IN THE SUPREME COURT OF THE UNITED STATES

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GLEN WHORTON, DIRECTOR, :

NEVADA DEPARTMENT OF :

CORRECTIONS, :

Petitioner, :

v. : No. 05-595

MARVIN HOWARD BOCKTING. :

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Washington, D.C.

Wednesday, November 1, 2006

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

APPEARANCES:

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

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

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

C O N T E N T S

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 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

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

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

JUSTICE GINSBURG: And none other occurs to you?

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

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

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

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

retroactive?

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

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

MR. CHANOS: Correct.

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

apply.

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

There would be nothing that would preclude the Federal court from making a merits determination so long as the state court had not already made a merits determination.

JUSTICE GINSBURG: Well, suppose the state has, which is going straight to AEDPA. Does that mean that Teague is out entirely, even the first category, that is a decision, a substantive decision that would mean that what defendant did was not a crime?

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

whether it was a substantive, a substantive claim or a procedural claim. However, in Atkins v. Kentucky there would be nothing that would prevent the petitioner from going back to the state court and arguing cause and prejudice, and then if the state court were to make a procedural determination on the second petition that was -- that were to deny the petitioner his claim, he could take that to the Federal court. The Federal court could then look at that because it was only a procedural determination by the state court on the second habeas claim and the Federal court at that point could look back at the substantive rule as established law because on the second claim they have the right, if he's only denied a procedure -- on a procedural basis, there's nothing that would preclude the Federal court on his second claim from looking back at what would then be established law.

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

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

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

JUSTICE SCALIA: Habeas is an equitable --

MR. CHANOS: I'm sorry?

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

MR. CHANOS: Yes, Justice Scalia.

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

JUSTICE STEVENS: Let me ask this question as to the basic issue of whether you should be relying on Teague or the statute. If you're relying just on the statute, how would it apply to a case which was correct under established law at the time that the state court made its ruling, but before the case reached the appellate court, in which there was a change in our interpretation? What if this case -- if Crawford had been decided while the case was on appeal?

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

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

on the statute if we disagree with you?

MR. CHANOS: It make difference. It makes a difference.

JUSTICE SCALIA: Well, I assume there would be a Rule 60(b) motion or the equivalent of it in state court.

MR. CHANOS: Yes.

JUSTICE SCALIA: If indeed our law had changed; don't you think?

MR. CHANOS: Absolutely.

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

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

JUSTICE GINSBURG: That's a odd position to take, to proliferate proceedings that way. I mean, I thought your argument, AEDPA argument, was: Too bad, the Federal court is out of it, but the state court is most likely, recognizing that this Court has said what this man did wasn't a crime, to grant him relief. But

if you're making this two-step and saying, but somehow we can change the substantive proceeding into a procedural proceeding, that seems to me odd, to proliferate proceedings that way.

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

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

JUSTICE SCALIA: You're saying not just "clearly"; "then clearly established law."

MR. CHANOS: That's exactly.

JUSTICE SCALIA: That is, at the time of the state court decision. *END STENO

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

JUSTICE STEVENS: The word was is somewhat ambiguous. It could either mean at the time of the trial court's decision or at the time of the final judgment on appeal.

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

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

MR. CHANOS: Yes, exactly.

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

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

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

JUSTICE KENNEDY: Crawford did use the term bedrock?

MR. CHANOS: Yes. Yes. And what Crawford -- what we believe Crawford was saying -- well, Crawford said that the Sixth Amendment right to

confrontation is bedrock. It didn't say that that decision altered our understanding of the bedrock procedural elements essential to a fair trial. That is the standard. Not whether or not the Sixth Amendment is bedrock.

In fact, if you look at the case of Gideon versus Wainwright and Betts versus Brady, in Betts versus Brady this Court had held the Sixth Amendment right to counsel was not applicable to the states through the 14th Amendment. Gideon overruled Betts versus Brady and said that the Sixth Amendment right to counsel was applicable to the states under the 14th Amendment.

That alters our understanding of the bedrock procedural elements that are essential to a fair trial. In one case, we're saying rights of counsel is not one of those bedrock procedural elements. Is not, therefore, applicable to the states under the 14th amendment, Betts versus Brady. In the next case we're saying right to counsel is it implicit in the Constitution. It is an essential to the fairness of a proceeding, and it is therefore applicable to the states under the 14th Amendment.

That truly alters our understanding of the bedrock procedural elements that are essential to a fair

trial.

In contrast, when you look at Crawford vis-a-vis Ohio versus Roberts, the -- there's a real distinction there. In both cases, we know that the right to confrontation is essential and Federal and one of those bedrock elements that are essential to a fair proceeding. Therefore Crawford doesn't alter our understanding of what elements are or are not essential to -- bedrock elements essential to a fair proceeding. Instead it modifies the contours --

JUSTICE STEVENS: You make the same analysis if you say the right is not necessarily the right of confrontation but the narrower right of cross-examination.

MR. CHANOS: Would I make the same analysis?

JUSTICE STEVENS: Because that is central to Crawford.

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

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

MR. CHANOS: It alters, it modifies the manner in which we implement that right. Under Ohio

versus Roberts there was plenty of cross-examination that was occurring. The standard under Ohio versus Roberts was unavailability and inadequate indicia of reliability. There was a reliability screen in place, and it was clear under Ohio versus Roberts that the right to confrontation was an essential bedrock right, essential to a fair trial.

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

MR. CHANOS: Well, there were --

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

MR. CHANOS: Well, Justice Scalia --

JUSTICE SCALIA: It is like obscenity.

(laughter.)

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

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

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

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

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

MR. CHANOS: I'm sorry?

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

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

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

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

JUSTICE SOUTER: -- accuracy-enhancing then?

MR. CHANOS: I'm sorry?

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

MR. CHANOS: That, and it is really an analysis of Roberts. Is, is that judicial determination of reliability under adequate indicia of reliability, so

fundamentally flawed that all of the decisions that were, that were arrived at pursuant to its authority must be undone, and new trials must occur with respect to those decisions because it is so fundamentally flawed. And our point is that it is not. It does not rise to that level of inadequacy and Crawford is therefore not a rule without which the accuracy of a proceeding is seriously diminished.

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

CHIEF JUSTICE ROBERTS: Thank you General Chanos.

Mr. Gornstein, we will hear now from you.

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

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

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

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

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

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

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

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

The first is that Roberts had a built-in

reliability screen. Hearsay could not be admitted under Roberts unless a determination was made that there were particularized guarantees of trustworthiness.

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

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

MR. GORNSTEIN: Yes. And I don't think that this is a self-sufficient argument for that reason. It

is just one component of the argument about why there was reliability. The fact that there was a Roberts screen on reliability is an additional factor that distinguishes my example from what you said.

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

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

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

Because of the importance of finality to the system -- and there are only going to be two very -- there's only a very narrow window for watershed rules, of rules that, the accuracy of proceedings beforehand

are so seriously diminished that there is an unacceptably large risk that systematically, innocent people were being convicted, and that this is a rule that approaches Gideon in its fundamental and sweeping importance. Those are the only circumstances in which the Court is going to go back on finality.

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

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

The third reason I wanted to give about why

there was not a serious diminishment in accuracy that is in at least one respect, the Roberts rule actually promotes more accuracy than the Crawford rule, and that's with respect to non-testimonial hearsay. In the case of non-testimonial hearsay, under Roberts, that could come in only if determination had been made there were particularized guarantees of trustworthiness. Whereas under the Crawford rule, that kind of non-testimonial hearsay comes in without any reliability check under the Constitution at all.

JUSTICE KENNEDY: But that's not this case.

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

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

MR. GORNSTEIN: Yes. The daughter's testimony about what she said to the mother illustrates the difference, because that came in through the mother. It only came in because there was a particularized guarantees of trustworthiness to that statement; whereas under Crawford in future trials, statements to the mother -- which are not testimonial -- they will come in through the mother without any screen for reliability under the Constitution at all. So in that respect, the

defendant here got more by virtue of the Roberts rule than by -- than he would have had by virtue of the Crawford rule.

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

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

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

MR. GORNSTEIN: But Justice Scalia --

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

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

I wanted to move on to the bedrock aspect of the inquiry, which is a separate second inquiry that had

threshold that has to be crossed if you are going to find something to be watershed, and the only rule that the Court has found to be bedrock is Gideon. And this rule, Carawford does not approach Gideon in its fundamental and sweeping importance, and there are a couple of reasons for that.

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

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

Finally, the Gideon rule established for the first time a right to free counsel in all felony criminal trials. Before Crawford was established, there was a right to cross-examine. It simply was a different

right. You had a right to cross-examine the live witnesses and you had a right to screen out uncross-examined statements unless they met the reliability standard of Roberts. And the change that was made was one in which the Roberts rule was thrown out, and you can no longer get in uncross-examined statements with a determination of reliability.

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

If the Court has nothing further.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Gornstein.

Ms. Forsman?

ORAL ARGUMENT OF FRANCES A. FORSMAN

ON BEHALF OF THE RESPONDENT

MS. FORSMAN: Thank you very much, Mr. Chief Justice. Members of the Court:

This man was sentenced to life in prison based upon accusations that have never been tested by the only constitutionally reliable test that is now acceptable in this Court. There is no question that the statements that were admitted through the police officer

were testimonial. There is no question that if Mr. Bockting were tried today, that those statements would not have come in.

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

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

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

(Laughter.)

JUSTICE SCALIA: -- that the new rule produced greater accuracy. We said that it was the view of the framers of the Constitution that cross-examination, confrontation in that sense, was necessary for greater accuracy.

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

Am I bound, for purposes of the rule we're arguing about here, to what the framers think?

MS. FORSMAN: No, Your Honor, you are not bound to what the framers think. However, I think that you went far beyond simply saying that this was like quartering soldiers in discussing the confrontation clause and the right to confrontation. The opinion goes into at length why the Roberts rule was so fundamentally flawed. You talked about the kinds of decisions that were produced, although this Court said that this Court

had pretty much tacked to the same direction as the framers' view.

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

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

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

JUSTICE KENNEDY: That's in an instruction, like Toomey versus Ohio. The judge is corrupt. It is just structural. You can't say that about Crawford, or can you?

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

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

We know that two out of those three examples are actually subject to harmless error analysis. So this Court has never tied the issue of the elements of Teague or even the elements of the pre-Teague jurisprudence to the issue of whether something is structural or harmless. It is the issue, as it was in the more recent decision of Gonzalez-Lopez, of the right

to choice of counsel decision. They are what the Court looked to to determine the issue was, is it harmless, is it quantifiable. And in this case, courts are accustomed, appellate courts are accustomed to looking at the introduction of this kind of evidence and determining whether or not it is harmless.

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

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

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

JUSTICE GINSBURG: Ms. Forsman, what about

the cases we're had so far on this second Teague category? As far as I know -- well, we haven't found anything to be retroactive on collateral review so far, so this would be the first time.

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

But if we look to cases such as the retroactivity application of Batson, for instance, what this Court has found is that the Batson rule, the cross-section of the community on a jury, that the purpose of that rule was not created for the purpose of protecting against unjust convictions or ensuring the integrity of the fact-finding process. That was not the purpose of the Batson rule, this Court found that it wasn't the purpose of the Batson rule, and that therefore, it would not fall under the Teague exception.

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

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

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

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

JUSTICE KENNEDY: The problem with your case -- maybe it's our problem because it was our rule -- is that we're asked to adopt an across-the-board calculus as to the rule. In some cases, as I think you will have to concede, under the Roberts jurisprudence, the fact finding was more accurate.

In your case, what you are telling us is that the fact finding is far less accurate. But I think you are stuck unless you can give us some reason that we

depart with it. With a rule-made jurisprudence, we have to look at the rule in the whole universe of cases, not just your case. It seems to me that was the problem you had in arguing in this area, and maybe you can suggest some way out. I don't see it.

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

And I don't know how you would be able to square that with the strong statements that are made in Crawford. And the strong statements that are made in the cases, for instance, in the case finding that Bruton should be retroactive, because it goes to the integrity of the fact- finding process. Unlike all of the other cases that you've talked about since Teague, the integrity of the fact-finding process is what is at

issue here. Do you have confidence in a result which is based upon an accuser's statements being admitted without ever having been cross-examined?

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

MS. FORSMAN: That's -- Your Honor, that is the base of the decision. It harkens back to what the Founders believed. However, the rule in Roberts was described variously from "amorphous to unpredictable, proof manipulable," to saying that the basis for the right to confrontation and cross-examination comes from a basic mistrust of, even to the levels of a judge in terms of accepting the testimony without the advantage of an actual adversary proceeding.

This case, of course, illustrates the dire need for cross-examination because the accuser in this case testified inconsistently at the preliminary hearing in this case and then was excused before cross-examination was allowed. The accuser in this case, who was sent to a counselor by the district attorney, when she went to the counselor refused to

knowledge that the incident happened, according to the testimony of the counselor.

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

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

CHIEF JUSTICE ROBERTS: You had the opportunity to challenge those findings under the Roberts regime in state court?

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

JUSTICE BREYER: You can still argue -- what hearsay exception did it come in under?

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

JUSTICE KENNEDY: Adequate indicia of reliability.

JUSTICE BREYER: Adequate indicia of reliability?

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

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

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

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

MS. FORSMAN: Children under ten.

JUSTICE GINSBURG: As you just said.

MS. FORSMAN: That's correct.

JUSTICE GINSBURG: And here we had someone

who was six years old and was hardly articulate, it seems from the little we have of this record. So the Nevada statute I think was very specific to children and was not --

MS. FORSMAN: It was. Yes, yes. No, it was. It was adopted for witnesses under ten. This child actually was quite articulate in the preliminary hearing and was able -- was able to talk about the fact that she remembered talking to the police officer, that she remembered -- but then, but then in terms of trying to recall the incident, she was unable to recall the incident, and she was unable to recall it in any of the same detail that the police officer testified to.

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

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

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

JUSTICE SOUTER: Would you comment, Ms. Forsman, on your opponent's argument based on

2254(d)?

MS. FORSMAN: Yes. I think the easiest way to explain our position on that is that what has been articulated here is that a retroactive -- a rule made retroactive by this court would be applicable to Mr. Bockting if he had not raised this issue or had been somehow procedurally defaulted along the way. In other words, in order to be able to get the advantage that was discussed by both the state and the government of the other sections of the statute which clearly recognize, as to the extent that it's relevant the sponsor of the legislation did, that you still have the power to make rules retroactive, but the only way that Mr. Bockting would be able to get advantage of that rule would be if the state court had never ruled on the merits of his claim or had made some sort of procedural ruling that meant that he was defaulted on the claim. So instead of Mr. Bockting, who has raised this question of being able to cross-examine his accuser from day one in the trial, he cannot have that rule applied retroactively to him. If instead he now, he goes back later and the court says, no, this is a successor petition, you can't, you can't get it, you can't come into our courtroom, the door is slammed on you, according to the state now there's no ruling on the merits of his claim, and that's

why that section of the statute would permit the retroactive rule to apply.

2254(d)(1), while it has the language clearly established, and the court asked some questions about that, I think it must be remembered that when that statute is being addressed, it's being addressed in state court -- or in Federal court, on Federal habeas. And so at the time that the petitioner is in Federal court, then the rule has been clearly established.

The 2254(d) --

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

MS. FORSMAN: Correct.

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

MS. FORSMAN: 2254(d)(1), I think the only way that you can read that section compatibly with the four other sections which are quoted in our appendix 2 of our brief, the only way that you can do that is to recognize, although this Court will recall that it has described AEDPA as not quite a silk purse of legislative

drafting, but the only way to make those sections compatible is to say, listen, what was going on when 2254(d)(1) was written was we were talking not about the timing of the new rule, what we were talking about is who is it decided by, because before AEDPA was adopted it wasn't apparent that it must be a decision by you, by this Court, that established by the rule. So that's the first part.

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

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

MS. FORSMAN: There is not language in 2254(d)(1). The language -- the reason that we know that Congress was cognizant of Teague is that there is language throughout AEDPA, particularly in the sections that we've quoted to you, that are lifted directly from Teague.

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

MS. FORSMAN: I think that what you would say is that
Congress would not have deprived you of the power to make a rule retroactively applicable and would have not then created the ludicrous situation which the state suggests would occur here, which is instead of the motivation in Congress in having someone like
Mr. Bockting raise the issue from the very beginning in one unitary proceeding, as opposed to going back, which is what they've suggested he must do in order to get the advantage of a retroactive rule, is that Congress was cognizant of that and in order to make all of the statute -- all of the provisions of the statute have

meaning and not render certain provisions, including the sections that we quoted, superfluous, that you must interpret that to mean that the -- that the -- that 2254(d)(1) is not a timing statute. It's what law do we look to. That must be what they meant. Otherwise, the rest of it just doesn't make any sense.

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

MS. FORSMAN: No. I don't believe that's the tail wagging the dog, because I don't think that that was the intent of 2254(d)(1). I think the intent -- again, I think the intent of 2254(d)(1) was in order to define what kinds of decisions the state court decisions should be measured against. There must be some kind of meaning to retroactivity, and retroactivity means that you are making this decision now and you're making it retroactive to the time. It is not going to be many things, as we know not only from your decisions, but as we know from the very small core of decisions that Teague left open. And it is those decisions where we must worry whether or not an innocent man has been

convicted. It is those rules that protect against those -- an unjust, an unwarranted, a wrongful conviction. It is only those rules that go to reliability, that go to the integrity of the fact-finding process, that you are going to let through that veil.

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

It is from that date forward. So there is a defined population. In appendix 1 of our brief, you will see all of the decisions that we could find that have actually applied Crawford and there were 49 of them. And what you'll find is that of the decisions --

and the state and the government have not disputed this -- of the 49 decisions which we were able to find at the time of the writing of that brief, only five actually resulted in relief. There's no question it would result in relief here because there is no contention before you that the Ninth Circuit's determination of harmfulness -- there is no determination before you; they haven't challenged that to you.

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

And that is as it should be. The state argues that watersheddedness, if that's a word, is that watersheddedness must mean that it affects many, many decisions. Now, that can't mean what Teague means. Teague can't mean that my burden is to show you that many decisions will be overturned. That's the exact opposite of what Teague was decided for.

Watersheddedness has to do with the alteration of our understanding. It is difficult for me to understand how the change of course as described by then Chief Justice Rehnquist, that the change of course

that Crawford represented in the way that we look at the right to confrontation cannot be, cannot be seen as precisely the alteration in the understanding of this bedrock principle again directly from the language of Crawford.

We ask you, Your Honors, to make the rule of Crawford retroactive and to affirm the determination of the Ninth Circuit.

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

(Laughter.)

MS. FORSMAN: I was not.

JUSTICE STEVENS: I attend a moot court at Notre Dame in about your year and it was an awfully good moot court.

MS. FORSMAN: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Forsman.

General Chanos, you have two minutes remaining.

REBUTTAL ARGUMENT OF GEORGE J. CHANOS

ON BEHALF OF PETITIONER

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

First of all, counsel's argument with regard

to the interpretation of 2254(d)(1) clearly established language is inconsistent with the statement made -- statements made by this Court in Lockyer and in Williams v. Taylor. In Lockyer, the Court stated Section 2254(d)(1)'s clearly established phase referred to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state court decision, citing Williams v. Taylor. In other words, clearly established federal law under 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.

With regard to counsel's point about this case in particular, Bockting, I agree that there are broader issues beyond this particular fact situation. However, I want the Court to feel comfortable that when this Court sent this case back down to the Nevada Supreme Court and told the Nevada Supreme Court to follow Ohio -- Idaho versus Wright, the factors in Idaho versus Wright to determine trustworthiness, talk about spontaneity and consistent reputation -- repetition, mental state of declarant, use of terminology unexpected of a child of similar age, and lack of motive to fabricate. Particularized guarantees of trustworthiness must be so trustworthy that

adversarial testing would add little to its reliability.

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

Finally, I would just point out that although Caldwell is indeed an important rule, and may, in fact, be a fundamental rule, so was Batson in Teague, as was Caldwell in Sawyer, as was Ring in Summerlin, as was Duncan in DiStefano as was Mills in Banks. Yet this Court failed to apply retroactive status to any of those important fundamental rules saying none of them rose to the level of Gideon versus Wainwright. The same should be true with your decision here with respect to Crawford.

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

CHIEF JUSTICE ROBERTS: You can finish your sentence.

MR. CHANOS: Thank you.

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

(Laughter.)

MR. CHANOS: Thank you, Mr. Chief Justice. No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, General. The case is submitted.

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