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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Danforth v. Minnesota.

Mr. Butler.

ORAL ARGUMENT OF BENJAMIN J. BUTLER

ON BEHALF OF THE PETITIONER

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

In this case, the Minnesota Supreme Court held that this Court had prevented it from deciding for itself which State prisoners can go into Minnesota State courts to raise Federal constitutional challenges to their convictions. This is incorrect.

A State court is free to fashion -- the State courts are free to fashion their own jurisprudence as to who may raise a Federal constitutional question in State court in the context that if you hear State courts and State legislatures can make their own policy decisions about the costs and benefits of allowing State prisoners to challenge their otherwise final convictions based on new rules of Federal constitutional criminal --

JUSTICE KENNEDY: Well, I propose if the State of Minnesota really cared about this, it could have its own confrontation rule. Does it have a

1 confrontation rule?

2 MR. BUTLER: The State constitution, Justice
3 Kennedy, has a confrontation clause. Its jurisprudence
4 on the confrontation clause, its own, is identical to
5 this Court's jurisprudence. So, yes, theoretically, a
6 Petitioner could always go in and make a State-court
7 challenge to his State-court conviction. The question
8 --

9 JUSTICE KENNEDY: Well, I mean, that means
10 the State isn't necessarily tied in knots. It has the
11 option to do substantively what it chooses.

12 MR. BUTLER: The question in this case, Your
13 Honor, I think, is that whether -- is the question of
14 whether it has to. Yes, a State prisoner can make a
15 State court challenge to his conviction. The question
16 is, does he have to? In this case, Mr. Danforth
17 challenges his conviction under the Federal
18 Constitution.

19 JUSTICE KENNEDY: Well, page 2 of your reply
20 brief, the yellow brief, you take issue with the State,
21 and you say the State is wrong if there is a decision
22 either way on the confrontation clause and it's
23 questionable under Federal law, we can review it. I can
24 concede that's right, but that doesn't get you home.
25 That's the problem.

1 MR. BUTLER: Well --

2 JUSTICE KENNEDY: That is the problem.
3 You're now creating a regime in which State-courts are
4 reaching questions that we said ought not to be reached
5 for final convictions.

6 MR. BUTLER: Your Honor --

7 JUSTICE KENNEDY: And that was the basis on
8 which we decided Crawford.

9 MR. BUTLER: Your Honor, it's simply a
10 regime under which the State court, as it can in any
11 number of other contexts, can choose to consider the
12 merits of a litigant's claim. The Federal question --
13 the Federal question here is -- well, there are two. In
14 this case, it's whether Federal law prevents the State
15 court from hearing it, but the substantive Federal
16 question is whether Mr. Danforth's conviction violates
17 the confrontation clause.

18 JUSTICE SCALIA: And you think that our
19 holding in Teague was that it did, but we're not going
20 to let you out of jail?

21 MR. BUTLER: I think --

22 JUSTICE SCALIA: You think that's really
23 what we said in Teague, that even though your
24 constitutional rights were violated, we're going to
25 foreclose the remedy of habeas corpus? I -- I find it

1 difficult to believe that that -- you know, any
2 responsible court could make such a determination.

3 MR. BUTLER: Your Honor, what the Teague
4 Court did was set up a procedural and a prudential limit
5 on a defense available to the State in the particular
6 form of habeas corpus.

7 JUSTICE GINSBURG: That issue is not a
8 necessary part of your case at all, but you don't have
9 to suggest that you could depart. You could do less
10 than Teague. For example, Griffith. You can accept
11 that as a given because it doesn't touch your case.
12 Isn't that so?

13 MR. BUTLER: That's correct, Your Honor.
14 Griffith sets forth, as we see it, the minimum
15 requirements of Federal law, that a new rule must be
16 applied to all cases that were pending when the new rule
17 is announced. That's what the Federal Constitution
18 requires.

19 CHIEF JUSTICE ROBERTS: Well, Federal rules
20 don't have minimums and maximums. They have a rule.
21 And as Justice Kennedy pointed out, you can have a State
22 rule under the State constitution that goes further. It
23 seems to me that the State's determination to apply
24 Crawford retroactively must be based on a disagreement
25 with this Court's Teague analysis, which refers back to

1 the substantive elements of Crawford. So, in other
2 words, the disagreement at bottom is a disagreement
3 about how to read the substantive requirements of
4 Crawford.

5 MR. BUTLER: Respectfully, Mr. Chief
6 Justice, I don't think that's necessarily true. I think
7 the disagreement, if there is one, is with this Court's
8 policy decision in Teague to -- that the Court announced
9 in Teague onto whether to allow such challenges.
10 There's no disagreement as to the substance of Crawford
11 or to the substance of the Sixth Amendment. Nobody has
12 ever reached that --

13 CHIEF JUSTICE ROBERTS: Well, how do you --
14 I understand your point. Teague has both elements to
15 it. But if you're applying Teague, there are certain
16 exceptions that are based on exactly what the underlying
17 right is, what the Crawford right is. Is it a watershed
18 rule? Is it something else? And the Court makes a
19 determination as a matter of Federal law on those
20 points. And what you're arguing for is discretion in
21 the State to disagree with those substantive
22 determinations.

23 MR. BUTLER: What we're arguing for,
24 Mr. Chief Justice, is discretion in the State to
25 disagree with the general policy rule that a court will

1 not consider a new rule when considering the validity of
2 a conviction on, in Teague's case, habeas or on
3 collateral review.

4 JUSTICE KENNEDY: Well, you say it's a
5 general policy rule, but it may well, as in the Crawford
6 case, as a good example, have affected this Court's
7 initial determination to strike off in a new direction.
8 We did so knowing that there's a possibility that we
9 wouldn't upset final convictions.

10 MR. BUTLER: Well --

11 JUSTICE SCALIA: And I think it is --

12 JUSTICE KENNEDY: -- the right was limited
13 -- excuse me -- to that extent.

14 JUSTICE SCALIA: Is it not a substantive
15 determination of Federal law when you say that this
16 constitutional change that we're making in this case or
17 that we have made in a past case is not retroactive?
18 That means there was no constitutional violation in the
19 past prior to the announcement of this case, and what
20 the State -- what you want the State court to be able to
21 say is yes, there is a Federal constitutional violation
22 for which we're going to give a remedy in habeas.

23 MR. BUTLER: I think -- Justice Scalia and
24 Justice Kennedy, if I could address your points in turn.
25 On Justice Scalia's question about whether there was or

1 was not a constitutional violation, if the Court is
2 really holding that there was -- that something -- that
3 there was no constitutional violation at the time
4 Petitioner's conviction became final or at the time
5 Mr. Bockting's conviction became final in the habeas
6 case, then what the Court is really holding is that
7 Crawford didn't just interpret the confrontation clause;
8 it somehow changed the confrontation clause, that the
9 confrontation clause meant -- that the confrontation
10 clause said one thing at one point and now says
11 something else.

12 JUSTICE SCALIA: I think that's exactly what
13 Crawford means, and I think that's exactly what
14 happened. That's what it means, whether it's a new
15 rule. What does a new rule mean? It means it didn't
16 used to be the rule, but it is the rule after this case.

17 Now, you can argue, and there are many
18 originalists who would agree with you, that there
19 shouldn't be such a thing as a new rule, but once you've
20 -- once you've agreed that there can be new rules, if
21 this Court says this is a new rule, we acknowledge it
22 wasn't the rule before, but it's new, it will not have
23 retroactive effect, it seems to me that the State would
24 be contradicting that ruling by saying oh, in our view
25 the law used to be exactly what you say it newly is.

1 MR. BUTLER: But the question, Your Honor --

2 JUSTICE STEVENS: I take it your basic
3 position is that we should not be making new law. We
4 should be -- we might have misinterpreted the law over
5 the years, but, basically, this Court has no power to
6 change the text of the Constitution or its meaning. I
7 guess Justice Scalia's position is we have all that
8 power in the world.

9 (Laughter.)

10 JUSTICE SCALIA: My position is we have
11 asserted all that power in the world.

12 (Laughter.)

13 JUSTICE GINSBURG: But there is -- there is
14 -- it's not as though we have a new rule, and we apply
15 it from this day forward. Crawford is retroactive at
16 least for cases that are not yet final. When they were
17 on trial, Crawford wasn't there, but maybe somewhere
18 toward the end of the appellate process, lo and behold,
19 they can take advantage of it.

20 So it's a question of where you want to cut
21 it off. And at one time, didn't this Court cut it off
22 at a different place?

23 MR. BUTLER: Yes, Justice Ginsburg, it did.
24 In fact, for centuries everything this Court did was
25 always retroactive, as the Court knows.

1 And then we got the Linkletter balancing
2 test, and then later on we got Griffith and Teague, and
3 the Court has refined, usually through the scope of
4 Federal habeas corpus --

5 JUSTICE ALITO: And during the period
6 between Linkletter and Griffith, did State -- if the
7 Supreme Court said that a decision was not retroactive,
8 did State supreme courts feel free to apply it
9 retroactively?

10 MR. BUTLER: It -- there -- there doesn't
11 seem to be any case law on that point, Your Honor, that
12 I'm aware of. State courts usually -- as they do today
13 -- usually followed this Court's retroactivity decisions.
14 But it is unclear whether they thought they had to or
15 whether they just chose to. The question --

16 CHIEF JUSTICE ROBERTS: Can they -- can
17 they pick -- can the State pick and choose? Can it say
18 that we are going to allow Crawford claims to be applied
19 retroactively, but other claims, we're not going to?

20 MR. BUTLER: I think, when it -- if you
21 consider, Mr. Chief Justice, that the Teague rule is a
22 procedural rule about who gets to make what claims, then
23 I think the answer to your question is yes. The State
24 court could say --

25 CHIEF JUSTICE ROBERTS: Well, and if you

1 think that the Teague rule is an assessment of the
2 substantive -- part of the substantive constitutional
3 interpretation, an assessment about what the impact of
4 Crawford is versus other decisions, then I guess they
5 couldn't, right?

6 MR. BUTLER: Well, it depends on the impact
7 in what -- in what setting, Your Honor. It -- the --
8 the Teague rule -- and Teague, itself, and every case
9 this Court has ever -- in which this Court has ever
10 considered Teague, has come from one procedural posture:
11 Federal habeas corpus review of State-court convictions.

12 It is over that posture that this Court
13 exercises both supervisory power and control to
14 interpret the various Federal habeas statutes.

15 JUSTICE KENNEDY: Well, even -- even outside
16 of the habeas context, we -- we decided a case, Hudson
17 v. Walker, one or two terms ago. It was the no-knock
18 case. We said that, even if there is a no-knock
19 violation, the exclusionary rule does not apply. This
20 would be too costly an extension of the exclusionary
21 rule and would bring the -- would make the Fourth
22 Amendment a disruptive force.

23 Under your view, I take it, the State, even
24 in -- in its trial proceedings subject to direct review,
25 could disagree with that and take a Federal concept,

1 no-knock, and then apply the exclusionary rule, thereby
2 forcing us to make the -- to draw the very lines that we
3 said we ought not to draw in Hudson.

4 MR. BUTLER: Let me -- no, Your Honor.

5 First of all, what Hudson -- the Hudson case
6 asked was whether exclusion of evidence was required
7 under the Fourth Amendment when the violation of the
8 Fourth Amendment was a no-knock violation.

9 The word "required" appears throughout the
10 opinion in Hudson, and the answer was no, it doesn't.
11 The Fourth Amendment doesn't require exclusion of
12 evidence.

13 But there was no suggestion in -- in Hudson
14 that the State court could not then say, here is a
15 Fourth Amendment violation. We need to come up with
16 what the remedy is. The Constitution doesn't require us
17 to suppress the evidence, so we are -- we either choose
18 not to --

19 JUSTICE KENNEDY: But -- but you agree with
20 me, then, that under your position, the State could
21 apply an exclusionary rule.

22 MR. BUTLER: Yes, Your Honor, it could under
23 State law. And if --

24 CHIEF JUSTICE ROBERTS: Based on the
25 distinction between "right" and "remedy," a distinction that

1 is -- that in countless areas of the law we -- we have
2 said is -- is an ephemeral one?

3 MR. BUTLER: Well, the -- that is not based
4 on that distinction. That is one way to look at it,
5 Mr. Chief Justice, that in -- in the Hudson context, it
6 is definitely a question of right and remedy.

7 There's no question in Hudson that the
8 defendant's Fourth Amendment rights were violated. The
9 question is what remedy is required by the Constitution.

10 Here, Mr. Danforth wants the Minnesota State
11 court to consider whether his constitutional rights were
12 violated. It did not hold that they were not. It held
13 that it could not consider the merits of his claim
14 because of Teague.

15 And in other settings this Court, in its
16 other limitations on the availability of habeas corpus,
17 has described these prudential rules like Teague as
18 gateway claims.

19 JUSTICE SCALIA: Mr. Butler, let me -- this
20 is a habeas case, but I assume the same issue could come
21 up in a -- in a direct appeal to the State supreme
22 court. Is it your position that in a direct appeal, the
23 State can determine to be retroactive constitutional
24 rights that we have said are not retroactive, on direct
25 appeal, now, not habeas?

1 MR. BUTLER: As long, Justice Scalia, as the
2 State acknowledges that it is using State law to do so,
3 that it is -- that it is not mismanaging this Court's
4 retroactivity jurisprudence. In other words, as long as
5 it doesn't think, well, we -- we must do this.

6 JUSTICE SCALIA: No, I mean it -- it bases
7 its decision on the Federal Constitution, and we have
8 said that this Federal constitutional rule is not
9 retroactive. What do they say on a direct appeal?

10 MR. BUTLER: On a -- on a direct --

11 JUSTICE SCALIA: And my next question is
12 going to be whatever they say, when it comes up to us,
13 what do we do?

14 MR. BUTLER: It would -- it would depend on
15 the facts of the case, Your Honor.

16 JUSTICE GINSBURG: I'm -- I'm confused on
17 this point, because I thought it was part of our
18 retroactivity jurisprudence that the States must apply
19 that new rule while the case is still in the pipeline,
20 while it is on direct appeal, not that they -- well,
21 they just may, but they absolutely must apply it
22 retroactively. I thought that's what Griffith was --

23 MR. BUTLER: That is, Your Honor, what
24 Griffith says, and that's -- that's what -- that's --

25 JUSTICE SCALIA: My case was not in the

1 pipeline. The prosecution began after our new decision.
2 Okay? And it comes up to the State supreme court. Can
3 the State supreme court, despite the fact that we've
4 said the decision is not retroactive, make it
5 retroactive? And your answer is yes?

6 MR. BUTLER: My answer is --

7 JUSTICE SCALIA: Whether it's habeas or not?

8 MR. BUTLER: My answer, Your Honor, is that
9 if the -- the --

10 JUSTICE GINSBURG: If it comes up after --
11 if the prosecution is after the Federal decision, of
12 course, the decision has to apply.

13 MR. BUTLER: Yes, I think that's correct,
14 Justice Ginsburg. The decision would apply. If the
15 prosecution starts after this Court announces a new rule
16 and then says that it is not retroactive -- when you
17 announce that it is not retroactive, it is not
18 retroactive to cases that are already final.

19 If the case hasn't even begun yet, then, of
20 course -- then, yes, then the new rule would apply.

21 CHIEF JUSTICE ROBERTS: Does your -- does
22 your approach apply to legislative enactments as well?
23 Let's say Congress passes a law and it provides a
24 particular remedy, and it says this remedy shall not be
25 retroactive but only apply in new cases.

1 Can the State say well, we think it ought to
2 apply to old cases, pending cases on habeas, or
3 whatever, and so we are going to apply this
4 retroactively, even though Congress said it's only
5 prospective?

6 MR. BUTLER: I think that's a -- that's a
7 somewhat different question, Your Honor, and it would --
8 it would depend on if -- if Congress passed a law that
9 said no State court shall apply retroactively something
10 or other --

11 CHIEF JUSTICE ROBERTS: No, no. They just
12 say here's a new remedy, maybe a grants and exclusionary
13 remedy in cases where we have held one isn't required --
14 can the State allow that retroactively, even though
15 Congress -- it's a Federal remedy, even though Congress
16 has said this Federal remedy is only prospective?

17 MR. BUTLER: In the past, Your -- I think --
18 I think the short answer to your question, Mr. Chief
19 Justice, is yes. And I think the reason it can is
20 because, if you look at, for example -- if this is a
21 question of remedy, then I -- then the State courts have
22 all the power to grant more remedies, to grant more
23 expansive --

24 CHIEF JUSTICE ROBERTS: Well, it gets back
25 to your reliance on this ancient distinction between

1 "right" and "remedy" -- I mean if Congress says you don't
2 have a remedy if it's retroactive, it's hard to say
3 what kind of right you have.

4 MR. BUTLER: If, Your Honor -- think about
5 the -- the tax cases, for example, American Trucking and
6 McKesson, the case -- the companion case. In both of
7 those cases, especially McKesson, the Court held that
8 where there has been a violation of somebody's
9 constitutional rights and the -- and the State owes that
10 person some sort of a remedy, then the State can give
11 whatever remedy the minimum requirements of the Federal
12 Constitution or Federal law are, but can also go
13 further.

14 CHIEF JUSTICE ROBERTS: Sure, as a matter of
15 State law.

16 MR. BUTLER: Yes.

17 CHIEF JUSTICE ROBERTS: But here you are
18 arguing in favor of retro-application of Federal law.
19 There is no issue -- as Justice Kennedy pointed out, you
20 can have a State confrontation clause and do whatever
21 you want with it. But you are relying on the Federal
22 provision.

23 MR. BUTLER: What -- what we are relying on
24 -- we are relying, Mr. Chief Justice, on the substance
25 of the Sixth Amendment, yes. That is the substantive

1 claim Mr. Danforth makes.

2 JUSTICE SOUTER: No. But you are also
3 relying, as I understand it, on State common law, in
4 effect. And you are saying, that so long as the State
5 common law does not give less by way of remedy and
6 relief than the Federal decision requires, the State is
7 free, as a matter of State remedial common law, to do
8 more. That's your point, isn't it?

9 MR. BUTLER: That is absolutely my point,
10 Justice Souter.

11 JUSTICE SOUTER: You are saying that,
12 ultimately, the State's choice in this case rests upon a
13 choice of State common law about procedure leading to
14 remedy.

15 MR. BUTLER: It is not even just State
16 common law, Justice Souter. It is State statutory law.

17 CHIEF JUSTICE ROBERTS: No. No. It's -- I
18 would have thought the very least Teague is, is Federal
19 common law. In other words, this is the Federal law of
20 remedies. I think it is more than that. I think it is
21 substantive constitutional -- substantive Federal
22 constitutional law. But it's at least Federal common
23 law, and doesn't Federal common law preempt State common
24 law?

25 MR. BUTLER: Only, Mr. Chief Justice, if the

1 Federal interest is so strong as to outweigh all of the
2 State-court interests. And when it comes to the
3 remedial question of does this person have a right to go
4 to State court and challenge his conviction, that is
5 quintessentially the matter of State law.

6 JUSTICE SCALIA: That always assumes that
7 that's a remedial question, and that the question is not
8 was the Constitution violated at the time this act
9 occurred. That -- if that's the question, then you
10 acknowledge that the State can't change the situation.

11 MR. BUTLER: That's true, Justice Scalia.
12 That if this Court -- if Teague is a rule that says what
13 the Constitution was at a particular time, then it is
14 much harder for us, we would probably have to make a
15 State-law claim.

16 JUSTICE GINSBURG: But you can say -- it
17 is a little odd that the State executive can say, yes,
18 as far as we're concerned, we like the new law, or what
19 was always the law but the Court wasn't perceptive
20 enough to see that, we like it, so we're not going to
21 raise Teague. It would be an anomaly, would it not,
22 that the executive of the State is not bound by Teague,
23 but the courts are?

24 MR. BUTLER: That's correct, Justice
25 Ginsburg. And that's -- the waiver doctrine about

1 Teague shows why Teague is not a decision about what the
2 law was.

3 JUSTICE SCALIA: I assume that the State
4 executive can do that with respect to any Federal law
5 that it's authorized to implement, simply choose not to,
6 couldn't it? That's prosecutorial discretion.

7 MR. BUTLER: No, Justice Scalia,
8 respectfully, I don't think that's true. If the law at
9 the time of Mr. Danforth's conviction became final said
10 there's no confrontation violation, and we go to State
11 court or Federal habeas court, for that matter, and the
12 State chooses to say we don't want to apply Teague,
13 we'll take him on on his Crawford claim. That, under a
14 view that the law has changed, that allows the State
15 executive branch through waiver or even worse, through
16 procedural default, inaction, to change the substance of
17 Federal law.

18 JUSTICE KENNEDY: You want us to write an
19 opinion which begins with the sentence, "This Court has
20 no interest in the extent to which its constitutional
21 decisions upset final judgments"?

22 MR. BUTLER: No, Justice Kennedy, I don't
23 think that's what the opinion should start with. I
24 don't necessarily think that that's true. I don't know
25 that there's no interest in much of anything in this

1 case.

2 When you weigh and balance the interests,
3 however, the interests of the State courts in
4 controlling access to their courthouse doors, in
5 reviewing that their own judgments -- I mean, Teague
6 gets back to a comity decision. Whatever Teague is it's
7 based almost -- not exclusively but primarily on comity
8 and respect for State courts. Federal courts are not --

9 JUSTICE ALITO: If Crawford had been a
10 decision of the Minnesota Supreme Court, is it clear
11 what retroactivity rule they would have applied?

12 MR. BUTLER: No, Justice Alito, it's not.
13 The State court has used in the past the Linkletter
14 balancing test. It's also used something akin to
15 Teague. And then in this case, they held for Federal
16 rules they have to use Teague.

17 JUSTICE SOUTER: Mr. Butler, if as you say
18 Teague is, in effect, a comity rule, then what is your
19 answer, in effect, to Justice Scalia's point that we
20 make a decision when we come down with a substantive
21 legal judgment about the Constitution, we make a
22 decision as to whether the rule is retroactive or not?
23 And he says that if you look at Teague as simply, in
24 effect, a comity decision, that's inconsistent with the
25 determination that we have made, because if you say

1 okay, we as a State will apply it earlier than the Feds
2 say we have to, you, in effect, are changing the
3 substantive determination that we have made, that the
4 decision is not retroactive.

5 What is the retroactivity analysis that
6 underlies your comity analysis of Teague?

7 MR. BUTLER: The retroactivity analysis,
8 Your Honor, when this Court makes a decision is that, as
9 Justice Ginsburg suggested earlier, Griffith. The Court
10 says when it makes a new rule, when it announces what it
11 believes to be a new rule, that it knows that it will
12 apply to a certain group of cases.

13 It doesn't know -- it can't know anything
14 more than that, because the Court doesn't exercise
15 control over the State courts.

16 JUSTICE SOUTER: Alright, but let's be more
17 specific. What does it know about retroactive
18 application under Griffith?

19 MR. BUTLER: That it will apply.

20 JUSTICE SOUTER: And it will apply to some
21 cases that depend upon facts and have eventuated from
22 trials that are --

23 MR. BUTLER: -- that are already finished.

24 JUSTICE SOUTER: Right. So that there's is
25 going to be some retroactivity?

1 MR. BUTLER: Yes, absolutely.

2 JUSTICE SOUTER: And if there is going to be
3 some retroactivity, then I take it your position has got
4 to be and is that our substantive decisions are not so much
5 retroactive or non-retroactive, but retroactively
6 applied, to some extent, and not retroactively applied
7 to others, and a State is free to apply it more
8 retroactively than ours. Is that the nutshell?

9 MR. BUTLER: That is the gravamen of our
10 argument, Justice Souter.

11 JUSTICE SOUTER: So your answer to Justice
12 Scalia is, I take it, not that the decision is
13 retroactive or not, but there is a decision about the
14 degree to which application will be retroactive or not?
15 That is what underlies your case?

16 MR. BUTLER: That's correct, Your Honor.

17 JUSTICE SCALIA: Then do you think the State
18 is free to decide how and when and whether it will,
19 quote, apply? I mean, simply to separate the law from
20 the application of the law seems to me no answer at all.

21 Is there any other area where you say well,
22 yes, there was a Supreme Court decision; but whether to
23 apply that decision is up to the State?

24 JUSTICE STEVENS: You're overlooking what I
25 understand to be the basic distinction you're drawing.

1 I know the Chief Justice has cast doubt on it. But I
2 think there is a basic distinction between "rights" and
3 "remedies."

4 And you're holding -- I understand your
5 position to be that the remedy may not be retroactive,
6 even though the decision itself can assume that there
7 would have been a violation from the beginning of the
8 Constitution today we may have misinterpreted before.
9 But if there is a violation of the right, then there's a
10 decision about what kind of remedy shall be imposed.

11 And you can say we will not impose a remedy
12 for past wrongs, even though we must impose them in the
13 future and we can let other states decide whether to
14 impose a remedy or not. And that's totally consistent
15 with the holding that the violation is always
16 retroactive, but the remedy may not be.

17 MR. BUTLER: I think that's correct, Justice
18 Stevens. When you talk about remedy --

19 CHIEF JUSTICE ROBERTS: Well, no, it is
20 exactly the other way around which makes it problematic.
21 You are going to say the remedy is retroactive even if
22 there's no right. You're going to say where we have
23 decided that there is no remedy and, therefore, if you
24 have a right, it's -- I don't know what you get out of
25 it -- you want to say, no, there is a remedy.

1 MR. BUTLER: What I want to say, Mr. Chief
2 Justice, is that if there is a violation of the text of
3 the Sixth Amendment confrontation clause, this Court
4 decides what remedies are required, what remedies for
5 certain people and perhaps for other people what
6 remedies are not required. Justice Harlan in Mackey
7 called it the body responsible for defining the scope of
8 the -- what he called the writ, in other places, the
9 adjudicatory process.

10 In this case it's State post-conviction
11 review. It is that body that decides whether there
12 shall be either a remedy, you want to call it a remedy
13 for the violation, you want to call it who decides
14 whether the decision shall be applied retroactively, as
15 opposed to whether it is retroactive. It is the
16 group -- it is whoever is controlling the adjudicatory
17 process.

18 JUSTICE GINSBURG: It's subject to the
19 floor, that the floor that this Court sets, it must be
20 retroactive to a certain extent.

21 MR. BUTLER: That's correct, Justice
22 Ginsburg. Subject to the floor, it is then up to the
23 governing body to decide how much protections to give.
24 And that gets back to Justice Stevens' point -- the
25 States can always choose to give either -- you can call

1 it a greater remedy, you can call it a larger
2 retroactive application, as long as the substance of
3 Federal law doesn't change, then it is a State question.

4 JUSTICE STEVENS: It is the same as the
5 question of whether to apply the exclusionary rule.

6 MR. BUTLER: It is.

7 JUSTICE STEVENS: That was a remedial
8 decision. Everybody agreed the knock and announce
9 business was a violation. The only question was on
10 remedy. And there are lots of rights that -- for which
11 there's no remedy. Look at all our implied-cause-of-
12 action cases, you will find many, many examples of that.

13 MR. BUTLER: In habeas corpus as well,
14 Justice Stevens. If you file your habeas petition one
15 day late, no remedy. If you don't preserve the issue in
16 the trial court, no remedy.

17 CHIEF JUSTICE ROBERTS: So you have to
18 argue, and this is why I think the distinction has been
19 rejected in so many other areas of the law, you have to
20 argue that the remedy question is totally separate from
21 an analysis of the right. Because otherwise, you are
22 saying the State courts have the right to disagree with
23 our determination of what the Federal right is. If you
24 think the remedy, the question of remedy draws some
25 substance from what the right is, which I would have

1 thought is obviously the case, then it seems to me
2 you're asserting a power on the basis of the State court
3 to overturn our Federal law determinations.

4 MR. BUTLER: We are not asserting, Mr. Chief
5 Justice, that the State court has the ability to
6 disagree with this Court's interpretation of the Federal
7 Constitution.

8 What we are asserting is that the State
9 courts and the State legislatures have the ability to
10 decide who can come into State court and what claims the
11 State court can listen to.

12 And I want to -- before I -- my time, I
13 wanted to address -- Justice Kennedy had a concern
14 earlier about knowing the scope of the application of a
15 right when you announce a substantive decision.

16 And the answer to that, I believe, is that
17 the court -- not only does it already know it's going to
18 go -- it will apply to anything pending on direct
19 review, but that -- that -- that question is much more
20 complicated than it seems. Different States have
21 different time lines for when something is pending on
22 direct review. How long it takes an appeal to pass
23 through the State-court process? What requirements of
24 the defendant are there?

25 In Minnesota it takes about 15 months to run

1 a direct appeal. And so a defendant can sit there for
2 15 months and know that he's probably going to get the
3 benefit of any decision this Court announces. In
4 another State it might take two years. In another State
5 it might take six months. There are different groups of
6 defendants -- even under the Griffith standard, we
7 already don't have the sort of uniformity that the
8 Respondent thinks is so -- thinks is so important in
9 this area.

10 There's always -- things are always left to
11 the matter of State courts to -- to decide to have
12 their own procedural rules and decide how best to use
13 their adjudicatory processes, and all this Court can do
14 is announce the best Federal rules it thinks the
15 Constitution supports, have some idea of what the
16 minimum requirements of those rules are going to be; and
17 then it is up to the State courts to decide what other
18 remedies to give for the violations that -- if this
19 Court holds something is a violation, then it is up to
20 the State courts to decide as a minimum who it will
21 apply to.

22 If there are no further questions, I'll
23 reserve my time.

24 CHIEF JUSTICE ROBERTS: Thank you -- thank
25 you, Mr. Butler.

1 Mr. Diamond.

2 ORAL ARGUMENT OF PATRICK C. DIAMOND

3 ON BEHALF OF THE RESPONDENT

4 MR. DIAMOND: Mr. Chief Justice, and may it
5 please the Court:

6 Federal law controls the retroactivity or
7 non-retroactivity of new constitutional rulings. This
8 Court determines the constitutional requirements that
9 apply --

10 JUSTICE STEVENS: May I ask you, just at the
11 outset, when you use the term "retroactivity," are you
12 saying there was no violation of the Constitution before
13 the decision, or there just is no remedy for it?

14 MR. DIAMOND: Your Honor, I think in this --
15 this Court has made it clear in the retroactivity area
16 that retroactivity is a question of the substantive
17 constitutional standard that will apply to a specific
18 defendant. I think the Court's cases from Payne,
19 Griffith, Yates --

20 JUSTICE STEVENS: -- one of the cases where
21 the line is drawn when the expiration of direct
22 review has passed. Is it your view that at that
23 particular point in time a constitutional violation
24 either exists or does not exist? It's not a remedy
25 question?

1 MR. DIAMOND: That's correct, Your Honor. I
2 don't believe this is a matter of remedy. This Court,
3 for example, in Reynoldsville Casket wrote that Teague
4 itself is not a limitation on remedy. What it is, is a
5 limitation on the principle of retroactivity itself.

6 JUSTICE KENNEDY: Is part of that because of
7 what's involved in expectations? That's the Smith case,
8 where we said the determination of whether a
9 constitutional decision is retroactive is every bit as
10 much a question of Federal law as the decision of the
11 substantive right itself. We said that in Smith.

12 MR. DIAMOND: Yes, Your Honor, and the point
13 is that the substantive rights and retroactivity are not
14 two different things.

15 JUSTICE KENNEDY: And here the
16 expectation -- in Smith it was expectation of people
17 in the private sector. Here the expectation is one of
18 finality of judgments.

19 MR. DIAMOND: Exactly, Your Honor.

20 JUSTICE SOUTER: Then how do you -- how do
21 you reconcile that answer with the point that your
22 brother made just before he sat down, and that is,
23 taking standard Griffith analysis, the application of a
24 so-called new rule is going to vary depending on how
25 long it takes a person on direct appeal to get through

1 the State-court system?

2 And it seems to me that that is inconsistent
3 with your view that there has got to be one rule with
4 respect to the date of application as a matter of
5 substantive Federal law, because we know for a fact
6 that, depending how long it takes to get through the
7 State appellate system on direct review, the new rule
8 may be applied and it may not be applied.

9 MR. DIAMOND: Your Honor, two points: First
10 of all, I think Griffith is very clear, that finality is
11 that point. Griffith is very clear, and it defines
12 finality as that point when the direct appellate process
13 has run, and this Court -- and the opportunity to
14 petition this Court for review is over. Secondly, Banks
15 II, a retroactivity case from this Court, says that it's
16 up to the Federal courts to define finality. Remember
17 in Banks II there was a question of whether the
18 Pennsylvania courts -- passing on waiver requirements
19 somehow destroyed the finality of --

20 JUSTICE SOUTER: I understand your -- your
21 point about finality, and finality has a well-known
22 operative effect. But one operative effect when the
23 Federal courts have defined finality and have said it is
24 not final until -- a case is not final until direct
25 review is over -- one consequence of that is that a

1 substantive Federal rule will be applied to an
2 individual in one State whose crime and whose trial
3 procedure is different in time from that of a defendant
4 in another State.

5 So that the consequence is that the
6 substantive rule will apply to some people who acted on
7 date X and it will not apply to some people who acted on
8 date X; and that, it seems to me, is inconsistent with
9 your answer to Justice Stevens' question.

10 MR. DIAMOND: Your Honor, given the varied
11 proceedings at the State level, that -- that is
12 inevitable no matter what time this Court --

13 JUSTICE SOUTER: And if it is inevitable, I
14 don't see how you can answer Justice Stevens' question
15 the way you did.

16 MR. DIAMOND: Your Honor, the point in
17 Griffith is that in terms of uniformity, this is -- in
18 terms of providing similarly situated people, the best
19 the Court can do in this area is to cut -- to make the
20 point at finality --

21 JUSTICE SOUTER: And the finality point in
22 effect establishes a way of calculating the application
23 of a rule in any given State in any given case, but it
24 will not result in the uniform application of the rule.
25 Isn't that correct?

1 JUSTICE SCALIA: Yes, that's correct. You
2 have to say that's correct.

3 (Laughter.)

4 JUSTICE KENNEDY: But there can also --

5 JUSTICE SCALIA: And -- but I think you can
6 also explain that the reason it's correct is the Court
7 probably would have liked to say yes, we're making up a
8 new rule; the Constitution didn't use to say this; and
9 this rule will apply from now on to all actions taken by
10 individuals from now on. But then, you know, Justice
11 Harlan says my goodness, you're going to give relief to
12 this individual and not give relief to other individuals
13 who are making the same claim and already have cases
14 pending? You have to treat them equally. So we will
15 make an equitable exception for that.

16 But basically, the existence of that
17 exception does not prove that the Court was not
18 purporting to make a substantive rule. There's an
19 exception to the application of that substantive rule
20 for pending cases, which is totally understandable.

21 MR. DIAMOND: Which, Your Honor, is Griffith
22 and is defined by Federal law.

23 JUSTICE STEVENS: Can you give me an example
24 of a case in which this Court candidly said, we're
25 announcing a new rule which was not the law before?

1 Aren't we always interpreting what we thought the intent
2 of the Framers was from the beginning, even though we
3 may have gotten it before? What is your best example of
4 a new rule, in the sense it's a different rule of law as
5 opposed to a different remedy? See, all these equitable
6 considerations go to the remedy. But the notion that we
7 can make up a new rule of law at will strikes me as a
8 very dramatic departure from what I understand the rule
9 of law to require.

10 JUSTICE SCALIA: I'm really glad to hear
11 that.

12 (Laughter.)

13 MR. DIAMOND: Your Honor, I think the
14 point -- this isn't Blackstone -- Blackstone is not the
15 only view here. The point is that finality is -- is not
16 a competing concern, but the point --

17 JUSTICE STEVENS: Finality is a condition
18 for fashioning the right remedy. There's no doubt.
19 Everything you say is necessary for treating litigants
20 in a -- in a fair manner. But that all goes to remedy,
21 not to the violation.

22 JUSTICE SCALIA: Don't we call it a new
23 rule in Teague?

24 JUSTICE KENNEDY: Do we think the settled
25 expectations as being questions of remedy?

1 MR. DIAMOND: Excuse me, Your Honor.

2 JUSTICE KENNEDY: It seems to me that your
3 -- your answer to Justice Souter's question earlier
4 should be that there is uniformity. Some States are
5 fast, some are slow, but in the end there is a final
6 judgment which is a settled expectation, and the
7 substance of the law honors settled expectations, which
8 is finality.

9 MR. DIAMOND: Your Honor -- and that point
10 is -- the point of finality is a recognized point of
11 what is necessary for the integrity of judicial
12 decision-making.

13 JUSTICE SOUTER: That's sort of like
14 defining "order" as random order, isn't it?

15 MR. DIAMOND: I disagree, Your Honor. I
16 think as Justice Harlan said in the -- in the
17 Williams and Mackey dissents, there is -- a decision
18 that is always subject to revision is really the
19 functional equivalent of no decision at all. It's what
20 makes judicial decisions judicial.

21 JUSTICE SOUTER: And -- and the concern is a
22 concern not so much for the defendant here, but for the
23 States, isn't it? We don't want -- we think there is --
24 there is an important value implicit in habeas, and one
25 of those values is that there be a limit to the degree

1 to which we are going to upset the settled expectations
2 of the States. Isn't that right?

3 MR. DIAMOND: Your Honor, the State's
4 interest here can be vindicated by the State by applying
5 State law.

6 JUSTICE GINSBURG: That's not the point. I
7 thought that Teague was driven not by some abstract
8 notion about finality, but the intrusion on State
9 decisionmaking. Here was a State that had conducted an
10 entire process that appeared to be in line with what the
11 Federal law then appeared to be. And then the State is
12 told by some Federal habeas court, State, you've got to
13 do it all over again, because you didn't -- you didn't
14 predict that we were going to interpret the Constitution
15 differently. I thought that the really motivating idea
16 of Teague was it addressed the Federal forum and said,
17 Federal forum, don't step on the States' toes, don't
18 make them redo trials that have long since been over.

19 MR. DIAMOND: Your Honor, I'm here
20 representing the State of Minnesota, and the intrusion
21 that I'm concerned about in this case is a State-court
22 judge adopting some Federal optional -- sort of Federal
23 requirement, and applying it as opposed to using State
24 law that can be reviewed and overturned and for which
25 that State-court judge is accountable to the citizenry

1 of the State.

2 JUSTICE KENNEDY: Well, I must say I have
3 serious problems with your position in that regard.

4 If you were not to prevail in this case
5 and -- or, pardon me, if the Petitioner were to prevail
6 in this case, and there were a ruling on what Crawford
7 means, or doesn't mean, we could review it. I think the
8 Petitioner is absolutely right on that point.

9 MR. DIAMOND: Your Honor, I think it's
10 difficult. If you look at, for example, the recent case
11 in Minnesota, Krasky, dealing with essentially the same
12 evidence that's at issue in this case, if the State was
13 adopting Krasky as some State standard, then this Court
14 wouldn't be in a position to review it. If it's
15 adopting Krasky as a -- as the Federal standard, then
16 the question is, how is it that the State is adopting
17 something as a matter of the Federal Constitution that
18 is not a Federal constitutional requirement?

19 JUSTICE BREYER: The question I have is, to
20 go back, you said two separate things. One is you say
21 the question here is a matter of Federal law. I'll give
22 you that. It's a matter of Federal law.

23 But the question is, what's the content of
24 the Federal law? Does the Federal law say to the States
25 -- State, if in a collateral review proceeding, you want

1 to apply Crawford retroactively to people whose
2 convictions were long ago, do it, we don't care?

3 And a lot of Teague says that should be the
4 Federal rule, if it's called a Federal rule.

5 But then you said a different thing, in
6 answer to Justice Stevens. The different thing was but
7 the substantive rule of Crawford only takes effect as of
8 the day of Crawford and into the future.

9 Now, on that position -- or take any other
10 date you want as of one year earlier or whatever you're
11 going to pick there -- if you're right about that, you
12 win.

13 But how could you be right about what I call
14 there a metaphysical point? Because on the metaphysics,
15 as Justice Souter just pointed out, imagine three people
16 who have three identical trials each one year before
17 Crawford. The first person is called Crawford, and he
18 wins.

19 The second person is called Smith, and he's
20 delayed forever in the appeals process.

21 And the third person is called Jones, and he
22 gets a quick appeal, convicted, in jail at the time of
23 Crawford.

24 Now we know that the first two Crawford
25 applies to, but metaphysically, if the law of Crawford

1 was the law at the time of the first two trials, why
2 wasn't it the law in terms of what the rights are in
3 respect to the third person whose trial was held at
4 precisely the same time?

5 MR. DIAMOND: Your Honor, the point I think
6 is that this is a point that Griffith makes, that when
7 your conviction becomes final, that your stake -- if I
8 can call it that -- in changes in the law come to a
9 close.

10 JUSTICE BREYER: I agree with that.

11 JUSTICE SCALIA: Mr. Turner, I suppose
12 metaphysically this Court has no power to enunciate new
13 constitutional rules metaphysically, but we have done
14 so, and Teague is full of references to new rules. "We
15 therefore hold that implicit in the retroactivity
16 approach we adopt today is the principle that habeas
17 corpus cannot be used as a vehicle to create new
18 constitutional rules of criminal procedure unless those
19 rules would be applied retroactively to all defendants."

20 The opinion is full of new rules.

21 So -- so, you know, we have violated
22 metaphysics already. Having violated it, in adopting
23 new constitutional rules, why should it be any surprise
24 that we also violated in the application of those
25 rules? There should be no surprise at all. Don't get

1 hung up on metaphysics, Mr. Turner.

2 JUSTICE STEVENS: But in Crawford itself,
3 it seems to me there was quite a bit of attention given to
4 history long before the original interpretation of the
5 clause. I guess that was unnecessary because we were
6 just making up a new rule. Is that the --

7 (Laughter.)

8 JUSTICE BREYER: If you've adopted Justice
9 Scalia's approach through your silence, then I'd ask you
10 whether -- whether -- whether there isn't just a simpler
11 explanation that doesn't require us to go into Spinoza,
12 Immanuel Kant, or even Aristotle. And the simpler
13 explanation would simply be what Justice Stevens started
14 with, that Teague is about remedies, and that we assume
15 that the law was the law at the time of Crawford's
16 trial, at the time of Smith's trial, and at the time of
17 Jones' trial.

18 But Jones is knocked out because he went to
19 habeas. And that's what Teague is about. Habeas. And,
20 therefore, if the State wants to apply Crawford
21 retroactively and let everybody out of jail, that's
22 their problem. Or their virtue. That's up to them.

23 That's where Justice Stevens started, and
24 that's what I would like to hear an answer to.

25 JUSTICE SCALIA: You wouldn't want to say

1 that, Mr. Turner, because that would place you in the
2 position of saying what we are telling people in these
3 Teague cases is oh, yes, the Constitution was violated,
4 but we don't want to hear about it. I mean that's the
5 alternative, to acknowledge that the Constitution is
6 violated in all of these Teague cases, some of them
7 being capital cases, and we nonetheless say well, too
8 bad, it's on habeas.

9 I'd like to think that that's not what
10 we're doing, that what we're saying is, this is a new
11 constitutional rule, there was no constitutional
12 violation before, and that's why we're letting it stand.

13 MR. DIAMOND: Your Honor --

14 CHIEF JUSTICE ROBERTS: I think you're
15 handling these questions very well.

16 (Laughter.)

17 JUSTICE GINSBURG: That was not a question
18 addressed to you, Mr. Diamond.

19 MR. DIAMOND: Your Honor, I think that, in
20 terms of Teague as a remedial limitation, first of all,
21 I don't think this Court's retroactivity jurisprudence
22 at all supports that notion.

23 I also think, for example, while certainly
24 not directly at issue in the habeas area, in construing
25 habeas, this Court said that Teague was not so much

1 about a standard of review as it was about the standard
2 that applies itself. And so I think it's very difficult
3 to square the notion of Teague as a remedial limitation
4 with this Court's retroactivity jurisprudence.

5 It's also difficult to square it with the
6 explicit rejection of that notion in American Trucking
7 and in Harper and in Reynoldsville Casket.

8 JUSTICE GINSBURG: You do recognize, though,
9 that one of the propelling forces behind Teague and why
10 we changed from the Linkletter regime was respect for
11 State courts' processes and a resistance to the heavy
12 hand of Federal habeas courts telling States what to do.

13 It seems a little ironic then if you take an
14 opinion that was driven by the Feds staying out of the
15 State courts' territory to say oh, no, we're going to
16 tell you that it's not -- we control when we want to.

17 MR. DIAMOND: Your Honor, certainly that was
18 one of the things that was going on in Teague. But,
19 respectfully, I think the question -- it's every bit as
20 intrusive on the State process when a State-court judge
21 applies a new Federal rule to overturn a conviction, as
22 it is when a Federal court judge does the same thing.

23 In other words, those comity concerns apply
24 regardless of forum.

25 JUSTICE KENNEDY: Isn't what you are saying

1 is that the concern in Teague was not only with
2 State-court processes, but with settled expectations of
3 those who are involved in the criminal system,
4 particularly victims who are entitled at some point to
5 rely on a conviction being final?

6 MR. DIAMOND: Your Honor. I don't think --

7 JUSTICE KENNEDY: We don't usually think of
8 just of settled expectations as being questions of
9 remedy. We consider those as being questions of
10 substance.

11 MR. DIAMOND: Your Honor, I think if you
12 look at Justice Harlan's writing in Teague about the
13 post-conviction -- what should be the rule for
14 post-conviction, you see he lays out very eloquently
15 what those concerns are in terms of finality and
16 uniformity in the post-conviction arena. And what I'm
17 saying is that those concerns -- certainly comity is a
18 concern; but those other concerns in terms of finality
19 and allocation of judicial -- scarce criminal justice
20 resources and what kind of a trial are you going to have
21 11 years after the fact, is it going to be more fair
22 than the trial that occurred in the first place, all of
23 those concerns apply.

24 JUSTICE GINSBURG: But the prosecutor and
25 the State executive can upset all those expectations.

1 The State executive says I want this -- the issue -- the
2 substantive issue in this case settled, so I'm not going
3 to raise Teague. And so Crawford is going to be
4 retroactive because I say so. It is a bit of an anomaly
5 that the prosecutor has that power but not the State
6 court itself.

7 MR. DIAMOND: Your Honor, first of all, I
8 think the State court is in a business -- is in a
9 different role in terms of enforcing the constitutional
10 rights in that situation. In fact, as it relates to the
11 constitutional right, it is difficult to see what State
12 interest a judge should be vindicating at that point.

13 JUSTICE GINSBURG: It is also difficult to
14 see what Federal interest is vindicated when the State
15 says we know we have to respect this -- call it what you
16 want -- new precedent in cases still in the pipeline,
17 and we don't have to if the case has reached a final
18 judgment. But "not required to" doesn't say "can't,
19 even if you want to."

20 MR. DIAMOND: Your Honor, that brings me
21 back to the point where I started, which is that the
22 Constitution doesn't -- remember, we're using the
23 Federal Constitution here as authority to do something
24 that, for example, in this case the Minnesota court
25 would be otherwise unable to do.

1 This defendant never raised the State law
2 claim. Under -- never had -- this defendant never
3 raised his State confrontation rights. So in this
4 proceeding, the Minnesota court would bar him from
5 raising his confrontation --

6 JUSTICE BREYER: Let me take the other point
7 here, which is Justice Scalia's, which I think I
8 understand now. Imagine that the Crawford begins to
9 take effect as of the day of decision. No law like
10 Crawford before. But for practical reasons and reasons
11 having to do with courts, we let certain people take
12 advantage of it. We let person A take advantage of it,
13 Mr. Crawford. We let person B take advantage of it, who
14 is on direct appeal. We don't let people in habeas take
15 advantage of it.

16 Why don't we let the State take advantage of
17 it in its collateral proceedings if the State wants to,
18 for reasons of federalism, for reasons they can do what
19 they want, for reasons if it is going to be the law in
20 the future any way?

21 MR. DIAMOND: Your Honor, my point is the
22 State can take -- the State can do that as a matter
23 of State law. The problem is with allowing a State to
24 extend the Federal standards here, is that the Federal
25 standards under Teague and under Griffith, but mainly

1 Griffith and Whorton together in this case, defines what
2 the constitutional requirement -- what constitutional
3 standard this --

4 JUSTICE STEVENS: May I ask another sort of
5 basic question? The Teague rule is a Federal rule --
6 the Teague rule is. What is your understanding of the
7 source of that rule? Is it the Court's power to
8 announce, make Federal common law? Or is it a
9 constitutionally mandated rule?

10 I will give you one other decision, cover it
11 all at once.

12 And if it were not a judge-made rule, and
13 rather, it was a statute and it goes beyond regulating
14 Federal habeas corpus proceedings and effects
15 State-court proceedings, what provision in the
16 Constitution would have given Congress the authority to
17 enact such a statute?

18 MR. DIAMOND: Your Honor, let me --

19 JUSTICE STEVENS: Interpreting it the way
20 you interpret it.

21 MR. DIAMOND: Let me try the first question,
22 and then we will see where we go. I think the source
23 of -- the authority for Teague is, frankly, the same
24 source of authority as it is for Griffith, and as the
25 same source of authority as in Griffith. Griffith talks

1 about -- the best I can do for that is Griffith talks
2 about it being grounded on basic norms of constitutional
3 adjudication and the integrity of the judicial decision
4 making.

5 JUSTICE STEVENS: Which qualifies for the
6 Federal system. Where is the authority to regulate the
7 State system come from?

8 MR. DIAMOND: Your Honor, I disagree in
9 terms of that that all applies only in the Federal
10 system. If you look at, for example, the civil cases,
11 American Trucking, Reynoldsville, and Harper, they
12 talk about that same basic norms of constitutional
13 adjudication applying in the State forum as well.

14 I'm sorry. There was a second part to your
15 question which was in terms of Congress being able to
16 amend or modify Teague in some fashion?

17 JUSTICE STEVENS: No. Where would Congress
18 get the authority to require State courts to follow the
19 rule, the interpretation of Teague that you're advancing
20 in this Court, that they may not go beyond the decisions
21 of this Court? What under the Federal Constitution
22 authorizes the Federal government, either judges or
23 Congress, to tell State courts that they cannot do what
24 your opponent argues they should be able to do?

25 MR. DIAMOND: Your Honor, I don't believe

1 that that's what's going on in the Federal habeas
2 statute. I think this Court has said that --

3 JUSTICE STEVENS: I agree when you are
4 talking about what Federal courts can do -- administering
5 the Federal habeas corpus, I have no problem. I'm
6 asking where does the Federal authority to tell State
7 courts they cannot do what your opponent says they
8 should be free to do?

9 MR. DIAMOND: Your Honor, I guess my source
10 of confusion with your question is I don't understand
11 Teague is a rule from Congress. I understand Teague is
12 a rule of this Court in terms -- describing what the
13 Constitution -- what constitutional standard applies to
14 what defendant.

15 JUSTICE STEVENS: In Federal habeas corpus
16 proceedings, yes.

17 MR. DIAMOND: Your Honor, that's where the
18 point of disagreement is. I think Teague does many
19 things, but one of the things that Teague does -- and,
20 frankly, not just Teague, the whole retroactivity
21 jurisprudence of this Court, Griffith and Teague
22 together set up a coherent whole. Griffith treats
23 finality. Teague post-finality. And the process of
24 this Court saying, you this defendant enjoy this
25 substantive Federal right, you this defendant enjoy

1 this substantive Federal right that was active at the
2 time your conviction became final --

3 JUSTICE STEVENS: The protection of habeas
4 corpus. What -- why can't they provide more protection?
5 What Federal rule prevents that?

6 MR. DIAMOND: Your Honor, I think what --
7 the problem with it is in the constitutional design
8 itself. In terms of the Constitution provides
9 requirements. You don't even have to get into Teague.
10 Griffith and Whorton together, Whorton saying Teague's
11 exceptions don't apply to Crawford, those two cases
12 together basically say the State's requirement to
13 provide this new constitutional rule ended when this
14 defendant's conviction became final.

15 At that point, that is the constitutional
16 requirement. The constitutional design then is that
17 States are not free as a matter of Federal authority to
18 exceed that requirement. They may not rely on Federal
19 authority to do that. Just the same -- they can
20 certainly do it as a matter of their own authority. But
21 the Constitution, for example, this defendant having
22 waived his State claims, having not raised them, the
23 Constitution doesn't allow the State of Minnesota --

24 JUSTICE STEVENS: Suppose it is a knock and
25 announce violation. They don't want to apply an

1 exclusionary rule. Can they apply a remedy that will
2 fire any officer who does this? Or will they say, no,
3 you can't do that, because it goes beyond what the
4 Federal Constitution requires?

5 MR. DIAMOND: Your Honor, I think that if
6 that remedy is grounded in State laws, the State of
7 Minnesota could certainly do that. But I don't think
8 they can rely on the Federal Constitution to fire any
9 officer who does that.

10 JUSTICE GINSBURG: Could a -- could a State
11 say: We know that on Federal habeas, the Fourth
12 Amendment, is out. Stone v. Powell says when it's --
13 when you go through the direct process, that's the end
14 of your raising search-and-seizure claims.

15 Could a State say: Well, we know the Fourth
16 Amendment is binding on us under the Federal
17 Constitution, but we think that we should extend the
18 Fourth Amendment right, not only to cases on direct
19 review but to collateral review as well?

20 Federal habeas courts can't do it, but could
21 States?

22 MR. DIAMOND: Your Honor, I think the answer
23 to that is probably yes, and the reason is different,
24 though. The reason is the State -- we're not changing
25 the right that the person is entitled to.

1 What we are -- what you're changing -- that
2 is -- that is the remedy-and-right question again. And
3 -- and what I'm saying is that what Teague -- Griffith
4 and Whorton together say that this person's
5 constitutional right, the right that he has, was fixed
6 when his conviction became final, as opposed to the case
7 where you -- that you're postulating, which is the
8 question of, yes, the State's going to recognize the
9 Fourth Amendment right in its post-conviction -- the
10 right -- the content of the right, itself, is not
11 changed in that instance.

12 JUSTICE SOUTER: Mr. Diamond, let me ask you
13 a question. Let me ask you a question which is totally
14 off the point of the Federal Constitution, I guess.
15 That is, if Minnesota really wants the rule that you
16 want it to have, its legislature can provide that that
17 will be the rule, can't it?

18 The Minnesota Legislature can pass a statute
19 saying nobody gets more than Teague allows.

20 MR. DIAMOND: Your Honor, I don't think the
21 Minnesota Legislature could -- could go into the
22 pre-finality area. In other words, the Minnesota
23 Legislature --

24 JUSTICE SOUTER: Can the Minnesota
25 Legislature say: Look, the -- the Supreme Court of the

1 United States has -- has come down with some rules. We
2 won't characterize them as minimums or anything else.
3 We'll just say it's a set of rules. It's called Teague,
4 and Teague is going to be the law for the application of
5 Federal rights in Minnesota State courts. Is -- can the
6 Minnesota Legislature do that?

7 MR. DIAMOND: Your Honor, I think, in that
8 instance, the Minnesota Legislature -- I see my time is
9 up, but I think in that instance the Minnesota
10 Legislature is -- is providing the minimum that the
11 Constitution requires. So the answer to --

12 JUSTICE SOUTER: So the answer is yes.

13 MR. DIAMOND: -- that is yes.

14 JUSTICE SOUTER: Yes.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Mr. Diamond.

17 Mr. Butler, you have a minute remaining.

18 REBUTTAL ARGUMENT OF BENJAMIN J. BUTLER

19 ON BEHALF OF THE PETITIONER

20 MR. BUTLER: Thank you, Mr. Chief Justice.

21 Two quick points in my -- in my one minute:

22 On finality, the State court can weigh the
23 costs and benefits of upsetting the finality of its own
24 convictions, convictions rendered in State court and
25 appeals rendered in State court.

1 It can decide, as several States have, that
2 the interests in full adjudication of constitutional
3 claims outweigh the interest in finality.

4 The question in Teague was whether the
5 Federal court could decide that for the States, and the
6 answer is no. But the States can decide that for
7 themselves.

8 On Justice Souter's point about what -- or
9 somebody's point about what the source of authority was,
10 Mr. Diamond said it was basic norms of constitutional
11 adjudication, and that is the phrase used in Griffith.

12 That phrase is a minimum. The basic norms
13 of constitutional adjudication require the following:
14 They require application of new rules to pending cases,
15 even though the conduct had already -- had already
16 happened.

17 They don't require anything more than that,
18 and we're not here asking the Court to hold that they
19 do. We're simply asking the Court -- I see my time is
20 up.

21 CHIEF JUSTICE ROBERTS: Why don't you finish
22 your sentence.

23 MR. BUTLER: We are simply asking the Court
24 to hold that if the State wishes to go beyond the
25 minimum, they are free to do so.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,

3 Mr. Butler.

4 The case is submitted.

5 (Whereupon, at 11:03 a.m., the case in the
6 above-entitled matter was submitted.)

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