No. 98-7540

In the Supreme Court of the United States

SCOTT LESLIE CARMELL, PETITIONER

v.

THE STATE OF TEXAS

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TEXAS, SECOND DISTRICT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the application of a Texas statute at petitioner's trial, which was amended after his crime to permit a conviction of sexual assault to be supported by the uncorroborated testimony of a child-victim (and thus eliminated the prior requirement of corroboration or outcry within six months of the offense), violates the Constitution's Ex Post Facto Clause in Art. I, § 10, Cl. 1.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether a state criminal procedure statute, which was amended to remove a requirement that testimony by certain child-victims be corroborated in sex crime prosecutions when the victim had not informed any other person of the offense within six months, can be applied in trials of offenses that were committed before the statute was enacted, consistent with the Ex Post Facto Clause in Art. I, § 10, Cl. 1, of the Constitution. The Constitution also prohibits Congress from passing ex post facto laws, see U.S. Const. Art. I, § 9, Cl. 3. The United States

therefore has a significant interest in the resolution of this case.[1]

STATEMENT

On January 9, 1997, after a jury trial in Texas state court, petitioner was found guilty on two counts of aggravated sexual assault, in violation of Tex. Penal Code Ann. § 22.021(a)(1)(B)(iii) and (2)(B); five counts of sexual assault, in violation of Tex. Penal Code Ann. § 22.011(a)(2)(C); and eight counts of indecency with a child, in violation of Tex. Penal Code Ann. § 21.11 (West 1994). J.A. 2, 22-104; see State C.A. Br. 38-46. Petitioner was sentenced to life imprisonment on the aggravated sexual assault convictions and to concurrent 20-year terms of imprisonment on the remaining convictions. J.A. 2, 3.

1. Petitioner worked as a counselor and represented himself as an expert in counseling victims of incest. J.A. 4. He counseled a woman named Eleanor, an incest survivor, and eventually married her in 1988, becoming stepfather to Eleanor's daughter, K.M. *Ibid.*[2] The evidence at petitioner's trial established that, beginning in 1991, petitioner engaged in various incidents of sexual contact, eventually including sexual intercourse, with K.M. over the course of four years. The first incident occurred in February 1991, when K.M. was 12 years old and in sixth grade. J.A. 10-11; State C.A. Br. 7. The last incident occurred in March 1995, when K.M.

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[1] We refer in this brief to the Ex Post Facto Clause applicable to the States. The same principles apply to the counterpart provision applicable to Congress.

[2] We follow the practice of the Court of Appeals and petitioner's counsel (Pet. Br. 3 n.2) of protecting the identity of the victim by referring to her as "K.M." and by not using her mother's surname.

was 15 years old and in tenth grade. Petitioner's criminal conduct ceased at that time because, after the March 1995 incident, K.M. told a friend and then her mother about what petitioner had been doing to her and her mother reported it to the police. J.A. 5; State C.A. Br. 18-19.

Petitioner was charged in a fifteen-count indictment. Each count alleged a separate incident of unlawful sexual contact with K.M. J.A. 13-21. The count directly at issue here[3] is Count VII, which charged that petitioner "on or about the 1st day of June, 1992, * * * did then and there and knowingly cause the sexual organ of [K.M.], a child younger than 17 years of age and not the spouse of the defendant, to contact the sexual organ of the defendant." J.A. 16. K.M. testified at trial that, one day during the summer after seventh grade when her mother was at work, petitioner took her into his bedroom, had both of them undress, pulled K.M. on top of him, and touched her genitals with his erect penis. Jan. 7, 1997 Tr., Vol. 9, at 111-112. That testimony established the elements of sexual assault, in violation of Tex. Penal Code Ann. § 22.011(a)(2)(C) (West 1994), which makes it a crime for a person to "intentionally or knowingly * * * cause[ ] the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of

[3] The Court's grant of certiorari in this case was "limited to Question 1 presented by the petition." 119 S. Ct. 2336. The *pro se* petition asserted the argument identified by the first question presented as grounds for invalidating only Count VII. See Pet. i, 4-7. Other of petitioner's convictions are also susceptible to the same legal challenge, however. See Br. in Opp. 4 n.3; Carmell C.A. Supp. Br. 1-4; Pet. Br. 4-7 (contending that Counts VIII, IX, and X are invalid for same reasons as Count VII). The court of appeals summarily rejected the claims based on other counts because of its rejection of the claim involving Count VII. J.A. 8-9 n.5.

another person, including the actor." Petitioner was convicted on Count VII as well as the other counts. J.A. 22-104.

2. a. The Texas Court of Appeals affirmed. J.A. 1-12. The court rejected petitioner's claim that the evidence was "legally insufficient" to support his conviction on Count VII, because the law in effect at the time of petitioner's offense required that the victim's testimony be corroborated if she had not told anyone about the offense within six months, and (in his view) there was no such corroboration. J.A. 7-8. The court of appeals rejected that claim, finding that the statute had been amended to eliminate the corroboration requirement and that, because the statute was a "rule of procedure," it applied to petitioner's trial.[4]

Under the version of Texas Code of Criminal Procedure Article 38.07 in effect at the time of the June 1992 sexual assault, a conviction for sexual assault under Texas Penal Code Section 22.011 was supportable on the uncorroborated testimony of the victim if the victim was younger than 14 years of age at the time of the offense. If the victim was 14 years old or older, however, the victim's uncorroborated testimony could support a conviction only if he or she had informed another person, other than the defendant, about the offense within six months of the date on which the offense was alleged to have occurred (the outcry pro-

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[4] In his brief in the court of appeals, petitioner argued that the trial court had erred in denying his motion for an instructed verdict on Count VII. Carmell C.A. Br. 11-12 (citing Jan. 8, 1997 Tr., Vol. 10, at 373). Respondent explained to the court of appeals, however, that the referenced motion by petitioner had been limited to Counts I through IV, but that such a motion was not a necessary prerequisite to petitioner's claim on appeal. State C.A. Br. 46 n.6.

vision). J.A. 7-8; Tex. Code Crim. P. Ann. art. 38.07 (West 1992) (reprinted at App., *infra*, 1a). The version of Article 38.07 in effect at the time of petitioner's trial[5] enlarged the group of sexual assault victims whose uncorroborated testimony could support a conviction to include all victims who were under 18 years old at the time of the offense. Tex. Code Crim. P. Ann. art. 38.07 (West Supp. 1999) (reprinted at App., *infra*, la).[6] Thus, under the version of Article 38.07 in effect at the time of petitioner's trial, petitioner's conviction was supportable by the uncorroborated testimony of K.M.

The court of appeals upheld the application of the version of Article 38.07 in effect at the time of petitioner's trial, explaining that it is a rule of procedure and, as such, applies to pending and future prosecutions. J.A. 8 (citing *Zimmerman* v. *State*, 750 S.W.2d 194, 202-202 (Tex. Crim. App. 1988, pet. ref'd)). The court observed that the amended statute "does not increase the punishment nor change the elements of the offense that the State must prove." J.A. 8. Rather, the court stated, Article 38.07, as amended, merely "remove[s] existing restrictions upon the competency of certain classes of persons as witnesses." J.A. 8 (quoting *Hopt* v. *Utah*, 110 U.S. 574, 590 (1884)). The court also noted that there was no showing that the legislature had intended that Article 38.07 not be a rule of pro-

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[5] Article 38.07 was amended in 1993. See Act of May 29, 1993, ch. 900, § 12.01, 1993 Tex. Gen. Laws 3765-3766.

[6] Under the amendment, uncorroborated testimony by victims 18 years of age or older at the time of the offense can support a conviction only if the victim informed another person of the offense within one year of the date the offense was committed. See Tex. Code Crim. P. Ann. art. 38.07 (West Supp. 1999); App., *infra*, 1a.

cedure and apply as of the date of the offense. J.A. 8 (citing *Lindquist* v. *State*, 922 S.W.2d 223, 227 n.4 (Tex. App. 1996, pet. ref'd)).[7]

b. On March 26, 1998, the Court of Appeals of Texas denied rehearing. J.A. 3; Pet. App. B. On September 16, 1998, the Court of Criminal Appeals of Texas denied discretionary review. Pet. App. C.

3. On June 14, 1999, this Court granted certiorari "limited to Question 1 presented by the petition." 119 S. Ct. 2336.

SUMMARY OF ARGUMENT

The Ex Post Facto Clause of the Constitution prohibits the enactment of laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins* v. *Youngblood*, 497 U.S. 37, 43 (1990). The authoritative definition of an ex post facto law articulated in *Collins* builds on the standard that this Court adopted in *Beazell* v. *Ohio*, 269 U.S. 167 (1925), and is supported by the Court's modern jurisprudence and by the historical origins of the Ex Post Facto Clause.

Measured against that definition, the application of Article 38.07 of the Texas Code of Criminal Procedure, as amended, does not violate petitioner's rights under

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[7] The court of appeals also rejected petitioner's claim that the trial court erred in denying his motion for a new trial based on the State's failure to disclose allegedly impeaching evidence, because the court of appeals ruled that the evidence would not have been admissible as impeachment. J.A. 11-12. And the court of appeals rejected petitioner's claim that the evidence was legally insufficient to support several of the convictions because K.M.'s testimony about petitioner touching her genital area was not specific enough. The court held that K.M.'s testimony was sufficiently specific in each instance to prove conduct that violated the applicable statutory prohibition. J.A. 9-11.

the Ex Post Facto Clause. The statute does not alter the definition of any crime or increase the punishment for any criminal act. Nor does it deprive petitioner of a defense that was available at the time of his crime or prevent him from pleading any excuse or justification for his criminal conduct that was available at the time he engaged in that conduct. Rather, Article 38.07 simply permits the jury to conclude that petitioner engaged in the prohibited conduct on the basis of the testimony of the victim, without additional corroborating evidence. Its effect is thus comparable to many changes in the rules of evidence that affect the nature of the proof from which the jury may conclude that the defendant committed the charged offense.

Petitioner relies heavily on a category of ex post facto analysis described in Justice Chase's opinion in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798): that the Clause applies to "[e]very law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*." That description, however, does not conform either to the historic meaning of an ex post facto law or to the definition of such a law that the Court adopted in *Collins* and other cases. Nor are petitioner's policy arguments persuasive. Rather than singling out a particular class of unpopular defendants, the revision of Texas law at issue in this case simply moves the rules governing certain victim testimony back toward conformity with state law governing witness testimony generally. As such, the amended law cannot be denounced as vindictive or arbitrary legislation.

ARGUMENT

A LAW ELIMINATING A REQUIREMENT OF VICTIM CORROBORATION, WITHOUT CHANGING THE NATURE OF THE PROHIBITED CONDUCT OR THE PUNISHMENT FOR THE CRIME, DOES NOT IMPLICATE THE PROHIBITIONS OF THE EX POST FACTO CLAUSE

A. Procedural Changes That Do Not Retroactively Change The Definition Of A Crime Or Increase The Punishment For A Criminal Act Are Not Ex Post Facto Laws

1. a. The Ex Post Facto Clause of the Constitution prohibits the enactment of laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins* v. *Youngblood,* 497 U.S. 37, 43 (1990). In *Collins*, this Court examined its cases construing the Clause and expressly disavowed language in some earlier precedents indicating that the constitutional restriction extended to any retroactive law that deprives an accused of a "substantial protection" under the law existing at the time of his crime. See *Id*. at 44-46.[8] The Court explained that, while a law does not escape ex post facto scrutiny simply by virtue of being labeled "procedural," *id.* at 46, procedural changes that do not make innocent acts criminal or increase punishment do not offend the Clause even when they disadvantage a defendant in other ways. *Id.* at 49-52.

The Court in *Collins* began its analysis by quoting language from Justice Chase's "now familiar opinion" in

[8] Petitioner is, therefore, in error when he argues that "[t]he touchstone for *ex post facto* purposes is whether the change affects substantive rights." Pet. Br. 11.

Calder v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), that "expounded those legislative Acts which in his view implicated the core concern of the *Ex Post Facto* Clause." *Collins*, 497 U.S. at 41-42:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

3 U.S. (3 Dall.) at 390 (opinion of Chase, J.). While the *Collins* Court noted that early opinions of this Court described Justice Chase's formulation as the "exclusive definition of ex post facto laws," *id.* at 42, the definitive modern summary of the scope of the Ex Post Facto Clause was announced in *Beazell* v. *Ohio*, 269 U.S. 167 (1925):

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense

> available according to law at the time when the act was committed, is prohibited as *ex post facto*.

Collins, 497 U.S. at 42 (quoting *Beazell*, 269 U.S. at 169-170)). *Collins* added that the *Beazell* formulation was "faithful to the use of the term '*ex post facto* law' at the time the Constitution was adopted" and conforms "to our best knowledge of the original understanding of the *Ex Post Facto* Clause." 497 U.S. at 43, 44.

The *Beazell* definition, announced by Justice Stone for a unanimous Court, differs from Justice Chases's list in two important respects. First, the Court in *Beazell* specifically included within the sweep of the Ex Post Facto Clause statutes that "deprive[] one charged with crime of any defense available according to law at the time when the act was committed." As the Court explained in *Collins*, Justice Stone's inclusion of that category did not expand the historic scope of the ex post facto prohibition, but rather is consistent with the focus of the Clause on retroactive changes in the definition and punishment of crimes. The *Collins* Court explained that "[a] law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done," thus altering the definition of a crime or increasing a punishment. 497 U.S. at 49.

Second, the Court in *Beazell* omitted Justice Chase's fourth category pertaining to laws that "alter[] the *legal* rules of *evidence*." The *Beazell* Court acknowledged that its omission was deliberate: "[e]xpressions are to be found in earlier judicial opinions to the effect that the constitutional limitation may be transgressed by alterations in the rules of evidence or procedure." 269 U.S. at 170 (citing *Calder*, 3 U.S. (3 Dall.) at 390;

Cummings v. *Missouri*, 71 U.S. (4 Wall.) 277, 326 (1866); and *Kring* v. *Missouri*, 107 U.S. 221, 228, 232 (1883)). But, the Court in *Beazell* observed, it was "well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited." 269 U.S. at 170.[9]

The Court in *Collins* expressly recognized that "[t]he *Beazell* definition omits the reference by Justice Chase in *Calder* * * * to alterations in the 'legal rules of evidence.'" 497 U.S. at 43 n.3. The Court approved of that omission, however, explaining that "cases subsequent to *Calder* make clear" that "this language was

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[9] The Court's observation that Justice Chase's fourth category did not represent an accurate portrayal of the scope of the ex post facto prohibition was foreshadowed in the Court's opinion in *Thompson* v. *Missouri*, 171 U.S. 380 (1898). There, the Court acknowledged that there was "apparent support" "in the general language used in some opinions," including Justice Chase's fourth category, for the defendant's position. 171 U.S. at 382. The defendant there challenged, as ex post facto, application at his retrial of a newly enacted law rendering admissible certain writings which the Missouri Supreme Court, on direct appeal from the defendant's first trial, had ruled inadmissible. See *id.* at 381-382. The Court ultimately upheld application of the new law, however, emphasizing that the Court had "[a]ppl[ied] the principles announced in former cases—without attaching undue weight to general expressions in them that go beyond the questions necessary to be determined." *Id.* at 382, 386. And, as one court has noted, although this Court has cited the *Calder* dictum about altering the "legal rules of evidence" in various opinions, the Court "has never actually applied it to invalidate a retrospective change in an evidentiary rule." *State* v. *Hudy*, 535 N.E.2d 250, 256 (N.Y. 1988) (citing Derek J.T. Adler, Note, *Ex Post Facto Limitations on Changes in Evidentiary Law: Repeal of Accomplice Corroboration Requirements*, 55 Fordham L. Rev. 1191 (1987)).

not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes." *Ibid.* (citing *Thompson* v. *Missouri*, 171 U.S. 380, 386-387 (1898); *Hopt* v. *Utah*, 110 U.S. 574, 588-590 (1884)).

Thus, far from endorsing Justice Chase's original fourth category (see Pet. Br. 10, 19-20, 22, 23, 28-29; see also Br. Amicus Curiae for Nat'l Ass'n of Criminal Defense Lawyers 2-10), this Court in *Collins* recognized, consistent with the holdings and analysis of later cases, that Justice Chase's language was overbroad. A correct understanding of ex post facto principles protects against retroactive changes in the scope of the prohibited conduct, and retroactive increases in punishment. It does not apply to evidentiary changes that affect procedural matters, such as how a crime is proved.

b. Subsequent decisions of this Court have adhered to *Collins*' holding that the Ex Post Facto Clause bars the application of new evidentiary or procedural rules only if they redefine a crime or increase a penalty. In *California Dep't of Corrections* v. *Morales*, 514 U.S. 499 (1995), the Court declined to rely on earlier precedent suggesting that the ex post facto prohibition extended to legislative changes that produced "some ambiguous sort of 'disadvantage.'" *Id.* at 506 n.3. The Court declared that, instead, "[a]fter *Collins*, the focus of the *ex post facto* inquiry is * * * on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Ibid.* In *Lynce* v. *Mathis*, 519 U.S. 433 (1997), the Court cited earlier ex post facto cases, including *Calder*, but similarly recognized that, "[t]o fall within the *ex post facto* prohibition," a law must disadvantage a criminal defendant "by altering the definition of criminal con-

duct or increasing the punishment for the crime." *Id.* at 441 (citing *Collins*); see also *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 275 n.28 (1994) ("While we have strictly construed the *Ex Post Facto* Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening procedural changes even if application of the new rule operated to a defendant's disadvantage in the particular case." (citing, inter alia, *Collins* and *Beazell*)).[10]

2. The Court's conclusion in *Collins* that the ex post facto prohibition does not apply to evidentiary rules unless they alter the definition of a crime or increase a penalty is strongly supported by a re-examination of Justice Chase's opinion in *Calder* and consideration of the original intent of the Framers.

a. *Calder* was a civil case. The issue was whether a statute that granted a new hearing in a probate case, after the case had become final on direct appeal and where there was no statutory mechanism for securing a new hearing before the Court of Probate, constituted an impermissible ex post facto law. The Court held that the constitutional prohibition against ex post facto laws

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[10] Consistent with the view that *Calder* does not bar the application of a change in an evidentiary or procedural rule to the trial of crimes committed before the change, this Court regularly includes in its orders amending the Federal Rules, including the Federal Rules of Evidence and the Federal Rules of Criminal Procedure, a directive that the amendment is to take effect on a particular day "and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending." See, *e.g.*, Order Amending Federal Rules of Evidence, 523 U.S. 1237 (1998); Order Amending Federal Rules of Evidence, 520 U.S. 1325 (1997); Order Amending Federal Rules of Criminal Procedure, 523 U.S. 1229 (1998); Order Amending Federal Rules of Criminal Procedure, 520 U.S. 1315 (1997).

applies only to criminal legislation, not to civil statutes. There was no opinion for the Court; rather, the Justices issued separate opinions seriatim, each expressing a different rationale.[11]

Justice Chase grounded his understanding of an ex post facto law in history. He explained that the Constitution's prohibition of such laws "very probably arose from the knowledge, that *the Parliament of Great Britain* claimed and exercised a power to pass *such laws*, under the denomination of *bills of attainder*, or *bills of pains and penalties*; the *first* inflicting *capital*, the other *less*, punishment." 3 U.S. (3 Dall.) at 389. He then described the varieties of such laws and their origin in "ambition [of their proponents], or personal resentment, and vindictive malice," and concluded that "[t]o prevent such, and similar acts of violence and injustice, I believe, the Federal and State legislatures, were prohibited from passing any bill of *attainder*; or any *ex post facto law*." *Ibid.*

That background, and the historical examples that Justice Chase gave of the practices intended to be prohibited, forms the basis for understanding the fourth category of ex post facto laws the Justice described. Each of the categories of laws listed by Justice Chase as a type of ex post facto law responded directly to problems caused by unjust British laws that he had discussed earlier in his opinion. See 3 U.S. (3 Dall.) at 389. His fourth category, covering any law that "alters the *legal* rules of *evidence*, and receives less, or

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[11] Justices Chase (3 U.S. (3 Dall.) at 386-395), Paterson (*id.* at 395-397) and Iredell (*id.* at 397-400) filed separate opinions analyzing the relevant issues; Justice Cushing filed a two-sentence opinion agreeing that the judgment should be affirmed (*id.* at 400-401). The Chief Justice did not participate. *Id.* at 386.

different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*," recalled his condemnation of laws passed by the British Parliament that "violated the rules of evidence (to supply a deficiency of legal proof) by admitting *one* witness, when the *existing* law required two." *Ibid.* The footnote accompanying that discussion cited the "case of Sir John Fenwick, in 1696." *Id.* at 389 n.†.

Fenwick's case involved a bill of attainder that Parliament passed to summarily convict Fenwick of high treason, without a trial and without a second witness as would have been required at a trial under the then-existing law.[12] The bill of attainder thus "altere[d] the legal rules of evidence" only "to convict the offender," Fenwick. See *Calder*, 3 U.S. (3 Dall.) at 390; see also *id.* at 391 (deeming ex post facto, inter alia, laws that "change the rules of evidence, *for the purpose of conviction*"). The law did not alter the rules of evidence generally to apply thenceforth to any other offender, nor did it respond to a general legislative determination about the weight juries should be permitted to give to the testimony of a class of victims. Thus, Justice Chase's fourth category appears to have been intended to apply only to laws that alter the rules of evidence to convict a particular, named offender—a legislative act that may appear implausible today, but that was still considered a threat at the time of *Calder*.[13]

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[12] Fenwick had been indicted on the testimony of two witnesses but, after indictment, he managed to bribe one of the witnesses to abscond. See Zechariah Chafee, *Three Human Rights in the Constitution* 133-135 (1956); see generally 4 Thomas Macaulay, *History of England* 663-694 (1860); Adler, *supra*, at 1211 n.113.

[13] It was not until 1798 that the last bill of attainder was enacted by the British Parliament. Chafee, *supra*, at 98.

That interpretation of Justice Chase's opinion is consistent with his statement that he viewed ex post facto laws "precisely in the *same* light" as Sir William Blackstone. 3 U.S. (3 Dall.) at 391. Blackstone's definition of ex post facto laws was limited, along the lines of *Collins*, to laws that are enacted "*after* an action is committed," where "the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it." 1 William Blackstone, *Commentaries on the Laws of England* 46 (1765). Therefore, Justice Chase apparently did not intend to extend the scope of the Ex Post Facto Clause to evidentiary rules generally.

The opinions by the other Members of the Court in *Calder* further support that narrow interpretation of Justice Chase's fourth category. Justice Paterson relied on Blackstone's definition, 3 U.S. (3 Dall.) at 396, and emphasized that ex post facto laws "are restricted in legal estimation to the creation, and, perhaps, enhancement of crimes, pains and penalties." *Id.* at 397. Justice Paterson also cited the ex post facto clauses that had been included in early state constitutions, as did Justice Chase. Those clauses were limited to laws that change definitions of crimes or alter punishments. See *id.* at 391-392. In another separate opinion, Justice Iredell, a "leading Federalist who had guided the Constitution to ratification in North Carolina," *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 223 (1995), similarly limited his interpretation of the Ex Post Facto Clause to a prohibition that legislatures "not inflict a punishment for any act, which was innocent at the time it was committed; nor increase the degree of punishment previously denounced for any specific offence." 3 U.S. (3 Dall.) at 400.

Thus, read in light of the historical backdrop of Justice Chase's opinion and the separate views of the other Justices, the list of ex post facto laws described in Justice Chase's opinion in *Calder* was accurately understood by *Collins* not to bar application of evidentiary rule changes unless they change the definition of a crime or increase the punishment.

b. That conclusion also best reflects the Framers' intent. In the course of their discussion of the Ex Post Facto Clauses, the Framers specifically referred to Blackstone's Commentaries, see 2 *The Records of the Federal Convention of 1787*, at 448 (Max Farrand ed., Yale Univ. Press 1966) (*Federal Convention*), as well as the ex post facto clauses contained in early state constitutions, see 2 *Federal Convention* 376. See also *Collins*, 497 U.S. at 43-44 (ex post facto clauses in early state constitutions "appear to have been a basis for the Framers' understanding of the provision"). As discussed above, those authorities support *Collins*' restriction of the ex post facto prohibition to laws redefining crimes or increasing punishments.

The debates on the Constitution included some opposition to the Ex Post Facto Clauses, based on the view that they were superfluous because such laws are so obviously invalid. See 2 *Federal Convention* 376; 3 *Federal Convention* 165; see generally Chafee, *supra*, at 94-95. Even opponents, however, expressed the same narrow interpretation of the scope of the Clause: "To say that the legis. shall not pass an ex post facto law is the same as to declare they shall not do a thing contrary to common sense—that they shall not cause that to be a crime which is no crime." 2 *Federal Convention* 379.

The Federalist Papers also defined the Ex Post Facto Clauses in a similar manner. Alexander Hamil-

ton indicated that the prohibition was intended to prevent "[t]he creation of crimes after the commission of the fact, or in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law." *The Federalist No. 84*, at 577 (Jacob Cooke ed. 1961); see also *The Federalist No. 44*, at 301 (James Madison) (Jacob Cooke ed. 1961) (referencing ex post facto clauses in early state constitutions).

Thus, petitioner's effort to revive Justice Chase's fourth ex post facto category—and to apply it to procedural rules lifting corroboration requirements that had prevented the jury from relying on victim testimony found to be credible—should be rejected as inconsistent with both the Court's modern jurisprudence and the historical origins of the Ex Post Facto Clause.

B. Application Of Article 38.07 At Petitioner's Trial Did Not Violate The Ex Post Facto Clause

The state law at issue in this case rendered inapplicable a requirement in prior law that a conviction for a sex offense was not supportable based on the testimony by certain child-victims, unless the victim had either told another person about the offense within six months of its commission or unless there was corroborating evidence. The change in the law, allowing the jury to give effect to the victim's testimony alone, neither altered the rules governing petitioner's conduct nor increased the penalty for his offense, but instead regulated procedures governing his trial. As such, application of the law to petitioner's pre-amendment conduct did not violate the Ex Post Facto Clause.

1. a. Article 38.07 of the Texas Code of Criminal Procedure, as amended in 1993, does not "retroactively alter the definition of crimes or increase the punish-

ment for criminal acts." *Collins*, 497 U.S. at 43. Both before and after the amendment, Texas law proscribed the same conduct by petitioner and set the same punishment for it; the amendment does not change the standards for determining whether petitioner's conduct was prohibited or what punishment could be imposed. Hence, Article 38.07 it is not an invalid ex post facto law under *Collins*.

The amendment to Article 38.07 eliminates the requirement of corroboration in certain cases, but the effect of that law is in many ways comparable to a law enabling the jury to rely on, and give probative effect to, evidence that previously it could not have considered in determining whether the defendant committed the charged crime.[14] Laws that enable a jury to consider evidence that had previously been inadmissible have long been understood not to violate the ex post facto prohibition. As the Court explained in *Hopt*:

> Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases

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[14] Petitioner's characterization (Pet. Br. i, 8, 9, 11, 13, 16, 24, 34) of Article 38.07 as a "two-witness" rule is inaccurate. The statute requires corroboration, which means that there must be some other evidence that "tend[s] to connect the defendant with the commission of the offense." *Zule* v. *State*, 802 S.W.2d 28, 32 (Tex. App. 1990, pet. ref'd). Contrary to petitioner's claim (Pet. Br. 5-6 n.5), the corroboration need not be in the form of eyewitness testimony. "It is not necessary that the corroborative evidence provide independent evidence of guilt sufficient to support the conviction." *Ibid.* Circumstantial evidence may suffice. *Ibid.* In any event, even traditional "two-witness" rules have been interpreted to allow proof in a form other than a second witness. See *Hammer* v. *United States*, 271 U.S. 620, 627 (1926) (two-witness rule for perjury prosecution may be satisfied by single witness and sufficient corroboration in the form of documentary proof and circumstantial evidence).

> are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.

110 U.S. at 589.

Contrary to petitioner's repeated assertions (Pet. Br. 9, 12, 13, 18, 25, 26-28, 31, 33), Article 38.07 does not reduce the amount of proof necessary to support a conviction, nor did it "change [] the substantive criminal law of Texas" (*id.* at 31). Both before and after the amendment to Article 38.07, the State of Texas bore the burden of establishing petitioner's guilt of the charged offense by proving each of the elements of the offense beyond a reasonable doubt. Article 38.07 affects only the manner of proving facts that are already elements of the crime.

Moreover, Article 38.07 leaves "unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible." *Thompson* v. *Missouri*, 171 U.S. at 387. The defendant remains free to challenge the credibility of the witness on cross-examination and through other evidence, and the jury remains charged with the responsibility to assess the witness's credibility. The amendment is thus similar in effect to a law that does "nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the

ultimate, essential fact to be established, namely, the guilt of the accused." *Ibid.* A law such as that, which "only remove[s] existing restrictions upon the competency of certain classes of persons as witnesses, relates to modes of procedures only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged." *Hopt*, 110 U.S. at 590. See also *Splawn* v. *California*, 431 U.S. 595, 600-601 (1977) (finding it unnecessary to adjudicate ex post facto challenge to retroactively applied instruction claimed to permit consideration of previously inadmissible evidence, but noting that instruction statute "does not create any new substantive offense, but merely declares what type of evidence may be received and considered").[15]

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[15] Lower courts have rejected other ex post facto challenges to new rules disadvantaging defendants by rendering admissible previously inadmissible evidence including, for example, victim impact evidence in capital sentencing proceedings (see *Mitchell* v. *State*, 884 P.2d 1186, 1203-1204 (Okla. Crim. App. 1994), and certain blood alcohol readings (see *People* v. *Kotecki*, 666 N.E.2d 37 (Ill. App. Ct. 1996)). Lower courts have also rejected ex post facto challenges to new rules disadvantaging defendants by rendering inadmissible previously admissible evidence including, for example, evidence of a rape victim's past sexual conduct (see *People* v. *Dorff*, 396 N.E.2d 827, 830 (Ill. App. Ct. 1979) (rejecting ex post facto challenge to rape shield law); *Finney* v. *State*, 385 N.E.2d 477, 480-481 (Ind. Ct. App. 1979) (same); *Turley* v. *State*, 356 So.2d 1238, 1243-1244 (1978) (same); *People* v. *Mandel*, 61 A.D.2d 563 (N.Y. App. Div. 1978), rev'd on other grounds, 401 N.E.2d 185 (N.Y. 1979) (same); see also *Commonwealth* v. *Edgerly*, 435 N.E.2d 641, 644-645 & n.3 (Mass. App. Ct. 1982)

b. Article 38.07 does not deprive petitioner of an "absolute defense available at the time of his conduct," as he claims. Pet. Br. 10; see also *id.* at 11, 13, 29-30, 31-32. At the time of petitioner's crime, he did not have a defense based on Article 38.07. Petitioner could not have known whether K.M. would report the sexual assault to someone else within six months. If K.M. had met the 6-month statutory outcry provision, her uncorroborated testimony would have been sufficient even under the version of Article 38.07 in effect at the time of petitioner's crime.

The Court should reject petitioner's reliance on *Beazell*'s statement that a law that "deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto." 269 U.S. at 169-170. The Court made clear in *Collins* that the term "defense," as used in *Beazell*'s ex post facto definition, "was linked to the prohibition on alterations in 'the legal definition of the offense' or 'the nature or amount of the punishment imposed for its commission.'" *Collins*, 497 U.S. at 50 (quoting *Beazell*, 269 U.S. at 169-170); see also 497 U.S. at 49 ("[a] law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the

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(noting that no cases were found in which a court had held any rape-shield law unconstitutional under Ex Post Facto Clause)), and evidence of an expert witness's opinion that a defendant did not have the mental state that constituted an element of the charged offense (see *United States* v. *Bartlett*, 856 F.2d 1071, 1077 n.7 (8th Cir. 1988) (rejecting ex post facto challenge to change in Federal Rule of Evidence 704(b)); *United States* v. *Alexander*, 805 F.2d 1458, 1462 (11th Cir. 1986) (same); *United States* v. *Mest*, 789 F.2d 1069, 1071-1073 (4th Cir.), cert. denied, 479 U.S. 846 (1986) (same); *United States* v. *Prickett*, 790 F.2d 35, 37 (6th Cir. 1986) (same)).

act is done.”). Where, as here, the law “ha[s] not changed * * * the matters which might be pleaded as an excuse or justification for the conduct underlying [the] charge,” *id.* at 50, it has not deprived petitioner of a defense within the meaning of *Beazell* or *Collins*.[16]

2. Article 38.07 is not invalid under the Ex Post Facto Clause as a vindictive or arbitrary law enacted “to convict a class of unpopular defendants,” as petitioner contends. Pet. Br. 9, 14; see also *id.* at 17, 18, 20.[17]

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[16] The Texas Penal Code clearly identifies the affirmative defenses to a charge of sexual assault in violation of Section 22.011. See Tex. Penal Code Ann. § 22.011(d) (West 1994) (“[i]t is a defense to prosecution under Subsection (a)(2) that the conduct consisted of medical care for the child and did not include any contact between the anus or sexual organ of the child and the mouth, anus, or sexual organ of the actor or a third party”); *id.* § 22.011(e) (West 1994) (“[i]t is an affirmative defense to prosecution under Subsection (a)(2) that the actor was not more than three years older than the victim, and the victim was a child of 14 years of age or older”).

[17] Petitioner notes (Br. 17 n.9) that prevention of arbitrary and vindictive legislation is not the only purpose served by the ex post facto prohibition. The prohibition is also “aimed at a second concern, namely, that legislative enactments ‘give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.’ ” *Ibid.* (quoting *Miller* v. *Florida*, 482 U.S. 423, 430 (1987), and *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981)). Here, petitioner was given fair warning by Texas law that his conduct was criminal and subject to the punishment that he received. As noted above, because petitioner could not have known, at the time of his crime, whether K.M. would meet the statutory outcry provision, petitioner could not have known whether admission of K.M.’s testimony would be conditioned on corroboration. Thus, there could have been no reliance interest in the procedural rule of Article 38.07. See also *Landgraf*, 511 U.S. at 275 (“Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted

First, Article 38.07 was not enacted "to convict" anyone. Unlike the law that was enacted to convict John Fenwick, which concerned Justice Chase and which changed the rules of evidence only in that particular case to achieve that express purpose, Article 38.07 changes a generally applicable rule of criminal procedure bearing on the sufficiency of uncorroborated testimony by certain witnesses. Second, one of the express purposes of the amendment to Article 38.07 was to bring the law governing minor-age sexual assault victims such as K.M. into line with the generally applicable state law. See House Research Org., Bill Analysis 14 (Mar. 15, 1993) (explaining that amendment to Article 38.07 would eliminate an "artificial barrier," because "[v]ictims in sexual assault cases are no more likely to fantasize or misconstrue the truth than the victims of most other crimes, which do not require corroboration of testimony or previous 'outcry.'"); *ibid.* ("Sexual assault and other sexual offenses are more comparable to crimes such as theft, arson and robbery —none of which require corroboration of the victim's testimony for conviction.").[18] Petitioner's attempt to differentiate Article 38.07 from "neutral rules of general application" (see Pet. Br. 10, 20, 25-26, 32) overlooks that fact.

The reason that Article 38.07's enlargement of the class of victims allowed to testify at trial without corroboration adversely affects only certain defendants is that their cases are the only ones in which former Article 38.07 had altered state law in this manner to

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after the conduct giving rise to the suit does not make application of the rule at trial retroactive.")

[18] Petitioner lodged a copy of this document with the Clerk of the Court, see Pet. Br. 18.

condition certain victim evidence on corroboration or outcry. That does not render the law invalid. Article 38.07 can hardly be deemed arbitrary or vindictive when it simply is an effort to move the rules governing certain witness testimony toward conformity with state law governing witness testimony generally.

Admittedly, persons convicted of sexual offenses against minor-age children are an unpopular group. But so was the group of persons affected by the law challenged in *California Department of Corrections* v. *Morales*, 514 U.S. 499 (1995)—persons who had been convicted of offenses involving the killing of more than one person. As *Morales* made clear, however, the ex post facto standard does not vary "on the basis of societal animosity." *Id.* at 510-511 n.7. Because Article 38.07 does not alter the definition of a crime or increase a punishment, it does not violate the constitutional prohibition against ex post facto laws.

CONCLUSION

The judgment of the Court of Appeals of Texas should be affirmed.

Respectfully submitted.

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APPENDIX

1. In June 1992, Article 38.07 of the Texas Code of Criminal Procedure provided:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense. The court shall instruct the jury that the time which lapsed between the alleged offense and the time it was reported shall be considered by the jury only for the purpose of assessing the weight to be given to the testimony of the victim.

Tex. Code Crim. P. Ann. art. 38.07 (West 1992).

2. As amended, effective September 1, 1993, Article 38.07, provides:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 18 years of age at the time of the alleged offense.

Tex. Code Crim. P. Ann. art. 38.07 (West Supp. 1999).