No. 06-8273

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**In the**
**SUPREME COURT OF THE UNITED STATES**

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Stephen Danforth, *Petitioner,*

*v.*

State of Minnesota, *Respondent.*

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On Writ of Certiorari to the
Supreme Court of the State of Minnesota

# BRIEF FOR PETITIONER

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## QUESTION PRESENTED

Are state supreme courts required to use the standard announced in *Teague v. Lane*, 489 U.S. 288 (1989), to determine whether United States Supreme Court decisions apply retroactively to state-court criminal cases, or may a state court apply state-law- or state-constitution-based retroactivity tests that afford application of Supreme Court decisions to a broader class of criminal defendants than the class defined by *Teague*?

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## OPINIONS BELOW

The opinion of the Minnesota Supreme Court is published at 718 N.W.2d 451 (Minn. 2006). It appears at pages 42-54 of the joint appendix. The opinion of the Minnesota Court of Appeals is published at 700 N.W.2d 530 (Minn. Ct. App. 2005). It appears at pages 36-41of the joint appendix. The district court's order denying the petition for post-conviction relief is unpublished. It appears at pages 31-35 of the joint appendix.

## JURISDICTION

The Minnesota Supreme Court issued its decision on July 27, 2006, and entered final judgment on the appeal on October 10, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (2006).

## CONSTITUTIONAL PROVISIONS

**U.S. CONST. amend. VI:**

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

**U.S. CONST. amend. XIV, § 1:**

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

The Minnesota Supreme Court held that this Court had precluded it from applying a new rule of federal constitutional criminal procedure on state post-conviction review. The Minnesota Supreme Court was wrong, and this Court should reverse its decision.

Petitioner Stephen Danforth was convicted by a jury in Minneapolis, Hennepin County, Minnesota, of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(a) (1994), on March 6, 1996. JA 5. The conviction arose out of the alleged sexual abuse of J.S., a six-year-old boy. *Id.* The district court judge found that J.S. was incompetent to testify at petitioner's trial. JA 7. In lieu of J.S.'s live testimony which would have been subject to cross-examination, the jury saw and heard a videotaped interview of J.S. conducted by staff at a "non-profit center." *Id.* During the interview, J.S. accused petitioner of sexually abusing him. *Id.*

Petitioner appealed his conviction. Among other claims, he argued that the admission of the videotape of J.S.'s statement violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. JA 13. The Minnesota Court of Appeals considered the issue under the balancing test set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), and attendant United States Supreme Court and Minnesota caselaw. JA 14-15. The court of appeals affirmed the admission of the tape and the conviction, holding that "the videotape was sufficiently reliable to be admitted into evidence." JA 14. The Minnesota Supreme Court denied review and, following a second direct appeal after a resentencing, petitioner's case became final in 1999.[1] JA 30.

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[1] In 2000, petitioner filed his first petition for post-conviction relief challenging his

In 2004, this Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Court "impose[d] an absolute bar to [the admission of] statements that are testimonial, absent a prior opportunity to cross-examine [the declarant]." *Crawford*, 541 U.S. at 61. Believing that J.S.'s statement was testimonial and thus was admitted in violation of his right of confrontation, petitioner, acting pro se, filed a petition for post-conviction relief to challenge his conviction.[2] The district court, the Honorable Marilyn Brown Rosenbaum, denied the petition. JA 31-35. The district court used the standard first announced in *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality), to determine if *Crawford* applied to petitioner's case. JA 35, ¶ 4. The court concluded that *Crawford* "announced a new rule of law not dictated by precedent at the time Petitioner's conviction became final" and thus did not apply to petitioner's case.[3] *Id.* Petitioner appealed and the Minnesota Court of Appeals affirmed. JA 36-41. Petitioner petitioned for further review before the Minnesota Supreme Court. The court granted the petition on "the *Crawford* issue only," JA 43, and assigned petitioner counsel.

Petitioner made two arguments to the Minnesota Supreme Court. First, he argued that *Crawford* applied to his case under *Teague*. The Minnesota court rejected this claim

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conviction and sentence. The petition was denied and it is not at issue here. *See Danforth v. State*, 2000 WL 1780244 (Minn. Ct. App. 2000), *rev. denied* (Minn. Feb. 13, 2001) (attached in appendix to petition for writ of certiorari at E-1 – E-5).

[2] Petitioner also challenged his sentence under *Blakely v. Washington*, 542 U.S. 297 (2004). The Minnesota courts denied that claim and it is not before this Court now.

[3] The district court erroneously concluded that petitioner's case became final in 1998. The mistake is irrelevant, as petitioner's conviction became final before this Court decided *Crawford*.

and it is not before this Court now. JA 47-54. Second, he argued that the Minnesota court was "free to apply a broader retroactivity standard than that of *Teague*…, and that he is entitled to the benefit of *Crawford* under state retroactivity principles." JA 45. (emphasis original; *see Danforth*, 718 N.W.2d at 455). The Minnesota court rejected this claim as well. The court held that petitioner "is incorrect when he asserts that state courts are free to give a [United States] Supreme Court decision of federal constitutional criminal procedure broader retroactive application than that given by the Supreme Court." JA 45-46. Relying primarily upon *American Trucking Ass'n v. Smith*, 496 U.S. 167, 178 (1990) (plurality opinion), and *Michigan v. Payne*, 412 U.S. 47, 49 (1973), the Minnesota court held that it "cannot apply state retroactivity principles when determining the retroactivity of a new rule of federal constitutional criminal procedure if the Supreme Court has already provided relevant federal principles." JA 45-46. The court recognized that several other state supreme courts had reached the opposite conclusion and noted that the policy concerns underlying the *Teague* rule may not apply to state post-conviction proceedings. JA 47. But ultimately, the court held that it was "not free to fashion [its] own standard of retroactivity for *Crawford*." *Id.*

This Court granted certiorari to decide whether state courts are required to use the *Teague* standard to determine the retroactive effect of this Court's decisions. The Court should now hold that the state courts are not so constrained.

## SUMMARY OF THE ARGUMENT

State supreme courts are not required to use the standard announced in *Teague v. Lane*, 489 U.S. 288 (1989), to determine whether United States Supreme Court decisions apply retroactively to state-court criminal convictions. This Court adopted the *Teague* standard to solve a specific problem: the anomaly created when a federal court upsets a state-court conviction on the basis of constitutional commands not in force when the state-court conviction became final. As such, the *Teague* rule is a procedural defense that may be invoked by States as parties to federal habeas corpus litigation. It is not a limitation on the power of the courts of the several States.

The Minnesota Supreme Court's misstep in this case came when it confused cases setting a constitutionally-mandated retroactivity floor – i.e., cases describing the minimum requirements of federal law – with some sort of constitutionally-mandated ceiling on state-court authority. The Federal Constitution sets floors, not ceilings, regarding retroactive application of new rules of federal constitutional criminal procedure. Basic norms of constitutional adjudication require state courts to apply new rules of constitutional criminal procedure to all cases pending on direct review when the rule is announced. The Constitution requires nothing else. But neither the Constitution nor non-constitutional federal law prohibits state courts or state legislatures from opening a forum for that state's prisoners to challenge their convictions under all currently applicable constitutional rules, if a State chooses to do so.

The Court did not intend to require state courts to use the *Teague* standard. Nor could the Court have imposed such a requirement, as no possible source of authority for

the *Teague* rule could be used to place a limit on the actions of state courts. Were this Court now to impose upon the States the burden of following the *Teague* rule, it would not only be turning established concepts of federalism upside down but would be upsetting the States' historical freedoms to provide greater substantive and procedural protections to their respective citizens than those afforded in federal court. This Court must reverse the Minnesota Supreme Court, reaffirm the long-held understanding of our federalism, and confirm that States are free to grant to their citizens more protections under state law than those citizens are entitled to under federal law.

## ARGUMENT

### I. *TEAGUE* WAS INTENDED TO SOLVE A SPECIFIC PROBLEM: FEDERAL COURT INTERFERENCE WITH STATE CRIMINAL CONVICTIONS. IT WAS NOT INTENDED TO, AND DOES NOT, BIND STATE COURTS IN STATE POST-CONVICTION PROCEEDINGS.

#### A. *Teague* applies only to federal courts reviewing state-court convictions on federal habeas review.

The *Teague* standard governs only federal courts sitting in habeas corpus review of state-court criminal convictions. Federal courts are empowered to entertain a petition for a writ of habeas corpus "on behalf of a person in custody pursuant to the judgment of a State court" if the person alleges that he or she "is in custody in violation of the [federal] Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (2006). Since Congress first provided federal courts with this authority, the Supreme Court "has grappled with the relationship between the classical common-law writ of habeas corpus and the remedy provided in [the habeas statute]." *Wainwright v. Sykes*, 433 U.S. 72, 78 (1977); *see also Fay v. Noia*, 372 U.S. 391, 415-26 (1963) (detailing history of federal habeas review of state-court convictions under statute). In the last two decades, this Court has promulgated several restrictions on the federal courts' authority to upset state-court criminal convictions on habeas review. *See Sykes*, 433 U.S. at 77-82 (detailing different prudential doctrines limiting or expanding availability of habeas relief).

In *Teague*, a plurality of this Court announced the most significant such restriction.[4] *Teague* announced two bright-line rules: subject to two extremely narrow exceptions, federal courts reviewing state-court convictions on habeas corpus review would no longer be permitted to 1) announce new rules of constitutional criminal procedure; or 2) apply a new rule to a case that had become final before the new rule was announced. *Teague*, 489 U.S. at 310. The plurality reached its decision by focusing not upon the nature of the constitutional right at stake or the extent of the alleged constitutional violation, but rather "on the nature, function, and scope of the adjudicatory process in which such cases arrive." *Id.* at 306 (quotation omitted). That "adjudicatory process" was federal habeas corpus review of state-court convictions, and the proper focus was upon "the purposes for which the writ of habeas corpus is made available." *Id.* The issue in *Teague* was "not so much one of prospectivity or retroactivity of [a new constitutional] rule," but rather was a policy choice: to define which state prisoners could obtain "'federal habeas corpus [review] to go behind [an] otherwise final judgment of conviction'" based upon new rules of procedure. *Id.* at 309-10 (quoting Paul J. Mishkin, The High Court, the Great Writ, and the Due Process of Time and Law, 79 HARV. L. REV. 56, 77-78 (1965)).

In forming that policy, the plurality focused on two key interests: comity and finality. *Teague*, 489 U.S. at 308. The Court was concerned about the "costs imposed

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[4] Justice O'Connor's opinion for the Court in *Teague* was a plurality opinion. The *Teague* rule, however, was quickly adopted by a majority of the Court and has been used since. *See Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) (majority adopts *Teague* standard), *abrogated in part on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). Citations to *Teague* in this brief are to the plurality opinion unless otherwise indicated.

upon the State[s] by retroactive applications of new rules of constitutional law on habeas corpus[.]" *Id.* at 310 (quotation omitted). The plurality determined that those costs "far outweigh the benefits of [required retroactive] application" of new rules. *Id.* Such required application "continually forces" the States to defend otherwise final judgments against habeas attacks in federal court. *Id.* (emphasis original). Ultimately, the plurality decided that "[a]pplication of constitutional rules [that were] not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Id.* at 309; *see also Reed v. Ross*, 468 U.S. 1, 21 (1984) (Rehnquist, J., dissenting) (discussing the "anomal[y]" created when a federal habeas court upsets a state criminal conviction "because of legal developments that occurred long after the [state-court] conviction became final.").

The *Teague* rule was based largely upon Justice Harlan's policy positions on the retroactive application of new rules to federal habeas cases. *Teague*, 489 U.S. at 305-14 (discussing, inter alia, *Mackey, et al. v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in judgments in part and dissenting in part); *and Desist v. United States*, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting)). Justice Harlan believed that all new rules had to be applied to cases pending on direct review when the rule was announced, *see Desist*, 394 U.S. at 257 (Harlan, J., dissenting), but that federal courts, acting on habeas review, should not apply such rules to cases that had already become final. *See Mackey*, 401 U.S. at 683, 688-89 (Harlan, J., concurring in part and dissenting in part); *Desist*, 394 U.S. at 260-62 (Harlan, J., dissenting). Justice Harlan based these specific positions upon his general view that the Constitution did not "[a]ssur[e] every state and

federal prisoner a forum in which he can continually litigate the current constitutional validity of the basis for his conviction." *Mackey*, 401 U.S. at 689 (Harlan, J., concurring in part and dissenting in part).

*Teague*, and the decisions upon which it was based, were focused exclusively upon one forum: habeas corpus review by federal courts of state-court criminal convictions. *See Teague*, 489 U.S. at 292 (describing state prisoner's federal habeas claim); *Id.* at 305-14; *Mackey*, 401 U.S. at 682 n. 1 (Harlan, J., concurring in part and dissenting in part) (framing discussion as involving prisoners seeking federal habeas review of their convictions); *Id.* at 682-89 (discussing "the purposes for which the [federal] writ of habeas corpus is made available"); *Desist*, 394 U.S. at 260-62 (Harlan, J., dissenting) (discussing "Retroactivity on Habeas Corpus"). Nothing in *Teague* indicates that the rule it announced was intended to bind any courts other than federal courts sitting in habeas review of state-court convictions.[5] And while Justice Harlan did not believe that the Constitution guaranteed state prisoners a forum in which they could challenge their convictions on the basis of new rules of procedure, he did not discuss, or discount, the possibility that the States might choose to create such a forum.

This Court has repeatedly emphasized the limited nature of *Teague*'s holding by commenting that it concerns only the specific fact scenario there presented: federal habeas review of state-court convictions. Three years after authoring the opinion that announced the test, Justice O'Connor described *Teague*'s limited application: "*Teague*

[5] One dissent pointed out as much. *Teague*, 489 U.S. at 328 (Brennan, J., dissenting) (commenting that decision appeared to apply only to specific fact scenario of state prisoner challenging state conviction in federal court).

simply requires that a state conviction on federal habeas be judged according to the law in existence when the conviction became final." *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring); *see also Beard v. Banks*, 542 U.S. 406, 412 (2004) (*Banks II*) ("*Teague*'s nonretroactivity principle acts as a limitation on the power of federal courts to grant habeas corpus relief to ... state prisoner[s].") (quotation omitted) (alteration original) (emphasis added); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995) ("The *Teague* doctrine embodies certain special concerns – related to collateral review of state criminal convictions [by federal courts] – that affect which cases are closed, for which retroactivity-related purposes, and under what circumstances."); *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) ("The nonretroactivity principle prevents a federal court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final.") (emphasis altered) (citation omitted); *Stringer v. Black*, 503 U.S. 222, 227-28 (1992) ("When a petitioner seeks federal habeas relief based upon a principle announced after a final judgment, *Teague* and [its progeny] require a federal court to answer an initial question, and in some cases a second.") (emphasis added). In sum,

> [t]he *Teague* cases reflect this Court's view that habeas corpus is not to be used as a second criminal trial, and federal courts are not to run roughshod over the considered findings and judgments of the state courts that conducted the original trial and heard the initial appeals.

*Williams v. Taylor*, 529 U.S. 362, 383 (2000) (op. of Stevens, J.) (emphasis added).

The *Teague* rule was based upon the purpose and scope of "the adjudicatory process in which [*Teague*] ar[ose]." *Teague*, 489 U.S. at 306 (quoting *Mackey*, 401 U.S. at 682) (Harlan, J., concurring in part and dissenting in part)). That "adjudicatory

process" was federal habeas corpus review of state-court criminal convictions, not state-court post-conviction review of that state's criminal convictions. The two processes are entirely different, and state courts are not required to use the *Teague* standard when reviewing their own criminal convictions.

### B. The Cases Interpreting *Teague*'s "New Rule" Requirement Make Clear that *Teague* Controls Federal, not State, Courts.

The cases interpreting *Teague*'s "new rule" requirement strongly indicate that *Teague* binds only federal courts when those courts consider creating or applying a new rule of constitutional criminal procedure in a habeas review of a state-court conviction. Out of respect for decision-making by state-court judges, the Court has greatly expanded the definition of a "new rule" that would be inapplicable on habeas review. The Court has explained this expansion by stating that it "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."[6] *Butler v. McKeller*, 494 U.S. 407, 414 (1990); *see also O'Dell v. Netherland*, 521 U.S. 151, 156 (1997); *West*, 505 U.S. at 291 (op. of Thomas, J.); *Stringer*, 503 U.S. at 227. Thus, a decision will be treated as "new" even if it was "controlled" or "governed" by prior law. *Butler*, 494 U.S. at 415. A rule will only be considered "old" if, at the time it was decided, "no other interpretation [of precedent] was reasonable." *Lambrix v. Singletary*, 520 U.S. 518, 538 (1997) (emphasis original). This standard is necessary, the Court has reasoned, to "protect[]…the reasonable judgments of

[6] Whether this statement is one of "policy" or of "law," it stands for the proposition that federal courts are "not to run roughshod over the considered findings and judgments of the state courts that conducted the original trial and heard the initial appeals." *Williams*, 529 U.S. at 382-83 (op. of Stevens, J.).

state courts." *Banks II*, 542 U.S. at 413. This policy of deference – to either the conviction generally, *see Williams*, 529 U.S. at 383 (op. of Stevens, J.) or to the legal question specifically, *see West*, 505 U.S. at 294 (op. of Thomas, J.) – dates back to *Teague*'s emphasis on comity. *See Teague*, 489 U.S. at 310.

When this Court decided *Teague*, it made clear that it was reluctant to allow federal-court judges to second-guess state-court decision-making on the basis of constitutional rules that were not in place at the time of the state-court proceeding. *Teague*, 489 U.S. at 309. The Court recognized that "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.'" *Teague*, 489 U.S. at 310 (quoting *Engle v. Isaac*, 456 U.S. 107, 128 n. 33 (1982) (alterations in original)). *Teague* prohibited such second guessing when the outcome of a particular decision was "susceptible to debate among reasonable minds." *Butler*, 494 U.S. at 415. In that circumstance, *Teague* requires the federal court to give way to the original state-court decision. But this rationale applies only to federal courts sitting in judgment of state-court convictions. It has no application when the state-court decision at issue is being reviewed by a higher court in the same state.

### C. *Teague* Comes From a Source of Authority that Can Bind Only Federal Courts.

This Court has never explicitly stated from which source of its authority it drew the *Teague* rule. But there are only two possible sources of authority for *Teague*, and neither of them may force the state courts to apply a particular retroactivity test.

The *Teague* rule could have resulted from this Court's interpretation of the federal habeas corpus statute, 28 U.S.C. § 2254. A state prisoner's right to obtain federal court review of his state-court conviction is premised upon section 2254, and *Teague* itself involved a section 2254 petition.[7] *Teague*, 489 U.S. at 293; *see also Mackey*, 401 U.S. at 687-88 (Harlan, J., concurring in part and dissenting in part); *Noia*, 372 U.S. at 409-410, 415-26 (explaining history of habeas statute and availability of federal habeas relief for state prisoners). Or, *Teague* could have come from an exercise of this Court's supervisory powers over the federal courts. *See United States v. Hasting,* 461 U.S. 499, 505 (1983) (holding that this Court has the authority to "within limits[] formulate procedural rules not specifically required by the Constitution or the Congress" that bind all federal courts). *Teague* was, in the end, a policy decision, and this Court can use its supervisory powers to make such policies. *See Teague*, 489 U.S. at 310 (discussing policy-driven basis for decision); *Mackey*, 401 U.S. at 682-83, 688-89, 691 (Harlan, J., concurring in part and dissenting in part) (discussing application of new rules to habeas cases as policy decisions); *see also Butler*, 494 U.S. at 413-14 (comparing *Teague* to policy-based good-faith exception to Fourth Amendment's probable-cause warrant requirement) (citing *Untied States v. Leon*, 468 U.S. 897, 918-19 (1984)).[8]

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[7] Justice Brennan, for one, apparently saw *Teague* as a statutory-interpretation decision, albeit, in his view, an incorrect one. *See Butler*, 494 U.S. at 417-28 (Brennan, J., dissenting); *Teague*, 489 U.S. at 332-33, 339 (Brennan, J., dissenting).

[8] *Butler*'s comparison of *Teague* to *Leon* is an apt one. The rules announced in each case represent choices made by the Court in its role as policy-maker for the federal courts. *See Leon*, 468 U.S. at 913, 922 (discussing policy reasons behind the good-faith exception). But state courts are free to make different policy decisions regarding the good-faith exception, *see, e.g., State v. Novembrino*, 519 A.2d 820, 853-57 (N.J. 1987)

But from whichever source of authority sprang the *Teague* rule, state courts are not compelled to follow it. State courts review state-court convictions on collateral attack under authority granted to them by their respective legislatures, not under the federal habeas statute. *See Cowell v. Leapley*, 458 N.W.2d 514, 517 (S.D. 1990) (emphasizing that collateral review in South Dakota state court is conducted pursuant to state statute, over which state supreme court exercises final interpretive authority). Indeed, section 2254 does not discuss state courts at all. 28 U.S.C. § 2254(a) (2006).

This case, for example, concerns petitioner's request for relief in Minnesota state court under Minnesota's Post-Conviction Relief Act, Minn. Stat. §§ 590.01 – 590.09 (2004).[9] That statute allows a Minnesota state-court judge to make any "disposition as may be appropriate" to resolve the case, including granting the petitioner a new trial. Minn. Stat. § 590.01, subd. 1. If the Minnesota Supreme Court interprets that language to allow for retroactive application of new rules of procedure to otherwise final cases, its decision would be the authoritative and final interpretation of the statute. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992). The same is true for state post-conviction statutes that authorize retroactive application of new rules "in the interests of justice." Colo. Rev. Stat. § 18-1-410(f)(I) (West 2004); N.D. Cent. Code § 29-32.1-01(1)(f) (2005).[10] It is for the courts of those states, not the federal courts, to determine when "the

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(rejecting good-faith exception), and they are similarly free to make different policy decisions regarding application of new rules to otherwise final cases.

[9] For a discussion of the history and purposes of Minnesota's Post-Conviction Relief Act, see *Deegan v. State*, 711 N.W.2d 89, 93-95 (Minn. 2006).

[10] The Colorado Supreme Court has chosen, as a matter of state public policy, to adopt

interests of justice" require retroactive application of new rules of constitutional criminal procedure.

Furthermore, "[i]t is beyond dispute that [this Court] do[es] not hold a supervisory power over the courts of the several States." *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2679 (2006) (quoting and citing *Dickerson v. United States,* 530 U.S. 428, 438 (2000); *Smith v. Phillips,* 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension")). State courts are not compelled to follow the holdings of supervisory-powers decisions including, if premised upon supervisory authority, *Teague*. *See Early v. Packer*, 537 U.S. 3, 10 (2003) (*per curiam*).

If *Teague* were a constitutional command to all courts, as the Minnesota Supreme Court concluded it was, then one would think that this Court would have relied upon some constitutional provision in promulgating the *Teague* rule. But it did not. *See Teague*, 489 U.S. at 299-316. This is because *Teague* was not a constitutional decision. *Cf. Lowenfield v. Phelps*, 484 U.S. 231, 239 n. 2 (1988) (holding that decision in *Jenkins v. United States*, 380 U.S. 445 (1965), was based upon exercise of supervisory powers, not interpretation of the Constitution, based in part upon fact that "[t]he *Jenkins* Court cited no provision of the Constitution" in support of its holding). As such, state courts are not compelled to follow it. *See Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991) ("[I]n

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the *Teague* rule. *Edwards v. People*, 129 P.3d 977, 981-83 (Col. 2006), *cert. denied*, 127 S.Ct. 1483 (2007). The North Dakota Supreme Court has not fully considered the issue of whether it is required to use the *Teague* standard. *See, e.g., Clark v. State*, 621 N.W.2d 576, 577-79 (N.D. 2001) (declining to decide whether state court was required to use *Teague*).

state courts… [Supreme Court] authority is limited to enforcing the commands of the United States Constitution."). The Court announced and enforces the *Teague* rule pursuant to a source of authority which does not and cannot limit the actions of the courts of the several States.

### D. *Teague* Is a Prudential Doctrine that May Be Raised by the State as a Party to Federal Habeas Corpus Litigation, Not a Constitutional Command to All Courts.

The Minnesota Supreme Court apparently believed that *Teague* announced some sort of constitutionally-based command to that court, and all other state courts, dictating what rules of law could be applied to which cases. *Teague* did nothing of the sort. The *Teague* rule is simply a procedural defense that can be raised by the State as a party to federal habeas litigation. If the State chooses to so invoke the *Teague* rule, the federal court must consider the defense, even if a state court has considered the merits of the prisoner's challenge. *Horn v. Banks*, 536 U.S. 266, 272 (2002) (*per curiam*) (*Banks* I). But if the State chooses not to rely upon *Teague* and instead to meet the merits of a prisoner's constitutional arguments head-on, the federal court may honor that decision as well. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (so holding and contrasting Eleventh Amendment-based defense which "need not be raised [to be] decided by the Court on its own motion") (citing *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 515 n. 19 (1982)).

More to the point, as with any procedural defense, a State may give up the right to have federal courts consider the *Teague* rule by default. A State may forfeit consideration of *Teague* by silence, *see Parke v. Raley*, 506 U.S. 20, 26 (1992), or by

attempting to claim the protections of the *Teague* rule in an untimely manner, *see Schiro v. Farley*, 510 U.S. 222, 228-29 (1994) (state waived *Teague* by not raising it in opposition to petition for writ of certiorari); *Godinez v. Moran*, 509 U.S. 389, 397 n. 8 (1993) (state waived *Teague* by raising defense for first time in petition for certiorari). If the *Teague* rule truly limited the authority of state courts to hear and consider the merits of federal constitutional claims, one would not think that it could be so easily surrendered by States as parties to litigation.

**E. Conclusion.**

The *Teague* rule, which came from an interpretation of the federal habeas statute or from this Court's exercise of its supervisory powers over lower federal courts, applies only to cases involving the adjudicatory process in which *Teague* arose: federal habeas corpus review of state court criminal convictions. In such cases, *Teague* provides a prudential defense available to States as parties to federal habeas corpus litigation. The rule was designed, and has been enforced, to protect the reasonable judgments of state courts. But the prudential, procedural rule announced in *Teague* is not a limitation upon the power of the courts of the several States. The Minnesota Supreme Court erred by concluding that it was, and this Court should now hold that it is not.

## II. *TEAGUE* DOES NOT SET THE MAXIMUM PROTECTION THAT STATE COURTS CAN OFFER STATE CRIMINAL DEFENDANTS BECAUSE THIS COURT'S RETROACTIVITY PRECEDENTS SET CONSTITUTIONALLY MANDATED FLOORS BELOW WHICH STATE COURTS MAY NOT DESCEND, NOT CEILINGS ABOVE WHICH STATES MAY NOT ASCEND.

### A. The Constitution Sets a Floor, Not a Ceiling, Concerning the Need for Retroactive Application of this Court's Decisions.

This Court's retroactivity cases set floors below which state courts may not descend, not ceilings above which they may not ascend, in applying this Court's decisions to otherwise final cases. Long before *Teague*, this Court made clear that state courts are free to apply federal law to a broader class of defendants than the class defined by federal retroactivity standards. In *Johnson v. New Jersey*, 384 U.S. 719 (1966), the Court held that the then-prevailing retroactivity standards did not require state courts to apply *Escobedo v. Illinois*, 378 U.S. 478 (1964) or *Miranda v. Arizona*, 384 U.S. 436 (1966), to cases pending on state collateral review. *Johnson*, 384 U.S. at 721, 731-33. Federal law required application of *Escobedo* and *Miranda* only to cases initiated after those decisions were announced. *Johnson*, 384 U.S. at 733. But the Court made plain that "States are still entirely free to effectuate under their own law stricter standards than those we have laid down and to apply those standards in a broader range of cases than is required by this decision." *Id.* (emphasis added). This is all petitioner seeks. The Minnesota Supreme Court erred by ignoring – not even citing, let alone discussing – *Johnson*.

The Court set the retroactivity floor in *Griffith v. Kentucky*, 479 U.S. 314 (1987). There, the Court held that all courts, state and federal, had to apply constitutional new

rules to all cases pending on direct review when the rule is announced. *Griffith*, 479 U.S. at 322. In so holding, the Court retreated from its earlier pronouncement that "the Constitution neither prohibits nor requires retrospective effect of a new constitutional rule." *Id.* at 320 (quoting *Linkletter v. Walker*, 381 U.S. 618, 629 (1965)). The Court instead recognized that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322; *see also Teague*, 489 U.S. at 317 (White, J., concurring in part and concurring in the judgment) (commenting that *Griffith* "appear[s] to have constitutional underpinnings") (citation omitted). The "norms" were defendants' rights to due process and the requirement of "treating similarly situated [parties] the same." *Id.* at 322-23; *see also Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 95 (1993) (discussing rationales behind *Griffith*).

But *Griffith* set the floor, not the ceiling. It held that state courts must apply new rules to all pending cases. *See, e.g., O'Meara v. State*, 679 N.W.2d 334, 339-40 (Minn. 2004). It did not hold that "a state cannot apply new criminal procedural rules to cases on collateral review." *State v. Whitfield*, 107 S.W.3d 253, 266 (Mo. 2003) (emphasis original). State courts certainly may not "limit" retroactive application of federal law in violation of federal retroactivity standards because doing so would violate the "basic norms of constitutional adjudication" upon which *Griffith* was based. *Harper*, 509 U.S. at 100. But States are not prohibited from applying those rules to an even broader class of cases if they choose do so. *Johnson*, 384 U.S. at 733.

*Teague*, like *Griffith*, sets retroactivity "floors" which States are obliged to follow. Holdings which place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Teague*, 489 U.S. at 307 (quoting *Mackey,* 401 U.S. at 692 (Harlan, J., concurring in part and dissenting in part), and holdings which establish "watershed rules" that "implicate the fundamental fairness of the trial," *Teague*, 489 U.S. at 312, must be applied retroactively to all cases, final and pending. State courts must apply such holdings retroactively because, as with applying new rules to cases on direct review, not doing so would violate "components of basic due process." *Teague*, 489 U.S. at 313. State courts are obliged to meet these retroactivity floors. Nothing else is required by the Constitution or by federal law, but the States are not prohibited from applying other types of rules retroactively, if they choose to do so.

### B. The Minnesota Supreme Court Confused this Court's Precedent Dealing with Retroactivity Floors – Decisions Detailing the Minimum Requirements of Federal Law - With Decisions Setting Retroactivity Ceilings.

The Minnesota Supreme Court's wrong turn in this case came when it misconstrued cases dealing with floors – cases in which this Court set forth the minimum requirements of federal retroactivity law – as somehow supporting the proposition that *Teague* had set a constitutional ceiling with respect to retroactive application of new rules of constitutional criminal procedure.

The primary case that the court misinterpreted was *American Trucking Ass'n v. Smith*, 496 U.S. 167 (1990). JA 45-47. In *American Trucking*, this Court considered whether the Arkansas Supreme Court had misapplied the then-applicable federal test for determining retroactive application of civil cases. *American Trucking*, 496 U.S. at 174-

75 (plurality). Three years earlier, in *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 284 (1987), the Court had declared unconstitutional certain types of highway taxes. Following that decision, the Arkansas Supreme Court considered whether *Scheiner* applied retroactively or, stated another way, whether *Scheiner* required Arkansas to refund all taxes collected under the now-unconstitutional scheme, even those collected before *Scheiner* was released. *American Trucking*, 496 U.S. at 173-76 (plurality); *see also Id.* at 205-06 (Stevens, J., dissenting). The Arkansas Supreme Court considered the question under the then-applicable federal retroactivity standards and concluded that it did not. *American Trucking*, 496 U.S. at 174-76 (plurality). Therefore, the state court declined to afford relief to state taxpayers who had paid the unconstitutional tax before *Scheiner* invalidated it. *Id.*

On grant of certiorari, this Court first considered whether it had jurisdiction to hear the case. *Id.* at 177 (plurality). The plurality held that when a state court uses federal law to decide that a United States Supreme Court decision does not apply retroactively, thus depriving some of the citizens of that state of the benefits of the decision at issue, the question presented – "does the decision at issue apply retroactively?" – is one of federal law which this Court has jurisdiction to answer. *Id.* The question of whether a state court must apply a United States Supreme Court decision retroactively also "is a matter of federal law." *Id.* The plurality went on to hold that, under the federal standard, *Scheiner* was not fully retroactive and thus federal law did not require the State to provide relief to all taxpayers burdened by the tax. *Id.* at 182-83 (plurality). But, again considering the issue under federal law, the Court held that

*Scheiner* was partially retroactive and that, therefore, the State had to provide relief to taxpayers who paid the unconstitutional tax at issue after *Scheiner* was announced. *Id.* at 186-87 (plurality).

The Minnesota Supreme Court confused *American Trucking*'s discussion of a federally-mandated floor with a federally-mandated ceiling. Federal retroactivity standards are necessary "to prevent States from denying or curtailing federally protected rights." *Id.* at 178 (plurality) (emphasis added). Therefore, "federal law sets certain minimum requirements that States must meet but may exceed in providing appropriate relief." *Id.* at 178-79 (plurality). While Arkansas was required by federal law to provide some relief to taxpayers only for taxes collected after *Scheiner* was announced, nothing precluded Arkansas from "exceed[ing]" that requirement, thereby granting even greater retroactive application of *Scheiner*.[11] *Id.* As long as the federal minimum is satisfied, States may, but are not required to, provide relief that exceeds that minimum. *Id.* at 178-79.

The other cases that the Minnesota Supreme Court relied upon are equally distinguishable. In *Ashland Oil v. Caryl*, 497 U.S. 916 (1990) (*per curiam*), this Court considered the West Virginia Supreme Court's holding that *Armco Inc. v. Hardesty,* 467 U.S. 638 (1984), "which invalidated the West Virginia tax scheme that had…been applied against Ashland [Oil] as discriminatory against interstate commerce," did not

[11] Writing in dissent, and also commanding four votes, Justice Stevens was even more emphatic in defense of that State's right to afford relief broader than that required under federal law. "[T]he Federal Constitution," he wrote, "does not ordinarily limit the State's power to give a decision remedial effect greater than that which a federal court would provide." *American Trucking*, 496 U.S. at 210 (Stevens, J., dissenting).

apply retroactively under state law. *Ashland Oil*, 497 U.S. at 917. This Court reversed because federal law required the state court to apply *Hardesty* retroactively. *Id.* at 918-21. The West Virginia court erred in *Ashland Oil* because, by refusing to apply *Hardesty* retroactively, it violated the floor set by federal retroactivity rules. *Id.*

That is not the situation here. If, for example, this Court held that a particular decision applied retroactively under *Teague*, and a state court purported to rely upon state law to refuse to undertake such application, *Ashland Oil* would be authority for this Court to reverse such a decision. *Id.*; *see also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991) (op. of Souter, J.) (holding that state court erred by refusing to apply retroactively a Supreme Court decision where federal law required such application); *Yates v. Aiken*, 484 U.S. 211, 217-18 (1988) (rejecting argument that state court could refuse to apply a decision retroactively where federal law required retroactive application); *Arsenault v. Massachusetts*, 393 U.S. 5 (1968) (*per curiam*) (reversing state conviction because federal law required retroactive application of right-to-counsel cases). But *Ashland Oil* does not discuss, let alone limit, the state's authority to afford broader retroactive application of United States Supreme Court decision than federal law requires.

The Minnesota Supreme Court also misread *Michigan v. Payne*, 412 U.S. 47 (1973). JA 46-47. In *Payne*, the Michigan Supreme Court ruled that it was probably required, under federal law, to apply this Court's holding in *North Carolina v. Pearce*, 395 U.S. 711, 723-26 (1969), to Payne's case, which was pending on direct review when *Pearce* was announced. *Payne*, 412 U.S. at 49 (citations omitted). The state court relied upon what it guessed federal law required and expressly invited this Court to correct it if

it was wrong. *Id.* This Court did so and held that, under the then-applicable balancing test, the state court did not have to apply *Pearce* to Payne's case. *Id.*

But this Court did not hold that the Michigan Supreme Court could not apply *Pearce* to Payne's case. Thus, the question presented here was not at issue in *Payne*. Instead, the only question in *Payne* was whether the Michigan Supreme Court was required to apply *Pearce* retroactively. Stated another way, the question was whether this Court would "impose[]" the "burden[]" of retroactive application of *Pearce* upon Michigan and the other States. *Payne*, 412 U.S. at 57; *see also American Trucking*, 496 U.S. at 210 n. 4 (Stevens, J., dissenting) ("*Payne* does not stand for the expansive proposition that federal law limits the relief a State may provide, but only for the more narrow proposition that a state court's decision that a particular remedy is constitutionally required is itself a federal question."). The Michigan court chose to use the federal retroactivity standard and this Court simply ruled on what the federal standard required.[12]

When it comes to retroactive application of United States Supreme Court decisions, federal law sets floors, not ceilings. This Court should reverse the Minnesota Supreme Court's decision, which erroneously confused the two.

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[12] In addition, *Payne*'s precedential effect is lessened in the post-*Griffith* world. Payne's case was pending on direct review when *Pearce* was announced and therefore, presumably, he would be entitled to the benefit of *Pearce* if the situation replayed itself today.

## III. STATE COURTS ARE FREE TO COME TO DIFFERENT POLICY CONCLUSIONS REGARDING THE INTERESTS AT STAKE IN COLLATERAL REVIEW OF CRIMINAL CONVICTIONS.

In setting and enforcing the *Teague* standard, this Court made a policy decision. But nothing stops the state courts from making different policy decisions after balancing the interests at stake: stated generally, the interests of finality against the interests of affording full review of the merits of important federal constitutional claims. Where disagreement exists about how best to accomplish a particular goal, such as the best way to balance the interests of finality and full adjudication of constitutional claims, "the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (citations omitted).[13] *See* Mary C. Hutton, Retroactivity in the States: The Impact of *Teague v. Lane* on State Postconviction Remedies, 44 ALA. L. REV. 421, 445-58 (1995) (describing differing policy concerns between state and federal courts regarding collateral review of state convictions). Several States have, in fact, done just that.

The South Dakota Supreme Court, for example, determined that the *Teague* standard was "unduly narrow" and that its own retroactivity standard "adequately restrict[ed] what decisions may be reviewed." *Cowell*, 458 N.W.2d at 518; *see also Smart v. State*, 146 P.3d 15, 46-47 (Alaska Ct. App. 2006) (Mannheimer, J., concurring) (arguing that state courts can and should use a broader retroactivity test because *Teague*

[13] A state is "freer" to revel in this role once it have been "disabused of its erroneous view of what the United States Constitution requires." *Arizona v. Evans*, 514 U.S. 1, 8 (1995) (citation omitted).

is so "limited" in what claims it will allow and "[s]tate courts must…be free to do justice in situations where a new rule should, in fairness, be applied retroactively"), *rev. granted* (Alaska 2006).

The Nevada Supreme Court recognized that "the need to prevent excessive interference [with state criminal convictions] by federal habeas courts[,]" *Teague*'s comity-based primary animating concern, "has no application to habeas review by state courts [of state court convictions]." *Colwell v. State*, 59 P.3d 463, 471 (Nev. 2002).[14] The Nevada court also decided that the state's interest in the finality of a conviction was lessened when state courts review state convictions because any decision would only apply within the State and because state collateral review (at least in Nevada) generally occurs relatively quickly. *Colwell*, 59 P.3d at 471. Finally, the Nevada court concluded that it wished to "encourage[]…[the] perspicacious, reasonable application of constitutional principles in cases where no precedent appears to be squarely on point," a policy that it felt could best be achieved by using a broader retroactivity standard. *Id.*

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[14] As one Alaska state-court judge put it:

> 'Federal-state comity' is a polite way of referring to the goal of avoiding the political difficulties that can be created when the federal government exercises authority over matters that might reasonably be viewed as being primarily state concerns. This goal has no bearing on the question of whether a state supreme court should grant or withhold retroactive application of new constitutional rules to defendants who were prosecuted and convicted under that state's law.

*Smart v. State*, 146 P.3d at 45 (Mannheimer, J., concurring).

Similarly, the Missouri Supreme Court determined that its concerns about finality "are well protected by" a broader retroactivity standard, the one it had "traditionally applied." *Whitfield*, 107 S.W.3d at 267. That standard "comports better with Missouri's legal tradition." *Id.* at 268; *see also* Hon. Laura Denvir Stith, A Contrast of State and Federal Court Authority to Grant Habeas Relief, 38 VAL. U. L. REV. 421, 438-49 (2004) (discussing *Whitfield* and arguing that States are free to use retroactivity standards other than *Teague* to afford retroactive application of United States Supreme Court decisions to a broader class of defendants than the class defined by *Teague*).

Other state supreme courts have chosen, for their own policy reasons, to adopt the *Teague* standard. *See, e.g., State v. Slemmer*, 823 P.2d 41, 49 (Az. 1991); *People v. Flowers*, 561 N.E.2d 674, 682 (Ill. 1990). Still others have formulated hybrid forms of *Teague*, using its basic structure while reserving for themselves the right to apply new rules to a broader class of cases, or to a particular case, if the need arises or the interests of justice so require. *See State v. Forbes*, 119 P.3d 144, 147-48 (N.M. 2005), *cert. denied*, 127 S.Ct 1482 (2007) (using combination of *Teague* framework and equity considerations to apply *Crawford* to a case that became final in 1985); *Colwell*, 59 P.3d at 471-72 (announcing a retroactivity standard that uses *Teague* as a model but with different guidelines for determining whether a rule is new); *see also* Colo. Rev. Stat. § 18-1-410(f)(I) (West 2004); N.D. Cent. Code 29-32.1-01(1)(f) (2005) (allowing state post-conviction courts to retroactively apply of new rules of procedure "in the interests of justice").

These States' consideration, acceptance, rejection, or modification of the *Teague* standard for state-court collateral review is a prime example of how our federalism works. States, as sovereigns, are free to make their own policy choices after balancing interests of finality against those of full adjudication of constitutional claims. State courts must provide at least as extensive retroactive application of new rules of federal constitutional rules as do federal courts. *Griffith*, 479 U.S. at 322. But as long as States do not drop below the floor set by federal law, nothing should stop the States from using any retroactivity standard that they see fit.

Indeed, state courts may properly come to a different conclusion than did this Court about the policy benefits of applying *Crawford v. Washington*, 541 U.S. 36 (2004), to cases on collateral review. Federal courts may not apply *Crawford* on habeas review of state-court convictions that were final before *Crawford* was announced. *Whorton v. Bockting*, 127 S.Ct. 1173, 1184 (2007). Under *Teague*, it would be improper for a federal court to second-guess a state-court judge who did not anticipate that this Court would "overrule[]" *Ohio v. Roberts*, 448 U.S. 56 (1980), "the prior governing precedent." *Bockting*, 127 S.Ct. at 1181. But there is nothing unconstitutional or illegal about state courts reviewing their own convictions and choosing, in the interests of justice, to reach a different conclusion.

At least one State has already done so. In 1985, the New Mexico Supreme Court ordered a new trial for Ralph Earnest because of a Confrontation Clause violation, relying upon "the very rationale" embraced twenty years later in *Crawford*.[15] *Forbes*, 119 P.3d at

[15] The trial judge had admitted Earnest's co-defendant's hearsay statements to police.

145 (citing *State v. Earnest*, 703 P.2d 872, 876 (1985) (*Earnest I*)).[16] This Court reversed and ordered the New Mexico courts to apply a different Confrontation Clause test, one that resulted in the state court affirming Earnest's conviction.[17] *Forbes*, 119 P.3d at 145 (citations omitted). Following the release of *Crawford*, which seemed to confirm that the New Mexico court's original decision had been correct, Earnest filed a state habeas corpus petition challenging his convictions. *Id.*

Emphasizing the "unique circumstances" and the "unique facts and procedural posture of Earnest's case," the New Mexico Supreme Court applied *Crawford* retroactively and reversed his conviction. *Id.* at 145, 147-48. The court reasoned that "[g]ranting Earnest a new trial is consistent with [its] responsibility 'to do justice to each litigant on the merits of his own case.'" *Id.* at 148 (quoting *Desist*, 394 U.S. at 259 (Harlan, J., dissenting)). The court summed up its decision as follows:

> Our decision is limited to the very special facts of this case, highlighted by the fact that the very law this Court applied to Earnest's case twenty years ago has now been vindicated, which entitles him now to the same new trial he should have received back then.

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The New Mexico Supreme Court reversed because the statements were made to a law-enforcement officer and Earnest did not have the opportunity to cross-examine the declarant. *State v. Earnest*, 703 P.2d 872, 876 (N.M. 1985) (*Earnest I*).

[16] Apparently because the New Mexico Supreme Court received the 2006 case on a pre-decision appeal, it is styled as the State of New Mexico versus the Honorable Jay W. Forbes, the presiding district court judge. *See Forbes*, 119 P.3d at 145. Ralph Rodney Earnest, the original defendant and the petitioner for a state –court writ of habeas corpus, is the "Real Party in Interest." *Id.* at 144.

[17] This Court's *per curiam* decision remanded the case "for further proceedings not inconsistent with the opinion in *Lee v. Illinois,* 476 U.S. 530 (1986)." *New Mexico v. Earnest*, 477 U.S. 648 (1986) (*per curiam*) (mem).

*Id.* at 148-49. This Court denied New Mexico's petition for a writ of certiorari. *New Mexico v. Forbes*, 127 S.Ct. 1482 (2007).

The question presented in this case, essentially, is whether the New Mexico Supreme Court acted in some way illegally. It is unclear, at best, how reversing Earnest's conviction could have been illegal or unconstitutional. The New Mexico court made a policy decision and determined that Earnest's interest in full adjudication of his constitutional claims outweighed the State's interest in the finality of Earnest's conviction. In so ruling, the court did not misapply the Federal Constitution. One may dispute whether the New Mexico court made the correct policy decision. But the decision was the New Mexico court's to make. *See Banks II*, 542 U.S. at 412 (noting the "possibility that a state court might, in its discretion, decline to enforce an available procedural bar and choose to apply a new rule of law").

The Minnesota Supreme Court recognized that state post-conviction review involves "different policy concerns" than does federal habeas corpus review of state convictions. JA 47. But the court determined that it could not consider those concerns because this Court had imposed upon the States a "uniform national requirement," to borrow Justice Harlan's phrase, that state courts may not apply new rules of constitutional criminal procedure to state-court cases that had become final. *Chapman v. California*, 386 U.S. 18, 48 (1967) (Harlan, J., dissenting)[18]; JA 47. Justice Harlan did

[18] Justice Harlan dissented in *Chapman* because he perceived its holding (that a state court may not dismiss as harmless federal constitutional error unless that error is harmless beyond a reasonable doubt) as emanating from some kind of "general supervisory power" over the state courts, which this Court does not have. *Chapman*, 386 U.S. at 46-47. However, this Court has made clear in subsequent cases that the *Chapman*

not believe in the imposition of such restrictions. To do so "would destroy that opportunity for broad experimentation which is the genius of our federal system." *Chapman*, 386 U.S. at 48 (Harlan, J., dissenting). His concerns are well-taken. Any command to the state courts to apply *Teague* would amount to "a radical shift of authority from the States to the Federal Government" and would upset "the federal-state balance" that our federalism is designed to protect. *Gonzales v. Oregon*, 546 U.S. 243, ___, 126 S.Ct. 904, 925 (2006).

This Court is free to promulgate and enforce procedural rules for federal courts. But "'[f]ederal judges…may not require the observance of any special procedures' in state courts 'except when necessary to assure compliance with the dictates of the Federal Constitution.'" *Dickerson*, 530 U.S. at 438-39 (quoting *Harris v. Rivera*, 454 U.S. 339, 344-45 (1981) (*per curiam*)); *see also Chapman*, 386 U.S. at 21 (noting that Court may only impose upon the States those "authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights."). "States are quite capable" of enacting their own procedural limitations on collateral review of state convictions if they feel the need to strictly protect the finality of their criminal convictions. *Johnson v. United States*, 544 U.S. 295, 312 (2005) (Kennedy, J., dissenting). *See, e.g.,* Minn. Stat. § 590.01, subd. 4(a) (Supp. 2005) (providing for two-

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rule is constitutionally based, not based upon an exercise of some kind of supervisory power. *See Fry v. Pliler*, 127 S.Ct. 2321, 2326 (2007) (noting that "state courts are required to apply *Chapman*" and that state courts have a "duty to apply *Chapman*"); *see also Dickerson*, 530 U.S. at 438 (holding that Court may only reverse state-court convictions when those convictions were imposed in violation of the Federal Constitution).

year time limit on filing of post-conviction petitions).[19] But States may differ with each other, or with the federal government, "as to the appropriate resolution of the values they find at stake" in this area. *Lego v. Twomey*, 404 U.S. 477, 489 (1972). For example, this Court took no constitutional issue with a State's decision to allow collateral attacks upon a conviction for an "indefinite[]" period of time. *Johnson*, 544 U.S. at 306, 306 n. 6. So long as States respect the minimum requirements of federal retroactivity law, the decision of which new rules apply to which set of cases in a particular state is a decision for that State's courts and legislature to make. *See Colwell*, 59 P.3d at 471. This is how our federalism works.

The Federal Constitution does not "[a]ssur[e]" state prisoners of "a forum" in which they may challenge their otherwise final convictions based upon new rules of constitutional criminal procedure. *Mackey*, 401 U.S. at 689 (Harlan, J., concurring in part and dissenting in part). But the Constitution also does not prevent States from establishing such a forum. The Minnesota Supreme Court's decision to the contrary must be reversed.

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[19] The Minnesota Legislature amended the Post-Conviction Relief Act to provide for the two-year time limit in 2005, after petitioner filed the post-conviction petition at issue here. 2005 Minn. Laws ch. 136, art. 14, § 13, at 1098. All defendants whose convictions became final before August 1, 2005, were given two years from that date to file post-conviction petitions. *Id.*

## IV. IMPOSING THE *TEAGUE* RULE UPON STATE COURTS WOULD TURN THE ESTABLISHED NOTION OF FEDERALISM ON ITS HEAD AND WOULD VIOLATE THE STATE COURTS' HISTORICAL FREEDOM TO GRANT MORE PROTECTION TO THEIR CITIZENS THAN THOSE AFFORDED BY THE FEDERAL GOVERNMENT.

Under our federal system, the courts of the sovereign States may interpret their respective laws to afford broader protections to their citizens than the protections afforded by the Federal Constitution or federal law. The Constitution recognizes the States as "sovereign entities." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n. 15 (1996). The States, not the federal government, "possess primary authority for defining and enforcing the criminal law." *Isaac,* 456 U.S. at 128. Therefore, "[i]t is fundamental that state courts be left free and unfettered by [the Supreme Court] in interpreting their state constitutions," so that they might best decide how to carry out that responsibility. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Indeed, the States' authority in this area is not limited to interpretations of state constitutions. States may "adopt by statute, rule, or decision," *Iowa v. Tovar*, 541 U.S. 77, 94 (2004), or by simple promulgation of state "public policy," *Nichols v. United States*, 511 U.S. 738, 749 n. 12 (1994), any standard that offers greater protections to their respective citizens than those offered by federal law.

Similarly, and key to this case, is the state courts' authority to afford greater procedural protections to their respective citizens, even where the state court is applying substantive federal law. State courts may apply Supreme Court cases announcing new rules to "a broader range of cases" than those required under federal law. *Johnson*, 384 U.S. at 733; *see also Banks II*, 542 U.S. at 412 (citing *Sykes*, 433 U.S. at 81-91); *Wichita*

*Royalty Co., et al. v. City Nat. Bank of Wichita Falls*, 306 U.S. 103, 109 (1939) ("nothing requires the state court to adopt the [procedural] rule which the federal or other courts may believe to be the better one"). Indeed, a state court usually does not have an obligation to consider any "preliminary nonmerits issue," such as *Teague*, and may choose instead "to bypass the preliminary issue and rest its decision on the merits" of a prisoner's claim. *Smith v. Texas*, 127 S.Ct. 1686, 1703 (2007) (Alito, J., dissenting). For example, an unpreserved Sixth Amendment error under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), is reviewable in federal court only for plain error. *United States v. Cotton*, 535 U.S. 625, 631-34 (2002). But a state court may choose to bypass the nonmerits plain-error test and instead consider on their merits unpreserved Sixth Amendment errors. *See State v. Osborne*, 715 N.W.2d 436, 444-46 (Minn. 2006).

State courts or state legislatures may allow litigants to bring claims asserting a violation of federal law in state courts even where those litigants would not be able to bring the same claim in federal court. In *ASARCO, Inc. v. Kandish*, 490 U.S. 605 (1989), for example, the Court considered whether it had jurisdiction to review an Arizona state-court decision in a lawsuit brought by parties who, had the suit been filed in federal court, would not have had standing.[20] *ASARCO*, 490 U.S. at 613-17 (op. of Kennedy, J.); *Id.* at 634 (Rehnquist, C.J., concurring in part and dissenting in part). The original plaintiffs had standing to sue in Arizona state court, however, under Arizona's taxpayer-standing laws. *Id.* at 612, 617. The Court held that Arizona was free to "[take] no account of

[20] The original plaintiffs in *ASARCO*, as mere taxpayers, would not have had standing in federal court because Article III does not generally recognize taxpayer standing. *See ASARCO*, 490 U.S. at 613-17 (op. of Kennedy, J.).

federal standing rules" and could afford standing to pursue federal claims in state court to a bigger group of litigants than federal law required. *Id.* at 617. "[E]ven when they address issues of federal law, as when they are called upon to interpret the Constitution or…a federal statute," states are free to grant standing to litigants who would not have such rights in federal court. *Id.*

The Court recognized the "paradox" that this result created; namely, that plaintiffs proceeding in state court could obtain a determination of their rights under federal law "that would have been unavailable if the action had been filed initially in federal court." *Id.* at 624. But to disallow this result would be to "impose federal standing requirements on the state courts whenever they adjudicate issues of federal law…[.] That result…would be contrary to established traditions and to [this Court's] prior decisions…[.]" *Id.* at 620. In sum, allowing the States to open their courthouse doors to a larger class of litigants than would be so eligible in federal court, even to pursue claims under federal law, is "necessary in deference to the States." *Id.* at 624.[21]

*Teague* is similar to *ASARCO* in that both cases concern who, among a group of potential litigants, is entitled to make a substantive federal claim. *See Teague*, 489 U.S. at 309-10 (quoting Mishkin, The High Court, 79 Harv. L. Rev. at 77-78). And the federal courts have no more authority to "impose federal…requirements on the state courts" in this arena than they do in the civil arena. *ASARCO*, 490 U.S. at 620. If anything, given

[21] Although *ARASCO* produced three opinions, no Justice questioned Arizona's right to grant standing to the original plaintiffs to pursue their federal claims in state court, regardless of whether the same plaintiffs would have had standing in federal court or whether this Court had jurisdiction over the case.

state courts' freedom to interpret their own laws or enact their own policies that result in granting more protections to state citizens than those afforded in federal court, the federal courts' authority to require state courts to use the *Teague* rule is even more doubtful than was their authority to impose federal standing requirements upon the States.

Even in the criminal context, state courts may open their doors to litigants who cannot be heard in federal courts to raise federal claims. For example, in capital cases, the Pennsylvania Supreme Court once applied a "relaxed waiver rule," under which that court would consider federal claims that, among other things, would have been *Teague*-barred if pursued via federal habeas. *See Banks II*, 542 U.S. at 411-12 (citing cases and discussing former rule); *Banks I*, 536 U.S. at 269-72. In *Banks I*, this Court held that such a practice does not change the federal habeas court's obligation to conduct a *Teague* analysis if *Teague* was properly raised by the State in a subsequent federal habeas proceeding. *Banks I*, 536 U.S. at 272. And in *Banks II*, this Court held that such a practice does not change the determination of when a case is final for *Teague* purposes in the subsequent federal habeas case. *Banks II*, 542 U.S. at 412. But in neither case did the Court take issue with the practice itself. In other words, this Court had no quarrel with the Pennsylvania Supreme Court's policy decision to ignore *Teague* and to review all claimed legal issues, federal or state, in a particular set of cases. To the contrary, the Court expressly recognized that a state court may, in its discretion, "decline to enforce an available procedural bar and choose to apply a new rule of law" to an otherwise final case. *Banks II*, 542 U.S. at 412 (citing *Sykes*, 433 U.S. at 81-91).

States may even enlarge the scope of relief available for a federal constitutional violation when that violation is litigated in state court. In 2005, the Washington Supreme Court held that, as a matter of federal law, a Sixth Amendment error under *Blakely v. Washington*, 542 U.S. 296 (2004), was automatically reversible structural error. *State v. Hughes*, 110 P.3d 192, 208 (Wash. 2005) (relying upon, inter alia, *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)). This Court subsequently disagreed. *Washington v. Recuenco*, 126 S.Ct. 2546, 2553 (2006). But this Court made clear that Recuenco's "argument that, as a matter of state law, the *Blakely*…error was not harmless remains open to him on remand." *Recuenco*, 126 S.Ct. at 2551 n. 1 (emphasis original); *see also Id.* at 2554 (Stevens, J., dissenting) (agreeing with majority that "[t]he Washington Supreme Court can, of course, reinstate the same judgment on remand…[if] that court chooses, as a matter of state law, to adhere to its view that the proper remedy for *Blakely* errors…is automatic reversal of the unconstitutional portion of a defendant's sentence"). Thus, this Court gave the Washington Supreme Court permission to hold that criminal defendants in that state are entitled to something to which criminal defendants in other states or federal court are not entitled – automatic reversal of the portion of their sentences that were imposed in violation of the Federal Constitution. In other words, the Washington Supreme Court could afford defendants in that State a form of relief for a Sixth Amendment error to which no other defendant in the country was entitled.

This, essentially, is what the Minnesota Supreme Court held that federal law prohibited it from doing. JA 46-47. The Minnesota court held that federal law, i.e., *Teague*, controlled the question of who was entitled to relief under *Crawford* because

*Crawford* was a case interpreting the Federal Constitution. *Id.* If that were true, then the Washington courts would not be able to hold that *Blakely* errors are structural under state law; *Blakely* errors, after all, are violations of the Federal Constitution, not the Washington state constitution. If federal law limited state-court authority in this area to the extent that the Minnesota Supreme Court believed it did, Washington would not have the authority recognized in *Recuenco*.

In sum, there is always a "possibility" that a state court may "decline to enforce an available procedural bar[, such as the *Teague* rule,] and choose to apply a new rule of law," to a particular case. *Banks II*, 542 U.S. at 412 (citing *Sykes*, 433 U.S. at 81-91); *see, e.g., Forbes*, 119 P.3d at 147-48. The Minnesota Supreme Court erroneously held that there was no such possibility because it was required to apply the *Teague* procedural bar, whether it wanted to or not. The Minnesota court was wrong, and this Court should hold as much.

## V. THIS COURT SHOULD REVERSE THE DECISION OF THE MINNESOTA SUPREME COURT, THEREBY VINDICATING STATE-COURT AUTHORITY AND RETURNING POWER TO THE PEOPLE OF THE SEVERAL STATES.

By confirming that state courts are not required to use the *Teague* rule when considering state post-conviction petitions, but instead may offer broader protections to state prisoners, this Court will "vindicate" state authority to open access to state courts. *Kansas v. Marsh*, 126 S.Ct. 2516, 2531 (2006) (Scalia, J., concurring). By correcting the Minnesota Supreme Court's "federal error[]," this Court will "<u>return power to the State, and to its people</u>." *Marsh*, 126 S.Ct. at 2531 (Scalia, J., concurring) (emphasis original). Furthermore, the Court will allow the state supreme courts to act with their full, robust

authority to afford greater protections than federal law requires to the citizens of their respective states. *See Marsh*, 126 S.Ct. at 2541 (Stevens, J., dissenting).

As this Court has long recognized, state courts are, and must remain, "free to interpret state [law] to accord greater protection to individual rights" than are offered in federal court. *Arizona v. Evans*, 514 U.S. 1, 8 (1995); *see also Long*, 463 U.S. at 1041. The best way to encourage States to act as laboratories of individual rights is to "disabuse[] [them] of [their] erroneous view of what the United States Constitution requires." *Evans*, 514 U.S. at 8; *see also Marsh*, 126 S.Ct. at 2531 (Scalia, J., concurring). Petitioner respectfully requests that this Court so disabuse the Minnesota Supreme Court.

## CONCLUSION

This Court should reverse the judgment of the Minnesota Supreme Court and remand this case to that court for further proceedings.

Dated: July 19, 2007

Respectfully Submitted,

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