IN THE SUPREME COURT OF THE UNITED STATES

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STEPHEN DANFORTH, :

Petitioner :

v. : No. 06-8273

MINNESOTA. :

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Washington, D.C.

Wednesday, October 31, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

BENJAMIN J. BUTLER, ESQ., Assistant Minnesota State Public Defender, Minneapolis, Minn.; on behalf of the Petitioner.

PATRICK C. DIAMOND, ESQ., Deputy County Attorney, Minneapolis, Minn.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:01 a.m.)

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

Mr. Butler.

ORAL ARGUMENT OF BENJAMIN J. BUTLER

ON BEHALF OF THE PETITIONER

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

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

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

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

confrontation rule?

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

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

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

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

MR. BUTLER: Well --

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

MR. BUTLER: Your Honor --

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

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

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

MR. BUTLER: I think --

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

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

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

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

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

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

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

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

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

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

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

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

MR. BUTLER: Well --

JUSTICE SCALIA: And I think it is --

JUSTICE KENNEDY: -- to that effect.

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

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

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

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

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

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

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

(Laughter.)

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

(Laughter.)

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

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

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

And then we got the Linkletter balancing

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

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

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

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

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

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

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

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

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

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

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

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

MR. BUTLER: No, Your Honor.

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

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

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

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

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

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

said is -- is an ephemeral one?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BUTLER: My answer is --

JUSTICE SCALIA: Habeas or not?

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

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

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

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

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

Can the State say well, we think it ought to

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

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

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

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

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

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

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

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

MR. BUTLER: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

law was.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BUTLER: That it will apply.

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

MR. BUTLER: -- that are already finished.

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

MR. BUTLER: Yes, absolutely.

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

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

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

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

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

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

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

think there is a basic distinction between rights and remedies.

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

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

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

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

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

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

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

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

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

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

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

MR. BUTLER: It is.

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Diamond.

ORAL ARGUMENT OF PATRICK C. DIAMOND

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

MR. DIAMOND: Exactly, Your Honor.

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

And it seems to me that that is inconsistent

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

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

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

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

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

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

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

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

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

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

(Laughter.)

MR. DIAMOND: And --

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

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

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

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

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

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

(Laughter.)

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

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

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

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

MR. DIAMOND: Excuse me, Your Honor.

JUSTICE KENNEDY: It seems to me that your

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

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

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

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

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

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

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

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

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

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

of the State.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: I agree with that.

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

The opinion is full of new rules.

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

hung up on metaphysics, Mr. Turner.

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

(Laughter.)

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

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

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

JUSTICE SCALIA: You wouldn't want to say

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

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

MR. DIAMOND: Your Honor --

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

(Laughter.)

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

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: Isn't what you are saying

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

MR. DIAMOND: Yes, Your Honor.

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

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

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

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

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

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

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

This defendant never raised the State law

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

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

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

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

the constitutional requirement -- what constitutional standard this --

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

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

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

MR. DIAMOND: Your Honor, let me --

JUSTICE STEVENS: Interpreting it the way you interpret it.

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

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

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

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

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

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

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

statute. I think this Court has said that --

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

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

JUSTICE STEVENS: In Federal habeas corpus proceedings, yes.

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

final --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: So the answer is yes.

MR. DIAMOND: -- that is yes.

JUSTICE SOUTER: Yes.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Diamond.

Mr. Butler, you have a minute remaining.

REBUTTAL ARGUMENT OF BENJAMIN J. BUTLER

ON BEHALF OF THE PETITIONER

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

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

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

It can decide, as several States have, that

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

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

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

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

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

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

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Butler.

The case is submitted.

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