No. 05-595

IN THE

Supreme Court of the United States

GLEN WHORTON, Director,
Nevada Department of Corrections,

Petitioner,

vs.

MARVIN HOWARD BOCKTING,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Did *Crawford* v. *Washington*, which overruled *Ohio* v. *Roberts*, create a "new rule" within the meaning of *Teague* v. *Lane*?

2. If so, does *Crawford* qualify for the second exception to *Teague*'s rule of nonretroactivity on habeas?

3. When a state court has faithfully and reasonably applied the precedents of this Court in effect at the time of its decision, can that decision later become "a decision that was contrary to . . . clearly established Federal law" within the meaning of 28 U. S. C. § 2254(d) when those precedents are later overruled?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Amicus CJLF has a particular interest in the retroactivity rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) and the deference standard of 28 U. S. C. § 2254(d). In *Teague*, *amicus* submit-

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

ted the brief proposing the rule adopted in that case. See 489 U. S., at 300. Counsel for *amicus* wrote one of the few law review articles defending § 2254(d) as it was written and intended, at a time when it was under severe attack in the law reviews. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888 (1998). *Amicus* CJLF has filed a brief in most of this Court's major habeas cases from 1988 to the present.

In this case, the Ninth Circuit has once again evaded the limitations placed on federal habeas courts by this Court and by Congress. A state court applied the rules in effect at the time of the appeal faithfully and correctly, yet its decision was overturned in a collateral attack, contrary to the plain wording of the statute. This result is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

A medical examination of six-year-old Autumn clearly shows that she was grievously sexually abused. See *Bockting* v. *State*, 109 Nev. 103, 105, 847 P. 2d 1364, 1365 (1993). The question is by whom. At the hospital, she would only tell the detective that someone had hurt her. See *ibid*. Two days later, in an interview at a specially designed interview room at the detective's office, she said it was her stepfather, Marvin Bockting. See *ibid*. This interview was recorded, and the Nevada Supreme Court found that it was conducted "in a manner that was not suggestive, leading or indicative of a predetermined resolve to produce evidence of child abuse." *Id*., at 110, 847 P. 2d, at 1368-1369.

At trial, Autumn was uncommunicative, and the trial court declared her unavailable as a witness. See *id*., at 106, 847 P. 2d, at 1366. The court admitted her statement to the detective and her prior statement to her mother pursuant to Nev. Rev. Stat. § 51.385. The statute was enacted in 1985. See *id*., at 107, 847 P. 2d, at 1367. In drafting this statute, the

Nevada Legislature clearly relied on this Court's decision in *Ohio* v. *Roberts*, 448 U. S. 56 (1980), making "guarantees of trustworthiness" the key criterion for admissibility. Compare *id*., at 66, with Nev. Rev. Stat. § 51.385(a).

Following the initial affirmance on appeal, this Court vacated and remanded for reconsideration in light of *Idaho* v. *Wright*, 497 U. S. 805 (1990). See *Bockting* v. *Nevada*, 497 U. S. 1021 (1990). In other words, this Court specifically directed the Nevada Supreme Court to apply the *Roberts* " 'particularized guarantees of trustworthiness' " test, as "shown from the totality of the circumstances . . . that surround the making of the statement and that render the declarant particularly worthy of belief." *Wright*, *supra*, at 819. On remand, the state court proceeded to do exactly as directed, and it unanimously found that the *Wright*/*Roberts* standard had been met. See 109 Nev., at 112, 847 P. 2d, at 1369-1370.

Following state postconviction proceedings, Bockting filed a federal habeas corpus petition. The District Court denied the petition, and Bockting appealed. See *Bockting* v. *Bayer*, 399 F. 3d 1010, 1013 (CA9 2005). After oral argument of the appeal, see *id*., at 1024 (Wallace, J., concurring), this Court decided *Crawford* v. *Washington*, 541 U. S. 36 (2004). Two judges on the three-judge panel agreed that *Crawford* announced a new rule. *Bockting*, *supra*, at 1012; *id*., at 1025 (Wallace, J., dissenting). One judge concluded that it did not. See *id*., at 1023 (Noonan, J., dissenting). The majority concluded that the *Crawford* rule qualifies for an exception to the general rule of nonretroactivity. *Id*., at 1021. The majority opinion further concluded that the exceptions to the nonretroactivity rule are incorporated in 28 U. S. C. § 2254(d). See *ibid*. This Court granted certiorari on May 15, 2006.

SUMMARY OF ARGUMENT

Crawford v. *Washington* is a new rule. By substituting an entirely different standard for the preexisting *Ohio* v. *Roberts* rule, *Crawford* overruled *Roberts*. A rule established by overruling a prior case is obviously not "dictated by precedent" and is *per se* "new" for the purpose of *Teague*.

Crawford does not qualify for the second exception to the rule of *Teague* v. *Lane*. That exception is limited to new rules that establish an "absolute prerequisite to fundamental fairness." *Crawford* is based on history, not fairness. The *Ohio* v. *Roberts* regime it replaced may have been confusing and inconsistent, but it was not fundamentally unfair on the same scale as the practices this Court has previously indicated qualify for that designation: unrepresented indigent defendants in felony cases, confessions extracted by brutality, or lynch mobs surrounding courthouses.

The time has come to recognize what this Court has previously hinted. There are *no* rules of *Gideon* magnitude remaining to be made, and none have been made for decades. The second exception to *Teague* v. *Lane* is history, and litigation over it is a pointless waste of resources. The exception should be formally retired.

The *Teague* exceptions are inapplicable to the deference rule of 28 U. S. C. § 2254(d)(1). Congress enacted a general rule with two stated exceptions, and courts cannot read in additional exceptions that Congress chose not to include. The fact that Congress included retroactivity exceptions in other provisions of AEDPA but not this one indicates the omission was intentional.

The absence of these exceptions does not create any genuine constitutional doubt. Congress has no constitutional obligation to authorize collateral attacks on state judgments at all, and it can limit the attacks it does allow on conditions it sees fit.

The absence of the second *Teague* exception causes no difficulty, because that exception is already obsolete, as noted earlier. The absence of the first *Teague* "exception" could preclude federal habeas relief on a meritorious petition only in an unlikely set of circumstances, which experience in the wake of *Atkins* v. *Virginia* shows has not happened yet. In the unlikely event that such an injustice does occur some time in the future, an alternate remedy can be devised. A statute should not be interpreted in a manner contrary to its plain language to avoid an imagined problem.

ARGUMENT

I. Under the rule of *Teague* v. *Lane*, *Crawford* v. *Washington* does not apply retroactively to cases which were already final before it was decided.

The consensus of the federal circuits is that *Crawford* v. *Washington*, 541 U. S. 36 (2004), does not apply retroactively on habeas corpus under the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989). See, *e.g.*, *Lave* v. *Dretke*, 444 F. 3d 333, 336 (CA5 2006) (collecting cases). The consensus is correct.

A. New Rule.

When Justice Harlan first proposed the limitation on habeas now known as the *Teague* rule, he recognized that in some cases the determination of whether a rule was new would be difficult but in others it would be easy. In this context, "the lower courts cannot be faulted when, following the doctrine of *stare decisis*, they apply the rules which have been authoritatively announced by this Court." *Desist* v. *United States*, 394 U. S. 244, 264 (1969) (dissenting opinion).

But for the astonishing concurring opinion in the Court of Appeals in the present case, *amicus* CJLF would have thought that the newness of *Crawford* was so obvious as to be beyond dispute and worth no more than a bare citation to *Butler* v.

McKellar, 494 U. S. 407, 412-413 (1990). Regrettably, it appears that some very basic ground must be replowed once again.

Under *Teague*, "a case announces a new rule if the result was not *dictated* by precedent . . . ." 489 U. S., at 301 (emphasis in original). Judge Noonan's concurrence makes no mention of this requirement. He simply quotes *Crawford*'s own statement that its rule is faithful to the Framers' understanding and declares, "*Crawford*, therefore, does not announce a new rule. Retroactivity is not an issue." *Bockting* v. *Bayer*, 399 F. 3d 1010, 1023 (CA9 2005) (Noonan, J., concurring).

Under Judge Noonan's concept of *Teague*, the only new rules are wrong rules. No matter how squarely a decision contradicts earlier precedent, it is not a "new rule" if it is faithful to the original understanding. The precedents of this Court to the contrary are clear and emphatic.

The very next term after *Teague*, the Court clarified in *Butler* that the fact that a court viewed an issue as "controlled" or "governed" by an earlier case did not preclude the later decision from being a new rule. See *Butler*, 494 U. S., at 415. In *Sawyer* v. *Smith*, 497 U. S. 227, 236 (1990), the Court held that a rule was new even though earlier cases "lent general support" to its conclusions. State courts could validly have relied on "indications" to the contrary in other decisions. See *id*., at 237.

In this Court's pre-*Crawford* Confrontation Clause jurisprudence, there were not merely "indications" that the key to admissibility was reliability and not the testimonial versus nontestimonial distinction later adopted in *Crawford*. That was the square holding of *Ohio* v. *Roberts*, 448 U. S. 56 (1980) and other cases in that line, including *Idaho* v. *Wright*, 497 U. S. 805 (1990), the case this Court specifically directed the state court to apply. Not only was the *Crawford* rule not dictated by precedent, a contrary rule was actually dictated by precedent. Prior to *Crawford*, a state court would have *violated* the

doctrine of *stare decisis* if it decided a federal Confrontation Clause claim on the basis of the testimonial nature of the out-of-court statement rather than on the criteria set out in *Roberts*. *Crawford* overruled *Roberts*. See *Davis* v. *Washington*, 547 U. S. __, No. 05-5224 (June 19, 2006) (slip op., at 10, n. 4). If any proposition is clear beyond question in this Court's *Teague* jurisprudence, it is that a case that overrules an earlier precedent creates a new rule. See, *e.g.*, *Butler*, 494 U. S., at 412; *Saffle* v. *Parks*, 494 U. S. 484, 488 (1990); *Graham* v. *Collins*, 506 U. S. 461, 477 (1993).

The notion that a rule is not "new" because it represents a return to the original understanding of the Constitution is refuted by *Schriro* v. *Summerlin*, 542 U. S. 348 (2004). *Ring* v. *Arizona*, 536 U. S. 584 (2002), like *Crawford*, was based on a return to original understanding as the Court now sees it. See *id*., at 607 (quoting *Apprendi* v. *New Jersey*, 530 U. S. 466, 498 (2000) (Scalia, J., concurring)). Yet the status of *Ring* as a new rule for *Teague* purposes was beyond serious question. See *Summerlin*, *supra*, at 352; see also *id*., at 358-359 (Breyer, J., dissenting) (not disputing *Ring* was "new" but contending it was "watershed").

So it is with *Crawford*. Under this Court's precedents, it is beyond serious dispute that *Crawford* is a new rule within the meaning of *Teague*.

B. Not An Absolute Prerequisite.

Crawford v. *Washington* was decided on March 8, 2004. Justice Scalia wrote the opinion of the Court. Three months later, Justice Scalia wrote the opinion of the Court in *Summerlin*. The latter opinion says, regarding rules that qualify for the second *Teague* exception, "This class of rules is extremely narrow, and 'it is unlikely that *any* . . . "ha[s] yet to emerge." ' " 542 U. S., at 352 (quoting *Tyler* v. *Cain*, 533 U. S. 656, 667, n. 7 (2001) (quoting *Sawyer* v. *Smith*, 497 U. S. 227, 243 (1990))) (emphasis added) (alteration by the *Tyler* Court). To conclude that *Crawford* fits within the set that

Summerlin says is probably a null set, one would have to conclude that the *Summerlin* Court was oblivious to an opinion issued only three months earlier by the same author. Such a hypothesis would require exceptionally compelling evidence.

The panel majority in the present case concluded that "the *Crawford* rule meets the Court's criteria," *Bockting*, 399 F. 3d, at 1016, by quoting some very general language from *Summerlin* and disregarding the long line of *Teague* cases from this Court. In the context of the whole line, *Crawford* can be seen to be no more "fundamental" than many other rules that have been held not to qualify for the exceptions and it does not come close to the rules that this Court has indicated would have qualified.

Justice Harlan's original proposal was to apply retroactively on habeas "all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures . . . ." *Desist*, 394 U. S., at 262. This proposal never became law, and Justice Harlan himself abandoned it just two years later. See *Mackey* v. *United States*, 401 U. S. 667, 694-695 (1971) (opinion concurring in judgments in part and dissenting in part). *Teague* combined the accuracy-enhancing requirement of the *Desist* proposal with a requirement that "the procedure at issue must implicate the fundamental fairness of the trial." 489 U. S., at 312. Further, this exception is limited "to those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Id*., at 313. Still further, the rule must be an "absolute prerequisite to fundamental fairness." *Id*., at 314.

The generality of this formulation has created widespread confusion. Not only does deciding *Teague* questions take up much of this Court's docket, but the Court itself is often narrowly divided. See, *e.g.*, *Summerlin*, 542 U. S., at 358-359 (Breyer, J., dissenting) (four Justices arguing that *Ring* qualifies).

For 30 years, most of this Court's decisions creating new rules have been thought to enhance the accuracy of convictions. Deliberately subverting the search for truth in criminal trials to serve other goals is a practice in decline, for good reason. See generally *Hudson* v. *Michigan*, 547 U. S. __, No. 04-1360 (June 15, 2006) (refusing to extend the exclusionary rule to new territory); *Sanchez-Llamas* v. *Oregon*, 548 U. S. __, No. 04-10566 (June 28, 2006) (slip op., at 14) (same). Yet this Court has never found any rule created after *Teague* itself to qualify for the exception.[2]

The clarity of the second *Teague* exception comes not from the general and subjective wording of the standard but rather from the examples of what does and what does not qualify. Justice Harlan was thinking primarily of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) when he proposed the exception, see *Mackey*, 401 U. S., at 693-694, and *Gideon* has been the primary example ever since. See, *e.g.*, *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990). *Teague* itself also quoted with approval Justice Stevens' list of fundamental rules from *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (dissenting opinion): " 'that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods.' " *Teague*, 489 U. S., at 313-314.

The four rules cited have four things in common: (1) they are all fundamental; (2) violation of any of them creates a grave risk of convicting an innocent person; (3) all except *Gideon* were, and *Gideon* could have been, decided under the Four-

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2. In the interval between *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993), and *Tyler* v. *Cain*, 533 U. S. 656 (2001), a number of Courts of Appeals concluded that because error under *Cage* v. *Louisiana*, 498 U. S. 39 (1990), is "structural," it must qualify for the second exception. See *Tyler*, *supra*, at 672 (Breyer, J., dissenting). The *Tyler* Court rejected the idea that structural errors necessarily qualify. See *id*., at 666-667. Not only is *Cage* not fundamental, it may not even be correct. See *id*., at 658, n. 1.

teenth Amendment Due Process Clause without the need for the incorporation doctrine; and (4) they are very old rules. *Gideon* is the relative youngster of the group.

In contrast, the following practices have been found or conceded to not be such fundamental violations of fairness as to qualify for the second exception: interrogation by a police officer regarding a different offense after invocation of *Miranda* rights, see *Butler* v. *McKellar*, 494 U. S., at 416, misleading argument by a prosecutor in the penalty phase, see *Sawyer* v. *Smith*, 497 U. S., at 244, a misleading jury instruction that may have caused the jury to overlook a partial defense reducing murder to manslaughter, see *Gilmore* v. *Taylor*, 508 U. S. 333, 338-339, 345 (1993), failure of the jury in a capital case to find an aggravating circumstance in terms sufficiently defined to meet constitutional requirements, see *Lambrix* v. *Singletary*, 520 U. S. 518, 521, 539-540 (1997), failure to inform the jury that defendant was ineligible for parole when the prosecution argued future dangerousness as the basis for a death sentence, see *O'Dell* v. *Netherland*, 521 U. S. 151, 154, 167 (1997), a jury instruction that may require a death sentence if a single juror does not agree to the existence of a mitigating circumstance, see *Beard* v. *Banks*, 542 U. S. 406, 408, 419-420 (2004), and denial of jury trial on the circumstance that distinguishes capital murder from noncapital murder. See *Summerlin*, 542 U. S., at 358.

When asking whether *Crawford* fits better with the first group of qualifying rules or the second group of nonqualifying rules, it is important to keep in mind that the fundamental nature of a change is not determined in the abstract but rather by comparison to the preexisting state of the law. Thus *Sawyer* v. *Smith*, 497 U. S., at 243-244, held that the special rule against misleading prosecutorial argument at the penalty phase of a capital case was not fundamental in part because preexisting case law protected against remarks that made any trial fundamentally unfair.

The question, then, is whether *Crawford* is such a dramatic leap forward in the fairness of trial relative to the preexisting *Roberts* requirements that it sharply reduces the chance of a wrongful conviction. *Crawford* itself makes no such claim. History, not accuracy of result, permeates the opinion from beginning to end. Rejection of reliability itself as a criterion for decision is the keystone of the opinion. "The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising." 541 U. S., at 67.

Indeed, *Crawford* might result in a net increase in wrongful convictions based on hearsay. *Crawford* hints that even the rankest hearsay presents no Confrontation Clause issue if it is not testimonial. See 541 U. S., at 51. *Davis* v. *Washington*, 547 U. S. __, No. 05-5224 (June 19, 2006) (slip op., at 8-9), elevates that hint to a holding. Under *Roberts*, reliability was the key to admissibility without cross-examination. Under *Crawford*, reliability is irrelevant.

The change made by *Crawford* may very well be faithful to the text and history of the Constitution. It may very well limit the role of judges in accord with the original understanding. See *Crawford*, 541 U. S., at 67. It may very well be a net improvement in the operation of the criminal justice system. Yet the substitution of the *Crawford* rule for the *Roberts* rule is definitely *not* an "absolute prerequisite to fundamental fairness," as is required for the second *Teague* exception. See 489 U. S., at 314. If it were, it would have been recognized long ago.

The *Roberts* Court may have created a framework that produced unpredictable results, see *Crawford*, 541 U. S., at 63, but it did not countenance fundamentally unfair trials. Nothing in *Roberts* remotely compares to forcing a defendant without legal training to defend himself in court. Cf. *Gideon*, 372 U. S., at 344-345. It is not in the same ballpark as beating a confession out of a suspect or conducting a trial while a lynch

mob outside places the jury in fear of their own lives. Cf. *Brown* v. *Mississippi*, 297 U. S. 278, 281-282 (1936); *Moore* v. *Dempsey*, 261 U. S. 86, 89 (1923).

When Justice Harlan first proposed the habeas nonretroactivity rule in 1969, the criminal procedure revolution was in high gear. *Gideon* itself was only six years old. An exception to his proposed rule would have been needed at the time. By the time *Teague* was decided in 1989, this era was long past, and the fundamental problems had all been corrected. The *Teague* Court therefore noted "we believe it unlikely that *many* such components of basic due process [qualifying for the second exception] have yet to emerge." 489 U. S., at 313 (emphasis added). By 2001, the Court saw fit to change "many" to "any," see *Tyler* v. *Cain*, 533 U. S. 656, 667, n. 7 (2001); accord *Summerlin*, 542 U. S. 352, an implicit recognition that the probability is asymptotically approaching zero.

The time has come, *amicus* CJLF submits, to recognize expressly what *Tyler* and *Summerlin* recognized implicitly. There is *no* practice previously approved by this Court, or uncorrected by this Court despite widespread use in the country, which is so fundamentally unfair that a rule against it would qualify for the second *Teague* exception. One pro-petitioner treatise raises the remote possibility that some jurisdiction might come up with a novel and fundamentally unfair procedure which requires a fundamental new rule simply because it has never been necessary to rule against it before. See 2 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 25.7, p.1241 (5th ed. 2005). In that event, it is extremely unlikely that resort to habeas corpus would be needed to correct the problem. The days when state courts could be presumed to be inadequate guardians of constitutional rights are behind us and have been for a very long time. See *Stone* v. *Powell*, 428 U. S. 465, 493, n. 35 (1976). In the very unlikely event that a legislature would enact such a law *and* the state courts would approve it, this Court's certiorari docket is

not so crowded that it could not correct a once-in-a-generation error.

The second *Teague* exception is a historical relic. It belongs on the museum shelf. There are no rules "of the primacy and centrality of . . . *Gideon*," *Saffle* v. *Parks*, 494 U. S., at 495, remaining to be made, and none have been made since some time before *Teague*. The extended litigation over whether each new rule qualifies is pointless, fruitless, and a waste of resources. It can and should be ended with a simple declaration that the second exception is history.

II. The prior adjudication rule of AEDPA does not incorporate the *Teague* exceptions.

Properly applied, the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), in conjunction with *McCleskey* v. *Zant*, 499 U. S. 467 (1991), would have streamlined and speeded federal review of state criminal cases, especially capital cases. On most questions of federal constitutional law, it is obvious that the state court applied then-existing Supreme Court precedent on direct appeal and that a different rule was neither dictated by precedent nor an absolute prerequisite to fundamental fairness. See *supra*, at 6, 8.

Regrettably, it did not happen, and cases continued to be bogged down for years as multiple courts pondered whether the petitioner was asking for a new rule or an application of an old rule and whether the rule, if new, qualified for the second *Teague* exception. By 1996, Congress had had enough. In the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA), Congress tightened many of the existing limitations. In new subdivision (d) of 28 U. S. C. § 2254, Congress created a new prerequisite for habeas relief. Unlike *Teague*, the new rule versus application question is not dispositive. More importantly for this case, the two exceptions to *Teague* are missing altogether.

New subdivision (d) of § 2254 is commonly called the "deference" rule. During the congressional debate, it was called that by every member who spoke on it, for or against. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 945, and n. 400 (1998). Although there was some initial discomfort with that word in court opinions, see *ibid*., we now see that designation routinely used in opinions. See, *e.g.*, *Rompilla* v. *Beard*, 545 U. S. 374, 387 (2005) (Kennedy, J., dissenting).

The essential backdrop for understanding the deference standard is the debate in *Wright* v. *West*, 505 U. S. 277 (1992). See *Williams* v. *Taylor*, 529 U. S. 362, 410-412 (2000).[3] In *Wright*, the Court asked for briefing on "whether a federal habeas court should afford deference to state-court determinations applying law to the specific facts of a case . . . ." 505 U. S., at 284. The Court ultimately decided not to answer this question, see *id*., at 295, possibly because it could not reach a majority agreement on it.

Justice Kennedy's opinion concurring in the judgment is based on his conclusion that *Teague*'s rule of retroactivity is different in kind from a rule of deference. See *Wright*, 505 U. S., at 306-307. Regarding the comity interest underlying the *Teague* rule, Justice Kennedy wrote,

> "The comity interest is not, however, in saying that since the question is close the state-court decision ought to be deemed correct because we are in no better position to judge. That would be the real thrust of a principle based on deference. We see that principle at work in the statutory requirement that, except in limited circumstances, the federal habeas court must presume the correctness of state-court factual findings." *Id*., at 308.

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3. Part II of Justice O'Connor's opinion in *Williams* is the opinion of the Court on the issues discussed in this brief. Part II of Justice Stevens' opinion is effectively a dissent on those points.

Justice O'Connor's opinion, joined by Justices Stevens and Blackmun, endorsed Justice Kennedy's view that retroactivity and deference are qualitatively different rules. See *id*., at 305.

After enactment of AEDPA, some commentators read the statute to do nothing more than "codify and strengthen *Teague* . . . ." Liebman & Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking That Article III and the Supremacy Clause Demand of the Federal Courts, 98 Colum. L. Rev. 696, 868 (1998). In this view, the single most hotly debated section of this very controversial act was actually much ado about not much, doing little more than "express a 'mood' that the Federal Judiciary must respect." *Williams*, 529 U. S., at 386 (opinion of Stevens, J.). The Court rejected this limited view of § 2254(d)(1). See *id*., at 403 (opinion of the Court). "It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." *Id*., at 404.

Although some commentators cling to the notion that § 2254(d)(1) is simply a more muscular version of *Teague*'s choice-of-law rule, see, *e.g.*, 2 Hertz & Liebman, *supra*, § 32.3, p. 1580, this Court's case law is now clearly to the contrary. In addition to *Williams*, the unanimous *per curiam* opinion in *Horn* v. *Banks*, 536 U. S. 266, 272 (2002), held that "the AEDPA and *Teague* inquiries are distinct."

The *Teague* rule is basically a "choice of law problem." See *Mackey* v. *United States*, 401 U. S. 667, 682 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part). The habeas petition is judged by the rules of law in effect on the date of finality, rather than the date of the habeas decision. A choice-of-law rule reaches its logical limit when the court selects the rule of law it will apply to the facts of the case. One of the primary goals of the proponents of AEDPA was to eliminate the overturning of reasonable applications of law to fact by the state courts. See *Williams*, 529 U. S., at 408, n. *. The opponents also understood that changing the standard for "mixed questions" was a primary purpose of the legislation.

See Scheidegger, 98 Colum. L. Rev., at 951-952. Given the views expressed in *Wright* v. *West* that the *Teague* retroactivity rule was not suitable for this purpose, it is not at all surprising that Congress turned to an entirely different type of rule.

Section 2254(d) is stated as a general rule with two exceptions. The general rule is a rule of res judicata. "An application for writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless . . . ." As Senator Biden correctly observed while speaking against this section, "The general principle in this language in the Hatch bill is that Federal courts shall not grant a claim that was adjudicated in State court proceedings. That is what is at the top." 141 Cong. Rec. 15058, col. 1-2.

The *Teague* rule of temporal choice of law does not depend at all on whether the state courts have ever ruled on the merits of the claim. See, *e.g.*, *Breard* v. *Greene*, 523 U. S. 371, 373, 377 (1998) (*per curiam*) (*Teague* applied to a claim never raised to state court). For § 2254(d), a state-court ruling on the merits is the threshold requirement. Timing only comes in incidentally through the operation of the first exception. State court decisions are excepted from the general rule of preclusion if they are contrary to clearly established Federal law or apply it unreasonably, and this judgment must necessarily be based on the law that was established "as of the time of the relevant state-court decision." *Williams*, 529 U. S., at 412. This timing aspect is evident from the statute's reference to the state-court decision in the past tense: "*was* contrary . . . ."

As a rule against relitigation of a previously decided question, § 2254(d) belongs to the same family of rules as res judicata, see *Allen* v. *McCurry*, 449 U. S. 90 (1980), the Full Faith and Credit Act, see 28 U. S. C. § 1738, the coordinate court aspect of the doctrine of law of the case, see *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 815, 816 (1988), and the rule that a court hearing a suppression motion should defer to the probable cause determination of the

magistrate who issues a search warrant. See *Illinois* v. *Gates*, 462 U. S. 213, 236-237 (1983); see also Scheidegger, 98 Colum. L. Rev., at 911-917.

The contention that § 2254(d) somehow incorporates the *Teague* exceptions has no basis whatever in the language of the statute. The language states a general rule and two exceptions. If additional exceptions had been intended, they would have been stated. " 'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.' " *TRW Inc.* v. *Andrews*, 534 U. S. 19, 28 (2001) (quoting *Andrus* v. *Glover Constr. Co.*, 446 U. S. 608, 616-617 (1980)). There does not appear to be any statement in the debates or reports on this bill indicating an intent to incorporate the *Teague* exceptions.

Hertz and Liebman cite three cases for the proposition that § 2254(d) might incorporate the *Teague* exceptions. See 2 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 32.3, p. 1584, and n. 9 (5th ed. 2005). *Muhleisen* v. *Ieyoub*, 168 F. 3d 840 (CA5 1999), predates *Williams* v. *Taylor*. That opinion says, "*If* AEDPA codifies the *Teague* doctrine, . . . that statute could also be read to codify the two exceptions to *Teague* as well." *Id.*, at 844, n. 2 (emphasis added). The premise was rejected by *Williams*, so the conclusion falls as well. The language they cite from *Williams* v. *Cain*, 229 F. 3d 468, 475 (CA5 2000), is dicta. The holding of that case is that AEDPA precludes retroactive application of *Cage* v. *Louisiana*, 498 U. S. 39 (1990). They also cite the Court of Appeals opinion in the present case.

> "Having determined that *Crawford* is retroactive, the remaining task is to determine whether, under AEDPA, the Nevada Supreme Court's analysis was either 'contrary to, or involved an unreasonable application of, clearly established Federal law.' 28 U.S.C. § 2254(d)(1)-(2). The Supreme Court has yet to address directly whether AEDPA was intended or should be read to adopt the *Teague*

> exceptions. *Williams v. Taylor*, 529 U.S. 362, 380, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (Stevens, J., for four justices) ("AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final."). Application of *Teague* is the means by which new rules are made retroactive. As noted earlier, the Court has clarified that the *Teague* and AEDPA inquiries are separate. *Horn*, 536 U.S. at 272, 122 S. Ct. at 2147. But in directing us to undertake both inquiries in an AEDPA case, the Court has impliedly endorsed the application of *Teague* in the AEDPA context. Further, it appears that Congress intended to preserve the *Teague* exceptions because AEDPA explicitly provides for their application in proceedings involving state habeas petitions. *See* 28 U.S.C. § 2254(e) ("If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that . . . the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court.") But even if Congress' intent is unclear, the constitutional doubt cannon [sic] of construction mandates that we read the statute to incorporate the *Teague* exceptions to avoid the serious constitutional problem raised by depriving individuals of bedrock principles of Due Process. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003)." *Bockting* v. *Bayer*, 399 F. 3d 1010, 1021 (CA9 2005).

This paragraph is a tangle of confusion. First, the quotation from Justice Stevens' opinion in *Williams* regarding codification of *Teague* is a proposition rejected by the opinion of the Court on this point, which held that § 2254(d)(1) created a new constraint, not a codification of an existing one. See 529 U. S., at 412. Second, the holding of *Horn* v. *Banks* that *Teague* and § 2254(d) are separate is a reason to reject an implicit incorporation of the *Teague* exceptions. A separate and independent

precondition for habeas relief would be pointless if it implicitly incorporated the limitations of the preexisting rule.

Congress did indeed implicitly preserve the *Teague* rule with its exceptions by allowing for retroactivity in multiple places. Congress allowed for retroactivity in the successive petition rule and the statute of limitations, as provided in paragraphs (b)(2)(A) and (d)(1)(C) of § 2244 and the corresponding paragraphs of § 2255. It also provided a retroactivity exception to the rule on default of the factual basis of a claim in § 2254(e)(2)(A)(i). However, it does not follow that the *Teague* exceptions are also exceptions to § 2254(d)(1). Quite the contrary, the fact that Congress provided for retroactivity in five other places, yet made no such provision in § 2254(d), indicates that the latter omission was intentional. See *Lindh* v. *Murphy*, 521 U. S. 320, 336 (1997); *Hamdan* v. *Rumsfeld*, 548 U. S. __, No. 05-184 (June 29, 2006) (slip op., at 13).

The lack of a retroactivity exception for § 2254(d)(1) does not nullify the retroactivity exceptions that Congress did make. As *Banks* illustrates and as we discuss *infra*, at 21, regarding retardation, there are occasions where "the relevant state-court decision," *Williams*, 529 U. S. 412, is on state postconviction review. When a state court decides a delayed or successive petition on the merits, applying the retroactive new rule, the petitioner may need §§ 2244(b)(2)(A) and (d)(1)(C) to get into federal court. Once there, however, the § 2254(d)(1) inquiry will be directed to the state-court decision applying the new rule. In addition, if no state court has ever addressed the merits, and no state remedies remain or the state waives exhaustion, the federal court will proceed to the merits without § 2254(d) after clearing the retroactivity hurdles. The canon of construing language to avoid making any part superfluous, see, *e.g.*, *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001), has no place here.

With nothing else to stand on, the Court of Appeals invokes "[t]he 'constitutional doubts' argument . . . the last refuge of many an interpretative lost cause." *Reno* v. *Flores*, 507 U. S.

292, 314, n. 9 (1993). "[H]owever, the canon of constitutional avoidance has no application in the absence of statutory ambiguity." *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U. S. 483, 494 (2001). Given that § 2254(d) makes no mention of the *Teague* exceptions, is not a rule of retroactivity, and was enacted in a statute that does expressly allow for retroactivity in five other places, a claim that the statute reaches the requisite threshold of ambiguity cannot be sustained.

In addition, the canon in question only applies in cases of "serious constitutional doubts," *Flores*, 507 U. S., at 314, n. 9; *Department of Housing and Urban Development* v. *Rucker*, 535 U. S. 125, 135 (2002), and there are none here. The constitutional doubt argument against § 2254(d)(1) was also made in *Williams* v. *Taylor*. See Brief for Petitioner in *Williams* v. *Taylor*, No. 98-8384, p. 44. The Court rejected it by ignoring it. See *Clemons* v. *Mississippi*, 494 U. S. 738, 747-748, n. 3 (1990) (argument made by party or dissent is rejected if not mentioned in opinion of the Court).

Congress has no constitutional obligation to provide collateral attacks on state criminal judgments. Congress could forbid federal habeas for state prisoners altogether, and the First Congress did precisely that. This early statute was enforced as written, and its constitutionality was never in doubt. See Scheidegger, 98 Colum. L. Rev., at 932. The greater power to abolish this form of review altogether includes the lesser power to limit it to the circumstances Congress deems desirable, so long as the limitation does not involve any unconstitutional discrimination. See *id*., at 953-957.

The Court of Appeals was concerned about "depriving individuals of bedrock principles of Due Process." *Bockting*, 399 F. 3d, at 1021. As explained in Part I, *supra*, at 12-13, there simply are no widespread practices in recent history that qualify as violations of "bedrock principles," and direct review is sufficient to deal with any novel violations that might arise in the future. Congress's implicit conclusion that federal

habeas retroactivity is no longer needed in this situation is certainly reasonable.

The first *Teague* "exception" requires more thought, because there are recent examples of new rules that certain conduct can no longer be made criminal, see, *e.g.*, *Lawrence* v. *Texas*, 539 U. S. 558 (2003), or that certain punishments can no longer be imposed on certain defendants. See, *e.g.*, *Atkins* v. *Virginia*, 536 U. S. 304 (2002).

First, we should note that this is not really an "exception" to the *Teague* rule but rather a limitation on the scope of *Teague* to rules of procedure and not substance. See *Summerlin*, 542 U. S., at 352, n. 4. No such limitation can be read into § 2254(d). On its face, the statute protects the integrity of all state-court decisions which were reasonable under the law which was established at the time, whether the issue is substantive or procedural.

Theoretically, then, § 2254(d) could preclude federal habeas relief if (1) the defendant anticipates a forthcoming new rule of substantive law, such as *Lawrence* or *Atkins*, and makes that claim on direct appeal or state postconviction review; (2) the state court rejects the claim on the merits, based on then-existing Supreme Court precedent; (3) this Court later adopts the new, substantive, constitutional rule; (4) the state courts refuse to reopen the case for a new decision on the merits, based on their state successive petition rule or statute of limitations; and (5) the state asserts § 2254(d)(1) and the prior state-court ruling on the merits to preclude reconsideration in federal court.

This scenario could only happen if the state postconviction law lacks exceptions along the lines of 28 U. S. C. § 2244(b)(2)(A) and (d)(1)(C). To see if this is a serious danger, *amicus* checked the case law for *Atkins* cases in the 20 capital punishment states that did not have a statutory prohibition against execution of the retarded prior to *Atkins*. See 536 U. S., at 322 (Rehnquist, C. J., dissenting). The results are

reported in the Appendix to this brief. In a nutshell, *amicus* did not find a single case where § 2254(d)(1) precluded a post-*Atkins* merits review. Generally, the states have provided a mechanism for deciding these claims on the merits. When a new decision on the merits applying the new rule is made on state postconviction review, the § 2254(d) question on federal habeas becomes only whether that new application is reasonable. See, *e.g.*, *Horn* v. *Banks*, 536 U. S. 266, 269 (2002) (District Court denied habeas based on state court's reasonable application of new rule on state postconviction).

An Act of Congress should not be given a tortured construction to avoid mere phantom possibilities. If the courts of any state ever decide that a person must suffer a punishment for which he is not eligible or for an act which is not criminal, there will be an opportunity to decide what remedy may be granted. For example, it remains undetermined whether § 2254(d) is binding in an original habeas application to this Court. See *Felker* v. *Turpin*, 518 U. S. 651, 662-663 (1996). That question may never need to be answered. If the state courts continue to treat new substantive rules as they did *Atkins*, the lack of a retroactivity exception to § 2254(d) will not stand in the way of relief.

Finally, in interpreting § 2254(d), it is important to keep in mind the goals of the legislation. "Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Williams* v. *Taylor*, 529 U. S., at 386 (opinion of Stevens, J.). The opinion of the Court in *Williams* endorses this statement of the congressional purpose, see *id*., at 404, and goes on to say, "It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." *Ibid*. The goal of curbing delays is furthered by streamlining and simplifying the issues. It is frustrated by adding exceptions to rules. An exception that is never found but must always be sought is a pointless complexity that causes delay yet achieves no purpose.

Reading the *Teague* exceptions into § 2254(d)(1) would be contrary to both the language and the purpose of the statute. The canon of avoiding constitutional doubt does not apply, because both statutory ambiguity and substantial doubt are absent. The statute should be enforced as written. Decisions subsequent to the relevant state-court decision are not "clearly established Federal law" for the purpose of § 2254(d)(1).

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

July, 2006

Respectfully submitted,

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APPENDIX

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The following is a summary of how *Atkins* claims have been handled in states without a statute prohibiting execution of the mentally retarded when *Atkins* was decided.

No cases of *Atkins* claims by death row inmates sentenced before *Atkins* were found in Delaware, Idaho, Montana, Nevada, New Hampshire, Utah, or Wyoming.

Alabama

In *Clemons* v. *Alabama*, No. CR-01-1355, 2003 Ala. Crim. App. LEXIS 217 (Aug. 29, 2003), the Court of Criminal Appeals held that rules qualifying for the first *Teague* exception, including *Atkins*, also qualify for the state rule "that an illegal or void sentence may be challenged at any time." *Id*., at *8, n. 4. The *Atkins* claim was remanded to the trial court for an evidentiary hearing even though raised for the first time on appeal from denial of state postconviction review.

California

In California, it has long been the law that a change in the applicable law is an exception to the successive petition rule. See *In re Clark*, 5 Cal. 4th 750, 767, 855 P. 2d 729, 740 (1993). In *In re Hawthorne*, 35 Cal. 4th 40, 43, 105 P. 3d 552, 554 (2005), the California Supreme Court considered a fourth petition for writ of habeas corpus presenting the same claim that had been rejected three other times. The court considered the petition on the merits and transferred it to the superior court for an evidentiary hearing. See *id.*, at 44, 105 P. 3d, at 554.

Illinois

In *People* v. *Pulliam*, 206 Ill. 2d 218, 794 N. E. 2d 214 (2002), the case was pending on appeal from denial of state postconviction review when *Atkins* was decided. See *id*., at 257, 794 N. E. 2d, at 236. The court noted that if the defendant raised the issue on a subsequent postconviction petition a hearing would be necessary, so in the interests of judicial economy the

court remanded *sua sponte* for a *de novo* determination of whether defendant was mentally retarded. See *id*., at 259, 794 N. E. 2d, at 237.

Louisiana

State v. *Williams*, 831 So. 2d 835 (La. 2002) was pending on direct appeal when *Atkins* was decided. The court held that the mandate of *Atkins* is retroactive to any case, at any stage of the proceedings, in which the defendant is facing the prospect of capital punishment. *Id.*, at 851-852, n. 21. The court concluded that defendant was entitled to an evidentiary hearing which would give him an opportunity to prove he is mentally retarded. *Id.*, at 857.

Mississippi

In *Foster* v. *State*, 848 So. 2d 172 (Miss. 2003), the case had been through direct appeal and state postconviction review before *Atkins*. *Id.*, at 172. Federal habeas review ended with denial of certiorari six months after *Atkins*. *Foster* v. *Epps*, 537 U. S. 1054 (2002), rehearing denied, 537 U. S. 1098 (2003). Defendant pursued the issue of mental retardation at the trial level, on initial appeal, and in his postconviction relief petitions. *Id.*, at 176 (Smith, J., dissenting in part). The court applied the statutory "intervening decision" exception to Mississippi's successive petition rule, see Miss. Code Ann. § 99-39-23(7), and authorized the defendant to proceed in the trial court. 848 So. 2d, at 175.

New Jersey

In *State* v. *Harris*, 181 N. J. 391, 526, 859 A. 2d 364, 444 (2004), the New Jersey Supreme Court held that a retardation claim could be considered when raised for the first time in an amendment to a pending state postconviction petition, although the petitioner in that case had not made a sufficient case to warrant an evidentiary hearing.

Ohio

Ohio has a retroactive new rule exception to its statute of limitations and successive petition rules, similar to AEDPA. See Ohio Rev. Code Ann. § 2953.23(A). In *State* v. *Lott*, 97 Ohio St. 3d 303, 306, 779 N. E. 2d 1011, 1015 (2002), the Ohio Supreme Court not only held that this provision applied but went on to stretch the statutory language to excuse *Atkins* claimants from the requirement to show clear and convincing evidence of ineligibility for the death penalty.

Oklahoma

In *Murphy* v. *State*, 54 P. 3d 556, 560 (Okla. Crim. App. 2002), the Oklahoma Court of Criminal Appeals considered an *Atkins* claim that was initially raised in a postconviction petition. The court made an exception to the usual rule against raising claims on postconviction that could have been raised on appeal. See *id*., 566-567. The court outlined procedures for raising *Atkins* claims in pending cases, with the only prerequisite being that the defendant had previously put his retardation at issue by anticipating *Atkins*, asserting retardation as a mitigating circumstance under *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), or asserting ineffective assistance due to counsel's failure to raise the issue. See *Murphy*, *supra*, at 569.

Oregon

In *Pratt* v. *Armenakis*, 199 Ore. App. 448, 452, 112 P. 3d 371, 374 (2005), the Court of Appeals of Oregon considered an appeal from denial of state postconviction relief in a case where *Atkins* was decided while that appeal was pending. The court held that, under controlling statutes, it lacked the authority to remand for a new claim to be considered at that point, but it did not rule out the possibility of considering the claim on the merits in a successive petition under the statutory exception for claims "which could not reasonably have been raised in the original or amended petition." See *id*., at 454-455, and n. 5, 112 P. 3d, at 374-375, and n. 5; Ore. Rev. Stat. § 138.550(3).

Pennsylvania

In *Commonwealth* v. *Mitchell*, 576 Pa. 258, 273-274, 839 A. 2d 202, 210-211 (2003), the Supreme Court of Pennsylvania decided that *Atkins* claims in pre-*Atkins* cases where the issue had not been raised during trial would be considered on postconviction review. *Commonwealth* v. *Miller*, 888 A. 2d 624, 626 (Pa. 2005), was an *Atkins* claim on a successive postconviction petition by a defendant whose direct appeal and first postconviction review were final before *Atkins*. The case was decided on the merits, with no procedural bars imposed.

South Carolina

South Carolina has a statutory new-rule exception to its successive petition rule, S. C. Code Ann. § 17-27-45(B), and inmates with pre-*Atkins* death sentences can file under this exception. See *Franklin* v. *Maynard*, 356 S. C. 276, 279-280, 588 S. E. 2d 604, 606 (2003).

Texas

The Texas statutory successive petition rule has an exception for cases where "factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." Tex. Code Crim. Proc., Art. 11.071, § 5(a)(1). When a pre-*Atkins* petitioner files a successive petition making a *prima facie* showing that he is retarded, the Texas Court of Criminal Appeals remands the writ application to the trial court for an evidentiary hearing. See *Ex Parte Briseno*, 135 S. W. 3d 1, 3-4 (Tex. Crim. App. 2004) (application filed on execution date). The Court of Criminal Appeals has denied a number of *Atkins* claims in terse, unpublished orders. As explained in *Ex parte Williams*, No. 43,907-02, pp. 3-4 (Feb. 26, 2003) (Cochran, J., concurring), these denials are on the ground that the particular application does not present a *prima facie* case that the petitioner is actually retarded. Although the Fifth Circuit has not definitively resolved the question, this determination would appear to be a ruling on the merits of the federal question

subject to the deference standard of § 2254(d). See *Moreno* v. *Dretke*, 450 F. 3d 158, n. 3 (CA5 2006).

Virginia

In Virginia, the General Assembly enacted emergency legislation after *Atkins*, Va. Code § 8.01-654.2. That legislation provided a mechanism for raising *Atkins* claims on direct appeal or an initial state habeas petition. The statute also has an unusual provision forbidding successive state petitions under *Atkins* by petitioners whose appeal and initial state habeas were already final when the statute was enacted, but recognizing that these petitioners could pursue a remedy in federal court. The legislature evidently considered the efficiency of proceeding to the merits in federal court, for cases that had already reached that stage, to be more important than the interest of the state in giving its own courts first crack at applying *Atkins*. In this situation, the deference standard does not apply, and the petitioner receives a *de novo* determination of retardation in federal court. See *Walker* v. *True*, 399 F. 3d 315, 319 (CA4 2005).