 the general population of a jail. In this case it is
3 medium security, not maximum security, and they were put
4 -- there were people around. They have recess, they
5 have television, they have a cafeteria, and so forth.

6 Finally, going to Justice Alito's question
7 regarding the time limit, where you do it, this Court
8 has in County of Riverside -- obviously, there's
9 48 hours from presentment, is the time.

10 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
11 The case is submitted.

12 (Whereupon, at 11:04 a.m., the case in the
13 above-entitled matter was submitted.)

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23
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| A | | | | |
|--|---|--|---|--|
| ability 39:21 42:19 | 38:20 advice 47:6,10 54:24 57:1 | 21:20 amounts 35:25 | arbitrary 15:13 15:14 16:11 22:12 | assumed 5:16 atmosphere 7:7 |
| able 15:20 20:18 20:19 45:5 | advised 39:14 46:3 | analogous 53:23 | area 12:22 32:20 50:5 | attached 55:20 |
| above-entitled 1:11 63:13 | advisement 31:25 | analysis 12:7 13:18 25:14 | argue 5:9 10:9 12:19 13:20 28:23 29:12 51:3 62:1 | attempt 34:2,8 34:11 35:9,13 35:22 |
| Absolutely 7:3 31:13 | advocating 37:24 | answer 24:5 34:15 35:13 42:8 45:25 53:14 59:3 61:13 | argued 29:24 59:5 | attempting 27:6 |
| absurd 19:25 | affirm 60:14 | anti-badgering 22:2 31:3 | arguing 12:24 17:2 35:6 | attend 27:18 |
| abuse 19:12 | afford 46:5 | anything's 39:25 | argument 1:12 2:2,10 3:4,7 12:14 14:23 21:18 22:4 32:11 60:21 61:15 | attorney 1:15 23:10 33:21 39:6 55:2,3,5,9 55:9,12 57:20 58:1,2,3,4,12 58:13 59:11 |
| accept 15:7 38:25 | agents 51:15 | anyway 48:20 | arguments 57:15 | authorities 18:20 33:17 36:6 48:6 48:8 |
| accepting 38:20 | ago 18:24 48:5 56:18 | apparent 29:18 | Arizona 21:25 22:1 54:23 | authorized 53:18 |
| accepts 25:18 | agree 45:14 49:18 51:9 61:8 | appeals 3:12,12 3:21 27:4 31:2 60:15 | arrangements 60:11 | available 59:13 |
| access 8:25 45:3 | ahead 47:7 57:5 | APPEARANC... 1:14 | arrested 13:16 34:23 37:19 | average 8:25 |
| accomplish 26:2 26:4 | albeit 5:16 | applicable 52:16 | arrests 34:16 | aware 21:11 50:10 |
| accused 45:2 | alert 34:18 | application 33:16 | art 33:24 | a.m 1:13 3:2 63:12 |
| accustomed 17:21 | Alito 24:16 25:1 26:23 32:20 33:12,15,23 34:21 35:1 36:1 36:19 37:16 47:13,18 48:2 58:14,23 59:1,3 59:7,9 | applied 50:5,10 | ascertain 11:21 59:14 | |
| Act 30:10 | Alito's 42:8 49:10 63:6 | applies 48:10 49:9,23 56:14 | asked 9:7,8 12:7 29:3 38:17 44:14 48:3 55:11 57:1 | B |
| activity 19:7 | allegations 36:11 | apply 24:21 28:2 33:10 36:14 42:16 45:18 60:24 | asking 9:16 10:23 28:19 54:13 57:20 58:13 | back 4:12 6:22 13:6,25 20:4 23:19 35:13 36:7 38:15 44:4 44:7,20 59:10 62:15,18,19,22 |
| additional 44:20 | Alley 61:19 | applying 28:1 | asks 11:1 | badgered 22:4 |
| address 31:20 | allow 35:14 59:10 | appointed 46:6 | aspects 31:23 | badgering 6:2 24:23 33:22,24 34:1 37:3 47:14 48:1 59:25 |
| addressed 56:4 | allowed 7:9 | appreciate 22:24 | assistance 23:4 | balance 49:6,24 |
| addresses 32:1 | allowing 42:1 | approach 23:2 27:5,15 28:7,8 29:15,25 30:25 31:16 35:14,22 39:9 43:22 44:3 59:20 | Assistant 1:17 1:21 | Baltimore 1:16 1:22 |
| administer 52:11 | alternative 44:11 44:15 47:19 | approached 35:16 56:9 | assume 14:15 18:4 | bar 42:23 43:5 |
| admissible 48:15 | alternatives 48:14 59:12 | appropriate 28:2 29:15 30:16 | | based 36:24 48:9 |
| admittedly 25:12 | Amendment 22:5 23:3,4,7,12,21 24:7 26:12 27:9 30:2 32:7 33:9 54:1 55:17,20 55:25 | approximately 24:13 | | basically 61:22 |
| adolescence 36:7 | amicus 1:19 2:6 | | | basis 28:1 31:10 32:5 |
| adopt 12:23 16:9 37:7 42:12 44:10 | | | | |
| adopted 18:8 29:8 | | | | |
| adopting 29:22 30:24 | | | | |
| adopts 3:24 | | | | |
| advancing 50:18 | | | | |
| adversary 39:7 59:15 | | | | |
| adversary's | | | | |

| | | | | |
|--|--|---|--|---|
| <p>bears 44:8 beginning 52:19 behalf 1:16,19 1:22 2:4,6,9,12 3:8 21:19 32:12 60:22 believe 22:19 37:6 54:1 benchmark 30:11 benefit 26:1,4 benefits 29:20 best 22:17 better 12:24 25:16 31:18 bidding 30:7 big 7:18 BLAINE 1:6 Blankenship 18:3 blocking 7:9 box 62:17,19 breach 22:18 break 3:22 4:2 4:15 5:2,14,16 5:21 6:11,25 12:15,19,25 13:1 15:10,15 15:19 16:2 17:14 18:23 19:22 20:22,24 21:2 22:11 25:11 28:15 29:14 31:17 37:25 38:2,2,7 38:25 39:3 50:19 51:4,7,8 51:10,11 53:16 53:18 61:21 62:7 breaks 4:22 Breyer 15:1 22:6 23:1,15,23 24:3 36:15 42:18,20 43:8,12 61:4</p> | <p>Breyer's 60:24 brief 6:5 17:24 53:17 bright 3:23 4:14 9:15 bright-line 12:21 12:22,23,25 bring 4:17,19 brought 4:11 17:20 61:9 62:15,19 Burbine 23:8 burden 40:14,16 40:17,18</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 cable 62:3 cafeteria 7:5,8 63:5 California 18:18 call 45:5 51:2 62:17 called 6:18,18 7:24 calls 13:9 can't 14:7,7 15:1 captive 13:5 captivity 49:7,9 49:10,12 care 55:4 carry 40:17 carrying 25:13 25:13 case 3:4,11,12 3:25 5:12,15 6:17 8:10,12,14 9:22,24 10:22 10:24,25 12:19 13:11,23 17:5,7 17:8,17,18 18:3 18:19 19:12,14 22:3 23:3,9,9 24:12 25:24 26:25 27:3</p> | <p>30:18,25 31:2,7 34:9 36:10,15 36:16 38:3 39:9 40:6,18 42:16 42:25 43:17,22 43:23 44:2,4,13 44:19 45:4,18 45:23 46:2 47:24 48:3,18 48:19 49:25 50:1,4 53:18,21 53:22 55:19 56:15,24 57:9 58:5,8 61:2,3 62:13 63:2,11 63:12 caselaw 5:19 cases 4:6 14:11 15:24 16:7,20 20:4 21:6 30:21 50:5 61:18,22 62:6,10,16 case-in-chief 48:16 catch 4:21,24 13:2,3 31:20 category 4:6 CELIA 1:21 2:8 32:11 cell 6:8 13:7,17 62:18,18,21 center 50:23 centers 50:16 certain 35:9 certainly 14:12 24:25 27:2 29:16,21 30:3 55:2 chairs 6:20 chance 48:17 change 24:17 26:23 34:8,12 35:23 37:5 38:3 38:7,21 51:19 52:6 53:12</p> | <p>59:16,22 changed 38:18 43:18 51:15 changes 59:11 charged 45:10 55:23 Chief 3:3,9 4:1 4:16 14:14,17 14:20 19:15 21:16,22 32:9 32:13 35:11,20 38:5,10,13 42:7 46:10,15,18,22 47:1,4,7 49:8 50:14,22 51:2,9 55:16,19,21,24 56:3,8 57:3,6 57:14 60:17 63:10 choice 13:10 32:4 39:5 choose 26:21 57:21 58:18 chooses 57:23 chose 12:10 circuit 20:22 21:2 53:15 61:21 circuits 5:13 15:19 21:5 circumstances 7:22 24:22 30:16 35:10 36:13 37:8 40:14 49:24 52:5 53:21 cited 53:16 civil 22:14,23 48:8 clarification 53:3 clear 20:13 21:24 23:19 25:7 26:2 32:6,16 38:25 44:16 45:4 57:19 58:7 cleared 7:7</p> | <p>clearly 6:20 26:16 client 22:15 43:23 clock 37:25 close 53:23 codes 22:14 coerced 29:9,9 coercion 6:6 31:24 32:1 35:25 37:10,12 56:1 60:1 coercive 12:17 56:11 cold 20:4 colorable 22:3 Columbia 17:8 combination 36:19 come 4:7 7:9 57:12 59:10,18 comes 6:8 13:24 26:15 51:25,25 57:10 coming 7:4 20:4 comment 22:9 36:18 comments 22:25 committed 48:4 committing 45:2 compelling 32:7 completely 19:12 comply 58:17 comported 8:15 compulsory 23:5 conceivable 40:2 concern 24:23 31:18 concerned 49:3 concluded 31:2 61:3 condition 52:8 confer 14:8 confessing 59:19 confession 3:16</p> |
|--|--|---|--|---|

| | | | | |
|--|--|---|--|---|
| <p>5:9 confined 42:4 60:6 confront 44:21 confusion 61:24 conjecture 9:15 connection 35:18 consider 6:10 considerable 15:25 considered 40:5 consistent 33:2 49:4 constant 42:5 constantly 39:10 constitutes 32:17 Constitution 49:5 constitutional 45:7 58:17 60:2 consult 8:3,7 12:5 contact 7:16,21 34:25 60:9 context 6:21 7:12 10:8 24:7,9 33:24 continuation 28:17,18 continues 36:7 59:6 continuous 27:8 continuously 36:13 control 40:3 42:13,14 57:23 convicted 33:19 conviction 17:15 25:16 cooperate 17:12 17:13 55:14 core 56:13,14 correct 11:3,6,7 12:2,17 40:21 50:12 53:5,6,9</p> | <p>53:10 correctional 6:15 7:4 14:12 corrections 27:5 correctly 54:6 cot 62:3 counsel 3:20 7:18 8:3 9:3 10:12,13 11:14 18:24 19:1 21:1 21:16 22:9,21 23:4,16,16,18 23:21,21,24,25 24:4,7 26:13 27:9 28:8 29:11 31:25 32:2,9 33:10 35:24 38:17 39:5,6 42:21 43:13,16 43:21,22,24 44:4,7,9,15 45:3,8,16 46:12 46:16,23 47:2,9 48:14,23 50:2 54:25 56:24 58:7,9 59:21 60:2,12 63:10 countless 6:9 country 24:14 27:14 county 38:7,9 63:8 course 58:10 court 1:1,12 3:10 3:11,12,14,17 3:21,21,24,25 4:7 5:7,15,25 7:11 12:20,21 12:23 16:10,21 17:6 18:4 20:22 21:23,24 23:6 23:11,19 25:1 26:2 27:4 29:8 29:22 30:3,19 31:1,6,8 32:3,6</p> | <p>32:14 37:6 42:12 44:10 49:3 54:7 57:19 58:15 59:9 60:14,15 63:7 courts 6:13,14 7:11,11 21:2 31:9 37:8 53:15 Court's 11:18 29:25 cover 40:1 covered 31:3 covering 18:14 covers 23:25 created 3:25 creates 19:21 Creating 32:15 crime 18:15 19:7 19:11,13,18 20:18 28:20 33:19 41:19,20 44:6 45:2,12,18 45:24 50:24 54:15 crimes 19:4 49:5 criminal 19:7 39:7 criminals 6:22 curiae 1:19 2:7 21:20 custodial 3:19,23 4:13 8:4 28:14 28:17 49:23 50:17 custody 3:22 4:2 4:15 5:2,14,17 5:21 6:4,11,15 6:15,25 7:10,13 12:15,15,25 13:1 14:4,8,9 14:12,24 15:11 15:16,19 16:3 17:15 18:23 19:22 20:23,24 21:2 22:11,18</p> | <p>25:11,19,20 26:18,19 28:15 28:17,18 29:15 31:17 32:17 33:4,6,6 34:17 36:5,12 37:10 37:16,25 38:2,4 38:8,16,22 39:10,20,22 40:5,16 42:2,10 42:14 48:6,8 49:15,19 50:7 50:19 51:4,17 51:21 52:1,5 53:16 56:11 57:23 61:3,21 61:25 62:2,7,8 cut 41:24</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 daily 4:12 13:25 62:25 Davis 1:21 2:8 32:10,11,13 33:12,23 34:2,7 34:14,25 35:8 35:19,21 36:9 37:6,18,23 38:1 38:6,12,16,23 39:3,25 40:10 40:13,19,22 41:2,6,11,14 41:23,25 42:11 42:19 43:7,9,17 43:25 44:10,24 45:14,17,22 46:14,17,21 47:1,6,8,16,22 48:12 49:2,14 49:22 50:3,13 51:1,5,14 52:3 52:12,24 53:6 53:10,13,22 54:5,22 55:11</p> | <p>55:19,22 56:2,7 56:10,23 57:5 57:12,18 58:6 58:11,20,24 59:5,8,23,25 60:6,18 day 4:2,5,9 16:19 38:10 42:24,24 59:13 61:20,21 days 4:8 13:20 16:12,12,15,17 16:20 21:8,10 30:7,11 62:4,6 day-to-day 31:10 deal 31:8,9 43:13 dealing 39:9 deals 42:23 dealt 50:6 decide 7:12 26:21 31:12 decision 27:4 43:10 deemed 7:6 defect 30:24 defend 33:2 defendant 3:18 4:11 5:5,9 6:18 7:13,15,21,25 8:9 13:16 18:18 18:23 19:21,22 20:19 56:20 61:10 defendants 4:9 28:22 Defender 1:21 Defender's 45:7 defense 48:23 definition 42:2 42:15 degree 36:4 degrees 37:10 37:10,10 demand 58:2 denied 61:17 departed 31:4</p> |
|--|--|---|--|---|

| | | | | |
|--|--|---|--|---|
| department 1:18 18:6,8,9,10,13 19:8 36:12 38:9 | discussion 37:11 41:25 | 33:13 36:13,14 36:20 37:22,25 38:3 42:3,21 43:10 44:6,11 44:12 45:12 47:20 48:10 49:5,15,22,24 50:6,10 51:8 53:25 56:14 59:5,10 61:14 62:6 | event 29:22 eventually 43:2 everybody 27:13 51:24 evidence 44:21 44:22 exactly 8:11,14 14:25 19:20 53:13 61:1,8 example 6:17 7:22 8:10 10:22 16:10 23:9 27:22 exception 25:11 50:3,19 exceptions 30:10 30:14 32:15 excluded 39:6 48:21 excuse 32:18 43:20 exist 12:20 38:2 62:5 existence 5:8 exists 13:21 expectation 42:6 extend 16:23 45:24 extended 13:19 47:23 extends 44:13 extreme 32:23 extremely 24:15 | fairly 22:12 familiar 49:24 fanciful 48:2 far 11:17 30:15 31:4 32:24 41:4 45:24 fashion 12:21 fault 62:25 Federal 5:13 15:19 21:4 36:5 48:8 feel 4:14 fellow 44:3 fewer 29:16 Fifth 23:4,7,11 23:20 24:6 26:12 27:9 30:2 32:7 33:9 55:25 figuring 14:22 file 48:19 58:8 finally 4:21 5:11 63:6 find 5:18 15:13 32:21 34:16,19 34:22 35:1,3 fine 10:11 finish 26:25 first 3:4 5:4 7:20 9:9 11:12 15:18 23:2 26:15 27:6 31:5 33:8,16 34:9,14 42:1 43:19 56:9,21 fishing 35:4 Florida 35:4 focus 39:19 following 3:13,15 22:9 61:20,21 force 27:17 forced 24:8 foregoing 37:11 forever 19:23 36:6,8 form 50:11,13 forth 63:5 |
| derivative 24:8 24:10 described 20:12 designed 21:25 30:2 detained 18:11 detective 18:3,4 35:1,3 48:18 detectives 36:11 detention 4:6,10 13:18 17:9 50:16,23 51:20 53:9 determination 42:1 determinations 32:17 determine 27:6 dicta 5:16 difference 6:14 7:18 44:18,18 50:15 62:10,20 different 3:19 12:7,14 13:12 13:15,17,22 16:7,7 17:12,21 17:25 19:9,14 19:16 26:15,18 37:12 38:22 39:9,11 44:2,2 44:4,6,8 47:14 47:24 51:11 57:18,20 62:2 62:19,24 differently 57:10 difficult 6:12 17:5 32:21,22 difficulties 52:25 difficulty 37:8 diminished 47:11 directed 56:1 discuss 13:9 | distinction 19:18 District 17:8 DNA 20:3,3 documenting 58:7 doesn't 45:24 52:22 don't 15:12 door 40:7 42:14 doors 7:8,9 double-check 54:6 DOUGLAS 1:15 2:3,11 3:7 60:21 dragged 61:12 dramatically 52:6 draw 19:17 32:21 32:22 due 5:7 22:18 61:17 Dunkins 61:20 duty 45:8 D.C 1:8,18 | effect 5:15 12:17 44:6 eight 15:18 21:4 either 9:23 31:16 31:16 43:15 53:9 Eleventh 61:20 emphasis 15:12 encounter 50:18 ends 14:2 enforcement 24:23 Ennis 28:12 entire 54:3 entirely 44:2 53:23 entitled 28:12,13 54:19 entrepreneur 36:4 environment 37:13 40:3,7 envision 7:4 16:13 equivalent 52:1 especially 60:8 ESQ 1:15,17,21 2:3,5,8,11 ethical 22:23 43:21 44:5,9 57:16 ethics 22:14 23:6 36:24 60:24 evening 38:14 | | |
| E | | | | |
| E 2:1 3:1,1 earlier 15:17 34:23 easier 45:13,17 easy 30:25 59:13 60:8 Edwards 3:25 4:7 5:3 6:1,25 7:12 8:1,2 9:16 12:2 12:3 13:4,19 14:2,24 15:14 15:18 16:19,21 21:25 24:18 28:15,21 29:3 31:5,19,23 32:6 32:15,24 33:10 | | | | |
| F | | | | |
| | | F 1:15 2:3,11 3:7 60:21 faced 49:6 facility 53:4,12 facing 45:1 fact 4:11 5:15 12:16 18:5 31:1 45:16 facts 22:3 49:25 53:3 | | |

| | | | | |
|---------------------------------------|---------------------------------|--------------------------|--------------------------|---------------------------|
| found 3:14 8:14 15:19 20:22 | 3:6 6:5,10,23 13:23 39:12,23 | 47:13 | hired 44:4,7 | inconsistent 60:1 |
| founded 5:19 | 51:20 54:14 | Green 17:7 | hit 60:25 | increased 55:15 |
| frames 53:9 | 60:19 62:12,22 | 29:24 44:12 | holding 56:14 | incriminate 24:9 |
| fraud 36:6 | 63:2 | 47:24 | 62:18,21 | incriminating |
| free 3:15 13:13 | Ginsburg 7:15 | guard 60:9 | holdings 11:18 | 29:9 36:22 |
| 14:10,15 15:2,5 | 15:24 16:2,5 | guess 43:6 | Holman 53:17 | indicating 29:19 |
| 40:4,7,16,23 | 17:23 18:12 | guidance 31:8,14 | home 6:25 7:16 | individual 43:15 |
| 43:2 49:11 | 19:6 30:18 | guy 61:22 | 7:19 13:13 39:1 | 49:6 54:3 |
| freedom 13:8,9 | 44:17 56:16 | | 39:2 50:8 54:4 | initially 44:14,23 |
| 42:17 | give 4:18,19 8:24 | H | 54:5 61:22 | inmate 20:8 |
| freedoms 42:5 | 10:1 27:18 30:5 | habitual 6:22 | Honor 4:4,24 | 25:17 |
| freely 61:17 | 10:1 27:18 30:5 | 63:1 | 5:24 7:20 10:21 | inmates 7:6 |
| front 18:9,10 | 36:25 39:17 | half 24:14 | 12:18 15:4 16:4 | 24:14 25:15 |
| 55:7 | given 3:13 5:6,9 | handled 36:23 | 16:6 20:14 | instance 60:13 |
| fulfilled 46:8 | 7:14 10:4,10 | 37:1 | 21:12 36:10 | institution 52:5 |
| 54:25 55:13 | 25:17 26:21 | happen 10:3 | Hoover 18:4 | 52:14 |
| 57:2 | 40:11 43:19 | 14:22 60:11 | 48:18 | instructive 18:6 |
| functional 52:1 | 54:17 | happened 18:9 | hope 55:1 57:1 | intensely 24:13 |
| further 21:14 | gives 11:9 | 48:18 | horribles 4:24 | interest 12:22 |
| 25:14 | glad 26:5 | happening 29:6 | hours 54:3 61:19 | interested 23:24 |
| future 30:21 | go 4:19 6:25 | happens 13:7 | 63:9 | 23:24 24:3,7 |
| | 11:19,20 13:6 | happy 28:4 | hypothetical | interim 35:24 |
| G | 13:13 22:7 | hard 52:10,13 | 19:3-27:11 | 45:3 |
| G 3:1 | 27:20,21 30:10 | hear 3:3 | 32:23 34:12 | interrogate |
| Gansler 1:15 2:3 | 37:20 39:1,2,21 | heart 59:19 | 36:2 37:15 42:9 | 31:12 |
| 2:11 3:6,7,9 4:4 | 44:7 47:7 52:14 | held 16:14 17:3,4 | 49:11 | interrogated |
| 4:23 5:24 6:13 | 57:5 61:13 | 17:8,18 19:11 | hypotheticals 5:1 | 33:18 |
| 7:20 8:13,18,22 | 62:22 | 19:11 51:16 | | interrogation |
| 9:2,8,13,18,21 | goes 5:24,25 | 58:16 | I | 3:19,23 4:14 |
| 10:4,9,17,21 | 7:15 15:16 | help 23:22 57:1 | idea 7:17 10:2 | 6:20 7:1,7,10 |
| 11:4,7,11,24 | 16:21 | 57:20 61:5 | 18:20 25:3,6 | 8:4 13:24 14:13 |
| 12:3,18 13:11 | going 10:19 12:9 | Heytens 1:17 2:5 | 42:21 | 15:3,6 18:15 |
| 13:14 14:5,9,16 | 14:22 16:9 22:7 | 21:17,18,22 | illustrated 37:11 | 27:21 28:13,14 |
| 14:19,25 15:4,7 | 22:16 23:19 | 23:1,18 24:2,6 | immune 19:23 | 33:11 39:22 |
| 15:15 16:1,4,6 | 30:21 33:17 | 24:25 25:5,10 | immunized 37:21 | 48:24 49:23 |
| 16:18 17:4,11 | 42:20 43:24 | 25:22 26:7,10 | implement 22:1 | 58:10 |
| 18:2,16 19:2,10 | 44:3 49:1,14 | 26:19 27:2,15 | 30:2 | interrogational |
| 19:20 20:14,24 | 63:6 | 27:24 28:11,22 | important 26:25 | 6:15 7:2 15:8 |
| 21:4,9,11 60:19 | good 10:2 25:3,6 | 28:25 29:5,14 | 27:3 | 62:1 |
| 60:21,23 61:7 | 42:21,22 | 29:21 30:12,23 | impose 49:4 | interrogations |
| 62:13,16,23 | gotten 36:3 | 31:13 32:3 | inability 39:21 | 7:23 |
| GEN 1:15 2:3,11 | government | he's 14:8,9,11,12 | inaccurate 14:21 | interrogators |
| 60:21 | 29:24 | 14:14,15,23,23 | incarceration | 29:4 49:7 55:14 |
| general 1:15,18 | great 31:8 | 15:2 61:2 | 27:8 28:17 | interrupt 31:23 |
| | greater 20:2 | hire 46:5 55:3 | incentives 17:12 | 35:12,12 |

| | | | | |
|--|---|--|---|--|
| <p>interval 15:25 intervening 49:16 interview 6:17 55:10 introduces 32:16 investigation 18:13 19:4 60:10 investigators 41:19 55:6,7 58:4 invocation 19:6 20:25 32:2 58:7 invoke 10:12 20:20 invoked 3:20 11:13 18:21,24 27:8 28:7 33:20 34:18 35:17,21 36:7 45:16 48:20 50:25 56:17 59:21 invokes 10:12 18:18 19:23 33:9 57:22 invoking 26:12 involved 53:25 involving 48:3 Iowa 18:19 irrational 19:25 irrebuttable 3:24 5:3 14:1 24:19 28:2 Island 28:11 isolation 4:13 issue 48:4 55:6 60:3 it's 14:20 26:14 32:20 47:22 60:6 I'll 61:7 I'm 15:4 i.e 50:8</p> | <hr/> <p>J</p> <hr/> <p>J 1:17 2:5 21:18 jail 14:6,10,21 17:3,4,18 27:13 38:7,9 50:11,11 50:13 51:12 60:9 61:9 62:2 63:2 join 29:11 joy 37:19 joy-riding 33:5 35:18 36:2 judge 8:14,14 judgment 60:15 jurisprudence 5:7 11:18 justice 1:18 3:3,9 4:1,16 5:20 6:3 7:15 8:11,16,20 8:23 9:5,11,17 9:19,25 10:7,15 10:19 11:1,5,8 11:22,25 12:13 13:2,12 14:3,6 14:14,17,20 15:1,2,5,10,22 15:24 16:2,5,8 16:16 17:1,10 17:23 18:12 19:1,3,5,15 20:6,21,25 21:8 21:10,16,22 22:6,10 23:1,15 23:23 24:3,16 25:1,3,7,10,13 25:22 26:3,7,8 26:10,14,19,23 26:24 27:3,10 27:17,24 28:6 28:16,24,25 29:1,2,11,18 30:5,9,14,18 31:11,22 32:9 32:13,20 33:12 33:15,23 34:1,3</p> | <p>34:6,11,21 35:1 35:11,20 36:1 36:15,19 37:14 37:15,19,24 38:5,10,13,19 38:24 39:4,7,8 40:8,11,15,21 40:24 41:4,7,8 41:12,15,18,24 42:7,8,18,20 43:8,12,20 44:1 44:17 45:11,15 45:19,20,25 46:10,15,18,22 47:2,4,7,13,18 48:2,22 49:8,10 49:18 50:2,4,14 50:21,22 51:2,9 51:18 52:7,12 52:17,18,21 53:1,2,7,11,13 53:20 54:2,8,22 55:4,16,20,21 55:24 56:3,8,16 57:3,6,14,25 58:9,14,23 59:1 59:3,7,8,15,24 60:4,7,17,23 60:25 61:4,9 62:9,15,20 63:6 63:10 Justice's 15:17</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>keep 12:9 Kemna 53:17 Kennedy 5:20 6:3 15:10 22:10 29:11,18 30:5,9 30:14 45:20 Kennedy's 16:8 Keys 35:4 kind 43:6 kindness 59:19 knew 11:14</p> | <p>23:10 46:19,24 56:20 know 4:17,21 6:19,23 8:10,11 14:2 18:9 20:15 21:5 22:6 25:8 30:6 33:17 34:13 35:4 36:6 36:17 41:2,6,9 41:15 42:25 43:1 45:15 48:19,25 49:1,2 50:14,23 52:8 52:14,15 54:21 59:17 knowing 19:2 known 48:23</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>language 42:12 Laughter 30:8 34:5 41:17 58:22 59:2 law 24:23 36:3 lawyer 7:16,22 8:6,7,17,19,21 9:1,6,20,23,23 10:4,5,11,22 10:23 11:2,3,6 11:15,21 12:1,5 12:6,9,10,12 22:16 36:21,23 43:1 46:4,5 54:19,19 55:18 56:6,17 57:9,11 57:15,16 lawyered 48:25 lawyers 60:25 61:5 lead 29:16 leave 13:8 14:7 14:10,15 15:3,5 40:17 legal 23:6 length 30:20</p> | <p>32:18 lengths 16:7 let's 7:24 36:9 life 17:20 liked 25:7 likelihood 5:21 limit 16:9,10,24 17:2 18:12 36:16 44:19 58:16 63:7 limitation 49:12 limitations 33:1 48:4 limited 42:5 45:12,24 47:20 limits 49:3 61:18 line 3:23 4:15 9:15 13:21 lines 25:8 32:21 32:22 36:25 line-drawing 29:16 literally 15:17 litigation 44:3 little 10:8 26:14 live 6:24 18:16 20:1 40:24 62:25 63:1 lived 40:6,20 43:5,10 lives 17:19 42:4 living 49:21 locked 13:7,23 38:21,22 long 4:5 8:7 14:8 24:15 31:7,15 55:5 longer 13:3 14:24 24:19 25:19 30:15 43:15 51:21 look 10:23 16:18 23:13 24:10 36:9 51:5 56:5 57:11</p> |
|--|---|--|---|--|

| | | | | |
|---|--|---|---|--|
| <p>looked 50:24 looking 22:20 lose 55:1 56:25 lost 32:16 lot 23:15 61:24 lower 6:13 31:9 lying 62:3</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>Maine 61:19 maintenance 6:19 62:21 man 26:15 maps 31:18 marks 33:25 37:3 Maryland 1:3 3:5,11,21 18:20 18:20 27:4 31:1 33:4,20 34:23 35:2 60:15 materially 57:20 matter 1:11 17:2 30:13 61:11 63:13 matters 23:22 24:12 maximum 40:20 40:25 63:3 McNeil 5:15 Md 1:16,22 mean 6:9 9:12 14:14,15 15:2 19:12 25:8 30:17 31:6 34:1 41:9,20 43:13 43:13 46:12 48:25 54:16 meaning 13:4 means 32:16 34:2,7 35:22 47:10 55:2 measuring 37:9 medium 63:3 member 42:23</p> | <p>mental 12:11 mentioned 32:3 Merely 54:24 metal 6:19 17:22 Michael 1:6 40:6 42:16 Michigan 57:19 million 24:14 36:4 mind 22:16 34:8 34:12,13 35:23 37:5 38:18 43:18 59:11,16 59:22 mind-set 56:20 minimized 12:16 Minnick 4:7 8:2 12:4 13:19 16:19,24 51:8 62:6 minutes 60:19 Miranda 3:15 4:18,20 5:5,8 8:2,8,8,12,13 8:15,24 10:1,7 14:10 15:9 22:1 23:20,25 26:20 26:21 28:3 37:1 39:18 42:3 43:19 46:11,19 47:4,6 49:3 50:25 52:19 54:8,10,17 55:17 56:12 60:2 61:16 misleading 10:8 misunderstand 54:8 moment 22:17 31:20 53:3 Monday 1:9 Montana 33:7 33:17 Montejo 6:1 33:25 42:12</p> | <p>months 3:18 7:23 9:22 12:11 30:19,22 31:3 31:15 46:9 55:13 56:18 58:21 morning 38:14 Mosley 57:19 mother 41:16 motivated 31:19 moved 53:7 murder 33:7 35:15 48:4,6</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 necessarily 13:9 14:7 necessary 30:3 30:16 need 10:23 12:12 17:17 24:10 needed 40:1 needs 17:6 never 33:19 46:8 48:18 55:13,20 55:22 new 39:17 40:1 44:22 non-coercion 5:22 number 4:25 10:18 15:13 21:1 48:17</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 obligation 11:19 43:13 57:16 obtaining 48:15 obviously 4:6,25 12:20,25 16:6 20:2,3 42:10 63:8 October 1:9</p> | <p>offenders 63:1 offense 47:15,21 56:11 offer 5:22 Office 45:7 officer 7:4 17:24 17:25 18:1 26:6 26:11,16 27:5 27:12 34:18 35:8 48:13 officers 7:8 17:21 20:17 37:9 43:10 50:18 52:14 official 27:5 oh 6:5,8 48:24 51:9 58:20 okay 35:20 58:4 once 6:16 28:7 48:25 59:21 one's 7:9 open 24:25 29:17 30:3 opened 48:19 opens 30:6 operable 42:15 operating 22:2 opinion 5:18 33:25 opportunity 8:3,7 12:5 25:17 27:19 40:12 oppose 29:22 oral 1:11 2:2 3:7 21:18 32:11 order 3:24 29:8 58:17 ordinary 22:23 original 31:5 ought 7:1 34:3 outset 54:9 outside 10:6 overborne 5:10 5:10 overrule 45:21</p> | <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 53:17 parade 4:23 parenthetically 5:16 part 12:14 36:21 36:22,23 37:1 42:22 particular 7:25 12:24 28:20 43:22 54:14,15 62:11 particularly 30:25 parts 36:20 passage 22:18 29:24 30:24 passed 46:9 passes 43:2,14 pay 51:22 people 6:22,24 25:15 26:17 29:8 51:22 63:4 perception 47:25 period 6:24 12:16,24 20:22 27:7 30:20 49:17 53:15,19 54:7 56:25 58:18 permission 41:21 permit 50:3 permitted 39:2 perpetuity 16:25 person 6:4,16,21 7:3 8:17 18:10 26:20 33:18,19 34:17,18,22 35:5,6,15,23 36:3 37:16 38:17 39:13 40:2 42:9,13,13 45:8,16 46:15 46:19 49:11,14</p> |
|---|--|---|---|--|

| | | | | |
|--|---|--|---|---|
| <p>55:1 56:25 57:22 person's 39:5 perspective 23:13 24:11 persuade 35:23 Petitioner 1:4,16 1:20 2:4,7,12 3:8 21:21 60:22 phone 14:7 pick 16:11 place 13:6 15:12 18:15 27:7 31:5 42:2,22 places 58:8 planned 59:18 please 3:10 21:23 32:14 plus 13:1 point 11:16 14:1 27:7 30:13 31:4 31:7 38:20 44:25 47:25 51:14 59:24 60:5,7 pointing 19:6 points 33:13 police 6:15 8:5 10:5 11:16,19 11:23 15:8 17:13 18:8,9,10 18:13 19:8,24 25:8,23 27:4 31:11,14 34:15 34:18 35:8,14 36:12 37:9,22 38:6,9 43:10 44:13,20 45:1 45:13 46:11,24 48:1,12 50:15 50:18 52:13 59:10,13,20 60:9,10,25 62:2 62:7 population 6:6</p> | <p>6:10,23 13:24 27:20 39:12,23 51:20 63:2 pose 36:1 posit 5:1 positing 19:4 position 3:22 8:1 42:2 45:1 posits 13:15 possibilities 6:6 possibility 27:23 52:3 possible 47:22 56:23 possibly 33:17 post-conviction 24:18 potential 30:24 practical 24:13 30:12 50:20 precisely 25:11 predictable 49:25 premise 20:7 26:20 present 12:1,10 24:24 45:22 46:4 47:2,9 48:15 54:19 56:12,12 59:12 60:3,12 presented 16:14 presently 45:9 presentment 63:9 presents 50:19 52:24 preserve 25:21 pressure 6:7 55:14 pressures 56:12 presumably 11:25 presume 28:5 presumption</p> | <p>3:25 5:3 14:1 16:21 24:19,20 25:21 28:1,2 37:7 pretrial 4:6,10 13:18 17:9 24:18 39:11 50:16,23 51:19 53:8 62:7 pretty 43:4 prevent 6:2 26:12 29:8 previously 33:18 primary 29:23 prior 3:18 5:7 25:15 34:16 46:19 prison 6:4,7,10 7:3,16,19,21 8:17,24 9:11 14:15,23 20:7 24:14 27:20 37:13 38:21 39:12,23 40:3,7 40:20,25 45:5 50:16 51:12,20 52:16 53:8 54:3 62:22 prisoner 6:9 8:25 13:5 20:16,18 27:6,19 38:8 42:4 50:7,11 51:24 52:21 53:5 54:2 55:2 56:10 60:8,8 prisoners 37:12 56:7 62:11 prisons 20:15 privacy 42:6 probably 43:2 problem 19:21 22:10,10 23:12 27:24 42:23 52:13 58:25 problematic</p> | <p>15:16 problems 15:11 23:2,16 29:16 31:9 38:1 42:1 50:20 proceed 39:5 60:13 process 5:7 61:17 produce 27:12 prohibits 32:7 prolonged 12:16 prong 32:1 properly 34:15 prophylactic 21:25 29:7 30:1 propose 58:19 proposed 49:12 proposes 29:2 proposing 6:12 32:1 proposition 38:25 prosecuting 49:5 prosecution 24:21 44:8 protect 7:17 protection 8:9 32:19 44:11,13 protections 22:1 protocol 20:15 provide 11:6 31:14 45:8 46:11 57:16 provided 8:8 9:4 9:6 10:16,20 11:9 39:6 51:21 55:18 57:15 provides 8:2 33:13 providing 31:8 public 1:21 7:5,5 45:6 published 5:17 pure 30:24</p> | <p>purely 24:9 purpose 22:22 purposes 6:25 14:24 31:5 42:3 42:3 pursuant 25:15 put 6:22 13:17 17:21 36:16,16 62:18,22 63:3 putting 58:8</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>question 13:14 15:17 16:8 17:13 19:9,16 19:17 22:7 23:14 24:1,5 27:13,22 34:15 37:3 39:15 40:15 41:10 46:1 49:16,21 52:15 53:14,24 55:17,18 59:4 60:24 63:6 questioned 4:12 11:10,12 13:6 13:16 14:11 19:18,24 33:5,7 33:21 34:9 35:2 36:5,11 44:14 44:23 45:9 46:5 48:5,8 49:7,16 49:19,20 56:11 57:23 62:11 questioner 22:19 23:10 questioning 11:16 12:4 14:22 27:16,18 33:8 34:6 36:2 37:3 39:20 46:7 46:13,24 47:3,9 47:11,14,21,24 51:12,16 52:8 56:4,5,19 57:24</p> |
|--|---|--|---|---|

| | | | | | |
|---|--|--|---|--|--|
| 60:13 questions 9:16 10:24 21:14 61:13,25 62:5 quibble 17:16 quickly 60:11 quite 23:15 51:11 60:12 quotation 33:25 | receive 54:13 recess 63:4 recognized 21:2 54:7 record 6:19 9:14 40:8,19 41:3 records 41:4 redundant 28:18 referred 50:14 refuse 39:21 40:4,23 refused 20:11 41:3 regard 4:1 regarding 61:25 63:7 regardless 19:24 rejects 29:23 related 19:13 60:2 relationship 44:8 release 4:21,24 13:2,3 31:21 38:16,22 54:5 released 4:12 6:5 6:21 13:25 33:5 39:2 48:7 50:7 54:4 62:12 relevant 23:7 relevantly 5:11 remain 38:13 56:17 57:9,21 remainder 21:14 remaining 60:20 removed 38:8 repeat 24:1 repeatedly 4:17 21:24 32:6 repeating 54:24 represent 10:24 46:6 representation 24:4 45:6 represented 22:15,20 23:25 | 42:25 61:2 request 41:21 questioning 21:1 require 45:20 46:11 47:5 requirement 58:18 requires 30:10 resent 46:6 reserve 21:13,14 reset 12:12 respect 8:25 31:24 32:2,4 respecting 32:4 Respondent 1:22 2:9 3:13 32:12 Respondent's 16:22 18:7,7 53:16 response 60:23 responses 5:4 result 20:1 resume 28:14 retains 37:2 retired 35:3 returning 34:7 reverse 3:21 re-approached 37:21 re-engage 12:1 Rhode 28:11 ridiculous 33:16 riding 37:20 right 3:20 4:22 6:3 7:17 8:18 9:3,6,18,25 10:10,12,13 11:8,14,24 13:21 14:16,25 16:12,18,23 17:10 18:16,22 19:20 20:1,7 23:3,5,21,23 24:8,10,14 | 26:12 27:9 28:8 28:9 33:9,14,20 34:19,21 35:17 35:22 36:7 37:2 37:17 38:1,8 39:15 41:6 45:16 46:3,16 47:8,11 54:24 55:7,13,21,24 56:17,24 57:22 58:7,9 59:23 60:2 61:1,1,8 rights 3:15 4:18 4:20 5:5 8:8,8 11:13 12:8 15:9 22:5 35:16 43:19 46:3,8,11 48:9,20 risk 29:5 47:13 47:16,17 48:21 Riverside 63:8 Roberson 4:8 8:2 13:19 16:19 18:5,17 19:16 19:17 45:21,23 45:25 54:24 62:5 Roberts 3:3 4:1 4:16 14:14,17 14:20 19:15 21:16 32:9 35:11,20 38:5 38:10,13 42:7 46:10,15,18,22 47:2,4,7 49:8 50:14,22 51:2,9 55:16,20,21,24 56:3,8 57:3,6 57:14 60:17 63:10 room 6:19 10:1 13:7,7 15:3,6 17:22 26:17 27:21 38:21,22 39:22 49:21 | 51:16 59:17 61:13 62:11,12 62:21 routine 4:13 13:25 62:25 rule 5:14,17,23 6:12 11:20 12:21,23,25 15:14,19 16:12 16:17,17,22 18:7,23 19:22 20:8 21:25 22:2 22:7,13,23,23 23:8 24:19,21 24:22 25:16 26:1,3 28:10 29:7,12,19,22 30:1,1,21 31:3 32:6,15,16,24 33:1,3,10,13 33:16 35:6,14 36:24 37:22 39:13,24 40:1 41:24 43:4,21 44:5,11 48:10 49:9,13 50:10 50:19 51:23 52:2,4,10,13 52:15 61:5,6 ruled 25:23 rules 12:22 23:6 36:24 44:9 60:24 run 34:16,21 48:20 | |
| R | | | | | |
| R 3:1 raised 44:12 range 50:17 rap 34:16,22 rationale 5:20 33:3 36:14 47:23 56:14 raw 29:24 reach 15:13 17:7 23:11 reaches 32:24 read 12:8 15:9 23:15 really 26:4 37:4 45:13 48:13 60:5 reason 3:17 5:22 6:1 15:15 16:11 23:21 24:12,22 25:24 27:2 29:6 39:11 43:18 44:19 57:21 59:6 60:3 reasonable 43:15 reasonably 22:19 reasons 60:14 rebuttable 24:20 37:7 rebuttal 2:10 22:8 60:21 recall 35:5 53:21 54:6 | | | | | |
| S | | | | | |
| S 2:1 3:1 sanctioned 53:15 saying 7:9 35:15 37:1,20 42:11 57:21 says 4:18,20,22 6:8 9:16 10:2 12:4 16:21 | | | | | |

| | | | | |
|---|--|--|---|---|
| 22:11 25:19 26:15 41:15,20 43:11 47:8 48:24 56:5 57:3 57:11 58:1,2,3 59:15 Scalia 16:16 17:1 17:10 25:3,7,10 26:24 27:3 28:6 28:16,24,25 29:1 31:11 34:1 34:3,6,11 41:8 41:12,15,18,24 43:20 44:1 45:11,15,19 48:22 52:18 53:1 54:8,22 55:4 57:25 58:9 60:25 scenario 5:19 13:15,18,22 17:5,11 49:15 62:4,24 scenarios 13:15 50:17 61:23 scheme 29:1 scratch 39:18 second 6:17 12:8 19:19 33:10 34:20 35:22 54:17 56:22 61:8 Secondly 5:6 second-order 25:2 29:7 30:1 security 40:20 40:25 63:3,3 see 17:5 20:8,17 22:9 28:19 29:4 35:16 52:9,10 seeing 55:1 seen 55:13 self 36:22 self-incriminat... 23:5,8,12 | sense 6:4 14:9 18:6 19:13 50:7 51:19 sensible 52:2 sent 14:23 50:8 sentence 51:13 sentenced 53:5 sentences 24:15 sentencing 17:15 serious 59:1,3 serving 24:15 setting 26:18 sexual 19:12 shape 22:7,13,24 61:5 shaping 36:24 Shatzer 1:6 3:5 18:23 22:4 40:6 42:16 sheet 34:16,22 shoplifting 18:19 short 53:19 shortest 20:21 21:5 show 24:21 37:2 40:14,19,22 41:5 showing 40:16 shown 6:14 12:21 shows 31:4 37:8 41:11,14,25 52:22 shut 40:7 42:14 side 5:12 51:3 signal 38:17 significant 45:4 silence 57:22 silent 38:13 56:17 57:9,21 similar 20:23 simply 24:20 31:7 situation 7:3 8:5 13:4,13 16:13 20:12,23 22:14 | 24:17 27:25 31:21 33:22 39:11,14 40:2 43:6 44:22,25 46:19 48:11,13 50:6 51:11 58:15 situations 47:20 50:9 62:7 Sixth 22:5 23:3 53:25 55:17,20 sleep 62:22 small 15:23 society 49:4 solely 29:8 Solicitor 1:17 solve 58:24 somebody 8:6,6 16:14 20:9 39:10,14 48:5 somebody's 42:25 sorry 15:4 35:11 57:4 sort 4:21 5:12 10:5 13:15,20 19:25 20:15 54:4 62:17 Sotomayor 11:1 11:5,8,22,25 12:13 13:2,12 14:3,6 15:22 19:1,3 20:21,25 21:8,10 31:22 37:14,19,24 38:19,24 39:4 50:2,4,21 53:2 53:7,11,14,20 54:2 59:15,24 60:4,7 62:9,15 62:20 sounds 10:2 space 42:4 speak 20:17 41:19 58:12 | specific 41:20 43:5 specter 60:1 Speedy 30:9 spontaneous 59:17 spot 9:25 SR 1:6 standard 22:24 standing 7:8 stands 33:13 start 12:6 32:22 39:18 56:5 started 26:24 starting 42:22 state 11:5 18:25 19:7 25:24 29:12 30:6 38:6 40:14 48:6 49:7 51:15 53:4,8 61:19,19 63:1 statement 3:13 7:14 48:15,20 53:24 States 1:1,12,19 2:6 5:14 21:19 29:23 44:12 State's 48:16 station 50:15 status 4:10 15:8 24:18,18 28:13 53:12 statute 48:3 statutory 45:8 stay 27:20 stayed 50:11 step 25:14 Stevens 8:11,16 8:20,23 9:5,11 9:17,19,25 10:7 10:15,19 15:2,5 20:6 25:13,22 26:3,7,8,10,14 26:20 27:10,17 27:24 29:2 39:8 | 40:8,11,15,21 40:24 41:4,7 49:18 51:18 52:7,12,17,21 61:9 Stevens's 46:1 stock 36:6 stop 9:16 10:13 11:16,23 12:4 46:12,24 47:10 49:20 56:4,19 57:23 stopped 56:8 stops 37:25 street 49:20 55:3 strikes 49:6,24 strong 54:12 strongly 36:14 56:15 submission 29:23 submit 44:15 48:24 submitted 63:11 63:13 substantial 6:7 substantially 19:9 suggest 5:1 11:20 16:9 suggested 16:24 36:25 suggesting 6:16 47:19 suggestions 30:6 suggests 16:11 supporting 1:20 2:7 21:21 suppose 17:23 17:25 22:13 48:5 50:22 supposed 22:15 43:1 Supposing 20:7 suppressed 3:12 |
|---|--|--|---|---|

| | | | | |
|--------------------------|--------------------------|-----------------------|--------------------------|--------------------------|
| Supreme 1:1,12 | 63:5 | 30:23,25 31:1,6 | TOBY 1:17 2:5 | 48:9 |
| sure 13:14 23:22 | tell 8:16,20,25 | 31:16,17,18 | 21:18 | understand 9:17 |
| 28:24 48:15 | 9:2 11:17,22 | 32:4,24 33:15 | today 13:21 | 11:12 14:17 |
| 60:12 | 26:24 32:23,25 | 33:22 34:7,15 | 25:18 40:12 | 35:9 42:8 51:3 |
| surveillance 42:5 | 40:9 52:19,22 | 37:11 39:25 | 41:13 | 62:10 |
| suspect 22:20 | 60:9 | 40:1,13 41:23 | told 13:6 19:16 | understanding |
| 23:10,13 25:23 | tells 12:2,3 | 42:21,22 43:9 | 27:11 46:2 | 11:9 62:13,16 |
| 33:9 34:8,9 | temporarily | 43:15,18,25 | 51:21 54:9,16 | understands |
| 35:2,15 36:10 | 51:16 | 44:5,24 45:3 | 55:7 61:10 | 11:15 |
| 37:2 43:18 | tensions 45:23 | 47:16 49:5,9 | totally 44:2 | understood |
| 44:14 46:2 | term 3:4 33:24 | 52:4,13,24 54:5 | track 35:5 | 11:13 |
| 48:19 55:22 | 34:4 | 54:23 55:13 | transaction | unfulfilled 56:25 |
| 59:11 | terminate 54:20 | 56:7,13,16,23 | 48:10 | unimportant 13:3 |
| suspect's 44:24 | 55:10 | 57:12,19 58:11 | transfer 51:5 | United 1:1,12,19 |
| 47:25 51:14 | terminated 28:15 | 58:14,15 60:25 | transported | 2:6 21:19 29:23 |
| system 39:7 | 61:15 | thinking 36:17 | 18:19 | 44:12 |
| <hr/> | termination 60:5 | thinks 9:20 | treat 51:19,25 | unrealistic 48:23 |
| T | 60:7 | thought 19:15 | treated 39:22,23 | unrelated 19:4 |
| T 2:1,1 | terms 14:18 | 22:25 25:7 28:6 | 58:6 | 19:12 |
| table 6:20 57:17 | 61:18 | 28:7 30:3 43:21 | trial 3:14 8:14 | update 28:12 |
| tainted 53:24 | test 31:25 | 47:18 61:4 | 30:9,10 | use 14:7 22:23 |
| take 22:22 30:20 | tethered 31:17 | three 4:6 5:4 | tried 9:22 22:22 | 42:20 61:4 |
| 48:3,17,20 | Thank 21:16 | 26:17 48:13,21 | true 15:13 27:10 | utilized 42:13 |
| taken 33:4,6 | 32:9 60:16,17 | 50:9 | 28:5 | <hr/> |
| 34:17 36:5 38:9 | 63:10 | time 3:20 4:2 | try 22:13 35:1 | V |
| 48:6,7 | that's 12:6 13:17 | 6:24 7:12 9:9 | 37:4 | v 1:5 3:5 21:25 |
| talk 4:19,20,22 | 14:25 26:22 | 10:5 11:10,12 | trying 23:11 26:1 | 22:1 28:11 |
| 11:2 20:9,10,11 | 55:16 59:14 | 12:8,11,15,16 | two 4:8 6:20 7:23 | 29:23 44:12 |
| 20:11 22:15 | theory 21:3 61:9 | 12:24 13:21 | 13:15 18:21 | 54:23 57:19 |
| 26:5,5,11,15 | there's 17:19 | 15:11,12 16:7,9 | 26:17 31:23 | 61:19,20 |
| 26:22,22 27:11 | 20:9 43:25 51:4 | 16:10 19:19,23 | 33:13 36:20 | vague 43:4 |
| 28:4,9 39:16,17 | They'll 60:11 | 20:22 21:15 | 56:17 58:8 | valid 3:14 |
| 43:1,3 46:4,23 | Thigpen 61:20 | 22:12,18 29:12 | 59:12,12 | versus 53:17 |
| 49:1 51:22,24 | thing 29:13 36:20 | 29:19,22,24 | type 37:7 | view 14:1 16:23 |
| 54:10,11,18 | 46:18,23 51:15 | 30:24 32:18 | types 37:12 | 17:6 19:25 |
| 55:5,6 56:6 | things 23:13 | 33:8 36:16,25 | <hr/> | 44:25 47:25 |
| 57:8,11 58:1,3 | thing's 43:3 | 39:20 43:2,14 | U | 51:15 61:14 |
| 58:5 60:10 | think 4:2,4 5:11 | 47:10,12,25 | ultimately 25:1 | violating 29:3 |
| 61:11,12 | 6:11 15:11,15 | 49:15,16 53:9 | 27:25 29:25 | violation 28:21 |
| talking 8:4 10:11 | 17:6 18:2 19:5 | 53:15,19 54:17 | 32:5 | 48:9 53:25 |
| 10:13 19:5 | 20:1,16 22:3 | 55:1 56:9,21,22 | unavailable 7:25 | visit 51:23 52:21 |
| 23:20 25:14 | 23:1 24:12 25:5 | 56:25 58:16,18 | uncertainty | visitor 25:18,18 |
| 53:11 56:8 62:1 | 25:11,24 28:22 | 60:6 61:18 63:7 | 32:16 | 39:16,17 54:14 |
| telephone 40:4 | 29:5,6,14,19 | 63:9 | unclear 9:13 | visitors 20:8 |
| television 62:3 | 29:25 30:12,15 | times 23:6 | underlying 10:22 | 28:20 40:5,12 |

| | | | | |
|---|---|--|---|--|
| <p>41:1,9,13,21 52:9 54:13 61:9 61:11,12 voluntarily 5:6 61:16 voluntary 3:15 20:12</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait 48:14 waiting 10:6 waive 35:16 waived 61:16 waiver 3:14 waiving 22:4 walk 40:10 42:15 want 4:18,20 6:1 10:11 11:2,14 11:20 12:9 20:10,17 25:17 25:20 26:8,11 27:19 28:20 29:10 31:22 36:16,17,18 39:16 40:12,25 41:12 43:22 46:23 49:17 51:22 52:9 54:11,18,18 55:8 56:5 57:8 57:9,11 58:1,3 61:10,11 wanted 29:3 38:11 44:21 53:14 wanting 29:12 wants 20:9 26:4 39:14 43:16 54:13,14 59:21 warden 6:7 warning 8:12 10:2,7 52:19 54:10,17 warnings 8:13,15 8:24 26:21 28:3</p> | <p>39:18 50:25 54:9 61:16 Washington 1:8 1:18 wasn't 28:5 53:8 59:18 watching 62:3 waterfront 18:14 way 5:10 6:9 18:8 19:2 24:13 49:25 57:13 week 16:3 42:24 42:24 weeks 21:6 went 4:24 56:24 61:22 we've 59:5 we're 23:20 what's 14:22 62:20 wholly 19:25 willfully 5:6 willing 26:5 27:21 33:2 39:16 41:19 window 6:8 wish 46:7 withdraw 24:4 witness 32:8 wonder 20:6 wondering 9:19 word 50:8 words 8:5 18:17 37:4 work 15:20 29:2 29:13 37:5 56:21 61:6 workable 52:4 worked 56:21 61:5 world 18:17 20:3 worried 55:25 worse 18:22 wouldn't 12:1 25:16 28:19,21</p> | <p>29:2 51:2,18 52:2 56:16,19 written 7:24 wrong 39:13,24 39:25</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>year 15:18 years 3:18 7:23 9:22 12:11 17:19 18:24 20:5 21:6 30:19 31:2,15 34:23 35:17 36:3 37:21 43:6 46:9 48:5,7 49:11 51:12 55:12 56:18 58:20 you'd 25:21</p> <hr/> <p style="text-align: center;">\$</p> <hr/> <p>\$20 36:4</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>08-680 1:5 3:4</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 4:2,4,9 38:10 1-day 53:17 54:7 10 17:19 34:23 35:17 10:05 1:13 3:2 11:04 63:12 15 17:19 20:4 51:12 1981 20:4 1982 5:13 15:18 1999 33:5 35:2</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 3:18 7:23 9:21 12:11 30:19 31:2,15 46:8</p> | <p>48:17 55:12 58:20 60:19 20 5:14 17:19 18:24 20:4 37:20 2003 11:4 15:8 45:1 46:20 53:4 2006 15:9 45:2 2009 1:9 33:6 21 2:7 24 54:3 25 18:24 20:4 27 53:17</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 4:8 13:20 16:12,15,17,20 62:4,6 3-day 16:24 30 48:5,7 32 2:9</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 16:15 40 36:3 37:21 49:11 48 63:9</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 1:9</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>6 30:22 61:19 60 2:12</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>7 3:18 7:23 9:22 12:11 16:12 30:7,19 31:3,15 46:9 55:12 56:18 58:21 7-day 16:10 17:2 70 30:11</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>8 5:13</p> | <hr/> <p style="text-align: center;">9</p> <hr/> <p>9:00 38:14</p> |
|---|---|--|---|--|