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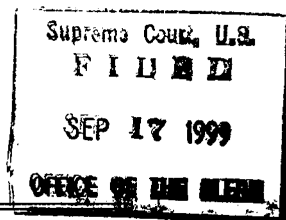

In The

Supreme Court of the United States

SCOTT LESLIE CARMELL,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The
Texas Court Of Appeals

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether the retroactive application of a criminal statute that repeals a statutory requirement of two witnesses to convict a criminal defendant violates the Ex Post Facto Clause in Article I, Section 10 of the Constitution, because it requires "less . . . testimony, than the law required at the time of the commission of the offence, in order to convict the offender," *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798), and, in addition, because it eliminates a defense on the merits.

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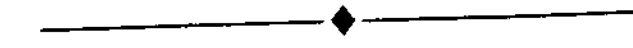
OPINION BELOW

The decision of the court of appeals affirming Petitioner's conviction is reported at *Carmell* v. *Texas*, 963 S.W.2d 833 (Tex. App.-Fort Worth 1998, pet. ref'd).



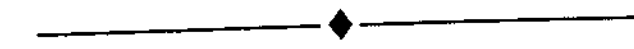
JURISDICTION

The judgment of the Texas Court of Appeals was entered on February 12, 1998. The Texas Court of Criminal Appeals denied review on September 16, 1998. The *pro se* Petition for Writ of Certiorari was filed on December 14, 1998, and granted on June 14, 1999. This Court appointed counsel for Petitioner on July 21, 1999. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Ex Post Facto Clause of the United States Constitution, Article I, Section 10, provides in pertinent part: "No State shall . . . pass any . . . ex post facto law."

2. Texas Code of Crim. Proc. article 38.07 (1983); Texas Code of Crim. Proc. Article 38.07 (1993); and Texas Penal Code Sections 21.11, 22.011, and 22.021.



STATEMENT OF THE CASE

A. The Statutory Change

In 1983, the Texas Legislature enacted a law governing certain types of sexual offense prosecutions. That law provided, in pertinent part:

> 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.

Tex. Code Crim. Proc. art. 38.07 (1983).[1]

Effective September 1, 1993, the Texas Legislature amended Article 38.07 of the Texas Code of Criminal Procedure to read, in pertinent part:

> 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. Proc. art. 38.07 (1993), Acts 1993, 73rd Leg., ch. 900, § 12.01.

[1] Texas Penal Code Chapter 21 covers sexual offenses, including indecency with a child (section 21.11). Texas Penal Code Chapter 22 covers "Assaultive Offenses," including sexual assault (section 22.011) and aggravated sexual assault (section 22.021).

B. The Alleged Crimes and Trial

Although Petitioner contests the facts as found by the Texas Court of Appeals, the factual recitation herein is based upon the opinion of the Texas Court of Appeals in *Carmell* v. *Texas*, 963 S.W.2d 833 (Tex. App.-Fort Worth 1998, pet. ref'd), *cert. granted*, 119 S. Ct. 2336 (1999). Petitioner Scott Leslie Carmell married Eleanor in 1988, and became the stepfather of "KM," a daughter born to Eleanor and her previous husband on March 24, 1978.[2] Carmell gave back rubs to KM every night before she went to bed. Some time in the Spring of 1991, Carmell touched KM on her pubic hair during one of the back rubs. Later that Spring, Petitioner touched KM's breast. On two occasions in the summer of 1991, Petitioner caused his penis to touch KM's genital area.

Approximately one year later, in June 1992 (when KM was 14), Petitioner's penis touched KM's genital area. *Id.* at 835. In March 1993, Petitioner touched KM's breast. On or about June 1, 1993 and July 1, 1993, Petitioner caused KM to touch his genitals.

[2] To protect the identity of the complaining witness, this brief follows the Court of Appeals' practice of referring to her as "KM," and by not identifying her mother's surname.

In September 1993, when KM was fifteen, she and Petitioner had sexual intercourse for the first time. KM and Petitioner had sexual intercourse on several subsequent occasions, ending in March 1995. KM did not tell her mother or anyone else about her sexual contact with Petitioner until March 1995. KM reported Petitioner's alleged conduct to the police in March 1995.

Petitioner was indicted in Texas district court on eight counts of indecency with a child, five counts of sexual assault, and two counts of aggravated sexual assault on December 19, 1996. Petitioner pleaded not guilty to each count of the indictment. Petitioner's trial on the indictment commenced on January 6, 1997. There was no testimony offered at trial to corroborate KM's account of the sexual contact between KM and Petitioner. On January 9, 1997, the jury returned a verdict of guilty on all counts. On January 10, 1997, the jury returned a sentencing verdict imposing the maximum prison sentence allowed by law on each count, which resulted in two life sentences and several 20 year sentences, to be served concurrently.[3]

C. The Retroactive Application of the 1993 Statute

All of the conduct alleged in Counts 7 – 10 of the indictment occurred before the effective date of amended

[3] Petitioner was sentenced to life imprisonment on Counts 3 and 4, and 20 years in prison for each of the other counts. The trial court judgment shows the prison sentences are to be served concurrently. J.A. 22-104.

Article 38.07, but after KM turned 14.[4] The corroboration statute in effect at the time of the conduct alleged in Counts 7 – 10 of the indictment provided, in pertinent part:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code [*viz.* for a sexual offense], *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.*

Tex. Code Crim. Proc. art. 38.07 (1983) (emphases added). Thus, the pre-amendment statute required eyewitness corroboration to support a conviction except in cases in which the alleged victim either (1) informed another person within six months of the alleged offense; or (2) was younger than age 14. Neither exception applies to the counts of conviction challenged here.[5] See *Carmell*, 963

[4] Count 7 alleged sexual assault on or about June 1, 1992. Counts 8 – 10 alleged indecency with a child, occurring on or about March 1, 1993, June 1, 1993, and July 1, 1993, respectively. J.A. 16-18.

[5] Respondent did not attempt at trial to satisfy the corroboration requirement contained in the pre-amendment version of Article 38.07. There was no eyewitness testimony, or any other contemporaneous evidence, introduced at trial to support KM's testimony regarding Petitioner's alleged conduct. The corroborating testimony required by Article 38.07 is testimony by an eyewitness to the alleged conduct. *E.g.*, *Shelby*

S.W.2d at 836; see generally Resp't's Br. in Opp. to Cert. at 5-7. Accordingly, under the terms of the statute in effect at the time of the alleged conduct, as a matter of law, Petitioner could not have been convicted of the crimes alleged in Counts 7 – 10, because KM's testimony was uncorroborated. See Tex. Code Crim. Proc. Art. 38.07 (1983).

Effective September 1, 1993, the Texas Legislature amended the statute to eliminate the corroboration requirement for alleged victims under the age of 18:

> 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. Proc. art. 38.07 (1993), Acts 1993, 73rd Leg., ch. 900, § 12.01 (emphasis added). Because it is undisputed that KM did not inform anyone of the alleged conduct until well over a year after the last offense at issue in this Petition (Count 10 of the indictment), the 1993 statutory change in the outcry period from six months to one year is irrelevant here. Rather, Petitioner's conviction on Counts 7 – 10 was possible solely because of the retroactive application of the 1993 substantive amendment to Texas criminal law that eliminated the requirement for conviction of a second witness to corroborate the account of the complaining witness.

v. *Texas*, 800 S.W.2d 584, 586 (Tex. App. 1990) (for purposes of corroboration statute, " '[u]ncorroborated testimony' means absence of any eye-witness other than the victim"), *rev'd on other grounds*, 819 S.W.2d 544 (Tex. Crim. App. 1991); *Heckathorne* v. *Texas*, 697 S.W.2d 8, 12 (Tex. App. 1985, pet. ref'd) ("We believe art. 38.07 speaks to cases . . . wherein the State seeks a conviction in the *absence* of any eyewitness . . . other than the young victim. 'The lack of any other eyewitness' is what is meant in Article 38.07 by 'uncorroborated testimony.' "); *see Bowers* v. *Texas*, 914 S.W.2d 213, 215 (Tex. App. 1996, pet. ref'd) (holding that retroactive application of amended Article 38.07 would be *ex post facto* violation, finding "[the victim] was the only witness to testify about the assault. Her testimony was uncorroborated."); *Friedel* v. *Texas*, 832 S.W.2d 420, 421-22 (Tex. App. 1992, no pet.) (applying pre-amendment version of Article 38.07 to hold lack of outcry within six months and lack of evidence to corroborate victim's account compelled acquittal; court suggested this was harsh result, but found result was compelled by clear language of statute and intent of legislature).

D. The State Appeals Court Decision

On appeal, Petitioner raised several challenges, including a challenge to the prosecution's admitted failure to disclose impeachment evidence; the sufficiency of testimony that Petitioner touched KM's "genital area" to prove the type and level of sexual contact required to prove sexual assault; and a challenge to the retroactive application of the 1993 amendment to Article 38.07 to Petitioner's pre-amendment conduct as an unconstitutional *ex post facto* law. See *Carmell*, 963 S.W.2d 833.[6] The

[6] Carmell's *ex post facto* appeal directly applied only to the charges in Counts 7 – 10. J.A. 16-18. Similarly, the *ex post facto*

Texas Court of Appeals rejected Petitioner's challenges and affirmed his conviction. *Id.* at 838. Petitioner sought and was denied discretionary review in the Texas Court of Criminal Appeals. *Carmell* v. *Texas,* No. 837-98 (Tex. Crim. App. Sept. 16, 1998).

Carmell filed a Petition for Writ of Certiorari with this Court. The Court granted the Petition, confining its consideration to the *ex post facto* and due process issues set forth in the Petition's first question. *Carmell* v. *Texas,* 119 S. Ct. 2336 (1999).[7]

SUMMARY OF ARGUMENT

Straightforward and longstanding *ex post facto* principles demonstrate that Texas' conviction of Petitioner on the testimony of one witness, when the law in effect at the time of his conduct required the testimony of two witnesses, violates the Constitution. The retroactive application of the amendment to Article 38.07 of the Texas Code of Criminal Procedure falls squarely within a category of prohibited retroactive criminal laws set forth in this Court's landmark *ex post facto* decision, *Calder* v. *Bull,* 3 U.S. (3 Dall.) 386 (1798). That decision, written by

issues raised in this Petition ask this Court to reverse Carmell's conviction on those four counts only; Petitioner's remaining convictions are not directly at issue.

[7] Because the Ex Post Facto Clause in Article I, Section 10 directly applies to the states and the precedent under that Clause expressly addresses the question presented, this brief does not address any additional due process limitations on retroactivity.

Justice Chase shortly after ratification of the Constitution, enumerated four types of laws repugnant to the Ex Post Facto Clause, among them: "4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, that the law required at the time of the commission of the offence, in order to convict the offender." *Id.* at 390. Justice Chase's inclusion of this fourth category stemmed directly from *ex post facto* acts passed by the British Parliament, particularly one involving the case of Sir John Fenwick. In that case, Parliament "violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two" (*id.* at 389) to convict Fenwick of treason and to sentence him to death. So too here. Texas convicted Petitioner of a crime on the testimony of one witness when the law in effect at the time of his conduct required the testimony of two witnesses. This is a clear violation of the Ex Post Facto Clause because it allowed the conviction of Petitioner on less evidence than required by the law in effect when the underlying conduct occurred.

The Framers believed the purpose of the Ex Post Facto Clause – to prevent politically responsive legislatures from retroactively changing criminal laws in order to convict a class of unpopular defendants – was vital to the protection of individual liberty. This protection was considered so important that the state Ex Post Facto Clause was among very few express limits on state power in the original Constitution. The fourth category of *Calder* v. *Bull* reflects the original understanding of the scope of this fundamental protection.

During the ensuing two hundred years, this Court has consistently reaffirmed that the *Calder* categories are

the foundation of *ex post facto* jurisprudence. Indeed, the Court recently re-emphasized that the "prohibition which may not be evaded is the one defined by the *Calder* categories." *Collins* v. *Youngblood*, 497 U.S. 37, 46 (1990).

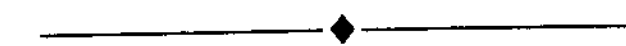
Applying the Ex Post Facto Clause here will result in limited but vital protection of individual rights without restricting the states' ability to implement routine changes to rules of evidence or other criminal procedures. Although the fourth category of *Calder* v. *Bull* provides an essential protection against overreaching legislative acts, properly construed it is not applicable to most retroactive evidentiary changes. It applies only to those changes that allow conviction based on "less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." *Calder*, 3 U.S. at 390. Thus, changes to neutral rules of general application (for example, changes to the Federal Rules of Evidence governing hearsay and similar matters) which may help the prosecution in one case and help a defendant in another, are not within the *Calder* prohibitions and do not run afoul of the Ex Post Facto Clause.

Retroactive application of the 1993 amendment to Petitioner's pre-amendment conduct also violated the Ex Post Facto Clause because it deprived him of an absolute defense available at the time of his conduct. Laws prohibited by the Ex Post Facto Clause include "any statute . . . which deprives one charged with [a] crime of any defense available at the time when the act was committed." *Beazell* v. *Ohio*, 269 U.S. 167, 169 (1925). Under the law in effect at the time of Petitioner's conduct, he had an absolute defense on the merits to Counts 7 – 10, because

the prosecution produced no testimony to corroborate the account of the complaining witness. This defense goes to "guilt or innocence," *id.* at 170, as a two-witness rule is designed to prevent erroneous convictions. Like *Calder*, the *Beazell* formulation of the reach of the Ex Post Facto Clause has been recently and unequivocally endorsed by this Court. *Collins*, 497 U.S. at 43.

The assertion of the Texas Court of Appeals that the amendment to Article 38.07 was procedural is both irrelevant and incorrect. *Collins* reaffirms that the *ex post facto* prohibition is not avoided merely because a law is labeled "procedural." *Collins*, 497 U.S. at 46. The touchstone for *ex post facto* purposes is whether the change affects substantive rights. The 1993 amendment to Article 38.07 indubitably affected Petitioner's substantive rights, because it permitted his conviction on the testimony of one, rather than two, witnesses, and eliminated a defense on the merits. In any event, the amendment at issue has a clear substantive purpose: making it easier to obtain convictions of those charged with sex offenses against teenagers. And, regardless of the characterization employed by the State, as a matter of federal law (which governs here, in interpreting the Ex Post Facto Clause), burden of proof issues are matters of substance, not procedure.

Petitioner's conviction on Counts 7 – 10 should be reversed.



ARGUMENT

I. RETROACTIVE APPLICATION OF THE 1993 AMENDMENT TO ARTICLE 38.07 VIOLATED THE EX POST FACTO CLAUSE BY REDUCING THE AMOUNT OF PROOF NECESSARY TO SUPPORT A CONVICTION.

A. Retroactive Application Of The 1993 Amendments Violated The Ex Post Facto Clause By Reducing The Amount Of Evidence Necessary For Conviction, Contrary To The Fourth Category Of *Calder* v. *Bull*.

"Our understanding of what is meant by *ex post facto* largely derives from the case of *Calder* v. *Bull*, 3 Dall. 386 (1798)." *Miller* v. *Florida*, 482 U.S. 423, 429 (1987). Barely a decade after the ratification of the Constitution, Justice Chase enumerated four types of laws "within the words and intent of the prohibition" against *ex post facto* laws:

> 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. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. 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.*

Calder v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (emphasis added). In the lead opinion for a Court whose members included Framers of the Constitution, Justice Chase detailed the abuses of the British Parliament prior to the

American Revolution that led the Framers to prohibit the states, as well as the federal government, from enacting *ex post facto* laws. The abuses Justice Chase described included retroactive acts of Parliament that "violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two." *Id.* at 389. At the end of his survey of legislative abuses, Chase concluded, "[t]o prevent such, and similar, acts of violence and injustice . . . the Federal and State Legislatures, were prohibited from passing any bill of attainder; or any *ex post facto* law." *Id.*

Under the clear language of *Calder* and the history it summarizes, this is not a difficult case. The action of the State of Texas in this case – convicting Petitioner of a crime on the testimony of one witness when the law in effect at the time of the person's conduct required at least two witnesses – is a violation of the Ex Post Facto Clause, because Texas allowed "less . . . testimony" to support convictions on Counts 7 – 10 "than the law required at the time of" Petitioner's alleged conduct. *Id.* at 390.

Under the law in effect at the time of the conduct, Petitioner simply could not have been convicted of Counts 7 – 10. The absence of testimony corroborating the account of complaining witness KM would have operated as an absolute bar to conviction on those counts. Petitioner's conviction on those counts was made possible solely by the September 1993 retroactive legislative removal of the corroboration requirement for those offenses. See *supra* pp. 4-7, *infra* pp. 25 n.14, 29-30. This retroactive reduction of the amount of proof required for conviction is proscribed by the Ex Post Facto Clause as explicated by the fourth category of *Calder* v. *Bull*.

B. The Fourth Category Of *Calder* v. *Bull* Is Essential To Fulfillment Of The Purpose Of The Ex Post Facto Clause.

The fourth category of *Calder* v. *Bull* should be reaffirmed by this Court because it falls squarely within a fundamental purpose of the Ex Post Facto Clause: to prevent legislatures inclined to respond to an emotionally charged electorate from changing criminal laws after the fact in order to convict a class of unpopular defendants. A "solid foundation of American law" is "the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place . . . [This principle] has timeless and universal human appeal.' " *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994); *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring). The dual Ex Post Facto Clause in the Constitution[8] embodies this solid foundation.

The Framers rightly considered the Clause a vital protection of individual liberty, one of the few deemed worthy of inclusion in the original Constitution, prior even to the adoption of the Bill of Rights. Even more significant, the ban on state *ex post facto* laws was one of the very few limits on *state* powers embodied in the original Constitution. See, *e.g.*, *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (Chief Justice Marshall described art. I, § 10, cl. 1, as "a bill of rights for the people of each state"); *The Federalist No. 44*, at 282 (James Madison)

[8] U.S. Const. art. I, § 9, cl. 3 (barring federal *ex post facto* laws); *id.* § 10, cl. 1 (barring state *ex post facto* laws).

(Clinton Rossiter ed., 1961); James Iredell ("Marcus"), *Answers to Mr. Mason's Objections to the New Constitution* (1788), *reprinted in Pamphlets on the Constitution of the United States, Published During Its Discussion by the People, 1787-1788*, at 368 (Paul L. Ford ed., De Capo Press 1968) (1888) (referring to Ex Post Facto Clause as "one of the most valuable parts of the new constitution," and stating that "[t]his very clause, I think, is worth ten thousand declarations of rights, if this, the most essential right of all, was omitted in them"). Indeed, the bans on *ex post facto* laws, bills of attainder, and impairment of contracts were essentially the only express limits on the States' actions affecting individual liberty in the pre-amendment Constitution. See generally U.S. Const. art. I, § 10. The few other limitations on the States set forth in the pre-amendment Constitution were primarily concerned with the relationship of the States to the federal government in a federal system. See *id.* (prohibiting states from, *inter alia*, entering treaties, coining money, and imposing duties on imports and exports).

The Ex Post Facto Clause embodies the principle that politically responsive legislatures should create penal policy solely on a prospective basis, while the impartial judiciary is charged with the application of those policies to specific actors and conduct. See, *e.g.*, *Miller*, 482 U.S. at 430; *Weaver* v. *Graham*, 450 U.S. 24, 29 n.10 (1981); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 513 (1989) (Stevens, J., concurring) ("Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political

process to punish or characterize past conduct of private citizens."); *Ogden* v. *Blackledge*, 6 U.S. (2 Cranch) 272, 277 (1804); see also Joseph Story, *Commentaries on the Constitution of the United States* § 1338 n.28 (1833); John Hart Ely, *Democracy and Distrust* 90 (1980). Cf. *Calder*, 3 U.S. at 389 (Chase, J.) (British *ex post facto* laws were "legislative judgments" and thus "an exercise of judicial power").

The Ex Post Facto Clause was enacted in response to the Framers' fear – based on contemporary examples in Great Britain – that a legislature could use *ex post facto* laws to single out unpopular groups or individuals for retroactive application of new criminal laws. One significant example of such vindictive legislation that was familiar to the Framers' generation is the 1696 case of Sir John Fenwick. See generally An Act to Attaint Sir John Fenwick Baronet of High Treason, 8 Will. 3, ch. 4 (1696) (Eng.). Fenwick was indicted for high treason, a charge that required at least two witnesses, but Fenwick had secured the absence of the second witness. See *Mattox* v. *United States*, 156 U.S. 237, 240 (1895). Parliament allowed Fenwick to be convicted and sentenced to death anyway, on the testimony of the remaining witness. In *Calder*, Justice Chase cited Fenwick's case as a paradigmatic improper *ex post facto* law, noting that Parliament had "violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two." *Calder*, 3 U.S. at 389 (Chase, J.). Petitioner's challenged convictions here also rest on the retroactive repeal of a two-witness rule.

As Justice Harlan once noted, the Ex Post Facto Clause:

> rest on the apprehension that the legislature, in imposing penalties on past conduct, even though the conduct could properly have been made criminal and even though the defendant who engaged in that conduct in the past believed he was doing wrong . . . may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or *classes of persons*.

James v. *United States*, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., separate opinion) (emphasis added). The Ex Post Facto Clause thus provides critical safeguards of individual liberty, protecting unpopular groups or individuals from the potentially arbitrary, capricious, and vindictive actions of a powerful State. See *Miller*, 482 U.S. at 429; *Weaver*, 450 U.S. at 29; see also *Landgraf*, 511 U.S. at 266 (noting that popularly elected legislatures, in response to political pressures, "may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.").[9]

Plainly, the legislative purpose here was to exact retribution against a paradigmatically unpopular group – alleged sex offenders. In an analysis of the 1993 bill that amended Article 38.07 done for the Texas House of Representatives, supporters of the bill stated that the "[c]urrent [outcry or corroboration requirement] creates

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[9] This is not the only purpose served by the Ex Post Facto Clause. As *Miller* explained, the Clause is additionally "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.' " 482 U.S. at 430 (quoting *Weaver*, 450 U.S. at 28-29)).

an absurd obstacle for prosecuting [sexual assault] cases. . . . The outcry [or corroboration] requirement is an especially difficult obstacle to overcome in sexual assault and other sexual offense cases." House Research Org., *Bill Analysis* 14 (Mar. 15, 1993) (analyzing HB 261) (a copy of this document has been lodged with the Clerk of Court).

As societal views of a particular crime change, a legislature may become more willing to find a given class of defendants guilty based on less evidence. A law specifying the minimum amount of proof necessary for conviction is inextricably intertwined with the question of the defendant's guilt. See *infra* pp. 25-28, 32-34. The prosecution's failure to produce the minimum amount of proof requires a judgment of not guilty. It is, of course, entirely proper for a legislature to reduce the minimum amount of proof necessary for conviction, provided that change in the criminal law is accomplished prospectively.

It is not surprising, however, that Texas singled out those accused of sexual misconduct for a retroactive change in the minimum amount of proof necessary for conviction. History tells us that these kinds of legislative attempts to guarantee convictions for past conduct by reducing the legally required amount of proof are reserved for those accused of the most heinous crimes, such as treason, murder, or sexual offenses, *supra* pp. 8-9, 16-17; *infra* p. 21 n.11.

Convicting sex offenders is a laudable and important purpose of the criminal law. But the Ex Post Facto Clause requires that expansions of the criminal law be pursued prospectively. Prospective application of new criminal

laws fully vindicates society's interest in general deterrence, because a new criminal law cannot deter conduct that already has occurred. And, society's interest in retribution for, or specific deterrence of, an individual defendant does not provide a legitimate basis for exceptions to the Ex Post Facto Clause as, virtually by definition, such exceptions would swallow the rule. As Justice Story stated:

> If the laws in being do not punish an offender, let him go unpunished; let the legislature, admonished of the defect of the laws, provide against the commission or future crimes of the same sort. The escape of one delinquent can never produce so much harm to the community, as may rise from the infraction of a rule, upon which the purity of public justice, and the existence of civil liberty, essentially depend.

Joseph Story, *Commentaries on the Constitution of the United States* § 1338 n.28.

Because the legitimate goals of the amended Article 38.07 can be met fully by prospective application of the new rule, there is no reason to depart from the original understanding of the Ex Post Facto Clause set forth in *Calder* v. *Bull*. Indeed, this Court has noted that " '*ex post facto* law' was a term of art with an established meaning at the time of the framing of the Constitution," and that *Calder* reflects that meaning. *Collins* v. *Youngblood*, 497 U.S. 37, 41-42 (1990). *Collins* thus rightly emphasized the

continuing importance of "the original understanding of the *Ex Post Facto* Clause." *Collins*, 497 U.S. at 43.[10]

Finally, it is important to note that the fourth category of *Calder* does *not* cover all retroactive changes in the rules of evidence. It applies only if the change permits *"less, or different, testimony, than the law required* at the time of the commission of the offence, *in order to convict the offender."* *Calder*, 3 U.S. at 390 (emphases added). For example, routine changes in the Federal Rules of Evidence governing relevance, hearsay, leading questions and the like would not fall within the fourth category. See *Collins*, 497 U.S. at 43 n.3. Indeed, no rule in the Federal Rules of Evidence specifies the minimum amount of evidence required for conviction. Rather, the Federal Rules of Evidence are neutral rules of general application; in one case a given rule may help the prosecutor and in another case the same rule may help the defendant. Unlike the amended Article 38.07, the Federal Rules of Evidence do not single out a specific class of unpopular defendants for retroactive application of a new rule designed to increase substantially their likelihood of conviction.

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[10] The Ex Post Facto Clause is different from other constitutional provisions that apply to criminal trials, such as the Confrontation Clause, in that a ruling that a state law is unconstitutional under other provisions *prevents both retrospective and prospective* application of that law. In light of that prospective effect, it is understandable that changing societal understandings of what is required for general deterrence have played a role in this Court's interpretations of *other* constitutional provisions. *See, e.g.*, *Maryland* v. *Craig*, 497 U.S. 836, 853-55 (1990).

C. Later Decisions By This Court Explicitly Reaffirm The Continuing Vitality Of The Fourth *Calder* Category.

As Justice Story recognized, by 1833 it was well settled that the Ex Post Facto Clause barred retroactive changes in the criminal law "whereby different, or less evidence, is required to convict an offender, than was required, when the act was committed." Story, *Commentaries on the Constitution of the United States* § 1339. Indeed, for the past two centuries, lower courts have enforced *Calder*'s fourth category against laws attempting to change retroactively the minimum amount of proof required for conviction of a variety of crimes.[11] Over the

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[11] *See, e.g.*, *Bowen* v. *Arkansas*, 911 S.W.2d 555, 562-64 (Ark. 1995) (retroactive application of aggravating factor in felony murder case violates Ex Post Facto Clause); *Minnesota* v. *Niska*, 514 N.W.2d 260, 265 (Minn. 1994) (retroactive application of statute shifting burden of proving affirmative defense of justification from prosecution to defendant held unconstitutional *ex post facto* law); *United States* v. *Alexander*, 805 F.2d 1458, 1461 n.2 (11th Cir. 1986) (retroactive application of heightened burden of proof of insanity violated Ex Post Facto Clause); *Pennsylvania* v. *Hoetzel*, 426 A.2d 669, 672 (Pa. Super. Ct. 1981) (retroactive change in burden of proving amount of controlled substance violated Ex Post Facto Clause); *Idaho* v. *Byers*, 627 P.2d 788, 795-96 (Idaho 1981) (court abolished corroboration requirement for sexual assault, but refused to apply retroactively because to do so would violate *ex post facto* prohibition); *Virgin Islands* v. *Civil*, 591 F.2d 255, 259-60 (3rd Cir. 1979) (retroactive application of repeal of corroboration requirement for criminal conviction was an unconstitutional *ex post facto* law); *Delaware* v. *Moyer*, 387 A.2d 194, 197 (Del. 1978) (in capital murder case, retroactive application of statute placing burden on defendant to prove mitigating factor would violate Ex Post Facto Clause by allowing punishment on " 'less

same period, all four of the *Calder* categories have remained the foundation of *ex post facto* precedent in this Court, and this Court has never undertaken to restrict the core applications of any of *Calder*'s categories.[12]

or different testimony' "); *United States* v. *Williams*, 475 F.2d 355, 356-57 (D.C. Cir. 1973) (retroactive application of statute shifting burden to prove insanity to defendant violated Ex Post Facto Clause); *United States* v. *Bell*, 371 F. Supp. 220, 221-22 (E.D. Tex. 1973) (retroactive application of statutory change to eliminate requirement of two witnesses for perjury conviction violates Ex Post Facto Clause by allowing the government to rely upon "less onerous proof"); *United States* v. *Hise*, 42 C.M.R. 195, 196-97 (C.M.A. 1970) (overturning sodomy conviction of naval officer, even though he confessed, because trial court retroactively applied reduced corroborating evidence standard); *New York* v. *Caifa*, 299 N.Y.S. 838, 839 (N.Y. App. Div. 1937) (retroactive change in proof required to prove perjury violates Ex Post Facto Clause); *Goode* v. *Florida*, 39 So. 461, 461-62 (Fla. 1905) (applying law requiring two witnesses for conviction of illegal alcohol sales, even though law had been repealed – to apply new law retroactively would violate Ex Post Facto Clause); *Hart* v. *Alabama*, 40 Ala. 32, 34-35 (Ala. 1866) (court refused to apply law eliminating requirement of corroborating testimony for gambling conviction to conduct occurring before change in the law, lack of corroborating witness compelled acquittal).

12 Prior to the decision below, Texas courts had also applied *Calder*'s fourth category. *See, e.g.*, *Aylor* v. *Texas*, 727 S.W.2d 727, 729 (Tex. App. 1987, pet. ref'd) (finding retroactive application of change in law would constitute impermissible *ex post facto* law by allowing conviction on "less or different evidence," but holding defendant waived this objection by failing to raise it at trial); *see also Holt* v. *Texas*, 2 Tex. 363, 364 (Tex. 1847) (using *Calder* categories to apply Ex Post Facto Clause of Texas Constitution).

Earlier this decade, the Court confirmed the continuing vitality of *Calder* and the four categories it describes, holding that the constitutional *ex post facto* "prohibition which may not be evaded is the one defined by the *Calder* categories." *Collins*, 497 U.S. at 46; see *Lynce* v. *Mathis*, 519 U.S. 433, 441 n.13 (1997) (quoting the four categories of *ex post facto* laws proscribed by *Calder*). On numerous occasions, the Court has left intact the core prohibition enunciated in *Calder*'s fourth category: Laws that retroactively change the amount of proof essential for conviction of a crime are unconstitutional.

In *Cummings* v. *Missouri*, the Court struck down as an unconstitutional *ex post facto* law a provision of the Missouri constitution applied retroactively to punish a person for conduct occurring prior to the adoption of the state constitution. 71 U.S. (4 Wall.) 277 (1866). The Court defined "an *ex post facto* law" to include "one which . . . changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Id.* at 325-26.[13]

Later cases that have upheld the retroactive application of new procedural laws have been careful to distinguish them from *Calder*'s fourth category. Eighteen years

13 Although the dissent in *Cummings* would have held that the law in question was civil, and thus not subject to the *ex post facto* prohibition, it agreed that the four *Calder* categories were definitive, noting that *Calder*'s "exposition of the nature of *ex post facto* laws has never been denied." *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 391 (1866) (Miller, J., Chase, C.J., Swayne and Davis, JJ., combined dissent for *Cummings* and *Garland*).

after *Cummings*, the Court upheld the retrospective application of a procedural change to state law whose effect was to make convicted felons competent to testify at trial. *Hopt* v. *Utah*, 110 U.S. 574 (1884). Under Utah law in effect at the time of the defendant's conduct, felons were not allowed to testify in criminal trials. After the date of the defendant's conduct, but before trial, Utah changed its law and allowed felons to testify. *Id.* at 587-88. This Court held that the expansion of persons eligible to testify was merely a procedural change that did *not* change the "quantity or the degree of proof necessary" to convict the defendant, explaining that "[s]tatutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage, for they do *not* . . . lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed." *Id.* at 589 (second emphasis added).

This case would be within the class of changes allowed by *Hopt* if Texas had retained the corroboration requirement, but retroactively changed Texas law to allow felons to provide the corroborating testimony. What Texas did here, however, was to reduce the amount of evidence and number of witnesses required for conviction, not merely change who was allowed to be a witness. Nor can the two Texas statutes at issue in this case be viewed as witness competency rules based on the youth of the witnesses. To the contrary, under either statute, a defendant could be convicted based on the uncorroborated testimony of a 13-year-old, or a 5-year old. Rather, the statutes reflect a policy judgment about the risk of

convictions based on uncorroborated, and thus potentially false, allegations.[14] The legislature changed its judgment on this question in 1993, and the 1993 amendment to Article 38.07 was designed to make conviction markedly easier. See *supra* pp. 17-18. Stated differently, the 1993 legislature was willing to accept the greater risk of an erroneous conviction inherent in making a reduced amount of proof sufficient for conviction. Under *Calder* v. *Bull*, however, such a change may only be applied prospectively.

A second important difference between the situation in *Hopt* and this case is that the amendment to Article

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[14] *See, e.g.*, *Scoggan* v. *Texas*, 799 S.W.2d 679, 683 (Tex. Crim. App. 1990) (en banc) ("The [1983] amendment to 38.07 clearly expresses the legislature's intent to shield sexual assault victims under 14 from the normal outcry or corroboration requirements, but to require stricter proof when the sexual assault victim is 14 or older."); *Ex parte Merrill*, 201 S.W.2d 232, 233-34 (Tex. Crim. App. 1947) ("[A sexual assault] conviction will not be sustained upon the uncorroborated testimony of the prosecutrix who failed to make prompt outcry or report of the [sexual assault] when opportunity to do so was reasonably afforded. Such rule is founded not upon the idea that such failure to make outcry tends to connect the prosecutrix with the alleged crime and therefore require that she be corroborated as an accomplice but because it tends to lessen or diminish the credit to be given to her testimony." (citations omitted)); *Tyrone* v. *Texas*, 854 S.W.2d 153, 155 (Tex. App. 1993, pet. ref'd); *see generally* 7 John Henry Wigmore, *Evidence* § 2061, at 457 (James H. Chadbourn rev., 1978); Note, *Corroborating Charges of Rape*, 67 Colum. L. Rev. 1137, 1137 (1967) ("Because of the inordinate danger that innocent men will be convicted of rape, some states have adopted the rule that the unsupported testimony of the complaining witness is not sufficient evidence to support a rape conviction.").

38.07 is not neutral; when it applies, it will always and invariably work to the disadvantage of the defendant. Admitting into evidence at trial the testimony of a class of persons who had previously been barred from testifying is a neutral and generally applicable change that might help or might hurt a particular defendant, depending on the nature of the additional testimony. For example, the testimony of a convicted felon might provide a defendant with alibi testimony or other exculpatory evidence. In contrast, the 1993 amendment to Article 38.07 indisputably will always disadvantage defendants in Petitioner's circumstances, by allowing conviction on proof that would have been legally inadequate at the time of the alleged conduct. See *Miller*, 482 U.S. at 431-32 (retroactive change in law that disadvantages the accused without any "ameliorative" effect violates prohibition against *ex post facto* laws). Elimination of the requirement of corroborating testimony to establish guilt can only work to the disadvantage of the defendant.

The relevance of the distinction between facially neutral evidentiary changes and one-sided changes lowering the minimum amount of evidence for conviction is buttressed by *Thompson* v. *Missouri*, 171 U.S. 380 (1898). In *Thompson*, state common law at the time of the offense prohibited the use of documents handwritten by the defendant to demonstrate that the handwriting on another document was also that of the defendant. After the alleged offense, Missouri enacted a statute repealing the common law rule and allowing the introduction into evidence of documents in the defendant's handwriting for purposes of comparison with other documents alleged to be in the defendant's handwriting. *Id.* at 381. As

Thompson explained, the change in the law to allow the admission of handwriting samples gave the prosecution and the defense equal right to "have disputed writings compared with writings proved . . . to be genuine." *Id.* at 387-88. The Court held the retroactive application of the statute to the defendant did not violate the Ex Post Facto Clause because the statute merely admitted additional evidence, and "did not require 'less proof, in amount or degree,' than was required at the time of the commission of the crime charged upon him." *Id.* at 387.

Beazell v. *Ohio*, 269 U.S. 167 (1925), where the issue was the retroactive application of a law allowing the joint trial of co-defendants, contains a similar discussion. At the time of the defendants' conduct, Ohio law provided that defendants jointly indicted for a felony were entitled to separate trials. After defendants' conduct, but before their indictment, Ohio changed the law to provide the trial court with discretion to grant or deny a request for separate trials. *Id.* at 169. The trial court denied defendants' motions for separate trials, and defendants were tried and convicted in a single trial. *Id.* The Supreme Court upheld the conviction against an *ex post facto* challenge, holding that retrospective application of the statute allowing joint trials did not substantially disadvantage the defendants, but rather affected "only the manner in which the trial of those jointly accused shall be conducted" and did "not deprive the [defendants] of any defense previously available" to them. *Id.* at 170. Distinguishing the procedural change in *Beazell* from changes that would transgress the requirements of the Ex Post Facto Clause, the Court found that, under the new Ohio statute, *"[t]he quantum and kind of proof required to establish*

guilt, and all questions which may be considered by the court and jury in determining guilt or innocence, *remain the same*." *Id.* (emphases added).

More recent decisions have also reaffirmed the *Calder* categories. In *Miller* v. *Florida*, 482 U.S. 423 (1987), the Court struck as unconstitutional a statute that had the effect of retroactively disadvantaging a specific class of convicted felons, sex offenders. *Id.* In *Miller*, between the time of the defendant's sexual offense and the time of his conviction, the State of Florida changed the presumptive sentence for that offense from 3½ - 4½ years in prison to 5½ - 7 years in prison. *Id.* at 427. At the outset of the opinion, the Court noted that the meaning of the prohibition against *ex post facto* laws "largely derives from the case of *Calder* v. *Bull*," and listed the four categories of laws that *Calder* established were prohibited by the Ex Post Facto Clause. *Id.* at 429. The Court held that the retroactive change violated the prohibition against retroactive increases in punishment established by *Calder* (third category) and its progeny. *Id.* at 435-36 (citing *Weaver* v. *Graham*, 450 U.S. 24, 36 (1981)).

In *Collins*, the Court upheld a Texas statute that allowed reformation of a judgment to delete a punishment that could not be combined with another. 497 U.S. at 39-40, 52. The amount of evidence necessary for conviction, however, was unaffected by the new statute. Moreover, the Court reaffirmed that the formulations of the proscriptions of the Ex Post Facto Clause set forth in *Calder* remain good law. *Collins* v. *Youngblood*, 497 U.S. 37, 41-42 (citing, *inter alia*, *Cummings* v. *Missouri* dissent's statement that *Calder*'s "exposition of the nature of *ex post facto* laws has never been denied"). *Collins* limited turn-

of-the-century decisions that had suggested the reach of the Ex Post Facto Clause extended beyond the *Calder* categories to prohibit retrospective application of laws that deprived a defendant of "substantial protections," or infringed upon "substantial personal rights." *Id.* at 45-46 (discussing *Duncan* v. *Missouri*, 152 U.S. 377 (1894) and *Malloy* v. *South Carolina*, 237 U.S. 180 (1915)). Finding that the amorphous phrases "substantial personal rights," and "substantial protections" should not be read to expand the reach of the Ex Post Facto Clause beyond the explicit *Calder* formulation, the Court held *"the prohibition which may not be evaded is the one defined by the Calder categories."* *Id.* at 46 (emphasis added).

II. RETROACTIVE APPLICATION OF THE 1993 AMENDMENT ALSO VIOLATED THE EX POST FACTO CLAUSE BY DEPRIVING PETITIONER OF A DEFENSE AVAILABLE UNDER THE LAW IN EFFECT AT THE TIME OF HIS CONDUCT.

Retroactive application of the 1993 amendment to Petitioner's pre-amendment conduct also violated the Ex Post Facto Clause by depriving him of an absolute defense to Counts 7 – 10 available at the time of that alleged conduct. Laws prohibited by the Ex Post Facto Clause include "any statute . . . which deprives one charged with [a] crime of any defense available at the time when the act was committed." *Beazell* v. *Ohio*, 269 U.S. 167, 169 (1925); see *Collins* v. *Youngblood*, 497 U.S. 37, 52 (1990). *Collins* reaffirmed the *Beazell* formulation, stating that "[t]he *Beazell* formulation is faithful to our best knowledge of the original understanding of the *Ex Post Facto* Clause." 497 U.S. at 43.

Under the law in effect at the time of Petitioner's conduct, he had an absolute and insuperable defense to Counts 7 – 10 of the indictment, because the prosecution produced no corroborating testimony to support the testimony of the complaining witness, nor was there evidence that the complaining witness made a timely "outcry." *E.g., Scoggan* v. *Texas*, 799 S.W.2d 679, 683 (Tex. Crim. App. 1990) (applying 1983 version of Article 38.07, holding that absence of corroboration or timely outcry compelled acquittal on sexual assault charge); *Friedel* v. *Texas*, 832 S.W.2d 420, 421 (Tex. App. 1992, no pet.) (same); *Jones* v. *Texas*, 789 S.W.2d 330, 331 (Tex. App. 1990, pet. ref'd) (same); see Tex. Code Crim. Proc. art. 38.07 (1983). This is the kind of defense that cannot be repealed retroactively, because it is a defense on the merits. That is, a two-witness requirement provides a defense "considered by the court . . . in determining guilt or innocence." *Beazell*, 269 U.S. at 170. In particular, a two-witness rule is designed to reduce the risk of erroneous convictions, *i.e.*, convictions that are wrong on the merits. See, *e.g., Scoggan*, 799 S.W.2d at 682; *Ex parte Merrill*, 201 S.W.2d 232, 233-34 (Tex. Crim. App. 1947); see also *Utah* v. *Foust*, 588 P.2d 170, 173 (Utah 1978) ("The real purpose behind the law requiring corroboration . . . is to afford protection to one falsely accused."). Application of the amended 1993 corroboration statute to Petitioner's pre-amendment conduct stripped him of this absolute defense on the merits to Counts 7 – 10.

III. THE 1993 AMENDMENT CHANGED THE SUBSTANTIVE CRIMINAL LAW, AND THUS ITS RETROACTIVE APPLICATION TO PETITIONER VIOLATES THE EX POST FACTO CLAUSE.

The retroactive application of the amended Article 38.07 was a change in the substantive criminal law of Texas. That change allowed Petitioner's conviction on less proof than would have been allowed under the law in effect at the time of his conduct, and deprived him of a defense on the merits requiring acquittal. The Texas Court of Appeals stated, without analysis, that the amendment to Article 38.07 was a procedural change that did not offend the prohibition against *ex post facto* laws. See *Carmell* v. *Texas*, 963 S.W.2d 833, 836 (Tex. App. 1998). Another Texas Court of Appeals, however, has held that "the amended article 38.07 is not merely a procedural change." *Bowers* v. *Texas*, 914 S.W.2d 213, 217 (Tex. App. 1996, pet. ref'd). In any event, the "procedural" label is both irrelevant and wrong.

A. Whether Article 38.07 Is Labeled "Procedural" Is Irrelevant.

Collins reaffirmed that the key to analyzing whether a law offends the Ex Post Facto Clause is not whether it is labeled "substantive" or "procedural," but whether it violates one of the *Calder* categories or *Beazell*. *Collins* v. *Youngblood*, 497 U.S. 37, 46 (1990); *Weaver* v. *Graham*, 450 U.S. 24, 29 n.12 (1981) (retroactive change in law can violate Ex Post Facto Clause "even if the statute takes a seemingly procedural form"). As *Collins* explained,

> [S]imply labeling a law "procedural," . . . does not . . . immunize it from scrutiny under the *Ex Post Facto* Clause. Subtle *ex post facto* violations are no more permissible than overt ones.

Collins, 497 U.S. at 46 (citation omitted).

B. Amended Article 38.07 Affects Substance, And Not Merely Procedure.

In any event, for purposes of interpreting the Ex Post Facto Clause, whether a state law affects substantive matters or merely procedure is a question of federal constitutional law, not state law. See, *e.g.*, *Collins*, 497 U.S. at 45. Amended Article 38.07 clearly affects substantive matters for purposes of the Ex Post Facto Clause because, as demonstrated above, it falls squarely within the fourth category of *Calder* v. *Bull*, and eliminates a defense on the merits.

Moreover, unlike (for example) a provision of the Federal Rules of Evidence, the 1993 amendment to Article 38.07 is not a neutral rule that will sometimes help defendants and sometimes help prosecutors. Nor was it an attempt to produce more efficient courtroom proceedings. Rather, the 1993 amendment was consciously designed to make it easier to convict those accused of sexual offenses against teenagers. See *supra* pp. 17-18, 29-30. Stopping sexual misconduct against teenagers is a vital public purpose – but it is a substantive purpose, not a mere matter of procedure.

A comparison to *Miller* v. *Florida*, 482 U.S. 423 (1987), is instructive. *Miller* rejected Florida's argument that a change in sentencing range was merely a procedural

change, finding that "the sole reason for the increase [in the presumptive sentencing range] was to punish sex offenders more heavily; the amendment was intended to, and did, increase the 'quantum of punishment' for [sex] crimes." *Id.* at 433-34. Similarly, in the present case, the reason for Texas' elimination of the requirement of corroboration was to make it easier to convict persons accused of sex crimes involving teenagers. *Supra* pp. 17-18, 29-30. The 1993 amendment to Article 38.07 was intended to, and did, reduce the State's required quantum of proof by reducing the amount of evidence necessary for a conviction. Just as in *Miller*, the 1993 amendment worked entirely and unambiguously to Petitioner's disadvantage, and had no feature that in any way "could be considered ameliorative" with respect to Petitioner's interests. 482 U.S. at 431-32.

Furthermore, what is substantive for purposes of criminal cases, where the defendant's liberty is at stake, ought to be at least as expansive as what is substantive in a civil tort action in federal court. If a plaintiff had sued a defendant for a tort, and Texas had a statute requiring a corroborating witness for proof of that tort, or some other specified minimum amount of proof, it would be crystal clear that such a rule is substantive, and must be applied in federal court in a diversity or ancillary jurisdiction case under *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Indeed, since *Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208 (1939), the Court has held that burden of proof issues are substantive under *Erie*. *Id.* at 212; see *Palmer* v. *Hoffman*, 318 U.S. 109, 117 (1943) ("The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases

must apply.") (internal citation omitted); *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 446 (1959) ("[u]nder the *Erie* rule, presumptions (and their effects) and burden of proof are 'substantive' ") (footnote omitted); see also *Blair* v. *Manhattan Life Ins. Co.*, 692 F.2d 296, 302 (3d Cir. 1982) (diversity action applying Pennsylvania law to question of whether "testimony from two witnesses or from one witness and corroborating circumstances" was required). At a minimum, it would be anomalous to hold that a Texas two-witness rule *must* be applied by a federal court to avoid "forum-shopping" against a civil defendant, but the same kind of rule can be jettisoned retroactively in a criminal case, and thereby deprive a criminal defendant of an absolute defense on the merits.

CONCLUSION

Petitioner's convictions on Counts 7 – 10 should be reversed, and the remainder of the case remanded for further proceedings consistent with this Court's opinion.

Respectfully Submitted,

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