No. 98-7540

IN THE SUPREME COURT OF THE UNITED STATES

SCOTT LESLIE CARMELL,
Petitioner

v.

STATE OF TEXAS,
Respondent

RESPONDENT'S BRIEF ON THE MERITS

Filed October 20, 1999

QUESTION PRESENTED

Whether the Ex Post Facto Clause of article I, § 10, of the United States Constitution precluded the application of Texas's amended "outcry statute," codified in article 38.07 of the Texas Code of Criminal Procedure, to Petitioner's prosecution for various sex-related offenses committed against his minor stepdaughter.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS, STATUTES, AND LEGISLATIVE HISTORY

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 98-7450

SCOTT LESLIE CARMELL,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Texas Court of Appeals

RESPONDENT'S BRIEF ON THE MERITS

At issue in this case is whether an amended statute that repeals an evidentiary corroboration requirement may, consistent with the Ex Post Facto Clause, be applied in the trial of a defendant whose criminal acts were committed prior to the amendment.

Petitioner urges an interpretation of the Ex Post Facto Clause that is nearly as cynical as the life he has led. Carmell—a counselor for incest victims who began an intimate relationship with one of his patients, married her, and then initiated an incestuous and sexually abusive relationship with her minor daughter that lasted four years —asserts an interpretation of the Ex Post Facto Clause that has nothng to do with whether his actions were innocent when taken, whether the State attempted to retro-

actively apply a redefined crime, or whether the State attempted to retroactively increase the punishment that could be imposed on him. In short, Carmell's interpretation has nothing to do with the Clause's traditional role of allowing individuals to rely on existing law to structure their actions to avoid committing crimes. Instead, Carmell asserts an interpretaton that would permit him and other criminals to rely on evidentiary loopholes to structure their crimes to avoid conviction and punishment. The Court has previously rejected similar arguments and should do so again in this case.

STATEMENT OF THE CASE

Scott Carmell repeatedly sexually abused his stepdaughter, KM, begnning in the spring of 1991 and ending in early 1995.[1] When the sexual abuse began, KM was 13 years old. The sexual abuse ended only after KM finally confided the facts of the abuse to her mother, and KM's mother reported Carmell to the police. Prior to confiding in her mother, KM did not tell anyone of the sexual abuse Carmell had committed upon her.

Carmell was indicted on eight counts of indecency with a child, two counts of aggravated sexual assault, and five counts of sexual assault. J.A. at 22-104. The convictions at issue here concern counts seven through ten of the indictment, which alleged that the offenses occurred between June 1, 1992, and July 1, 1993, when KM was either 14 or 15 years old. J.A. at 55, 60-62, 66-67, 72-73. At the time that Carmell committed these offenses, Texas's "outcry statute" provided in relevant part:

[1] Respondent's *"Statement of the Case"* is based primarily upon the opinion of the court of appeals found in the parties' Joint Appendix beginning at page 3 and reported as *Carmell v. State*, 963 S.W.2d 833 (Tex. App.—Fort Worth 1998, pet. ref'd) (per curiam), *cert. granted*, 119 S.Ct. 2336 (1999).

> "A conviction under Chapter 21, 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." Act of May 26, 1983, 68th Leg., R.S., ch. 382, § 1, 1983 Tex. Gen. Laws 2090, 2090-91, *amended by* Act of May 10, 1993, 73rd Leg., R.S., ch. 200, § 1, 1993 Tex. Gen. Laws 387, 387-88, *and* Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 12.01, 1993 Tex. Gen. Laws 3765, 3765-66 (current version at TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon Supp. 1999)).

Carmell was tried for these offenses in January of 1997. J.A. at 1-2. Between the time that the last of the offenses at issue occurred and the time of Carmell's trial, the Texas Legislature amended the outcry statute, effective September 1, 1993, as follows:

> "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." Act of May 10, 1993, 73rd Leg., R.S., ch. 200, § 1, 1993 Tex. Gen. Laws 387, 387-88; Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 12.01, 1993 Tex. Gen. Laws 3765, 3765-66 (codified as amended at TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon Supp. 1999)).

At trial, KM testified about the offenses Carmell committed upon her.[2] The jury found Carmell guilty of all 15 counts of the indictment, and assessed punishment at two concurrent life sentences on the aggravated sexual assault counts and concurrent 20-year sentences on each of the remaining counts. J.A. at 22-104. The 1993 version of the outcry statute was applied in convicting Carmell of the offenses.

Carmell appealed his convictions and asserted numerous points of error. Carmell argued that he should be acquitted of the charges because KM did not tell her mother about the abuse until 1995 and her testimony

[2] KM's testimony was not the only evidence of Carmell's crimes. The prosecution presented other testimony and evidence corroborating KM's testimony and tending to connect Carmell to the charged offenses. Several other witnesses testified to the inappropriate and unusual relationship that existed between Carmell and KM. *See* Statement of Facts, vols. 9 & 10. Indeed, in closing argument, the prosecution reminded the jury that "[t]he other testimony that we introduced was pretty much just what we refer to as *corroborative testimony*, testimony from other people saying that they saw the actions and the interaction between [KM] and [Carmell] and thought it was unusual. They acted more like lovers than they did like father and stepdaughter." S/F, vol. 11, at 383 (emphasis added). Other corroborative evidence was also admitted, including, but not limited to, cards and letters exchanged between Carmell and KM, State's Exhibits nos. 8-19; the horseshoe-nail "wedding" ring Carmell gave to KM at a "ceremony" Carmell staged, S/F, vol. 9, at 136-39, State's Exhibit 4; a photograph of the hand-held massage vibrator Carmell used on KM in connection with the offenses alleged in counts 9 and 10 of the indictment, S/F, vol. 9, at 118-23, State's Exhibit 2; and various herbs, teas, and other concoctions that Carmell insisted KM take in order to regulate her menstrual cycle, S/F, vol. 9, at 142-45; State's Exhibits nos. 5-7. All of this evidence tended to connect Carmell to the alleged offenses. *See Nemecek v. State*, 621 S.W.2d 404, 406-07 (Tex. Crim. App. 1980) (holding that corroborative evidence under article 38.07 is sufficient if it tends to connect defendant with the offense charged), *overruled in part on other grounds, Hernandez v. State*, 651 S.W.2d 746, 754 (Tex. Crim. App. 1983) (per curiam).

was otherwise uncorroborated. J.A. at 7. The court of appeals rejected Carmell's ex post facto argument, holding that "the law in effect at the time of [Carmell's] trial in 1997 applies, which is the [1993 version of the outcry statute]." J.A. at 8. In so holding, the court reasoned that the 1993 version of the outcry statute did "not increase the punishment nor change the elements of the offense that the State must prove[,] . . . [it] merely 'remove[d] existing restrictions upon the competency of certain classes of persons as witnesses' and . . . is . . . a rule of procedure." *Id.* The court further reasoned that there was no showing that "the legislature intended [the 1993 version of the outcry statute] not to be a rule of procedure and apply as of the date of the offense." *Id.* Accordingly, the court held that "because KM was younger than 18 at the time of the offense, the one-year time limit on her outcry [did] not apply." *Id.*[3] Carmell's petition for discretionary review was refused by the Texas Court of Criminal Appeals.

Courts have split on whether the application of a statute abrogating a corroboration requirement that existed at the time the crime was committed violates the Ex Post Facto Clause. *Compare Murphy v. Sowders*, 801 F.2d 205, 209 (CA6 1986), *People v. Hudy*, 73 N.Y.2d 40, 51-54, 535 N.E.2d 250, 256-58 (1988), *Murphy v. Commonwealth*, 652 S.W.2d 69, 73 (Ky. 1983), *Graves v. State*, 994 S.W.2d 238, 242 (Tex. App.—Corpus Christi 1999, pet. ref'd), *Carmell v. State*, 963 S.W.2d 833, 836 (Tex. App.—Fort Worth 1998, pet. ref'd) (per

[3] The court of appeals's opinion did not mention the corroborative testimony and evidence supporting KM's testimony. *See supra* note 2. Because the court held that application of the 1993 amendments to article 38.07 did not violate the Ex Post Facto Clause, it was not necessary for the court to determine whether the record contained corroborative evidence.

curiam), *and Lindquist v. State,* 922 S.W.2d 223, 228 (Tex. App.—Forth Worth 1996, pet. ref'd), *with Virgin Islands v. Civil,* 591 F.2d 255, 259 (CA3 1979), *State v. Schreuder,* 726 P.2d 1215, 1218 (Utah 1986), *State v. Byers,* 627 P.2d 788, 795-96 (Idaho 1981), *and Bowyer v. United States,* 422 A.2d 973, 981 (D.C. 1980).[4] The Court granted Carmell's petition for writ of certiorari on Carmell's ex post facto challenge.

SUMMARY OF THE ARGUMENT

The 1993 version of Texas's outcry statute was properly applied in Carmell's 1997 trial to convict him of four of the fifteen counts against him that occurred between June 1, 1992, and July 1, 1993, prior to the effective date of the act, September 1, 1993. The application of the 1993 outcry statute to convict Carmell of those four counts—one count of sexual assault and three counts of indecency with a child—did not violate the Ex Post Facto Clause contained in article I, § 10, of the United States Constitution. Under the Court's most recent formulation of the test to be applied in determining whether an ex post facto violation occurred, a law offends the Ex Post Facto Clause if it "alter[s] the definition of crimes or increase[s] the punishment for criminal acts." *Collins v. Youngblood,* 497 U.S. 37, 43 (1990). The 1993 amendment of the outcry statute neither altered the definition of the crimes of sexual assault and indecency with a child nor increased the punishment for those crimes. Consequently, the trial court's use of the 1993 version of article 38.07 in Carmell's trial was not an ex post facto violation.

[4] Fifteen years ago, in a dissent from a denial of a petition for writ of certiorari, Justice White, joined by Justices Brennan and Powell, recognized "the evident confusion among lower courts concerning the application of the Ex Post Facto Clause to changes in rules of evidence and procedure." *Murphy v. Kentucky,* 465 U.S. 1072, 1073 (1984) (mem.) (White, J., dissenting).

The 1993 amendments to the outcry statute do not bring this case within the fourth category of prohibited ex post facto laws set forth in Justice Chase's opinion in *Calder v. Bull,* 3 U.S. (3 Dall.) 386 (1798). The 1993 statute neither alters the definition of the crimes for which Carmell was convicted nor increases the punishment for those offenses. The amended statute's abrogation of the outcry or corroboration requirements did not diminish the prosecution's burden to prove all of the substantive elements of the offenses charged beyond a reasonable doubt. The same essential facts were required to be established by the evidence at Carmell's trial as were required prior to the abrogation of the corroboration requirement. Nor did the abrogation of the outcry and corroboration requirements deprive Carmell of an "absolute defense." His suggestion that the corroboration requirement constituted a defense ignores this Court's holding in *Collins* that the term "defense" is linked to the Ex Post Facto Clause's prohibition on alterations in the legal definition of the offense or the nature or amount of the punishment imposed for a conviction.

Application of the 1993 outcry statute to convict Carmell did not implicate the core concerns of the Ex Post Facto Clause: vindictive lawmaking, lack of fair warning, and reliance on existing law. There was nothing vindictive about the 1993 amendments; they were intended solely to level the playing field and make some alleged sex offenders subject to the same rules that apply to other criminal defendants. Carmell had fair warning that the heinous acts he perpetrated on KM were punishable under the law and the extent to which those acts could be punished, and he did not and could not have legitimately relied on a procedural rule that affected neither his culpability nor his expected punishment.

ARGUMENT

I. HISTORY AND DEVELOPMENT OF TEXAS'S OUTCRY STATUTE

The requirement of corroboration for the complainant's testimony in sex offense cases did not exist at common law and came about through "either express statutory inventions or plan judicial creations." Vitauts M. Gulbis, Annotation, *Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense,* 31 A.L.R.4th 120, 124 (1984). Texas originally followed the common-law rule not requiring corroboration of a rape complainant. *See Gonzalez v. State,* 32 Tex. Crim. 611, 620, 25 S.W. 781, 781-82 (1894) (holding that it was not error for the trial court to refuse to instruct the jury that in the absence of direct evidence corroborating the prosecutrix, they should acquit the defendant of rape). However, late in the 1800s and early this century, Texas courts moved away from the common-law rule and began requiring corroboration of a victim's testimony in rape cases in which the victim had the opportunity to complain of the rape to someone but remained silent without cogent reasons explaining her silence. *E.g., Gray v. State,* 130 Tex. Crim. 289, 293, 93 S.W.2d 1146, 1148 (1936); *Davis v. State,* 100 Tex. Crim. 617, 624, 272 S.W. 480, 483 (1925); *Price v. State,* 36 Tex. Crim. 143, 145, 35 S.W. 988, 988 (1896). The outcry and corroboration requirements, however, applied only to rape cases in which consent was an issue. *Hindman v. State,* 152 Tex. Crim. 75, 80, 211 S.W.2d 182, 185 (1948). In cases of statutory rape, consent was not an issue, and the victim's testimony did not need to be corroborated even though the victim did not make an immediate outcry when there was a reasonable opportunity to do so.

Id.; *see also Hernandez v. State,* 651 S.W.2d 746, 752-53 (Tex. Crim. App. 1983) (Clinton, J., concurring).[5]

The 1960s and 1970s saw dramatic increases in reported rapes and increased public awareness of the plight of rape victims across the United States, and a movement emerged to reform states' rape laws. *See* Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Reforms,* 39 JURIMETRICS J. 119, 120-21 (1999); Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform,* 24 J. LEGIS. 125, 128 (1998); *Sarah Weddington, Rape Law in Texas: H.B. 284 and the Road to Reform,* 4 AM. J. CRIM. L. I, 1-3 (Wint. 1975-76). In 1975, Texas state representatives Kay Bailey of Houston and Sarah Weddington of Austin co-sponsored a bill in the Texas Legislature that sought to reform Texas's rape laws by focusing on the aspects of the law that they believed to be "the source of the greatest injustice—those that tended to put the victim on trial." Weddington, *Texas Rape Law,* at 4, 6. One of the proposed changes in the Bailey-Weddington bill concerned the abolition of the judicially created outcry or corroboration requirements in rape cases. *Id.*, at 5, 10.

The full legislature, however, felt that the bill went too far, *see Scoggan v. State,* 799 S.W.2d 679, 682 (Tex. Crim. App. 1990), and the final version of the bill did

---

[5] From the latter part of the 1800s up until the early 1970s, Texas's only statutory corroboration requirement for sex offenses concerned the crime of "seduction" of a female, which was repealed in 1974, leaving only the judicially created outcry or corroboration requirements in cases of rape. *See* Act of 22nd Leg., R.S., ch. 33, § 1, 1891 Tex. Gen. Laws 34, 34-35, *reprinted in* H.P.N. GAMMEL, LAWS OF TEXAS 36, 36-37 (1898), *repealed by* Act of May 24, 1973, 63rd Leg., ch. 399, § 3(b), 1973 Tex. Gen. Laws 883, 991, 995; *Hernandez,* 651 S.W.2d, at 752.

not abolish the common-law requirement of an immediate outcry but, rather, only eased the outcry or corroboration requirements by sustaining convictions based upon the uncorroborated testimony of the victim if the victim confided in anyone else besides the defendant within six months of the offense. Act of May 8, 1975, 64th Leg., R.S., ch. 203, § 6, 1975 Tex. Gen. Laws 476, 479, *amended by* Act of May 26, 1983, 68th Leg., R.S., ch. 382, § 1, 1983 Tex. Gen. Laws 2090, 2090-91, *and* Act of May 10, 1993, 73rd Leg., R.S., ch. 200, § 1, 1993 Tex. Gen. Laws 387, 387-88, *and* Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 12.01, 1993 Tex. Gen. Laws 3765, 3765-66 (current version codified at TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon Supp. 1999)). Consistent with the common law, the original statute did not create any outcry or corroboration requirement in cases involving minor victims of sex crimes.[6] *Id.* A conviction for statutory rape could still be sustained in Texas on the uncorroborated testimony of the minor victim, even if the victim did not make a timely outcry. *See, e.g., Hernandez v. State,* 651 S.W.2d 746, 754 (Tex. Crim. App. 1983) (per curiam); *Waldrop v. State,* 662 S.W.2d 612, 614 (Tex. App.—Houston [14th Dist.] 1983, pet. ref'd).

---

[6] In Texas, as in other states, only the legislature has authority to define crimes or set punishments. *See Matchett v. State,* 941 S.W.2d 922, 932 (Tex. Crim. App. 1996) (en banc) ("The legislature is vested with the lawmaking power of the people in that it alone 'may define crimes and prescribe penalties.'" (quoting *State ex rel. Smith v. Blackwell,* 500 S.W.2d 97, 104 (Tex. Crim. App. 1973))). The fact that Texas's corroboration requirements originally arose as part of a common-law development is strong evidence that the legislature's codification and subsequent modification of the corroboration requirements did not involve the definition of a crime or its punishment—as required by *Collins*—and, consequently, could not have implicated the Ex Post Facto Clause.

In 1983, the legislature amended article 38.07 of the Texas Code of Criminal Procedure and changed the outcry or corroboration requirements for minor victims of sexual assault. *See* Act of May 26, 1983, 68th Leg., R.S., ch. 382, § 1, 1983 Tex. Gen. Laws 2090, 2090-91 (amended 1993). The 1983 amendment to article 38.07 shielded sexual assault victims under the age of 14 from the normal outcry or corroboration requirements but not victims 14 or older. *Id.*; *see Scoggan v. State,* 799 S.W.2d 679, 683 (Tex. Crim. App. 1990); *Friedel v. State,* 832 S.W.2d 420, 422 (Tex. App.—Austin 1992, no pet.); *Jones v. State,* 789 S.W.2d 330, 333 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd). The 1983 amendment applied only to prosecutions commencing on or after the effective date of the act, and prosecutions commencing before that time were to be covered by the law in effect at the time the prosecution was commenced. Act of May 26, 1983, 68th Leg., R.S., ch. 382, § 2, 1983 Tex. Gen. Laws 2090, 2091 (amended 1993).

The 1983 version of the outcry statute was sharply criticized for drawing a "bewildering and inappropriate" distinction between victims under the age of 14 and those over that age, and courts decried the distinction as being "arbitrary and purposeless." *Jones,* 789 S.W.2d, at 333; *accord Friedel,* 832 S.W.2d, at 422. Notwithstanding that criticism, the 1983 version of the outcry statute remained in place until 1993 when it was finally amended. Act of May 10, 1993, 73rd Leg., R.S., ch. 200, § 1, 1993 Tex. Gen. Laws 387, 387-88; Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 12.01, 1993 Tex. Gen. Laws 3765, 3765-66 (codified as amended at TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon Supp. 1999)). The 1993 version of the outcry statute lengthened the outcry period from six months to one year and abolished the outcry requirements for persons under the age of 18. TEX. CODE

CRIM. PROC. ANN. art. 38.07 (Vernon Supp. 1999). Conspicuously absent from the 1993 version of the outcry statute was a provision, like the one in the 1983 version, providing that it would apply only to prosecutions commencing after the statute's effective date. The legislature's omission of that language in the 1993 statute evidenced its intent that the amended statute be applied in all pending prosecutions tried after the effective date. *See Lindquist v. State*, 922 S.W.2d 223, 227 n.4 (Tex. App.—Austin 1996, pet. ref'd) (noting that the legislature purposefully intended to omit such language).[7]

Carmell claims that application of the amended statute to convict him of one count of sexual assault and three counts of indecency with a child, all of which occurred prior to September 1, 1993 (the effective date of the amended enactment), violated the Ex Post Facto Clause applicable to the states. For the reasons that follow, the Court should reject Carmell's interpretation of the Ex Post Facto Clause and affirm Carmell's conviction.

---

[7] The Texas courts of appeals split, three-to-one, over whether the 1993 version of the outcry statute could be applied to prosecutions commencing after the effective date of the act for offenses that occurred before the effective date of the act. *Compare Graves v. State*, 994 S.W.2d 238, 241 (Tex. App.—Corpus Christi 1999, pet. ref'd) (holding that application of 1993 outcry statute in a trial occurring after 1993 for offenses occurring before the effective date of the act was proper and did not constitute a violation of the Ex Post Facto Clause), *Carmell v. State*, 963 S.W.2d 833, 836 (Tex. App.—Fort Worth 1998, pet. ref'd) (per curiam) (same), *and Lindquist*, 922 S.W.2d, at 223 (same), *with Bowers v. State*, 914 S.W.2d 213, 216-17 (Tex. App.—El Paso 1996, pet. ref'd) (holding that application of 1993 outcry statute in a trial occurring after 1993 for offenses occurring before the effective date of the act constituted a violation of the Ex Post Facto Clause).

II. APPLICATION OF THE 1993 AMENDMENTS TO CARMELL'S TRIAL DID NOT VIOLATE THE EX POST FACTO CLAUSE BECAUSE THEY DID NOT RETROACTIVELY ALTER THE DEFINITION OF THE CRIMES OR INCREASE THE PUNISHMENT FOR THE CRIMES.

The Constitution prohibits state legislatures from enacting ex post facto laws. *See* U.S. CONST. art. I, § 10 ("No state shall . . . pass any . . . ex post facto law). Literally, any law can be ex post facto if it is passed "after the fact, or thing done, or action committed." *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (Chase, J.); *see also* William Winslow Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539, 539 (1947) (a law ex post facto is simply "a law made after the doing of the thing to which it relates, and retroacting upon it"). In the seminal case of *Calder v. Bull*, the Court narrowed the meaning of the clause by holding that it applied only to retroactive penal legislation, and not to civil statutes. 3 U.S. (3 Dall.), at 390-92 (Chase, J.); *id.*, at 396-97 (Paterson, J.); *id.*, at 399-400 (Iredell, J.). In *Calder*, Justice Chase categorized various laws that he considered to be prohibited by the clause:

> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender." *Id.*, at 390.

Carmell argues that the 1993 outcry statute as applied to him constituted an ex post facto violation as described by Justice Chase in *Calder v. Bull,* 3 U.S. (3 Dall.) 386 (1798), and subsequent cases of this Court interpreting *Calder. See* Pet. Br. 14-34. Specifically, Carmell asserts that his case fits within Justice Chase's fourth category of ex post facto laws. *Calder,* 3 U.S. (3 Dall.), at 390.

Although Carmell would have the Court believe that it is writing on a clean slate in interpreting Justice Chase's fourth category of ex post facto laws, the Court has taken the opportunity on more than one previous occasion to translate Justice Chase's list of illustrative violations into a comprehensive and generally applicable statement of ex post facto doctrine. For instance, nearly three-quarters of a century ago, the Court summarized Justice Chase's categories as follows:

> "[A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto." *Beazell v. Ohio,* 269 U.S. 167, 169-70 (1925).

More recently, the Court succinctly restated the *Beazell* formulation as a concise two-part test: "Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins,* 497 U.S., at 43. In other words, an individual should not be punished for conduct that was innocent when done or punished more severely than would have been permissible at the time of the crime. The *Collins* two-part formulation for ex post facto violations has been reaffirmed on at least two occasions since it was decided. *See Lynce v. Mathis,*

519 U.S. 433, 441 (1997); *California Dep't of Corrections v. Morales,* 514 U.S. 499, 505-06 (1995).

Under the *Collins* formulation, this is a straightforward case. Carmell's sexual abuse of KM was criminal under the Texas Penal Code at the time of the abuse. His acts constituted sexual assault and indecency with a child irrespective of the 1993 amendments, and the partial abrogation of the corroboration requirement did not change the fact that Carmell's conduct constituted an indictable offense. Carmell was not convicted of acts that were innocent when he committed them and that were only made criminal after the fact. They were criminal when he committed them.

The 1993 outcry statute did not alter the definition of the crimes for which Carmell was convicted. Both before and after the 1993 amendments to the outcry statute, the Texas Penal Code defined sexual assault as follows:

> "A person commits an offense if the person . . . intentionally or knowingly . . . causes the penetration of the anus or female sexual organ of a child by any means; . . . causes the penetration of the mouth of a child by the sexual organ of the actor; . . . causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or . . . causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor. . . . 'Child' means a person younger than 17 years of age who is not the spouse of the actor." TEX. PEN. CODE ANN. § 22.011(a)(2)(A)-(D), (c)(1) (Vernon 1994).

Similarly, the crime of indecency with a child was defined as follows:

> "A person commits an offense if, with a child younger than 17 years and not his spouse, whether

the child is of the same or opposite sex, he . . . engages in sexual contact with the child. . . ." *Id.* § 21.11(a).

The 1993 amendments' abrogation of the corroboration requirement for victims between 14 and 18 years of age did not alter the definition of sexual assault or indecency with a child or change any of the substantive elements of those crimes. At trial, the prosecution was still required to prove every element of both crimes beyond a reasonable doubt. *See* Tr. at 75-77.[8]

The 1993 outcry statute did not increase the punishment for sexual assault and indecency with a child. These crimes were both second-degree felonies at the time Carmell committed them. TEX. PEN. CODE ANN. §§ 21.11(c), 22.011(f). Second-degree felonies carried a punishment of imprisonment for a term of not more than 20 years nor less than two years and a fine not to exceed $10,000. *Id.* § 12.33. The punishment for second-degree felonies was unaltered by the 1993 outcry statute. The severity of Carmell's punishment was the same after enactment of the 1993 outcry statute as it was before the statute's enactment.

Because Carmell's sexual abuse of KM was not innocent when committed, and because the 1993 outcry statute neither changed the definition of the crimes for which Carmell was being tried nor increased the punishment applicable to those crimes, application of the 1993 outcry statute to Carmell's criminal trial did not violate the Ex Post Facto Clause.

[8] The trial court properly instructed the jury on the elements of both offenses. Tr. at 68, 69, 70.

III. APPLICATION OF THE 1993 AMENDMENTS TO CARMELL'S TRIAL DID NOT VIOLATE THE EX POST FACTO CLAUSE BECAUSE *CALDER*'S FOURTH CATEGORY DOES NOT HAVE MEANING INDEPENDENT OF THE *COLLINS* FORMULATION.

Carmell does not, and cannot, argue that there was anything innocent about his four-year incestuous molestation of his stepdaughter. Instead, he argues the existence of an evidentiary loophole at the time he was sexually abusing KM that would have permitted him to escape conviction on counts seven through ten of the indictment. He argues that since there was no corroborating evidence,[9] thus making KM's testimony insufficient under article 38.07 to convict him, the Ex Post Facto Clause gave him an enforceable reliance interest in the application of that evidentiary loophole to any conduct that occurred while the loophole existed. In other words, Carmell argues that the Ex Post Facto Clause protects a criminal's ability to canvas existing evidentiary law in order to structure his criminal activities so as to minimize the risk of conviction and that it guarantees that the legislature cannot later interfere with the criminal's evidentiary advantage.

This Court's holdings in recent (and not-so-recent) ex post facto cases do not support Carmell's contentions. In the face of his inability to satisfy the *Collins* standard, Carmell has searched the fringes of ex post facto doctrine for support for his contention that the 1993 elimination of the corroboration requirement improperly "reduce[d] the amount of evidence and number of witnesses required for conviction," Pet. Br. 24, "work[ed] to . . . [his]

[9] Again, Texas believes there was sufficient corroborating evidence to support the conviction. *See supra* note 2.

disadvantage," *id.*, at 26, and changed the amount and kind of proof required to establish his guilt, *id.*, at 27.

A. Article 38.07's Corroboration Requirement Does Not Affect the Quantity or Degree of Proof Necessary to Convict and Is Not a Two-Witness Rule.

As a preliminary matter, Carmell repeatedly attempts to bolster his case somehow by mistakenly asserting that the 1983 outcry statute imposed a two-witness rule requiring the testimony of a second eyewitness to the offense in order to sustain a conviction, even though the language of the statute makes no mention of a two-witness rule and speaks in terms of corroboration only. *See* Pet. Br. 5-6 & n.5, 7, 16, 30, 34. Surprisingly, Carmell seems to take the indefensible position that he could never be convicted of sexual assault or indecency with a child unless the prosecution was able to produce a third-party eyewitness to his acts of improper intimacy with KM.

Rules requiring corroboration are generally concerned with the sufficiency of evidence—that is, whether the testimony of a single witness is sufficiently credible to support a conviction and, if not, what other evidence will support the witness's testimony. 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2030, at 324 (James H. Chadbourn rev. 1978). Contrary to Carmell's assertions, the corroborative evidence required by article 38.07 could be any evidence that tended to connect him to the crime. *Nemecek v. State*, 621 S.W.2d 404, 406 (Tex. Crim. App. 1980), *overruled in part on other grounds, Hernandez v. State*, 651 S.W.2d 746, 754 (Tex. Crim. App. 1983) (per curiam); *see also Scoggan v. State*, 799 S.W.2d 679, 681 n.5 (Tex. Crim. App. 1990) (noting that *Nemecek* states the standard for corroboration

under article 38.07).[10] Corroborating evidence need not be more or different from the victim's testimony; it may be entirely cumulative of the victim's testimony or it may be physical evidence that supports the victim's testimony. Corroborating evidence may be entirely circumstantial, *Zule v. State*, 802 S.W.2d 28, 32 (Tex. App.—Corpus Christi 1990, pet. ref'd), may consist of "suspicious circumstances," *Burks v. State*, 876 S.W.2d 877, 888 (Tex. Crim. App. 1994), and need not independently establish any of the elements of the crime. The corroboration requirement is not intended to provide independent proof necessary to convict an individual of a crime; rather, it is intended merely to force the prosecution to provide evidence corroborating the victim's version of events and, as a result, bolstering the testifying victim's credibility. In short, eyewitness testimony is not required to satisfy the statute's corroboration requirement. *Zule* 802 S.W.2d, at 32.

---

[10] Cases occurring before enactment of the outcry statute in 1975 also did not require eyewitness testimony from persons other than the victim or the accused in order to sustain a conviction of rape or statutory rape. *See, e.g., Bass v. State*, 468 S.W.2d 465, 466-67 (Tex. Crim. App. 1971) (mother's testimony as to victim's appearance and testimony of examining physician held to be "sufficient corroboration of prosecutrix' testimony" and sufficient to sustain a conviction for statutory rape); *Johnson v. State*, 449 S.W.2d 65, 68 (Tex. Crim. App. 1970) (victim's testimony and testimony of police officer as to witness's appearance and condition shortly after the offense was held to be sufficient evidence to support conviction for statutory rape); *Lacy v. State*, 412 S.W.2d 56, 56-57 (Tex. Crim. App. 1967) (victim's testimony and medical records held to be sufficient evidence to show victim had only one act of sexual intercourse and to support conviction of statutory rape); *Purifoy v. State*, 163 Tex. Crim. 488, 491, 293 S.W.2d 663, 664-65 (1956) (medical testimony and witness's testimony of overhearing accused threatening victim held to be sufficient evidence to support conviction of statutory rape); *Gonzales v. State*, 32 Tex. Crim. 611, 620, 25 S.W. 781, 782 (1894) (medical testimony held to be sufficient evidence to sustain conviction for rape).

The cases Carmell cites in support of his two-witness rule argument—*Shelby v. State,* 800 S.W.2d 584, 586 (Tex. App.—Houston [14th Dist.]), *rev'd on other grounds,* 819 S.W.2d 478 (Tex. Crim. App. 1990); and *Heckathorne v. State,* 697 S.W.2d 8, 12 (Tex. App.—Houston [14th Dist.] 1985, pet. ref'd)—are distinguishable. First, *Heckathorne* does not hold that eyewitness testimony is necessary to corroborate a victim's testimony; rather, in *Heckathorne,* the defendant argued that Texas's outcry statute did not apply to his case (because the victim was younger than 14) and that, therefore, the statute could not be used to authorize the admission of the victim's outcry statements against the defendant. The court rejected the defendant's argument and held that the outcry statements were admissible because there had been no eyewitness to the offense. 697 S.W.2d, at 12. The court did *not* hold that third-party eyewitness testimony was necessary to corroborate a victim's testimony. *Id. Shelby* merely cites to and relies on *Heckathorne.*

In addition, the two-witness rule derives from an unrelated legal phenomenon—the "rule of number"—that has its origins in Roman law and the medieval ecclesiastical notion that the mere recitation of an oath, by itself, rendered one's testimony effective, regardless of the witness's personal credibility, and that the probative value of testimony would be increased if others testifying to the same facts swore an oath, too. *People v. Hudy,* 73 N.Y. 2d 40, 53 & n.8, 535 N.E.2d 250, 257 & n.8 (1988); *see also* 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 203 (3d ed. 1944); Irving Younger, *The Requirement of Corroboration in Prosecutions for Sex Offenses in New York,* 40 FORDHAM L. REV. 263, 263-64 (1971); John H. Wigmore, *Required Numbers of Witnesses: A Brief History of the Numerical System in England,* 15

HARV. L. REV. 83, 85 (1901). Treason and perjury are two offenses that derive from the rule of number and that often require two witnesses. Wigmore, *Required Numbers of Witnesses,* at 99. Texas has a two-witness rule for both those offenses. TEX. CODE CRIM. PROC. ANN. art 38.15 (Vernon 1979) ("No person can be convicted of treason except upon the testimony of at least two witnesses to the same overt act, or upon his own confession in open court."); *see also* art. 38.18(a) ("No person may be convicted of perjury or aggravated perjury if proof that his statement is false rests solely upon the testimony of one witness other than the defendant."). The outcry statute in article 38.07 is not a two-witness rule because it did not derive from the rule of number, and if the Texas Legislature had wanted to impose a two-witness rule in the outcry statute it would have expressly done so.

B. Carmell's Expansive Interpretation of Category Four Was Rejected in *Hopt,* and the Court Has Consistently Recognized *Hopt*'s Clarification of the *Calder* Categories.

In *Collins,* the Court declared that Justice Chase's fourth category in *Calder* "was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes." *Id.,* at 43 n.3 (citing *Thompson v. Missouri,* 171 U.S. 380 (1898); *Hopt v. Utah,* 110 U.S. 574 (1884)).[11] *Collins* expressly recognizes that the Court rejected Carmell's expansive interpretation of *Calder*'s fourth category more than a century ago. *Id.* In *Hopt,* a law prohibiting testimony from convicted felons was changed, and the defendant was convicted of murder after a felon testified against

---

11 Carmell fails to acknowledge, much less explain, the Court's broad statement in *Collins* that *Calder* does not bar the application of new evidentiary rules.

him. The Court rejected the ex post facto challenge because "[t]he crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute." 110 U.S., at 589-90. The Court further stated that "[a]ny statutory alteration of the legal rules of evidence which . . . only removes existing restrictions upon the competency of certain classes of witnesses, relate to modes of procedure only" and "are not ex post facto in their application to prosecution for crimes committed prior to their passage." *Id.*, at 590.

The Court reiterated its concern about retroactive reductions in the required quantum of proof that was first expressed in Justice Chase's fourth category in *Calder*: "Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon ex post facto laws." *Id.* Although the Court has acknowledged that language in rejecting an ex post facto challenge to an evidentiary rule change, *see, e.g., Thompson v. Missouri*, 171 U.S. 380 (1898),[12] the Court has never applied that language in *Hopt* to invalidate the application of a change in an evidentiary rule. In any event, the Court in *Hopt*

---

12 In *Thompson*, the Missouri Supreme Court reversed Thompson's conviction of murder because of the inadmissibility of certain evidence. Letters written by the defendant to his wife were submitted for handwriting comparison, which was prohibited by the rules of evidence. Prior to the second trial, the law was changed to make this objectionable evidence admissible and the defendant was convicted. The Court rejected the argument that this change violated the Ex Post Facto Clause and held that the change was procedural. 171 U.S., at 293.

clarified that its reference to the "quantity or degree of proof" referred not to evidentiary issues of proof at trial, but rather to "proof" in the sense of how the crime is defined and how the constitutional burden of proving the crime is allocated. *Hopt*, 110 U.S., at 590 ("[A]lterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt . . . relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure.").

Beazell and *Collins* marked a retreat from certain earlier decisions that attempted to broaden the categories of impermissible ex post facto laws enunciated in *Calder*. The Court clarified that its scrutiny of laws alleged to violate the Ex Post Facto Clause is limited to determining whether legislatures have "retroactively alter[ed] the definition of crimes or increase[d] the punishment for criminal acts." The Court folded the fourth category in Justice Chase's list into the *Collins* two-part formulation and implicitly declared that only those changes in evidentiary rules that alter the definition of the crime or increase the punishment for criminal acts will violate the Ex Post Facto Clause. In other words, although Carmell asserts that "later decisions by this Court explicitly reaffirm the continuing vitality of the fourth *Calder* category," Pet. Br. 21, *Collins* makes clear that the fourth category, or what is left of it, cannot bear the burden that Carmell attempts to force it to carry.

The Court has only twice invalidated an evidentiary change under the ex post facto prohibition—*Kring v. Missouri*, 107 U.S. 221 (1883), and *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866). The Court overruled *Kring* in *Collins*. *See infra* Part III.C. In *Cummings*

v. Missouri, the Court invalidated a provision of the Missouri constitution declaring persons incapable of holding offices of public trust unless they first swore an oath that they had never "been in armed hostility to the United States," and that they had never expressed sympathy for the enemies of the United States. 71 U.S. (4 Wall.), at 316-17. Justice Field, writing for the Court, noted that Missouri's test oath

> "subvert[ed] the presumptions of innocence, and alter[ed] the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the conscience of the parties." *Id.*, at 328.

Cummings reflected the Court's understanding that altering "the rules of evidence" meant to place the burden of proof on the accused and to force him to show his innocence by taking an oath. In others words, the law challenged in *Cummings* violated the Ex Post Facto Clause not because it changed evidentiary rules, but because it shifted the constitutional burden of proof and infringed on the presumption of innocence:

> "The Clauses in the Missouri constitution, which are the subject of consideration, do not, in terms, define any crimes, or declare that any punishment shall be inflicted, but they produce the same result upon the parties, against whom they are directed, as though the crimes were defined and the punishment was declared. They assume that there are persons in Missouri who are guilty of some of the acts designated. They would have no meaning in the constitution were not such the fact." *Id.*, at 327.

The test oath violated the Ex Post Facto Clause because, consistent with *Collins*, it in effect retroactively defined a crime and declared a punishment against individuals who could not make the oath. The test oath in *Cummings* is notably different from the corroboration requirement in this case because the 1993 amendments did not shift the constitutional burden or modify any element of the crimes that Carmell committed.

Carmell's attempt to distinguish *Hopt* on the basis that article 38.07's corroboration requirement is not a "witness competency rule[]," Pet. Br. 24-25, fails because, although the statutes took a different form, the same policy animated both. The law in *Hopt* declaring convicted felons to be incompetent to testify in criminal proceedings derived from a common-law rule originating in England in the 1600s that proclaimed a person who had been convicted of an infamous crime—that is, a crime involving treason, a felony, dishonesty, or false statement (crimen falsi)—to be incompetent as a witness. 1 McCORMICK ON EVIDENCE § 42 (John William Strong ed., 4th ed. 1992); 3 JACK B. WEINSTEIN, MARGARET A. BERGER, & JOSEPH M. McLAUGHLIN, WEINSTEIN'S EVIDENCE ¶ 609 [02], at 609-27 (1996); 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 519, at 725-27 (James H. Chadbourn rev. 1979); Irwin R. Miller, Note, *Constitutional Problems Inherent in the Admissibility of Prior Record Conviction Evidence for the Purpose of Impeaching the Credibility of the Defendant Witness*, 37 U. CIN. L. REV. 168, 169 (1968). The underlying premise of this rule was that a person who committed such infamous crimes was "unworthy of belief" and "could not be trusted." McCORMICK ON EVIDENCE § 42; WEINSTEIN'S EVIDENCE ¶ 609[02], at 609-27; *see also* WIGMORE § 519, at 726 ("The thought underlying this exclusion is plain

enough nowadays; the man who has been guilty of a heinous crime cannot be trusted in any respect, therefore, cannot be trusted in his testimony.").[13]

The outcry or corroboration requirements imposed by the Texas outcry statute beginning in 1975 and pre-1975 Texas case law were based on the same principle: absent a timely outcry, a sex crime victim's uncorroborated testimony is inherently untrustworthy, unreliable, and less credible than the testimony of other crime victims. *See Villareal v. State*, 511 S.W.2d 500, 502 (Tex. Crim. App. 1974) (stating that "[t]he basis of this rule is that the failure to make an outcry or promptly report the rape diminishes the credibility of the prosecutrix"); *Hindman v. State*, 152 Tex. Crim. 75, 80, 211 S.W.2d 182, 185 (1948) (same); *Ex parte Merrill*, 150 Tex. Crim. 365, 367, 201 S.W.2d 232, 234 (1947) (same); *Topolanck v. State*, 40 Tex. 160, 1874 WL 7921, at *2 (1874) (same); *see also* 42 GEORGE E. DIX & ROBERT O. DAWSON, CRIMINAL PRACTICE AND PROCEDURE § 31.241, at 301 (1995) (Texas Practice); Irving Younger, *The Requirement of Corroboration in Prosecutions for Sex Offenses in New York*, 40 FORDHAM L. REV. 263, 264 (1971).[14] Like the law in *Hopt*, the Texas outcry

[13] Although this disqualification began disappearing from Anglo-American law in the last century, WIGMORE § 519, at 726, and today a person with a prior conviction for an infamous crime can now testify, the credibility of such an individual is subject to attack through the introduction of his prior convictions into evidence. Miller, Note, *Prior Conviction Evidence*, at 169.

[14] The oft-quoted statement of Lord Chief Justice Hale reflects the classic perception of this rule: "It is one thing whether a witness be admissible to be heard; another thing, whether they are to be believed when heard. It is true, rape is a most detestable crime, and therefore ought to be severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder

statute was an evidentiary safeguard intended to ensure that only trustworthy or reliable testimony would be used to support a conviction.

When the legislature in 1993 reinstated the pre-1975 common-law rule, it merely removed the stigma of unreliability attached to a teenaged victim's testimony in a sexual offense case, a modest evidentiary adjustment compared to *Hopt*. Indeed, the 1993 amendments to article 38.07 were far less unfavorable to criminal defendants than the change in *Hopt*. After the change in both instances, the prosecution could rely in whole or part on the testimony of a felon witness or sex crime victim, respectively. But prior to the repeal of the Utah law at issue in *Hopt*, the prosecution was barred from relying on the testimony of a convicted felon and, therefore, in order to obtain a conviction, the prosecution had to satisfy its entire burden of proving each element of the crime beyond a reasonable doubt from evidence other than a felon witness.

By contrast, the 1983 outcry statute merely declared that, if the victim did not make an outcry within six months, then the prosecution was required to introduce some evidence corroborative of the victim's testimony. Unlike the Utah rule, which required the prosecution to prove its entire case without reference to the felon's testimony, the 1983 outcry statute required only slight corroborative evidence to vouch for the victim's credibility. Although the statute required some corroboration, it did not dictate what that evidence would have to be, did not redefine any of the elements of the crime, and did not even require that the corroborating evidence satisfy any of the elements of the crime. If *Hopt* was not an ex post

to be defended by the party accused, tho never so innocent." Younger, *Corroboration in Sex Offenses*, at 264 n.7 (quoting 1680 Pleas of the Crown I, at 635).

facto violation, then the application of the 1993 amendments to Carmell's trial could not have been, either.[15]

Other courts, too, have correctly recognized that modification of a statutory corroboration requirement does not implicate the Ex Post Facto Clause. In thoughtful analyses, both the Sixth Circuit and the New York Court of Appeals, have determined that the repeal of a corroboration requirement will not implicate the ex post facto prohibition. In *Murphy v. Sowders*, 801 F.2d 205, 209 (CA6 1986), the Sixth Circuit held that the repeal of a Kentucky law requiring an accomplice witness's testimony to be corroborated by other evidence in order to support a conviction against the accused did not violate the Ex Post Facto Clause.

> "Applying the teachings of the Supreme Court in *Hopt*, it would appear that the repeal of [the accomplice witness corroboration requirement] did not (1) attach criminality to any act previously committed; (2) aggravate any crime theretofore committed; (3) provide greater punishment than was prescribed at the time of the commission of the crime; or (4) alter the degree or lessen the amount or measure of the proof necessary to sustain a conviction when the crime was committed. . . . A corroboration requirement clearly did not occupy the status of an element of the crime nor did its elimination alter the reasonable doubt standard which traditionally protected criminal defendants. The same essential facts were required to be established by the evidence at Murphy's trial as were required to be proven prior to the repeal of [the corroboration requirement] to convict him of the crime of murder. Accordingly, the dictates of the Supreme Court in *Hopt* suggest a conclusion that the legislative enactment that repealed [the corroboration requirement] did not constitute an ex post facto act as applied to Murphy." *Id.*

[15] Carmell also attempts to distinguish *Hopt* on the grounds that the change in the Utah law was facially neutral, while the 1993 modification of article 38.07 "will always and invariably work to the disadvantage of the defendant," Pet. Br. 26, and "was consciously designed to make it easier to convict those accused of sexual offenses against teenagers" [*i.e.*, vindictive lawmaking], *id.*, at 32. The Court has never required neutrality; to the contrary, the Court in *Collins* expressly rejected the proposition that an ex post facto challenge may be premised on the claim that the evidentiary or procedural change works to the defendant's disadvantage. *See infra* Part III.C. When a state has created obstacles that make the prosecution of a particular crime more difficult, the Ex Post Facto Clause does not prevent the state from lifting those obstacles—as long as the state does not redefine the elements of the crime or increase the punishment. There is no evidence in this case of the sort of legislative abuse contemplated by the framers and the Court's ex post facto jurisprudence. It simply does not follow from the legislature's removal of an arbitrary and purposeless corroboration requirement imposed on underage victims of sex crimes that the legislature vindictively sought to exact some measure of retribution against sex offenders. *See infra* Part IV.

Murphy rejected the defendant's reliance on *Hopt* to contend that the repeal of the corroboration requirement violated the Ex Post Facto Clause because it permitted his conviction on a lesser "amount" or "degree of proof." *Id.* The court stated instead that *Hopt* contrasted laws that retroactively change the elements of a crime or burden of proving those elements, which violate the Ex Post Facto Clause, with laws that merely alter the procedure at trial, which do not. *Hopt*'s "reference to the degree or amount of 'proof' in the initial sentence obviously referred to the burden of proof by which the government must prove its case, not proof of evidentiary facts which could have been placed before a jury." *Id.* The court concluded that the Court in *Hopt* was "drawing a sharp distinction between the burden of proof by which the prosecution was required to prove its case and the manner

in which a state by evidentiary rules might permit a prosecutor to do so." *Id.* at 209-10.

The Sixth Circuit refused to interpret *Hopt*'s reference to "proof" as synonymous with "evidence." *Id.* Instead, the court concluded that *Hopt*'s discussion of the amount of proof refers not to any particular evidence or evidentiary rule, but to "the degree of proof that is required in each criminal action to convince a factfinder of the guilt of the accused beyond a reasonable doubt." *See id.*, at 210-11 (citing and quoting *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979); *In re Winship*, 397 U.S. 358, 364 (1970)).

Similarly, the New York Court of Appeals in *People v. Hudy*, 73 N.Y.2d 40, 535 N.E.2d 250 (1988), held that a New York law that repealed statutory provisions requiring corroboration of the victim's testimony in certain sex-crime prosecutions involving underage victims did not violate the Ex Post Facto Clause. *Id.*, at 44, 535 N.E.2d, at 252. Like *Murphy*, the court concluded that *Hopt*'s "reference to the quantum of proof . . . ha[d] no application to the repealing legislation at issue here" because that reference "principally concerned retrospective reductions in the People's burden of proof." *Id.*, at 51-52, 535 N.E.2d, at 256-57.

Murphy and *Hudy* persuasively demonstrate that Justice Chase's fourth category in *Calder* does not invalidate the application of new evidentiary rules, including modified or repealed corroboration requirements, unless they alter the elements that must be shown to convince a trier of fact beyond a reasonable doubt that the crime has been committed. Because the 1993 amendments to article 38.07 left unchanged both the definition of the crimes of sexual assault and indecency with a child as well as the punishment declared for those crimes, the district court

properly applied the amended statute in Carmell's trial, and he was properly convicted.

C. *Collins* Specifically Rejects Carmell's Assertion that Evidentiary or Procedural Changes that Disadvantage a Defendant Violate the Ex Post Facto Clause.

To avoid the Court's comprehensive expression of the ex post facto doctrine in *Collins* and other cases, Carmell encourages the Court to ignore its recent formulations in favor of a strained and unsupported interpretation of Justice Chase's fourth category of ex post facto laws that was rejected more than 100 years ago. In the aftermath of the Civil War, the courts found themselves faced with a variety of statutes that placed criminal defendants at a disadvantage. Although Justice Chase's oft-quoted categories had once been regarded as the "exclusive definition of ex post facto laws," *Collins*, 497 U.S., at 42, some of the post-Civil War cases of the Court seemed to broaden the list.

In *Kring v. Missouri*, 107 U.S. 221 (1883), the Court first departed from Justice Chase's categories and stated that *Calder* should not be understood to have presented an exclusive list of "all the cases to which the constitutional provision would be applicable." *Id.*, at 228. The Court altered the scope of ex post facto scrutiny by including any law that, " 'in relation to the offence or its consequences, alters the situation of a party to his disadvantage.' " *Id.*, at 228-29 (quoting *United States v. Hall*, 26 F. Cas. 84, 86 (D. Pa. 1809) (No. 15,285)). The Court also introduced the notion that a "law of procedure" may violate the Ex Post Facto Clause if it takes away "any substantial right which . . . the defendant [had] at the time to which his guilt relates." *Id.*, at 232; *see also Thompson v. Utah*, 170 U.S. 343, 352-53 (1898)

(reversing the defendant's conviction on the basis of the Ex Post Facto Clause because the defendant was "deprive[d] . . . of a substantial right involv[ing] . . . his liberty" and his situation was "materially altere[d] . . . to his disadvantage").

When the Court in *Collins* revisited *Calder's* list of prohibited ex post facto laws, it specifically reexamined those cases that broadened the *Calder* list. Examining the apparent inconsistency between *Calder*, on the one hand, and decisions such as *Kring* and *Thompson v. Utah* on the other, *see Collins*, 497 U.S., at 45-52, the Court stated that *Kring* and *Thompson* had caused confusion in state and federal courts about the scope of the Ex Post Facto Clause. The Court overruled *Kring* because its holding unjustifiably departed from the meaning of the clause as it was understood at the time of the Constitution's adoption. *Id.*, at 47-50. The Court noted that *Kring* relied heavily upon the language in *United States v. Hall*, 26 F. Cas. 84 (D. Pa. 1809) (No. 15,285), in order to justify its departure from "*Calder*'s explanation of the original understanding of the Ex Post Facto Clause," but that "[t]he language in the *Hall* case . . . [did] not support a more expansive definition of ex post facto laws." *Collins*, 497 U.S., at 49. As the Court explained, the language in *Hall* condemned a law that abolished a defense of justification or excuse as being ex post facto. *Id.* The Court remarked that *Hall's* analysis was "consistent with the *Beazell* framework," but that "[n]othing in the *Hall* case supports the broad construction of the ex post facto provision given by the Court in *Kring*." *Id.*, at 49, 50.

The Court also overruled *Thompson v. Utah* to the extent it rested on the Ex Post Facto Clause and not the Sixth Amendment right to a jury trial. *Id.*, at 51-52.

The Court concluded that the Texas statute at issue in *Collins* did not violate the Ex Post Facto Clause because the statute: (1) did not punish a previously committed act that was innocent when committed; (2) did not increase the punishment for a crime after its commission; and (3) did not deprive the defendant of a defense available by law at the time of the commission of the offense. *Id.*, at 52. In overruling *Kring* and *Thompson*, the Court made clear that "disadvantage" to the defendant will not be sufficient to invoke the Ex Post Facto Clause.

D. *Collins* Also Rejects Carmell's Assertion that the 1993 Amendments Deprived Him of a Defense.

Carmell asserts that application of the 1993 amendments to his case improperly deprived him of a defense. Pet. Br. 29-30. When the Court in *Collins* overruled *Kring*, it observed that *Kring* could be reconciled with prior cases by asserting that the change in Missouri law took away a defense available to the defendant. 497 U.S., at 50. The Court also noted, however, that those prior cases had broadly interpreted the term "defense," in contrast to the narrow, technical meaning used in *Beazell*, in which "the term was linked to the prohibition on alterations in 'the legal definition of the offense' or 'the nature or amount of the punishment imposed for its commission.' " *Id.* (quoting *Beazell*, 269 U.S., at 169-70).

> "The 'defense' available to Kring under the Missouri law was not one related to the definition of the crime, . . . Missouri had not changed any of the elements of the crime of murder, or the matters which might be pleaded as an excuse or justification for the conduct underlying such a charge. . . ." *Id.*

Carmell wrongly suggests that a challenge to the sufficiency of the evidence under a corroboration rule is a

"defense" that can support an ex post facto challenge. The same argument could be made about any changed evidentiary rule—consider *Hopt* or *Thompson v. Missouri*, for example. *Collins*, however, made clear that only defenses that relate to the definition of the crime, ordinarily affirmative defenses like "excuse or justification," can implicate the Ex Post Facto Clause. *Id.*

Carmell's claim of an "absolute defense," Pet. Br. 29, is also insupportable because it is the legislature's sole province to define defenses or affirmative defenses, and the legislature has never identified lack of corroborating evidence as a defense or affirmative defense to prosecution for the offenses of sexual assault and indecency with a child. The Texas Penal Code specifically provides that a defense or affirmative defense to an offense will include the phrase: "[i]t is a defense to prosecution" or "[i]t is an affirmative defense to prosecution." TEX. PEN. CODE ANN. §§ 2.03, 2.04 (Vernon 1994). Although the code expressly provides defenses and affirmative defenses for Carmell's offenses, *see id.* § 21.11(b); *id.* § 22.011(d), (e), neither offense (nor any other in the Texas Penal Code) sets out the lack of corroboration of the victim's testimony as a defense or affirmative defense. Carmell was not improperly denied a defense to the crimes for which he was convicted.

IV. THE CORE CONCERNS OF THE EX POST FACTO CLAUSE WERE NOT IMPLICATED BY THE APPLICATION OF THE 1993 AMENDMENTS TO CARMELL'S TRIAL.

Carmell argues that applying the 1993 outcry statute in order to convict him violated the "fundamental purpose" of the Ex Post Facto Clause and that he fell victim to a "legislature[] . . . respond[ing] to an emotionally charged electorate" that changed the outcry statute "in order to convict a class of unpopular defendants." *See* Pet. Br. 14. While it is true that the Ex Post Facto Clause protects persons from legislative abuses, that is not the only purpose that the clause serves and, in any event, Carmell was not subjected to a hot-blooded legislature that vindictively singled out him, or others like him, for unfair treatment.

A strong bias against ex post facto laws has existed since ancient times[16] and existed in America at the time of the Constitutional Convention of 1787. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389 (1798) (Chase, J.). This bias was so entrenched that some of the framers of the United States Constitution thought that an ex post facto clause would be unnecessary and that inserting such a prohibition would "proclaim that we are ignorant of the first principles of Legislation." 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 376, 378-79 (1937). The prevailing view, however, was that ex post facto laws were so inimical to individual liberty and the basic principles of republican government that the prohibitions against ex post facto laws in the Constitution were a necessary restraint against legislative excesses. *Id.*, at 375-76; *see also* THE FEDERALIST No. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961) (declaring that "ex-post-facto laws . . . are contrary to the first principles of the social compact, and to every principle of sound legisla-

[16] The ancient Greeks denounced retroactive lawmaking. Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 775 (1936) (citing the case of Timokrates and the Athenian Ambassadors as an example of the Greeks' abhorrence of retroactive lawmaking). Roman law recognized the principle that no man can change his purpose to another's injury. *Id.* (noting that Corpus Juris Civilis, Digest announced the principle "nemo potest mutare consilium suum in alteris injuriam").

tion"); THE FEDERALIST No. 84, at 511-12 (Alexander Hamilton) ("The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law . . . and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.").[17]

Justice Chase noted in *Calder* that the framers of the Constitution felt that the Ex Post Facto Clause was a necessary safeguard against punitive and arbitrary lawmaking by vindictive legislatures. *See* 3 U.S. (3 Dall.), at 388-89.[18] Chief Justice Marshall reiterated the same

[17] *See also* Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1275 (1998) (noting that the Ex Post Facto Clause derives prominence from its location in article I of the Constitution that is "otherwise reserved for structural issues of broad democratic governance"); Breck P. McAllister, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 CAL. L. REV. 269, 269 (1927) (attaching importance in the primacy of the Ex Post Facto Clause relative to the Bill of Rights).

[18] Carmell mentions the 1696 case of Sir John Fenwick as an example of the type of vindictive lawmaking that influenced the framers adoption of the Ex Post Facto Clause. Pet. Br. 16. Carmell claims that his case "is a clear violation of the Ex Post Facto Clause" like the Fenwick case because "Texas convicted [Carmell] 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." *Id.*, at 9. Aside from the fact that the outcry statute has never had a two-witness rule requirement, *see supra* Part III.A, Carmell's reliance on the Fenwick case is misplaced. Although Justice Chase cites the case as an example of the British Parliment passing an ex post facto law that altered the rules of evidence in order to convict Sir John Fenwick of treason, Parliament actually passed a bill of attainder convicting him without a judicial trial because it lacked sufficient evidence (*i.e.*, only one witness could be secured to provide testimony against Fenwick) to convict him in a court of law. *People v. Hudy*, 73 N.Y.2d 40, 53 n.8, 535 N.E.2d 250, 257 n.8 (1988); Derek J.T. Adler, Note, *Ex Post Facto Limitations on Changes in Evidentiary Law: Repeal of Accomplice Corroboration Requirements*, 55 FORDHAM L. REV. 1191, 1211 n.113 (1987). In other words, Parliamment did not change the law to convict Fenwick of an act that was innocent when it was committed, *i.e.*, an ex post facto law; rather, Parliament passed a bill of attainder in order to convict Fenwick without a jury trial. *Hudy*, 73 N.Y.2d at 53 n.8, 535 N.E.2d at 257 n.8; Adler, Note, *Ex Post Facto*, at 1211 n.113; *see also Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 846-47 (1984) (defining a bill of attainder as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial"). Fenwick's case has no application to this case.

view ten years later in *Fletcher v. Peck*, 10 U.S. (6 Cranch 87 (1810), in which he stated that "the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment," and that the Ex Post Facto Clause's "restrictions on the legislative power of the states are obviously founded in this sentiment." *Id.*, at 137-38.

Two of the best examples of vindictive and abusive lawmaking by state legislatures that were found to violate the Ex Post Facto Clause are the test oath cases. *See Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866). In *Cummings*, the Court noted that the Missouri constitution was framed at the time of the Civil War, that "the struggle for ascendency" in that state had aroused "fierce passions," and that "[i]t was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard." *Id.*, at 322. Thus, as the test oath cases exemplify, one of the core concerns of the Ex Post Facto Clause is protecting against vindictive legislative enactments that are directed toward maligned persons of the moment in times of political upheaval.

In evaluating the presence of vindictive lawmaking, the Court has sometimes focused on the legislature's intent

and purpose in enacting the challenged law. *See Hawker v. New York*, 170 U.S. 189, 196 (1898) (looking to the legislature's intent in enacting a law that prohibited convicted felons from practicing medicine and rejecting an ex post facto challenge because "[t]he state [was] not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character"); *see also James v. United States*, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., concurring in part and dissenting in part) ("[T]he policy of the prohibition against ex post facto legislation would seem to rest on the apprehension that the legislature in imposing penalties on past conduct . . . 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."); *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960) (holding that Congress intended to regulate the waterfront, not punish ex-felons, by enacting a statute that prohibited unions from soliciting or collecting dues from workers on the New York waterfront if any officer or agent of the union had been previously convicted of a felony); *Trop v. Dulles*, 356 U.S. 86, 95-96 (1958) (stating that in deciding whether a law is penal, the Court's determination "normally depends on the evident purpose of the legislature").

Carmell does not attempt to suggest that he, personally, was vindictively singled out by the 73rd Legislature for unfair treatment. Rather, Carmell asserts that "the legislative purpose here was to exact retribution against a paradigmatically unpopular group—alleged sex offenders" —of which he is a member. *See* Pet. Br. 17. The sole support Carmell cites for that assertion—the bill analysis of the 1993 amendments—is bereft of any suggestion that the legislature was acting in the heat of the moment to "exact [political] retribution" against sex offenders.

Supporters of the bill were focused on the victims of sexual assaults, not sex offenders. They recognized that "a long overdue change in Texas law governing the trial of sexual assault cases" was needed because "the nature of sexual assaults [was] such that the victim is often the only witness to the crime other than the defendant." HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 261, 73rd Leg., R.S. (1993). They sought to remove the "arbitrary" and "artificial" barrier in the 1983 version of the outcry statute that presented "an absurd obstacle for prosecuting" sexual assault cases. *Id.* Some supporters of the bill believed that the outcry and corroboration requirements of the former outcry statute were "based on cruel and outdated notions about the victims of sex crimes" and that "[v]ictims in sexual assault cases [were] no more likely to fantasize or misconstrue the truth than victims of most other crimes, which do not require corroboration of testimony or previous 'outcry.' " *Id.*

Statistics indicated that "in the majority of sexual assault cases, the offenders [were] acquainted with the victim," that "[i]n these situations particularly, the victim may feel that the perpetrator will be believed and the victim will not," and that "[b]ecause of these fears, victims of sexual offenses often hesitate[d] to 'cry out' to someone." *Id.* Supporters hoped to "remove . . . [a] vestige of sexism and prejudice against women, the primary victims of these crimes," and to bring Texas in line with "most states [which] no longer require[d] this type of corroboration." *Id.*

The Texas Legislature acted not out of vindictiveness toward sex offenders like Carmell, but out of concern for their victims. The 1993 amendments were not the result of political upheaval, nor was political retribution their purpose. The purpose and intent of the legislature was to protect a particularly vulnerable class of persons who

were statistically more likely to fall prey to sex offenders but not report the crime because of their relationship with the perpetrator. *See Hawker,* 170 U.S., at 196; *DeVeau,* 363 U.S., at 160. A prior legislature—without any support in the common-law development of corroboration requirements in Texas—had burdened young sex crime victims and prosecutors with an unnecessary (and unfair) corroboration requirement. The legislature in 1993 sought not to stack the deck against alleged sex offenders, as Carmell asserts, but simply to put them on a level playing field with other criminal defendants. This Court has never suggested, much less held, that such an enactment violates the Ex Post Facto Clause.

Moreover, protecting against legislative vindictiveness is only one of the core concerns of the Ex Post Facto Clause. The other concerns—ensuring fair warning and protecting reliance on existing laws—are equally important. Yet, besides a passing reference in a footnote, Pet. Br. 17 n.9, Carmell fails to discuss the other core ex post facto concerns addressed in several recent decisions of the Court. *See, e.g., Miller v. Florida,* 482 U.S. 423 (1987); *Weaver v. Graham,* 450 U.S. 24 (1981); *Dobbert v. Florida,* 432 U.S. 282 (1977). The Court has characterized an ex post facto law as one that fails to provide fair warning of the punishable conduct and frustrates one's reliance on existing laws. *See Weaver,* 450 U.S., at 28-29 (stating that the framers considered the Ex Post Facto Clause as a means "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed"); *Dobbert,* 432 U.S., at 297-98 (stating that Florida's death penalty statutes "provided fair warning as to the degree of culpability which the State ascribed to the act of murder" and "the penalty which Florida would seek to impose upon him if he were convicted of first-degree murder").

The policy behind the fair warning rationale is that "[a]n individual should be warned that his contemplated acts are punishable and of the extent to which they can be punished, since only if he is warned of these consequences can society expect him to refrain from acting." Note, *Ex Post Facto Limitations on Legislative Power,* 73 MICH. L. REV. 1491, 1496 (1975). Similarly, the policy underlying the twin evil of frustrated reliance is that "[a]n individual who acted in reliance upon existing definitions of crimes cannot fairly be punished and cannot be punished without detracting from the liability of the criminal law to provide guidance for conduct." *Id.* The Court has recognized that the fair warning and reliance rationales are "central to the ex post facto prohibition." *Miller,* 482 U.S., at 430.

The fair warning and reliance rationales do not even remotely suggest that the 1993 outcry statute is an ex post facto law. Carmell had fair warning that his inappropriate sexual relationship with KM was illegal. Carmell—both generally as a citizen and specifically as an incest counselor—knew that sexually abusing a child was a criminal act for which the State could properly punish him. Consequently, the district court's application of the 1993 outcry statute in Carmell's trial was not obnoxious to the Ex Post Facto Clause's core concern for fair warning, because Carmell had all the warning he needed to know that his conduct was criminal and of the punishment he might receive if convicted.

Carmell does not expressly claim a reliance interest in the continued application of the 1983 outcry statute, but it is implicit in his assertion that the application of the 1993 amendments to his conduct unfairly allowed him to be convicted of the crimes he committed. The Court should neither recognize nor legitimize that form

of reliance as part of an ex post facto analysis because it is undeserving of constitutional protection. Carmell "had no legitimate right to rely on a procedural rule that neither affected his culpability nor his expected punishment but instead merely made the prosecution's case against him more difficult to prove." *People v. Hudy*, 73 N.Y.2d 40, 54, 535 N.E.2d 250, 258 (1988) (holding that application of statute repealing requirement of corroboration of minor victim's testimony in certain sex-crime prosecutions did not violate Ex Post Facto Clause). The amendment of the outcry statute "did nothing more than remove an obstacle arising out of a rule of evidence." *Id.* (quoting *Thompson v. Missouri*, 171 U.S. 380, 387 (1898)).

The Court has recognized that the reliance interest gives individuals confidence that their actions, if legal when done, will not later be declared illegal; it emphatically does not, however, permit individuals confidently to structure their crimes so as to maximize the prosecution's difficulty in proving the case without having to worry that the legislature will close an evidentiary loophole. The interest that Carmell "wants elevated to the level of a constitutional right is a rather dubious interest in being acquitted at trial after having committed a criminal offense—an interest hardly worth preservation." *Note, Ex Post Facto Limitations*, at 1513. If Carmell's view of ex post facto protection were adopted, it would promote criminal sophistication rather than honest living.

The change in the outcry statute (1) was not the result of legislative abuse, (2) did not create criminal liability without warning, and (3) did not frustrate reasonable reliance on existing laws. Accordingly, application of the 1993 outcry statute to convict Carmell did not violate the Ex Post Facto Clause, because the core concerns of that

clause were not implicated by the 1993 amendments to the statute.

CONCLUSION

For these reasons, the judgment of the Texas court of appeals should be affirmed.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas
Counsel of Record
ANDY TAYLOR
First Assistant Attorney General
LINDA S. EADS
Deputy Attorney General for Litigation
GREGORY S. COLEMAN
Solicitor General
PHILIP A. LIONBERGER
Assistant Solicitor General
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700
Counsel for Respondent

October 20, 1999