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

2 (10:01 a.m.)

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

5 Mr. Butler.

6 ORAL ARGUMENT OF BENJAMIN J. BUTLER

7 ON BEHALF OF THE PETITIONER

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

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

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

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

1     confrontation rule?

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

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

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

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

1 MR. BUTLER: Well --

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

6 MR. BUTLER: Your Honor --

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

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

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

21 MR. BUTLER: I think --

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. BUTLER: Well --

11 JUSTICE SCALIA: And I think it is --

12 JUSTICE KENNEDY: -- to that effect.

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

22 MR. BUTLER: I think, Justice Scalia and  
23 Justice Kennedy, if I could address your points in turn,  
24 on Justice Scalia's question about whether there was or  
25 was not a constitutional violation, if the Court is



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

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

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

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

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

8 (Laughter.)

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

11 (Laughter.)

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

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

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

25 And then we got the Linkletter balancing

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

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

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

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

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

24 CHIEF JUSTICE ROBERTS: Well, and if you  
25 think that the Teague rule is an assessment of the

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

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

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

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

22 Under your view, I take it, the State, even  
23 in -- in its trial proceedings subject to direct review,  
24 could disagree with that and take a Federal concept,  
25 no-knock, and then apply the exclusionary rule, thereby

1 forcing us to make the -- to draw the very lines that we  
2 said we ought not to draw in Hudson.

3 MR. BUTLER: No, Your Honor.

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Based on the  
24 distinction between right and remedy, a distinction that  
25 is -- that in countless areas of the law we -- we have

1 said is -- is an ephemeral one?

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

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

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

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

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

25 MR. BUTLER: As long, Justice Scalia, as the

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

5 JUSTICE SCALIA: If it bases its decision on  
6 the Federal Constitution, and we have said that this  
7 Federal constitutional rule is not retroactive, what --  
8 what do they say on a direct appeal?

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

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

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

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

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

24 JUSTICE SCALIA: My case was not in the  
25 pipeline. The prosecution began after our new decision.

1     Okay? And it comes up to the State Supreme Court. Can  
2     the State Supreme Court, despite the fact that we've  
3     said the decision is not retroactive, make it  
4     retroactive? And your answer is yes?

5                 MR. BUTLER: My answer is --

6                 JUSTICE SCALIA: Habeas or not?

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

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

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

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

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

25                Can the State say well, we think it ought to



1    apply to old cases, pending cases on habeas, or  
2    whatever, and so we are going to apply this  
3    retroactively, even though Congress said it's only  
4    prospective?

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

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

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

23                  CHIEF JUSTICE ROBERTS:  Well, your reliance  
24   on this ancient distinction between right and remedy --  
25   I mean if Congress says you don't have a remedy if it's

1 retroactive, it's hard to say what kind of right you  
2 have.

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

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

15 MR. BUTLER: Yes.

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

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

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

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

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

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

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

24 MR. BUTLER: Only, Mr. Chief Justice, if the  
25 Federal interest is so strong as to outweigh all of the

1 State court interests. And when it comes to the  
2 remedial question of does this person have a right to go  
3 to State court and challenge his conviction, that is  
4 quintessentially the matter of State law.

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

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

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

23 MR. BUTLER: That's correct, Justice  
24 Ginsburg. And that's -- the waiver doctrine about  
25 Teague shows why Teague is not a decision about what the

1 law was.

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

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

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

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

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

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

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

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

1 say we have to, you, in effect, are changing the  
2 substantive determination that we have made, that the  
3 decision is not retroactive.

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

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

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

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

18 MR. BUTLER: That it will apply.

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

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

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

25 MR. BUTLER: Yes, absolutely.

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

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

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

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

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

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

23 JUSTICE STEVENS: You're overlooking what I  
24 understand to be the basic distinction you're drawing.  
25 I know the Chief Justice has cast doubt on it. But I



1 think there is a basic distinction between rights and  
2 remedies.

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

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

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

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

25 MR. BUTLER: What I want to say, Mr. Chief

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

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

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

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

1 retroactive application, as long as the substance of  
2 Federal law doesn't change, then it is a State question.

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

5 MR. BUTLER: It is.

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

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

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

1     you're asserting a power on the basis of the State court  
2     to overturn our Federal law determinations.

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

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

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

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

24                In Minnesota it takes about 15 months to run  
25    a direct appeal. And so a defendant can sit there for

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

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

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

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

25               Mr. Diamond.

1 ORAL ARGUMENT OF PATRICK C. DIAMOND

2 ON BEHALF OF THE RESPONDENT

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

5 Federal law controls the retroactivity or  
6 non-retroactivity of new constitutional rulings. This  
7 Court determines the constitutional requirements --

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

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

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

24 MR. DIAMOND: That's correct, Your Honor. I  
25 don't believe this is a matter of remedy. This Court,

1 for example, in Reynoldsville Casket wrote that Teague  
2 itself is not a limitation on remedy. What it is, is a  
3 limitation on the principle of retroactivity itself.

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

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

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

17 MR. DIAMOND: Exactly, Your Honor.

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

25 And it seems to me that that is inconsistent

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

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

18 JUSTICE SOUTER: I understand your -- your  
19 point about finality, and finality has a well-known  
20 operative effect. But one operative effect when the  
21 Federal courts have defined finality and have said it is  
22 not final until -- a case is not final until direct  
23 review is over -- one consequence of that is that a  
24 substantive Federal rule will be applied to an  
25 individual in one State whose crime and whose trial



1 procedure is different in time from that of a defendant  
2 in another State.

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

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

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

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

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

24 JUSTICE SCALIA: Yes, that's correct. You  
25 have to say that's correct.

1 (Laughter.)

2 MR. DIAMOND: And --

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

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

19 MR. DIAMOND: Which, Your Honor, is Griffith  
20 and is defined by Federal law.

21 JUSTICE STEVENS: Can you give me an example  
22 of a case in which this Court candidly said, we're  
23 announcing a new rule which was not the law before?  
24 Aren't we always interpreting what we thought the intent  
25 of the framers was from the beginning, even though we

1 may have gotten it before? What is your best example of  
2 a new rule, in the sense it's a different rule of law as  
3 opposed to a different remedy? See, all these equitable  
4 considerations go to the remedy. But the notion we can  
5 make up a new rule of law at will strikes me as a very  
6 dramatic departure from what I understand the rule of  
7 law to require.

8 JUSTICE SCALIA: I'm really glad to hear  
9 that.

10 (Laughter.)

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

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

20 JUSTICE SCALIA: Don't we call it a new  
21 rule in Teague?

22 JUSTICE KENNEDY: -- expectations as being  
23 questions of remedy?

24 MR. DIAMOND: Excuse me, Your Honor.

25 JUSTICE KENNEDY: It seems to me that your

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

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

11 JUSTICE SOUTER: That's sort of like  
12 defining order as random order, isn't it?

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

19 JUSTICE SOUTER: And -- and the concern is a  
20 concern not so much.

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

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

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

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

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

1 of the State.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 JUSTICE BREYER: I agree with that.

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

20 The opinion is full of new rules.

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



1     hung up on metaphysics, Mr. Turner.

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

7                   (Laughter.)

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

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

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

25                   JUSTICE SCALIA:   You wouldn't want to say

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

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

13                MR. DIAMOND: Your Honor --

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

16                (Laughter.)

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

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

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

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

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

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

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

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

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

25 JUSTICE KENNEDY: Isn't what you are saying

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

6 MR. DIAMOND: Yes, Your Honor.

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

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

24 JUSTICE GINSBURG: -- State executives can  
25 upset all those expectations. The State executive says

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

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

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

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

25 This defendant never raised the State law

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

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

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

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

1 the constitutional requirement -- what constitutional  
2 standard this --

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

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

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

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

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

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

1 about it being grounded on basic norms of constitutional  
2 adjudication and the integrity of the judicial decision  
3 making.

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

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

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

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

24 MR. DIAMOND: Your Honor, I don't believe  
25 that that's what's going on in the Federal habeas



1 statute. I think this Court has said that --

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

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

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

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

1 final --

2 JUSTICE STEVENS: The protection of this  
3 Court. What -- why can't they provide more protection?  
4 What Federal rule prevents that?

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

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

23 JUSTICE STEVENS: Suppose it is a knock and  
24 announce violation. They don't want to apply an  
25 exclusionary rule. Can they apply a remedy that will

1 fire any officer who does this? Or will they say, no,  
2 you can't do that, because it goes beyond what the  
3 Federal Constitution requires?

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

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

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

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

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

25 What we are -- what you're changing -- that

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

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

17 The Minnesota legislature can pass a statute  
18 saying nobody gets more than Teague allows.

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

23 JUSTICE SOUTER: Can the Minnesota  
24 legislature say: Look, the -- the Supreme Court of the  
25 United States has -- has come down with some rules. We

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

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

11 JUSTICE SOUTER: So the answer is yes.

12 MR. DIAMOND: -- that is yes.

13 JUSTICE SOUTER: Yes.

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

16 Mr. Butler, you have a minute remaining.

17 REBUTTAL ARGUMENT OF BENJAMIN J. BUTLER

18 ON BEHALF OF THE PETITIONER

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

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

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

25 It can decide, as several States have, that

1 the interests in full adjudication of constitutional  
2 claims outweigh the interest in finality.

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

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

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

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

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

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

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 Mr. Butler.

3 The case is submitted.

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

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