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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 10-637, Greene v. Fisher.

5 Mr. Fisher.

6 ORAL ARGUMENT OF JEFFREY L. FISHER

7 ON BEHALF OF THE PETITIONER

8 MR. FISHER: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 Any decision announced from this Court
11 before a State prisoner's conviction becomes final
12 constitutes clearly established law for purposes of
13 applying section 2254(d) of AEDPA. For decades, in
14 fact, it has been a bedrock rule under Teague and
15 Griffith that State prisoners are entitled to the
16 benefit of decisions from this Court that come down
17 before finality, and that rule has delivered fairness
18 and clarity to an area that that this Court has
19 acknowledged previously lacked it. There's no
20 compelling reason to chart a new course now.

21 There's no doubt that AEDPA changed Federal
22 habeas law in many important ways, but it did not change
23 habeas law with respect to retroactivity, for under this
24 Court's Teague jurisprudence, States already had comity,
25 as opposed to other areas. Now --

1 CHIEF JUSTICE ROBERTS: Mr. Fisher, we
2 wouldn't have this problem, at least not in this case,
3 if your client had -- had sought cert, right? Because
4 then presumably when his petition came before the Court,
5 our normal practice would have been to GVR it, because
6 the decision would come out the other way under -- under
7 Gray, right?

8 MR. FISHER: If this Court had GVR'ed the
9 case, it -- yes.

10 CHIEF JUSTICE ROBERTS: No, if he had sought
11 cert.

12 MR. FISHER: Well, I -- well, I'm not
13 sure --

14 CHIEF JUSTICE ROBERTS: We can't very well
15 GVR it until he seeks cert.

16 MR. FISHER: Of course.

17 CHIEF JUSTICE ROBERTS: And I think it's
18 kind of a glaring factual nuance to the case, kind of a
19 -- that he didn't seek cert. And he also didn't seek
20 State collateral review. I mean, if he had tried one of
21 those or both of those, we -- we probably wouldn't be
22 here.

23 MR. FISHER: Well, let me take those one at
24 a time, Your Honor. First, with -- with the GVR
25 request, if he'd had counsel that would have advised him

1 to seek cert, he may well have done it, and this Court
2 may well have GVR'ed, but realize that this Court isn't bound
3 to do that. This Court has discretionary jurisdiction,
4 and I don't think this Court wants to take on the
5 responsibility of deciding every single case that falls
6 into a twilight zone situation.

7 You're going to have cases, like this one
8 very well would have in light of what the Pennsylvania
9 -- the State filed in its own supreme court, wrapped up
10 in procedural arguments, harmless error allegations,
11 perhaps alternative State grounds. And this Court often
12 has decided that habeas is the better place to work that
13 out, not GVR. Now, it may well have GVR'ed, but I don't
14 think the Court wants to take on that responsibility.

15 JUSTICE BREYER: Why? I mean, normally a
16 lawyer just looks to see what the docket is. And when
17 there's a case that seems to affect his case, he asks
18 for cert. And our practice normally, since I have been
19 here, is where it implicates a case, you hold it until
20 the case is decided. Then the writing judge or other
21 people look through it and see if in fact it really does
22 affect it, and if it does, we GVR.

23 I mean, as a practicing lawyer here, have
24 you discovered instances where we've failed to do that,
25 do you think?

1 MR. FISHER: Well, I can think of -- let me
2 take it one step at a time. I think there are cases
3 that this Court doesn't GVR. Because they are so
4 procedurally complicated, the Court leaves it.

5 And, in fact, I can think of one case right
6 now in California. After Melendez-Diaz, there was a
7 case called Geyer that came out of the California
8 courts, that this Court did -- held for Melendez-Diaz
9 but did not GVR, in part because I think the State was
10 making harmless error allegations there. And now the
11 States and California are trying to figure out what to
12 do in light of that.

13 CHIEF JUSTICE ROBERTS: I would think our
14 normal --

15 MR. FISHER: So, that's just one example,
16 but --

17 CHIEF JUSTICE ROBERTS: Normally, I think if
18 it looks like a mess procedurally, or whatever, the
19 normal assumption is you let the lower court figure it
20 out. Send it back, and I -- I think the research is
21 that in actually most cases in which we GVR, the court
22 reinstates the judgment below for one reason or -- or
23 another. But the idea that we parse through them
24 carefully -- I think if it's arguable, send it back and
25 let the lower court sort it out.

1 MR. FISHER: Well, let me get back to
2 Justice Breyer's question, though, with the assumption
3 that if he has a lawyer he's going to bring it up here.
4 Of course, Mr. Greene's right to appointed counsel under
5 Pennsylvania State law ended when the Pennsylvania
6 Supreme Court dismissed his case.

7 JUSTICE KAGAN: Well, he doesn't --

8 JUSTICE KENNEDY: Let me ask -- let me ask
9 this. There was a second half of the Chief Justice's --

10 MR. FISHER: Yes.

11 JUSTICE KENNEDY: -- question that you never
12 got to, but since we're on --

13 MR. FISHER: Yes.

14 JUSTICE KENNEDY: -- the GVR, I have one
15 more question on the GVR, at least.

16 If you had sought -- if you had been
17 counsel -- you're not. If you had been Greene's counsel
18 and you had sought cert from this Court, you would have
19 sought cert to the supreme -- the Superior Court of
20 Pennsylvania, to the intermediate court, correct?

21 MR. FISHER: Correct, I think that's right.

22 JUSTICE KENNEDY: Which indicates that that
23 is the decision that's -- that's involved here. And
24 once that decision becomes final, then you have a
25 problem.

1 If -- if the protocol or the practice or the
2 rules had been that you would seek cert to the
3 Pennsylvania Supreme Court, then you might have had an
4 argument about finality, but now you don't. But you can
5 get to that later, because the -- the Chief Justice had
6 a second part of his question which was collateral.

7 MR. FISHER: Okay. So let me address that.

8 So there -- I don't think it is a given,
9 Your Honor, that we would have been able -- Mr. Greene
10 would have been able to bring this claim in the
11 Pennsylvania State courts. The -- the justices on -- the
12 judges on the Third Circuit disagreed about that, and
13 it's unsettled under Pennsylvania law. But what is
14 clear is that --

15 JUSTICE GINSBURG: But Respondents said you
16 could.

17 MR. FISHER: Pardon me?

18 JUSTICE GINSBURG: Respondents in their
19 brief said that if you had sought postconviction relief
20 in the State courts, then you could have argued Gray was
21 the controlling decision, and they would have accepted
22 that Gray --

23 MR. FISHER: They do say that now, Justice
24 Ginsburg, and all I can say is we checked as hard as we
25 could to find an actual case in Pennsylvania in the

1 procedural posture of somebody going back in the
2 situation, and we haven't found one --

3 CHIEF JUSTICE ROBERTS: The problem is
4 that --

5 MR. FISHER: -- that either decides it or
6 the State takes a position one way or the other. But
7 there are many States -- you don't have to dwell on --
8 just on Pennsylvania, because there are States -- we
9 cite them in our brief -- that would not let somebody
10 like Mr. Gray go into State court. And, indeed, the
11 amicus brief from the group of States I think is telling
12 in its silence, that none of the 12 States that signed
13 on to that brief are willing to say you could bring a
14 claim like this in collateral review in our own
15 State courts.

16 CHIEF JUSTICE ROBERTS: You would be -
17 I appreciate your point that you may or may not have
18 been able to bring it. My -- my concern is that you have,
19 I guess as someone put it, the perfect storm here. You have a
20 person who did not file cert, and he could well have
21 gotten relief if he had through the GVR process, and who
22 did not seek State collateral review, and he could well
23 have -- you say probably wouldn't. The State said
24 certainly would have. Somewhere in there. At least
25 he'd have had a fair chance --

1 MR. FISHER: Right.

2 CHIEF JUSTICE ROBERTS: -- or a chance. But
3 because he didn't seek cert and he didn't file State
4 collateral relief, we have this more complicated
5 scenario.

6 MR. FISHER: I think that's a fair
7 statement, Your Honor. And the way you frame it,
8 though, frames what sounds to me more like an exhaustion
9 argument than it does about a statutory construction
10 argument with respect to 2254(d).

11 And this Court has never held either that
12 you have to seek cert in this Court in order to exhaust
13 State remedies, nor to take a -- to take a claim back to
14 State collateral review that you've already taken up
15 through the State direct review system. So if we had an
16 exhaustion case in the future, maybe somebody would make
17 that argument.

18 But that's not what's before you today.
19 What's before you today is the hypothetical that -- that
20 Mr. Greene actually did seek cert and for some reason
21 this didn't GVR, or he did seek review in the
22 Pennsylvania courts and they refused to hear it.

23 And under the State's position, even then
24 you would bar him from getting the reliance on Gray,
25 because Gray came down after the Pennsylvania Supreme --

1 I'm sorry -- the Pennsylvania Superior Court decision.

2 JUSTICE GINSBURG: Well, apparently the
3 Pennsylvania Supreme Court thought that he hadn't
4 properly raised it. I mean, they initially granted
5 review post-Gray, and then they found that the grant was
6 improvident most likely because Greene had not raised
7 the -- the Gray issue below.

8 MR. FISHER: Well, he very much had raised
9 the Gray issue below, Justice Ginsburg. You're
10 absolutely right that the State, faced with really no
11 alternative but to try to argue waiver, did argue waiver
12 in the Pennsylvania Supreme Court, which did dismiss the
13 case. But, of course, the order doesn't say why it
14 dismissed the case. And we litigated that very issue in
15 the lower courts, and the Third Circuit squarely held
16 that Mr. Greene had, in fact, preserved this claim in
17 the Pennsylvania courts, and on top of that, the
18 Pennsylvania Superior Court had reached it and resolved
19 -- understood him to be raising a Gray-type argument and
20 resolved it by citing a Pennsylvania case that had
21 previously held that just putting an X in place of -- in
22 place of the defendant's name was good enough to satisfy
23 Bruton.

24 JUSTICE ALITO: How can you -- how can you
25 square your position with what 2254(d) says, that there

1 must be an unreasonable application of clearly
2 established law? What the intermediate appellate court
3 did was not an unreasonable application or -- let's
4 assume for the sake of argument it was not an
5 unreasonable application of clearly established law when
6 they did it. So, how do you get around that?

7 JUSTICE KENNEDY: And just to follow up on
8 that question, the statute says it was "adjudicated,"
9 past tense, and the decision "resulted in," past tense.

10 MR. FISHER: Right. We don't disagree that
11 it's a backward-looking statute. There is a
12 retroactivity cutoff. The question is, where is it?

13 And we don't contend, Justice Alito, that
14 it's an unreasonable application. We contend that
15 there's more statutory language that it's contrary to --

16 JUSTICE KENNEDY: You said -- you don't
17 contend that -- what's --

18 MR. FISHER: There's two prongs --

19 JUSTICE KENNEDY: You said you don't contend
20 that, and I didn't hear -- was an unreasonable? I just
21 didn't hear it.

22 MR. FISHER: Yes. Justice Alito cited one
23 prong of 2254(d) --

24 JUSTICE KENNEDY: Yes.

25 MR. FISHER: -- which is unreasonable

1 application.

2 JUSTICE ALITO: And the other is it
3 was --

4 MR. FISHER: I think the more natural --

5 JUSTICE ALITO: It was contrary to. How was
6 it contrary to?

7 MR. FISHER: It was contrary to this Court's
8 clearly established law as of the date of finality. So,
9 you have a statute that says it has to be -- it resulted
10 in a decision that was contrary --

11 JUSTICE SCALIA: Yes, the decision -- what
12 decision did the Supreme Court of Pennsylvania make
13 other than the decision not to hear the case?

14 MR. FISHER: No, it's the decision from the
15 Pennsylvania Superior Court, Justice Scalia, that's
16 contrary to clearly established law as of the date of
17 finality. So, you have to --

18 JUSTICE GINSBURG: Not as of the date they
19 made it.

20 MR. FISHER: That's not the date they made
21 it, no. But the question of contrary to, as this Court
22 said in Williams and has repeated many times, is whether
23 the lower court either did one of two things: decided a
24 case -- decided the case with a question of law and
25 decided the question of law opposite as how this Court

1 has decided it, or decided the case differently than
2 this Court has in another case on materially
3 indistinguishable facts.

4 JUSTICE KAGAN: Well, how do you square your
5 argument with Pinholster? Because I thought that what
6 we said in Pinholster just last year is no Monday
7 morning quarterback. We put ourselves in the position
8 of the court at the time. We look at what the court
9 looked at. We know what the court knew, and we make a
10 decision on that ground. And it seems to me that your
11 argument just runs smack into that holding.

12 MR. FISHER: Justice Kagan, no, we don't
13 think it does, because there has always been a
14 difference between facts and law. So, this Court of
15 course held in Pinholster that you look at the factual
16 record that existed before the State court, but ordinary
17 appellate review and principles have always allowed new
18 law to be considered up to a certain point.

19 And so, it's consistent with Pinholster to
20 say you take the set of facts, just as you would from a
21 trial court, but that new law up to the point of
22 finality is -- can be considered.

23 JUSTICE KAGAN: Well, I understand how there
24 can be a distinction between facts and law for many
25 purposes, but Pinholster rested on a view of the

1 statute, which was basically the view that Justice Alito
2 gave you, which said everything in this statute is
3 framed in the past tense. What the statute is getting
4 at is -- is the decision at the time the State court
5 made it.

6 MR. FISHER: We don't -- again, we don't
7 disagree at all that it's in the past tense. The
8 question is where in the past is the cutoff? And so,
9 what we say is -- and it's important what this Court did
10 say in Pinholster. In Pinholster, it didn't say that
11 the plain language of 2254(d) resolved this. It said
12 that -- I think I'm going to get this quote right --
13 that the structure of the statute compelled the
14 conclusion that for facts you leave the window. Well,
15 the structure of this statute as to law compels the
16 opposite conclusion.

17 JUSTICE GINSBURG: Why?

18 MR. FISHER: For a few reasons --

19 JUSTICE GINSBURG: Because the statute says
20 adjudication resulted in a decision. And the decision,
21 the only decision, is the Pennsylvania Superior Court,
22 because there was a non-decision by the Pennsylvania
23 Supreme Court. Resulted -- that is -- in a decision
24 that was. It didn't say "is." I mean, you would have a
25 much stronger argument if it had read "resulted in a

1 decision that is contrary." But when it says "was,"
2 that sounds like at the time of the adjudication.

3 MR. FISHER: Well, Justice Ginsburg, if I
4 can get this point across. I'm not saying "is," because
5 then there would be no -- there would be no
6 retroactivity cutoff whatsoever. I agree that the
7 statute says "was," but it's was as of when? We say
8 "was" as of the time of finality. The State wants to
9 read into the statute "was" as of the time the decision
10 was made. And so, that's the question you have.

11 And if you look to the structure of the
12 statute, you'll see lots of clues that Congress didn't
13 intend to change the previous clear retroactivity cutoff
14 at Teague. And, of course, that's the barrier the State
15 has to overcome here, a clear and specific change in
16 law. If you look at the limitations provision, it
17 references finality. If you look at various provisions
18 of the statute that reference retroactivity law, they
19 reference new rules in retroactivity. And this Court
20 has held in Tyler v. Cain that Teague is what Congress
21 had in mind when it did that. So --

22 JUSTICE SOTOMAYOR: Counsel, how do you --
23 how do you get past Horn? Horn says that Teague and
24 AEDPA are two different analyses that each case must
25 undergo, that you start with, okay, what does Teague

1 say, but you then look at what AEDPA says, and that each
2 can serve as an independent bar. So, if that's the
3 case, how do you get around AEDPA's requirement of a
4 past-looking statute being one that involves the
5 adjudication and whether at its time it was contrary to
6 Supreme Court precedent?

7 MR. FISHER: Justice Sotomayor, we think
8 Horn is another structural component of the statute that
9 shows why we win. And let me explain why. Again, we
10 don't disagree it's a backward-looking statute, but
11 backward-looking to finality. Now, what Horn held --
12 Horn rejected a form of the very same argument that the
13 State is making today, which is 2254(d) changes
14 retroactivity law to establish the cutoff at the time of
15 the State court decision, not as of finality. This
16 Court rejected that argument and said, no, Teague and
17 2254(d) are distinct. And we think the best way to
18 understand them as distinct is to understand that
19 2254(d) deals with the standard of review, and Teague
20 still continues to control finality.

21 Now, in light of Horn -- I'm sorry --
22 retroactivity. Now, in light of Horn on the books, if
23 the State were right that what 2254(d) is actually
24 trying to do is also do retroactivity work and prevent
25 the State courts from, as it put in its brief, being

1 "blind-sided," then Teague would serve -- no
2 longer serve any purpose, and Horn would have had to
3 come out the other way, because once you say 2254(d) is
4 actually concerned with setting a cutoff at the time of
5 the last State court decision for retroactivity
6 purposes, you don't need Teague anymore. So, Horn would
7 have had to come out the other way if the State is
8 right.

9 Now, let me go back to one other structural
10 feature of the statute that -- that shows that Congress
11 had in mind that Teague would continue, and that's the
12 one I referenced earlier with respect to retroactivity.
13 Keep in mind the State's argument would bar not just
14 somebody like Greene from relying on a new case like
15 Gray, but it would also -- the implication would be it
16 would bar him from relying on a new case like Roper v.
17 Simmons, Graham v. Florida, or other cases that alter --
18 that say the Constitution can no longer cover or punish
19 substantive conduct in a certain way. Because, again,
20 if Teague is out of the picture --

21 JUSTICE KENNEDY: Well, and, of course, those
22 are ongoing injuries where the person continues to be
23 confined.

24 MR. FISHER: Well -- but, no, the State's
25 rule --

1 JUSTICE KENNEDY: I'm not sure there's an
2 ongoing injury here. All we're doing is talking about a
3 trial error. That's -- that's different than --

4 MR. FISHER: It's not different -- under the
5 State's view of AEDPA, Justice Kennedy. Remember, the
6 State's view of AEDPA is that if a decision comes down
7 after the latest State court's decision on the merits,
8 then the defendant cannot seek relief based on it. And
9 on page 38 of the red brief, in footnote 12, they try to
10 deal with this problem, but not in a satisfactory way.

11 And it's not an abstract problem. If I give
12 this Court a few citations -- if you'll permit me to
13 give you three citations of cases working through the
14 lower courts right now that raise Roper, Graham, and
15 Atkins claims that the lower courts -- the only way they
16 have reached them is by saying that Teague still has a
17 role to play with respect to 2254(d). And the three
18 citations, if I can give them very quickly, are Arroyo,
19 362 F. Supp. 2d 869; Holladay, 331 F.3d 1169; and Simms
20 2011 Westlaw 1161696.

21 Again, that's another structural feature of
22 the statute that the State simply can't get around with
23 its -- with its view. Now, some of the lower courts
24 haven't quite focused on this, and, in fact, it's
25 because for many, many years after AEDPA was passed,

1 States didn't even make the argument that you have
2 before you today. All the way through Smith v. Spisak,
3 which came to this court just a couple of years ago, the
4 State of Ohio, for example, was not even making this
5 argument, which is quite odd if you step back for a
6 moment and realize that the State's position today is
7 that the plain text of AEDPA is so clear there's no
8 possible way you could read it in any other direction.
9 So --

10 JUSTICE GINSBURG: Mr. Fisher, what about
11 the -- well, the purpose of AEDPA was to require the
12 Federal courts to respect the State courts' decision.
13 And there's only been one decision in this picture, and
14 that decision was the Pennsylvania Superior Court. And
15 we are not giving much respect to that decision, which
16 did not have the benefit of Gray, if we're going to say,
17 no, we have to look at that decision as though Gray were
18 already on the books.

19 MR. FISHER: So, Justice Ginsburg, let me
20 answer that question by starting, if I may, before
21 AEDPA, because before AEDPA, under Caspari and Teague,
22 there's no doubt whatsoever that that's what a Federal
23 habeas corpus court would have done, is say the cutoff is
24 finality. Because, remember, finality doesn't exist in
25 a vacuum. It exists against the Griffith rule. And so,

1 what Federal courts had always asked is, did the
2 defendant not get credit for a case that he's entitled
3 to under Griffith?

4 And so, the question is: Did AEDPA change
5 that rule? And, Justice Ginsburg, you asked about the
6 purpose or spirit of AEDPA. We think what the spirit of
7 AEDPA is, is to give States deference and to give them
8 comity where they otherwise didn't have it at the time.
9 And so, it changed the standard of review, it changed
10 the statute of limitations, but it didn't need to change
11 Teague. It didn't need to change retroactivity because,
12 as this Court had explained in Teague itself, in Justice
13 Kennedy's long opinion in Wright v. West concurring, the
14 very purpose of Teague was to give States the comity
15 that -- of not foisting new law upon them.

16 And so, you do end up, of course, in this
17 situation, which is -- I think we called it earlier the
18 twilight zone or perfect storm situation. But this is
19 something that this Court saw coming under Teague and
20 long ago, even though even under those cases this Court
21 said the purpose of retroactivity law is not to hold the
22 States responsible for something new.

23 And so, the question is why did we have this
24 twilight zone under Teague and why should it continue
25 today? And the answer again is because Teague doesn't

1 exist in a vacuum; it works in tandem with Griffith.
2 Remember, what Griffith said is that it violates basic
3 norms of constitutional adjudication for a defendant to
4 not get the credit for a decision that this Court
5 announces before his State conviction becomes final.

6 And so, Teague is necessary as the other
7 side of the coin to make Griffith work. And to undo all
8 of that and to go back to an unsettled state of
9 retroactivity law, whether it's -- whether it's
10 Linkletter or something else, is going to really cause
11 problems. Let me give you one other image that the
12 States' situation --

13 JUSTICE GINSBURG: Well, I don't -- I don't
14 understand the problem. If you look at the Pennsylvania
15 Superior Court decision and say, as of that time, the --
16 there was no violation of any clearly established law,
17 period. Why is that complicated?

18 MR. FISHER: Here's why, Justice Ginsburg:
19 Take the typical case, and maybe you'll put in your
20 mind, for example, the Martinez oral argument you had
21 last week. A typical case works its way through the
22 State courts. There's going to be an appeal as of right
23 in the State intermediate court, where all of the claims
24 the defendant brings can be addressed.

25 Then what might happen quite often is the

1 State Supreme Court is going to hear, like this Court
2 does, maybe one or two of those claims and address them
3 on the merits. Then he's going to go into State
4 collateral review and bring an IAC claim, an ineffective
5 assistance of counsel claim, and maybe whatever other
6 claim he couldn't have brought earlier.

7 Under the State's rule, you have three
8 different retroactivity cutoffs for different claims
9 that are brought and adjudicated at the different part
10 of that regime. You have a retroactivity cutoff at the
11 intermediate court for certain claims, a retroactivity
12 cutoff at the Pennsylvania -- I'm sorry -- the State
13 Supreme Court for the -- for certain other claims, and a
14 retroactivity cutoff at finality for certain other
15 claims. And we think that's just unwieldy, and not only
16 that, it's just difficult. In Cullen v. Pinholster --

17 CHIEF JUSTICE ROBERTS: Well, but, I mean, it seems
18 to me that AEDPA contemplates that. It refers to any
19 claim that was adjudicated on the merits in State court
20 proceedings. So, naturally, you'd have a different
21 result with respect to claims that were adjudicated on
22 direct review and any claim that was pushed over to
23 collateral review.

24 MR. FISHER: It does tell you to go on a
25 claim-by-claim basis; that's right. And therein lies

1 the difficulty. With our system, you simply look at the
2 date of finality for purposes of any claim being
3 adjudicated on Federal habeas. Under the State system,
4 you have to go claim by claim with different dates and
5 have arguments, as this Court did in Pinholster, for
6 example, about whether this claim is the same claim that
7 was brought, or the State supreme court decided this
8 claim but not the other claim, and whether the States --

9 CHIEF JUSTICE ROBERTS: Well, I'm sorry, but
10 I mean, my point is that it seems a pretty weak
11 criticism of a result that it requires you to go claim
12 by claim, when the statute specifically requires you to
13 go claim by claim.

14 MR. FISHER: No, I --

15 CHIEF JUSTICE ROBERTS: The objection there
16 it seems to me would have to be with Congress.

17 MR. FISHER: I'm not objecting to the
18 claim-by-claim nature of the approach. I'm just saying
19 it would be unwieldy and administratively difficult,
20 and, therefore, I think you can question whether
21 Congress would have contemplated not just going claim by
22 claim for purposes of adjudication, but for purposes of
23 retroactivity analysis. And it just is going to create
24 problems that I don't think anyone would argue, and I
25 don't think the State has even contended, that Congress

1

2 had any of this in mind when it passed this.

3

JUSTICE BREYER: I'm having trouble
4 following it. It may be my fault. But I -- but the --
5 suppose the Supreme Court has now some kind of
6 interpretation of something that's new. All right.
7 Now, there are going to be a wide range of people that
8 that many might apply to whose convictions became final
9 or just about final in State courts at different times.
10 So, it's obviously always going to be somewhat unfair
11 and somewhat arbitrary that it applies to some and not
12 to others.

13 So, what is the problem here? What -- the
14 reading of the statute on the other side says: I'll
15 tell you who it applies to or who it doesn't apply to.
16 It doesn't apply to people where the last State court
17 decision was made before the Supreme Court made its
18 decision. That's it. Now, that's arbitrary somewhat,
19 but you have to cut and draw a line somewhere.

20 MR. FISHER: I think, Justice Breyer --

21 JUSTICE BREYER: What's the problem? Why is
22 that complicated?

23 MR. FISHER: You're right that there's --
24 that there's arbitrariness built into any cutoff.

25 JUSTICE BREYER: Yes.

1 MR. FISHER: And the State makes this point
2
3 in its brief. But by disjoining habeas law from
4 Griffith, you're going to create a whole new level of
5 arbitrariness that we think is undesirable and
6 unnecessary.

7 So, for example, in a situation like this
8 everything is going to turn on whether a State supreme
9 court grants review and ultimately disposes an issue on
10 the merits. And many State supreme courts might take
11 the view that, well, hey, if the State supreme court --
12 if the U.S. Supreme Court has just decided this issue
13 and we don't have any new law to make here, this isn't
14 worth our time. So, we're just going to let it go.

15 JUSTICE BREYER: But the person would say:
16 Look, the State supreme court has -- you -- we're under
17 a decision here the exact opposite of what the United
18 States Supreme Court held. Will you please either take
19 our case and hear it or at least send it back to the
20 lower court?

21 And wouldn't most State supreme courts do
22 it?

23 MR. FISHER: I think many State supreme
24 courts -- I think there's a possible two questions you
25 asked. One is whether State supreme courts in that

1 situation would themselves GVR back to the immediate
2 court. Pennsylvania, by our estimation, doesn't seem to
3 do that. And many State supreme courts don't do it.
4 They don't have to do it.

5 And, again, you have the problem, if you're
6 going to rely on somebody to bring the case up to this
7 Court and say that's the only way that he can get
8 benefit of the new decision, I think this Court -- I
9 know it's counterintuitive, but you're going to have to
10 take a hard look, not just at fairness and equity, but
11 at this Court's right to counsel jurisprudence and ask
12 yourself whether somebody under the Halbert test who has
13 a right to have a decision on the merits of that claim
14 and that's the only time it can be litigated, therefore
15 has to have the right to counsel because he couldn't
16 otherwise navigate the process.

17 JUSTICE KAGAN: I don't understand --

18 MR. FISHER: If I could reserve --

19 JUSTICE KAGAN: -- that, Mr. Fisher, because
20 you want to do this in Federal habeas, where there's no
21 right to counsel either. So, what difference does it
22 make?

23 MR. FISHER: Well, there's at least a
24 backup that -- a backup that doesn't exist today -- or
25 I'm sorry, that wouldn't exist under the State's rule.

1 And so, the difference it would make would be he would
2 have a second chance to bring the claim where if he
3 brought it the district courts often would appoint
4 counsel.

5 If I could reserve the balance of my time.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Eisenberg.

8 ORAL ARGUMENT OF RONALD EISENBERG

9 ON BEHALF OF THE RESPONDENTS

10 MR. EISENBERG: Mr. Chief Justice, and may
11 it please the Court:

12 Every relevant word in the statute and every
13 relevant precedent to this Court points to the same
14 place, to the law as it existed at the time of the State
15 court decision. That's the body of law that must be
16 used in deference analysis. Now --

17 JUSTICE SOTOMAYOR: One part of your
18 argument that troubles me is what if those 12 States
19 that don't have the right to collateral review -- what
20 do we do with the two Teague exceptions?

21 MR. EISENBERG: Your Honor, as we addressed
22 in our brief at footnote 12, as Petitioner referred, we
23 believe that Teague exceptions clearly would survive
24 review, and the reason for that is really a two-step
25 process. Number one, in most States -- and perhaps

1 hypothetically there will be some where there --
2 where this isn't true, but Petitioner hasn't identified
3
4 -- has identified no more than two that I can see in his
5 brief. In most States the defendant will receive review
6 of the Teague exception on State collateral review. We
7 want him -- AEDPA calls upon him --

8 JUSTICE SOTOMAYOR: Don't worry about the
9 States that do.

10 MR. EISENBERG: Okay.

11 JUSTICE SOTOMAYOR: I asked -- my
12 hypothetical was assuming there are some that don't.

13 MR. EISENBERG: Of course, Justice
14 Sotomayor. As to those relatively few States that
15 hypothetically might not, the defendant goes to Federal
16 court, and because this is a Teague exception -- and
17 they are exceptions because they are exceptional -- he
18 has a number of existing habeas doctrines to rely on:
19 cause and prejudice, actual innocence, inadequate State
20 grounds. And he is quite likely in the Teague exception
21 case to be able to get through the default of not having
22 had an adjudication in State court, and he'll have not
23 only review in Federal court, but he'll have de novo
24 review in Federal court, because there was no ruling on
25 the merits. So, not only will he have Federal court

1 review, but it won't be deferential review in that
2 circumstance.

3 If the State did allow the review of the
4 Teague exception, then he will have deferential review.
5 And, in fact, this question has been debate by the Court
6 before. It came up at oral argument in Whorton v.
7 Bockting. One of the amicus briefs in that case
8 actually addressed the question empirically, looked at
9 one of the most recent candidates for first Teague
10 exception status, which was the mental retardation rule
11 of Atkins v. Virginia and, in an appendix to the brief,
12 found that no State had barred review of the Atkins
13 claim even though it was not even officially declared
14 yet to be a Teague exception.

15 We think that's what would happen with
16 Teague exceptions. Of course, this case doesn't concern
17 a Teague exception. And so, really the only question
18 here is whether a ruling in favor of the State would
19 inadvertently determine that question for future
20 purposes. I think our argument is adequate at least to
21 show that the question remains live and it can be safely left
22 for another day.

23 JUSTICE ALITO: Your answer is that the
24 State in that -- the State courts in that situation
25 would entertain the claim. But what if they didn't?

1 MR. EISENBERG: If they didn't, Your Honor,
2 then the defendant can surmount whatever procedural bar
3 that would constitute when he got Federal habeas in the
4 Teague exception case.

5 JUSTICE ALITO: How?

6 MR. EISENBERG: By arguing -- well, the most
7 likely Teague exception would be a first exception; not
8 the second exception, not the watershed rules, which are
9 few and far between, if any still remain to be
10 discovered. That exception fits very neatly with the
11 actual innocence --

12 JUSTICE KENNEDY: What's that? Cause and
13 prejudice? What's the --

14 MR. EISENBERG: Actual innocence.

15 JUSTICE KENNEDY: Oh, actual innocence.

16 MR. EISENBERG: Actual innocence because --

17 JUSTICE SOTOMAYOR: But we haven't decided
18 whether actual innocence --

19 MR. EISENBERG: Actual innocence, Your
20 Honor, is well established as a way to get around a
21 procedural default on Federal habeas.

22 JUSTICE SOTOMAYOR: Well, whether it's well
23 established is another issue.

24 MR. EISENBERG: I don't mean -- I don't mean
25 actual innocence as being an independent free-standing

1 habeas claim. I mean as a gateway to merits review.
2 That is well established. And the first Teague
3 exception by definition deals with people who
4 essentially didn't commit the crime. The nature of the
5 exception is that the State did not have the
6 constitutional power to make that a crime.

7 JUSTICE ALITO: What if it was a -- what if
8 it was case like Gideon v. Wainwright?

9 MR. EISENBERG: That would be the watershed
10 exception rule, Your Honor. Again, I believe that the
11 States would generally and have empirically entertained
12 those claims. If the State did not, I believe that the
13 defendant would have the right to say that because of
14 the watershed nature of the rule, the State's failure to
15 entertain the claim was an inadequate State ground for
16 blocking review in Federal court. And I think that
17 would be an appropriate application of the doctrine.

18 I think, as Justice Kagan stated earlier or
19 suggested by her question, Pinholster really does
20 resolve this claim, even in addition to the language of
21 the case.

22 Petitioner argues that facts and law are
23 different. And they might be to some extent, but
24 actually law is the easier question for the issue that's
25 presented here. And Pinholster did not simply tell us

1 that new facts couldn't be considered, but the premise
2 of the decision was that since new law couldn't be
3 decided, neither could new facts. The -- the statute is
4 phrased in the past tense. As the Court said, the
5 entire statute is backward-looking. There was no --
6 nothing about the statute that made --

7 CHIEF JUSTICE ROBERTS: I'm sorry. If I
8 could just go back to your Pinholster point. Your
9 friend makes the argument that, of course, in a typical
10 appellate case, you don't go back and revisit the facts,
11 but that appellate court is expected to apply the law at
12 the time it renders its decision. So, there is that
13 distinction between law and facts that seems to cut in
14 his favor.

15 MR. EISENBERG: Well, Your Honor, the -- the
16 only decision that was rendered in this case did apply
17 the law as it existed at the time, and then --

18 CHIEF JUSTICE ROBERTS: Well, I'm talking
19 more generally about the idea that Pinholster
20 automatically applies to this situation. It applies to
21 facts; therefore, it applies to law. The distinction in
22 that context between law and facts, the general context,
23 strikes me as one that supports his argument that
24 they're at least not tied at the hip and have to be
25 treated the same way.

1 MR. EISENBERG: Your Honor, I think that
2 Pinholster was somewhat more specific than that. It
3 stated that -- the statute was backwards-looking in its
4 entirety, certainly with no exceptions for law. After
5 all, (d)(1) is about law. It doesn't mention the word
6 "facts" or "evidence"; it mentions only the word "law."
7 And the Court had to move from that to its decision
8 about facts.

9 Number two, in Pinholster, the Court
10 specifically stated that it was relying on prior
11 precedents. And it used the word "precedent" to
12 describe the prior decisions for the proposition that
13 our cases "emphasize that review under 2254(d)(1)
14 focuses on what a state court knew and did." State
15 court decisions are measured against this Court's
16 precedent as of the time the State court renders its
17 decision. That was the jumping-off point, so to speak,
18 for the Court's extension of the principle in effect
19 that we're debating today to the area of new facts. And
20 I don't think there's any way to reconcile that holding
21 with the Petitioner's argument or with the language of
22 the statute.

23 Now, the Petitioner argues that this is
24 necessary in order to give the defendant his rights
25 under Griffith v. Kentucky. But, as I think the Chief

1 Justice's questions illustrate, he had those rights. He
2 was entitled to seek review on direct appeal as long as
3 it lasted of whatever new rules came out before the point
4 of finality. He was entitled to seek discretionary
5 review in the State supreme court. He was entitled to
6 seek discretionary review in this Court. Had he done
7 so, I think --

8 CHIEF JUSTICE ROBERTS: What is the State
9 -- it's a hypothetical -- and I don't mean to give you an
10 opportunity for a self-serving answer, but what would
11 the State have done if he had filed a petition and said:
12 My case was controlled by Gray; you the Supreme Court
13 should grant, vacate and remand. Are you aware of
14 situations where the State has agreed with such a
15 request?

16 MR. EISENBERG: Yes, Your Honor. In fact,
17 we think that there are hundreds of cases in which the
18 State supreme court has granted, vacated, and remanded.
19 I know Petitioner said that he had --

20 CHIEF JUSTICE ROBERTS: No, no. I'm talking
21 about your office's position in responding to a petition
22 for cert.

23 MR. EISENBERG: I think --

24 CHIEF JUSTICE ROBERTS: Have you ever said,
25 yes, Gray controls; that's different, you, the Supreme

1 Court? We see it.

2 MR. EISENBERG: I'm not sure I've seen any
3 cases like that other than this one where this, as you
4 said, perfect storm actually occurred. In this case,
5 that's not what we said, and that's because we thought
6 that there had been an affirmative abandonment of the
7 method of redaction claim by the defendant.

8 But if the State court, as it did here,
9 decides not to grant review, then, of course, the
10 defendant is free to come to this Court. The point is
11 that under Griffith the defendant obviously doesn't have
12 any more of a right than to go to the courts that are up
13 the chain and which at a certain point exercise
14 discretionary review.

15 JUSTICE KENNEDY: Is Griffith a
16 constitutional case?

17 MR. EISENBERG: Your Honor, I believe it was
18 a constitutional interpretation, but that's a right that
19 the defendant had.

20 JUSTICE KENNEDY: Would the -- would the
21 Congress of the United States have the authority,
22 looking at this case, to direct Federal courts to issue
23 habeas in this -- on these facts?

24 MR. EISENBERG: I think that the Congress
25 could have written the -- the AEDPA in order to allow

1 review here. But I don't think that they did.

2 JUSTICE KENNEDY: Is that then a restriction
3 on habeas corpus?

4 MR. EISENBERG: I think that all of AEDPA is
5 a restriction on habeas corpus, Your Honor, and in
6 most cases, in most aspects of AEDPA, far more
7 of a restriction than exist in this case.

8 JUSTICE KENNEDY: Is there a rule of
9 constitutional avoidance that we should interpret the
10 statute to avoid? Any inference that there is a
11 restriction on habeas corpus?

12 MR. EISENBERG: No, Your Honor. I think
13 it's clear from prior case law that the AEDPA does not
14 constitute an unconstitutional restriction of habeas.
15 The defendant here does not argue that the
16 restriction --

17 JUSTICE KENNEDY: No. That's not argued. I
18 agree.

19 MR. EISENBERG: And I think it's -- it's
20 clearly not. This is a relatively minor restriction on
21 AEDPA review compared to the deference rule in and of
22 itself, which the Court has characterized as a
23 fundamental bedrock principle of AEDPA.

24 JUSTICE KENNEDY: While we're discussing--
25 on a different point. What response do you make to Mr.

1 Fisher's point about Graham and Roper v. Simmons?

2 MR. EISENBERG: Your Honor, if those kinds
3 of cases amount to a Teague exception, then for the
4 reasons that I've explained, I think that those will be
5 subject to review on Federal habeas corpus. If they're
6 not, if they don't meet the --

7 JUSTICE KENNEDY: But do they?

8 MR. EISENBERG: -- the high standards --

9 JUSTICE KENNEDY: Do they meet the Teague
10 exception?

11 MR. EISENBERG: Your Honor, I don't know
12 whether any particular new rule meets the Teague
13 exception standards. Those are high standards, and they
14 should be. They are exceptional. But for the normal
15 new rule --

16 JUSTICE KENNEDY: It seems to me it's not a
17 question of a new trial. It's just a question of
18 looking at a continuing sentence and seeing the validity
19 of a continuing sentence.

20 MR. EISENBERG: I think there are certainly
21 good arguments that those kinds of rules would not
22 qualify as Teague exceptions, Your Honor. It's going to
23 be a rare circumstance. And as I said -- and the only
24 one that even arguably in recent years would seem to fit
25 well into the first Teague exception, that is the Atkins

1 case, the State courts have allowed review.

2 JUSTICE BREYER: How does that happen if --
3 let's imagine Smith is convicted of some kind of
4 disorderly conduct, and he goes through the State courts
5 and it's upheld. And then at some time thereafter --
6 I leave vague how -- how much time. Maybe it's a couple
7 of months or something. The Supreme Court says that
8 particular kind of conduct is protected by the First
9 Amendment. So, now it falls within the exception for
10 you can't criminalize this.

11 Now, habeas is filed. Smith files habeas.
12 Well, how can he get that heard? Because this
13 particular provision says that unless it was clear at
14 the time under, in your view, of the State statute --
15 the final State decision on the matter, he can't get
16 into habeas. Now, it wasn't clear.

17 MR. EISENBERG: The defendant should go
18 first to the State court, once the new Teague exception
19 is established, Your Honor. And if he doesn't, if he
20 goes to Federal court first --

21 JUSTICE BREYER: He goes to State court
22 under a collateral review.

23 MR. EISENBERG: Yes, Your Honor.

24 JUSTICE BREYER: Suppose there is no such --

25 MR. EISENBERG: Then I think we have Justice

1 Sotomayor's question, Your Honor. And the answer is
2 that, in that case, the defendant can argue that the
3 State's failure to provide review constituted a bar that
4 he is allowed to circumvent by the existing doctrine of
5 habeas corpus.

6 JUSTICE BREYER: So this is quite far out, but
7 conceivable. You'd argue that in the State court, the
8 State -- you'd have to go to collateral review in State
9 court and argue that they now have to apply the new
10 rule.

11 MR. EISENBERG: Yes, Your Honor, and that's
12 appropriate because, of course, AEDPA wants the State
13 court to have the first chance to review. If the State
14 court refuses to do so, then he can circumvent the bar.
15 If the State court does so, then the State court's
16 review on the merits of the new rule becomes the law
17 that will be applied, the clearly established law that
18 will be applied.

19 Your Honor, I think it's -- Your Honors, I
20 think it's important also to remember here that -- that
21 Teague has not been abolished by 2254. Its role has
22 certainly been reduced, but that is true of many aspects
23 of AEDPA.

24 JUSTICE GINSBURG: What's left of it?

25 MR. EISENBERG: What's left of it primarily,

1 Your Honor, is the situation where there's no merits
2 decision in the State court. And we've just described
3 one example of that in the Teague exception case where
4 the State court refuses to provide merits review, but
5 there will be many others where the State asserts a
6 default and the defendant is able to overcome them
7 through cause and prejudice, et cetera.

8 In those cases, the defendant, for purposes
9 of 2254, wouldn't be barred because there is no merits
10 determination. But Teague might still bar him if the
11 new rule on which he seeks review is one that came down
12 after the point of finality.

13 Teague is not a guarantee of rights to the
14 defendant. Griffith was the guarantee of rights to the
15 defendant, and the defendant received his Griffith
16 rights. Teague is a bar to review. AEDPA is a bar to
17 review. They are two separate bars that overlap to some
18 degree but work in different ways.

19 Another example of a situation where --

20 JUSTICE KAGAN: And if it was the case that
21 Congress supplanted Teague to the extent that you said
22 it did, why is it, as Mr. Fisher says, that it took
23 States upwards of 10 years to figure this out?

24 MR. EISENBERG: Your Honor, I'm not sure I
25 agree with that factually. In the Spisak case, for

1 example, I don't know that it was necessary for the
2 State to make that argument. The State thought it had a
3 strong argument on the merits. That's exactly what
4 happened in Horn v. Banks, as well, Your Honor, which is
5 a case that actually supports our position.

6 In that case, the State court applied on
7 collateral review the rule of Mills v. Maryland. Now,
8 this Court later held in that same case that Mills was a
9 new rule that would be Teague-barred, but the State
10 didn't know that at that time, and the State had a
11 well-established body of law applying Mills and thought
12 -- the State thought it could easily dispose of the
13 claim on the merits of the Mills issue. So, it did so.

14 The case came to Federal habeas corpus
15 review. It wouldn't have been barred, review on the
16 merits would not have been barred by 2254 because the
17 State collateral review court applied Mills and made a
18 merits determination. So, the defendant would have been
19 entitled to merits review under the deferential
20 standard.

21 The problem is Mills was a new rule, and so
22 the independent bar of Teague comes into play. The
23 Third Circuit refused to apply that independent bar;
24 that's why this Court reversed in Horn v. Banks. And
25 so, it neatly illustrates another example of a situation

1 where Teague actually does survive despite 2254.

2 There are other doctrines that -- based on
3 this Court's case law, that have been overshadowed to an
4 even greater extent than Teague was. Abuse of the writ,
5 the Keeney v. Tamayo-Reyes concerning evidentiary
6 hearings. Certainly, Congress had the right to do that,
7 and, in fact, these issues were addressed to some degree
8 even in the Court's seminal deference case in
9 Williams v. Taylor.

10 In Williams v. Taylor for example, it was
11 Justice Stevens's position in dissent, arguing in
12 dissent, that the statute really only embodied Teague.
13 When the statute said clearly established, all that
14 Congress meant to do was to codify Teague. He said it
15 was perfectly clear that that was the case. And he
16 argued, particularly in footnote 12 of his dissenting
17 portion of his opinion in Williams v. Taylor, just as
18 Petitioner argues today, that the fact that Congress in
19 other portions of AEDPA, particularly in section 2244,
20 used language talking about finality of judgment and
21 talking about retroactivity -- the fact that Congress
22 did that in 2244 meant that it was thinking about Teague
23 and that it really meant to extend the Teague rule
24 throughout the entire statute, that Teague really
25 flavored the entire statute.

1 The Court necessarily rejected that
2 argument. And, in fact, in reference to another prior
3 case of this Court, Wright v. West, that had been argued
4 by Justice Stevens in his dissent, Justice O'Connor
5 speaking for the Court said Congress need not mention a
6 prior decision of this Court by name in a statute's text
7 in order to adopt a rule.

8 Now, I think that's clearly what Congress
9 did, and I think that the Court clearly recognized in
10 Williams v. Taylor that the deference rule, 2254,
11 constituted a new rule which sat side by side with
12 Teague and operated in different ways, even if in some
13 cases, many cases that would mean you never had to get
14 to the Teague bar, because the 2254 bar came into play
15 first or more easily.

16 If there are no further questions, I'll rely
17 on my brief. Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Fisher, you have 4 minutes remaining.

20 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

21 ON BEHALF OF THE PETITIONER

22 MR. FISHER: Thank you.

23 Let me make three points, starting with the
24 most important, which is the Teague exceptions we've
25 been talking about. Now, the State, in its brief in

1 footnote 12 and today, says actual innocence, cause and
2 prejudice, or something, would let you get around the
3 problem that I've raised. But that doesn't work,
4 because all those doctrines do is allow you to bring the
5 case forward. They just allow you to get out from under
6 a situation where you haven't preserved a claim
7 previously.

8 But this case is all about a situation where
9 the defendant does everything he is supposed to do,
10 everything he can do, but it just so happens that this
11 Court's decision has come down after the last State
12 court decision on the merits, and the State on
13 collateral review has refused -- if it's been given a
14 chance -- to remedy that.

15 The three cases I cited to you -- at least
16 one of them involves a situation where the defendant did
17 go back to the State -- and I believe it's the Graham
18 case -- and said apply this to me. The State of
19 Virginia said, no, you're barred from State collateral
20 review.

21 So, all those doctrines do is allow the
22 defendant to get in the door. Once he's in the door, he
23 still has to satisfy 2254(d)(1), which says that no
24 claim shall be granted -- no -- habeas relief shall not
25 be granted on any claim unless the language we've been

1 talking about today. So, the only way out of the
2 problem that we've phrased is to say that Teague decides
3 what is clearly established law, not the language of the
4 statute itself, under the State's reading of the
5 statute.

6 The second thing is, as to this Court's GVR
7 practice, I don't think there is much doubt, in all
8 fairness --

9 JUSTICE ALITO: If the claim -- the claim
10 under Graham is a different claim from any previous claim.
11 Doesn't that get you out from under it?

12 MR. FISHER: Well, not if the State says
13 that you're barred in its own -- remember, that will get
14 you out from the problem of being able to get in the
15 door, because what would happen in that situation is the
16 State would say this is waived because he didn't make it
17 earlier. And then you'd go to the Teague -- you'd go to
18 the exceptions in AEDPA for new claims and whether
19 actual innocence applies, et cetera. All those are
20 merely gateways to the question of whether the defendant
21 gets relief, which is controlled by 2254(d).

22 JUSTICE ALITO: But do you think that a case
23 like Graham or Atkins applies only to those who -- whose
24 cases are pending on direct review at the time when the
25 case was decided, or do you think it applies to others?

1 MR. FISHER: I think it -- I think it would
2 satisfy one of the Teague exceptions. That's what the
3 lower courts have all held. If it wouldn't, certainly
4 the hypothetical that Justice Breyer gave about the
5 First Amendment would satisfy the Teague exception, and
6 you have the exactly the same problem.

7 JUSTICE ALITO: No, if someone -- if a
8 juvenile is sentenced to death prior to the decision, and
9 -- I'm sorry -- and, yes, you think it applies only if
10 it comes down during that period?

11 MR. FISHER: No, we think it applies anytime
12 afterwards, too. But that just makes the problem bigger
13 than just the twilight zone.

14 JUSTICE BREYER: It's not impossible to get
15 out, because he says here's -- bring your collateral
16 State. And Now, the collateral State, you're imagining,
17 says, no, we can't have it --

18 MR. FISHER: Right.

19 JUSTICE BREYER: -- because it's
20 time-barred.

21 MR. FISHER: Right.

22 JUSTICE BREYER: Then you go into habeas,
23 and you say the time bar is no good --

24 MR. FISHER: Right.

25 JUSTICE BREYER: And it's such an important

1 opinion, you know, for all the reasons in Teague, that
2 what they did is to time-bar and they wouldn't hear it.
3 Okay, so you hear it. And the claim is that they made a
4
5 mistake. That State court that wouldn't hear it made a
6 mistake in not hearing it and deciding it for me. Okay?
7 So, now we have a State court thing to review.

8 MR. FISHER: No, but that wouldn't be a
9 decision on the merits, Justice Breyer. The decision on
10 the merits would have been earlier in the proceedings,
11 when you argued I can't be executed because I was 17
12 when I committed the crime, and a State would have
13 rejected that before Roper, and then you end up, after
14 Roper, a State saying we won't hear this on collateral
15 review because we've already heard it once. And then we
16 have the situation we have today, and the only way out
17 of that situation is to understand that Teague continues
18 to control what is clearly established law.

19 And it's not just a problem. Again, it goes
20 back to the structure of the whole statute, because the
21 question this Court is supposed to be asking itself is,
22 is there clear and specific language in the new statute
23 to think that Congress wanted to dispense with Teague?
24 And this is very clear indication that, no, that's not
25 what Congress had in mind. That's not what Congress had

1 in mind. And so, this is a case not just about habeas
2 law but also this Court's relationship with Congress,
3 about whether Congress clearly had the kind of intent
4 that's necessary.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel,
6 counsel.

7 The case is submitted.

8 (Whereupon, at 1:43 p.m., the case in the
9 above-entitled matter was submitted.)

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abandonment	AEDPA's 17:3	application 12:1	34:21 42:2,3	42:23 44:14,14
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