

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
BENJAMIN J. BUTLER, ESQ.	
On behalf of the Petitioner	3
PATRICK C. DIAMOND, ESQ.	
On behalf of the Respondent	30
REBUTTAL ARGUMENT OF	
BENJAMIN J. BUTLER, ESQ.	
On behalf of the Petitioner	53

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

1 confrontation rule?

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

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

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

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

1 MR. BUTLER: Well --

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

6 MR. BUTLER: Your Honor --

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

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

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

21 MR. BUTLER: I think --

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. BUTLER: Well --

11 JUSTICE SCALIA: And I think it is --

12 JUSTICE KENNEDY: -- to that effect.

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

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

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

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

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

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

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

8 (Laughter.)

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

11 (Laughter.)

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

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

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

25 And then we got the Linkletter balancing

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

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

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

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

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

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

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

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

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

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

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

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

3 MR. BUTLER: No, Your Honor.

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

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

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

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

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

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

1 said is -- is an ephemeral one?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MR. BUTLER: My answer is --

6 JUSTICE SCALIA: Habeas or not?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 MR. BUTLER: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 law was.

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

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

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

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

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

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

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

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

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

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

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

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

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

18 MR. BUTLER: That it will apply.

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

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

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

25 MR. BUTLER: Yes, absolutely.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MR. BUTLER: It is.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Mr. Diamond.

1 ORAL ARGUMENT OF PATRICK C. DIAMOND

2 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

17 MR. DIAMOND: Exactly, Your Honor.

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

25 And it seems to me that that is inconsistent

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

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

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

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

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

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

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

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

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

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

1 (Laughter.)

2 MR. DIAMOND: And --

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

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

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

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

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

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

10 (Laughter.)

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

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

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

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

24 MR. DIAMOND: Excuse me, Your Honor.

25 JUSTICE KENNEDY: It seems to me that your

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

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

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

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

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

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

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

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

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

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

1 of the State.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 JUSTICE BREYER: I agree with that.

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

20 The opinion is full of new rules.

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

1 hung up on metaphysics, Mr. Turner.

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

7 (Laughter.)

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

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

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

25 JUSTICE SCALIA: You wouldn't want to say

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

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

13 MR. DIAMOND: Your Honor --

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

16 (Laughter.)

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

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

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

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

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

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

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

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

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

25 JUSTICE KENNEDY: Isn't what you are saying

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

6 MR. DIAMOND: Yes, Your Honor.

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

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

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

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

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

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

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

25 This defendant never raised the State law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 final --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 JUSTICE SOUTER: So the answer is yes.

12 MR. DIAMOND: -- that is yes.

13 JUSTICE SOUTER: Yes.

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

16 Mr. Butler, you have a minute remaining.

17 REBUTTAL ARGUMENT OF BENJAMIN J. BUTLER

18 ON BEHALF OF THE PETITIONER

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

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

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

25 It can decide, as several States have, that

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

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

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

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

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

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

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

25 Thank you.

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

3 The case is submitted.

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

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A				
ability 28:4,8	agreement	36:1 39:6	applying 7:15	a.m 1:13 3:2
able 8:19 48:14	49:17	41:24 51:21	37:4,23 48:12	55:4
48:23	akin 22:13	53:10,11 54:5	approach 16:21	
above-entitled	Alito 11:4 22:8	appeal 14:20,21	40:16 41:9	B
1:11 55:5	22:11	14:24 15:8,19	area 24:20 29:8	B 46:12
absolutely 15:20	allocation 44:19	28:21,25 31:23	30:13 33:17	back 6:25 22:5
19:8 23:25	allow 7:9 11:17	39:22 46:13	42:24 52:21	26:23 38:20
38:8	17:13 50:22	appeals 39:20	areas 13:25	45:20
abstract 37:7	allowing 3:20	53:24	27:18	bad 42:8
accept 6:10	46:22	APPEARAN...	arena 44:16	balance 22:1
access 22:3	allows 21:13	1:14	argue 9:16	balancing 10:25
accountable	52:18	appeared 37:10	27:17,19	22:13
37:25	Alright 23:15	37:11	argues 48:23	Banks 32:12,15
acknowledge	alternative 42:5	appears 13:8	arguing 7:20,23	bar 46:3
9:20 20:9 42:5	amend 48:15	appellate 10:17	18:17	based 3:22 6:24
acknowledges	Amendment	32:5,10	argument 1:12	7:16 13:23
15:1	7:11 12:21	application	2:2,7 3:3,6	14:2 22:6
act 20:7	13:6,7,10,14	23:17 24:19	24:9 30:1	bases 15:5
acted 33:4,5	14:7 18:24	27:1 28:13	53:17	basic 10:1 24:24
action 27:11	26:2 51:10,15	31:21 32:2	Aristotle 41:12	25:1 47:4 48:1
actions 34:7	51:17 52:8	33:20,22 34:17	asked 13:5	48:11 54:9,11
active 49:25	American 18:4	40:24 53:3	asking 49:4	basically 10:4
address 8:23	43:6 48:10	54:13	54:17,18,22	34:14 50:11
28:12	analysis 6:25	applications	asserted 10:10	basis 5:7 28:1
addressed 37:16	23:4,5,6 27:20	24:13	asserting 28:1,3	began 15:25
42:18	31:21	applied 6:16	28:7	beginning 25:6
adjudication	ancient 17:24	11:17 22:10	assessment	34:25
48:2,12 54:1	announce 16:16	24:5,5 26:13	11:25 12:2	begins 21:18
54:10,12	27:7 28:14	32:6,6,24	Assistant 1:15	46:7
adjudicatory	29:13 47:7	40:19	assume 14:19	begun 16:18
26:8,15 29:12	50:24	applies 30:15	21:2 25:5	behalf 1:16,19
administering	announced 6:17	39:25 43:2,21	41:14	2:4,6,9 3:7
49:3	7:8	48:8 49:12	assumes 20:5	30:2 53:18
adopt 40:16	announcement	apply 6:23 10:13	attention 41:3	behold 10:17
adopted 41:8	8:18	11:7 12:18,25	Attorney 1:18	believe 6:1
adopting 37:22	announces	13:20 15:17,20	authority 45:22	28:15 30:25
38:13,15,16	16:14 23:9	16:11,13,19,21	47:15,22,23,24	48:24
40:22	29:2	16:24 17:1,2,8	48:5,17 49:5	believes 23:10
advancing 48:18	announcing	21:11 22:25	50:16,18,19	benefit 29:2
advantage 10:18	34:23	23:11,18,19	54:8	benefits 3:20
46:11,11,12,14	anomaly 20:20	24:6,18,22	authorized 21:4	53:22
46:15	45:4	27:4 28:17	authorizes	BENJAMIN
ago 12:16 39:2	answer 11:22	29:20 33:4,5	48:21	1:15 2:3,8 3:6
agree 9:17 13:18	13:9 16:4,5,7	34:7 39:1	availability	53:17
40:10 49:2	17:17 22:18	41:20 43:23	14:15	best 29:11,13
agreed 9:19 27:7	24:10,19 28:15	44:23 50:10,24	available 6:5	33:16 35:1
	31:19 33:7,12	50:25	aware 11:11	47:25

<p>beyond 47:12 48:19 51:2 54:23 binding 51:15 bit 31:7 41:3 43:19 45:4 Blackstone 35:12,12 Bockting's 9:4 body 26:6,10,22 bottom 7:2 bound 20:21 branch 21:14 BREYER 38:19 40:10 41:8 46:5 brief 4:20,20 bring 12:20 brings 45:19 brother 31:20 business 27:8 45:7 Butler 1:15 2:3 2:8 3:5,6,8 4:2 4:12 5:1,6,9,21 6:3,13 7:5,23 8:10,22 9:25 10:22 11:9,19 12:5 13:3,21 14:2,18,25 15:9,13,22 16:5,7,12 17:5 17:16 18:3,15 18:22 19:8,14 19:24 20:10,23 21:6,21 22:11 22:16 23:6,18 23:22,25 24:8 24:15 25:16,25 26:20 27:5,12 28:3 29:24 53:16,17,19 54:22 55:2</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 1:18 2:1,5 3:1 30:1</p>	<p>calculating 33:20 call 26:11,12,24 26:25 35:20 39:13 40:8 45:14 called 26:6,7 39:4,17,19,21 53:2 candidly 34:22 capital 42:7 care 39:2 cared 3:24 case 3:10 4:12 4:16 5:14 6:8 6:11 8:2,5,15 8:16,18 9:5,15 11:10 12:7,15 12:17 13:4 14:19 15:14,18 15:24 16:18 18:5,5 19:11 21:25 22:14 24:14 26:9 27:25 31:5 32:13,22 33:21 34:22 37:21 38:4,6,10,12 45:2,16,23 46:25 52:5 55:3,4 cases 6:16 10:15 16:17,24 17:1 17:1,12 18:4,6 23:11,20 27:11 30:16,18 34:11 34:18 42:3,6,7 45:15 48:9 50:10 51:17 54:13 Casket 31:1 43:7 cast 24:25 cause 27:10 centuries 10:23 certain 7:15 23:11 26:4,19</p>	<p>46:10 certainly 42:23 43:17 44:17 50:19 51:6 challenge 3:21 4:7,15 20:3 challenges 3:13 4:17 7:9 change 8:15 10:4 20:9 21:15 27:2 changed 9:7 21:13 43:10 52:10 changes 40:8 changing 23:1 51:23,25 characterize 53:1 Chief 3:3,8 6:19 7:5,13,24 11:15,20,24 13:23 14:4 16:20 17:10,17 17:23 18:13,16 18:23 19:16,24 24:25 25:18,25 27:16 28:3 29:23 30:3 42:14 53:14,19 54:20 55:1 choice 19:11,12 choose 5:11 11:16 13:16 21:4 26:24 chooses 4:11 21:11 chose 11:14 citizenry 37:25 civil 48:9 claim 5:12 14:12 18:25 20:14 21:12 34:11 46:1 51:13 claims 11:17,18 11:21 14:17 28:9 50:21</p>	<p>54:2 clause 4:3,4,22 5:17 9:6,7,8,9 18:19 26:2 41:5 clear 22:9 30:13 32:8,9 close 40:9 coherent 49:21 collateral 8:3 38:25 46:16 51:18 come 12:9 13:14 14:19 22:19 28:9 40:8 48:6 52:25 comes 15:11 16:1,9 20:1 comity 22:5,6,17 22:23 23:5 43:23 44:17 common 19:2,4 19:6,12,15,17 19:21,22,22 47:7 companion 18:5 competing 35:14 complicated 28:19 concede 4:24 concept 12:24 concern 28:12 35:14 36:19,20 36:21,22 44:1 44:18 concerned 20:17 37:21 concerns 43:23 44:15,17,18 condition 35:15 conduct 54:14 conducted 37:9 confrontation 3:25 4:1,3,4,22 5:17 9:6,7,8,8 18:19 21:9</p>	<p>26:2 46:2,4 confused 15:15 confusion 49:9 Congress 16:22 17:3,7,14,14 17:25 47:15 48:14,16,22 49:10 consequence 32:23 33:3 consider 5:11 8:1 11:20 14:10,12 44:9 considerations 35:4 considered 12:9 considering 8:1 consistent 25:13 constitution 4:2 4:18 6:17,22 10:5 13:15 14:8 15:6 18:11 20:7,12 22:20 25:7 28:6 29:14 30:10 34:6 37:14 38:17 42:3,5 45:21 45:22 47:14 48:20 49:12 50:7,20,22 51:3,7,16 52:13 53:10 constitutional 3:13,17,22 5:24 8:15,17 8:20,25 9:2 12:1 14:10,22 15:7 18:8 19:20,21 21:19 30:6,7,15,21 31:7 38:18 40:13,18,23 42:11,11 45:8 45:10 47:1,1 48:1,11 49:12 50:6,12,14,15</p>
--	---	---	---	--

<p>52:4 54:1,9,12 constitutionally 47:8 construing 42:24 content 38:23 52:9 context 3:18 12:15 14:4 contexts 5:11 contradicting 9:23 control 12:12 23:14 43:16 controlling 22:3 26:15 controls 30:5 convicted 39:22 conviction 3:14 4:7,15,17 5:16 8:2 9:3,4 20:3 21:8 40:7 43:21 44:5 49:25 50:13 52:5 53:23 convictions 3:21 5:5 8:9 12:10 39:1 53:23 corpus 5:25 6:6 11:3 12:10 14:15 27:12 40:17 47:13 49:4,14 correct 6:13 16:12 20:23 24:15 25:16 26:20 30:24 33:23,24,25 34:4 costly 12:19 costs 3:20 53:22 countless 13:25 County 1:18 course 16:11,19 court 1:1,12 3:9 3:10,11,15,18 4:6,7,15 5:10</p>	<p>5:15 6:2,4 7:8 7:18,25 8:19 8:25 9:5,20 10:4,20,23,24 11:2,6,23 12:8 12:8,10,11 13:13 14:10,14 14:21 16:1,2 16:14 17:8 18:6 20:1,3,11 20:18 21:10,10 21:18 22:9,12 23:7,8,13 24:21 26:2,18 27:15 28:1,4,9 28:10,16,22 29:2,12,18 30:4,7,13,25 31:24 32:11,12 32:13 33:10,17 34:4,15,22 37:12,21,25 38:13 40:12 42:25 43:20,22 44:2 45:5,7,23 46:3 47:14 48:19,20 49:1 49:3,11,20,22 50:3 52:24 53:21,23,24 54:4,17,18,22 courthouse 22:3 courts 3:13,16 3:18 5:3 11:7 11:11 17:20 20:22 22:2,7,7 23:14 27:21 28:8 29:10,16 29:19 32:14,16 32:21 43:11,12 43:15 46:10 48:17,22 49:5 51:19 53:4 Court's 4:5 6:25 7:7 8:6 11:12 15:2 28:5 30:16 42:21</p>	<p>43:4 47:6 cover 47:9 Crawford 5:8 6:24 7:1,4,10 7:17 8:5 9:6,12 10:14,16 11:17 12:3 21:12 22:8 38:6 39:1 39:7,8,17,17 39:23,24,25 41:2,20 45:3 46:7,9,12 50:10 Crawford's 41:15 create 40:17 creating 5:3 crime 32:25 criminal 3:22 40:18 44:3,19 cut 10:19,20 33:17</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 Danforth 1:3 3:4 4:16 14:9 18:25 Danforth's 5:16 21:8 date 32:2 33:5,6 39:10 day 10:14 27:14 39:8 46:8 dealing 38:11 decide 24:17 25:12 26:22 28:9 29:10,11 29:16,19 53:25 54:4,5 decided 5:8 12:15 25:21 decides 26:3,10 26:12 deciding 3:11 decision 4:21 7:8 11:6,12</p>	<p>15:5,25 16:3 16:10,11,13 19:5 20:25 22:5,9,19,21 22:23 23:3,7 24:11,12,21,22 25:5,9 26:13 27:7 28:14 29:2 30:11 31:7,8 36:15 36:17 46:8 47:9 48:2 decisions 3:20 12:3 21:20 24:3 36:18 48:19 decision-maki... 36:10 37:9 default 21:15 defendant 28:23 28:25 30:16 33:1 36:22 45:25 46:1 49:13,23,24 50:20 defendants 29:5 40:19 defendant's 14:7 50:13 Defender 1:16 defense 6:5 define 32:14 defined 32:21 34:20 defines 32:9 46:25 defining 26:6 36:12 definitely 14:5 degree 24:13 37:1 delayed 39:20 depart 6:9 departure 35:6 depend 15:13 17:7 23:20 depending</p>	<p>31:22 32:4 depends 12:5 Deputy 1:18 described 14:16 describing 49:11 design 50:6,15 despite 16:2 destroyed 32:17 determination 6:2,23 7:19 8:7 8:14 22:24 23:2 27:22 31:6 determinations 7:22 28:2 determine 14:22 determines 30:7 Diamond 1:18 2:5 29:25 30:1 30:3,12,24 31:10,17 32:7 33:8,14 34:2 34:19 35:11,24 36:7,13 37:3 37:19 38:9 40:5 42:13,18 42:19 43:17 44:6,11 45:6 45:19 46:20 47:17,20 48:7 48:24 49:8,16 50:5 51:4,21 52:11,19 53:6 53:12,15 54:9 different 10:21 17:6 28:19,20 29:4 31:12 33:1 35:2,3 39:5,6 45:8 51:22 differently 37:15 difficult 6:1 38:10 43:2,5 45:10,12 direct 12:23</p>
---	--	--	---	--

14:20,21,23 15:8,9,19 28:17,21,25 30:19 31:23 32:5,10,22 46:13 51:12,17	either 4:22 13:16 26:11,24 30:22 48:21	exceptions 7:16 50:10	48:15	40:7 44:5 45:16 50:1,13 52:5
direction 8:7 directly 42:24 disagree 7:21,25 12:24 27:21 28:5 36:13 48:7	elements 7:1,14 eloquently 44:14	exclusion 13:5 13:10	fashioning 35:16	finality 31:16 32:8,10,14,17 32:19,19,21 33:18,19 35:13 35:15 36:6,8 37:8 44:15,18 49:21 53:21,22 54:2
disagreement 6:24 7:2,2,7,10	enact 47:15 enactment's 16:21	exclusionary 12:18,19,25 13:20 17:11 27:4 50:25	favor 18:17	find 5:25 27:11
discretion 7:20 7:24 21:5	ended 50:12 enforcing 45:8 enjoy 49:23,24 entire 37:10 entitled 44:4 51:24	exclusively 22:6 Excuse 35:24 executive 20:16 20:21 21:3,14 44:25	Federal 3:13,17 3:22 4:17,23 5:12,13,14,15 6:15,17,19 7:19 8:14,20 11:3 12:10,13 12:24 15:6,7 16:10 17:14,15 18:10,11,17,20 19:5,17,18,20 19:21,22,25 21:3,10,16 22:7,14 27:2 27:22 28:2,5 29:13 30:5 31:8 32:3,14 32:21,24 34:20 37:11,12,16,17 37:22,22 38:15 38:17,18,21,22 39:4 43:12,21 43:22 45:13,22 46:23,23 47:4 47:7,13 48:5,8 48:20,21,25 49:3,4,5,14,23 49:24 50:4,16 50:17 51:3,7 51:10,15,19 52:13 53:4 54:4	finished 23:22 fire 51:1,7 first 3:4 13:4 32:7 39:17,24 40:1 42:20 44:22 45:6 47:20
disruptive 12:21 dissents 36:15 distinction 13:24,24 14:3 17:24 24:24 25:1 27:17	enunciate 40:12 ephemeral 14:1 equally 34:12 equitable 34:13 35:3	executives 44:24 exercise 23:13 exercises 12:12 exist 30:22 existence 34:14 exists 30:22 expansive 17:22	fixed 52:4	follow 48:17 followed 11:12 following 54:12 force 12:21 forces 43:9 forcing 13:1 foreclose 5:25 forever 39:20 form 6:6 forth 6:14 forum 37:16,17 43:24 48:12 forward 10:14 Fourth 12:20 13:6,7,10,14 14:7 51:10,14 51:17 52:8 framers 34:25 frankly 47:22 49:18 free 3:15,16 11:7 19:6 24:6 24:17 49:7 50:16 54:24
doctrine 20:24 doing 42:10 doors 22:3 doubt 24:25 35:16 dramatic 35:6 draw 13:1,2 drawing 24:24 drawn 30:19 draws 27:23 driven 37:7 43:14 D.C 1:8	equivalent 36:17 especially 18:6 ESQ 1:15,18 2:3 2:5,8 essentially 38:11 establishes 33:20 eventuated 23:20 everybody 27:7 41:21 evidence 13:5,11 13:16 38:12 exactly 7:16 9:11,12,24 31:17 example 6:10 8:6 17:19 18:4 31:1 34:21 35:1 38:10 42:23 45:23 48:9 50:20 examples 27:11 exceed 50:17 exception 34:13 34:15,17	expectation 31:14,14,15 36:4 expectations 31:5 35:22 36:5 37:2 44:2 44:8,25 expiration 30:19 explain 34:4 explanation 41:11,13 explicit 43:6 extend 46:23 51:16 extension 12:19 extent 21:19 24:5 26:19	final 3:21 5:5 8:9 9:3,4 10:15 16:17 21:8,20 32:22,22 36:3	
<hr/> E <hr/>		<hr/> F <hr/>	federalism 46:17 Feds 22:25 43:14 feel 11:7 file 27:13 final 3:21 5:5 8:9 9:3,4 10:15 16:17 21:8,20 32:22,22 36:3	
E 2:1 3:1,1 earlier 22:25 23:8 28:13 36:1 39:10 effect 8:12 9:22 19:3 22:17,18 22:23 23:1 32:20,20 33:20 39:7 46:8 effects 47:13		fact 10:23 16:2 32:3 44:21 45:9 facts 15:14 23:20 fair 35:18 44:21 far 20:17 fashion 3:15,16		

<p>full 40:14,20 54:1 functional 36:17 further 6:22 18:12 29:21 future 25:12 39:8 46:19</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 gateway 14:17 general 7:25 8:4 Ginsburg 6:7 10:12,22 15:15 16:9,13 20:15 20:24 23:8 26:17,21 37:6 42:17 43:8 44:24 45:12 51:9 give 8:21 18:9 19:4 26:22,24 29:17 34:9,10 34:21 38:21 47:9 given 6:11 33:8 33:21,21 41:3 47:15 glad 35:8 glance 17:11 go 3:12 4:6 18:11 20:2 21:9 28:17 35:4 38:20 41:11 47:21 48:19 51:12 52:20 54:23 goes 6:22 35:18 47:12 51:2 going 5:19,24 8:21 11:17,18 15:11 17:2 20:19 23:24 24:1 25:19,21 28:16 29:1,15 31:22 34:9 37:1,14 39:11</p>	<p>43:15,18 44:20 44:21 45:2,3 46:18 48:25 52:7 53:3 good 8:6 goodness 34:9 gotten 35:1 governing 26:22 government 48:21 grant 17:21,21 gravamen 24:8 greater 26:25 Griffith 6:10,14 11:1,5 15:21 15:23 23:8,17 29:5 30:17 31:21 32:8,9 33:15 34:19 40:6 46:24,25 47:23,24,24,25 49:20,21 50:9 52:2 54:10 grounded 48:1 51:5 group 23:11 26:15 groups 29:4 guess 10:5 12:3 41:5 49:8 52:13</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>habeas 5:25 6:6 8:2,21 9:4 11:3 12:10,13,15 14:15,19,24 16:6 17:1 21:10 27:12,13 36:25 37:12 40:16 41:19,19 42:8,24,25 43:12 46:13 47:13 48:25 49:4,14 51:10 51:19 hand 43:12</p>	<p>handling 42:15 happened 9:13 54:15 hard 18:1 harder 20:13 Harlan 26:5 34:9 36:14 Harlan's 44:12 Harper 43:7 48:10 hear 3:3,18 35:8 41:24 42:4 hearing 5:15 heavy 43:11 held 3:11 14:11 17:12 18:6 22:14 40:3 history 41:4 hold 14:11 40:15 54:17,23 holding 5:19 9:1 9:5 25:3,14 holds 29:18 home 4:24 Honor 4:13 5:6 5:9 6:3,13 9:25 11:10 12:6 13:3,21 15:14 15:22 16:7 17:6 18:3 23:7 24:15 30:12,24 31:10,17 32:7 33:8,14 34:19 35:11,24 36:7 36:13 37:3,19 38:9 40:5 42:13,19 43:17 44:6,11 45:6 45:19 46:20 47:17 48:7,24 49:8,16 50:5 51:4,21 52:19 53:6 honors 36:5 Hudson 12:15 13:2,4,4,9,12 14:4,6</p>	<p>hung 41:1</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 29:14 37:15 39:16 II 32:13,15 imagine 39:15 46:7 Immanuel 41:12 impact 12:2,5 implement 21:4 implicit 36:24 40:15 implied 27:10 important 29:7 36:24 impose 25:10,11 imposed 25:9 inaction 21:15 inconsistent 22:23 31:25 33:6 incorrect 3:14 individual 32:25 34:10 individuals 34:8 34:10 inevitable 33:10 33:11 initial 8:6 instance 52:10 53:7,8 integrity 36:9 48:2 intent 34:24 interest 19:25 21:19,24 37:4 45:11,13 54:2 interests 20:1 22:1,2 54:1 interpret 9:6 12:13 37:14 47:19 interpretation 12:2 28:5 41:4 48:18</p>	<p>interpreting 34:24 47:18 intrusion 37:8 37:20 intrusive 43:20 involved 31:5 44:3 ironic 43:13 issue 4:20 6:7 14:19 18:18 27:14 38:12 42:24 45:1,1</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>J 1:15 2:3,8 3:6 53:17 jail 5:20 39:22 41:21 Jones 39:21 41:17,18 judge 37:22,25 43:20,22 45:11 judges 48:21 judge-made 47:11 judgment 22:20 36:4 45:17 judgments 21:20 22:4 31:16 judicial 36:9,18 36:18 44:19 48:2 jurisprudence 3:16 4:3,5 15:3 15:17 42:21 43:4 49:19 justice 3:3,8,23 4:2,9,19 5:2,7 5:18,22 6:7,19 6:21 7:6,13,24 8:4,11,12,13 8:22,23,24 9:11 10:1,6,9 10:12,22 11:4 11:15,20,24 12:14 13:18,23</p>
--	--	---	--	---

<p>14:4,18,25 15:5,10,15,24 16:6,9,13,20 17:10,18,23 18:13,16,18,23 19:1,9,10,15 19:16,24 20:5 20:10,15,23 21:2,6,17,21 22:8,11,16,18 23:8,15,19,23 24:1,9,10,10 24:16,23,25 25:16,18 26:1 26:5,17,20,23 27:3,6,13,16 28:4,12 29:23 30:3,8,18 31:4 31:13,18 32:18 33:7,11,12,19 33:24 34:3,8 34:21 35:8,15 35:20,22,25 36:1,11,14,19 36:21 37:6 38:2,19 39:6 39:15 40:10,11 41:2,8,8,13,23 41:25 42:14,17 43:8,25 44:7 44:12,19,24 45:12 46:5,6 47:3,18 48:4 48:16 49:2,14 50:2,23 51:9 52:11,23 53:11 53:13,14,19 54:7,20 55:1</p> <hr/> <p style="text-align: center;">K</p> <p>Kant 41:12 Kennedy 3:23 4:3,9,19 5:2,7 6:21 8:4,12,23 12:14 13:18 18:18 21:17,21 28:12 31:4,13</p>	<p>35:22,25 36:21 38:2 43:25 44:7 kind 18:1 25:9 44:20 knock 27:7 50:23 knocked 41:18 knots 4:10 know 6:1 21:23 23:12,12,16 24:25 25:23 28:16 29:1 32:3 34:8 39:24 40:21 45:14 51:10,14 knowing 8:8 28:13 knows 10:24 23:10 Krasky 38:11,13 38:15</p> <hr/> <p style="text-align: center;">L</p> <p>larger 26:25 late 27:14 Laughter 10:8 10:11 34:1 35:10 41:7 42:16 law 4:23 5:14 6:15 7:19 8:14 9:24 10:2,3 11:10 13:22,25 15:1 16:22 17:7 18:11,14 18:17 19:2,4,6 19:12,15,15,18 19:21,22,22,23 20:4,14,17,18 21:1,3,7,13,16 24:18,19 27:2 27:18 28:2 30:5 31:8 32:3 34:20,23 35:2 35:5,7 36:5 37:5,11,24</p>	<p>38:21,22,24,24 39:25 40:1,2,8 41:15,15 45:25 46:8,18,22 47:7 53:3 lawful 19:18 laws 51:5 lays 44:14 leading 19:12 left 29:9 legal 22:20 legislative 16:21 legislature 52:15,17,20,22 52:24 53:5,7,9 legislatures 3:19 28:8 letting 42:12 let's 16:22 23:15 level 33:9 liked 34:5 limit 6:4 36:25 limitation 31:2,3 42:20 43:3 limitations 14:15 line 30:19 37:10 lines 13:1 28:20 Linkletter 10:25 11:5 22:12 43:10 listen 28:10 litigants 35:17 litigant's 5:12 little 20:16 43:13 lo 10:17 long 14:25 15:3 19:3 27:1 28:21 31:23 32:4 37:18 39:2 41:4 look 14:3 17:19 22:22 27:10 38:10 44:12 48:9 52:24 Lorton 52:3</p>	<p>lot 39:3 lots 27:9</p> <hr/> <p style="text-align: center;">M</p> <p>Mackey 26:5 36:15 making 8:15 10:2 34:5,11 41:6 48:3 mandated 47:8 manner 35:18 matter 1:11 7:19 18:13 19:6 20:4 21:10 29:10 30:25 32:2 33:10 38:17,21,22 46:21 50:16,19 55:5 maximums 6:20 McKesson 18:5 18:6 mean 9:14 17:25 22:4 24:18 38:7 42:4 meaning 10:5 means 4:9 8:17 9:12,13,14 38:7 meant 9:8 merits 5:12 14:12 metaphysical 39:14 metaphysically 39:25 40:12,13 metaphysics 39:14 40:22 41:1 minimum 6:14 18:10 29:15,19 53:9 54:11,24 minimums 6:20 53:1 Minn 1:16,19 Minneapolis 1:16,19</p>	<p>Minnesota 1:6 1:15 3:4,10,12 3:24 14:9 22:9 28:24 37:20 38:11 45:23 46:3 50:22 51:6 52:14,17 52:20,21,23 53:4,5,7,8 minute 53:16,20 misinterpreted 10:3 25:7 mismanaging 15:2 modify 48:15 months 28:24 29:1,4 morning 3:4 motivating 37:15</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:1,1 3:1 necessarily 4:10 7:6 21:23 necessary 6:8 35:17 36:9 need 13:14 never 45:25 46:1 46:1 new 3:22 6:15 6:16 8:1,7 9:13 9:14,18,19,20 9:21 10:2,13 15:18,25 16:14 16:19,24 17:11 20:17 23:9,10 30:6 31:22 32:5 34:6,23 35:2,5,20 40:12,14,17,20 40:23 41:6 42:10 43:21 45:15 50:12 54:13 newly 9:24 non-retroactive</p>
---	--	--	---	--

<p>24:4 non-retroacti... 30:6 norms 48:1,11 54:9,11 notion 35:4 37:8 42:22 43:3,6 no-knock 12:16 12:17,25 13:7 number 5:11 nutshell 24:7</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 obviously 27:25 occurred 20:8 44:22 October 1:9 odd 20:16 officer 51:1,8 oh 9:23 42:3 43:15 okay 16:1 22:25 old 17:1 once 9:18,19 47:10 operative 32:20 32:20 opinion 13:9 21:18,22 40:20 43:14 opponent 48:23 49:6 opportunity 32:11 opposed 26:14 35:3 37:23 52:5 option 4:10 optional 37:22 oral 1:11 2:2 3:6 30:1 order 36:12,12 original 41:4 originalists 9:17 ought 5:4 13:2 16:25</p>	<p>outset 30:9 outside 12:14 outweigh 19:25 54:2 overlooking 24:23 overturn 28:2 43:21 overturned 37:24 owes 18:8</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 4:19 pardon 38:5 part 6:8 12:1 15:16 31:4 48:13 particular 6:5 16:23 20:12 30:21 particularly 44:3 pass 28:21 52:17 passed 17:7 30:20 passes 16:22 passing 32:16 PATRICK 1:18 2:5 30:1 Payne 30:16 pending 6:16 17:1 28:17,20 34:12,18 54:13 Pennsylvania 32:16 people 26:4,4 31:14 33:4,5 33:16 39:1,15 42:2 46:10,13 perceptive 20:18 period 11:4 person 18:9 20:2 31:23 39:17,19 39:21 40:3</p>	<p>46:11,12 51:24 person's 52:3 petition 27:13 32:12 Petitioner 1:4 1:17 2:4,9 3:7 4:6 38:5,8 53:18 Petitioner's 9:3 phrase 54:10,11 pick 11:16,16 39:11 pipeline 15:18 15:25 45:15 place 10:21 42:1 44:22 places 26:7 please 3:9 30:4 point 7:14 9:9 11:10 19:7,8 22:18 26:23 30:21 31:10,19 32:9,10,19 33:14,18,19 35:12,13,14 36:7,8,8 37:6 38:8 39:14 40:5,6 44:4 45:11,20 46:5 46:20 49:17 50:14 52:13 54:7,8 pointed 6:21 18:18 39:15 points 7:20 8:23 32:7 53:20 policy 3:19 7:8 7:25 8:4 position 10:1,6,9 13:19 14:21 24:2 25:4 38:3 38:14 39:9 42:2 possibility 8:8 post 25:13 postulating 52:6 posture 12:9,11</p>	<p>post-conviction 26:9 44:13,14 44:16 52:8 post-finality 49:22 Powell 51:11 power 10:4,6,10 12:12 17:21 28:1 40:12 45:5 47:6 practical 46:9 precedent 45:15 precisely 40:4 predict 37:14 preempt 19:22 preserve 27:14 prevail 38:4,5 prevented 3:11 prevents 5:14 50:4 pre-finality 52:21 primarily 22:6 principle 31:3 40:16 prior 8:18 prisoner 4:14 prisoners 3:12 3:21 private 31:15 probably 20:13 29:1 34:5 51:22 problem 4:25 5:2 41:22 46:22 49:4 50:6 problematic 25:19 problems 38:3 procedural 6:4 11:21 12:9 21:15 29:11 procedure 19:12 33:1 40:18 proceeding 38:25 46:3</p>	<p>proceedings 12:23 33:9 46:16 47:13,14 49:15 process 10:17 26:8,16 28:22 32:10 37:10 39:20 43:20 49:22 51:12 processes 29:12 43:11 44:2 propelling 43:9 propose 3:23 prosecution 15:25 16:10,14 prosecutor 45:4 prosecutorial 21:5 prospective 17:4 17:15 protection 26:22 50:2,3 prove 34:15 provide 50:3,12 52:15 provides 16:22 50:7 providing 33:16 53:9 provision 18:21 47:14 prudential 6:4 14:16 Public 1:16 purporting 34:16</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualifies 48:4 question 3:17 4:7,12,13,15 5:12,13,16 8:24 9:25 10:19 11:14,22 14:5,6,8 15:10 17:6,17,20 20:2,6,6,8 27:2</p>
--	--	--	---	--

28:18 30:14,23 31:8 32:15 33:7,12 36:1 38:16,19,21,23 42:17 43:19 47:4,20 48:14 49:9 52:1,7,12 52:12 54:3 questionable 4:23 questions 5:4 29:21 35:23 42:15 44:8,9 quick 39:22 53:20 quintessentially 20:4 quite 41:3 quote 24:18	redo 37:18 references 40:14 refers 6:25 refined 11:2 regard 38:3 regardless 43:24 regime 5:3,10 43:10 regulate 48:5 regulating 47:12 rejected 27:18 rejection 43:6 relates 45:9 reliance 17:23 relief 19:5 34:9 34:10 rely 44:4 50:17 51:7 relying 18:20,22 18:23 19:2 remaining 53:16 remedial 19:6 20:2,6 27:6 42:20 43:3 remedies 17:21 19:19 25:2 26:3,3,5 29:17 41:14 remedy 5:25 8:21 13:15,24 14:5,8 16:23 16:23 17:11,12 17:14,15,20,24 17:25 18:9,10 19:4,13 25:4,9 25:10,13,15,17 25:20,22,24 26:11,11,25 27:9,10,14,15 27:19,23,23 30:11,22,25 31:2 35:3,4,16 35:18,23 44:9 50:25 51:5 remedy-and-r... 52:1 remember	32:14 45:21 rendered 53:23 53:24 reply 4:19 representing 37:20 require 13:10,15 35:7 41:11 48:17 54:12,13 54:16 required 13:5,8 14:8 17:12 26:3,5 45:17 requirement 37:23 38:18 47:1 50:11,15 50:17 requirements 6:15 7:3 18:10 28:22 29:15 30:7 32:16 50:8 requires 6:18 19:5 51:3 53:10 reserve 29:22 resistance 43:11 resources 44:20 respect 21:3 22:7 32:2 40:3 43:10 45:14 respectfully 7:5 21:7 43:19 Respondent 1:19 2:6 29:7 30:2 responsible 6:2 26:6 rests 19:11 result 33:22 retroactive 8:16 9:22 10:14,24 11:6 14:22,23 15:7 16:3,4,15 16:16,17,24 18:1 22:21 23:3,16 24:4	24:12,13 25:4 25:15,20 26:14 26:19 27:1 31:7 45:3 retroactively 6:24 11:8,18 15:21 17:3,8 17:13 24:4,5,7 26:13 39:1 40:19 41:21 retroactivity 11:12 15:3,17 22:10 23:4,6 23:24 24:2 30:5,9,13,14 31:3,11 32:13 40:15 42:21 43:4 49:19 retro-applicat... 18:17 review 4:23 8:3 12:10,23 26:10 28:18,21 30:20 32:5,12,23 38:7,14,25 43:1 51:18,18 reviewed 37:24 reviewing 22:4 revision 36:16 Reynoldsville 31:1 43:7 48:10 right 4:24 7:17 7:17 12:4 13:24 14:5 17:24 18:1 20:2 23:23 25:8,20,22 27:20,21,22,24 28:14 31:9 35:16 37:2 38:8 39:11,13 45:10 49:23,24 51:17 52:4,4,8 52:9,9 rights 5:24 14:7 14:10,23 18:8	25:1 27:9 31:11 40:2 45:9 46:2 51:24 53:4 ROBERTS 3:3 6:19 7:13 11:15,24 13:23 16:20 17:10,23 18:13,16 19:16 25:18 27:16 29:23 42:14 53:14 54:20 55:1 role 45:8 rule 3:25 4:1 6:15,16,20,22 7:18,25 8:1,5 9:14,14,15,15 9:18,20,21 10:13 11:20,21 11:25 12:7,18 12:20,25 13:20 15:7,18 16:14 16:19 20:11 22:10,17,21 23:9,10 27:4 31:22 32:1,5 32:24 33:4,21 33:22 34:6,7 34:16,17,23 35:2,2,5,6,21 39:4,4,7 42:11 43:21 44:13 47:4,4,6,8,11 48:18 49:10,11 50:4,12,25 52:14,16 rules 3:22 6:19 9:19 14:16 22:15 29:11,13 29:15 40:13,14 40:18,19,20,23 40:25 41:6 52:25 53:2 54:13 ruling 9:23 38:6 47:5
R				
R 3:1 raise 3:13,17 20:20 45:2 raised 45:25 46:2 50:21 raising 46:4 51:13 random 36:12 reached 5:4 7:12 45:16 reaching 5:4 read 7:3 really 3:24 5:22 9:1,5 35:8 36:16 37:15 52:14 reason 17:18 34:4 51:22,23 reasons 46:9,9 46:17,17,18 REBUTTAL 2:7 53:17 recognize 43:8 52:7 recognized 36:8 reconcile 31:19				

rulings 30:6	sentence 21:18	31:18 32:18	24:6,16,22	48:16 49:2,14
run 28:24 32:11	54:21	33:11,19 36:11	26:9 27:2,21	50:2,23
S	separate 24:18	36:19 39:15	28:1,4,7,8,9,10	Stevens's 26:23
	27:19 38:20	52:11,23 53:11	28:22 29:3,3	33:7,12
S 2:1 3:1	serious 38:3	53:13	29:10,16,19	Stone 51:11
sat 31:20	set 6:4 49:20	Souter's 36:1	31:24 32:5,25	strike 8:7
saying 9:23 19:3	53:2	54:7	33:2,9,21 37:4	strikes 35:5
19:10 27:21	sets 6:14 26:18	so-called 31:22	37:5,8,9,11,12	strong 19:25
30:10 40:11	setting 12:6	specific 23:16	37:20,21,23,25	subject 12:23
42:2,10 43:25	settings 14:14	30:15	38:1,12,13,16	26:17,21 36:16
44:17 49:22	settled 36:4,5	Spinonza 41:11	38:25 41:20	submitted 55:3
50:9 52:2,18	37:1 44:2,8	square 43:3,5	43:11,15,20,20	55:5
says 9:9,20	45:2	stake 40:7	44:1,24,25	substance 7:10
15:23 16:15,23	short 17:17	stand 42:12	45:5,7,10,13	7:11 18:23
17:25 20:11	shows 20:25	standard 29:5	45:25 46:2,15	21:15 27:1,24
22:22 23:9	silence 41:9	30:15 31:21	46:16,21,21,22	36:5 44:10
32:13 34:9	similarly 33:16	38:13,15 43:1	46:22 47:13	substantive 5:15
39:3 44:25	simpler 41:10	43:1 47:2	48:6,12,17,22	7:1,3,21 8:13
45:14 49:6	41:12	49:12	49:5 50:21,22	12:1,1 18:24
51:11	simply 5:9 21:4	standards 46:23	51:5,5,9,14	19:20,20 22:19
Scalia 5:18,22	22:22 24:18	46:24	53:4,21,23,24	23:2 24:3
8:11,13,22	41:13 54:18,22	start 21:22	54:23	28:14 30:14
9:11 10:9	sit 28:25	started 41:13,23	states 1:1,12	31:9,11 32:3
14:18,25 15:5	situated 33:16	45:20	6:23 15:17	32:24 33:4
15:10,24 16:6	situation 20:9	starts 16:14	25:12 26:24	34:16,17 39:7
20:5,10 21:2,6	45:9	state 1:15 3:12	28:19 36:2,23	45:1 49:23,24
24:11,16 33:24	six 29:4	3:12,15,16,18	37:2,17 38:24	substantively
34:3 35:8,20	Sixth 7:11 18:24	3:18,19,20,24	43:12 50:16	4:11
40:11 41:25	26:2	4:2,6,7,9,14,15	51:20,23 52:25	suggest 6:9
Scalia's 8:24	slow 36:3	4:20,21 5:3,10	53:25 54:4,5	suggested 23:8
10:6 22:18	Smith 31:5,9,14	5:14 6:5,21,22	State's 19:11	suggestion
41:9 46:6	39:19	7:21,24 8:19	37:3 50:11	13:12
scarce 44:19	Smith's 41:16	8:19 9:22 11:5	52:7	supervisory
scope 11:2 26:6	somebody's	11:7,11,15,16	statute 47:12,16	12:12
28:13	18:7 54:8	11:22 12:10,22	49:1 52:17	supports 29:14
search-and-se...	somewhat 17:6	13:13,19,22	statutes 12:13	42:22
51:13	sorry 48:13	14:9,20,22	statutory 19:15	Suppose 50:23
second 39:19	sort 18:9 29:6	15:1,1 16:1,2	staying 43:14	suppress 13:16
48:13	36:11 37:22	16:25 17:8,13	step 37:17	supreme 1:1,12
Secondly 32:12	47:3	17:20 18:8,9	STEPHEN 1:3	3:10 11:6,7
sector 31:15	source 47:6,21	18:14,19 19:2	Stevens 10:1	14:20 16:1,2
see 6:14 20:19	47:23,24 49:8	19:3,5,6,12,14	24:23 25:17	22:9 24:21
33:12 35:3	54:8	19:15,22 20:1	27:3,6,13 30:8	52:24
44:14 45:10,13	Souter 19:1,9,10	20:3,4,9,14,16	30:18 34:21	Sure 18:13
47:21 53:7	19:15 22:16	20:21 21:2,9	35:15 39:6	surprise 40:23
54:18	23:15,19,23	21:11,13 22:2	41:2,13,23	40:25
sense 35:2	24:1,9,10	22:7,12,25	47:3,18 48:4	system 31:24

32:5 44:3 48:5 48:6,9	term 30:9	three 39:15,16	24:14	14:7,11 20:7
	terms 12:16	tied 4:10	underlying 7:16	40:21,22,24
<hr/> T <hr/>	33:15,16 40:2	time 9:2,3 10:20	understand 7:14	42:3,6
T 2:1,1	42:20 44:15,18	20:7,12 21:8	19:2 24:24	violates 5:16
take 4:20 10:18	45:8 48:8,14	28:11,20 29:22	25:3 32:18	violation 8:17
12:22,24 21:12	49:11 50:7	30:21 33:1,10	35:6 46:7 49:9	8:20,25 9:2
24:2,11 29:3,4	territory 43:15	39:22 40:1,4	49:10	12:18 13:6,7
39:9 43:13	test 11:1 22:13	41:15,16,16	understandable	13:14 18:7
46:5,8,10,11	26:1	49:25 53:7	34:18	21:9 25:6,8,14
46:12,13,15,21	text 10:5	54:18	understanding	26:1,12 27:8
taken 34:7	thank 29:23,23	today 11:11 25:7	47:5	29:18 30:10,21
takes 28:21,24	53:14,19 54:25	40:16	uniform 33:22	35:19 42:12
31:23 32:4	55:1	toes 37:17	uniformity 29:6	50:24
39:7	theoretically 4:5	told 37:12	33:15 36:2	violations 29:17
talk 25:17	thing 9:9,18	totally 25:13	44:16	virtue 41:22
talked 48:11	39:5,6 43:22	27:19 34:18	United 1:1,12	<hr/> W <hr/>
talking 49:3	things 29:9	52:12	52:25	waived 50:21
talks 47:24,25	31:12 38:20	touch 6:11	unnecessary	waiver 20:24
tax 18:4	43:18 49:17,18	treat 34:12	41:5	21:14 32:16
Teague 5:19,23	think 4:13 5:18	treating 35:17	upset 8:9 21:20	Walker 12:16
6:3,10,25 7:8,9	5:21,22 7:6,6	treats 49:21	37:1 44:25	want 8:19 10:19
7:14,15 11:1	8:11,22 9:11	trial 10:16 12:23	upsetting 53:22	18:20 21:11,17
11:20,25 12:7	9:12 11:19,22	27:15 32:25	use 22:15 29:11	25:23,25 26:11
12:7,9 14:13	11:25 15:4	40:3 41:16,16	30:9 34:6	26:12 28:11
14:16 19:17	16:12,25 17:5	41:17 44:20,22	usually 11:2,11	36:23 38:25
20:11,20,21,25	17:16,17,18	trials 23:21	11:12 44:7	39:10 41:25
20:25 21:11	18:3 19:19,19	37:18 39:16	<hr/> V <hr/>	42:4 43:16
22:4,5,14,15	21:7,22,23	40:1	v 1:5 3:4 12:16	45:1,15,18
22:17,22 23:5	24:16 25:1,16	Trucking 18:4	51:11	46:18 50:24
31:1 35:21	27:17,23 30:12	43:6 48:10	validity 8:1	52:15
37:7,16 39:3	30:16 32:8	true 7:6 20:10	value 36:24	wanted 28:12
40:14 41:14,19	34:3 35:11	21:7,23	values 36:25	wants 14:9
42:3,6,20,25	36:14,23 38:7	try 47:20	varied 33:8	41:20 46:16
43:3,9,18 44:1	38:9 40:5 42:9	turn 8:23	various 12:13	52:14
44:12 45:2	42:14,19,21,23	Turner 41:1	vary 31:22	Washington 1:8
46:24 47:4,5	43:2,19 44:7	42:1	vehicle 40:17	wasn't 9:21
47:22 48:15,18	44:11 45:7	two 5:13 12:16	versus 12:3	10:16 20:18
49:10,10,17,18	46:6 47:21	29:3 31:12	victims 44:4	40:2
49:19,20,21	49:1,17 50:5	32:7 38:20	view 9:23 12:22	watershed 7:17
50:8,9 52:2,18	51:4,6,16,21	39:24 40:1	21:13 30:20	way 4:22 14:3
53:2,3 54:3	52:19 53:6,8	50:10 53:20	32:1 35:13	19:4 25:19
Teague's 8:2	thinks 29:7,7,13	<hr/> U <hr/>	vindicated 37:4	33:13,20 46:19
tell 43:16 48:22	third 39:21 40:3	ultimately 19:11	45:13	47:18
49:5	thought 11:13	unable 45:24	vindicating	Wednesday 1:9
telling 42:2	15:16,21 19:17	unclear 11:13	45:11	weigh 22:1
43:12	27:25 34:24	underlies 23:5	violated 5:24	53:21
	37:7,15			

well-known 32:19	10:01 1:13 3:2			
went 41:18	11 44:21			
we'll 3:3 21:12	11:03 55:4			
53:2	15 28:24 29:1			
we're 5:19,24	<hr/> 2 <hr/>			
7:23 8:15,21	24 :19			
11:18 20:17,19	2007 1:9			
34:5,22 42:9	<hr/> 3 <hr/>			
42:10,12 43:15	3 2:4			
45:21 51:23	30 2:6			
54:17,18	31 1:9			
we've 16:2	<hr/> 5 <hr/>			
Wharton 46:25	53 2:9			
50:9,9				
Williams 36:15				
win 39:12				
wins 39:18				
wishes 54:23				
word 13:8				
words 7:2 15:3				
19:18 43:23				
52:21				
world 10:7,10				
worse 21:14				
wouldn't 8:8				
38:14 41:25				
writ 26:7				
write 21:17				
writing 44:12				
wrong 4:21				
wrongs 25:11				
wrote 31:1				
<hr/> X <hr/>				
x 1:2,7 33:5,6				
<hr/> Y <hr/>				
Yates 30:17				
year 39:10,16				
years 10:3 29:3				
44:21				
yellow 4:20				
<hr/> 0 <hr/>				
06-8273 1:5				
<hr/> 1 <hr/>				