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IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X  
WILBERT K. ROGERS, :  
Petitioner :  
v. : No. 99-6218  
TENNESSEE :

- - - - -X  
Washington, D.C.  
Wednesday, November 1, 2000

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:00 a.m.

APPEARANCES:  
W. MARK WARD, ESQ., Assistant Shelby County Public  
Defender, Memphis, Tennessee; on behalf of the  
Petitioner.  
MICHAEL E. MOORE, ESQ., Solicitor General of Tennessee,  
Nashville, Tennessee; on behalf of the Respondent.

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

2 (11:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 98 -- 99-6218, Wilbert Rogers v. Tennessee.  
5 Mr. Rogers.

6 ORAL ARGUMENT OF W. MARK WARD

7 ON BEHALF OF THE PETITIONER

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

10 In two cases, Bouie v. City of Columbia and  
11 Marks v. United States, this Court stated that ex post  
12 facto principles apply to judicial decisions under very  
13 narrow circumstances, and that's only when those judicial  
14 decisions are unexpected and indefensible based upon the  
15 law that's been expressed at the time of the conduct in  
16 question.

17 This case involves a misapplication of this rule  
18 of law by the Tennessee Supreme Court. In this case, the  
19 Tennessee Supreme Court held that its decision to overrule  
20 itself and to overrule a 700-year-old rule of law was not  
21 unexpected and indefensible based upon this test that this  
22 Court adopted.

23 QUESTION: Has the Supreme Court of Tennessee  
24 ever applied the year-and-a-day rule to a case?

25 MR. WARD: The court has recognized it since

1 1907, Your Honor.

2 QUESTION: I -- that wasn't my question, because  
3 I think your opponent says it was dicta. Do you say it  
4 was not dicta, that it actually let somebody off on that  
5 basis?

6 MR. WARD: It was not dicta in that case. In  
7 1907 in Percer v. State, if I could explain --

8 QUESTION: Yes.

9 MR. WARD: -- the court reversed in Percer v.  
10 State for numerous reasons. Among those, they tried the  
11 defendant without the defendant being present.

12 One of the reasons they reversed was because  
13 they put on proof during the trial as to the date of the  
14 death of the deceased, the witness said that it happened  
15 sometime in July, but never testified as to what date,  
16 what day of the month in July, or what year in July. The  
17 court in -- the Tennessee Supreme Court referenced the  
18 year-and-a-day rule and reversed the case, because absent  
19 some evidence of what date and year there was a death,  
20 then there could be insufficient evidence.

21 QUESTION: Well, was it reversed because the  
22 case shouldn't have been brought, or because the testimony  
23 was not relevant?

24 MR. WARD: The court -- the Tennessee Supreme  
25 Court in 1907 listed numerous reasons and said for all of

1 these we reverse. It's not like they said --

2 QUESTION: Yes --

3 MR. WARD: -- specifically, this is the one  
4 we're going to reverse on.

5 QUESTION: Well, but they didn't then analyze  
6 separately the year-and-the-day rule, or -- you -- I  
7 thought you'd said that a witness testified, and the  
8 witness said something happened in July but she didn't say  
9 when.

10 MR. WARD: That's correct.

11 QUESTION: And I'm curious whether the Supreme  
12 Court of Tennessee in invoking the year-and-a-day rule  
13 said it made the witness' testimony irrelevant, or did  
14 it -- does the year-and-a-day rule mean that the entire  
15 prosecution shouldn't have been brought?

16 MR. WARD: Well, what the court stated was that  
17 absent the -- they -- it was really a very --  
18 one-paragraph opinion, a very short opinion. They --

19 QUESTION: The whole opinion was one --

20 MR. WARD: No. Most of the paragraph was -- the  
21 opinion was taken up with the discussion of trying the man  
22 in absentia.

23 QUESTION: Absentia.

24 MR. WARD: Then there was about a half-a-page  
25 paragraph that dealt with two issues. One was, was this

1 indictment returned before the date of the offense or not?  
2 The other one was the year-and-a-day rule, and absent this  
3 testimony there was insufficient proof before the court as  
4 to either fact, the year-and-a-day rule or when the  
5 offense was occurred, so I contend it was not dicta in  
6 that case.

7           And in this case, Your Honor, State v. Rogers,  
8 the court, the Tennessee Supreme Court said, we have  
9 recognized the year-and-a-day rule in Tennessee since  
10 1907.

11           QUESTION: Mr. Ward, there -- this case has an  
12 aura of unreality about it. Your client apparently  
13 attempted to murder the victim by stabbing him in the  
14 heart with a butcher knife. Now, he didn't have any  
15 settled expectation that he wasn't going to be accused of  
16 murder, and yet he wants to take advantage of this  
17 year-and-a-day rule. I mean, what does it serve?

18           It's some concept of fair warning or  
19 expectation, but at the time the crime was committed, I  
20 guess he hoped the victim would die, and I don't see that  
21 your client has been deprived of any kind of an  
22 expectation.

23           MR. WARD: Well --

24           QUESTION: Regardless of what we do with the  
25 year-and-a-day rule.

1                   MR. WARD: Well, with regard to fair warning my  
2 client was entitled objectively.

3                   Subjectively, I have to admit it is very  
4 difficult to ever prove that any criminal defendant relies  
5 upon the state of the law at the time that he or she  
6 commits an act, but objectively he was entitled to rely  
7 upon the year-and-a-day rule if the victim did survive.  
8 But more importantly than that, after the fact, after he  
9 was charged, fair notice and reliance applies after the  
10 fact also, not just at the time of the act; otherwise, a  
11 defendant who is approaching trial is never going to know  
12 exactly what are the elements of the offense, or what is  
13 the punishment that I'm about to face.

14                   We don't just say you're entitled to fair  
15 warning of the punishment at the time you commit it, but  
16 you're also, based upon that time, are allowed to rely  
17 upon that as you're approaching trial.

18                   QUESTION: Well, I guess we wouldn't allow a  
19 court, any more than we would allow a legislature, to  
20 change the law so that attempted murder now becomes  
21 murder. That is, so long as you intend to kill, dispense  
22 with the requirement that the victim actually die. You  
23 could say, gee, his expectations weren't disappointed. He  
24 intended to kill. It just so happened the person didn't  
25 die.

1                   And we certainly wouldn't uphold a State supreme  
2 court judgment that, well, you know, that's a  
3 technicality, we're not going to insist that the victim  
4 have died, we're going to get you for murder anyway. I  
5 guess you could likewise say no disappointment of  
6 expectations.

7                   MR. WARD: Well --

8                   QUESTION: I don't see why this is terribly  
9 different from that.

10                  MR. WARD: Well, it's not. Under the State's  
11 theory in this case, as long as the defendant had the same  
12 mens rea, same actus reus, the fact that the result  
13 occurred or didn't occur would be irrelevant, and under  
14 the State's theory you could eliminate the requirement  
15 that there be a result and there would be no problem with  
16 that.

17                  But the problem is that as a matter of  
18 fundamental fairness and fair warning as to punishment  
19 deals with not just at the time of the act. If we allow  
20 courts to retroactively alter the elements of an offense  
21 or to retroactively enhance punishment, what I have to do,  
22 what I have to tell my clients when we're getting ready to  
23 go to trial is, I can tell you what the law was at the  
24 time you committed your crime, and I can tell you what the  
25 law is today, as we get ready to go for trial, and you're



1 innocent of the law as we have it today. In some cases  
2 I'm going to get to tell them that. But I can't tell you,  
3 because the courts can change after the fact. They can  
4 eliminate this element of the offense.

5 QUESTION: Mr. Ward, let's assume that the  
6 Tennessee Supreme Court had simply affirmed the lower  
7 court that said the legislature made this change, and they  
8 made it long before he committed the crime. You would  
9 have no issue at all.

10 MR. WARD: I wouldn't be here, and that would be  
11 a matter of statutory interpretation.

12 QUESTION: Now, suppose the State is one, and I  
13 don't know if this is so, where you couldn't have purely  
14 prospective overruling because that would be considered an  
15 advisory opinion, so here's the Tennessee Supreme Court  
16 saying, gee, it was our mistake in not getting rid of this  
17 obsolete rule. It's our rule, not the legislature's rule,  
18 so we want to get rid of it, but we can't.

19 We're saying it's our fault, not the  
20 legislature's. We can't change, however, because if we  
21 apply it to this case it's going to be ex post facto, and  
22 we can't simply prospectively overrule without being an  
23 advisory opinion. So is your -- is the -- at the end of  
24 the road, is your argument one that a court can't cure its  
25 own error of this nature?

1           MR. WARD: No, Your Honor. The Tennessee court  
2 could have abolished this rule and applied it  
3 prospectively, and probably, and we contend was required  
4 to do that if it wanted to abolish the rule because of the  
5 ex post facto due process requirements.

6           QUESTION: So it can give -- the Tennessee  
7 courts can give an advisory opinion in that respect? I  
8 mean, they can --

9           MR. WARD: Tennessee courts, I have no  
10 citations, but they frequently make rulings prospectively.

11          QUESTION: Well, but Justice Ginsburg's  
12 hypothetical, and the point interests me as well, it's  
13 actually to assume the opposite, that a court is in a  
14 system where it is improper to give an advisory opinion.  
15 Then what would happen? The court's hands are tied.

16          MR. WARD: Well, I think that the court could  
17 give some indication, and could voice some discomfort with  
18 the rule short of an advisory opinion.

19          QUESTION: But it could never change it, unless  
20 you're saying that the dictum would provide sufficient  
21 basis for a subsequent case.

22          MR. WARD: It would --

23          QUESTION: Then we have an incremental  
24 overruling process that you would allow? They're still  
25 changing the law.

1           MR. WARD: I think the dictum in the case would  
2 then be such that when a court came along later it would  
3 be able to say, this was expected and defensible because  
4 we criticized the rule in a previous case.

5           QUESTION: Well --

6           QUESTION: Well --

7           QUESTION: -- a moment ago you were saying how  
8 you had to have certainty in advising your client, but if  
9 that is permissible in a gradual overruling, surely the  
10 certainty is gone.

11          MR. WARD: Well --

12          QUESTION: You don't know what the Tennessee  
13 Supreme Court is going to do the next time it comes up if  
14 in the interim it has criticized the rule.

15          MR. WARD: But I would be fairly confident, if  
16 the Tennessee Supreme Court had criticized the rule in  
17 advising my client that there was a substantial likelihood  
18 that the rule would be changed.

19          QUESTION: Well, suppose 10 State supreme courts  
20 in other jurisdictions -- that didn't happen here -- had  
21 criticized the rule and Tennessee was just quiet about it.  
22 You've got the same problem.

23          MR. WARD: Well --

24          QUESTION: Plus -- plus we know that the day,  
25 year-and-a-day rule is an outmoded relic anyway.

1                   MR. WARD: Well, with regard to other States I  
2 think it's asking too much of our citizens to ignore a  
3 rule of the Tennessee Supreme Court and look to other  
4 States.

5                   QUESTION: Mr. Ward, you seem to accept it as  
6 unthinkable that the Supreme Court of Tennessee should be  
7 unable to alter a rule of criminal law by judicial  
8 decision. Do you think it was unthinkable at the time the  
9 Federal Constitution was adopted?

10                   Do you think that common law courts, which had  
11 much more rigorous notions of stare decisis than we do  
12 today, do you think they would have thought it unthinkable  
13 that a court should not be able to suddenly make a crime  
14 of what had not been a crime at common law?

15                   I mean, I don't know why you accept that,  
16 especially when you're dealing with a State that has a  
17 constitutional provision adopted in 1870 which reads, all  
18 laws and ordinances now in force and use in this State not  
19 inconsistent with this constitution shall continue in  
20 force and use until they shall expire, be altered, or  
21 repealed by the legislature. I don't think it's  
22 unthinkable at all, the Supreme Court of Tennessee  
23 shouldn't be able to alter the criminal law.

24                   I mean, if you want to accept it, fine, but I  
25 don't know --

1 MR. WARD: I'm not sure --

2 QUESTION: -- why you would accept it.

3 MR. WARD: -- that the Tennessee Supreme Court  
4 can alter the -- I'm not sure I understand -- let -- well,  
5 maybe I should continue.

6 QUESTION: The question to you, assume that it  
7 was unthinkable that the Supreme Court of Tennessee  
8 shouldn't be able to change the criminal law, why it  
9 should be able to do that, but that's certainly not what  
10 is envisioned by the constitution of the State of  
11 Tennessee.

12 QUESTION: The question didn't assume that it  
13 was unthinkable. The question was simply putting it to  
14 you, is this the end result? That is, that the Tennessee  
15 Supreme Court cannot itself change its rule, only the  
16 legislature can?

17 MR. WARD: Well, the Tennessee Supreme Court can  
18 change the rule, and I have no problem with the court  
19 changing the rule. The problem that I'm talking about is  
20 the retroactive --

21 QUESTION: But they can't change it, because  
22 there'll never be a case in which they can change it. In  
23 other words, the court in this situation, we can't change  
24 it prospectively because it would be advisory. We can't  
25 change it in this case because it would be ex post facto.

1 One answer that you could give is yes, that's right, only  
2 the legislature can change it, but you're not giving that  
3 answer.

4 MR. WARD: No, I'm --

5 QUESTION: No. How do you explain the provision  
6 of the Tennessee constitution that I quoted?

7 MR. WARD: That provision, my interpretation of  
8 that provision is it refers to statutory laws and not to  
9 judicial decisions of the courts, would be my  
10 interpretation of that.

11 QUESTION: May I ask you this further question?  
12 Suppose we -- it's so, and we tell the Tennessee Supreme  
13 Court, you're wrong, this would be an ex post facto  
14 obligation. It would still be open to the Tennessee  
15 Supreme Court, would it not, to say, gee, we have to  
16 rethink what that lower court did, and we now decide that  
17 they were right after all, that the legislature made that  
18 change long before this crime was committed.

19 It would still -- no matter what we say here, it  
20 would still be open to the Tennessee Supreme Court to say  
21 the change was already made by the legislature and that  
22 really ended the case, and all this has been kind of an  
23 academic exercise.

24 MR. WARD: Well, the Tennessee Supreme Court has  
25 already said that the legislature did not make a change in

1 it, and the year-and-a-day rule is --

2 QUESTION: But they could change their mind,  
3 better enlightened by what's happened since then. There  
4 are highest courts who concede from time to time that they  
5 are fallible, that they may have made a mistake.

6 MR. WARD: So if this Court was to reverse, the  
7 Tennessee Supreme Court then would change its opinion?

8 QUESTION: I asked if that would be something  
9 that would be open to the Tennessee Supreme Court to do.

10 MR. WARD: I guess the Tennessee Supreme Court  
11 could do it. They could certainly try it, and I would  
12 certainly try to think of some way to come back to this  
13 Court, but --

14 QUESTION: Well, can you think of one? The  
15 Tennessee Supreme Court says, gee, we got it wrong, that  
16 court of criminal appeals, they had it right all along.  
17 The legislature took care of it. We don't have any more  
18 year-and-a-day rule, haven't had one for 5 years.

19 MR. WARD: I guess I have to concede that that's  
20 always possible, but the Court has made a detailed  
21 analysis, the Tennessee Supreme Court, they've rejected  
22 that, and I believe that I would stand behind them that  
23 they would not change their mind in midstream simply  
24 because this Court sent the case back and said they erred  
25 on another point.

1                   But I'm not contending the Tennessee Supreme  
2 Court can't change the rule. The rule is dead in  
3 Tennessee. The year-and-a-day rule has been done away  
4 with. The question is whether or not they can apply it to  
5 an offense that was committed 5 years prior to that, and  
6 it gets back to the basic principle of legality. Do we  
7 try defendants based upon the law that's in existence at  
8 the time of their conduct, or do we change it after the  
9 fact, and the problem with changing it after the fact is,  
10 what it's going to do is, it's going to undermine the  
11 presumption of innocence.

12                   QUESTION: I could understand very clearly,  
13 Mr. Ward, the argument if you were saying that they added  
14 an element, or they subtracted an element from the  
15 offense, or something like that. You used to have to do  
16 it intentionally, but you don't have to anymore, and it's  
17 a much different -- but here you have something that  
18 really is quite peripheral, out on the fringes, that  
19 doesn't govern the substantive criminal law at all. It's  
20 almost like a statute of limitations.

21                   MR. WARD: Well, I disagree, Your Honor. I  
22 believe that this is a material element of the offense as  
23 the Tennessee Supreme Court has interpreted it. They have  
24 said that you must prove death within a year and a day in  
25 order to convict of any homicide offense in Tennessee,



1 and --

2 QUESTION: But that would be true of a statute  
3 of limitations too, would it not? If the statute of  
4 limitations from -- say, supposing Tennessee had a statute  
5 of limitations for robbery, 10 years. The Supreme Court  
6 of Tennessee would say you have to bring an action within  
7 10 years in order to convict of robbery, but that doesn't  
8 really make it an element of the substantive criminal law.

9 MR. WARD: No, because it doesn't deal with  
10 anything with regard to the -- it doesn't deal with  
11 anything but a time period that they're required to bring  
12 an action in. This is a time period that they must prove  
13 certain facts occurred in.

14 QUESTION: With a statute of limitations your  
15 argument would go, you are guilty of the crime but can't  
16 be prosecuted for it after the 10 years, whereas with a  
17 year and a day, your position is you're not guilty of the  
18 crime unless the death occurs within a year of -- within a  
19 year and a day.

20 Now, your opponent says it's just evidentiary.  
21 What's your response to that? It's just a question of  
22 evidence.

23 MR. WARD: Well, it's -- as interpreted by the  
24 Tennessee Supreme Court, it's not just a question of  
25 evidence. It's a material element that's required to be

1 proven by the prosecution, and there is nothing else -- if  
2 it was a rule of admissibility of evidence, there would be  
3 something else that could prove this point, or prove the  
4 conviction of -- prove the elements of the crime, but this  
5 is an element that, it must be proven.

6           There's nothing else available. If you don't  
7 prove this element, you don't prove your case. It's a  
8 sufficiency of the evidence rule. If you don't prove  
9 this -- and this is -- you lose. And now we say after the  
10 fact I can't prove it, we'll just eliminate it. Any  
11 element of the offense I can't prove, we have the power to  
12 retroactively eliminate.

13           QUESTION: I guess one of the questions I have  
14 is whether we gain anything by characterizing it as an  
15 element. If you go back to Bouie, Bouie was concerned  
16 with, let's say, the elements that refer to the conduct of  
17 the defendant, didn't it? And Bouie was concerned about  
18 fair notice to an individual about what he could and could  
19 not do at the time he acts. And so even if we say, well,  
20 the year-and-a-day rule is kind of like an element, it's  
21 not the kind of element, it's not the kind of fact that  
22 Bouie was concerned with, was -- is it?

23           MR. WARD: It's not a fact that would deal with  
24 the first Calder category, whether something was criminal,  
25 made criminal after the fact, no more than whether or

1 not --

2 QUESTION: No, but I -- I think I agree with you  
3 there. I mean, if we assume that Bouie stands for the  
4 proposition that the ex post facto clause and all the  
5 Calder analytical framework is subsumed into due process,  
6 I'll be candid to say I think you win this case, and my --  
7 I guess my question was really aimed at, or premised on a  
8 different assumption, and that is that Bouie really does  
9 not stand for wholesale incorporation, and what Bouie  
10 actually held, the point as to which Bouie made a  
11 difference, was a point about altering elements that  
12 describe the criminal act itself as opposed to conditions  
13 that may or may not occur subsequent to that.

14 MR. WARD: I agree with Your Honor. The cases  
15 that come before this Court for the most part have dealt  
16 with the first Calder category.

17 QUESTION: Yes.

18 MR. WARD: But if this Court --

19 QUESTION: But I guess if you don't use an  
20 elements test for Bouie, I guess you have to reach the  
21 conclusion -- and you say it's only those things that  
22 affect the conduct at the time of the offense, regardless  
23 of whether it's an element or not. Then you would have to  
24 say that you could change the law and not require for  
25 murder in the first degree that the victim had died.

1 That's a subsequent event. You knew you shouldn't stab  
2 him with a knife, intending to kill him, and the fact that  
3 he died should make no difference. I --

4 MR. WARD: I believe --

5 QUESTION: I can't imagine that you're allowed  
6 to do that.

7 MR. WARD: Well, that's not my argument.

8 QUESTION: I know it isn't.

9 MR. WARD: That's my opponent's.

10 QUESTION: But that's what you should have said  
11 in response to the Bouie argument just raised.

12 (Laughter.)

13 MR. WARD: But if this Court applies one Calder  
14 category there's no reason not to apply them all. If  
15 there's some concern about whether due process principles  
16 should incorporate -- ex post facto principles should  
17 apply --

18 QUESTION: What is your authority, Mr. Ward, for  
19 simply suggesting that all of the Calder categories are  
20 carried over into this ex -- like ex post facto -- clearly  
21 this is not governed by the Ex Post Facto Clause. It's  
22 governed by Bouie, which said some of the same  
23 considerations applied. You're talking as if everything  
24 is carried over bag and baggage.

25 MR. WARD: Well, I submit it's carried over with

1 the Bouie limitation that the judicial decision has to be  
2 unexpected and indefensible, but what I'm suggesting is,  
3 there's no reason to distinguish the first Calder category  
4 from any of the others as far as ranking them in some  
5 priority that --

6 QUESTION: Well, but then you're acting for --  
7 asking for an extension of Bouie, which clearly didn't  
8 cover these others.

9 MR. WARD: Yes. I'm asking -- in one sense I'm  
10 asking for an extension. In the other sense I'm asking  
11 the Court to say that it meant what it said, that ex post  
12 facto principles apply through the Due Process Clause.

13 QUESTION: Well, Mr. Ward, with respect to that,  
14 Calder was itself dicta, because the case came out the  
15 other way, and there was something said by a justice and  
16 it has become venerable over the years just because it's  
17 been repeated and applied as law by later courts.

18 But then, when you're thinking of extending it  
19 under a due process label, wouldn't you want to take into  
20 account its origin, and the compartmentalization has been  
21 criticized? I mean, you're not bound to take it over  
22 lock, stock and barrel. Why should you, given its origin  
23 as dictum and its rigidity with these categories? I mean,  
24 it's not Scripture.

25 MR. WARD: That's correct, and actually when you

1 look at the definition in Bouie that was cited from Calder  
2 v. Bull, the discussion talks about aggravating a crime  
3 after the fact, and also making something criminal that  
4 wasn't a crime after the fact, and those are the two  
5 things that Bowie concentrated on in its statement or  
6 definition of an ex post facto law, the first two Calder  
7 categories. And then the Court said, if it's ex post  
8 facto for a legislature to do it, then due process should  
9 prevent the courts from obtaining the same result.

10 My suggestion is that there's just as great a  
11 harm from making something criminal that wasn't criminal  
12 before as it is to aggravate a criminal offense. For  
13 instance, if you take something that's not a crime and  
14 give it a 2-day punishment. It's a far greater harm to  
15 take something that already is a crime with a 2-day  
16 punishment and then aggravate it to where it has a  
17 20-year punishment.

18 Justice Chase talked in Calder about those  
19 Calder categories and said they came from the same kinds  
20 of harm, and my suggestion is that ex post facto  
21 principles are fundamental concepts, fundamental concepts  
22 like fundamental fairness. It's fundamentally unfair to  
23 alter the elements of an offense after the fact, or to  
24 aggravate it. It's fundamentally unfair because it  
25 undermines the presumption of innocence.

1           QUESTION: So everything under the Ex Post Facto  
2 Clause would be subsumed under due process vis-a-vis the  
3 legislature too, is it, and in fact that's what you're  
4 saying, isn't it?

5           MR. WARD: That's the rule I'm asking, but only  
6 under the limited circumstance when the ruling is  
7 unexpected and indefensible under the test this Court  
8 adopted in Bouie and Marks. This test was developed from  
9 Jerome Hall's principles of criminal law, and it's to take  
10 into consideration the fact that all opinions in one way  
11 or the other are retroactive. How do we treat these  
12 opinions that are grossly retroactive, that change a clear  
13 line of authority in a jurisdiction?

14           If there's no further questions, I'd like to  
15 reserve the remainder of my time.

16           QUESTION: Very well. Very well, Mr. Rogers.  
17 Mr. Moore, we'll hear from you.

18           ORAL ARGUMENT OF MICHAEL E. MOORE  
19           ON BEHALF OF THE RESPONDENT

20           GENERAL MOORE: Mr. Chief Justice, and may it  
21 please the Court:

22           The decision below did not deny petitioner due  
23 process of law because it did not deprive him of fair  
24 warning that stabbing another person in the chest with a  
25 butcher knife risked prosecution under Tennessee's

1 homicide statutes.

2           The statute under which petitioner was convicted  
3 defines the crime of second degree murder as the knowing  
4 killing of another. The -- a conviction under that  
5 statute does not require that the victim die within any  
6 particular period of time, it does not require that the  
7 defendant know that the victim will die within any  
8 particular time.

9           QUESTION: But statutes often -- I'm sorry,  
10 Chief. Go ahead.

11           QUESTION: Well, I was just going to say, wasn't  
12 it assumed by the Tennessee Supreme Court that this was a  
13 substantive rule of law, and that you agreed that it was  
14 but argued that it had been repealed by the 1989 revision  
15 of the statute?

16           GENERAL MOORE: Yes, Your Honor, our position  
17 below was that the rule was a substantive principle of law  
18 that had been abolished by operation of our Criminal Code  
19 of '89, which said that unless conduct is described as an  
20 offense by statute it is no longer an offense, and we  
21 argued that the evident purpose of that provision was to  
22 abolish all common law crimes, common law elements of  
23 crimes --

24           QUESTION: And the court rejected that argument.

25           GENERAL MOORE: -- but that position was



1 rejected, Your Honor.

2 QUESTION: But is it still not correct that you  
3 would agree that it's a substantive principle of law, or  
4 are you taking a different --

5 GENERAL MOORE: Our position is that for due  
6 process purposes the label one attaches to the rule,  
7 whether one calls it a substantive rule, a procedural  
8 rule, an evidentiary rule, an elemental rule, whatever  
9 label one attaches to it really doesn't make any  
10 difference, because the touchstone of due process fair  
11 warning in this context, in the retroactivity context, is  
12 the violation of a reliance interest of some sort, and  
13 because --

14 QUESTION: Let me ask you just a little  
15 refinement of the question. Supposing you had prevailed  
16 on the view that the 1989 statute had discarded this or  
17 changed this substantive rule of law, would you think that  
18 you could then have prosecuted someone who had committed  
19 the crime before the 1989 statute went into effect?

20 GENERAL MOORE: Your Honor's hypothetical is if  
21 we had prevailed and the '89 act had --

22 QUESTION: And then you wanted to indict someone  
23 who had committed the same kind of offense prior to 1989.

24 GENERAL MOORE: Yes, Your Honor, it is. What  
25 Your Honor's question essentially is, if the legislature

1 had effectuated this change, would this be a prohibited ex  
2 post facto law. Our contention is that no, it would not  
3 have been, although I must concede that if the rule had  
4 been a definitional element of the crime, that would have  
5 been an ex post facto violation.

6 QUESTION: But there you're placing a label on  
7 it, and I thought the label didn't matter.

8 GENERAL MOORE: Right, and I think labels do  
9 make a difference for Ex Post Facto Clause purposes, if  
10 in --

11 QUESTION: But not for due process purposes.

12 GENERAL MOORE: But not for due process  
13 purposes.

14 QUESTION: So your position is, in the  
15 hypothetical that I raised with your colleague over there,  
16 your position is that if the legislature changed, or our  
17 Court changed the law so that the victim no longer has to  
18 die, you're guilty of murder, your reliance would have  
19 been just the same. You intended to kill the person. You  
20 struck him with a knife. He just happened, through your  
21 good luck, not to die. No reliance interest at all. Do  
22 you really think the court could say, we no longer require  
23 the victim die for murder?

24 GENERAL MOORE: I do not.

25 QUESTION: Why?

1                   GENERAL MOORE:  But I think --

2                   QUESTION:  I think it's because it's an element  
3 of the crime, but why do you think it is?

4                   GENERAL MOORE:  Well, I -- certainly the death  
5 of the victim is an element of the crime.

6                   QUESTION:  Yes.

7                   GENERAL MOORE:  The timing of the death of the  
8 victim is not an element of the crime.

9                   QUESTION:  Ah, so we do come down to the debate  
10 over whether this timing thing here is an element of the  
11 crime or not.  You've just said that it's irrelevant for  
12 due process purposes.

13                   GENERAL MOORE:  I think the due process  
14 violation in Your Honor's hypothetical would be that --  
15 well, I think first of all, Your Honor's hypothetical  
16 assumes that a court may rewrite a statute.  Homicide in  
17 Tennessee is not a common law crime.

18                   QUESTION:  All right.

19                   GENERAL MOORE:  It's a statutory crime.

20                   QUESTION:  Change the hypothetical so it isn't a  
21 statute, it's a common law crime.  It doesn't matter.  I  
22 mean, the fact is, you have to come back -- in order to  
23 avoid my hypothetical you have to fall back on the fact  
24 that this is not an element of the crime in this case.  If  
25 it's an element of the crime, I think you're going to

1     lose, unless you're willing to accept the hypothetical I  
2     gave you that you can change the law through judicial  
3     decision to dispense with the death of the victim.

4             GENERAL MOORE: I think the change, the  
5     alteration in the law posited by Your Honor's hypothetical  
6     would be unconstitutional, but not because it violated  
7     Bouie's fair warning principle.

8             QUESTION: That's right, so there must be  
9     something beyond Bouie's fair warning principle.

10            GENERAL MOORE: Well, there is substantive due  
11    process. If it is a wholly irrational change, that indeed  
12    would be unconstitutional for that reason, but I think the  
13    retroactivity problem here that is the subject of Mr.  
14    Ward's client's complaint is that somehow the retroactive  
15    alteration of this principle of law deprived him of some  
16    form of fair warning.

17            QUESTION: You're careful to say that this is  
18    not a substantive due process violation, and that's the  
19    way the question presented is. I -- the ex post facto law  
20    applies to the States. Can we consider this as an ex post  
21    facto case without any prejudice to your position?

22            GENERAL MOORE: No, Your Honor, I do not think  
23    the Court may consider this to be an ex post facto case,  
24    because the ex post facto --

25            QUESTION: No, no, no. Can we debate this case

1 under the Ex Post Facto Clause, or does that depart  
2 from --

3 GENERAL MOORE: Certainly Your Honor may ask me  
4 questions concerning whether the Ex Post Facto Clause  
5 would be violated if this alteration had been effectuated  
6 by the legislature, yes. Is that Your -- is Your Honor's  
7 point --

8 QUESTION: Suppose the Court thinks that it's an  
9 ex post facto violation for the legislature to repeal  
10 the -- pardon me, for the Court to abrogate the  
11 year-and-a-day rule. That's really what's before us,  
12 isn't it? Isn't this an ex post facto case rather than a  
13 substantive due process case?

14 GENERAL MOORE: I would disagree with Your  
15 Honor, because it would be an ex post facto case if the  
16 alteration of the law here had been effectuated by the  
17 legislature. Now, Mr. Ward's argument is that the  
18 technical restrictions of the Ex Post Facto Clause have  
19 been imported into the Due Process Clause, but there are  
20 numerous reasons why we contend that would be imprudent  
21 and, as a matter of history, incorrect.

22 QUESTION: I see. And this is the way you read  
23 Bouie. Of course, Bouie does have language to the effect  
24 that if the legislature can't do it under the Ex Post  
25 Facto Clause, neither can the courts, and I would assume

1 that the Court in Bouie would have said, because of the Ex  
2 Post Facto Clause itself, as well as because of the  
3 substantive Due Process Clause, or was it restrained from  
4 doing that just because we've always said that ex post  
5 facto is for legislatures, not courts?

6 GENERAL MOORE: Well, I think a combination of  
7 the two, but I think Bouie cannot be read to have already  
8 accomplished this importation that Mr. Ward suggests this  
9 Court ought to adopt in this case.

10 QUESTION: Well, I think if we prevail for your  
11 position we do have to cut back on some of the language in  
12 Bouie, do we not?

13 GENERAL MOORE: Yes, Your Honor.

14 QUESTION: Because there is the fact, if we say  
15 well, the legislature can't do it under the Ex Post Facto  
16 Clause, neither can the courts.

17 GENERAL MOORE: Well, I think candidly the  
18 language to which Your Honor refers is properly  
19 characterized as dicta, because in the Bouie opinion  
20 Justice Brennan quite clearly located the doctrinal source  
21 of his ruling in this Court's Bouie for vagueness  
22 jurisprudence.

23 QUESTION: I think that's a fair argument, but  
24 we have to at least cut back on the dicta.

25 GENERAL MOORE: Yes, Your Honor.

1                   QUESTION:  If that's what it is.

2                   GENERAL MOORE:  The State of Tennessee would not  
3   object to Your Honors clarifying that point, and I think  
4   the point is well taken in Justice Brennan's opinion in  
5   that case, is that both the Ex Post Facto Clause and the  
6   Due Process Clause of course spring from a common core of  
7   concerns about fairness, but obviously the purpose of the  
8   Ex Post Facto Clause is as really a structural restraint  
9   on the power of the legislative branch.

10                  Now, clearly --

11                  QUESTION:  May I just interrupt you there for a  
12   second?  The clause itself doesn't speak about the  
13   legislative branch.  It speaks about, a State may not pass  
14   such a law, and it's true, of course, that a court  
15   normally looks to the past and decides what the law has  
16   always been, even though a question has never been  
17   decided.

18                  But here, however, it's unusual, because the  
19   Tennessee Supreme Court expressly says, we're going to  
20   change a substantive rule of law, and is that any  
21   different than if it had been exercising, say, its  
22   functions to make court rules, or had said, we are now  
23   going to pass the following rule, that in murder cases the  
24   victim does not have to die within a year.  If they'd  
25   written it out as a rule to be applied in the future, and

1 somehow had authority to do that and comply with the  
2 Tennessee constitution, how would we treat that, as a  
3 court rule, or as a legislative rule?

4           GENERAL MOORE: I think, under this Court's  
5 first ex post facto case, Calder v. Bull, the action would  
6 still be a judicial act and therefore beyond the scope of  
7 the Ex Post Facto Clause.

8           If Your Honor will recall, in that case three of  
9 the four justices posited the possibility that the  
10 resolution under review there had been adopted by the  
11 Connecticut legislature in the exercise of that body's  
12 historic powers to operate as a court, and all three of  
13 those justices said that if we decide this is a judicial  
14 act rather than an act of legislation, it is beyond the  
15 words of the Constitution.

16           But in that day of rigorous stare decisis, what  
17 they may have meant by a judicial act was a court  
18 announcing that this rule of a year and a day was never  
19 part of Tennessee law, that our past opinions were  
20 erroneous. At most they meant that, and maybe they meant  
21 simply affirming an ambiguous rule.

22           I mean, I think you have to read Calder in the  
23 time frame in which it was pronounced. You didn't have  
24 courts who suddenly just jumped up and said oh yes, that  
25 used to be the criminal law, but we are changing it.



1                   GENERAL MOORE: I would still argue, Your Honor,  
2                   that the Tennessee Supreme Court's decision in this case  
3                   is in the tradition of the -- of a common law court. The  
4                   common law does evolve, and the first principle of that  
5                   evolution is that where the reasons for a rule fail, the  
6                   rule should also fail, and so this --

7                   QUESTION: It really didn't evolve very much at  
8                   the time of *Calder v. Bull*. I mean, the courts -- or to  
9                   the extent it evolved it, it evolved the good  
10                  old-fashioned way. They lied about earlier cases.

11                  (Laughter.)

12                  QUESTION: But they certainly didn't just stand  
13                  up and say, you know, we're changing the law. That was  
14                  very rare.

15                  GENERAL MOORE: Right, but of course it is our  
16                  contention, Your Honor, that *Calder v. Bull* is really  
17                  beside the point here, because this is a due process case,  
18                  not an *Ex Post Facto* Clause case.

19                  QUESTION: May I pursue that just for a second?  
20                  Assume for the sake of argument here, and you will be  
21                  willing to do this, I guess, that the year-and-a-day rule  
22                  is not an element, and assume that the *Ex Post Facto*  
23                  Clause has not been totally incorporated and applied to  
24                  judicial acts. One line of analogy that has been  
25                  suggested here this morning, it's not a perfect analogy,

1 but it goes part of the way at least, is an analogy with  
2 sort of a statute of limitations.

3 What is the rule under due process if a statute  
4 of limitations is modified to a defendant's disadvantage  
5 after the limitation period has run? Can a legislature do  
6 that?

7 GENERAL MOORE: I believe, insofar as this  
8 Court's jurisprudence is concerned, that the question  
9 remains open. I would argue that --

10 QUESTION: What's the general rule in the State  
11 court, sitting with State due process clauses, or applying  
12 the Federal one for that matter? Have they held it a  
13 denial of due process in effect to reopen the limitation  
14 period after it has run in a defendant's favor?

15 GENERAL MOORE: I can only speak to my  
16 jurisdiction's case law, and I cannot cite to Your Honor a  
17 case that directly addresses that issue under our State  
18 constitutional equivalent of the United States or the  
19 Fourteenth Amendment's Due Process Clause.

20 QUESTION: Is it acknowledged and accepted that  
21 a legislature could not alter an ex -- a statute of  
22 limitations, after it has run for a defendant?

23 GENERAL MOORE: I do not believe that is an  
24 accepted proposition. I believe that if a legislature did  
25 it, one would have to measure that law against each of the

1 four Calder categories, and it's not really an easy fit  
2 under any of those four categories. A statute of  
3 limitations does not render criminal actions innocent when  
4 done. It involves -- the statute of limitations doesn't  
5 regulate primary conduct at all.

6 The statute of limitations also involves facts  
7 which are sort of wholly collateral to guilt or innocence,  
8 so I think it doesn't either aggravate the crime, it  
9 doesn't -- quite clearly it doesn't increase the  
10 punishment, and because it involves issues that are wholly  
11 collateral to guilt or innocence, it's hard to argue that  
12 it's a sufficiency-of-the-evidence rule. Rather, the  
13 remedy for a statute of limitations violation would be to  
14 dismiss the prosecution altogether, to dismiss the  
15 indictment altogether, not to enter a judgment of  
16 acquittal.

17 So I think if I were here arguing that case, at  
18 least I would have an argument that would pass the smile  
19 test.

20 QUESTION: Yes, but even in a statute of  
21 limitations case, in a civil action, don't we place a  
22 fairly high value on the assurance that a defendant has  
23 that his period of jeopardy, his period of exposure to  
24 liability is over, and he can simply get on with whatever  
25 he wants to do, and I would suppose that that same value

1 applies with a greater intensity, or at least as great an  
2 intensity in the area of the criminal law, and I -- the  
3 analysis so far doesn't seem to be giving any weight to  
4 that interest, and I'd like to know why you think that  
5 interest is not sufficient to support the petitioner's  
6 argument here.

7 GENERAL MOORE: Because, Your Honor, the  
8 year-and-a-day rule is not a rule of repose. None of its  
9 purposes at common law really were concerned with --

10 QUESTION: Well, it functions -- it certainly  
11 functions that way.

12 GENERAL MOORE: Perhaps it functions that way,  
13 but its purposes at common law were wholly unrelated to  
14 considerations of repose, or concern with -- concerns with  
15 repose, so I don't believe --

16 QUESTION: They were essentially evidentiary. I  
17 mean, you just couldn't prove the causation reliably after  
18 that period.

19 GENERAL MOORE: Precisely, Your Honor, so I  
20 don't believe that petitioner can really claim any  
21 expectation interest in repose that derives from the rule.

22 Now, the statute of limitations does protect  
23 such concerns but, of course, there is no statute of  
24 limitations for murder in Tennessee --

25 QUESTION: I --

1           GENERAL MOORE:  -- which reflects a judgment, I  
2 believe, that -- by our legislature that murderers should  
3 not have any repose.

4           QUESTION:  I think we've held, in connection  
5 with a civil case, that a legislature can change the  
6 statute of limitations without violating the Due Process  
7 Clause.

8           GENERAL MOORE:  Well, that -- certainly that  
9 case law certainly would, I think, support our position  
10 here.

11          QUESTION:  Why?  Suppose that if you have two  
12 statutes in a state, the first forbids attempted murder  
13 and has lesser penalties, the second forbids murder, and  
14 has greater penalties, and one day the State, the supreme  
15 court decides to -- that anyone who's guilty of attempted  
16 murder is guilty of murder, because they say there's no  
17 difference in the state of mind, et cetera.  They have  
18 some reasons.

19          Now, could you apply that retroactively?  I  
20 wouldn't have thought so.  I mean, it seems very unfair.

21          GENERAL MOORE:  I don't think so, but I --

22          QUESTION:  All right.  Now, I agree with you.  
23 But if that's so, how does this differ?  I mean, before  
24 they make the change people think, if I go after somebody  
25 and he survives for a year and a day, it's like attempted

1 murder. After the change, it's like murder. So if -- if,  
2 as I agree with you completely, the first would be  
3 fundamentally unfair, why isn't the second?

4 GENERAL MOORE: Your Honor, I believe that first  
5 of all the change here is a change in a rule that does not  
6 address either primary conduct or -- and does not  
7 eliminate the mens rea with respect to the result of  
8 that --

9 QUESTION: Nor did my example of attempted  
10 murder, murder.

11 GENERAL MOORE: And Your Honor's hypothetical is  
12 that -- that, if I understand it, that a court would  
13 decide that attempted murder equals murder.

14 QUESTION: You can imagine -- I mean, it's not  
15 totally absurd. It depends on how they're written. They  
16 have discretion as to sentencing, they say, these notions  
17 of punishing by effects are out of date, we should punish  
18 by state of mind, the state of mind is identical -- I  
19 mean, we can make that up. It's not totally absurd. It's  
20 just moderately absurd.

21 (Laughter.)

22 QUESTION: But if it did happen -- if it did  
23 happen, which is the point of it, I think we'd say it was  
24 fundamentally unfair, and that's why I want to know what  
25 the difference is. To me there is -- I can't find a

1 difference.

2           GENERAL MOORE: Analytically it seems to me  
3 there is a large difference, since you have essentially in  
4 your hypothetical created or expanded the elements of the  
5 crime in a way that affected the primary conduct of the  
6 actor.

7           QUESTION: Ah, we're back to the elements again.  
8 You ultimately were driven to the same response to my  
9 hypothetical, which was essentially the same as Justice  
10 Breyer's.

11           QUESTION: And it's awfully technical, you see.

12           QUESTION: Now, in the sense that from the point  
13 of view of fairness, really what's happened in my  
14 attempted murder, murder case is the difference as to  
15 something beyond the control of the defendant, whether the  
16 person happened to die, and that seems just what's at  
17 stake here, whether we call it an element, or whether we  
18 don't call it an element, and that's why it seems a  
19 relevant hypothetical.

20           GENERAL MOORE: I think the year-and-a-day rule,  
21 that it is not accurate to characterize the  
22 year-and-a-day rule as an element, for a couple of  
23 reasons. First of all, the court below, and as a matter  
24 of Tennessee law, I think it is clear from its opinion  
25 indicated that it is not an element of homicide. It said,

1       rather, that the effect of its elimination was merely to  
2       give the State an opportunity to prove causation, so --

3                QUESTION:  Is the ultimate characterization a  
4       matter for the State, or a matter for the Federal courts?

5                GENERAL MOORE:  I think --

6                QUESTION:  I mean, could a State call -- suppose  
7       you have the State in Justice Breyer's hypothetical  
8       saying, well, the actual death of the victim was not an  
9       element of the crime.  It was just -- you know, it wasn't  
10      really an element of murder.

11               Now, we'd look at that and we'd say, well, you  
12      say that, but come on, that's an element.  Isn't it a  
13      question for the Federal court, rather than the State,  
14      ultimately?

15               GENERAL MOORE:  I would disagree with that.  I  
16      think --

17               QUESTION:  All right.  Well --

18               GENERAL MOORE:  I think the State --

19               QUESTION:  How do you distinguish the  
20      year-and-a-day rule from what we held to be an element a  
21      couple of terms ago?  I think it was a couple of terms  
22      ago.  That is, in a rape prosecution, the requirement that  
23      there be a hue and cry by the victim.  We held that was an  
24      element of the crime.  Like the year-and-a-day rule, it  
25      has nothing to do with the intent of the criminal.  It's



1 after the event. It's after the fact. We held it was an  
2 element. Why is that an element and this not an element?

3 GENERAL MOORE: Well, I would answer in two  
4 ways. First of all, it is quite plainly not a statutory  
5 element, and it seems to me that is an issue of State law,  
6 and in fact the court here said, the lower court here said  
7 that it has never been a part of the statutory law of the  
8 State.

9 Secondly, it is not an element because it is not  
10 one of those issues that is submitted to the jury. It's  
11 rather a jurisdictional fact.

12 QUESTION: My recollection of the case Justice  
13 Scalia refers to, which I think is Carmel, is not the same  
14 as his. I think we were both in dissent in the case, but  
15 my recollection is that the Court held that the  
16 particular -- the hue and cry violated the Ex Post Facto  
17 Clause. I don't know that it said that that was an  
18 element of the crime.

19 GENERAL MOORE: Yes, Your Honor.

20 QUESTION: Well, I thought -- I -- well, we'll  
21 go and read it. I thought we -- we said that because it  
22 was an element.

23 GENERAL MOORE: But in either case I don't think  
24 the problem with Justice Breyer's hypothetical or Justice  
25 Scalia's hypothetical would be one of due process fair

1 warning, which is the principle of due process --

2 QUESTION: Well, can I give you a hypothetical  
3 that -- stick to the year-and-a-day rule, because that's  
4 what we have before us. Supposing just before 1989  
5 there'd been a really terrible crime, he killed a child in  
6 a bad situation, but the child didn't die for over a year  
7 and a half, or over a year and a day, and the Tennessee --  
8 that prompted the Tennessee legislature to abolish that  
9 rule, and they said in the rule, abolish it for the past  
10 case too, and they said well, they can't do that, and they  
11 say, if we can't do that because of the Ex Post Facto  
12 Clause we urge the supreme court to abolish it judicially,  
13 and remind them that they all run for reelection if they  
14 don't do it, so --

15 (Laughter.)

16 QUESTION: And then, sure enough, the case comes  
17 up and they decide, well, it's a -- it was a common law  
18 rule but we're going to abolish it. Now, why should there  
19 be a different rule when it's done by the court rather  
20 than by the legislature? That's my real question in the  
21 case.

22 GENERAL MOORE: Because of the institutional  
23 differences between courts and legislatures.

24 QUESTION: And what is the institutional  
25 difference when the court frankly says, we are making a

1 new rule of law? What is the institutional difference?

2 GENERAL MOORE: Because of the insulation of  
3 that, of the institution of the courts from the same sorts  
4 of political pressures that gave rise to the framers'  
5 complete distrust of the ability of the legislative branch  
6 to legislate in this particular area.

7 Courts not only are insulated from the same  
8 sorts of political pressures, but they're subject to a  
9 tradition of institutional --

10 QUESTION: But my hypothetical assumed that  
11 there was political pressure.

12 GENERAL MOORE: Excuse me, Your Honor?

13 QUESTION: My hypothetical assumed that there  
14 was political pressure because they have to run for  
15 reelection. They can read the newspapers and see how  
16 outraged the public is about this particular crime.

17 GENERAL MOORE: Well, I think Your Honor's  
18 hypothetical posits there is political pressure, but the  
19 court, of course, by tradition doesn't succumb to  
20 political pressure.

21 (Laughter.)

22 GENERAL MOORE: And in addition it operates  
23 under a set of institutional constraints in the way it  
24 goes about doing its business that it seems to me provides  
25 important protections here.

1           The -- it can't initiate law reform efforts of  
2     its own. It must -- it can only act in the context of  
3     cases that the litigants bring before the court. In  
4     addition, there is stare decisis, and the concomitant  
5     imperative that courts justify departures from precedent  
6     of the sort Your Honor's hypothetical posits, with  
7     reasons, and with some neutral principles of general  
8     applicability and some consideration of the impact of the  
9     change they're about to make, not only on the litigants  
10    before them, but on all similarly situated litigants.

11           I think all of those traditional restraints  
12    operate to justify different treatment for court decisions  
13    as opposed to decisions of legislatures, and certainly the  
14    history of the Ex Post Facto Clause indicates that the  
15    framers were acutely aware of those distinctions, and  
16    because of a well-documented history of parliamentary  
17    abuse involving legislation of this sort they thought it  
18    essential to insert a prophylactic prohibition against  
19    legislation of this sort without regard to -- they weren't  
20    going to look into the fairness of individual pieces of  
21    legislation and the circumstances under which they were  
22    passed. They erected a prophylactic bar to legislation of  
23    that sort at all.

24           QUESTION: But isn't the answer to the  
25    institutional argument that you've been making the answer

1 that Justice Scalia has raised a couple of times elsewhere  
2 in the argument, that at the time the ex post facto rule  
3 was written the way it was, common law courts, or our very  
4 conception of courts, even in the Federal system, which  
5 was in gestation at that time, involved a system of much  
6 stricter precedent than we have today, so the likelihood  
7 of a court doing what this court has done was simply much  
8 less than it is today.

9 We have an entirely different concept of binding  
10 precedent today, and for that reason, shouldn't the Due  
11 Process Clause take that into consideration by being  
12 starchier in -- than perhaps the founders ever thought  
13 there would be a need to be when reviewing judicial  
14 change?

15 GENERAL MOORE: Your Honor, I think the Due  
16 Process Clause and the Ex Post Facto Clause also are --  
17 serve very different functions under our constitutional  
18 scheme.

19 As I indicated, the Ex Post Facto Clause is this  
20 sort of structural restraint on the power of that branch  
21 of Government, but Due Process, litigation under the Due  
22 Process Clause is by its very nature case by case, and the  
23 concern of the Due Process Clause is individualized fair  
24 treatment, so I would suggest that it would be  
25 inconsistent with the nature of the due process guarantee

1 to build into it some sort of prophylactic structural  
2 restraint on the judicial branch because of concerns that  
3 the judicial branch in modern times engages in too much  
4 law reform.

5           It seems to me that due process, the Due Process  
6 Clause, with its concern about individualized fair  
7 treatment, is up to the task of protecting against  
8 aberrational cases in which a court is self-evidently  
9 engaged in some sort of arbitrary or vindictive action  
10 that -- of the sort that violates our notions of  
11 fundamental fairness and our notions about the rule of  
12 law.

13           To close, our position is that the Due Process  
14 Clause was not violated here, and that the Due Process  
15 Clause is not violated by a court decision of this sort  
16 that retroactively alters a rule of criminal law unless  
17 that change expands the scope of conduct covered by the  
18 criminal prohibition issue and does so unforeseeably.

19           Secondarily, our position is that the Ex Post  
20 Facto Clause simply doesn't regulate judicial action at  
21 all, and that none of its technical restrictions should be  
22 imported wholesale into the Due Process Clause.

23           Thank you very much.

24           QUESTION: Thank you, Mr. Moore.

25           Mr. Ward, you have 4 minutes remaining.

1                   MR. WARD: Unless the Court has other questions,  
2 I have nothing else.

3                   CHIEF JUSTICE REHNQUIST: The case is -- thank  
4 you, Mr. Ward. The case is submitted.

5                   (Whereupon, at 11:56 a.m., the case in the  
6 above-entitled matter was submitted.)

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