

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GLEN WHORTON, DIRECTOR, :

4 NEVADA DEPARTMENT OF :

5 CORRECTIONS, :

6 Petitioner, :

7 v. : No. 05-595

8 MARVIN HOWARD BOCKTING. :

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10 Washington, D.C.

11 Wednesday, November 1, 2006

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United
15 States at 11:04 a.m.

16 APPEARANCES:

17 GEORGE J. CHANOS, ESQ., Attorney General,
18 Las Vegas, Nev.; on behalf of the Petitioner.

19 IRVING L. GORNSTEIN, ESQ., Assistant to the
20 Solicitor General, Department of Justice,
21 Washington, D.C.; on behalf of the United
22 States as amicus curiae.

23 FRANCES A. FORSMAN, ESQ., Las Vegas, Nev.; on
24 behalf of the Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Whorton versus Bockting.

General Chanos.

ORAL ARGUMENT OF GEORGE J. CHANOS

ON BEHALF OF PETITIONER

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

Crawford v. Washington should not apply retroactively to cases on collateral review because it fails to meet the exacting standards for retroactivity established by this Court in Teague versus Lane. In addition, Respondent is not entitled to relief under AEDPA. Teague held that new rules of criminal procedure generally should not apply to cases on collateral review unless they fall within one of two narrow exceptions. The second exception, at issue here, is for those new watershed rules of criminal procedure without which the likelihood of an accurate conviction is seriously diminished, rules that alter our understanding of the bedrock procedural elements essential to a fair proceeding. Crawford is not a watershed rule of criminal procedure.

JUSTICE GINSBURG: Could you give an

1 example, General Chanos, of one that is other than
2 Gideon? Is there any other one, or --

3 MR. CHANOS: The only example that this
4 Court has pointed to in its 25 years of retroactivity
5 jurisprudence is Gideon versus Wainwright.

6 JUSTICE GINSBURG: And none other occurs to
7 you?

8 MR. CHANOS: None other occurs to me at this
9 time. None of the cases that this Court has ruled are
10 not retroactive would I find to be retroactive or
11 watershed, and I certainly don't find Crawford to be
12 watershed. Crawford is not watershed because it is not
13 a rule without which the likelihood of an accurate
14 conviction is seriously diminished and it is not a rule
15 which altered our understanding of the bedrock
16 procedural elements essential to a fair proceeding.

17 CHIEF JUSTICE ROBERTS: I take it from your
18 presentation you think we do have to go through the
19 Teague analysis. We can't just rely on 2254(d)(1)?

20 MR. CHANOS: No, Chief Justice Roberts. I
21 believe that you could go straight to 2254(d)(1) and bar
22 relief under 2254(d)(1).

23 CHIEF JUSTICE ROBERTS: Well then, what do
24 you do about 2254(e)(1), or I guess (e)(2), which seems
25 to suggest a different rule if a case is made

1 retroactive?

2 MR. CHANOS: Well, 2254(e)(2) provides a
3 cause and prejudice opportunity in the event that the
4 State court denies relief on a procedural basis rather
5 than a substantive basis and the Petitioner can show
6 cause and prejudice under 2254(e)(2)(A). The Federal
7 court could then look at the petitioner's claim because
8 no merits determination had been made by the State court
9 and, finding the cause and prejudice elements under
10 2254(e)(2), the Federal court would not be precluded
11 from making a merits determination since the -- and
12 conceivably applying a rule that had been made
13 retroactive under Teague -- because the State
14 court had not made a substantive merits determination.

15 CHIEF JUSTICE ROBERTS: Now, my point was
16 that looking at (d)(1), it says is the decision contrary
17 to established law. And then I would have thought that
18 if it's a new decision it's clearly not contrary to
19 established law.

20 MR. CHANOS: Correct.

21 CHIEF JUSTICE ROBERTS: But on the other
22 hand, you look at (e)(2) and it says here's what you do
23 if you're applying a new decision that's been made
24 retroactive. So I would have thought that meant you
25 can't say simply because it's a new decision, (d)(1)

1 applies.

2 MR. CHANOS: Our reading of 2254(d)(1) is
3 that Congress intended to have the Federal courts give
4 the State courts deference to the extent that the State
5 courts made a substantive determination. If the State
6 courts made no substantive determination, there's no
7 requirement for deference by the Federal courts, which
8 under 2254(e)(2)(A)(i) the Federal courts could
9 conceivably find that there was cause and prejudice
10 under 2254(2)(a)(i) under the standards enumerated in
11 those subparagraphs (a) and (b) and could then make a
12 merits determination.

13 There would be nothing that would preclude
14 the Federal court from making a merits determination so
15 long as the State court had not already made a merits
16 determination.

17 JUSTICE GINSBURG: Well, suppose the State
18 has, if you're going straight to AEDPA. Does that mean
19 that Teague is out entirely, even the first category,
20 that is a decision, a substantive decision that would
21 mean that what defendant did was not a crime?

22 MR. CHANOS: Yes, Justice Ginsburg. It
23 would mean under -- a plain meaning reading of
24 2254(d)(1), if the State court made a determination on
25 the merits, it would bar subsequent Federal review

1 whether it was a substantive, a substantive claim or a
2 procedural claim. However, in Atkins v. Kentucky there
3 would be nothing that would prevent the petitioner from
4 going back to the State court and arguing cause and
5 prejudice, and then if the State court were to make a
6 procedural determination on the second petition that
7 was -- that were to deny the petitioner his claim, he
8 could take that to the Federal court. The Federal court
9 could then look at that because it was only a procedural
10 determination by the State court on the second habeas
11 claim and the Federal court at that point could look
12 back at the substantive rule as established law because
13 on the second claim they have the right, if he's only
14 denied a procedure -- on a procedural basis, there's
15 nothing that would preclude the Federal court on his
16 second claim from looking back at what would then be
17 established law.

18 JUSTICE KENNEDY: What is the source for the
19 rule in Teague? Could Congress overturn the rule in
20 Teague if it wanted to and say that nothing is
21 retroactive or that everything is retroactive?

22 MR. CHANOS: My understanding is that the
23 rule in Teague is -- the source is not the U.S.
24 Constitution. It's a judicially created rule that began
25 with Linkletter and developed into Teague and its

1 progeny. And yes, I believe Congress could pass
2 2254(d)(1) and alter the habeas procedures, as they have
3 in enacting 2254(d)(1).

4 JUSTICE SCALIA: Habeas is an equitable --

5 MR. CHANOS: I'm sorry?

6 JUSTICE SCALIA: Habeas is equitable relief
7 and the Court has a lot of discretion in identifying the
8 boundaries of equitable relief, doesn't it?

9 MR. CHANOS: Yes, Justice Scalia.

10 JUSTICE SCALIA: I assume that's how we got
11 to Teague.

12 JUSTICE STEVENS: May I ask this question
13 as to the basic issue of whether you should be relying
14 on Teague or the statute. If you're relying just on the
15 statute, how would it apply to a case which was correct
16 under established law at the time the State court
17 made its ruling, but before the case reached the
18 appellate court, there was a change in our
19 interpretation? In other words, what if this case --
20 Crawford had been decided while the case was on appeal?

21 MR. CHANOS: While under the Court's
22 retroactivity jurisprudence Griffith would control,
23 under 2254 it would not. 2254(d)(1) would control.

24 JUSTICE STEVENS: So it really makes a
25 difference whether we rely on Teague or rely

1 on the statute if we agree with you?

2 MR. CHANOS: It makes a difference. It
3 makes a difference.

4 JUSTICE SCALIA: Well, I assume there would
5 be a rule 60(b) motion or the equivalent of it in State
6 court. If indeed our law had changed; don't you think?

7 MR. CHANOS: Yes, absolutely.

8 JUSTICE SCALIA: I mean, it's inconceivable
9 that the problem wouldn't be solved in some fashion by
10 the State court that rendered the decision.

11 MR. CHANOS: I believe that the petitioner
12 would be able to make a subsequent habeas petition at
13 the State court level and if they were somehow denied
14 relief on a procedural basis, there would be nothing
15 that would preclude the Federal court from granting them
16 relief thereafter.

17 JUSTICE GINSBURG: That's a very odd
18 position to take, to proliferate proceedings that way.
19 I mean, I thought your argument, AEDPA argument, was:
20 Too bad, the Federal court is out of it, but the State
21 court is most likely, recognizing that this Court has
22 said what this man did wasn't a crime, to grant him the
23 relief. But if you're making this two-step and saying,
24 but somehow we can change the substantive proceeding
25 into a procedural proceeding, that seems to me odd, to

1 proliferate proceedings that way.

2 MR. CHANOS: Justice Ginsburg, what we're
3 saying is that Congress in enacting 2254(d)(1) was
4 stating that the Federal courts should give deference to
5 the State court decision so long as it is a merits
6 decision and so long as it complies with existing
7 clearly established law and is not unreasonable.

8 And if that occurs, then Congress under
9 2254(d)(1) was saying give State courts deference under
10 those circumstances.

11 JUSTICE SCALIA: When you say -- but not just
12 "clearly"; "then clearly established law."

13 MR. CHANOS: Exactly.

14 JUSTICE SCALIA: That is, at the time of the
15 State court decision.

16 MR. CHANOS: Exactly, absolutely, at the
17 time of the State court decision. In fact, if you look
18 at the language of 2254(d)(1) it says "resulted in a
19 decision that was contrary to or an unreasonable
20 application of clearly established Federal law." It
21 doesn't say "is contrary to clearly established law."
22 It says "was contrary to."

23

24 JUSTICE STEVENS: Yes, but the word "was" is
25 somewhat ambiguous. It could either mean at the time of

1 the trial court's decision or the time of the final
2 judgment on appeal.

3 MR. CHANOS: Well, in either case, it is
4 referring to the --

5 JUSTICE STEVENS: I know you win under
6 either view, but --

7 MR. CHANOS: Yes, exactly.

8 JUSTICE STEVENS: -- it could mean either of
9 those two things.

10 MR. CHANOS: Our, our position would be that
11 it would be up to when the decision became final.
12 Whatever the law was up to the time that the decision,
13 the State court decision became final, that is what was
14 clearly established law.

15 I'll continue with our Teague analysis
16 because we believe that the claim is barred under either
17 analysis. The --

18 JUSTICE KENNEDY: Crawford did use the term
19 bedrock?

20 MR. CHANOS: Yes. Yes. And what
21 Crawford -- what we believe Crawford was saying -- well,
22 Crawford said that the Sixth Amendment right to
23 confrontation is bedrock. It didn't say that that
24 decision altered our understanding of the bedrock
25 procedural elements essential to a fair trial, and that

1 is the standard. Not whether or not the Sixth Amendment
2 is bedrock.

3 In fact, if you look at the case of Gideon
4 versus Wainwright and you look at Betts versus Brady, in
5 Betts versus Brady this Court had held that the Sixth
6 Amendment -- right to counsel was not applicable to the
7 States through the 14th Amendment. Gideon overruled
8 Betts versus Brady and said that the Sixth Amendment
9 right to counsel was applicable to the States under the
10 14th Amendment.

11 That alters our understanding of the bedrock
12 procedural elements that are essential to a fair trial.
13 In one case, we're saying right to counsel is not one
14 of those bedrock procedural elements. Is not,
15 therefore, applicable to the States under the 14th
16 amendment, Betts versus Brady. In the next case we're
17 saying right to counsel is implicit in the
18 Constitution. It is essential to the fairness of a
19 proceeding, and it is therefore applicable to the States
20 under the 14th Amendment.

21 That truly alters our understanding of the
22 bedrock procedural elements that are essential to a fair
23 trial.

24 In contrast, when you look at Crawford
25 vis-à-vis Ohio versus Roberts, the -- there's a real

1 distinction there. In both cases, we know that the
2 right to confrontation is essential and fundamental and
3 one of those bedrock elements that are essential to a
4 fair proceeding. Therefore Crawford doesn't alter our
5 understanding of what elements are or are not essential
6 to -- bedrock elements essential to a fair proceeding.
7 Instead it modifies the contours --

8 JUSTICE STEVENS: Do you make the same
9 analysis if you say the right is not necessarily the
10 right of confrontation but the narrower right of
11 cross-examination?

12 MR. CHANOS: Would I make the same analysis?

13 JUSTICE STEVENS: Because that is central to
14 Crawford.

15 MR. CHANOS: Yes. Yes. Crawford doesn't
16 tell us that the right to confrontation or the right of
17 cross-examination is a new right as Gideon tells us.
18 Instead Crawford tells us --

19 JUSTICE KENNEDY: Well, there is a new
20 emphasis on cross-examination.

21 MR. CHANOS: It alters, it modifies the
22 manner in which we implement that right. Under Ohio
23 versus Roberts there was plenty of cross-examination
24 that was occurring. The standard under Ohio versus
25 Roberts was unavailability and inadequate indicia of

1 reliability. There was a reliability screen in place,
2 and it was clear under Ohio versus Roberts that the
3 right to confrontation was an essential bedrock right,
4 essential to a fair trial.

5 JUSTICE SCALIA: Exactly. But you know, how
6 you play the game depends upon at what level of
7 generality you describe the right. And I agree that
8 if you describe the right as the right to
9 cross-examination, that -- that was -- reinstated by
10 Crawford, which said that the confrontation right is a
11 right to confrontation -- to cross-examination, which
12 didn't exist before. I mean, you could dispense with
13 that right of cross-examination if there were indicia of
14 reliability.

15 MR. CHANOS: Well, there were --

16 JUSTICE SCALIA: I'm not sure that you can
17 so -- in such a facile fashion decide what is a bedrock
18 principle. Frankly, I don't know any formula that
19 would -- that would describe it. I really think it is
20 a -- you know it when you see it.

21 MR. CHANOS: Well, Justice Scalia --

22 JUSTICE SCALIA: It is like obscenity.

23 (laughter.)

24 MR. CHANOS: I understand. The other point
25 that --

1 JUSTICE SOUTER: That gets, if you follow
2 Justice Scalia's argument, that gets you to, I think to
3 the argument that you have made. And that is all right, we
4 have got to look at it pragmatically. I mean, what are
5 the consequences of following a reliability model rather
6 than a cross-examination model? And your argument is
7 consequences that are not necessarily more favorable to
8 defendants, in fact -- or more productive of ultimately
9 reliable determinations, in fact. And that I take it is
10 your basic point.

11 So I think you've answered what for all of
12 us is a problem. And that is we don't have a clear
13 analytical definition of bedrock; but if we look to
14 consequences, you have got an argument. Your friends
15 don't think it is a good one, but that's your point.

16 MR. CHANOS: The other point is that there's
17 a second component to watershed which is it must be a
18 rule without which the accuracy of a proceeding is
19 seriously diminished. There was cross-examination under
20 Ohio versus Roberts. There -- in Crawford, the language
21 of Crawford isn't a sweeping indictment of -- of
22 Roberts.

23 JUSTICE KENNEDY: Well, there wasn't
24 cross-examination by defense counsel.

25 MR. CHANOS: I'm sorry?

1 JUSTICE KENNEDY: In this case there wasn't
2 cross-examination by defense counsel. Or am I
3 incorrect?

4 MR. CHANOS: There was cross-examination of
5 the mother, there was cross-examination of the police
6 detective -- there was cross-examination of --

7 JUSTICE KENNEDY: Oh, oh. No, I mean of the
8 witness.

9 MR. CHANOS: Not of Autumn -- not of Autumn
10 Bockting. But the important point that I want to make
11 before I reserve the balance of my time is that the
12 question isn't simply, is Crawford accuracy-enhancing?
13 The question is is it a rule without which the accuracy
14 of a proceeding is seriously diminished. In other words
15 must all --

16 JUSTICE SOUTER: -- accuracy-enhancing then?

17 MR. CHANOS: I'm sorry?

18 JUSTICE SOUTER: It's a question about how
19 much more accuracy-enhancing, if at all?

20 MR. CHANOS: That, and it is really an
21 analysis of Roberts. Is, is that judicial determination
22 of reliability under adequate indicia of reliability, so
23 fundamentally flawed that all of the decisions that
24 were, that were arrived at pursuant to its authority
25 must be undone, and new trials must occur with respect

1 to those decisions because it is so fundamentally
2 flawed. And our point is that it is not. It does not
3 rise to that level of inadequacy and that Crawford is
4 therefore not a rule without which the accuracy of a
5 proceeding is seriously diminished.

6 Mr. Chief Justice, may I reserve the balance
7 of my time?

8 CHIEF JUSTICE ROBERTS: Thank you General
9 Chanos.

10 Mr. Gornstein, we will hear now from you.

11 ORAL ARGUMENT OF IRVING L. GORNSTEIN, ON BEHALF OF
12 THE UNITED STATES AS AMICUS CURIAE, SUPPORTING
13 PETITIONER

14 MR. GORNSTEIN: Mr. Chief Justice, and may
15 it please the Court:

16 Crawford does not satisfy either of the two
17 requirements for a retroactive watershed rule. The
18 application of Roberts rather than Crawford did not so
19 seriously diminish the likelihood of accurate
20 convictions as to require the wholesale reopening of
21 convictions that were final before Crawford was decided,
22 with all the societal costs that entails.

23 CHIEF JUSTICE ROBERTS: Since you barely
24 cite AEDPA, I assume you think we need to reach the
25 Teague question before the AEDPA issue.

1 MR. GORNSTEIN: Mr. Chief Justice, we do not
2 have an interest in the AEDPA question because it does
3 not apply to Federal convictions, the 2254(d)(1), and
4 there is no Federal conviction analog to 2254(d)(1), so
5 we are not telling you that you should or should not
6 reach it. We just don't have an interest in that
7 question.

8 CHIEF JUSTICE ROBERTS: It is law that is
9 applied in Federal court, though. I assume you have an
10 interest in that.

11 MR. GORNSTEIN: Well, we have a general
12 interest in the way law is applied in the Federal court
13 but we do not ordinarily opine on issues just on that
14 basis and we haven't in the past opined on AEDPA issues
15 unless they have some Federal analog carryover effect.
16 And we did not here.

17 Now with respect to the reliability prong of
18 the Teague analysis, there are three reasons that the
19 Roberts rule did not so seriously diminish the
20 likelihood of accurate convictions as to call for
21 retroactive application of Crawford.

22 The first is that Roberts had a built-in
23 reliability screen. Hearsay could not be admitted under
24 Roberts unless a determination was made that there were
25 particularized guarantees of trustworthiness.

1 The second reason that Roberts did not
2 seriously diminish the likelihood of accurate
3 convictions is that there were other procedural
4 components that operated in tandem with Roberts to
5 promote accuracy. They included the right to
6 cross-examine the witness through whom an hearsay
7 statement was introduced, the right to introduce your
8 own evidence to challenge the reliability of the hearsay
9 statement. Defense counsel could point out to the jury
10 all the weaknesses in the hearsay statement and the
11 defendant could count on the common sense of the jury to
12 weigh the reliability of the hearsay statement in light
13 of all the evidence in the case.

14 JUSTICE ALITO: Can't you make that argument
15 about any, about cross-examination in general? It is
16 debatable whether -- how good cross-examination is in
17 determining the truthfulness of a witness's testimony.
18 Now, our Constitution decides the issue one way, but any
19 infringement of cross-examination could be susceptible
20 to the same argument that you are making.

21 MR. GORNSTEIN: Yes. And I don't think that
22 this is a self-sufficient argument for that reason. It
23 is just one component of the argument about why there
24 was reliability. The fact that there was a Roberts
25 screen on reliability is an additional factor that

1 distinguishes my example from what you said.

2 And the fact is that there was a right to
3 cross-examine live witnesses here. So there was a right
4 to cross-examine the police officer through whom this
5 hearsay statement was made. It is not a case where
6 there was an across-the-board denial of any
7 cross-examination.

8 JUSTICE KENNEDY: Well I guess you're asking
9 us to say Crawford, get one, take one, it is really not
10 that important. If that's so, I suppose we shouldn't
11 have overruled Roberts.

12 MR. GORNSTEIN: No, I think that Crawford is
13 an important decision. But if you made retroactive
14 every one of your important decisions, you would be
15 reversing the rule of Teague. What Teague says is that
16 there is not -- that the purposes of habeas corpus are
17 largely exhausted once somebody has received a trial in
18 accordance with then-existing law.

19 Because of the importance of finality to the
20 system -- and there are only going to be two very --
21 there's only a very narrow window for watershed rules,
22 of rules that, the accuracy of proceedings beforehand
23 are so seriously diminished that there is an
24 unacceptably large risk that systematically, innocent
25 people were being convicted, and that this is a rule

1 that approaches Gideon in its fundamental and sweeping
2 importance. Those are the only circumstances in which
3 the Court is going to go back on finality.

4 JUSTICE GINSBURG: How many times have we
5 dealt with a quote, "new rule," with the argument made
6 that it was watershed and therefore should be
7 retroactive? This is not the first time.

8 MR. GORNSTEIN: No, I think that there have
9 been -- I don't know the exact number, but maybe 11 or
10 12, about half of which are ones, are proposed new rules
11 and half of which are ones where the rule was already
12 established previously and the question was whether it
13 was going to be made retroactive. And I cited in the
14 brief there are three or four death penalty cases where
15 the Court had already established before each one of
16 them that there was a right not to be -- the death penalty to
17 be arbitrarily imposed. And in each case there was a
18 new rule that built on that basic rule in an important
19 way; but in each case, the Court said it was not the
20 kind of rule that was going to be applied retroactively.
21 And so, too, here.

22 The third reason I wanted to give about why
23 there was not a serious diminishment in accuracy is that
24 in at least one respect, the Roberts rule actually
25 promotes more accuracy than the Crawford rule, and

1 that's with respect to nontestimonial hearsay. In the
2 case of nontestimonial hearsay, under Roberts, that
3 could come in only if a determination had been made that
4 there were particularized guarantees of trustworthiness.
5 Whereas under the Crawford rule, that kind of
6 nontestimonial hearsay comes in without any reliability
7 check under the Constitution at all.

8 JUSTICE KENNEDY: But that's not this case.

9 MR. GORNSTEIN: Well there was actually in
10 this case the mother's testimony about what the daughter
11 said to her.

12 JUSTICE KENNEDY: I'm talking about the
13 daughter's testimony.

14 MR. GORNSTEIN: Yes. The daughter's
15 testimony about what she said to the mother illustrates
16 the difference, because that came in through the mother.
17 It only came in because there was a particularized
18 guarantees of trustworthiness to that statement; whereas
19 under Crawford in future trials, statements to the
20 mother -- which are not testimonial -- they will come in
21 through the mother without any screen for reliability
22 under the Constitution at all. So in that respect, the
23 defendant here got more by virtue of the Roberts rule
24 than by -- than he would have had by virtue of the
25 Crawford rule.

1 JUSTICE SCALIA: Is that the case in Federal
2 courts, too?

3 MR. GORNSTEIN: Well, it is a matter of
4 interpreting -- what protection is left is only going to
5 be by virtue of the residual hearsay rule. So there
6 will have to be some determination made about whether
7 there are sufficient guarantees of trustworthiness.

8 JUSTICE SCALIA: I mean, it is conceivable
9 that Federal courts would interpret the hearsay rule to
10 require precisely that anyway.

11 MR. GORNSTEIN: They might, Justice Scalia --

12 JUSTICE SCALIA: In which case you shouldn't
13 be making this argument because it applies only to State
14 courts.

15 MR. GORNSTEIN: No. I think it applies
16 equally to Federal courts because it is free to the
17 Federal court system to devise a rule that would allow a
18 looser standard of entry than the Roberts standard, and
19 if it did, that would be constitutional. So there is an
20 interest in that kind of argument in the Federal system.

21 I wanted to move on to the bedrock aspect of
22 the inquiry, which is a separate second inquiry that had
23 threshold that has to be crossed if you are going to
24 find something to be watershed, and the only rule that
25 the Court has found to be bedrock is Gideon. And this

1 rule, Crawford does not approach Gideon in its
2 fundamental and sweeping importance, and there are a
3 couple of reasons for that.

4 First, the right to counsel pervasively
5 affected all aspects of the criminal trial whereas this
6 focuses on one limited -- the admissibility of one
7 limited category of evidence, testimonial hearsay, and
8 adopts a somewhat new rule for that than had existed
9 before.

10 The second thing is that under, the right to
11 counsel is deemed so essential to a fair trial that
12 depriving someone of that right can never be discounted
13 as harmless error, whereas Crawford errors can be
14 harmless. There are a significant number of cases where
15 they are found to be harmless. And so you cannot say that a
16 violation of the Crawford rule always and necessarily
17 results in an unfair trial, whereas you can say that
18 about the right to counsel.

19 Finally, the Gideon rule established for the
20 first time a right to free counsel in all felony
21 criminal trials. Before Crawford was established, there
22 was a right to cross-examine. It simply was a different
23 right. You had a right to cross-examine the live
24 witnesses and you had a right to screen out
25 uncross-examined statements unless they met the

1 reliability standard of Roberts. And the change that
2 was made was one in which the Roberts rule was thrown
3 out, and you can no longer get in uncross-examined
4 statements with a determination of reliability.

5 But that is a modification or an incremental
6 change in an existing right that previously existed to
7 cross-examine, and instead -- unlike the Gideon rule,
8 which established the right to counsel for the first
9 time.

10 If the Court has nothing further.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 Mr. Gornstein.

13 Ms. Forsman?

14 ORAL ARGUMENT OF FRANCES A. FORSMAN

15 ON BEHALF OF THE RESPONDENT

16 MS. FORSMAN: Mr. Chief Justice. Members
17 of the Court:

18 This man was sentenced to life in prison
19 based upon accusations that have never been tested by
20 the only constitutionally reliable test that is now
21 acceptable in this Court. There is no question that the
22 statements that were admitted through the police officer
23 were testimonial. There is no question that if
24 Mr. Bockting were tried today, that those statements
25 would not have come in.

1 The Government has argued that the
2 reliability screen, so-called, that came from Roberts
3 was sufficient, and that it was only an incremental change
4 when the Crawford decision was decided. The fact of the
5 matter is that this Court found that the reliability
6 screen that the Government has discussed was
7 fundamentally flawed.

8 And in this case, comparing the right to
9 counsel to the right to cross-examination is easy. It
10 is easy because it would not have mattered how many
11 lawyers Mr. Bockting had. It would not have mattered if
12 he had the finest lawyers in the country. It would not
13 have mattered if he was Duke Power Company and had every
14 lawyer at the highest hourly rate representing him. If
15 he was unable to cross-examine his accuser, just as in
16 Crawford -- in Crawford, there was even an audiotape of
17 what the wife said. There was an audiotape. There was
18 a police officer who listened to what she said. And
19 this Court found that wasn't good enough.

20 JUSTICE SCALIA: Well, we didn't say in
21 Crawford, I don't think we said in Crawford -- I ought
22 to know, I suppose.

23 (Laughter.)

24 JUSTICE SCALIA: -- that the new rule
25 produced greater accuracy. We said that it was the view

1 of the framers of the Constitution that
2 cross-examination, confrontation in that sense, was
3 necessary for greater accuracy.

4 Now in our evaluation of what constitutes a
5 landmark decision, are we bound to the framers' view of
6 things? I mean, you know, maybe -- I'm not sure that if
7 you apply a proper interpretation of indicia of
8 reliability under Roberts, I'm really not sure whether
9 it wouldn't be more accurate than confrontation, but
10 that wouldn't matter to me, because confrontation is
11 what the Constitution required and what the framers
12 thought were necessary.

13 Now, am I bound, for purposes of the rule we're
14 arguing about here, to what the framers think?

15 MS. FORSMAN: No, Your Honor, you are not
16 bound to what the framers think. However, I think that
17 you went far beyond simply saying that this was like
18 quartering soldiers in discussing the confrontation
19 clause and the right to confrontation. The opinion goes
20 into at length why the Roberts rule was so fundamentally
21 flawed. You talk about the kinds of decisions that
22 were produced, although this Court said that this Court
23 had pretty much tacked to the same direction as the
24 framers' view.

25 JUSTICE SCALIA: I think that discussion of

1 the, you know, the contrary decisions that had been
2 produced under Roberts was just for the purpose of
3 justifying the overruling of a case that -- you know --
4 that was not that old. It hadn't worked out as well as
5 we maybe expected it would. But I don't think it was
6 for the purpose of showing that it always produces
7 unreliable results.

8 MS. FORSMAN: And I don't think that our
9 burden would to be show that it always produces
10 unreliable results. I think that this Court has clearly
11 taken the position that the only constitutional
12 reliability is the right to cross-examination. However,
13 throughout your retroactivity jurisprudence, you have
14 been able to distinguish easily between issues such as
15 the exclusionary rule, the right to a cross-section of
16 the community on a jury, and the right to
17 cross-examination. I would point out to you, the
18 decisions that made Bruton, for instance, retroactive,
19 because the right to cross-examination went so directly
20 to the integrity of the factfinding process.

21 I think that one of the major difficulties
22 in the argument being taken by the State --

23 JUSTICE KENNEDY: But that sin was
24 structural, like Toomey versus Ohio. The judge that is
25 corrupt. It is just structural. You can't say that

1 about Crawford, or can you?

2 MS. FORSMAN: I don't need to say, Your
3 Honor, that it is structural. I think the issue of
4 whether something is structural error or harmless error
5 has to do with whether or not it is measurable, not
6 whether it's bedrock, not whether it's watershed, not
7 whether it leads to better accuracy.

8 We know that, because in Teague, although
9 Gideon was the only case explicitly referenced, there
10 was also three other examples mentioned in Teague.
11 There was a trial tainted by mob violence. There was a
12 trial flawed because of the intentional introduction of
13 perjured testimony. And there was a trial flawed by the
14 introduction of testimony with regard to a coerced
15 confession.

16 And we know that two out of those three
17 examples are actually subject to harmless error analysis.
18 So this Court has never tied the issue of the elements of
19 Teague or the elements even of the pre-Teague
20 jurisprudence to the issue of whether something is
21 structural or harmless. It is the issue, as it was in
22 the more recent decision of Gonzalez-Lopez, the right
23 to choice of counsel decision. There, what the Court
24 looked to to determine the issue of harmlessness is, is
25 it quantifiable. And in this case, courts are

1 accustomed, appellate courts are accustomed to looking
2 at the introduction of this kind of evidence and
3 determining whether or not it is harmless.

4 The State has not taken a position before
5 this Court that the Ninth Circuit was erroneous in
6 determining that this evidence was prejudicial, and
7 therefore affected the outcome.

8 So the issue of accuracy as defined by the
9 State and by the Government, the problem with that
10 argument and the easiest way to see the problem in that
11 argument is if you look to Gideon. Certainly we
12 wouldn't argue that the insertion of counsel into a case
13 may not result in what the State is defining as a more
14 accurate result. The insertion of counsel into a case
15 may well cause the exclusion of evidence. In fact, in
16 many instances that is exactly what counsel does.

17 So their definition of accuracy if applied
18 to the Gideon case would mean that Gideon would flunk
19 that definition, and wouldn't be the case that has been
20 so repeatedly referenced by this Court as an example of
21 the kind of case that should be made retroactive.

22 JUSTICE GINSBURG: Ms. Forsman, what about
23 the few cases we've had so far on this second Teague
24 category? As far as I know -- well, we haven't found
25 anything to be retroactive on collateral review so far,

1 so this would be the first time.

2 MS. FORSMAN: It would be, Your Honor, and
3 it is appropriate that this be the first time. As I
4 previously referenced, those cases fell -- there are 12
5 of them, by the way. There were 12 decisions post-
6 Teague applying the Teague analysis in which this Court
7 did not find retroactivity. The Solicitor General is
8 correct. Some of those were cases in which on
9 collateral review, the petitioner was seeking to actually
10 create a new rule and then apply it retroactively.

11 But if we look to cases such as the
12 retroactive application of Batson, for instance, what
13 this Court has found is that the Batson rule, the
14 cross-section of the community on a jury, that the
15 purpose of that rule was not created for the purpose of
16 protecting against unjust convictions or ensuring the
17 integrity of the factfinding process. That was not the
18 purpose of the Batson rule, this Court found that it
19 wasn't the purpose of the Batson rule, and that
20 therefore, it would not fall under the Teague exception.

21 That is not so when you talk about the
22 purpose of the cross-examination rule.

23 JUSTICE GINSBURG: What about the decision
24 that said Ring v. Arizona was not retroactive on
25 collateral?

1 MS. FORSMAN: Again, in Schriro versus
2 Summerlin, the issue there was an issue with regard to
3 ultimate accuracy of a jury versus a judge. Again, this
4 Court found that the evidence was -- the evidence was
5 equivocal with regard to whether or not a judge findings
6 or jury findings were more accurate.

7 Now you might say, well, that sounds a
8 little bit like Roberts. The problem with that is is
9 that it isn't like Roberts, because under Roberts, the
10 cross-examination right, which is something that we have
11 held so dear and connected so directly to the right to
12 counsel, having counsel without the right to
13 cross-examination, isn't much of a right.

14 JUSTICE KENNEDY: The problem with your
15 case -- maybe you'll tell us it's our problem because it
16 was our rule -- is that we're asked to adopt an
17 across-the-board calculus as to the rule, and in some
18 cases, as I think you will have to concede, under the
19 Roberts jurisprudence, the factfinding was more accurate.

20 In your case, what you are telling us is
21 that the factfinding is far less accurate. But I think
22 you are stuck unless you can give us some reason that we
23 can depart with it, with a rule-made jurisprudence.
24 We have to look at the rule in the whole universe of cases,
25 not just your case, and it seems to me that's the problem

1 you had in arguing in this area, now maybe you can suggest
2 some way out. I don't see it.

3 MS. FORSMAN: I can, Your Honor. The reason
4 that I can is that the judge does not have the ability
5 to see the cross-examined statement either. So if we
6 start with the premise, when making this reliability
7 determination, we would have to throw out all of the
8 statements in Crawford and all of the previous cases
9 which hold so dear the right to cross-examination and
10 say, but a judge can make a reliability determination
11 without ever hearing the statements cross-examined, can
12 make them in that vacuum without ever testing the
13 reliability of the statements with the -- with
14 cross-examination.

15 And I don't know how you would be able to
16 square that with the strong statements that are made in
17 Crawford. And the strong statements that are made in
18 the cases, for instance, in the case finding that Bruton
19 should be retroactive, because it goes to the integrity
20 of the fact-finding process. Unlike all of the other
21 cases that you've talked about since Teague, the
22 integrity of the factfinding process is what is at
23 issue here. Do you have confidence in a result which is
24 based upon an accuser's statements being admitted
25 without ever having been cross-examined?

1 CHIEF JUSTICE ROBERTS: But Ohio versus
2 Roberts was not overruled because of a judgment that it
3 was not doing a good enough job in assessing the
4 reliability of these statements. It was overruled
5 because of a judgment that the Founders wanted there
6 to be cross-examination.

7 MS. FORSMAN: That's -- Your Honor -- that is
8 the base of the decision is harkening back to what the
9 Founders believed. However, the rule in Roberts was
10 described variously from "amorphous to unpredictable,
11 to manipulable," to saying that the basis for the
12 right to confrontation and cross-examination comes from
13 a basic mistrust of, even to the levels of a judge in
14 terms of assessing the testimony without the advantage
15 of an actual adversary proceeding.

16 This case, of course, illustrates the dire
17 need for cross-examination because the accuser in this
18 case testified inconsistently at the preliminary hearing
19 in this case and then was excused before
20 cross-examination was allowed. The accuser in this
21 case, who was sent to a counselor by the district
22 attorney, when she went to the counselor refused to
23 acknowledge that the incident happened, according to the
24 testimony of the counselor.

25 And because the court -- and the record is

1 very scant on what happened here -- the court, the trial
2 court for instance, under Roberts made only a couple of
3 findings and he said the testimony was consistent -- he
4 didn't look at the fact that it had been inconsistent on
5 at least two other occasions -- and said it was
6 chronological, at least according to what the police
7 officer said.

8 And so there were only a couple of findings
9 by the trial court at all with respect to --

10 CHIEF JUSTICE ROBERTS: And you had the
11 opportunity to challenge those findings under the
12 Roberts regime in State court?

13 MS. FORSMAN: We did. We did, and that --
14 and that issue was not reached by the Ninth Circuit
15 because after we had argued the case in the Ninth
16 Circuit the Crawford decision was decided; and it was at
17 that point that the Ninth Circuit picked up on the
18 Crawford, and they didn't decide the issue of whether or
19 not Roberts would have meant that this testimony was
20 unreliable anyway.

21 JUSTICE BREYER: You're going to still
22 argue -- what hearsay exception did it come in under?

23 MS. FORSMAN: It came in under a Nevada
24 statute which was patterned after Roberts. It came in
25 under a Nevada statute --

1 JUSTICE KENNEDY: Adequate indicia of
2 reliability?

3 MS. FORSMAN: Yes, adequate -- it's basically
4 indicia of reliability. It didn't go into -- it didn't
5 go into too much more detail than that. It just simply
6 required that, a witness under ten, the court must find
7 that the, that the statement is reliable and the
8 statements are reliable, and then --

9 JUSTICE BREYER: Is that universal in
10 Nevada? I mean, is they are no more hearsay rule in
11 Nevada, that you just evaluate hearsay straight out in
12 every case?

13 MS. FORSMAN: No. No. That was a statute
14 that was adopted specifically for child witnesses.

15 JUSTICE GINSBURG: This is for children
16 under ten, isn't it?

17 MS. FORSMAN: Children under ten.

18 JUSTICE GINSBURG: As you just said.

19 MS. FORSMAN: That's correct.

20 JUSTICE GINSBURG: And here we had someone
21 who was six years old and was hardly articulate, it
22 seemed from the little we have in this record. So the
23 Nevada statute I think was very specific to children and
24 was not --

25 MS. FORSMAN: It was. Yes, yes. No, it

1 was. It was adopted for witnesses under ten. This
2 child actually was quite articulate in the preliminary
3 hearing and was able -- was able to talk about the fact
4 that she remembered talking to the police officer, that
5 she remembered -- but then, but then in terms of trying
6 to recall the incident, she was unable to recall the
7 incident, and she was unable to recall it in any of the
8 same detail that the police officer testified to.

9 So it wasn't -- you know, it wasn't a
10 circumstance in which you had a child who simply
11 couldn't speak or a child who couldn't describe what had
12 occurred.

13 JUSTICE BREYER: So if you lose this case,
14 you can go back to the Ninth Circuit and say, well, even
15 under Roberts it shouldn't have come in?

16 MS. FORSMAN: I believe that's correct, Your
17 Honor, because the Ninth Circuit did not reach that
18 issue.

19 JUSTICE STEVENS: Would you comment,
20 Ms. Forsman, on your opponent's argument based on
21 2254(d)?

22 MS. FORSMAN: Yes. I think the easiest way
23 to explain our position on that is that what has been
24 articulated here is that a retroactive -- a rule made
25 retroactive by this Court would be applicable to

1 Mr. Bockting if he had not raised this issue or had been
2 somehow procedurally defaulted along the way. In other
3 words, in order to be able to get the advantage that was
4 discussed by both the State and the Government of the
5 other sections of the statute which clearly recognize,
6 as to the extent that it's relevant the sponsor of the
7 legislation did, that you still have the power to make
8 rules retroactive, but the only way that Mr. Bockting
9 would be able to get advantage of that rule would be if
10 the State court had never ruled on the merits of his
11 claim or had made some sort of procedural ruling that
12 meant that he was defaulted on the claim. So instead of
13 Mr. Bockting, who has raised this question of being able
14 to cross-examine his accuser from day one in the trial,
15 he cannot have that rule applied retroactively to him.
16 If instead he now, he goes back later and the court
17 says, no, this is a successor petition, you can't, you
18 can't get it, you can't come into our courtroom, the
19 door is slammed on you, according to the State now
20 there's no ruling on the merits of his claim, and that's
21 why that section of the statute would permit the
22 retroactive rule to apply.

23 2254(d)(1), while it has the language
24 clearly established, and the Court asked some questions
25 about that, I think it must be remembered that when that

1 statute is being addressed, it's being addressed in
2 State court -- or in Federal court, on Federal habeas.
3 And so at the time that the petitioner is in Federal
4 court, then the rule has been clearly established.

5 The 2254(d) --

6 CHIEF JUSTICE ROBERTS: That's not -- the
7 State has to result -- the State -- it's adjudicated on
8 the merits in State court and results in a decision that
9 was contrary to clearly established Federal law.

10 MS. FORSMAN: Correct.

11 CHIEF JUSTICE ROBERTS: So it seems to me
12 that the question is what was the law, what was the
13 clearly established law at the time of the State
14 decision.

15 MS. FORSMAN: 2254(d)(1), I think the only
16 way that you can read that section compatibly with the
17 four other sections which are quoted in our appendix 2
18 of our brief, the only way that you can do that is to
19 recognize, although this Court will recall that it has
20 described AEDPA as not quite a silk purse of legislative
21 drafting, but the only way to make those sections
22 compatible is to say, listen, what was going on when
23 2254(d)(1) was written was we were talking not about the
24 timing of the new rule, what we were talking about is
25 who is it decided by, because before AEDPA was adopted

1 it wasn't apparent that it must be a decision by you, by
2 this Court, that established the rule. So that's the
3 first part.

4 And the second part is that it's not dicta.
5 It is an actual holding of this Court that is to be
6 looked to to determine whether or not the State court
7 was wrong. And so the only way to read that is to say,
8 listen, there has to be some meaning to retroactivity,
9 and what does retroactivity mean? Retroactivity means
10 like a nunc pro tunc order, that when you've determined
11 that a new rule is retroactively applicable -- and
12 certainly -- between AEDPA and the Teague exceptions,
13 which you did say in Horn versus Banks, by the way,
14 should be analyzed separately -- although it has not
15 been tossed up to you directly as it has in this case,
16 the meaning of the 2254(d)(1), you have repeatedly
17 advised that Teague is still alive and well and that
18 when you look to the application of whether a rule
19 should be applied retroactively we look to the Teague
20 exceptions, so we also look --

21 JUSTICE ALITO: Is there any language in
22 2254(d) that could incorporate the Teague exceptions?

23 MS. FORSMAN: There is not language in
24 2254(d)(1). The language -- the reason that we know
25 that Congress was cognizant of Teague is that there is

1 language throughout AEDPA, particularly in the sections
2 that we've quoted to you, that are lifted directly from
3 Teague.

4 JUSTICE ALITO: What would we say if we were
5 to say that 2254(d)(1) accommodates the Teague
6 exceptions, that Congress meant to put them in but just
7 forgot to do it? How would we account for the language?

8 MS. FORSMAN: I think that what you would
9 say is that Congress would not have deprived you of the
10 power to make a rule retroactively applicable and would
11 have not have created the ludicrous situation which the
12 State suggests would occur here, which is instead of the
13 motivation of Congress in having someone like
14 Mr. Bockting raise the issue from the very beginning in
15 one unitary proceeding, as opposed to going back, which
16 is what they've suggested he must do in order to get the
17 advantage of a retroactive rule, is that Congress was
18 cognizant of that and in order to make all of the
19 statute -- all of the provisions of the statute have
20 meaning and not render certain provisions, including the
21 sections that we quoted, superfluous, that you must
22 interpret that to mean that the -- that the -- that
23 2254(d)(1) is not a timing statute. It's what law do we
24 look to. That must be what they meant. Otherwise, the
25 rest of it just doesn't make any sense.

1 JUSTICE ALITO: Isn't that making the tail
2 wag the dog, because there's language in the provisions
3 on successive petitions that refers to Teague, that you
4 would read the Teague exceptions into 2254(d)(1) when
5 there's nothing in the language there that can be
6 interpreted to refer to them?

7 MS. FORSMAN: No. I don't believe that's
8 the tail wagging the dog, because I don't think that
9 that was the intent of 2254(d)(1). I think the
10 intent -- again, I think the intent of 2254(d)(1) was in
11 order to define what kinds of decisions the State court
12 decision should be measured against. There must be
13 some kind of meaning to retroactivity, and retroactivity
14 means that you are making this decision now and you're
15 making it retroactive to the time. It is not going to
16 be many things, as we know not only from your decisions,
17 but as we know from the very small core of decisions
18 that Teague left open. And it is those decisions where
19 we must worry whether or not an innocent man has been
20 convicted. It is those rules that protect against
21 those -- an unjust, an unwarranted, a wrongful
22 conviction. It is only those rules that go to
23 reliability, that go to the integrity of the
24 factfinding process, that you are going to let through
25 that veil.

1 So if it is only that small core of rules
2 that you reserved in Teague, only that small core of
3 rules, and we know it won't be many at this point, then
4 if you read that compatibly with AEDPA, it is not and,
5 as we know, it is not going to open the floodgates.
6 There is a very defined period of time in which people
7 can bring actions for relief. Under your Dodd decision,
8 there is only one year, not from the time that
9 you make -- if you were to make, for instance, this
10 decision retroactive, not from today, but it is one year
11 from Crawford that petitioners have the opportunity to
12 be able to come into court within that statute of
13 limitations with regard to the date on which a new rule
14 is adopted.

15 It is from that date forward. So there is a
16 defined population. In appendix 1 of our brief, you
17 will see all of the decisions that we could find that
18 have actually applied Crawford and there were 49 of
19 them. And what you'll find is one of the 49 decisions --
20 and the State and the Government have not disputed
21 this -- of the 49 decisions which we were able to find
22 at the time of the writing of that brief, only five
23 actually resulted in relief. There's no question it
24 would result in relief here because there is no
25 contention before you that the Ninth Circuit's

1 determination of harmfulness -- there is no
2 determination before you; they haven't challenged that
3 to you.

4 So it would result in relief for
5 Mr. Bockting. But because of harmless error or it's
6 not testimonial or there was a previous opportunity to
7 cross-examine, of the 49 decisions only five were found to
8 have to result in relief.

9 And that is as it should be. The State
10 argues that watersheddedness, if that's a word, is that
11 watersheddedness must mean that it affects many, many
12 decisions. Well, that can't be what Teague means.
13 Teague can't mean that my burden is to show you that
14 many decisions will be overturned. That's the exact
15 opposite of what Teague was decided for.

16 Watersheddedness has to do with the
17 alteration of our understanding. It is difficult for me
18 to understand how the change of course as described by
19 then Chief Justice Rehnquist, that the change of course
20 that Crawford represented in the way that we look at the
21 right to confrontation cannot be, cannot be seen as
22 precisely the alteration in the understanding of this
23 bedrock principle again directly from the language of
24 Crawford.

25 We ask you, Your Honors, to make the rule of

1 Crawford retroactive and to affirm the determination of
2 the Ninth Circuit.

3 JUSTICE STEVENS: Ms. Forsman, can I ask you
4 a personal question? Were you a moot court finalist?

5 (Laughter.)

6 MS. FORSMAN: I was not.

7 JUSTICE STEVENS: I attended a moot court at
8 Notre Dame about your year and it was an awfully good
9 moot court.

10 MS. FORSMAN: Thank you, Judge.

11 CHIEF JUSTICE ROBERTS: Thank you, Ms.
12 Forsman.

13 General Chanos, you have two minutes
14 remaining.

15 REBUTTAL ARGUMENT OF GEORGE J. CHANOS

16 ON BEHALF OF PETITIONER

17 MR. CHANOS: Thank you, Mr. Chief Justice.
18 I only have a few points.

19 First of all, counsel's argument with regard
20 to the interpretation of 2254(d)(1)'s clearly established
21 language is inconsistent with the statement made --
22 statements made by this Court in Lockyer and in Williams
23 v. Taylor. In Lockyer, the Court stated section
24 2254(d)(1)'s clearly established phrase refers to the
25 holdings, as opposed to the dicta, of this Court's

1 decisions as of the time of the relevant State court
2 decision, citing Williams v. Taylor. In other words,
3 clearly established Federal law under 2254(d)(1) is the
4 governing legal principle or principles set forth by the
5 Supreme Court at the time the State court renders its
6 decision.

7 With regard to counsel's point about
8 this case in particular, Bockting, I agree that there
9 are broader issues beyond this particular fact
10 situation. However, I want the Court to feel
11 comfortable that when this Court sent this case back
12 down to the Nevada Supreme Court and told the Nevada
13 Supreme Court to follow Ohio -- Idaho versus Wright, the
14 factors in Idaho versus Wright to determine
15 trustworthiness, talk about spontaneity and consistent
16 reputation -- repetition, mental state of declarant, use
17 of terminology unexpected of a child of similar age, and
18 lack of motive to fabricate. Particularized guarantees
19 of trustworthiness must be so trustworthy that
20 adversarial testing would add little to its reliability.

21 Following that admonition from this Court,
22 the Nevada Supreme Court found those statements to be
23 reliable and to satisfy the standards of Ohio -- Idaho
24 versus Wright.

25 Finally, I would just point out that

1 although Caldwell is indeed an important rule, and may,
2 in fact, be a fundamental rule, so was Batson in Teague,
3 as was Caldwell in Sawyer, as was Ring in Summerlin, as
4 was Duncan in DeStefano as was Mills in Banks. Yet this
5 Court failed to apply retroactive status to any of those
6 important fundamental rules saying that none of them rose
7 to the level of Gideon versus Wainwright. The same
8 should be true with your decision here with respect to
9 Crawford.

10 Finally, as Justice Harlan stated in the
11 case of McKay, talking about where this Court's
12 retroactivity jurisprudence has come from, no one,
13 not --

14 CHIEF JUSTICE ROBERTS: You can finish your
15 sentence.

16 MR. CHANOS: Thank you.

17 CHIEF JUSTICE ROBERTS: Particularly if it
18 is Justice Harlan you're quoting.

19 (Laughter.)

20 MR. CHANOS: Thank you, Mr. Chief Justice.
21 No one, not criminal defendants, not the judicial
22 system, not society as a whole is benefited by a
23 judgment providing that a man shall tentatively go to
24 jail today, but tomorrow and every day thereafter his
25 continued incarceration shall be subject to fresh

1 litigation on issues already resolved.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, General.

4 The case is submitted.

5 (Whereupon, at 12:02 p.m., the case in the
6 above-entitled matter was submitted.)

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