No. 06-8273

IN THE

Supreme Court of the United States

STEPHEN DANFORTH,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF OF KANSAS AND THE *AMICI* STATES IN SUPPORT OF NEITHER PARTY

PAUL J. MORRISON
Attorney General of Kansas
STEPHEN R. MCALLISTER
Solicitor General of Kansas
Counsel of Record
JARED S. MAAG
Deputy Solicitor General
120 S.W. 10th Street, 2nd Floor
Topeka, KS 66612
(785) 296-2215
Counsel for Amicus Curiae

[Additional Counsel Listed After Conclusion]

QUESTION PRESENTED

Are state courts required to use the standard announced in *Teague v. Lane*, 489 U.S. 288 (1989), to determine whether decisions of this Court apply retroactively in state post-conviction proceedings?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

Statutes

Miscellaneous

In The Supreme Court of the United States

STEPHEN DANFORTH,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

On Writ Of Certiorari
To The Supreme Court Of Minnesota

BRIEF OF KANSAS AND THE *AMICI* STATES IN SUPPORT OF NEITHER PARTY

INTEREST OF THE *AMICI* STATES

Under the Constitution, the States determine the procedures and substance of any post-conviction remedies they choose to provide. States in fact have developed a diverse array of post-conviction proceedings, and state inmates file post-conviction actions with frequency. The fundamental question in this case—whether the Constitution dictates the procedures, substance and remedies the States must provide in post-conviction actions—goes to the very heart of federalism. Thus, the States have a substantial interest in the resolution of this case, both as a practical matter and as a matter of constitutional principle.

STATEMENT

1. Petitioner was convicted of first-degree criminal sexual conduct in violation of Minnesota law in 1996, resulting from petitioner's sexual abuse of a 6-year-old boy. Pet. App. A-2. The victim was found incompetent to testify at trial, but the trial court admitted into evidence a videotape of the victim being interviewed at a sexual abuse center. In that tape, the victim identified petitioner as his abuser. *Id*.

2. Petitioner unsuccessfully appealed his conviction, which became final in 1999. Pet. App. A-2. Petitioner then filed an unsuccessful state post-conviction petition. *Id*. After this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), petitioner filed a second state post-conviction petition, alleging that he was entitled to retroactive relief under *Crawford*. *Id*. at A-2. After the lower courts denied relief, the Minnesota Supreme Court granted review.

In the Minnesota Supreme Court, petitioner argued that the state supreme court could give *Crawford* broader retroactive effect than would result from applying the doctrine this Court adopted for federal habeas proceedings in *Teague v. Lane*, 489 U.S. 288 (1989). Pet. App. A-3. The Minnesota Supreme Court rejected petitioner's argument and denied his claim. The court held that "[w]e reaffirm our holding [in a prior case] that we are required to apply *Teague's* principles when analyzing the retroactivity of a rule of federal constitutional criminal procedure." *Id*. The court further held that, applying *Teague*, *Crawford* is not retroactive, the same conclusion this Court reached recently in *Whorton v. Bockting*, 549 U.S. ___, 127 S. Ct. 1173 (2007).

SUMMARY OF THE ARGUMENT

The Constitution does not compel nor require the States to provide post-conviction processes or remedies at all. Once a State provides a constitutionally sufficient trial and direct appeal, its federal constitutional obligations are satisfied. State post-conviction proceedings, from a federal constitutional standpoint, are a matter of state grace not of federal right. Necessarily, it follows that the Constitution generally does not dictate the procedures, substance or remedies of such proceedings when a State chooses to provide them.

There is no constitutional command that the States follow federal habeas corpus doctrines such as the retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989). Nor is there a constitutional bar to the States developing their own retroactivity doctrines for state post-conviction proceedings, whether those doctrines are broader or stricter than a federal habeas counterpart such as *Teague*. So long as state courts make that decision as a matter of state law, there is no federal interest nor federal constitutional principle at stake.

The State *amici* support neither party in this case because both parties' filings to date fail to respect fully the overriding federalism principle at stake here. The petitioner argues that States can give only *broader* but not *narrower* retroactive effect to Supreme Court decisions than would be the case applying *Teague*. And the respondent has argued that state courts must strictly follow *Teague*, with no departures. Both positions are wrong in part.

1. A. State post-conviction proceedings, with respect to federal law, are a matter of state grace not of federal right. Indeed, there is no federal constitutional barrier to a State abolishing state post-conviction proceedings altogether. In this context, the greater power includes the lesser. States can limit what decisions they apply retroactively in their own post-conviction proceedings, or recognize no retroactivity at all. In appropriate cases, the federal courts remain available

to grant federal habeas relief on the basis of this Court's new decisions.

B. States are free to *choose* the *Teague* retroactivity analysis for use in state post-conviction proceedings, but they are not constitutionally *compelled* to do so. Given the choice, many States may well decide that the *Teague* doctrine is appropriate and practical for use in their state post-conviction proceedings. But, as a matter of constitutional federalism principles, States are not required to reach that conclusion.

2. A. The Supreme Court of Minnesota's decision misapprehends the key legal distinction in the retroactivity context, which is "finality." This Court repeatedly has held that its decisions apply to any state criminal cases not yet "final," with "finality" being defined as conviction and completion of the direct review process. But once a state criminal conviction has become "final" for federal constitutional purposes, the Constitution demands no more from the States.

Thus, the Court's cases make clear that there is no constitutional authority to dictate retroactive application of new decisions to state criminal cases already "final." State court relief from a criminal conviction and sentence at that point is dependent on whether States choose to provide post-conviction remedies. Any constitutional "right" to post-conviction relief exists, if at all, only through federal habeas proceedings in federal court.

B. The cases on which the Minnesota Supreme Court primarily relied in holding that state courts must apply *Teague* are inapposite. Several are *civil* retroactivity cases. But civil retroactivity is simply inapposite, because in civil cases there are no "post-finality" proceedings, and the Court has made clear that its decisions do not and cannot reopen previously final judgments in civil cases. *See*, *e.g.*, *American Trucking Ass'n v. Smith*, 496 U.S. 167 (1990); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993).

Indeed, the Court has held that the Constitution bars Congress from reopening previously final judgments in civil cases. *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995). The clear and simple holding of the Court's civil retroactivity cases is only that the Court's civil decisions must be applied to *non-final* civil cases.

3. Apart from the structure inherent in the Constitution, several factors suggest that *Teague* retroactivity is not a constitutionally-compelled doctrine. First, *Teague* itself arose in the context of a federal habeas proceeding, not a state post-conviction proceeding, and there are significant constitutional and other differences between federal and state post-conviction proceedings. Second, this Court has held that *Teague* is not "jurisdictional" in the sense that a court must *sua sponte* address *Teague* retroactivity if the State fails to raise it in defending a petition seeking federal habeas relief. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). Third, if the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214, legitimately altered the *Teague* doctrine in any respect, that would mean *Teague* is not a constitutional requirement, just as most aspects of federal habeas corpus doctrine are not constitutionally compelled. Indeed, Congress retains broad power to define and limit federal habeas corpus relief, as this Court repeatedly has recognized.

ARGUMENT

I. STATE POST-CONVICTION PROCEEDINGS ARE NOT A FEDERAL CONSTITUTIONAL RIGHT.

A. There Is No Federal Constitutional Right To State Post-Conviction Proceedings, Nor Even A Direct Appeal, In State Criminal Cases.

The Constitution does not require the States to provide post-conviction processes or remedies at all. Once a State provides a constitutionally sufficient trial and direct appeal, its federal constitutional obligations are certainly satisfied.

This Court has declared or suggested on several occasions that even a direct appeal may not be constitutionally required. *See, e.g.*, *Fry v. Pliler*, 127 S. Ct 2321, 2326 (2007) (discussing what harmless error standard would apply in federal habeas proceedings "if a State *eliminated appellate review altogether*"); *Abney v. United States*, 431 U.S. 651, 656 (1977) ("[I]t is well settled that there is no constitutional right to an appeal. Indeed, for a century after this Court was established, no appeal as of right existed in criminal cases, and, as a result, appellate review of criminal convictions was rarely allowed.").

That proposition has been express—not just implicit—for over a century. In *McKane v. Durston*, 153 U.S. 684, 687 (1894), the first Justice Harlan declared that "review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law." If due process does not require the States to provide direct appeals in criminal cases, then surely it does not compel them to create post-conviction proceedings.

Rather, state post-conviction proceedings are a matter of state grace not of federal right. "State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Murray v. Giarratano*, 492 U.S. 1, 10 (1989). Thus, the States "have no obligation" to provide post-conviction relief at all. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). "[T]here is no constitutional mandate that" states provide post-conviction review. *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 402-403 (2001) (citations omitted).

The Court has more than once explained the reasons for this constitutional principle: "Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself,

and it is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction." *Finley*, 481 U.S. at 556-557; *see also Murray*, 492 U.S. at 13 (O'Connor, J., concurring) ("A post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings . . . .").

The distinction between trial/direct review and post-conviction proceedings underlies the Court's decisions holding that there is no constitutional right to counsel in state post-conviction proceedings generally, *Finley*, 481 U.S. 551, nor even in capital cases. *Murray*, 492 U.S. 1. In fact, the Court has even declined to find a constitutional right to counsel on direct review when the proceeding for which counsel is sought is discretionary, *Ross v. Moffitt*, 417 U.S. 600 (1974), rather than mandatory under state law. *Cf. Evitts v. Lucey*, 469 U.S. 387 (1985) (due process includes a right to counsel when state law gives convicted defendant a mandatory right to direct review).

Thus, both expressly and by implication, this Court's decisions make clear two very important propositions for this case: First, the Constitution does not require that the States provide any post-conviction proceedings at all. Second, constitutional rights that apply to a criminal trial and mandatory direct review do not automatically apply to post-conviction proceedings, and not even to direct review proceedings when they are discretionary.

B. States Are Free To Structure Their State Post-Conviction Proceedings As They Choose.

Because state post-conviction proceedings are a matter of state grace and not of federal right, there is no federal constitutional barrier to a State abolishing post-conviction proceedings altogether. Further, in the post-conviction

context, the greater power, to abolish the process, includes the lesser—to limit and restrict the grounds on which relief may be sought. Thus, the States necessarily retain broad discretion to set the terms and conditions on which their courts may grant post-conviction relief pursuant to the proceedings that state law creates.

The Court has on several occasions recognized this fundamental principle, declaring that it would "not question the State's power, in post-conviction proceedings, to reallocate the respective burdens of the individual and the State and to delimit the scope of state appellate review." *Drope v. Missouri*, 420 U.S. 162, 174 (1975). Similarly, the Court has declared that it is "unwilling to accept" the contention "that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume." *Finley*, 481 U.S. at 559; *see also Coleman v. Thompson*, 501 U.S. 722, 745-747 (1991) (emphasizing the importance of permitting the States to regulate their own post-conviction proceedings). Individual members of the Court, likewise, have emphasized that the States have "wide discretion to select appropriate solutions" in post-conviction proceedings, *Murray*, 492 U.S. at 14 (Kennedy, J., concurring), and that "[n]othing in the Constitution requires the States to provide such proceedings, nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings." *Id*. at 13 (O'Connor, J., concurring).

Not surprisingly, the States have developed a diverse array of post-conviction proceedings, with a variety of limitations on what claims are cognizable and under what standards relief may be granted. Indeed, the States are not even uniform in their conception of the basis for recognizing post-conviction relief, with some making such relief available by writ of habeas corpus, others using remedies similar to the writ of coram nobis, and yet others relying on proceedings that do not fit the two previous categories. *See generally*

LARRY W. YACKLE, POSTCONVICTION REMEDIES 13 (1981 & Cum. Supp. 2006/2007) (surveying state post-conviction proceedings). Furthermore, both the claims cognizable and the standards for granting relief vary dramatically among the States. *See id.*

Thus, unless this Court is to overrule more than a century of precedent, it follows as a matter of recognized constitutional principle that States are free to apply their own retroactivity doctrines in post-conviction proceedings. And that choice is a two-way street, including several options: States can create their own retroactivity doctrines that are either broader *or narrower* than *Teague*, or they may decline to recognize retroactivity at all. *See, e.g., Linkletter v. Walker*, 381 U.S. 618, 629 (1965) (the Constitution neither prohibits nor requires that new decisions be given retroactive effect in collateral proceedings). Given the choice, many States may well decide that the *Teague* doctrine is appropriate and practical for use in their post-conviction proceedings. But, as a matter of constitutional federalism principles, States are not required to reach that conclusion.

This Court's decisions long have made clear that the States have "substantial discretion", *Finley*, 481 U.S. at 559, to develop and implement post-conviction proceedings. That discretion necessarily includes choices regarding whether to apply new decisions of this Court retroactively to state convictions that have become "final." States are free to choose the *Teague* retroactivity analysis for state post-conviction proceedings, but they are not constitutionally compelled to apply *Teague*.

Rather, so long as state courts in post-conviction proceedings make retroactivity decisions as a matter of state law, there is no federal interest nor federal constitutional principle at stake, and nothing for this Court to review. That result is inherent in federalism. Irrespective of the retroactivity doctrine state courts may choose, the federal courts remain available to grant federal habeas relief on the

basis of this Court's new decisions in appropriate cases. Federal interests can and will be vindicated where and when appropriate, but the Constitution does not dictate that such interests be vindicated in state post-conviction proceedings.

II. THE CONSTITUTIONAL DETERMINANT IN RETROACTIVITY CASES IS WHETHER STATE CRIMINAL PROCEEDINGS ARE "FINAL."

A. The Supreme Court Of Minnesota Misunderstood The Principle Of "Finality."

The Supreme Court of Minnesota's decision misapprehends the key legal distinction in the retroactivity context, which is "finality." This Court has held that its decisions apply to any state criminal cases not yet "final," with "finality" defined as conviction and completion of the direct review process. *See, e.g.*, *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987).

Once "finality" has been reached in state criminal cases, there is no constitutional authority to dictate retroactive application of new decisions. Rather, "'the Constitution neither prohibits nor requires retrospective effect'" in that instance. *Griffith*, 479 U.S. at 320 (quoting *Linkletter v. Walker*, 381 U.S. 618, 629 (1965)).

The Court has divined a constitutional basis for requiring the application of its decisions to all cases not yet final, reasoning that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322. But once a state criminal conviction has become "final" for federal constitutional purposes, the Constitution demands no more from the States.

"Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality." *Teague v. Lane*, 489 U.S. 288, 309 (1989). State court relief from a criminal conviction and sentence after a case is "final" is dependent on whether States choose to provide post-conviction remedies. Any

constitutional "right" to post-conviction relief exists, if at all, only through federal habeas proceedings in federal court.

The cases on which the Supreme Court of Minnesota primarily relied in holding that state courts must apply *Teague* are inapposite. Several are *civil* retroactivity cases. But civil retroactivity is simply inapposite, because in civil cases there are no "post-finality" proceedings, and the Court has made clear that its decisions do not and cannot reopen previously final judgments in civil cases. *American Trucking Ass'n v. Smith*, 496 U.S. 167 (1990); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993). Indeed, the Court has held that the Constitution bars Congress from reopening previously final judgments in civil cases. *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995).

The Supreme Court of Minnesota appears to have been confused by language in *American Trucking* indicating that the retroactivity determination "is a matter of federal law." 496 U.S. at 177. But this Court in *American Trucking* made that assertion in the context of determining whether a decision would apply to *civil cases* that were *not yet final*. A careful reading of this Court's statements in *American Trucking* makes clear that all the Court said is that the question whether a decision of this Court applies to cases still pending (i.e., not yet final) is a matter of federal law, a proposition that no one in this case contests. The cases this Court cited for that proposition are all cases involving retroactivity in terms of whether a decision of this Court must be applied to *still pending* cases. This Court did not, and would not, cite any case involving *Teague* or post-conviction/post-finality review, even though *American Trucking* was decided after *Teague*, and the decisions are authored by the same Justice.

The simple current rule of this Court's civil retroactivity cases is that the Court's decisions must be applied to all *non-final* civil cases. That determination is a matter of federal law, and that rule is a federal rule. But nothing in the

Court's civil retroactivity cases suggests that new civil decisions can reopen previously final judgments; indeed, *Plaut* is directly to the contrary. And nothing in the civil retroactivity cases suggests that the question whether a new decision applies in state post-conviction proceedings is a matter of federal law. The Minnesota Supreme Court simply erred in its reading of the import and significance of *American Trucking*.

B. This Court Has Never Held That Its Decisions Must Be Applied Retroactively In State Post-Conviction Proceedings.

The only case on which the Supreme Court of Minnesota relied as expressly holding that this Court's retroactivity doctrine applies in state post-conviction proceedings is *Michigan v. Payne*, 412 U.S. 47 (1973). But the Minnesota Supreme Court's reliance on *Payne* is misplaced on the facts: *Payne* was a direct appeal and therefore the case was not "final" for retroactivity purposes. Furthermore, this Court's decision in *Payne* was itself arguably wrong in light of the Court's later criminal retroactivity decisions such as *Griffith v. Kentucky*, 479 U.S. 314 (1987) and *Teague*. In any event, a careful reading of *Payne* does not support the conclusion that *Teague* controls retroactivity in state post-conviction proceedings.

In *Michigan v. Payne* the defendant pled guilty in 1963 to a charge of assault with intent to commit murder, and he was sentenced to a prison term of 19 to 40 years. 412 U.S. at 47-48. Several years later, the Michigan courts set aside the defendant's plea and sentence, concluding that his confession and plea were involuntary. *Id*. at 48. In 1967, Payne was tried, a jury found him guilty, and the trial judge sentenced him to a prison term of 25 to 50 years. *Id*. The Michigan Court of Appeals affirmed the conviction and sentence.

But on direct appeal the Michigan Supreme Court reversed Payne's sentence, in light of this Court's decision in

North Carolina v. Pearce, 395 U.S. 711 (1969), which had been decided while Payne's direct appeal was pending. *Pearce* held that due process precludes courts from resentencing defendants to a higher sentence in retaliation for a defendant appealing a conviction or sentence. *Id.* at 725. *Pearce* further adopted prophylactic limitations applicable whenever a judge imposes a more severe sentence following a retrial. Those measures include that the trial judge set forth on the record the reasons for a higher sentence, and that such reasons be based on "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id*. at 726.

The Michigan Supreme Court applied *Pearce* to Payne's appeal "pending clarification" by this Court regarding the "retroactivity" of *Pearce*. This Court granted certiorari to review that decision. The Court concluded that the fundamental due process rule of *Pearce*—that a judge may not resentence a defendant more severely in retaliation for challenging the original conviction or sentence—was not a "new" constitutional rule and therefore was "available equally to defendants resentenced before and after the date" *Pearce* was decided. *Payne*, 412 U.S. at 50-51. Applying the three-factor retroactivity test of *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965), the Court concluded that the prophylactic requirements of *Pearce* were not retroactive and did not apply to Payne, whose resentencing occurred prior to the date the Court decided *Pearce*.

With all due respect, the Court's conclusion in *Payn*e that the procedural requirements of *Pearce* did not apply retroactively to Payne simply does not square with the Court's later decisions in *Griffith* and *Teague*. Indeed, Payne's case was *on direct appeal* when this Court decided it. Under *Griffith*, the *Pearce* decision's rules and procedures should have been applied to Payne's direct appeal, no matter

whether those rules and procedures were considered "new" or "old."

More importantly, for purposes of this case, nothing in *Michigan v. Payne* suggests—or indeed could suggest—that state courts are bound to apply the Court's federal habeas retroactivity doctrine (*Teague*) in state post-conviction proceedings. That principle simply was never in issue in *Payne*, which was a direct appeal in state court, not a post-conviction proceeding.

Furthermore, because the Michigan Supreme Court purported to rely on federal law in determining whether to apply *Pearce*, it was that reliance on federal law which arguably gave this Court jurisdiction to decide the case, even though under now well-grounded retroactivity principles, both the Michigan Supreme Court and this Court wrongly treated *Payne* as a retroactivity case at all. In any event, nothing in *Payne* holds or suggests that the Michigan Supreme Court could not have reached a different conclusion under state law.

III. *TEAGUE* RETROACTIVITY IS NOT A CONSTITUTIONAL REQUIREMENT.

Apart from the structure inherent in the Constitution, several factors suggest that *Teague* retroactivity is not a constitutionally-compelled doctrine. Indeed, the *amici* States are aware of no case in which any member of this Court has suggested that *Teague* retroactivity is constitutionally compelled. Nor has the Court questioned that Congress has the power to alter, amend, extend or eliminate the *Teague* doctrine.

1. *Teague* itself arose in the context of a federal habeas corpus proceeding, not a state post-conviction proceeding, and there are significant constitutional and other differences between federal and state post-conviction proceedings. Repeatedly, in its cases addressing *Teague*, even after the enactment of AEDPA, this Court has spoken of *Teague* retroactivity as an aspect of the Court's "habeas corpus"

jurisprudence, and as a doctrine that "federal courts" must follow in habeas cases. *See, e.g.*, *Horn v. Banks*, 536 U.S. 266, 267 (2002) (*per curiam*) ("federal courts must address the *Teague* question when it is properly argued by the government").

In the oral argument of a recently decided case, *Whorton v. Bockting*, 127 S. Ct. 1173 (2007), Justice Kennedy asked "[w]hat is the source of the rule in *Teague*? Could Congress overturn the rule in *Teague* if it wanted to and say that nothing is retroactive or that everything is retroactive?" *Whorton v. Bockting*, No. 05-595, Oral Arg. Tr. at 7. The short answers to Justice Kennedy's questions are (1) *Teague* is grounded in the Court's equitable powers in federal habeas cases and (2) "Yes", Congress could eliminate or compel retroactivity in federal habeas proceedings. Speaking to the lawyer arguing the case, Justice Scalia suggested that "[h]abeas is equitable relief and the Court has a lot of discretion in identifying the boundaries of equitable relief, doesn't it? I assume that's how we got to *Teague*." Oral Arg. Tr. at 8.

2. This Court has held that *Teague* is not "jurisdictional" in the sense that a court must sua sponte address *Teague* retroactivity if a State fails to raise it in federal habeas proceedings. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) ("Although the *Teague* rule is grounded in important considerations of federal-state relations, we think it is not jurisdictional in the sense that this Court, despite a limited grant of certiorari, must raise and decide the issue sua sponte."); *see also Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) ("[A] federal court may, but need not, decline to apply *Teague* if the State does not argue it.").

3. If Congress legitimately altered the *Teague* doctrine when it enacted AEDPA, then *Teague* cannot be a constitutional requirement, just as most aspects of federal habeas corpus doctrine are not constitutionally compelled. Furthermore, though members of this Court have

disagreed—as a matter of interpreting AEDPA—on the questions whether and, if so, to what extent the statute codified, amended, extended or eliminated the *Teague* doctrine, no member of the Court appears to question the proposition that Congress has the power to alter the doctrine legislatively, meaning that *Teague* itself has no constitutional basis.

A prime example is *Williams v. Taylor*, 529 U.S. 362 (2000), in which the Court divided over the scope and effect of AEDPA, in part with respect to *Teague*. In a part of the opinion that spoke for a plurality of four Justices, there are numerous statements indicating that Congress is free to alter or amend the *Teague* doctrine. For instance, the plurality opinion states that *Teague* "is the functional equivalent of a *statutory* provision commanding exclusive reliance on clearly established law," *id*. at 379 (emphasis added), and that "[i]t is perfectly clear that AEDPA *codifies Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final." *Id*. at 380 (emphasis added). In footnotes, the plurality observed that "[i]t is not unusual for Congress to codify earlier precedent in the habeas context," *id*. at 380 n.11, and that AEDPA's provisions "make it impossible to conclude that Congress was not fully aware of, and interested in codifying into law, that aspect [*Teague*] of this Court's habeas doctrine." *Id*. at 380 n.12.

* * * * *

Ultimately, whether the issue is the appropriate harmless error standard to apply, the choice of retroactivity doctrine, whether certain allegations such as Fourth Amendment violations or freestanding assertions of "actual innocence" are cognizable in post-conviction proceedings, or whether claims are procedurally barred from consideration on the merits, the States are free to structure their post-conviction proceedings as they wish, or even to dispense with such proceedings. *Teague* and its progeny reinforce rather than

undermine that conclusion: "The *Teague* cases reflect this Court's view that habeas corpus is not to be used as a second criminal trial, and federal courts are not to run roughshod over the considered findings and judgments of the state courts that conducted the original trial and heard the initial appeals." *Williams*, 529 U.S. at 383 (plurality opinion).

Thus, under fundamental federalism principles, the Supreme Court of Minnesota in fact was not bound to follow *Teague*. Rather, it had several options, ranging from declining to apply any decisions of this Court retroactively, to choosing to adopt *Teague*, to creating its own retroactivity doctrine for Minnesota post-conviction proceedings. Whether some choices on that spectrum would be wise or ill-considered is not the constitutional question. Rather, the Constitution makes state post-conviction proceedings a matter of state grace, not of federal right. Thus, as Justice Cardozo once declared with regard to state supreme courts' choices regarding retroactivity under state law, "the federal constitution has no voice upon the subject." *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932). Federalism demands no less.

CONCLUSION

The Supreme Court of Minnesota erred when it concluded that it is constitutionally compelled, in state post-conviction proceedings, to follow the retroactivity doctrine this Court adopted in *Teague v. Lane* for federal habeas corpus proceedings. Accordingly, that court's decision should be vacated, and the case remanded for further proceedings.

Respectfully submitted,

PAUL J. MORRISON
Attorney General of Kansas

STEPHEN R. MCALLISTER
Solicitor General of Kansas
Counsel of Record

JARED S. MAAG
Deputy Solicitor General

Counsel for *Amicus Curiae*

July 19, 2007

TROY KING
Attorney General
State of Alabama

TOM MILLER
Attorney General
State of Iowa

MICHAEL A. COX
Attorney General
State of Michigan

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

GREG ABBOTT
Attorney General
State of Texas

MARK L. SHURTLEFF
Attorney General
State of Utah

ROBERT F. McDONNELL
Attorney General
Commonwealth of Virginia