No. 98-7540

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

REPLY BRIEF OF PETITIONER

RICHARD D. BERNSTEIN*
CARTER G. PHILLIPS
KATHERINE L. ADAMS
PAUL A. HEMMERSBAUGH
BRIAN C. KALT
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

**Counsel of Record*

November 15, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

INTRODUCTION

Respondent's position would erode the foundation of Ex Post Facto Clause law – the four-category formulation of prohibited ex post facto laws enunciated more than two centuries ago in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), and affirmed in numerous subsequent decisions of this Court, lower federal courts, and state courts. Respondent and its *amici* make essentially four arguments in support of their position.

First, they argue that the retroactive statutory change at issue in this case is not within the terms of *Calder*'s fourth category. This argument is refuted by the clear language of *Calder*. Second, Respondents argue that *Calder*'s fourth category has been overruled. As demonstrated below, far from overruling category four, this Court has consistently reaffirmed that *Calder*'s four categories are the definitive formulation of the prohibitions of the Ex Post Facto Clause, and expressly *distinguished Calder*'s fourth category when laws falling outside that category were upheld. Third – and the crux of the matter – they argue that the Court should take this opportunity to overrule *Calder* category four, because it is allegedly not consistent with the original understanding of the Ex Post Facto Clause and its underlying policies. *Calder*'s fourth category should not be overruled because the stability of ex post facto law is vital for both legislatures and citizens. *Calder* category four, particularly as it applies to the retroactive criminal law at issue, prevents singling out disfavored groups or persons for *retroactive* application of new criminal laws. Respondent's historical argument is based on excerpts from general discussions covering broader topics, none of which purported to be offering a complete list of ex post facto laws.

At bottom, Respondent's position would eliminate the fundamental protection provided by *Calder*'s fourth category – for all people and all future cases – in order to prevent one specific accused sexual offender from having some of his convictions overturned. There can be no exception, however, to the proscriptions of the Ex Post Facto Clause for a "bad crime," a "bad man" or an "unwise" prior law, because any such exception would swallow the rule.

Finally, respondent and its *amici* argue that the retroactive elimination of the defense on the merits at issue here is not proscribed by *Beazell* v. *Ohio*, 269 U.S. 167 (1925). *Beazell* indicates that laws that provide a defense "which may be considered by the court and jury in determining guilt or innocence" may not be changed retroactively. *Id.* at 170. It notes as one such law, a law that establishes the "[t]he quantum and kind of proof required to establish guilt." *Id.* At the time of the alleged conduct at issue, the prior Texas statute provided a complete defense *on the merits* to a person in Petitioner's position. Under that law, the absence of corroboration or outcry entitled Petitioner to an acquittal as a matter of law. Because this defense directly determined the ultimate question of guilt or innocence, retroactive elimination of that defense runs afoul of the core of *Beazell*'s prohibition.

ARGUMENT

I. RETROACTIVE APPLICATION OF THE 1993 AMENDMENT OF ARTICLE 38.07 FALLS SQUARELY WITH THE CONSTITUTIONAL PROHIBITION ON EX POST FACTO LAWS ENUNCIATED IN *CALDER* V. *BULL*.

Retroactive application of the 1993 Amendment falls squarely within *Calder*'s fourth category, which proscribes "[e]very law that *alters the legal rules of evidence, and receives less*, or different, *testimony, than the law required* at the time of the commission of the offence, *in order to convict the offender*." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (emphases added). Retroactive application of the 1993 Amendment to Petitioner did precisely that. Under the law in effect at the time of Petitioner's alleged conduct, the absence of corroborating testimony meant that, as a matter of law, KM's testimony was insufficient evidence "to convict the offender." See Tex. Code Crim. Proc. art. 38.07 (1983); Pet. Br. 4-7, 12-13.[1]

[1] Respondent argues for the very first time in its merits brief before this Court that the 1983 version of Article 38.07 did not require eyewitness corroboration, and that the evidence adduced at Petitioner's trial was somehow sufficient to satisfy the corroboration requirement of the pre-amendment version of Article 38.07. *See* Resp. Br. 4 n.2, 17 n.9. Respondent never previously argued – in its opposition to certiorari or in any of its state court appellate briefs – that there was sufficient evidence of corroboration under the prior statute. *See, e.g.*, Resp. Br. in Opp. to Cert. at 4-8 (Apr. 26, 1999); *id.* at 5 (arguing that, because 1993 Amendment applied retroactively, "corroboration of a fourteen year-old victim's testimony was no longer required at the time of . . . trial, even when the victim had not made an outcry for several years."); *id.* at 6 n.5 (citing without contesting Petitioner's assertion that "there was no corroborating evidence" at trial); Appellee's Brief at 46-49 (Oct. 31, 1997);

Petitioner's conviction was made possible solely by the retroactive application of the 1993 Amendment –

Appellee's Supplemental Brief at 1-2 (Feb. 12, 1998). (Respondent's two state court appellate briefs have been lodged with the Clerk.) For several reasons, this newfound argument is unavailing. *First*, Respondent's failure to raise the argument before the Texas appellate courts constitutes a waiver of the argument before this Court. *See, e.g., Riggins* v. *Nevada*, 504 U.S. 127, 133 (1992); *Carter* v. *Kentucky*, 450 U.S. 288, 304 (1981) (refusing to consider argument advanced by state in United States Supreme Court, because government failed to present the argument to the Kentucky Supreme Court). *Second*, in any event, the Court should deem the issue waived because it was not raised in Respondent's opposition to the petition for certiorari. Sup. Ct. R. 15.2; *City of Canton* v. *Harris*, 489 U.S. 378, 383-85 (1989). *Third*, if the corroboration issue had been raised below, the fact that the Texas Court of Appeals decided the constitutional question would indicate that the court concluded the evidence at trial was insufficient to satisfy the corroboration requirement of the pre-amendment statute. Like federal courts, Texas state courts do not address the constitutionality of a statute if a case may be decided without reaching the constitutional question. *See, e.g., Baptist Hosp. of Southeast Texas, Inc.* v. *Barber*, 714 S.W.2d 310 (Tex. 1986). *Fourth*, because Texas courts appear divided on the question of whether Article 38.07 requires eyewitness corroboration, *compare Shelby* v. *Texas*, 800 S.W.2d 584, 586 (Tex. App. 1990), *rev'd on other grounds*, 819 S.W.2d 544 (Tex Crim. App. 1991), *and Heckathorne* v. *Texas*, 697 S.W.2d 8, 12 (Tex. App. 1985, pet. ref'd), *with Zule* v. *Texas*, 802 S.W.2d 28, 32 (Tex. App. 1990, pet. ref'd), Respondent is effectively asking this Court to act as the final arbiter of Texas law, a function properly reserved to the Texas Supreme Court. *See, e.g., R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 381 (1992). Finally, contrary to the implication at Resp. Br. 4 n.2, *no* witness, other than KM, testified to the jury that he or she saw any indication of any illegal contact between KM and petitioner. *See, e.g.*, Trial Tr. 305-06 (testimony of mother Eleanor that she never saw Petitioner do anything sexual with KM); *id.* at 310 (mother's testimony that she had "absolutely" no inkling about alleged

which, as Respondent concedes, "abrogat[ed] . . . the corroboration requirement" of the prior law. Resp. Br. 16. The 1993 repeal of the corroboration requirement was thus a substantive change in Texas criminal law which allowed the prosecution to convict Petitioner based on "less or different testimony" (KM's testimony alone) than the minimum required (KM's testimony *plus* corroboration or outcry) at the time of the alleged conduct. See *Calder*, 3 U.S. at 390.

Respondent's argument that category four prohibits only retroactive changes in "the definition of crimes" or "increases [in] punishment," Resp. Br. 7, 23, makes no linguistic or logical sense. If this were true, there would be no category four, because it would be entirely redundant of categories one and three.

II. THE COURT HAS CONSISTENTLY AFFIRMED THE FOUR *CALDER* CATEGORIES AS THE TOUCHSTONE FORMULATION OF THE PROHIBITIONS OF THE EX POST FACTO CLAUSE.

Contrary to Respondent's argument, the Court has consistently affirmed that the laws prohibited by the Ex Post Facto Clause are those set forth in the four *Calder* categories, including the fourth category. See, *e.g., Collins* v. *Youngblood*, 497 U.S. 37, 46 (1990) ("the prohibition which may not be evaded is the one defined by the *Calder* categories"). From 1798 to the present, the Court has cited *Calder*'s four categories, including the fourth category's core prohibition of laws retroactively changing the

---

(sex) crimes at the time). Evidence that petitioner sent his stepdaughter cards and gifts, or that KM identified a massage vibrator, Resp. Br. 4 n.2, is not evidence corroborating alleged sexual contact between KM and Petitioner.

amount of proof required for conviction, as defining the scope of the prohibition against ex post facto laws. See, *e.g.*, *Lynce* v. *Mathis*, 519 U.S. 433, 441 n.13 (1997) (quoting with approval all four *Calder* factors).

Respondent does not argue – because it cannot – that the Court has expressly overruled the fourth category. Indeed, if this Court had already expressly overruled *Calder*'s fourth category, it is doubtful that the Court would have granted Petitioner's *pro se* certiorari petition. Instead, Respondent and *amici* rely upon strained constructions of a few of this Court's subsequent cases to argue that the category has been "implicitly" overruled. Resp. Br. 23. In fact, the very cases upon which Respondent relies demonstrate the continuing vitality of the fourth category.

Respondent relies heavily on *Collins* for its argument that the Court has rejected the four *Calder* categories in favor of a narrower two-part test. Resp. Br. 15-18. Far from limiting *Calder*, however, *Collins* expressly and unequivocally reaffirmed the *Calder* categories. *Collins*, 497 U.S. at 46. What *Collins* rejected was expansion of the Ex Post Facto Clause beyond the four *Calder* categories. *Id.* at 46-51. *Collins* overruled two late nineteenth century decisions precisely because they exceeded *Calder*'s scope. *Id.*; see *id.* at 49 (rejecting a "more expansive definition of ex post facto laws" adopted by *Kring* v. *Missouri* and *Thompson* v. *Utah*, because "[t]he Court's departure from *Calder*'s explanation of the original understanding of the Ex Post Facto Clause was . . . unjustified").

The United States rests its argument that *Collins* overruled *Calder*'s two-hundred-year-old rule on a footnote. See U.S. Br. 10-12 (citing *Collins*, 497 U.S. at 43 n.3). This is more than this footnote can bear. *First*, contrary to the

United States' contention, the *Collins* footnote did not conclude that *Calder* category four was "overbroad." Rather, it rejected any interpretation of *Calder*'s fourth category that would cover all alterations in the " 'legal rules of evidence.' " 497 U.S. at 43 n.3. This is correct, as Petitioner has emphasized. Pet. Br. 20. *Calder*'s fourth category contains the *conjunctive* requirement that the new law permit conviction on *"less, or different, testimony than the law required* at the time of the commission of the offense, *in order to convict the offender."* 3 U.S. at 390 (emphases added). The United States' discussion also omits the approving citation, in the very same *Collins* footnote, to the statement in *Hopt* v. *Utah*, 110 U.S. 574, 590 (1884) that "approv[ed] procedural changes [that] *'leav[e] untouched the . . . amount or degree of proof essential to conviction.'* " *Collins*, 497 U.S. at 43 n.3 (emphasis added).

Second, contrary to Respondent's suggestion, the text in *Collins* to which footnote three is appended makes clear that the Court understands *Beazell* to be an affirmation of the four *Calder* categories. See *id.* at 42. In that discussion, the Court first quotes the four *Calder* categories, cites cases affirming *Calder*'s formulation, and concludes that *Beazell* was simply summarizing the "well-accepted" "principles" enunciated in *Calder*. *Id.* Thus, far from overruling *Calder*'s fourth category, footnote three provides further support for the *Collins*' holding that "the prohibition which may not be evaded is . . . defined by the *Calder* categories." *Id.* at 46.[2]

---

[2] Contrary to the further contention of the United States, U.S. Br. 12-13, this Court's two Ex Post Facto Clause decisions rendered after *Collins* do not, in any way, undercut *Calder*'s

Respondent and its *amici* similarly misapprehend the two other cases upon which they rely to argue that *Calder* category four has been overruled, *Hopt* v. *Utah*, 110 U.S. 574 (1884) and *Beazell* v. *Ohio*, 269 U.S. 167 (1925). In *Hopt*, the Court held that retroactive application of a procedural rule "enlarg[ing] the class of persons who may be competent to testify" did not violate the Ex Post Facto Clause, because it did not reduce the "quantity or the degree of proof necessary" to convict the accused. 110 U.S. at 589. The Court expressly distinguished the facially neutral evidentiary change at issue in that case from a change which, like the retroactive elimination of the corroboration requirement here, allows conviction on less evidence than required by the law in effect at the time of the conduct, explaining: "[a]ny statutory alteration of the legal rules of evidence which would authorize conviction upon *less proof, in amount or degree*, than was required when the offence was committed, might, in respect of that offence, *be obnoxious to the constitutional inhibition upon ex post facto laws.*" *Id.* at 590 (emphasis added).

Respondent asserts that "less proof" in *Hopt* refers only to a change in a generalized burden of proof – *e.g.*, absolute certainty – not a specific burden of proof – *e.g.*,

---

fourth category. Neither of those cases involved retroactive changes affecting the requirements for conviction or determination of guilt. Rather, the issue in both of those cases was the question of *post*-conviction changes in the law that might enlarge punishment, specifically whether a retroactive change in the law impermissibly increased the punishment for persons who had already been convicted and were serving prison sentences. *See Lynce* v. *Mathis*, 519 U.S. 433 (1997); *California Dep't of Corrections* v. *Morales*, 514 U.S. 499 (1995). Moreover, *Lynce* quoted *Calder*'s fourth category with approval. 519 U.S. at 441 n.13.

the requirement of a corroborating witness. "Less" means "less." As Respondent concedes, the prior Texas statute set a minimum "sufficiency of evidence." Resp. Br. 18. The new statute enabled petitioner's conviction on "less" evidence, *i.e.*, without corroboration or outcry.[3] In all events, *Hopt* simply cannot be read to overrule *Calder*'s fourth category.[4] *Beazell* is also fully consistent with the core prohibition of *Calder*'s fourth category. *Beazell* held that changes in "the manner in which the trial of those . . . accused shall be conducted" do not offend the Ex Post Facto Clause. 269 U.S. at 170. The next three sentences distinguish categories of laws that were not at issue in *Beazell* but would violate the Ex Post Facto Clause. The first two of these three sentences mirror the first three *Calder* categories, *i.e.*, they describe laws that change the "legal definition of the offense" (*i.e.*, *Calder* category one), increase the "criminal quality of the act charged" (*i.e.*, category two), and increase "punishment" (category three). 269 U.S. at 170. The third sentence certainly

---

[3] Moreover, respondent's argument is based on an elliptical quotation of a single sentence that leaves out the very language quoted by *Collins*. Resp. Br. 23. The omitted language reiterates that the Court was approving only retroactive changes that "*leav[e] untouched* the nature of the crime and the *amount* or degree *of proof essential to conviction*," *Hopt*, 110 U.S. at 590 (emphasis added). *See Collins*, 497 U.S. at 43 n.3.

[4] Contrary to Respondent's suggestion, and unlike the change in the law at issue in *Hopt*, Article 38.07's corroboration requirement was not a witness competency rule. *See* Resp. Br. 25-27. Both before and after the 1993 Amendment, KM was fully competent to testify. However, only after the statutory change was her testimony sufficient by itself to sustain a conviction. *Hopt* expressly distinguished such a statutory change from a change in witness competency rules. *Hopt*, 110 U.S. at 590.

includes *Calder*'s fourth category: "*The 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*,. . . . " 269 U.S. at 170 (emphases added). Indeed, this Court has recognized that *Beazell* simply summarized the "well-accepted . . . principles" enunciated in *Calder*. *Collins*, 497 U.S. at 42.

III. *CALDER*'S FOURTH CATEGORY IS CONSISTENT WITH THE HISTORY AND PURPOSES ANIMATING THE EX POST FACTO CLAUSE, AND THE COURT SHOULD NOT OVERRULE THIS IMPORTANT RULE.

Calder's formulation of the four categories of laws prohibited by the Ex Post Facto Clause should carry with it a strong presumption of validity. The formulation, announced by Justice Chase shortly after the ratification of the Constitution, " 'has never been denied' " by any decision of this Court. *Collins*, 497 U.S. at 42 (quoting *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 391 (Miller, J., dissenting) (1867)); see Pet. Br. 23 n.13. For more than two hundred years, this Court has repeatedly and consistently cited the four *Calder* categories as definitive.

A. Stability in ex post facto law is at least as important as in any other context. In order for the Court to provide clear guidance to both the federal and state legislatures, and for the Ex Post Facto Clause to perform its essential functions, it is critical that the Court maintain clear and unshifting rules regarding what legislative acts are and are not unconstitutional, retroactive criminal laws. Overruling, after 201 years, one of *Calder*'s bedrock

four categories would surely undermine that essential stability.[5]

B. *Calder*'s fourth category is necessary to fulfill a basic purpose of the Ex Post Facto Clause: to protect individuals or groups from being singled out for *retroactive* criminal legislation. See, *e.g.*, *Miller* v. *Florida*, 482 U.S. 423, 429-30 (1987); *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981); *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 137-38 (1810); Pet Br. 14-19.[6] The Ex Post Facto Clause is a

---

[5] The United States argues that category four may be readily overruled because it was dicta. *See* U.S. Br. 13-14. This argument, if it were accepted, would apply equally to all four of the *Calder* categories. Moreover, the potential implications of this argument are broad and unsettling. The argument would call into question fundamental precepts enunciated in dicta by the Supreme Court in other important foundational cases in the early years of this nation. For example, if *Marbury* v. *Madison* were confined to its narrow holding that this Court lacked original jurisdiction over that case, *see* 5 U.S. (1 Cranch) 137, 170-77 (1803), then the foundations of the legitimacy and scope of judicial review – established in an extensive discussion that was dicta – could be open to question. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). To the knowledge of Petitioner's counsel, this Court has never called into question any of the foundational principles of early landmark decisions such as *Marbury, or Calder* v. *Bull*, on the ground that they were (often) dicta.

[6] Contrary to Respondent's suggestion, Resp. Br. 2, 7, 40-42, the Court has never held that a showing of reliance by the accused is necessary to demonstrate that a retroactive statutory change violates the Ex Post Facto Clause. Rather, the Court has simply noted that, in addition to prevention of retroactive criminal legislation that singles out disfavored groups, a "*second* concern" underlying the Clause is to " 'give fair warning' " and allow reliance on existing laws "until [they are] explicitly changed." *Miller* v. *Florida*, 482 U.S. 423, 430 (1987) (emphasis added). For example, if reliance were required, *Calder*'s second and third categories would be in doubt. If a state changed the

constitutional bulwark against such acts of the legislature, which, by its nature, may respond to popular passions to the detriment of disfavored groups. As this Court has explained, the Clause serves to enforce structural limitations on the legislative branch established by the Constitution, "uphold[ing] the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." *Weaver*, 450 U.S. at 29 n.10 (citing *Ogden* v. *Blackledge*, 6 U.S. (2 Cranch) 272, 277 (1804)). Simply put, it is improper for legislatures to place their thumb on the judicial scale in order to ensure convictions for *past* conduct. That is indisputably what the retroactive application of the new Texas statute was designed to do and in fact does. See Pet. Br. 17-18.

Moreover, as Petitioner has demonstrated, the *retroactive* repeal of the corroboration requirement was plainly targeted at an unpopular group. See Pet. Br. 17-19. Respondent misapprehends the nature of the constitutional violation when it contends that the 1993 amendment merely "put [petitioner] on a level playing field with other criminal defendants." Resp. Br. 40. As Petitioner has emphasized, it is entirely constitutional for the Texas legislature to change the corroboration requirement, so long as it makes the change *prospective*. The vindictive aspect of the 1993 repeal of the corroboration requirement that singled out a disfavored group – and thus the source of its constitutional infirmity – was its

---

punishment for a particular kind of murder from life imprisonment to eligibility for capital punishment, it is doubtful that a murderer could show reliance on the prior limitation to life imprisonment in committing his or her crime.

retroactive application. Respondent points to no act of the Texas legislature in modern history making a retroactive change in the substantive criminal law applicable to all defendants, or even one singling out a group other than accused sex offenders.

In addition, other than perhaps a law that defines an element of the crime, it is difficult to imagine a law more inextricably intertwined with the question of a defendant's guilt or innocence than a law that establishes the minimum evidence necessary for conviction. Indeed, it is indisputable that the aim of the prior Texas statute was designed to protect the innocent, Pet. Br. 30 & 25 n.14; see Resp. Br. 26, and that the new statute is designed to make conviction easier and thus protect victims of sexual offenses, Pet. Br. 17-18. As *Calder* and *Beazell*, 269 U.S. 167, 170 (1925), indicate, legislative changes in rules governing the ultimate question of determining guilt or innocence may not be made retroactive.[7]

---

[7] As Petitioner demonstrated in his opening brief, the law at issue was enacted for substantive reasons and plainly affects substance, not procedure. *See* Pet. Br. 32-34. Beyond mere conclusory statements that Article 38.07 is a "procedural" law, neither Respondent nor its *amici* contest that an analogous law in a civil case – where a defendant's liberty is not at stake – would be considered substantive. *See id.* at 33-34. Indeed, Respondent's statement that "[t]he Texas Legislature acted . . . out of concern for the[ ] victims," Resp. Br. 39, makes clear that the purpose of the statutory change was substantive, not procedural. Indeed, Respondent (unintentionally) understates the importance of the public policy of protecting the victims of sexual offenses by any assertion that a law designed to implement that policy is merely procedural. *Cf. Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 429-30 (1996) (for *Erie*, state rule is substantive where the rule is phased as "a procedural instruction, but the State's objective is manifestly substantive") (citation omitted).

At times, Respondent's argument might be read to suggest there should be some sort of a "bad person," "bad crime," or "unwise prior law" exception to the protections of the Ex Post Facto Clause. See Resp. Br. 1-2, 11, 17, 39-40. Any such exception would effectively render the Clause a nullity. The legislature always believes that the changes it enacts to the criminal law are wise, and render "bad" people subject to criminal punishment. This Court would not second-guess such legislative policy choices. Rather, as Justice Harlan explained, the Ex Post Facto Clauses "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 . . . to impose by legislation a penalty against specific . . . classes of persons." *James* v. *United States*, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., separate opinion) (emphasis added).

Thus, although this particular case involves conviction for a sexual offense and the prior Texas statute could readily be characterized as outmoded and unwise, those factors are irrelevant. If *Calder*'s fourth category were overruled, it would be overruled for all cases for all time.[8]

---

[8] This Court has wisely declined to dilute the protections of the Ex Post Facto Clause just because the particular case involved convicted sex offenders. *See, e.g., Miller*, 482 U.S. at 433-34 (refusing to allow retroactive increase in punishment for convicted sex offender, stating that "the sole reason for the increase was to punish sex offenders more heavily"); *accord, California Dep't of Corrections* v. *Morales*, 514 U.S. 499, 510-11 & n.7 (1995). *But see generally Frank* v. *Mangum*, 237 U.S. 309 (1915) (Court rejected habeas claims of Leo Frank, who had been convicted of molesting and murdering a female child); *id.* at 345 (Holmes and Hughes, JJ., dissenting).

C. Contrary to the contentions of the United States, U.S. Br. 13-18, the historical groundings of the Ex Post Facto Clause support *Calder*'s fourth category and Petitioner's position. See Pet. Br. 14-19. The United States attempts to narrow the fourth *Calder* category through a selective, wooden interpretation of constitutional history.

First, the United States cites the "narrow interpretation of the scope of the Clause" expressed in some of the debates at the Constitutional Convention, and in some of the Federalist Papers. U.S. Br. 17-18. Each of the citations the United States relies upon, however, mention *only* the first *Calder* category: " 'caus[ing] that to be a crime which is no crime' " (as one delegate said at the Convention) or " 'the subjecting of men to punishment for things which, when they were done, were breaches of no law' " (as stated in *Federalist* No. 84). *Id.* This is because none of the sources the United States cites is purporting to catalog all laws prohibited by the Ex Post Facto Clause. Rather, each source is a general discussion of the virtues of the Constitution, and is citing one example of those virtues from the Ex Post Facto Clause. If these "narrow" statements were viewed as definitive legal definitions, they would read out of the law not only the fourth *Calder* category, but the second and third – concerning retroactive aggravation of the crime and retroactive increases in punishment – as well.

In contrast to the contextually limited sources cited by the United States, Justice Chase analyzed the full scope of the Ex Post Facto Clause and offered a complete

taxonomy of its prohibitions. Thus, Justice Chase's enumeration of *Calder*'s fourth category, prohibiting laws "receiv[ing] less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender," is entitled to great weight, both for its closeness in time to the Constitution and for its place as an integral part of the first complete description of the scope of the Ex Post Facto Clause. Accordingly, this Court has emphasized the primacy of Justice Chase's four categories in *Calder*. *E.g.*, *Miller*, 482 U.S. at 429. Moreover, Respondent and its *amici* ignore the second source to give a complete description of the Ex Post Facto Clause: Justice Story. See Pet. Br. 21-23. He too stated that the Ex Post Facto Clause bars retroactive changes in criminal law "whereby different, or less evidence, is required to convict an offender, than was required, when the act was committed." Joseph Story, *Commentaries on the Constitution of the United States* § 1339 (1833).

Second, examining the case of Sir John Fenwick, which informed *Calder*'s fourth category, the United States notes that the ex post facto law in Fenwick's case was inflicted via a bill of attainder. See U.S. Br. 15; see also Resp. Br. 36-37 & n.18. From this, the United States concludes that the fourth *Calder* category "appears to have been intended to apply only to laws that alter the rules of evidence to convict a particular, named offender." U.S. Br. 15. Of course, that is not what *Calder* says.

Calder itself illustrates the error and illogic of this argument. Just as Justice Chase supported the fourth category with a citation to *Fenwick*, he supported the first category – laws criminalizing actions that were "innocent when done" – with a citation to the 1641 case of the Earl

of Strafford. See *Calder*, 3 U.S. (3 Dall.) at 390 (Chase, J.); *id.* at 389 note a. In Strafford's case, Parliament "declar[ed] acts to be treason, which were not treason, when committed." *Id.* at 389. As in Fenwick's case, Strafford was convicted via a bill of attainder. See Zechariah Chafee, Jr., *Three Human Rights in the Constitution of 1787*, at 109-13 (1956) (describing Strafford's case). The United States' argument thus proves too much. Under the logic of the United States' position, the Ex Post Facto Clause would not prohibit a state from retroactively criminalizing innocent conduct, so long as the state applied the law to an entire class of offenders and did not single out a "particular, named offender." The fourth *Calder* category, like the first, is not redundant with the Attainder Clause, and is not limited to cases that single out individuals.

Finally, the United States contends that *Calder* did not mean what it said. Justice Chase, the United States, argues, expressed agreement with Blackstone's *Commentaries*, which mention only the first *Calder* category. See U.S. Br. 16. But Chase mentions Blackstone immediately after defining ex post facto laws as "those that create, or aggravate, the crime; or increase the punishment, *or change the rules of evidence, for the purpose of conviction*." *Calder* v. *Bull*, 3 U.S. at 391 (emphasis added). The United States' suggestion – that Justice Chase by his citation to Blackstone intended to flatly contradict the express language of his opinion – is thus unavailing.[9]

---

[9] The United States' contention that Justice Paterson "relied on Blackstone's definition," U.S. Br. 16, also must be placed in context. Justice Paterson relied on Blackstone only to support his argument that the Ex Post Facto Clause should not apply to civil laws – in the sentence immediately following his quotation of Blackstone, Paterson concludes that Blackstone "unquestionably

* * *

It remains, and always will remain, "a truism that constitutional protections have costs." *Coy* v. *Iowa*, 487 U.S. 1012, 1020 (1988). Calder's fourth category of prohibited ex post facto laws provides a necessary, though at times unpopular, limit on the reach of legislatures with respect to obtaining convictions for conduct that has already occurred. It properly protects against legislation that retroactively permits less or different proof for conviction of a past crime, especially when the law is retroactively directed at a disfavored group.

IV. RETROACTIVE REPEAL OF THE CORROBORATION REQUIREMENT IS ALSO UNCONSTITUTIONAL UNDER THE *BEAZELL* FORMULATION, BECAUSE IT DEPRIVED PETITIONER OF AN ABSOLUTE DEFENSE TO A FINDING OF "GUILT."

Retroactive application of the 1993 Amendment to convict Petitioner also violates *Beazell* v. *Ohio*, 269 U.S. 167 (1925). *Beazell*'s formulation, which the United States characterizes as "the definitive modern summary of the scope of the Ex Post Facto Clause," U.S. Br. 9, indicates that the Clause prohibits retroactive repeal of any defense "considered by the court . . . in determining guilt or innocence." *Beazell*, 269 U.S. at 170. The single example given for such a defense is a law establishing "[t]he

---

refers to crimes, and nothing else." *Calder*, 3 U.S. at 396 (Paterson, J.). Thus, Paterson relied on Blackstone solely for the limited proposition that the Ex Post Facto Clause does not cover civil cases. The same is true of the citation to Blackstone at the Constitutional Convention noted by the United States. *See* U.S. Br. 17.

quantum and kind of proof required to establish guilt." *Id. Collins* expressly declined to limit *Beazell*, stating that "[t]he *Beazell* formulation is faithful to our best knowledge of the original understanding of the Ex Post Facto Clause." *Collins*, 497 U.S. at 42-43.

There is no basis in logic or the policies animating the Ex Post Facto Clause for elevating "affirmative defenses" above defenses that establish that, as a matter of law, the defendant is not guilty. The pre-amendment version of Article 38.07 was designed to protect the potentially innocent from false accusations, and thus the State's failure to satisfy its terms required a judgment of acquittal. Pet. Br. 30, 25 n.14.[10] It thus provided a defense on the merits, or, in the language of *Beazell*, a defense "considered by the court . . . in determining guilt or innocence." *Beazell*, 269 U.S. at 170. Affirmative defenses, such as justification or excuse, apply when the government has carried its burden of introducing evidence necessary to establish a

---

[10] The State of Texas thus imposed a necessary precondition for it to obtain a conviction of the offenses at issue – proof of corroboration or outcry. Under the prior law, the government's failure to satisfy that condition compelled *acquittal*, not remand for a new trial. *See, 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, remanding for entry of judgment of "acquittal"); *Friedel* v. *Texas*, 832 S.W.2d 420, 422 (Tex. App. 1992, no pet.) (same); *Jones* v. *Texas*, 789 S.W.2d 330, 333 (Tex. App. 1992, pet. ref'd) (same); *see also* Pet. Br. at 30. The requirement of a judgment of acquittal further distinguishes the condition imposed by Article 38.07 from mere evidentiary rules. When an appellate court finds rules of evidence were violated at trial, the normal course is to remand the case for a new trial, not to enter a judgment of acquittal. *See, e.g., Beltran* v. *State*, 728 S.W.2d 382, 389 (Tex. Crim. App. 1987).

prima facie case that the defendant committed an otherwise criminal act, but additional circumstances, such as justification or insanity, nonetheless allow a verdict of not guilty. There is no principled basis to argue that such affirmative defenses are somehow more significant for Ex Post Facto Clause purposes than defenses – like Petitioner's defense in this case – that require a determination that the defendant is not guilty in the first instance.

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,

RICHARD D. BERNSTEIN*
CARTER G. PHILLIPS
KATHERINE L. ADAMS
PAUL A. HEMMERSBAUGH
BRIAN C. KALT
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

**Counsel of Record*

November 15, 1999