

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: WILLIAM FIORE, Petitioner v. GREGORY WHITE,
WARDEN, ET AL.

CASE NO: 98-942 C-2

PLACE: Washington, D.C.

DATE: Tuesday, October 12, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM FIORE,

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Petitioner

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v.

: No. 98-942

GREGORY WHITE, WARDEN, ET AL. :

-----X

Washington, D.C.

Tuesday, October 12, 1999

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:03 a.m.

13 APPEARANCES:

14 JAMES B. LIEBER, ESQ., Pittsburgh, Pennsylvania; on behalf
15 of the Petitioner.

16 ROBERT A. GRACI, ESQ., Assistant Executive Deputy Attorney
17 General, Harrisburg, Pennsylvania; on behalf of the
18 Respondents.

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PROCEEDINGS

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 98-942, William Fiore v. Gregory White.

Mr. Lieber.

ORAL ARGUMENT OF JAMES B. LIEBER

ON BEHALF OF THE PETITIONER

9 MR. LIEBER: Mr. Chief Justice, and may it
10 please the Court:

11 For 24 years I have practiced in the
12 Pennsylvania courts. In case after case, our judges
13 follow the law and apply the Constitution. When there is
14 a mistake or a miscarriage, there is a necessary
15 corrective, as there was in the case of Mr. Scarpone, my
16 client's co-defendant.

17 Like his co-defendant, Mr. Fiore was and is
18 factually and legally innocent of a crime which has only
19 two elements and is plainly understood from the reading of
20 the statute. Those elements are operating a waste
21 disposal facility and doing it without first having a
22 license.

23 QUESTION: Well, Mr. Lieber, I suppose that the
24 highest court of Pennsylvania has determined that at the
25 time he committed the offense it was an offense and that

1 they later interpreted the statute, but didn't give it
2 retroactive effect. Is that what they've done?

3 MR. LIEBER: Respectfully, I'd have to disagree,
4 Justice O'Connor. What the Supreme Court of Pennsylvania
5 did was deny a writ for allowance of appeal on the same
6 basis that this Court denies a writ for certiorari. No -
7 -

8 QUESTION: Well, the court had three different
9 opportunities to take up Mr. Fiore's case presumably.

10 MR. LIEBER: Presumably that's correct.
11 However, no inference can be drawn from their failure to
12 take jurisdiction under king's bench powers, which is an
13 emergency writ, or from not hearing the case in a
14 certiorari-like situation that mirrors your very rules.

15 QUESTION: Well, but the case became final if
16 they took -- did not take it on certiorari. The fact is
17 your client has been convicted, finally convicted, by the
18 Pennsylvania State courts of being guilty of this crime.
19 Isn't that -- isn't that correct?

20 MR. LIEBER: My client's conviction is, in fact,
21 final. However, Mr. Justice Scalia, the problem with that
22 is that the Pennsylvania courts did not apply the law of
23 the Pennsylvania statute which, as this Court held in
24 Rivers v. Roadway Express and recently in the Bousley
25 case, is -- is from the time of an action what the highest

1 court of -- of the State says it is. That's been the --

2 QUESTION: Mr. Lieber, in light of what you've
3 just said and in Justice -- in light of Justice O'Connor's
4 question, would your position be different if the
5 Pennsylvania Supreme Court had, indeed, held that the law
6 was as the lower courts thought it was; that is, even if
7 you had a permit, if you flagrantly violated it, it was as
8 though you had none?

9 Suppose that was the Pennsylvania Supreme
10 Court's precedent and then in Scarpone's case, the Supreme
11 Court overruled that precedent. Would your position be
12 different than it is today?

13 MR. LIEBER: Only in one situation, Justice
14 Ginsburg, and that would be in the situation, as in
15 Wainwright v. Stone, where the judicial application to the
16 statute over a long period gave consistent notice to our
17 citizens that their conduct would violate -- would be
18 violative of the statute in keeping with judicial
19 construction.

20 Now, in Wainwright, there were 50 years of
21 judicial construction to alert those individuals that
22 their conduct was in fact proscribed. This was the -- the
23 Fiore ruling was, in fact, a first ruling under the
24 statute and it was a -- a judicial misconstruction of the
25 first order.

1 QUESTION: Well, if you -- if -- if Mr. Fiore
2 had been convicted like, say, 5 years ago under the
3 statute and 5 years later a new case arose with the same
4 kind of facts and was decided as Scarpone's case was
5 decided, would you be here making the same argument?

6 MR. LIEBER: Your Honor, if there had been no
7 intervening law by our State supreme court, I would be
8 making precisely this argument.

9 QUESTION: But, of course --

10 QUESTION: You're asking for -- you're asking
11 for a very broad rule then, that no matter how much time
12 has gone by and in the -- your client's conviction had
13 become final on direct appeal and presumably many years
14 later, the Supreme Court of Pennsylvania were to decide
15 that there is an -- an element of the offense missing,
16 your client still would be entitled to relief.

17 MR. LIEBER: No, Mr. Chief Justice, not
18 necessarily. As I said, if there had been intervening
19 decisions, again -- and habeas lies to see whether the
20 State would be taxed by the change, which I submit to you
21 is not really a change. It's just a new decision.

22 QUESTION: Excuse me. Habeas lies to see
23 whether the State would be what by the change?

24 MR. LIEBER: Taxed.

25 QUESTION: Taxed?

1 MR. LIEBER: Yes, Your Honor. If the State
2 would be taxed by retrials and a floodgate problem and so
3 forth. There was none of that in --

4 QUESTION: Inconvenienced, you mean.

5 MR. LIEBER: Yes. There is none of that in this
6 case, Your Honor. None whatsoever.

7 QUESTION: Two things about that. First, isn't
8 there a good argument that he could have been charged and
9 indicted under a related section, that he was violating
10 the terms of the permit?

11 MR. LIEBER: Your Honor, there's a good argument
12 I believe for Mr. -- for Mr. Fiore because he is presumed
13 innocent under that other section. He is cloaked with the
14 presumption of innocence.

15 QUESTION: No, no, no. Let's assume that --
16 that he altered the pipe and that pollution was coming out
17 of the pipe, et cetera. Assume that. Wouldn't the State
18 have had a good argument -- wouldn't the State have had a
19 good argument that he could be tried under that other
20 provision?

21 MR. LIEBER: They should have tried him under
22 that other provision, and they did not, Your Honor.

23 QUESTION: All right. Then -- then this is not
24 a case of innocent conduct.

25 MR. LIEBER: It is a case, in fact, of innocent

1 conduct of the charge that was charged.

2 QUESTION: Well, I recognize that.

3 You mentioned the Wainwright case. Can you tell
4 me what that case is?

5 MR. LIEBER: Yes, Your Honor. That's Wainwright
6 v. Stone, which is the case that the respondent
7 principally uses to defend. It's a case which this Court
8 decided I believe in 1972.

9 QUESTION: All right. It's not a Commonwealth
10 case. Okay, thank you.

11 QUESTION: May I just go back to Justice
12 Ginsburg's question and modify it slightly? If the
13 Supreme Court of Pennsylvania had held in your client's
14 case that, in fact, he was properly charged and then, as
15 odd as it might be, let's say a month later it went the
16 other way in the co-defendant's case, then your position
17 here would be different, wouldn't it?

18 MR. LIEBER: I'm not exactly sure that -- that
19 it would be, Your Honor, because I believe it would be
20 then the same position as in -- in Wright v. West, where
21 we would still test. If there was a sufficiency claim, we
22 would still test the finding of the supreme court.

23 QUESTION: No, but your sufficiency claim, as I
24 understand it, is essentially a claim that the evidence
25 was insufficient simply because it was, under Pennsylvania

1 law, evidence that could not, as a matter of logic, as a
2 matter of law, prove the -- the offense that he was
3 charged with, i.e., operating without a permit, as opposed
4 to operating in violation of a permit.

5 So, the point that I'm getting at is this. If
6 in his case, in your client's case, the Supreme Court of
7 Pennsylvania said, yes, properly charged, the evidence in
8 fact is relevant and sufficient to convict, and then a
9 month later in the co-defendant's case, they said, no, the
10 -- the charge to which this -- this evidence was relevant
11 could only have been the charge of operating in violation
12 of a permit, it seems to me your position would have to be
13 different because you would be -- in order for your client
14 to get relief, you would have to argue that there -- that
15 we should adopt a Federal rule requiring the States to
16 apply a decision, as in the co-defendant's case,
17 retroactively. And as I understand it, that's not the
18 argument you're making here.

19 MR. LIEBER: No, that's not the argument we're
20 making here.

21 QUESTION: Okay. And you'd run -- you would --
22 I assume you admit you would run into a Teague problem if
23 -- if you were in the situation of my hypo in which you
24 were asking for a Federal rule requiring State
25 retroactivity.

1 MR. LIEBER: Your Honor, I -- I can't admit that
2 because Teague only applies to procedural matters. This
3 is clearly a substantive matter which decriminalized
4 behavior.

5 QUESTION: But why would the situation be any
6 different than if we had a legislature saying the permit
7 is not an essential element, and then the legislature
8 changed that to say it is? If -- if you have a permit,
9 you have to show that you don't have a permit. Why isn't
10 the highest court of the State declaring the law the same
11 as the legislature declaring the law, and then when the
12 high court changes it, it's like a legislative change that
13 doesn't have to be retroactive. I thought that you had to
14 make that concession and that you were relying on the
15 Pennsylvania Supreme Court never having addressed this
16 question, never having settled what the State law was.

17 MR. LIEBER: Your Honor, that -- that is not my
18 position. My position is that if the Pennsylvania Supreme
19 Court had not spoken, we would be here under Jackson and
20 Wright v. West and Sullivan v. Louisiana and that ilk of
21 case. However, our case is not worse in any sense. I
22 submit to you respectfully, it's better because the
23 Pennsylvania Supreme Court has spoken. It's their duty,
24 it seems to me, if the case comes before them, whenever,
25 to define the elements, and when they do that, as -- as a

1 concurrence said in Bousley, that's not really
2 retroactivity. That's explanatory behavior.

3 QUESTION: Bousley, however, was a Federal --
4 construing a Federal statute where the -- perhaps the case
5 law may be somewhat different than just stepping into a
6 State situation.

7 MR. LIEBER: Your Honor, but our case law in
8 Pennsylvania is identical under recently decided
9 Pennsylvania Supreme Court authority in Commonwealth v.
10 Shaffer. But you can look back to see how Judge Aldisert
11 in the Third Circuit, in the Ettinger case, for example,
12 which is cited in one of the briefs, took this same route
13 and said the statute is what it was from the time the
14 highest court in the State construes it. And that's what
15 we have here.

16 QUESTION: Well, if -- if the Pennsylvania law
17 supported you, you should have gotten relief in
18 Pennsylvania. The fact you didn't suggests that it does
19 not support you.

20 MR. LIEBER: No. Your Honor, we didn't get
21 relief in Pennsylvania because of a malfunction in the
22 law.

23 QUESTION: That's -- that's a somewhat
24 pejorative description.

25 MR. LIEBER: I apologize.

1 QUESTION: Mr. Lieber, I think you misstated the
2 holding in Shaffer. They didn't say it was the law from
3 the date of the supreme court decision. As I understood
4 it, they said it was the date -- it was the law from the
5 date of the enactment of the statute.

6 MR. LIEBER: I stand corrected, Mr. Justice
7 Stevens.

8 QUESTION: Which makes a world of difference.

9 MR. LIEBER: It does. I misspoke.

10 QUESTION: Mr. Lieber, most of the cases that we
11 take in this Court are cases that involve circuit
12 conflicts, disagreements in the law, in final decisions in
13 most cases, some of them years ago. Now, is it your
14 position that every time we resolve such a circuit
15 conflict, the Constitution requires that all of those who
16 have been finally convicted, under the side of the
17 conflict that has lost here, are entitled to -- to be
18 released?

19 MR. LIEBER: No, Your Honor. Only in the -- the
20 extreme situation where you have actual innocence as the
21 gateway, coupled with a fundamental constitutional error
22 which went to --

23 QUESTION: Well, take that kind of a situation,
24 limited to those cases where we have interpreted a
25 substantive statute in a certain way, and one set of

1 courts in cases, some of them decided years ago, have
2 interpreted that same statute a different way, which would
3 -- which would make a conduct that we have held to be
4 innocent in fact guilty. Now, are all of those who were
5 -- who were convicted under that interpretation entitled
6 to be released?

7 MR. LIEBER: I would say no, Your Honor, because
8 if you had made a decision on this Court, that would be a
9 decision that -- that those convictions earlier were
10 within the scope of the Constitution, whereas later they
11 were not. And I -- there have been so few --

12 QUESTION: Excuse me. I don't understand that.
13 We didn't make any such decision, as you know.

14 MR. LIEBER: Well --

15 QUESTION: There are two sets of cases. One of
16 them say, for conviction of this -- of this offense, you
17 need X. The other set says for conviction of this
18 offense, you don't need X. And -- and the lower courts
19 are in conflict. Some of these cases are very old. We -
20 - we take a recent case and we say in fact you need X.
21 What happens to all -- for the substantive offense. What
22 happens to all of the cases that said you don't need X?

23 MR. LIEBER: I would say, Your Honor, that --
24 that a habeas writ would lie if you decriminalized
25 behavior.

1 QUESTION: Mr. -- Justice Scalia is asking you
2 whether you think Bousley was correctly decided, I think.

3 MR. LIEBER: Absolutely, yes. I believe this -
4 - this case derives at least from one -- derives from at
5 least one Bousley principle, which is the state of the
6 statute.

7 QUESTION: But Bousley -- the -- you can -- our
8 cases say you can get relief from a Federal conviction on
9 habeas because of an error in statutory law, and the --
10 the same is not nearly as clear when you're talking about
11 a claimed error in State law.

12 MR. LIEBER: Mr. Chief Justice, I -- I agree
13 except when the error in State law is also an error of
14 Federal constitutional dimension.

15 QUESTION: But we don't have any evidence from
16 any statement of a Pennsylvania court that there has been
17 an error in Pennsylvania law.

18 MR. LIEBER: We have -- we have a statement,
19 Your Honor, from the Pennsylvania Supreme
20 Court both -- excuse me -- from the Pennsylvania Supreme
21 Court in the Scarpone case that there was an error of
22 State law, a misconstruction of the statute which in fact
23 was also a Jackson error, although the State admittedly
24 did not say Jackson. But what they said was that the
25 Commonwealth did not make out the crime. It was a pure

1 sufficiency problem.

2 QUESTION: Well, the State court didn't have to
3 get into Federal constitutional law. All it had to do was
4 construe its own statute. And it seems to me that you win
5 on a rule as narrow as this.

6 MR. LIEBER: I agree, Your Honor.

7 QUESTION: If the State court holds that the
8 statute, as they construed it, clearly, inarguably, always
9 meant that, that there was no room for reasonable
10 disagreement, that somebody had just made an inexcusable
11 error in construing it otherwise in prior cases, when that
12 happens, which you are claiming happened here, then you
13 win because you can take advantage of the settled Federal
14 rule to the effect that every element has got to be
15 proved. You don't have to have any broader holding from
16 this Court than that, as I understand it, for you to win
17 here.

18 MR. LIEBER: And that is precisely the narrow
19 holding in this case that would only release one person,
20 as far as I know, that we're asking for --

21 QUESTION: Why is that any worse than the
22 situation where you have a lower State court that -- that
23 clearly, unarguably, whatever -- whatever other adverbs
24 Justice Souter used --

25 (Laughter.)

1 QUESTION: -- got the statute wrong? It -- it
2 reads red in the statute to mean blue. It's just
3 absolutely, clearly wrong on its face, and that person,
4 you know, is finally convicted. The supreme court of the
5 State denies certiorari. We deny certiorari. Is he
6 constitutionally entitled to -- to release -- to be
7 released because the statute has simply been construed
8 flatly, clearly, inarguably wrong?

9 MR. LIEBER: No, Your Honor, of course not.
10 Unless we're in the very limited zone of -- of
11 insufficiency of evidence at a criminal trial.

12 QUESTION: No, but you -- when you say
13 insufficiency of evidence, you're talking about evidence
14 that, as a matter of law, cannot prove an element of an
15 offense. Right?

16 MR. LIEBER: Correct.

17 QUESTION: So -- so, your real argument is they
18 -- that you take advantage, in effect, of the Winship rule
19 or you -- you refer to it by -- by citing Jackson. That's
20 the rule that you're -- you're -- you're resting your case
21 on. So, in your answer to Justice Scalia, if the red/blue
22 distinction made the difference between an element and a
23 non-element, you would take advantage of it, and you would
24 make your Winship argument. If it didn't go to an
25 element, you or whoever was arguing would lose. Right?

1 MR. LIEBER: Correct.

2 QUESTION: It seems to me the issue in this case
3 is whether when the supreme court decided your client's -
4 - or rather decided the other -- your co-defendant's case,
5 whether it was stating what the law was at the time the
6 statute was enacted or whether it was changing the law
7 from an intermediate court view that prevailed in the
8 interim.

9 MR. LIEBER: It was stating the law from the
10 time it was enacted.

11 QUESTION: And you say Pennsylvania's supreme
12 court has said that's what -- what the view is on the
13 first construction of a statute.

14 MR. LIEBER: Correct, Your Honor.

15 QUESTION: Suppose it were the other way around.
16 Suppose, first, a State intermediate court said, this
17 decision is prospective only. What -- what would the
18 posture of the case be then?

19 MR. LIEBER: At that time, Your Honor, I would
20 say that -- that a Federal court could -- could look to
21 that intermediate ruling as datum for a -- a construction
22 of what the Pennsylvania Supreme Court might or might not
23 say later.

24 QUESTION: All right. Suppose then the State
25 supreme court said, our decision is prospective only.

1 MR. LIEBER: If the Pennsylvania Supreme Court
2 said the decision was prospective only, I think that --
3 that a Federal court would have to defer to it, but would
4 have to have the final say on the constitutional meaning
5 of the decision. Now, in this case, we have --

6 QUESTION: You mean the final say on whether or
7 not there's a due process violation --

8 MR. LIEBER: Correct.

9 QUESTION: -- for --

10 MR. LIEBER: Yes, Your Honor.

11 QUESTION: Of course, if they said it was
12 prospective only, then your co-defendant would remain in
13 jail. It wouldn't apply even to him if they had said that
14 in this case.

15 MR. LIEBER: Yes.

16 QUESTION: And would have both been treated
17 alike.

18 MR. LIEBER: Correct.

19 QUESTION: Yes.

20 QUESTION: Or they could apply it to this -- the
21 case before it and all future cases but no past cases,
22 which is something this Court once did.

23 QUESTION: Has any State supreme court ever said
24 that other -- that you've found other than the Georgia
25 court in Wainwright and Stone?

1 MR. LIEBER: That's the only case.

2 QUESTION: And even Wainwright and Stone was a
3 notice vagueness case.

4 MR. LIEBER: Yes. Yes, it's sort of a different
5 issue.

6 QUESTION: Mr. Lieber, there's no equal
7 protection claim being made here --

8 MR. LIEBER: Not at this time, Your Honor.

9 QUESTION: Bousley was -- was decided under
10 current habeas law. I guess you can argue whether it was
11 constitutional or not. It doesn't -- it doesn't on its
12 face -- it isn't clear that it's constitutional anyway.

13 But I suppose it is your position that if
14 Congress said a writ of habeas corpus shall not issue to
15 overturn a -- a prior conviction simply because the law
16 under which that conviction was obtained is later -- is
17 later amended, either by the legislature or by the courts
18 of the State, you would say that would be invalid at least
19 insofar as it applies to the courts.

20 MR. LIEBER: That's correct.

21 QUESTION: But you would also say that it would
22 be irrelevant to this case.

23 MR. LIEBER: That's also correct, Your Honor. I
24 think that the present -- we're -- we're squarely within
25 the -- the goals of Congress in the recent legislation

1 because what Congress has said is that there's deference,
2 but not to the extent that a State court decision runs
3 afoul of clearly stated Federal constitutional law, which
4 we have in a whole train of cases, such as Jackson, such
5 as Winship, and/or the -- there is a case to be made that
6 the State court -- that the State -- and I'm paraphrasing
7 -- that the State court's decision is unreasonable on the
8 facts, which it is fundamentally unreasonable on the facts
9 here. There's nothing that arises from the record in this
10 case that would suggest that Mr. Fiore or Mr. Scarpone did
11 not have a permit.

12 QUESTION: I understand that.

13 MR. LIEBER: Quite the opposite.

14 QUESTION: Every -- every State court decision
15 that is unreasonable on the facts is unconstitutional?
16 And -- and you can get habeas relief --

17 MR. LIEBER: No, Your Honor.

18 QUESTION: -- many years later?

19 MR. LIEBER: No, no.

20 QUESTION: Well, what does that have to do with
21 it then?

22 MR. LIEBER: Well, I would say if -- if we're in
23 an actual innocence situation with a fundamental defect
24 going to the truth-finding function of the trial, then I
25 would say every case.

1 QUESTION: You keep broadening --

2 QUESTION: Excuse me. Your answer is yes, then.

3 MR. LIEBER: Not -- no, Your Honor, not if it

4 were simply a procedural matter.

5 QUESTION: Oh, but if it's a substantive matter,
6 you say every case where the defendant says the factual
7 finding was simply unreasonable, you can bring a Federal
8 habeas action, a successful one, on the basis of the
9 Federal Constitution.

10 MR. LIEBER: No, Your Honor. I'm not saying
11 that. I'm saying that under the law, as I understand it,
12 as Congress has passed it, if there is a clearly stated
13 constitutional decision of this case in the background
14 which would be controlling, then my answer would be yes.
15 In other words, Jackson is there. So, in -- in this case
16 specifically, my answer would be yes. But if someone is
17 coming up with a -- a new substantive right or a
18 substantive right that doesn't go to guilt or innocence,
19 then perhaps I would say no.

20 QUESTION: The thing that I don't understand
21 about your argument is -- and it goes back to my earlier
22 question. As I understand it, the only thing you need to
23 win this case is a determination by us that what the
24 Pennsylvania courts did, in the case of the co-defendant,
25 was to make a decision, a ruling about an element of the

1 offense. Number two, for us to determine that that ruling
2 about the element of the offense was not in any sense new
3 law or the clarification of any legitimate or reasonable
4 confusion that existed beforehand, that what it was
5 declaring was what any -- any reasonable and careful
6 reader would always have said. And number three, the rule
7 in Winship or Jackson, to the effect that the State, as a
8 matter of Federal constitutional law, has got to prove
9 every element of the offense stated. As I understand it,
10 that's all your argument need consist of.

11 But you broaden it, and you just broadened it in
12 your response to Justice Scalia when you say that you
13 would be entitled to relief if the error went to the -- I
14 think you put it the truth-finding function. And I don't
15 understand. I'm missing something I guess because I don't
16 understand why you're broadening your -- your argument
17 and, in effect, requiring a broader rule than I thought
18 you were requiring.

19 MR. LIEBER: Allow me to clarify. What I was -
20 - what I was saying in response to Justice Scalia was my
21 view of a certain hypothetical situation. It was not my
22 view of this case. This case can be decided narrowly on
23 the basis that you have stated, and I submit to you that
24 is the basis --

25 QUESTION: Mr. Lieber, do I understand correctly

1 that what the Pennsylvania Supreme Court did was lay down
2 the law? It wasn't a question of reasonable or
3 unreasonable. They called it a bald fiction to say that
4 when you had a permit, you could be treated as not having
5 a permit. And that doesn't seem to be anything matter-
6 of-fact. They were resolving for the first time a
7 question of what the elements of these events were. And I
8 didn't know that lower court decisions, one way or
9 another, count as the law of the State.

10 MR. LIEBER: I think that's a correct statement,
11 and I think it's -- it's emphatically a correct statement
12 with regard to the lower court decision in Commonwealth v.
13 Fiore. The superior court decision is a memorandum
14 decision in our State, and if any lawyer looks it up,
15 which -- it appears at 563 Atlantic 2nd 189, he or she
16 will be instructed that these memorandum opinions cannot
17 be considered as precedent, nor can they be cited for any
18 purpose.

19 Your Honor, this is perhaps the only case -- the
20 only court where I -- where a lawyer could even speak
21 about that decision. It is not a rule. It is not
22 authoritative. It is not anything that any other
23 Pennsylvania practitioner or, if you will, defendant or
24 prosecutor could make anything of.

25 QUESTION: And you want us to assume that under

1 Pennsylvania law this decision, the Scarpone decision, is
2 retroactive --

3 MR. LIEBER: I want you --

4 QUESTION: -- under Pennsylvania law?

5 MR. LIEBER: Under Pennsylvania law, it is a --
6 retroactive is the best word we have. I would say yes.
7 But -- but there is another view which I believe Justice
8 Stevens has -- has espoused that it's not -- it's
9 explanatory. It's -- it's a very limited, specialized
10 type of retroactivity, which merely explains the statute.

11 QUESTION: What was your client sent to jail for
12 if it was not for a violation of Pennsylvania law?

13 MR. LIEBER: My client, Your Honor --

14 QUESTION: You're -- you're telling me the --
15 the Fiore decision doesn't mean anything simply because it
16 can't be cited in future cases. He was surely sent to
17 prison for violating Pennsylvania law.

18 MR. LIEBER: Your Honor, he was justly convicted
19 on some other counts, and we haven't challenged those.

20 QUESTION: No, no. I'm talking about this
21 count. This count.

22 MR. LIEBER: This -- this count --

23 QUESTION: He was sent to prison for violating
24 -- why was he sent to prison here? You're telling me that
25 this thing has no effect in Pennsylvania? It -- it is not

1 law in Pennsylvania? You can be sent to prison when you
2 haven't violated any law?

3 MR. LIEBER: Your Honor, this -- this was --

4 QUESTION: That's the issue.

5 (Laughter.)

6 QUESTION: Well --

7 MR. LIEBER: I don't think --

8 QUESTION: No, no. The issue -- the issue is -
9 - the issue is whether Pennsylvania deemed him to have
10 been in violation of Pennsylvania law. Counsel is telling
11 us Pennsylvania didn't deem the law to have been violated.
12 This case is not citable.

13 MR. LIEBER: Your Honor --

14 QUESTION: Why was Pennsylvania sending him to
15 jail then?

16 MR. LIEBER: Because Pennsylvania was in grave
17 error at that time, Your Honor, in one -- one case.

18 QUESTION: One court was. Isn't it -- once
19 again, instead of saying that -- instead of arguing or
20 conceding that you're asking for a limited retroactivity,
21 it seems to me all you have to say is you are asking this
22 Court to recognize that the Supreme Court of Pennsylvania
23 in the companion case was not making any change in the
24 law.

25 MR. LIEBER: No. It was applying settled

1 Pennsylvania as well as constitutional principles.

2 QUESTION: But what if the Supreme Court of
3 Pennsylvania in that -- in the Scarpone case had said this
4 decision is not retroactive?

5 MR. LIEBER: I -- I believe you -- that a
6 Federal court would have to defer and look to that, but in
7 that case, which is not this case, it would still have to
8 apply Jackson and Winship standards in a sufficiency
9 claim.

10 May I reserve any time that I have remaining?

11 QUESTION: Very well.

12 MR. LIEBER: Thank you.

13 QUESTION: Very well, Mr. Lieber.

14 MR. LIEBER: Thank you, Mr. Chief Justice.

15 QUESTION: Mr. Graci, we'll hear from you.

16 ORAL ARGUMENT OF ROBERT A. GRACI

17 ON BEHALF OF THE RESPONDENTS

18 MR. GRACI: Mr. Chief Justice, and may it please
19 the Court:

20 While this case is procedurally complex, the
21 principles involved are not. Like Coleman v. Thompson,
22 it's a case about federalism. At its core, the case
23 presents one very basic question: Should habeas relief be
24 extended to grant relief to a State prisoner by requiring
25 State courts to apply a new State appellate decision

1 interpreting State law to the petitioner's case which was
2 final before the new decision was announced?

3 QUESTION: Now is -- don't you, in making that
4 statement of the question, assume that it was -- that the
5 law changed when the Supreme Court of Pennsylvania made
6 its decision in the other case?

7 MR. GRACI: Yes, Justice Stevens. I assume that
8 under the decisional law of Pennsylvania as to what
9 constitutes a new decision, the decision in Scarpone was
10 new.

11 QUESTION: Supposing in that opinion they had
12 said, this is our understanding of what the statute means
13 and they had added a sentence, and we think it has meant
14 this ever since it was enacted, then you would lose, I
15 take it.

16 MR. GRACI: No, we would not, Your Honor,
17 because, while I agree with what my opponent said with
18 respect to the Ettinger case, which was a Third Circuit
19 case interpreting Pennsylvania law with respect to the
20 retroactive application of new decisions interpreting
21 State statutes, it didn't go far enough. Ettinger relied
22 on a case called Kuchinic.

23 QUESTION: But he also cites the Shaffer case.

24 MR. GRACI: And Shaffer. Shaffer was a case
25 decided while it was on direct appeal. So, the court had

1 no reason to say one way or the other about whether or not
2 it would apply retroactively. Quite frankly, in the
3 Shaffer context, we have very serious concerns because a
4 lot of cases had been -- there had been convictions and
5 guilty pleas based on the case that the Shaffer case
6 specifically overruled.

7 But all the court said in Shaffer was, as Your
8 Honor recognized, Justice Stevens, in Bousley, that the
9 law is what we say it was from the beginning, but then
10 they say in Kuchinic, which is cited in Ettinger -- and
11 the Kuchinic cite is 222 Atlantic 2nd 897, a Pennsylvania
12 Supreme Court case from 1966. It says that the latest
13 decision is applicable to a case -- and this applies even
14 if they changed, as one of the hypotheticals was, where
15 they said the statute meant one thing in one opinion and
16 then changed their mind years later. They said in such
17 circumstances, the latest interpretation is applicable to
18 a case whose appeal has not yet been decided.

19 QUESTION: There's no question that if this was
20 a law-changing decision, if there had been a prior
21 decision going the other way, then you would win. There's
22 no doubt about that. If it was retroactive -- if the
23 State court could say, this is a new rule that does -- the
24 old rule was to the contrary and we don't effect the old
25 rule.

1 But my question is supposing they say -- and I
2 think if you read this against Shaffer, they in effect
3 have said -- this is what the statute meant ever since it
4 was enacted. Then it really isn't retroactive. It's just
5 stating what the law was and this fellow was improperly
6 convicted under -- under the statute as enacted.

7 MR. GRACI: Your Honor, based on your
8 interpretation and your statement relying on Rivers and
9 the Bousley case --

10 QUESTION: Right.

11 MR. GRACI: -- that would be correct, as I
12 understand the decisions of this Court.

13 But Pennsylvania, as I've explained, in the --
14 in the Kuchinic case said -- and they didn't have to say
15 it in Shaffer, I'll reiterate, because in Shaffer he was
16 there on direct appeal. In Kuchinic, they said it does
17 not reach back to final cases. It only applies to cases
18 where the direct appeal is pending.

19 QUESTION: They specifically said it would not
20 be -- it would not be retroactive -- because it was a law-
21 changing decision.

22 MR. GRACI: Well, what they were interpreting -
23 - I don't think they -- they announced or said what the
24 rule was in Kuchinic, but in Shaffer they wouldn't have
25 had any reason to say it because Shaffer was there while

1 on direct appeal.

2 QUESTION: Am -- am I right, Mr. Graci, in
3 thinking that the Supreme Court of Pennsylvania granted
4 review in Scarpone's case because there was a split
5 between the Commonwealth court and the superior court as
6 to the meaning of the statute?

7 MR. GRACI: You're absolutely correct, Mr. Chief
8 Justice, and they said that at least twice. They said
9 there was a conflict between the -- what the superior
10 court did in petitioner's case and what Commonwealth court
11 did in Scarpone's case, and they were concerned that my
12 office, the office of Attorney General of the
13 Commonwealth, which brings these prosecutions, wouldn't
14 know how to work, wouldn't know what to do.

15 And that gets to a point that was made earlier,
16 Your Honor, as to the precedential effect of the
17 memorandum opinion. It doesn't have broad precedential
18 effect, but the -- the IOP is cited -- the internal
19 operating procedure of the superior court to which counsel
20 references, and it specifically says that there's an
21 exception as far as the precedential value in a criminal
22 case where the case is important as to issues of res
23 judicata.

24 In this particular case, that was critically
25 important because it went to the first issue that the

1 superior court and the trial court in the post-conviction
2 proceedings discussed, and that was that this statutory
3 construction, sufficiency of the evidence, Jackson claim,
4 if you will, had been decided against Fiore in his
5 original appeal and that they would not under State
6 procedural law, under our post-conviction relief act --
7 would not allow the re-litigation of a claim that had
8 already been litigated on direct appeal. That was one of
9 the bases for the State court's ruling. And I submit to
10 the Court that that's an adequate and independent State
11 ground as to why the Federal court doesn't get to
12 determine that this -- the constitutionality, if you will,
13 of the proceedings.

14 QUESTION: Well, Mr. Graci, I quite agree with
15 you that Pennsylvania, as a matter of -- of State
16 procedure, will -- will not apply the decision, we'll say,
17 retroactively, in quotes, to -- to this case.

18 The thing I want to be clear on, I guess, is
19 whether you agree with a premise of Justice Stevens'
20 hypothetical a moment ago. His premise, of course, was
21 that this was not a law-changing decision. And do you
22 agree that the Supreme Court of Pennsylvania did not treat
23 the ruling in Scarpone as a law-changing decision?

24 And let me -- the reason I ask the question is
25 this. I don't have the -- the Pennsylvania opinion in

1 front of me, but I think they used the phrase in
2 describing the -- the view that was taken in the Fiore
3 case as resting on a bald fiction. I read that to mean
4 that they say, no one could reasonably read the statute to
5 mean this. And do you -- and that's why it seems to me
6 they made it clear that this was not a law-changing
7 decision. Do you agree that it was not a law-changing
8 decision in Scarpone?

9 MR. GRACI: In -- not entirely, Justice Souter.
10 You are correct -- and Justice Ginsburg had indicated
11 earlier -- that they used that phrase, bald fiction.

12 The reason this is a new decision, however, for
13 Pennsylvania law isn't because it overruled a prior
14 decision, which would be a law-changing under your
15 hypothetical or under your set of facts. That's one way
16 that a new decision is announced, by overruling prior
17 precedent. If this Court, even if it reaches the limited
18 holding that Your Honor suggested earlier, that would be
19 overruling a part of what Sunburst said because Sunburst
20 didn't draw any distinction between the kinds of claims
21 and what the States had to do with their own new
22 decisions.

23 But Pennsylvania, when it adopted its own rule
24 of retroactivity and it cited the cases of this Court
25 which said that the Constitution has no voice on this

1 subject, starting with -- with Sunburst, and they adopted,
2 however, this Court's test set forth in Chevron Oil v.
3 Huson that said that you can have a new decision not only
4 by overruling clear past precedent, but by deciding an
5 issue of first impression, the answer to which was not
6 clearly foreshadowed. And even though the --

7 QUESTION: Right, and the hypothetical that --
8 or I guess the question that I'm asking you is, is this in
9 a third category in which it was a new decision in the
10 sense that the Supreme Court of Pennsylvania had never
11 ruled on it before? And two, there couldn't have been any
12 reasonable disagreement before because it seems to me that
13 that's what the Supreme Court of Pennsylvania said when it
14 referred to the alternative view as a bald fiction.

15 MR. GRACI: I guess, as I --

16 QUESTION: Is -- is it -- is it a law-changing
17 decision when it is, A, the first one and, B, the court in
18 making the first decision says, anything else would be a
19 bald fiction? Is that a law-changing decision?

20 MR. GRACI: I believe the answer, Justice
21 Souter, is no. I'm sorry. Is yes. That's the way --

22 QUESTION: I think the shorter answer was the
23 better one in that case, but --

24 (Laughter.)

25 QUESTION: Why -- why is it -- why is it a

1 changing decision when -- when the court says what it
2 said?

3 MR. GRACI: Well, I guess if we have to use your
4 words, it's a changing decision because you say it is, but
5 it's a new decision under Pennsylvania's law.

6 QUESTION: It's -- it's new simply because they
7 had never taken up the question before. Right? That's
8 what you mean by that.

9 MR. GRACI: Well, it's new because it was a -- a
10 -- in the State supreme court, an issue of first
11 impression, the answer to which was not clearly
12 foreseeable.

13 QUESTION: Yes, but every issue -- you're
14 assuming that every -- I think, every issue of first
15 impression presents a new decision -- or rather, announces
16 new law for the purposes of a Federal court in applying
17 the Winship rule. I think that's what you're assuming.

18 MR. GRACI: Not --

19 QUESTION: Any -- any first decision of the
20 State's highest court is announcing new law for purposes
21 of Winship. I think that's your assumption.

22 MR. GRACI: No, Your Honor, that's not the
23 assumption.

24 QUESTION: Okay.

25 MR. GRACI: If there was nothing that had gone

1 before, so that by announcing that whoever made a
2 decision, it could be questioned, but in this case -- then
3 I could agree with your premise.

4 QUESTION: Yes, but it cannot always be
5 questioned. Sometimes the statutory law in these cases is
6 so clear that no one can reasonably question what it
7 means. And I think -- I think the Supreme Court of
8 Pennsylvania was saying, with its bald fiction remark,
9 that that's what we had here. Sure, people -- you know,
10 people make mistakes, but the fact is you couldn't
11 reasonably make this mistake. I think that's what they
12 were saying.

13 And if that's what they were saying, it seems to
14 me it's fair to say that they were not making a law-
15 changing decision. They were saying there's nothing new
16 in what we're saying. It was right there on the statute
17 books. Isn't -- isn't that a fair reading?

18 MR. GRACI: I -- I submit to Your Honor that it
19 may be a fair reading, but not necessarily the only
20 reading.

21 QUESTION: Is -- is there anything in our cases
22 that defines the term law-changing decisions?

23 MR. GRACI: Not of which I'm aware, Your Honor.

24 QUESTION: I didn't think so.

25 QUESTION: What do you think it -- it would be

1 if, indeed, it -- it was obvious it couldn't be
2 interpreted any other way, but the Supreme Court of
3 Pennsylvania chooses to embrace the fiction and does
4 interpret it the other way, says that blue means red?
5 Now, do you think that would be a law-changing decision?
6 I guess, we've got to figure this out case by case as to
7 how obvious a statute was and how wrong the supreme court
8 of the State is.

9 MR. GRACI: Well -- I'm sorry. I didn't mean to
10 cut Your Honor off.

11 QUESTION: No. That's all right. I -- I'd like
12 to know your calculation of -- of what happens if the
13 Pennsylvania Supreme Court had -- had agreed with the
14 Fiore interpretation when the case finally came to it.

15 MR. GRACI: I --

16 QUESTION: Do you think that would have been a
17 law-changing decision or not a law-changing decision?

18 MR. GRACI: I think it would have been a
19 decision establishing the law by the highest jurisdiction
20 of the Commonwealth in that instance. I would -- as I
21 stand before the Court, I wish perhaps --

22 QUESTION: Do you think Justice Souter would
23 consider it a law-changing decision?

24 (Laughter.)

25 MR. GRACI: No. And it would depend on what the

1 context is. This question only gets asked when you have
2 somebody in petitioner's circumstance and somebody who got
3 relief. The -- as to whether or not it's a law-changing,
4 again we have to look to the determination of the State
5 courts as to what constitutes a new rule for its --

6 QUESTION: So, what --

7 MR. GRACI: -- own retroactivity purposes.

8 I'm sorry.

9 QUESTION: My -- my one question is what
10 Pennsylvania case -- this is a matter of Pennsylvania law,
11 pure and simple. We have nothing to do with it. What
12 Pennsylvania case do you want me to read on the question
13 that Justices Souter and Stevens have asked?

14 As I've read them so far, I get out of Shaffer
15 the notion that ordinarily under Pennsylvania law,
16 ordinarily when the supreme court interprets a statute, a
17 substantive, not a procedural one, they're making law for
18 all time. They're saying, this is what the law has always
19 been. That's the ordinary case.

20 Then you have a couple of cases like Schreiber
21 and Tedarro which say, now, we'll tell you what a new law
22 is. A new law is a break with past precedent or deciding
23 something that isn't clearly foreshadowed, just exactly
24 what you said.

25 So -- and I'm trying to figure out whether the

1 Pennsylvania Supreme Court in this case, which happened to
2 say nothing about it, didn't say a word -- we could ask
3 them I guess, but they didn't say a word -- didn't say a
4 word. What did they have in mind? They used the word,
5 well, my goodness, this statute is sort of like saying
6 horse theft and you convict somebody for stealing a cow.
7 I mean, bald fiction suggests that, but they didn't say
8 it.

9 So, what Pennsylvania case do you want me to
10 read that will be most favorable to you on what counts as
11 a new rule as opposed to interpretation law for all time?

12 MR. GRACI: Well, I think the -- the case that I
13 mentioned earlier --

14 QUESTION: Kuchinic seemed to be a case in which
15 they simply assumed -- and it was a new rule. It was a
16 break with past precedent. So, that won't help.

17 MR. GRACI: The Kuchinic, which I've given the
18 cite, Blackwell, where they --

19 QUESTION: Blackwell.

20 MR. GRACI: -- which is cited in --

21 QUESTION: Blackwell was the second one?

22 MR. GRACI: Blackwell, which is cited --

23 QUESTION: No. What was the first one?

24 MR. GRACI: Kuchinic, K-u-c-h- --

25 QUESTION: That's the one --

1 MR. GRACI: -- i-n-i-c.

2 QUESTION: Okay.

3 MR. GRACI: 222 Atlantic 2nd 897. Blackwell is
4 cited in the respondent's brief. Excuse me.

5 The language that the court chose in using bald
6 fiction I don't think should be a troublesome matter, any
7 more than when this Court has said in a number of its
8 Teague cases that, well, such and such is controlling or
9 such and such is controlled by. But then when you have to
10 truly analyze it as to whether or not the rule that is
11 being sought in that particular case --

12 QUESTION: But, counsel --

13 MR. GRACI: -- you say controlling --

14 QUESTION: Counsel --

15 MR. GRACI: I'm sorry.

16 QUESTION: If you -- if you took it in the
17 context of what the Pennsylvania Supreme Court said in
18 this case, first, they said, no doubt these people have
19 engaged in execrable conduct, but the one thing that they
20 clearly have not done is operate without a permit. To say
21 otherwise would be a bald fiction.

22 And then the Pennsylvania Supreme Court went on
23 and said, we think that the Attorney General would have
24 had a nice case under this other section which is even a
25 stronger offense than the one that they were prosecuted

1 for.

2 So, if you followed what the Pennsylvania
3 Supreme Court said, you would still be free to prosecute
4 Fiore, would you not, for a violation of that provision
5 that says if you intentionally dispose of a hazardous
6 waste in violation of any provision of the act and cause a
7 public nuisance, public nuisance specifically defined to
8 include violation of any term of a permit, the
9 Pennsylvania Supreme Court in effect said, you picked the
10 wrong crime. There's another crime in there that you
11 could have indicted him for, and the penalty would have
12 been at least as strong. Is that not so?

13 MR. GRACI: That is what the Pennsylvania
14 Supreme Court said, Justice Ginsburg. I don't know,
15 however -- and the record doesn't support -- that we could
16 have sustained a conviction on that charge because, as I
17 understand it, it requires a proof of pollution which
18 requires not simply discharge of hazardous waste -- and
19 there were these organic chemicals that were being thrown
20 into the tributary of the Youghiogheny River -- but it
21 also requires some particular level. And while we had
22 proof that it was being done, we didn't have proof of the
23 level. So, I don't know that we could have proven
24 pollution. And, therefore, I don't think we could have
25 proven the first degree felony.

1 QUESTION: Mr. Graci, so much of this seems to
2 turn upon what the Pennsylvania Supreme Court thought it
3 was doing. Does Pennsylvania have a certification
4 procedure whereby it can answer a certified question from
5 -- from Federal courts concerning Pennsylvania law?

6 MR. GRACI: It's my recollection, Justice
7 Scalia, that they've recently adopted one. I don't
8 believe it was in effect at the time that this case was
9 going through either the State or the Federal courts.

10 QUESTION: What is your position, as a State --
11 representing the State Attorney General, as to what the
12 State should do if you have a case like this and the
13 supreme court says it is retroactive, but the judgment of
14 somebody in Fiore's position is final? As a matter of
15 policy, what should happen?

16 MR. GRACI: The Pennsylvania Supreme Court
17 said --

18 QUESTION: The Pennsylvania court says this
19 retroactive.

20 MR. GRACI: But we don't apply our rules back to
21 final cases.

22 QUESTION: It doesn't say anything about that.

23 MR. GRACI: Okay, that's not Pennsylvania's
24 rule, as I understand it. But I think that should be --

25 QUESTION: Suppose it said -- suppose it said

1 this was always the interpretation of the statute. We are
2 not changing the law.

3 MR. GRACI: As a matter of Federal
4 constitutional jurisprudence --

5 QUESTION: No. As a matter of what should
6 happen under Pennsylvania law at that point.

7 MR. GRACI: What should happen under
8 Pennsylvania law, I submit to Your Honor, is what happened
9 in this case.

10 QUESTION: Because the judgment is final?

11 MR. GRACI: Yes, Your Honor.

12 QUESTION: Suppose there is a decision of this
13 court, some other factual situation, in which the conduct
14 for which the defendant has been convicted and he has a
15 final conviction is declared constitutionally protected
16 and he's picketing or something like that. Same rule?

17 MR. GRACI: No, Your Honor. That would be
18 within Teague's first exception. It would be a rule of
19 substance where you say the Constitution just prohibits
20 getting into that conduct the way that this Court has said
21 with respect to interracial marriage or --

22 QUESTION: Well, Teague is a question of the
23 extent of our remedies. I'm talking about whether it's
24 permissible under State law to hold the person. Suppose
25 we have said the conduct is constitutionally protected and

1 this is a new decision in the sense that we'd never
2 addressed it before, but we --

3 MR. GRACI: Well --

4 QUESTION: Then what would you do with a
5 prisoner who has been convicted and whose conviction is
6 final?

7 MR. GRACI: If the conviction -- if the Court's
8 ruling, Justice Kennedy, was that that type of private
9 primary conduct is removed from the criminal law making
10 authority to proscribe, which is the first exception to
11 Teague, then the State courts under Harper v. Virginia
12 Department of Taxation would be required to follow this
13 Court's rule and would be required, since it would be
14 within Teague's first exception, to apply that
15 constitutional decision.

16 QUESTION: Why should this case be any
17 different?

18 MR. GRACI: Because this -- the rule in Scarpone
19 is not a rule that removes private primary conduct from
20 the criminal law making authority of the States to
21 proscribe. It is not of the ilk that you just described,
22 Your Honor, where there is certain activity that can never
23 be punished.

24 It's clear that the activity that Fiore engaged
25 in could have been punished. The -- the -- what happened

1 here is the supreme court, after his conviction was final,
2 said they shouldn't have punished him under this statute.

3 QUESTION: From the standpoint of the prisoner,
4 what's the difference between prisoner A, whose conduct
5 was constitutionally protected, and prisoner B, whom we'll
6 assume by -- by hypothesis committed an act which was
7 never criminal under the laws of the State of
8 Pennsylvania? What's the real difference?

9 MR. GRACI: As to him, the only difference is
10 the rules of finality that this Court has embraced in
11 adopting its -- its habeas jurisprudence.

12 QUESTION: I'm talking about what -- what your
13 position is and what the law of the State of Pennsylvania
14 is in these two cases.

15 MR. GRACI: I believe the law of the State of
16 Pennsylvania is that, as to the conviction that was final
17 on appeal -- when you say it was never criminal, in
18 Fiore's case -- and this is where I have to beg to differ
19 with the Court, it was criminal because --

20 QUESTION: I want you to assume that it was --
21 that the State supreme court said the statute has always
22 meant that you must have a permit. It's not a -- we're
23 not changing law. It has meant this from the day it was
24 enacted. What's the difference in releasing, as I take it
25 your courts would, the prisoner in the first hypothetical,

1 whose conduct constitutionally protected, and the second
2 case where he was convicted for an act that was never
3 criminal?

4 MR. GRACI: The difference is the first case is
5 conduct that the Constitution has always prohibited from
6 being made criminal. In the second case, it's nothing
7 more than a matter of statutory interpretation. This
8 Court has drawn the line in applying the Teague exception,
9 the first Teague exception, to those cases where the
10 Constitution prohibits the criminalization of certain
11 conduct.

12 I have to concede that in Bousley this Court, in
13 interpreting a 2255 case, a petition brought by a Federal
14 prisoner, said that when you interpret a Federal law that
15 says that the law means this and that it has always meant
16 that, that the Court said that that was like Teague's
17 first exception. I submit to the Court that that wasn't
18 necessary to the Court's resolution of the case, but it
19 didn't say that it was Teague's first exception.

20 And that gets back to a question that the Chief
21 Justice asked --

22 QUESTION: I just -- I recognize we're here
23 under Teague. What I really want to know is what ought to
24 be the policy of the State, because Teague may well allow
25 people to remain in jail even though they had a -- a valid

1 defense at one time because of the passage of time. I
2 want to know what ought to be the difference in these two
3 cases under State law. And I don't see the difference.

4 MR. GRACI: Well, it would only be a difference
5 under State law if this Court, as the final arbiter of
6 what the Constitution says, says that in the one instance
7 it could never be -- it could never be prosecuted. It
8 could never be made criminal. That's the line that this
9 Court has drawn in expositing the Teague's first
10 exception. To extend that -- and I submit that it would
11 be -- and that's the -- the language that -- that Fiore
12 uses in his -- in his petition, to extend habeas to
13 include something that's like the Teague first exception
14 but is not really the Teague first exception as a matter
15 of policy shouldn't be the case.

16 Habeas is designed, as this Court has regularly
17 said, to overcome fundamental miscarriages of justice.
18 Well, let's look at what happened to Fiore and see what
19 was fundamentally flawed with his conviction. He was
20 tried. A charge was brought. He lodged an objection to
21 it and said it doesn't apply to me. The State court --
22 and there's always going to be a first case. The State
23 court said, yes, it does apply to you. This is how I
24 construe it. You are a person in a heavily regulated
25 industry. You had -- you went through the permitting

1 process. You should know that what you weren't permitted
2 to do wasn't permitted. And that's how he interpreted the
3 statute. And the State superior court, a court of equal
4 jurisdiction with the Commonwealth court, a court of
5 statewide jurisdiction, said, I agree.

6 QUESTION: Might I just interrupt? Because I'm
7 still concerned about the difference between Justice
8 Kennedy's two hypotheticals.

9 Has it not always been the law that one may not
10 be validly convicted of a crime unless every element
11 proscribed in the statute prohibiting the conduct, unless
12 every element of the offense has been proved? And is it
13 not the law of Pennsylvania that this crime required the
14 person not have a permit?

15 MR. GRACI: Your question, Justice Stevens, is
16 in two parts.

17 QUESTION: Yes.

18 MR. GRACI: Obviously, the answer to the first
19 question is yes, and the Pennsylvania Supreme Court has
20 now said, as the final arbiter of Pennsylvania's law, that
21 this statute is in two parts, and if you have a permit,
22 you can't be convicted of it. We submit to Your Honor
23 that that was a change in the law for State new law
24 principles --

25 QUESTION: And your -- your submission is that

1 there was a period of time under this statute where it was
2 a violation of the statute even though the person had a
3 permit.

4 MR. GRACI: Yes, if, as in this case, he
5 significantly departed from the specific terms. And our
6 brief sets forth in some detail, and purposely so, what he
7 did to demonstrate how he violated the terms of the permit
8 which were so significant that it constituted acting
9 without a permit.

10 QUESTION: Do you think that the Pennsylvania
11 Supreme Court can simply prescribe whether things will be
12 retroactive or not and thereby affect Federal
13 constitutional proscriptions? I mean, suppose we --
14 suppose we disagree with your contention and -- and we say
15 that since this was retroactive, the law was always such,
16 this individual has to be released. Do you think the
17 Pennsylvania Supreme Court could change all that by simply
18 announcing, this will -- this particular decision will not
19 be retroactive?

20 MR. GRACI: No, Justice Scalia. I think that
21 was the situation faced by this Court in *Harper v.*
22 Virginia Department of Taxation, and the Court said, when
23 we announce a rule -- and that case is particularly
24 important, because you said, when we announce a rule and
25 give a remedy to the party before the Court, every lower

1 court, State or Federal, has to follow our rule. But the
2 Court was clear to say that whatever Sunburst Oil says,
3 we're not interfering with. The States are free, when
4 they're interpreting questions of State law, to continue
5 to determine for themselves whether or not to apply a law
6 or a change in the law retroactively or prospectively or
7 partially retroactively.

8 QUESTION: It seems a very fragile, indeed
9 useless constitutional protection if it can be avoided by
10 the State supreme court by simply the supreme court
11 saying, ah, Fiore -- since we want Fiore held in jail and
12 other people in Fiore's position, we're just going to
13 announce that this one is not retroactive. I mean, what
14 kind of constitutional protection is that?

15 MR. GRACI: It would be a fragile constitutional
16 protection is the State courts could do that. Under --
17 I'm sorry. Under Harper, they can't and the cases that
18 precede Harper where the issue is one of State law and
19 interpretation of State law, this Court has regularly said
20 that the Constitution has no voice on the subject of
21 retroactivity. The Pennsylvania courts have cited to this
22 Court's opinions in that regard and -- and clearly believe
23 that they are talking about State law when they decide
24 whether or not to apply a new decision retroactively or
25 prospectively.

1 In this particular case, it's clear that the
2 trial judge on the post-conviction proceeding thought that
3 he was following settled Pennsylvania law that he could
4 not apply the new rule announced in Scarpone to Mr. Fiore.
5 The superior court said the same thing. That's the best
6 indicator I can find --

7 QUESTION: Well, as an indicator. I take it
8 your view is a bread and butter issue in the Pennsylvania
9 Supreme Court interpreting a statute, a bread and butter,
10 fairly tough, not too tough, medium, that automatically
11 those things are all considered new rules in Pennsylvania
12 and they're not considered to have always been the law.
13 Now, if that's the way Pennsylvania works, I guess you
14 could find some cases, which I haven't found, where on
15 collateral State review, even after the Pennsylvania
16 Supreme Court decision, the habeas court, State, applies a
17 different rule. Found an example of that? I mean, that
18 would be true if that's the Pennsylvania rule, that bread
19 and butter issues don't apply retroactively.

20 If that's so, then in the thousands of instances
21 where they've interpreted State criminal law -- you see -
22 - do I need to repeat it? Do you see my question?

23 MR. GRACI: I think I understand it, Your Honor.
24 I'm not sure that I can point to a specific case other
25 than --

1 QUESTION: I couldn't find any, which suggested
2 to me that it was really the unusual case that's non-
3 retroactive.

4 MR. GRACI: The -- well, Shaffer, or Shaffer --

5 QUESTION: Yes, there are some, but normally if
6 it's not going to apply as the law forever, the State
7 supreme court will say it.

8 MR. GRACI: Well, but --

9 QUESTION: Normally they'd say it.

10 MR. GRACI: What I have found --

11 QUESTION: It's an unusual thing.

12 MR. GRACI: I'm sorry. I didn't mean to cut
13 Your Honor off.

14 What I have found in Pennsylvania's cases,
15 similar to the cases in this Court both before and after
16 Teague, is they don't really say whether a new rule will
17 be prospective or retroactive until somebody asks the
18 court to say so. And I submit to Your Honor in Shaffer,
19 that Shaffer was on direct review. We have a problem with
20 Shaffer and that's one of the reasons that -- I don't mean
21 a problem before this Court, but it's one of the reasons
22 why this case is so important, because if this Court
23 announces a new rule and overrules Sunburst, then the
24 situation in Shaffer where our court, after 12 years of
25 following an interpretation of the superior court where a

1 lot of people went to jail both on guilty pleas and jury
2 trials for having violated our racketeering statute --

3 QUESTION: I think I should make one thing -- I
4 don't think anybody is considering overruling Sunburst
5 which was a civil case and which -- which specifically
6 said it was a new rule. That's not before us. So, we're
7 not overruling Sunburst no matter what we do.

8 MR. GRACI: I see my red light is on. May I
9 respond?

10 QUESTION: Yes. Mr. -- thank you, Mr. Graci.

11 MR. GRACI: Thank you, Your Honor.

12 QUESTION: Mr. Lieber, you have 2 minutes
13 remaining.

14 REBUTTAL ARGUMENT OF JAMES B. LIEBER
15 ON BEHALF OF THE PETITIONER

16 MR. LIEBER: In that time, Your Honor, I'd just
17 like to make a couple of points.

18 First of all, this Court has consistently said
19 that the distortion of the meaning of a statute is not a
20 rule, and for purposes of retroactive -- retroactivity
21 analysis, if that's what we're in, you need a new rule and
22 an old rule.

23 There was no old rule here under Pennsylvania
24 law. There was no foreshadowing. The foreshadowing quite
25 clearly was to Scarpone. The regulations taught everyone

1 in Pennsylvania in this industry what it meant to have a
2 license and what it meant to have one revoked.

3 QUESTION: Mr. Lieber, does it cut in either
4 direction that Fiore did try to get the Pennsylvania
5 Supreme Court to focus on his case, what, four times and
6 every time they just denied -- they denied review. Does
7 that count one way or another?

8 MR. LIEBER: Your Honor, I would submit that --
9 that if it counts at all, it counts very slightly and
10 only to the extent that there -- it shows the necessity
11 for habeas review in a Federal court. But it shows
12 nothing about the merits or the judgment of the merits by
13 the Pennsylvania Supreme Court because they are a
14 certiorari-like court.

15 QUESTION: Well, if he hadn't even tried to put
16 it to the Pennsylvania Supreme Court, perhaps there would
17 have been some question about exhaustion or waiver, but he
18 did try a number of times.

19 MR. LIEBER: Yes. He cannot be -- this is --
20 this is not the case where someone has procedurally
21 defaulted. This -- this individual --

22 QUESTION: But it does suggest a view of the
23 Pennsylvania court that it doesn't apply its new decisions
24 to cases that have become final. It won't apply them on
25 collateral review at the State level. I mean, that's what

1 it suggests anyway.

2 MR. LIEBER: I would respectfully disagree.

3 Proof beyond a reasonable doubt is a part of our
4 constitution in Pennsylvania, Your Honor. We have that in
5 all of our trials. This is very much of an unusual
6 situation. I've never seen one quite like it where two
7 individuals at the same trial on the same facts get two -

8 -

9 QUESTION: Well, presumably that -- that idea
10 must have occurred to the Supreme Court of Pennsylvania in
11 the petition for certiorari, and they nonetheless denied
12 it.

13 MR. LIEBER: Your Honor, my time is up.

14 CHIEF JUSTICE REHNQUIST: It is. The case is
15 submitted.

16 MR. LIEBER: Thank you, Your Honor.

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

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that
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The United States in the Matter of:

WILLIAM FIORE, Petitioner v. GREGORY WHITE, WARDEN, ET AL.
CASE NO: 98-942

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BY: Diana M. May
(REPORTER)