Oklahoma Law Review

Volume 61 | Number 3

2008

Danforth, Retroactivity, and Federalism

J. Thomas Sullivan
University of Arkansas at Little Rock, jtsullivan@ualr.edu

OKLAHOMA
LAW REVIEW

VOLUME 61 FALL 2008 NUMBER 3

DANFORTH, RETROACTIVITY, AND FEDERALISM

J. THOMAS SULLIVAN*

Table of Contents

* Judge George Howard, Jr. Distinguished Professor of Law, William H. Bowen School of Law, University of Arkansas at Little Rock.

This article honors my father-in-law, Floyd A. Shumpert of Terrell, Texas, who served as an Associate Justice on the Texas Court of Appeals for the Fifth Judicial District from his appointment in 1983 until his defeat in the 1984 general election. Judge Shumpert began his career in public service following his return to Kaufman County, Texas, after World War II. During the War, he served in the 8th Infantry Division, 28th Infantry Regiment, 2nd Battalion of the United States Army. He suffered a severe injury requiring amputation of his lower leg when he stepped on a land mine in the Hürtgen Forest in Germany only a few days before commencement of the German counter-offensive known today as the Battle of the Bulge. He was awarded the Silver Star and Purple Heart. Upon his return from Europe, he was elected County Clerk and later, after earning his law degree from Baylor University, County Judge. He left the bench for private practice for over fifty years in Kaufman County, interrupted only by his appointment to the court of appeals. He is the most courageous and the kindest man I have ever known.

Introduction

The United States Supreme Court's decision in *Danforth v. Minnesota*[1] represents a significant reaffirmation of the principle of judicial federalism that underlies much of the Court's criminal procedure jurisprudence. The Court's decision to afford state courts leeway in determining the extent to which its own decisions recognizing new rules of federal constitutional criminal procedure or new applications of existing rules should apply in ongoing state criminal prosecutions represents what may well be the final significant piece of the federalism puzzle. In so holding, the Court has essentially completed the restructuring of the federalized system of criminal law and procedure begun by the Warren Court activism of the 1960s. *Danforth* is also important because it provides a balance to the prevailing political orientation of the United States Supreme Court, a balance struck with the ideological diversity of state court judges.

The constitutional claim underlying the Court's recognition of state authority in the retroactive application of its decisions arose in the context of a Confrontation Clause violation. In *Crawford v. Washington*, the Court held

1. 128 S. Ct. 1029 (2008).

that the admission at trial of a witness's *testimonial* hearsay violates the right of confrontation ensured by the Sixth Amendment[2] unless the witness is subject to cross examination at trial or is unavailable for trial but subject to a prior, *adequate* opportunity for cross examination.[3] The Court's focus on the "testimonial" character of the statement is critical because *Crawford* does not impose a general prohibition on the admission of statements traditionally admitted as exceptions to the hearsay rule. Only those statements made with the reasonable expectation of their use in official proceedings, such as depositions, affidavits, or statements made in response to questioning by police, are within the ambit of the *Crawford* cross-examination requirement.[4]

Crawford overruled a quarter of a century of precedent in which the traditional requirement for cross-examination had been supplanted by the reliability test of *Ohio v. Roberts*.[5] Under *Roberts*, even statements of accomplices could be admitted provided they were found to demonstrate "adequate indicia of reliability" sufficient to warrant admission even in the absence of cross-examination.[6] Admission of statements through the reliability test was based on the idea that the hearsay exceptions and the Confrontation Clause were designed to protect similar values, so when a statement fell within a firmly rooted hearsay exception, the Confrontation Clause was met.[7] Since admission of accomplice statements was typically justified on the conclusion that statements jointly incriminating the accomplice/declarant and the accused were made against the declarant's penal interest and thus qualified for admissibility generally under Rule 804(b)(3) of the Federal Rules of Evidence, the Confrontation Clause was satisfied.[8]

Following *Crawford*'s significant reversal of the Court's Confrontation Clause jurisprudence, the next question to be addressed was whether the decision should apply retroactively to those cases in which convictions rested

---

2. U.S. CONST. amend. VI.

3. 541 U.S. 36, 68 (2004). The Sixth Amendment provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI. The *Crawford* Court emphasized that the opportunity for cross-examination must be *adequate*. 541 U.S. at 57 (emphasis added).

4. *Crawford*, 541 U.S. at 51 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.")

5. 448 U.S. 56 (1980), *abrogated by Crawford*, 541 U.S. at 36.

6. *Id.* at 66.

7. *Id.*

8. *Id.*; FED. R. EVID. 804(b)(3) ("statement[s] which . . . at the time of [their] making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement[s] unless believing [them] to be true").

in whole or part on testimonial hearsay not subjected to cross-examination.[9] The Court, applying its retroactivity doctrine adopted in *Teague v. Lane*,[10] rejected retroactive application of *Crawford* in *Whorton v. Bockting*.[11]

In *Danforth*, however, the Court explained that the application of *Teague*, as a matter of federal due process, does not bar more expansive retroactive application of federal decisions based on the application of state retroactivity doctrines or principles in state post-conviction proceedings.[12] State courts may thus apply their own retroactivity doctrines or principles to afford state court defendants the opportunity to rely on the Supreme Court's rulings recognizing new constitutional principles, application of existing principles in new situations, or corrections of its own jurisprudential errors, as in *Crawford*. It is in this sense that the decision in *Danforth* represents something of a watershed in the Court's federalism jurisprudence, restoring to the states the role of "little laboratories"[13] operating within the federal system for division of authority.

I. A Very Brief Overview of Judicial Federalism in the Context of Criminal Process

Historically, the administration of most American criminal law has been vested in the states, and the criminal process has been dominated by state

9. Historically, some decisions had been applied retroactively, particularly those most likely to have implication for the outcome of the trial process. For example, *Mullaney v. Wilbur*, 421 U.S. 684, 701-03 (1975), which prohibited explicit or implicit shifting of the burden of proof to the accused to disprove an element of the offense, such as malice in the commission of homicide, was applied retroactively in *Hankerson v. North Carolina*, 432 U.S. 233 (1977).

10. 489 U.S. 288, 310 (1989) (plurality opinion). The plurality's reasoning in *Teague* was applied by a majority of the Court in *Penry v. Lynaugh*, 492 U.S. 302 (1989).

11. 549 U.S. 406 (2007). According to the *Whorton* Court, "Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." *Id.* at 416.

12. Danforth v. Minnesota, 128 S. Ct. 1029, 1032-33 (2008).

13. States have sometimes been viewed as serving as "laboratories" for experimentation in the development of policy implicating constitutional doctrine. *E.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). *But see id.* at 280 (holding "[t]he principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments.").

criminal proceedings.[14] The general expansion of federal authority in response to the economic collapse of the Great Depression spilled over into criminal law, which was reflected by more active congressional involvement in legislative creation of federal crimes. Nevertheless, the primary responsibility for investigation and prosecution of traditional crimes—those without a definite nexus to some federal regulatory activity[15] and not committed on federal property—has remained with the states.[16]

---

14. *See* United States v. Lopez, 514 U.S. 549, 564 (1995) ("[I]n areas such as criminal law enforcement or education . . . States historically have been sovereign.").

15. In *Lopez*, the Supreme Court held that Congress had failed to demonstrate the necessary nexus between possession of a firearm on schoolgrounds and interstate commerce to warrant criminalization under federal law. *Id.* at 567. The Court's opinion is significant because it suggests that any federal regulation based upon interstate commerce must involve an activity directly or substantially affecting interstate commerce. *Id.* at 556. It is also arguable that the 5-4 decision reflects some concern with inadequate congressional fact-finding for the purpose of demonstrating the existence of the interstate commerce nexus. *Id.* at 562-63. The majority also observed that similar conduct was already the subject of state legislation. *Id.* at 561 n.3.

Subsequently, in *Jones v. United States*, the Supreme Court upheld the federal carjacking statute that clearly addressed a potential *Lopez*-based challenge, where the statute provided: "Whoever, possessing a firearm . . . takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall . . . ." Jones v. United States, 526 U.S. 227, 230 (1999) (quoting 18 U.S.C. § 2119 (Supp. IV 1992) (codified as amended at 18 U.S.C. § 2119 (2006)), but recognizing the statute had twice been amended before the case came before the Court.).

Lopez has spawned significant litigation regarding federalization of the criminal law. For instance, in *United States v. Morrison*, 529 U.S. 598, 601-02 (2000), the Court rejected a federal civil remedy created by a congressional effort to address the problem of violence against women; the issue arose in a suit brought by a college student alleging she had been raped on a college campus. The Court rejected reliance on the Commerce Clause or Section 5 of the Fourteenth Amendment as a basis for federal jurisdiction, enforcing the distinction between what is "truly" national and what is "truly" local. *Id.* at 617-18, 627. The suppression of violent crime and regulation of non-economic, violent criminal conduct are matters for the states, regardless of the aggregate impact on the national economy from violent crime. *Id.* at 617-18.

Similarly, in *Jones v. United States*, 529 U.S. 848, 850-51, 855 (2000), the Court held that federal legislation aimed at arson did not properly regulate arson of a private residence under the Commerce Clause despite the fact that the residence used natural gas transmitted through interstate pipelines, and the issuance of an insurance policy on the structure suggested an impact on commerce or economic activity. In contrast, in *Russell v. United States*, 471 U.S. 858 (1985), the Court upheld the federal arson statute as applied to the attempted destruction of a commercial property, which was an apartment building used as rental property. In *Russell*, the property's use constituted an activity affecting commerce such that Congress was entitled to regulate it. *Id.* at 86.

16. Every so often, the overlapping criminalization of activity on both the federal and state levels does, itself, prove to be a subject for litigation. For instance, the recognition of the "dual

For example, in *Patterson v. New York*, the Court unequivocally affirmed the traditional role of state legislatures in defining criminal offenses and recognizing affirmative defenses upon which the defendant may properly be assigned the burden of proof.[17] Similarly, the interplay between federal constitutional values and state authority in the criminal process is seen relatively early on in the Court's direct involvement in incorporating constitutional criminal procedural protections in state proceedings. In *Michigan v. Long*,[18] for instance, the Court observed:

> The state courts handle the vast bulk of all criminal litigation in this country. In 1982, more than 12 million criminal actions (excluding juvenile and traffic charges) were filed in the 50 state court systems and the District of Columbia. By comparison, approximately 32,700 criminal suits were filed in federal courts during that same year. *The state courts are required to apply federal constitutional standards*, and they necessarily create a considerable body of "federal law" in the process.[19]

The relatively quickly accomplished "selective incorporation" process[20] which

---

sovereignty" doctrine, permitting the same conduct to not only be subject to criminalization but also to prosecution in both federal and state forums, is a response to the involvement of Congress in criminal regulation. The primary responsibility for criminal regulation previously rested within the purview of state legislatures. *E.g.*, Bartkus v. Illinois, 359 U.S. 121, 132 (1959) (trial in state court not barred by Fifth Amendment double jeopardy protection following acquittal in federal prosecution on same charge); Abbate v. United States, 359 U.S. 187 (1959) (subsequent trial on similar charge in federal court not barred by prior conviction for same conduct in state court). Arguably, the result in *Bartkus* could be different as a result of the Court's recognition of the applicability of the collateral estoppel doctrine in criminal cases, based on its later decision in *Ashe v. Swenson*, 397 U.S. 436 (1970). There, the Court held that an acquittal may bar a subsequent prosecution in the same court not otherwise barred by the double jeopardy protection if the acquittal rested on full litigation of a fact essential to proof of the charge in both prosecutions. *Id.* at 445-46.

17. 432 U.S. 197, 201-02 (1977).

18. 463 U.S. 1032 (1983).

19. *Id.* at 1043 n.8 (emphasis added) (citations omitted). For its statistical comparison, the Court cited Victor E. Flango & Mary E. Elsner, *Advance Report: The Latest State Court Caseload Data*, 7.1 ST. CT. J. 16, 18 (1983), and ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 6 (1982), *available at* http://www.llmc-digital.org/docdisplay.aspx?textid=4651680.

20. As might be expected, significant judicial and scholarly comment has focused on the doctrine of "selective incorporation." *See, e.g.*, Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

included application of virtually every protection afforded by the Fourth,[21] Fifth,[22] Sixth,[23] and Eighth Amendments[24] through the Fourteenth Amendment

---

21. *E.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying exclusionary rule to require suppression of physical evidence seized in violation of Fourth Amendment to state court prosecutions).

22. *E.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (applying protection against double jeopardy to state proceedings); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (applying Fifth Amendment privilege against self-incrimination in state proceedings).

23. The important rights secured by the Sixth Amendment were made applicable to state proceedings in a series of important Supreme Court cases. *E.g.*, Duncan v. Louisiana, 391 U.S. 145, 150 (1968) (right to jury trial); Klopfer v. North Carolina, 386 U.S. 213, 221 (1967) (right to speedy trial); Washington v. Texas, 388 U.S. 14, 19 (1967) (right to compulsory process to obtain testimony and develop a defense); Pointer v. Texas, 380 U.S. 400, 403 (1965) (right to confrontation); Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (right to assistance of counsel). More recently, the Court found the notice and jury trial guarantees of the Sixth Amendment, applicable to state proceedings through the Fourteenth Amendment, to require any fact that is used for sentencing enhancement to be set out in the charging instrument. Apprendi v. New Jersey, 530 U.S. 466, 476 (2000). The right to trial only upon an indictment returned by a grand jury was held not to apply to the states in *Hurtado v. California*, 110 U.S. 516, 538 (1884).

24. In 1971, the Supreme Court rejected a challenge to the death penalty in *McGautha v. California*, 402 U.S. 183 (1971), in which the central claim was that the capital sentencing scheme unconstitutionally failed to impose limits on the sentencer's discretion in setting punishment at death. Justice Harlan wrote the majority opinion in his last term on the Court. A year later, a plurality reversed the Court's position, effectively voiding all existing state death penalty statutes in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), finding that the lack of effective standards or criteria for capital sentencing resulted in an unconstitutional application of the death penalty.

For an explanation of the Court's rather abrupt shift in perspective on the death penalty, see, e.g., Malcolm L. Stewart, *Justice Blackmun's Capital Punishment Jurisprudence*, 26 HASTINGS CONST. L.Q. 271, 276 (1998) ("Just over a year later, however, the Court abruptly shifted course."). The explanation for the apparent shift in the Court's position typically lies in the fact that the claim raised in *McGautha* was predicated on Fourteenth Amendment due process grounds, while *Furman* rested on the cruel and unusual punishment prohibition contained in the Eighth Amendment. *See, e.g.*, Jonathan Bridges, *Hooding the Jury*, 35 U.S.F. L. REV. 651, 674-78 (2001); Robert Taylor Lemon II, Note, *Constitutional Criminal Law—The Role of Mitigating Circumstances in Considering the Death Penalty*, 53 TUL. L. REV. 608, 611 n.24 (1979). This analysis is supported by the Court's own explanation in *Gregg v. Georgia*:

> *McGautha* was not an Eighth Amendment decision, and to the extent it purported to deal with Eighth Amendment concerns, it must be read in light of the opinions in *Furman v. Georgia*. There the Court ruled that death sentences imposed under statutes that left juries with untrammeled discretion to impose or withhold the death penalty violated the Eighth and Fourteenth Amendments. While *Furman* did not overrule *McGautha*, it is clearly in substantial tension with a broad reading of *McGautha*'s holding. . . . [W]e adhere to *Furman*'s determination that where the ultimate punishment of death is at issue a system of standardless jury

Due Process Clause to defendants in state court litigation was concluded by the mid-1970s with the exception of the Court's continuing involvement in reviewing state death penalty cases.[25]

In their respective separate opinions in *Adamson v. California*, Justices Frankfurter and Black argued over whether the Fourteenth Amendment Due Process Clause "incorporated" the protections afforded by the Bill of Rights into state proceedings.[26] The majority held that the Fifth Amendment protection against self-incrimination did not apply in a California capital murder prosecution because the jurisdiction did not prohibit comment on a defendant's decision not to testify or present evidence on his behalf.[27] Justice Frankfurter, concurring, agreed that the Fourteenth Amendment did not require application of the protections of the first eight amendments to state prosecutions whatsoever.[28] Justice Black dissented, arguing that total incorporation of these protections was clearly implicated by the adoption of the Fourteenth Amendment.[29] *Adamson* was overruled in *Malloy v. Hogan*.[30]

"Selective incorporation" represents a compromise over the extent to which the Fourteenth Amendment bears on specific protections ultimately deemed applicable to state proceedings. Justice Black offered an explanation of the concept in his concurring opinion in *Duncan v. Louisiana*:[31]

> The Court today holds that the right to trial by jury guaranteed defendants in criminal cases in federal courts by Art. III of the United States Constitution and by the Sixth Amendment is also guaranteed by the Fourteenth Amendment to defendants tried in

---

discretion violates the Eighth and Fourteenth Amendments.

428 U.S. 153, 196 n.47 (1976) (plurality opinion).

25. The Court remains active in construing the protections afforded by the Eighth and Fourteenth Amendments in state capital prosecutions. *See, e.g.*, Rompilla v. Beard, 545 U.S. 374, 390-93 (2005) (holding trial counsel rendered ineffective assistance in failing to examine file on defendant's prior conviction admitted at capital sentencing hearing); Bradshaw v. Stumpf, 545 U.S. 175, 187-88 (2005) (remanding for reconsideration of propriety of death sentence where prosecutor used inconsistent theories in pursuing death penalty against co-defendants); Miller-El v. Dretke, 545 U.S. 231, 265-66 (2005) (holding prosecutor's exercise of peremptory challenges in capital prosecution demonstrated racial discriminatory intent, despite contrary findings of state and lower federal courts); Deck v. Missouri, 544 U.S. 622, 632-34 (2005) (holding shackling of defendant during capital sentencing hearing improper); Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding execution of defendant under the age of eighteen at the time of offense prohibited by Eighth and Fourteenth Amendments).

26. 332 U.S. 46, 59-92 (1947), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964).

27. *Id.* at 54-55.

28. *Id.* at 63-65 (Frankfurter, J., concurring).

29. *Id.* at 70-72 (Black, J., dissenting).

30. 378 U.S. 1, 6 (1964).

31. 391 U.S. 145 (1968).

> state courts. With this holding I agree for reasons given by the Court. I also agree because of reasons given in my dissent in *Adamson v. California*. In that dissent, at 90, I took the position, contrary to the holding in *Twining v. New Jersey*, that the Fourteenth Amendment made all of the provisions of the Bill of Rights applicable to the States.[32]

Continuing, he explained that he supported the concept of "selective incorporation," in which only those constitutional protections implicating the notion of ordered liberty justify application of specific constitutional protections to state process,[33] as opposed to the rejection of any incorporation that had been the Court's position in *Twining*.[34] Justice Black, joined by Justice Douglas in his concurrence, then concluded:

> In closing I want to emphasize that I believe as strongly as ever that the Fourteenth Amendment was intended to make the Bill of Rights applicable to the States. I have been willing to support the selective incorporation doctrine, however, as an alternative, although perhaps less historically supportable than complete incorporation. The selective incorporation process, if used properly, does limit the Supreme Court in the Fourteenth Amendment field to specific Bill of Rights' protections only and keeps judges from roaming at will in their own notions of what policies outside the Bill of Rights are desirable and what are not. And, most importantly for me, the selective incorporation process has the virtue of having already worked to make most of the Bill of Rights' protections applicable to the States.[35]

In opposition, Justice Harlan criticized the Court's incorporation of express constitutional protections in the Bill of Rights to state proceedings in his concurring opinion in *Griffin v. California*, describing the practice as a

32. *Id.* at 162-63 (Black, J., concurring) (citations omitted).

33. The majority in *Duncan* relied on the traditional formula for assessing incorporation, whether claimed rights subject to incorporation through the Fourteenth Amendment constitute "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," whether it is deemed "basic [of] our system of jurisprudence," or whether it is a "fundamental right, essential to a fair trial." *Id.* at 148-49.

34. *Id.* (referencing Twining v. New Jersey, 211 U.S. 78, 98-99 (1908), where the Court had rejected the argument that the Fourteenth Amendment incorporated the protection afforded by the first eight amendments in restraining state action).

35. *Id.* at 171 (Black, J., concurring).

"creeping paralysis with which this Court's recent adoption of the 'incorporation' doctrine is infecting the operation of the federal system."[36]

The Court's incorporation "revolution" raised a new generation of lawyers versed in the realities of Supreme Court intervention in state process. When a more conservative Court took hold with the appointment of Justices advocating judicial restraint, those Justices' influence restricted involvement in work traditionally assigned to the states. This restriction came in the form of limitations on the expansion of constitutional protections, retrenchment,[37] and increasing deference to the concerns of federalism.

Michigan v. Long remains extremely important in the federalism equation fashioned by the Supreme Court because there the Court drew the line on the state court development of federal constitutional doctrine, reserving for itself the authority to interpret and apply the protections afforded by the Constitution.[38] In *Oregon v. Hass*, the Court disavowed the notion that state courts might properly interpret the Federal Constitution to provide greater protection to state court defendants than the Court itself had recognized.[39] In *Hass*, the Court rejected the Oregon Supreme Court's statement that it could "interpret the Fourth Amendment more restrictively than interpreted by the United States Supreme Court," holding that this was "not the law and surely must be an inadvertent error."[40] The *Hass* Court further explained that, while

> a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards . . . [it] may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.[41]

---

36. 380 U.S. 609, 616 (1965) (Harlan, J., concurring). For another conservative view on the incorporation debate, see Justice Frankfurter's opinion for the majority in *Bartkus v. Illinois*, 359 U.S. 121, 121-39 (1959).

37. *E.g.*, United States v. Leon, 468 U.S. 897, 905 (1984); Massachusetts v. Sheppard, 468 U.S. 981, 990-91 (1984). Both cases recognized a "good faith" exception to the warrant requirement where the warrant was defective due to a clerical or other error made inadvertently. *Leon*, 468 U.S. at 905; *Sheppard*, 468 U.S. at 990-91.

38. 463 U.S. 1032, 1040-41 (1983) ("[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.").

39. 420 U.S. 714, 719 (1975).

40. *Id.* at 719 n.4 (quoting State v. Florance, 527 P.2d 1202, 1208 (Or. 1974)).

41. *Id.* at 719 (citations omitted).

Many lawyers and state judges educated during the period of the Court's activism in the criminal procedure arena engaged in a flanking action in response to the Court's conservative "counter-revolution." They actively developed alternative theories based on state constitutional provisions, rather than advancing federal constitutional claims subject to review by the Supreme Court on certiorari.[42] The state constitutional law approach to litigating constitutional issues in the face of adverse precedent from the United States Supreme Court was promoted by Justice Brennan.[43]

The development of state constitutional theory as an alternative to reliance on federal constitutional protections has been apparent in the jurisprudence of many individual state courts and related academic literature. For example, the Arkansas Supreme Court recognized the rights of consenting adults to engage in homosexual relations in striking down the state's sodomy law in *Jegley v. Picado*,[44] prior to the United States Supreme Court's same result in *Lawrence v. Texas*.[45]

In *Rikard v. State*, the Arkansas Supreme Court summarized its development of state constitutional doctrine diverging from federal constitutional protection.[46] In reviewing a challenge to a search urged pursuant to article 2, section 15 of the Arkansas Constitution,[47] it observed:

> This court has recently imposed greater restrictions on police activities than the United States Constitution in three cases based on our own state law. Despite doing so, this court noted in *Sullivan,* that "there are occasions and contexts in which federal Fourth Amendment interpretation provides adequate protections against unreasonable law enforcement conduct; however, there are also occasions when this court will provide more protection under the Arkansas Constitution than that provided by the federal courts." Furthermore, we observed in *Sullivan* that one "pivotal inquiry" is

42. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 500-01 (1977) (noting that determinations relying on state constitutional law are beyond the reach of federal review). The practical approach to using these alternative sources of law is examined in Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635 (1987). *See also Long*, 463 U.S. at 1041 ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." (quoting Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940)).

43. Brennan, *supra* note 42, at 502.

44. 80 S.W.3d 332, 334 (Ark. 2002).

45. 539 U.S. 558, 578-79 (2003).

46. 123 S.W.3d 114 (Ark. 2003).

47. ARK. CONST. art. 2, § 15.

> "whether this court has traditionally viewed an issue differently than the federal courts."[48]

Similarly, the Montana Supreme Court recently held in *State v. Goetz*[49] that the privacy guarantee contained in the state constitution[50] prohibits the recording of conversations between a suspect and undercover drug agent or informant without a warrant.[51] The court held that the state constitution provided broader protection for personal privacy than that recognized under the United States Constitution.[52]

Last term, in another important decision having federalism consequences, *Virginia v. Moore*, the United States Supreme Court reinforced the autonomy of state courts to develop state law alternative theories for disposition of claims raising federal constitutional protection analogs.[53] In *Moore*, the Court held that where state actors violate privacy rights protected under state constitutional provisions or statutes, but not by the Fourth Amendment, the state court is not bound to suppress the improperly seized evidence.[54] Thus, while violations of Fourth Amendment rights require suppression of evidence under *Mapp*,[55] the prophylactic rule designed to prevent constitutional violations in the investigation process does not necessarily apply to violations

---

48. *Rickard*, 123 S.W.3d at 118-19 (citations omitted). These developments also prompted scholarly comment, including an article by Justice Brown, author of the opinions in *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002), one of the three cases imposing greater restrictions on police activities in Arkansas than the United States Constitution, and *Rickard*, 123 S.W.3d 114. Robert L. Brown, *Expanded Rights Through State Law: The United States Supreme Court Shows State Courts the Way*, 4 J. APP. PRAC. & PROCESS 499 (2002); *see also* Robert F. Williams, *The New Judicial Federalism Takes Root in Arkansas*, 58 ARK. L. REV. 883 (2006) (examining the development of Arkansas constitutional law).

49. 191 P.3d 489 (Mont. 2008).

50. MONT. CONST. art II, § 10. This section provides, in pertinent part: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." *Id.* No comparable language purporting to protect individual privacy interests appears in the United States Constitution.

51. *Goetz*, 191 P.3d at 504.

52. *Id.* at 494, 496 (implicitly rejecting United States v. White, 401 U.S. 745, 752-53 (1971) (plurality opinion)). *Goetz* held that the Fourth Amendment did not require that surreptitious recording of a conversation with a suspect be conducted pursuant to a warrant because the person engaged in the conversation "assumes the risk" that the other person may disclose the contents of the conversation. *Id.* The Montana court noted that the West Virginia Supreme Court in *State v. Mullens*, 650 S.E.2d 169, 190 (W. Va. 2007), had also rejected *White*, applying state constitutional law grounds in a similar context. *Id.* at 508 (Morris, J., concurring and dissenting).

53. 128 S. Ct. 1598, 1606-07 (2008).

54. *Id.* at 1606.

55. Mapp v. Ohio, 367 U.S. 643 (1961).

for acts contrary only to state law.[56] The decision recognizes greater autonomy in the enforcement of state law, affording state courts the option of adopting suppression of illegally or impermissibly seized evidence as a remedy, but not to the exclusion of alternate remedies.[57]

II. Retroactivity Doctrine as Applied to New Rules Under the Federal Constitution

One of the critical questions addressed in the incorporation process involved the determination of exactly when a rule or application of a criminal procedural protection recognized by the Court under the Federal Constitution would apply to state court litigation. The Court established the controlling principle of retroactivity in *Linkletter v. Walker*[58] and *Stovall v. Denno*[59] during the Court's most expansive period of selective incorporation of federal constitutional protections to state proceedings. There, the Court concluded that whether a holding should be applied retroactively should be determined by a three-part test: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[60]

This approach afforded flexibility in the retroactivity determination, but at some cost to certainty and, often, to fairness in the application of new constitutional doctrine. This concern for certainty and fairness prompted Justice Harlan to criticize the flexible approach to retroactivity taken in *Linkletter*.[61]

The Court essentially provided a definitive response to the criticism that *Linkletter*'s flexible approach led to uncertainty in two decisions, *Griffith v. Kentucky*[62] and *Teague v. Lane*.[63] In *Griffith*, the Court held that all new rules announced by the Court would apply to benefit those state and federal litigants having preserved their similar claims in litigation not final and still pending at the time the new rule is announced.[64]

---

56. *Moore*, 128 S. Ct. at 1606.

57. *Id.*

58. 381 U.S. 618 (1965).

59. 388 U.S. 293 (1967).

60. *Id.* at 297.

61. *See* Mackey v. United States, 401 U.S. 667, 675-702 (1971) (Harlan, J., concurring); Desist v. United States, 394 U.S. 244, 256-58 (1969) (Harlan, J., dissenting).

62. 479 U.S. 314 (1987).

63. 489 U.S. 288 (1989).

64. 479 U.S. at 322-23. *Griffith*'s retroactivity principle extends application of new rules to those cases remaining in the direct appeal process and not final at the time the rule is

In contrast to the defendant-friendly rule of retroactivity for cases pending when the "new" rule of constitutional criminal procedure is announced, a far less favorable rule applies to retroactive application of those "new" rule decisions for individuals whose cases have concluded on direct appeal. In *Teague v. Lane*, the Court held that "new" rules—those that break with established precedent[65]—are not applied retroactively for the benefit of defendants whose cases have been finalized through the direct appeal process at the time the "new" rule is announced.[66] Under *Teague*, rules dictated by precedent are not "new" and, thus, not subject to its restrictive retroactivity doctrine.[67]

Addressing Justice Harlan's criticism, Justice O'Connor observed for the plurality in *Teague*:

> [W]e believe that Justice Harlan's concerns about the difficulty in identifying both the existence and the value of accuracy-enhancing procedural rules can be addressed by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished.
>
> Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge.[68]

Teague supplanted *Linkletter*'s flexibility with a fixed principle subject to only limited exceptions.[69] In a sense, *Teague* complemented *Griffith* in providing the necessary corollary to *Griffith*'s bright line for retroactive application of new rules to benefit all litigants presenting preserved claims in the direct appeal process. But these fixed rules can result in an essentially unfair result for a litigant whose case was tried under a rule subsequently discarded and who would be denied the benefit of a new rule recognizing the correctness of the supplanted rule because of the non-retroactive policy adopted in *Teague*.

In *Teague*, the Court recognized two exceptions to the presumptive non-retroactivity principle governing announcement of new rules of constitutional

---

announced and includes the pendency of a petition for certiorari or time for filing for review by certiorari. *Id.* at 32l n.6.

65. *Teague*, 489 U.S. at 301 ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.").

66. *Id.* at 310.

67. *Id.* at 301.

68. *Id.* at 313.

69. *See generally Teague*, 489 U.S. 288.

criminal procedure.[70] The first accords retroactive application to new rules that restrict the authority of the government to proscribe particular types of conduct or impose specific forms of punishment against defendants based on their status or the nature of the offense.[71] For instance, the Court's rulings that certain mentally retarded individuals[72] and juveniles under the age of eighteen at the time of the offense[73] cannot be executed consistent with the Eighth Amendment fit this exception and require retroactive application.[74]

The second exception provides for retroactive application of new rules that are said to be "implicit in the concept of ordered liberty."[75] The Court explained that the class of rules fitting within this exception are those which ensure fundamental fairness and accuracy in the fact-finding process.[76] The *Teague* Court recognized the possibility that a newly-articulated rule of constitutional criminal procedure could be deemed so fundamental to the accuracy of fact-finding in the trial process that it would represent a "watershed" rule of criminal process.[77]

Not only did the Court in *Teague* draw a line in determining retroactive application of its holdings based on whether a rule applied in a decision was "new" or one dictated by existing precedent, but it also reserved the development of constitutional criminal procedural rules for itself, rather than permitting lower federal courts to articulate new rules or applications in the federal habeas process.[78] Constitutional claims requiring recognition of "new" rules by federal habeas courts do not warrant relief in the federal habeas process.[79] The federal habeas statute now reflects the Court's approach.[80]

---

70. *Id.* at 311.

71. *Id.*; *e.g.*, Penry v. Lynaugh, 492 U.S. 302, 330 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).

72. *Atkins*, 536 U.S. at 321.

73. Roper v. Simmons, 543 U.S. 551, 578 (2005).

74. These new rules may restrict the ability of the state to impose punishment, particularly the death penalty, based on the individual attributes of the convicted capital defendant, such as his mental impairment or his status as a juvenile.

75. *Teague*, 489 U.S. at 311 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

76. *Id.* at 312-13.

77. *See* Saffle v. Parks, 494 U.S. 484, 495 (1990). A "watershed" rule is a rule that "implicat[es] the fundamental fairness and accuracy of the criminal proceeding." *Id.*

78. *Teague*, 489 U.S. at 316.

79. This principle is now incorporated by statute in 28 U.S.C. § 2254(d) (2006), which provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable

The "new" rules doctrine also precludes federal circuit and district courts from applying existing rules to novel situations. For example, in *Caspari v. Bohlen*,[81] the Court held that the Eighth Circuit had violated this principle in analogizing from the Court's decision in *Bullington v. Missouri*[82] that a failure of proof in a non-capital sentencing proceeding would bar imposition of a greater sentence in a remanded resentencing proceeding.[83]

An interesting question left unanswered by *Teague* was whether due process rationale dictates that *Teague*'s retroactivity policy apply to state courts. The importance of this issue was suggested by the development of state constitutional law as an alternative to disposition of criminal procedure claims on federal constitutional grounds. The issue that arises is whether state courts have the authority to apply broader retroactivity doctrines or principles to United States Supreme Court decisions announcing "new" rules or new applications of existing precedent when the Court itself declines to apply these holdings retroactively. This issue was recently raised and decided in *Danforth v. Minnesota*.[84] The *Danforth* majority[85] concluded that state courts are not barred by federal constitutional restrictions from affording greater protection to state defendants than required by the federal due process guarantee in applying Supreme Court decisions announcing "new rules" of constitutional criminal procedure retroactively.[86] Thus, individual jurisdictions are afforded discretion to permit state court defendants whose cases are final at the time the Court announces a "new rule" to rely on the "new rule" in petitioning for relief in state postconviction proceedings.

> application of, clearly established Federal law, *as determined by the Supreme Court of the United States* . . . .

Id. § 2254(d)(1) (emphasis added).

80. *See, e.g.*, Goeke v. Branch, 514 U.S. 115, 120-21 (1995) (noting that federal habeas courts cannot announce new rules of existing rules of constitutional criminal procedure and following *Teague*).

81. 510 U.S. 383 (1994).

82. 451 U.S. 430 (1981).

83. *Caspari*, 510 U.S. at 396-97. Subsequently, in *Monge v. California*, the Court rejected the Eighth Circuit's reasoning in *Caspari* and held that the double jeopardy protections afforded by the Fifth Amendment do not bar an increase in a non-capital sentence on remand following a failure of proof in the original sentencing proceeding. Monge v. California, 524 U.S. 721, 734 (1998).

84. 128 S. Ct. 1029 (2008).

85. The *Danforth* majority opinion was written by Justice Stevens. Six members of the Court joined this opinion, with the Chief Justice, joined by Justice Kennedy, dissenting. *Id.* at 1032.

86. *Id.* at 1041-42.

III. Danforth *in Context*

The substantive claim involved in *Danforth* was based on *Crawford v. Washington*,[87] in which the Supreme Court reexamined the role of cross-examination in Confrontation Clause[88] analysis. There, it restored the primacy of cross-examination as a necessary element of confrontation when the State offers into evidence the custodial statement of a witness who has not been subjected to meaningful cross-examination by the accused's counsel in a criminal proceeding.[89]

A. Confrontation Precedent and Danforth's Claim

The procedural context in which *Danforth* arose requires some consideration of the progression of confrontation jurisprudence from *Crawford* through *Whorton v. Bockting*,[90] in which the Court addressed the question of retroactive application of *Crawford*. Importantly, *Crawford* arose in the context of direct appeal, thus avoiding the limiting rules of *Teague* that would have likely frustrated consideration of the claim had it been litigated in the federal habeas process.[91]

1. Revisiting Confrontation in Crawford

With regard to retroactivity, the Court's decision in *Crawford* poses a novel scenario in its post-*Teague* jurisprudence because instead of simply announcing a "new" rule not previously in place, it revived a traditional rule that had been subverted in a line of decisions reaching over a little less than twenty-five years.[92] In deciding the case, Justice Scalia, writing for the majority, candidly admitted: "[W]e view this as one of those rare cases in which the result below is so improbable that it reveals a *fundamental failure on our part* to interpret the Constitution in a way that secures its intended constraint on judicial discretion."[93]

---

87. 541 U.S. 36 (2004).

88. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." *Id.*

89. *Crawford*, 541 U.S. at 68-69.

90. 549 U.S. 406 (2007).

91. Under the *Teague* "new rules" doctrine, new rules of constitutional criminal procedure cannot be recognized by lower federal courts in the habeas corpus process. *See* Caspari v. Bohlen, 510 U.S. 383, 389-90 (1994).

92. *Crawford*, 541 U.S. at 68-69, issued in 2004, overruled the rationale adopted by the Court in *Ohio v. Roberts*, 448 U.S. 56, decided in 1980.

93. *Crawford*, 541 U.S. at 67 (emphasis added).

Michael Crawford was convicted of assaulting an individual that he claimed had tried to rape his wife, Sylvia.[94] Both the defendant and his wife gave statements to the police, but the statements diverged on a critical point. Crawford claimed that he had killed the victim in self-defense because he believed the victim had picked up a weapon during a confrontation over his alleged sexual assault of Sylvia.[95] Sylvia, however, told police that she had not seen the victim with a weapon during the fight, as her husband claimed.[96] At trial, the prosecution offered Sylvia's statement to rebut her husband's claim of self-defense,[97] and Crawford was convicted.[98] The conviction was affirmed by the Washington Supreme Court, which rejected the reasoning of the state court of appeals in ordering a reversal based on violation of Crawford's confrontation rights.[99]

The Washington Supreme Court followed *Ohio v. Roberts* in concluding that the statement was admissible as a declaration against Sylvia's penal interest,[100] bearing sufficient indicia of reliability to warrant admission despite the fact that she could not be compelled to testify for purposes of cross-examination.[101] However, the state court rejected the argument that Michael Crawford waived his confrontation rights when he invoked the marital privilege to prevent Sylvia from being compelled to testify against him at trial.[102]

On certiorari, the United States Supreme Court majority in *Crawford* overruled *Roberts*, functionally reinstating the rule of *Douglas v. Alabama*[103] that excluded accomplice statements in the absence of a meaningful opportunity for the accused to test a statement by cross-examination.[104]

---

94. *Id.* at 38-40.

95. *Id.*

96. *Id.* at 39-40.

97. *Id.* at 40-41.

98. *Id.* at 41.

99. State v. Crawford, 54 P.3d 656, 664 (Wash. 2002), *rev'g*, No. 25307-1-II, 2001 WL 850119 (Wash. Ct. App. July 30, 2001), *rev'd*, 541 U.S. 36 (2004). The court of appeals had rejected the claim that Sylvia's statement was reliable because it was against her penal interest and, thus, admissible against Michael because of its presumptive reliability. *Crawford*, 2001 WL 850119, at *6-7. Consequently, the court held that the admission of her statement did not satisfy constitutional standards for confrontation. *Id.*

100. *Crawford*, 54 P.3d at 662-63 (citing Ohio v. Roberts, 448 U.S. 56 (1980)). Washington recognizes declarations against penal interest as an exception to the hearsay rule. WASH. R. EVID. 804(b)(3).

101. *Crawford*, 54 P.3d at 662-64.

102. *Id.* at 659-60.

103. 380 U.S. 415, 418-20 (1965).

104. *Crawford*, 541 U.S. at 57. In re-affirming the accused's right to confrontation by cross-examination, the majority traced the history of the right to Sir Walter Raleigh's case in 1603.

Consistent with *Griffith*,[105] of course, *Crawford* applied to all cases still pending in state appellate courts or on certiorari to the Supreme Court in which the issue of admission of testimonial hearsay had been decided adversely based on pre-*Crawford* holdings of the Court.[106] But the Court did not indicate whether its decision would apply retroactively to cases already concluded in the direct appeal process prior to the date of its announcement of *Crawford*.[107]

2. Resolution of the Retroactivity Claim in Whorton v. Bockting

Bockting, convicted in a Nevada prosecution for sexual assault of a child under the age of fourteen years,[108] challenged his conviction based on the admission of an out-of-court statement made by the complainant.[109] The state supreme court dismissed the appeal in a table decision.[110] Bockting successfully petitioned the United States Supreme Court for certiorari following dismissal of his appeal in the Nevada Supreme Court.[111] The U.S. Supreme Court vacated and remanded his case for reconsideration in light of *Idaho v. Wright*, in which it had held that admission of certain statements made by children relating to sexual abuse violated the Confrontation Clause where the statements were made in response to questioning and offered under an exception to the hearsay rule.[112] On remand, the Nevada Supreme Court, relying on *Ohio v. Roberts*, found no violation under *Wright* and affirmed Bockting's conviction.[113]

Following *Crawford*, Bockting again attacked his conviction, this time in a federal habeas action that initially resulted in a denial of relief.[114] However, he found receptive judges in the Ninth Circuit, although the two members of the panel who voted to apply *Crawford* retroactively to afford him relief

---

Id. at 43-62 (citing Raleigh's Case, (1603) 2 How. St. Tr. 1, 15-16, 24 (K.B.) (Eng.)). Justice White, writing for the majority in *California v. Green*, also traced the historical roots of cross-examination to the trial of Sir Walter Raleigh. California v. Green, 399 U.S. 149, 157 n.10 (1970) (citing Raleigh's Case, (1603) 2 How. St. Tr. 1, 15-16, 24 (K.B.) (Eng.)).

105. Griffith v. Kentucky, 479 U.S. 314, 322-23 (1987); *see supra* notes 62, 64.

106. *Crawford*, 541 U.S. 36.

107. *See generally id.*

108. Whorton v. Bockting, 549 U.S. 406, 412 (2007); *see also* Bockting v. State, 847 P.2d 1364, 1364 (Nev. 1993) (per curiam).

109. Bockting v. State, 810 P.2d 317 (Nev. 1989) (unpublished table decision), *vacated*, 497 U.S. 1021 (1990) (mem.).

110. *Id.*

111. Bockting v. Nevada, 497 U.S. 1021, 1021 (1990) (mem.).

112. *Id.*; Idaho v. Wright, 497 U.S. 805, 812-27 (1990).

113. Bockting v. State, 847 P.2d 1364, 1368-70 (Nev. 1993) (per curiam) (citing Ohio v. Roberts, 448 U.S. 56 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004)).

114. Bockting v. Bayer, No. CV-N-98-0764-ECR (VPC), 2002 WL 34184485 (D. Nev. Mar. 19, 2002); *see also* Whorton v. Bockting, 549 U.S. 406, 413 (2007).

disagreed on the proper rationale.[115] Judge McKeown and Judge Wallace both concluded that, in fact, *Crawford* did announce a new rule of constitutional criminal procedure.[116] Judge McKeown found that the decision had recognized a watershed rule warranting retroactive application because it "rework[ed] our understanding of bedrock criminal procedure" and thus fell under *Teague*'s second exception to non-retroactivity.[117] Judge Wallace agreed that *Crawford* announced a new rule, but disagreed that it required retroactive application under *Teague*'s second exception.[118]

Judge Noonan concluded that *Crawford* did not announce a new rule, instead finding that the Court had restored prior precedent in overruling *Ohio v. Roberts*.[119] Thus, *Crawford* was dictated by precedent, rather than announcing a "new rule" governed by the *Teague* retroactivity doctrine.[120] Judge Noonan explained: "A change in rationale is not treated by the Supreme Court as a change in rules. All along, the bedrock was there."[121] Judge Noonan, however, wrote only for himself, otherwise concurring in Judge McKeown's analysis.[122] Like Judge Wallace, Judge Noonan argued that *Crawford*'s potential for retroactive application had already been foreclosed by the Court in *Schriro v. Summerlin*,[123] in which it had refused to apply *Ring v. Arizona*[124] retroactively, *while observing that it had yet to find any new rule that fit within* Teague*'s second exception based on the watershed character of the rule articulated*.[125]

The argument over retroactive application of *Crawford* was highlighted by rare support within the federal circuits for the proposition that the rule revived in *Crawford*—requiring cross-examination for admission of testimonial hearsay—would fit within *Teague*'s second exception to the retroactivity bar for cases final at the time the Court announced its decision in *Crawford*. Judge Clay of the Sixth Circuit,[126] and Judge DeMoss of the Fifth,[127] as well as Judge

115. Bockting v. Bayer, 399 F.3d 1010 (9th Cir. 2005), *amended and reh'g denied by* 408 F.3d 1127 (9th Cir. 2005), *and reh'g denied en banc*, 418 F.3d 1055 (9th Cir. 2005), *rev'd sub nom.* Whorton v. Bockting, 549 U.S. 406, 406 (2007).

116. *Id.* at 1014-16, 1024.

117. *Id.* at 1016.

118. *Id.* at 1024, 1028-29 (Wallace, J., concurring and dissenting).

119. *Id.* at 1022-24 (Noonan, J., concurring).

120. *Id.*

121. *Id.* at 1024 (citing Crawford v. Washington, 541 U.S. 36, 60 (2004)).

122. *Id.* at 1022-24.

123. 542 U.S. 348 (2004).

124. 536 U.S. 584 (2002).

125. Bockting v. Bayer, 399 F.3d at 1023-24 (Noonan, J., concurring); *id.* at 1029 (Wallace, J., concurring and dissenting).

126. Fulcher v. Motley, 444 F.3d 791, 811 (6th Cir. 2006) (Clay, J., concurring). The panel

McKeown of the Ninth,[128] all issued separate opinions accepting the argument that *Crawford* not only had announced a new rule, but one of a watershed character that warranted retroactive application. Judge DeMoss concluded, "Without confrontation in such cases, 'the likelihood of an accurate conviction is *seriously* diminished.'"[129] Judge McKeown similarly observed: "the *Crawford* rule is one without which the likelihood of accurate conviction is seriously diminished."[130]

But such "watershed" rules appear to actually exist only hypothetically in the Court's jurisprudence. Following the en banc rejection of a rehearing on the *Bockting* panel's holding affording him habeas relief,[131] the Supreme Court granted certiorari and unanimously reversed.[132] Apparently unimpressed by the views of lower court judges that *Crawford* represented a bedrock protection for criminal defendants, the Court concluded that the cross-examination requirement did threaten "an impermissibly large risk of an inaccurate conviction" sufficient to meet the reliability test of *Ohio v. Roberts*.[133]

On this point, the Court's analysis is flawed in the sense that *Crawford* directly addressed a subset of statements that the Court itself had consistently characterized as "suspect" statements made by accomplices.[134] But the statement admitted in *Ohio v. Roberts* was not an unsworn, uncrossed testimonial statement made to the police.[135] Instead, it was sworn preliminary hearing testimony subjected to cross-examination.[136] The potential for inaccurate convictions based on admission of untested accomplice statements should be viewed in light of the Court's own view of these statements as inherently suspect. To the extent that convictions have been obtained on the

---

applied pre-*Crawford* confrontation law to grant relief. *Id.* at 811 (noting that a prior panel had rejected the *Crawford* retroactivity argument in *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. 2005)).

127. Lave v. Dretke, 444 F.3d 333, 336 (5th Cir. 2006) (DeMoss, J., dissenting).

128. Bockting v. Bayer, 399 F.3d at 1016-21.

129. *Lave*, 444 F.3d at 337 (DeMoss, J., dissenting) (citing Schriro v. Summerlin, 542 U.S. 348, 352 (2004)).

130. Bockting v. Bayer, 399 F.3d at 1021.

131. Bockting v. Bayer, 418 F.3d 1055 (9th Cir. 2005) (denying motion for rehearing en banc), *rev'd sub. nom* Whorton v. Bockting, 549 U.S. 406 (2007).

132. Whorton v. Bockting, 549 U.S. at 408, 421.

133. *Id.* at 418.

134. *See* Lilly v. Virginia, 527 U.S. 116, 131 (1999); Cruz v. New York, 481 U.S. 186, 195 (1987) (White, J., dissenting) (noting that such statements "have traditionally been viewed with special suspicion"); Lee v. Illinois, 476 U.S. 530, 541 (1986); Bruton v. United States, 391 U.S. 123, 136 (1968) (explaining that such statements are "inevitably suspect").

135. 448 U.S. 56, 58-60 (1980).

136. *Id.*

basis of these statements, particularly when wholly or largely uncorroborated, the risk of inaccurate conviction in any case is substantial, and the argument for retroactive application of *Crawford* is compelling.

As both Judge Noonan and Judge Wallace had anticipated, the Court observed that a new rule fitting within the second *Teague* exception would be extremely rare[137] and unlikely to be discerned.[138] In fact, the Court noted "in the years since *Teague*, we have *rejected every claim* that a new rule satisfied the requirements for watershed status."[139] Given the Court's admitted history, it was hardly surprising that it would find that *Crawford* did not meet the requirements for a "watershed" rule under the second *Teague* exception.

Additionally, the Court rejected Judge Noonan's argument that *Crawford* did not announce a new rule, but was entirely consistent with precedent.[140] Even though *Douglas v. Alabama*[141] had never been expressly overruled, the Court in *Whorton v. Bockting* concluded that reasonable jurists would have found that *Ohio v. Roberts* correctly explained the constitutionally acceptable mode of analysis of confrontation questions and, thus, *Crawford* represented a break with that accepted precedent.[142] *Roberts* had swept far too broadly in encompassing all arguably reliable statements not subjected to cross-examination, including presumptively suspect statements made by accomplices having strong motivation to shift blame or curry favor with the police. Conversely, the Court's holding in *Crawford* perhaps swept too broadly by not limiting its testimonial hearsay scope to statements made by accomplices, a rule that would have properly addressed the factual situation in the case without reaching beyond to generate additional litigation involving other types of hearsay. Many types of hearsay have traditionally been found to be sufficiently reliable to fit within exceptions to the rule and admissible without cross-examination.[143] Additionally, in rejecting retroactivity for *Crawford*, the

137. Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (noting the exception is "extremely narrow").

138. Tyler v. Cain, 533 U.S. 656, 664 (2001).

139. Whorton v. Bockting, 549 U.S. 406, 418 (2007) (emphasis added).

140. *Id.* at 416-17.

141. 380 U.S. 415 (1965).

142. Whorton v. Bockting, 549 U.S. at 416-17.

143. *See, e.g.*, Davis v. Washington, 547 U.S. 813, 825 n.4 (2006) (holding 911 call made to report emergency admissible); White v. Illinois, 502 U.S. 346, 355-56 n.8 (1992) (accepting reliability of spontaneous declarations and statements made for purpose of medical diagnosis as "firmly rooted" exceptions to the hearsay rule).

The issue of whether out-of-court statements may be admitted as "firmly rooted" exceptions to the hearsay rule deemed so reliable to be admissible without cross-examination remains a continuing source of litigation in the aftermath of *Crawford*. For instance, lower courts have split on the question of whether laboratory results routinely used in criminal prosecutions may

Bockting Court noted that the Ninth Circuit panel's view was in conflict with "every other Court of Appeals and State Supreme Court that has addressed this issue."[144] On this point, Justice Alito erred as the New Mexico Supreme Court had applied *Crawford* retroactively to a New Mexico inmate convicted of capital murder in 1982 in *State v. Forbes*.[145] In fact, *Forbes* was pending

---

be admitted without cross-examination of the expert or technician who performed the test. *See, e.g.*, State v. Caulfield, 722 N.W.2d 304, 307-10 (Minn. 2006) (report containing laboratory test analysis "testimonial" and inadmissible without opportunity to cross-examine). *But see, e.g.*, United States v. Feliz, 467 F.3d 227 (2d Cir. 2006) (autopsy report "business record," not testimonial); People v. Geier, 161 P.3d 104, 133-41 (Cal. 2007) (DNA test results not testimonial); Rollins v. State, 897 A.2d 821, 839-43 (Md. 2006) (distinguishing statements of "fact" and statements of "opinion" in autopsy reports and ruling latter are testimonial but former are not); Commonwealth v. Verde, 827 N.E.2d 701, 704-05 (Mass. 2005) (certificate of lab analysis identifying nature and quantity of substance not testimonial); State v. Dedman, 102 P.3d 628 (N.M. 2004) (holding cross-examination of expert actually performing the test not constitutionally required); People v. Durio, 794 N.Y.S.2d 863, 867-69 (N.Y. Sup. Ct. 2005) (autopsy report not testimonial); State v. Forte, 629 S.E.2d 137, 142-44 (N.C. 2006) (police lab's report of DNA analysis "neutral" business record).

The issue is now before the United States Supreme Court in *Melendez-Diaz v. Massachusetts*, 870 N.E.2d 676 (Mass. App. Ct. 2007) (unpublished table opinion), *cert. granted*, 128 S. Ct. 1647 (2008). The case was argued in the Supreme Court in November 2008. *See generally* Transcript of Oral Argument, *Melendez-Diaz* (No. 07-591), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-591.pdf.

144. Whorton v. Bockting, 549 U.S. at 415. In a footnote, the Court related lower court authority rejecting retroactive application of *Crawford*. *Id.* at 415 n.4 (citing as examples Lave v. Dretke, 444 F.3d 333 (5th Cir. 2006); Espy v. Massac, 443 F.3d 1362 (11th Cir. 2006); Murillo v. Frank, 402 F.3d 786 (7th Cir. 2005); Dorchy v. Jones, 398 F.3d 783 (6th Cir. 2005); Brown v. Uphoff, 381 F.3d 1219 (10th Cir. 2004); Mungo v. Duncan, 393 F.3d 327 (2d Cir. 2004); Edwards v. People, 129 P.3d 977 (Colo. 2006) (en banc); Chandler v. Crosby, 916 So.2d 728 (Fla. 2005); State v. Williams, 695 N.W.2d 23 (Iowa 2005); Danforth v. State, 718 N.W.2d 451 (Minn. 2006); Ennis v. State, 137 P.3d 1095 (Nev. 2006); *In re* Markel, 111 P.3d 249 (Wash. 2005)).

145. 119 P.3d 144, 148 (N.M. 2005). The author represented New Mexico defendant Ralph Rodney Earnest from 1984 through 2006 as appellate and postconviction counsel. *Forbes* involved an action for extraordinary relief brought by the State Attorney General against the District Judge, Hon. Jay Forbes, to set aside habeas relief granted for state court defendant Ralph Rodney Earnest, the real party in interest in this litigation. Earnest had been convicted of capital murder based on admission of the inculpatory confession given to police by a codefendant who admitted his own participation in the crime, but who invoked his Fifth Amendment right to remain silent at trial, resulting in Earnest having no opportunity to cross-examine him regarding the contents of his confession or his motive for implicating others in the murder. Earnest's conviction was initially reversed, State v. Earnest, 703 P.2d 872, 876 (N.M. 1985), then affirmed on remand, State v. Earnest, 744 P.2d 539 (N.M. 1987), after the United States Supreme Court vacated the reversal, New Mexico v. Earnest, 477 U.S. 648 (1986). Earnest eventually sought relief in a state postconviction action, challenging his conviction by arguing for retroactive application of the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004). The state supreme court applied *Crawford* retroactively to afford relief on

certiorari in the Supreme Court when *Bockting* was decided and review was denied only after the decision was issued.[146] The New Mexico court's approach was consistent with the Court's subsequent decision in *Danforth*.

B. The Disposition of Danforth's Claim in the State Courts[147]

Danforth, like Bockting, asserted a confrontation claim in the direct appeal from his conviction that was finalized prior to the Court's holding in *Crawford*. Consequently, once the Court's holding in *Crawford* provided support for his Sixth Amendment claim, he relied on it as support in post-conviction proceedings. At this stage of the process, of course, potential success rested on retroactive application of *Crawford* to the facts of his case.

Danforth's claim that *Crawford* should be applied retroactively arose when he challenged a conviction obtained, in part, on the admission of a videotaped interview of the complainant in a child sexual assault case.[148] In the interview, the six-year-old complainant described the assaultive act, yet he was found

---

Earnest's confrontation claim in *Forbes.* 119 P.3d at 148. The *Earnest* litigation is discussed more extensively in Part V.A, *infra* notes 379-412 and accompanying text. For a thorough discussion of the history of Earnest's prosecution and eventual release on grant of state postconviction relief, see J. Thomas Sullivan, *Crawford, Retroactivity and The Importance of Earnest*, 98 MARQ. L. REV. 232 (2008).

146. New Mexico v. Forbes, 549 U.S. 1274 (2007); Petition for Writ of Certiorari, *Forbes*, 549 U.S. 1274 (No. 05-644), 2005 WL 3114493. Earnest filed a Suggestion of Mootness on October 17, 2006, based on dismissal of the charges that were pending on remand from the state supreme court as a result of its decision granting relief from his conviction. Nevertheless, the case was carried on the Supreme Court's docket until the State's petition was denied on March 5, 2007, New Mexico v. Forbes, 549 U.S. 1274 (2007), after the case was again distributed for the Court's March 2nd conference. The Court issued its opinion in *Bockting* on February 28, 2007. Whorton v. Bockting, 549 U.S. at 406.

147. The United States Supreme Court's grant of certiorari was following denial of post-conviction relief, rather than after direct appeal. The same issue was essentially raised on direct appeal and twice post-conviction before finally reaching the Supreme Court. Each time the Minnesota Court of Appeals affirmed and the Minnesota Supreme Court agreed, although sometimes only with an order denying review. State v. Danforth, 573 N.W.2d 369 (Minn. Ct. App. 1997), *review denied*, (Minn. Feb. 19, 1998), *appeal after new sentencing hearing*, No. C5-98-2054, 1999 WL 262143 (Minn. Ct. App. May 4, 1999), *review denied*, (Minn. July 28, 1999), *denial of post-conviction relief aff'd*, No. C6-00-699, 2000 WL 1780244 (Minn. Ct. App. Dec. 5, 2000), *review denied* (Minn. Feb. 13, 2001), *denial of post-conviction relief aff'd*, 700 N.W.2d 530 (Minn. Ct. App. 2005), *aff'd*, 718 N.W.2d 451 (Minn. 2006), *cert. granted*, Danforth v. Minnesota, 127 S. Ct. 2427 (2007), *rev'd*, 128 S. Ct. 1029 (2008), *opinion following remand*, Danforth v. State, 761 N.W.2d 493 (Minn. 2009). On remand from the United States Supreme Court, the Minnesota Supreme Court upheld the denial of post-conviction relief, holding that *Crawford* would not be applied retroactively in state proceedings. Danforth v. State, 761 N.W.2d 493 (Minn. 2009).

148. Danforth v. Minnesota, 128 S. Ct. 1029 (2008).

incompetent to testify at trial because of his inability to answer questions.[149] His report of the offense was corroborated, however, by the testimony of his five-year-old sister, whom the court did find competent to testify to events involving her brother and the accused.[150]

Admission of this type of evidence was addressed by the Supreme Court in *Maryland v. Craig*,[151] in which the Court held that the use of closed-circuit, televised testimony of a child, in lieu of live testimony and cross-examination before the jury, is sufficient to meet the requirement for confrontation when the trial court is convinced that in-court confrontation threatened to traumatize the child witness.[152] The *Craig* approach recognized that the primary goal of confrontation was achieved by cross-examination of the witness, albeit in a fashion designed to further the important policy interest in protecting child victims from further emotional injury that could result from the trauma of testifying in the presence of the accused and before strangers.[153]

But, in Danforth's case, the confrontation claim did not arise in a process identical to that expressly considered by the *Craig* court. In particular, the videotaped interview viewed by jurors in *Danforth* did not record a deposition in which the complainant was cross-examined by defense counsel, though not in the presence of the defendant himself, like the interview in *Craig*.[154] Instead, the taped interview included a description of the assault by the complainant, as well as his five-year-old sister.[155]

The trial court admitted the videotape, finding that it bore sufficient indicia of reliability to warrant admission, including the fact that the child's statements "appeared spontaneous and largely unsolicited by leading questions" and that

149. *Id.* The complainant was found incompetent to testify at trial when he could not respond to questioning. *Id.*

150. *Id.*

151. 497 U.S. 836 (1990).

152. *Id.* at 845-54. The procedure approved in *Craig* does not require the witness to testify in the physical presence of the accused during the child's testimony. Instead, the testimony was shown to jurors by closed circuit television, which effectively negated or modified the requirement of *Coy v. Iowa*, 487 U.S. 1012 (1988), for face-to-face confrontation in the courtroom at trial. In *Coy*, Justice Scalia had written for the majority: "We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Id.* at 1016. *Craig*, however, applied a rule of necessity for excepting face-to-face, in court confrontation, from the general Sixth Amendment policy preference. *Craig*, 497 U.S. at 844-46.

153. *Craig*, 497 U.S. at 851-52.

154. *Id.* at 840-42; State v. Danforth, 573 N.W.2d at 372.

155. State v. Danforth, 573 N.W.2d at 372.

the complainant "lacked any apparent motivation to fabricate the accusation."[156] The appellate court agreed with this assessment, noting that Minnesota applied the *Idaho v. Wright* formula for determining reliability—a showing of "particularized guarantees of trustworthiness"[157]—when determining whether an out-of-court statement is admissible in the absence of cross-examination.[158] Of course, this is the same test articulated in *Ohio v. Roberts*.[159]

Relying on *Crawford* and the Court's repudiation of the "particularlized guarantees of trustworthiness" test,[160] Danforth challenged the admission of the videotaped interview—rather than a deposition—of his child accuser in light of the fact that the interview itself was made with a clear eye toward its use in litigation.[161] In fact, the recorded interview was made in accordance with a Minnesota statute expressly authorizing the admission of this type of interview into evidence,[162] as the court itself noted.[163] The state supreme court denied

---

156. *Id.*

157. 497 U.S. 805, 815 (1990) (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004)).

158. State v. Danforth, 573 N.W.2d at 375.

159. 448 U.S. at 66.

160. *Crawford*, 541 U.S. at 60 (quoting *Roberts*, 448 U.S. at 66).

161. Danforth v. State, 718 N.W.2d 451, 454-55 (Minn. 2006).

162. *See* MINN. STAT. § 595.02, subdiv. 3 (1999), which provides:

> An out-of-court statement made by a child under the age of ten years . . . alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child . . . not otherwise admissible by statute or rule of evidence, is admissible as substantive evidence if:
>
> (a) the court or person authorized to receive evidence finds, in a hearing conducted outside of the presence of the jury, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and
>
> (b) the child * * * either:
>
> (i) testifies at the proceedings; or
>
> (ii) is unavailable as a witness and there is corroborative evidence of the act; and
>
> (c) the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.
>
> For purposes of this subdivision, an out-of-court statement includes video, audio, or other recorded statements. An unavailable witness includes an incompetent witness.

Id.

163. State v. Danforth, 573 N.W.2d at 375.

review,[164] and Danforth lost in his initial round of post-conviction proceedings.[165]

However, after the United States Supreme Court issued its decision in *Crawford*, Danforth again applied for state post-conviction relief, arguing retroactive application of *Crawford* as a basis for setting aside his conviction.[166] The Minnesota Court of Appeals denied relief, holding that *Crawford* announced a new rule not subject to *Teague*'s exceptions to the general rule of non-retroactivity.[167] In denying relief on Danforth's claim, the state appellate court also agreed with the approaches taken by all federal circuits other than the Ninth in *Bockting v. Bayer*[168] in determining whether *Crawford* fit within one of the *Teague* exceptions.[169]

On review of the court of appeals ruling, the Minnesota Supreme Court also rejected Danforth's argument that *Crawford* should be applied retroactively.[170] The court concluded that the limitations on retroactivity imposed in *Teague* effectively precluded state courts from affording broader retroactivity to Supreme Court decisions announcing new rules of constitutional criminal procedure than that required by federal due process protection.[171] The state supreme court's interpretation of the constitutional retroactivity framework dominated by *Teague* gave rise to review in the United States Supreme Court by writ of certiorari.[172]

---

164. *Id.* at 369. The court of appeals opinion notes that the Minnesota Supreme Court denied review on February 19, 1998. The court of appeals remanded for resentencing and subsequently denied relief on his appeal from the resentencing determination in the trial court. State v. Danforth, No. C5-98-2054, 1999 WL 262143 (Minn. Ct. App. 2000), *rev. denied*, (Minn. July 28, 1999).

165. Danforth v. State, C6-00-699, 2000 WL 1780244, at *1 (Minn. Ct. App. Dec. 5, 2000). In his application for post-conviction relief, Danforth alleged, *inter alia*, that he was denied his confrontation rights. Conceding that he had raised the confrontation issue on direct appeal, Danforth argued that newly discovered evidence showed that the interview with the child witness admitted in evidence at trial utilized techniques discredited as likely to produce unreliable information. *Id.* at *2 (discussing issue (6) in Danforth's petition). The court of appeals rejected his claim that the evidence supporting his reliability argument was either newly discovered or newly available. *Id.*

166. Danforth v. State, 700 N.W.2d 530, 531 (Minn. Ct. App. 2005).

167. *Id.* at 531-35.

168. 399 F.3d 1010 (9th Cir. 2005), *amended by* 408 F.3d 1127 (9th Cir. 2005).

169. Danforth v. State, 700 N.W.2d at 532-35.

170. Danforth v. State, 718 N.W.2d 451 (Minn. 2006).

171. *Id.* at 455.

172. Danforth v. Minnesota, 127 S. Ct. 2427 (2007).

IV. Danforth *in the Supreme Court*

Whorton declared that *Crawford* constituted a "new rule" not retroactively applicable to benefit defendants in either state or federal proceedings in which the prosecution relied on uncrossed, testimonial statements.[173] But the question left unresolved until *Danforth v. Minnesota* was whether state courts are free to give retroactive effect to *Crawford* in a more expansive way than that allowed by *Teague* in cases under state law.[174]

The Court's decision to grant review in *Danforth* might have initially suggested that it would hold that *Teague* controlled the retroactivity of its decisions in order to achieve a desired uniform application of federal constitutional law,[175] but state courts were free to apply their own constitutional and other protections based on state law retroactively in accord with local policy. Certainly, the desired uniform interpretation and application of federal constitutional protections was at the heart of the Court's broad assertion of jurisdiction over state court decisions expressly or implicitly resting on interpretations of federal constitutional protections expanding the Court's own holdings in *Michigan v. Long*.[176]

However, in an interesting split decision, the Court did not rest its decision in *Danforth* on concern for a uniform application of federal constitutional law, divorcing interpretation of federal constitutional protections from the scope of their application.[177] The *Teague* retroactivity doctrine does serve to ensure a uniform application of "new rules" announced by the Court, imposing a duty on state courts to apply those decisions benefitting state court defendants retroactively when the Court holds the decisions are to be given retroactive effect as a matter of federal due process. However, as the Court's post-*Teague* jurisprudence demonstrates, the burden is not particularly onerous because no procedural protections have actually been deemed retroactive under the second *Teague* exception.[178]

---

173. Whorton v. Bockting, 549 U.S. 406, 421 (2007).

174. Danforth v. Minnesota, 128 S. Ct. 1029, 1033 (2008).

175. *E.g.*, Arkansas v. Sullivan, 532 U.S. 769, 771 (2001) (reversing "[b]ecause the Arkansas Supreme Court's decision on rehearing is flatly contrary to this Court's controlling precedent . . . .").

176. 463 U.S. 1031, 1040, 1043 n.8 (1983) ("The state courts are required to apply federal constitutional standards, and they necessarily create a considerable body of 'federal law' in the process.").

177. Danforth v. Minnesota, 128 S. Ct. at 1041.

178. Whorton v. Bockting, 549 U.S. at 418.

A. Rebutting the Minnesota Courts' Retroactivity Position

The Minnesota Supreme Court addressed the issue of *Crawford* retroactivity, which was decided adversely to Danforth by the intermediate court.[179] Danforth argued that regardless of whether *Crawford* applied retroactively as a matter of due process, the state court was free to apply it retroactively because it announced a "new rule" fitting within either of the *Teague* exceptions to non-retroactivity.[180] The state supreme court rejected Danforth's argument, relying on its decision in *State v. Houston*,[181] where the court held that the Supreme Court's decision in *Blakely v. Washington*[182] would not be applied retroactively absent an express declaration requiring retroactive application by the United States Supreme Court.[183] The *Houston* court, however, did not hold that *Teague* forbids retroactive application of federal constitutional "new rules" by state courts.[184] Instead, the court rejected the argument that, in fact, the limitations imposed upon sentencing discretion by *Blakely* did not fit within *Teague*'s exceptions.[185]

In *O'Meara v. State*, the Minnesota court articulated its understanding of the mandatory nature of *Teague* when dealing with the duty to apply federal constitutional "new rules" articulated by the Supreme Court.[186] The *O'Meara* court, however, did not address the question ultimately raised by *Danforth*: whether Minnesota courts could apply a "new rule" retroactively as a matter of state law or policy when the Supreme Court did not expressly provide for retroactive application as a matter of federal due process.[187] It did, however, hold that because O'Meara's case was not final when the Court's decision in

179. Danforth v. State, 718 N.W.2d 451, 461 (Minn. 2006).

180. *Id.* at 455. The court observed that *Danforth* raised the question of the state court's authority to apply *Crawford* retroactively despite the fact that it would not qualify for retroactive application under *Teague* for the first time in his appeal to the state supreme court. Nevertheless, the court addressed the issue "in the interest[] of justice." *Id.* By ruling on the merits, the state court avoided the application of procedural default that would have foreclosed consideration of the issue by the United States Supreme Court on certiorari.

181. 702 N.W.2d 268 (Minn. 2005).

182. 542 U.S. 296 (2004).

183. Danforth v. State, 718 N.W.2d at 455.

184. *Houston*, 702 N.W.2d at 273.

185. *Id.* at 271-74. *Blakely* held that enhanced sentences based upon particular circumstances requires pleading and proof of those factors warranting increased sentences by the trier of fact, applying the principle of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), to certain sentencing discretionary decisions traditionally exercised by trial judges within statutory frameworks. *Blakely*, 542 U.S. at 303.

186. O'Meara v. State, 679 N.W.2d 334, 339-40 (Minn. 2004).

187. *Id.* at 336.

Apprendi v. New Jersey[188] was announced, he would be entitled to the benefit of that holding based on the requirement that even "new rules" are applicable to issues raised in pending litigation not final at the time the Supreme Court announces its decision.[189] It also made an interesting observation that would later prove somewhat ironic in the context of *Danforth*: "It is axiomatic that as Minnesota's highest court we determine whether our decisions on *state law* are given retroactive or prospective effect."[190] It did so, explaining its own doctrine of retroactivity for state law decisions that parallels the approach taken by the Supreme Court in *Griffith*.[191]

The Minnesota Supreme Court concluded that it *could not* apply *Crawford* retroactively on Danforth's claim, consistent with its own precedent.[192] In *O'Meara*, it had relied on the Supreme Court's decision in *American Trucking Ass'ns, Inc. v. Smith*[193] in distinguishing between its authority to give its own decisions on matters of state law retroactive effect and its authority to apply federal decisions retroactively.[194] Applying *Smith*, the court explained this difference on the question of retroactivity:

> In this case however, we are called upon to determine whether O'Meara is entitled to benefit from a new rule of *federal constitutional criminal procedure*. In this context, we are compelled to follow the lead of the Supreme Court in determining when a decision is to be afforded retroactive treatment.[195]

Later, in *Danforth*, the state court again relied on *Smith*[196] and *Michigan v. Payne*[197] to explain that it considered itself bound by the Supreme Court's retroactivity doctrine in rejecting the argument that it could afford retroactive application to federal constitutional decisions as a matter of *state* law.[198]

The United States Supreme Court, however, rejected the Minnesota court's reading of *Smith* and *Payne* in considering Danforth's claim that states could provide broader retroactivity to federal constitutional violation decisions than

188. *Apprendi*, 530 U.S. at 490.
189. *O'Meara*, 679 N.W.2d at 339-40 (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987)).
190. *Id.* at 338.
191. *Id.*
192. Danforth v. Minnesota, 718 N.W.2d 451, 460-61 (Minn. 2006).
193. 496 U.S. 167, 177 (1990).
194. *O'Meara*, 679 N.W.2d at 338-40.
195. *Id.* at 339 (*Smith*, 496 U.S. at 177-78).
196. *Smith*, 496 U.S. 167.
197. 412 U.S. 47 (1973).
198. Danforth v. Minnesota, 718 N.W.2d 451, 456 (Minn. 2006).

that commanded by *Teague*.[199] *Payne* was decided prior to *Teague* and dealt with a particularly fact-specific question.[200] The state court had applied the prohibition against vindictive sentencing on remand recognized by the Court in *North Carolina v. Pearce*[201] in a pending state case prior to a final determination on retroactive application being made by the Supreme Court.[202] When the Court held that *Pearce* was not to be afforded retroactive effect in *Payne*, it reversed because the state court had cautiously applied *Pearce* retroactively,[203] awaiting a definitive holding by the Supreme Court on retroactivity.[204]

Thus, the *Danforth* majority noted that *Payne*, arising in the context of the state court's attempt to anticipate a ruling on mandatory retroactive application as a matter of due process, had not addressed the issue of state authority to apply federal constitutional decisions retroactively at all.[205] *Payne* had not foreclosed broader retroactive application of federal constitutional "new rules" because of the context in which the issue arose.[206] In fact, the majority also noted that Pennsylvania[207] had expressly afforded retroactive application of the Court's holding in *Batson v. Kentucky*[208] despite the Court's own conclusion that *Batson* would not be given mandatory retroactive effect as a matter of federal due process in *Allen v. Hardy*.[209]

Similarly, the majority held that the Minnesota court had misapprehended the holding in *Smith*.[210] There, the retroactivity issue dealt with the right to a refund of taxes paid to the State of Arkansas under a scheme similar to that

---

199. Danforth v. Minnesota, 128 S. Ct. 1029, 1042 (2008).

200. *Id.* at 1042-43 (citing *Payne*, 412 U.S. 47).

201. 395 U.S. 711, 723-26 (1969).

202. Danforth v. Minnesota, 128 S. Ct. at 1042-43 (citing *Payne*, 412 U.S. at 49).

203. *Id.* at 1043. The Court observed that in *Payne*, the Michigan court had applied *Pearce* retroactively, expressly noting that it was doing so pending clarification from the Court on this question. *Id.* (citing *Payne*, 412 U.S. at 49).

204. People v. Payne, 191 N.W.2d 375, 378 n.2 (Mich. 1971) ("We decline to predict the high Court's answer to the question of *Pearce*'s retroactive or prospective application, but we will apply *Pearce* in the present case in order to instruct our trial courts as to the Michigan interpretation of an ambiguous portion of *Pearce* . . . pending clarification by the United States Supreme Court.").

205. Danforth v. Minnesota, 128 S. Ct. at 1043.

206. *Id.*

207. Pennsylvania v. McCormick, 519 A.2d 442, 444-47 (Pa. Super. Ct. 1986) (announcing state court not bound by federal retroactivity doctrine in applying *Batson* retroactively in case on direct appeal).

208. 476 U.S. 79 (1986).

209. 478 U.S. 255 (1986) (per curiam).

210. Danforth v. Minnesota, 128 S. Ct. at 1045-46 (citing Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990)).

declared unconstitutional in a case arising out of a challenge in Pennsylvania, *American Trucking Ass'ns, Inc. v. Scheiner*.[211] The complainants in *Smith* argued that they were entitled to refunds because the Court's decision that the tax levy violated constitutional protections arguably meant that taxes paid were illegally extracted.[212]

Once again, the retroactivity issue arose in an odd procedural context. This time, however, it arose because the Court's divisions in the two *American Trucking* cases did not produce a clear rule with regard to the claimed entitlement to refund,[213] as Justice Stevens explained for the *Danforth* majority.[214] He noted that Justice Scalia had voted with the dissenters in *Scheiner*[215] and would have found Pennsylvania's highway user tax levy constitutionally acceptable.[216] Subsequently, when a similar state-imposed tax was before the Court in *Smith*, the plurality decision rejected retroactive application of *Scheiner* to require refund of taxes collected by Arkansas prior to the Court's invalidation of the comparable taxation scheme in *Scheiner*.[217]

Justice Scalia concurred in the judgment in *Smith*,[218] however, but explained that once the *Scheiner* majority had found the tax unconstitutional—despite his disagreement with that decision—he believed that the tax could not be constitutionally levied *after* the Court issued the decision in *Scheiner*.[219] He based his concurrence on the reasonable expectations of litigants relying on the doctrine of stare decisis and the principle of adherence to precedent.[220]

Justice Scalia's core concern is apparently that the Court not engage in innovative interpretation of the Constitution, but remain faithful to its immutable principles. Consequently, as in *Scheiner*, the announcement of a holding that is prospective only in nature is inconsistent with his position that the Court itself is not free to articulate new constitutional values, but is bound by the text and original understanding of the document. The prospective nature of a ruling suggests that the majority has engaged in interpretive license that he finds inconsistent with his strict constructionist approach. Balancing

211. *Smith*, 496 U.S. 167; Am. Trucking Assn's, Inc. v. Scheiner, 483 U.S. 266 (1987).

212. *Smith*, 496 U.S. at 172. This claim was sufficiently persuasive that Justice Blackmun, sitting as Circuit Justice, ordered the taxes paid be held in escrow pending disposition of the question of retroactive application of *Scheiner*. Am. Trucking Ass'ns, Inc. v Gray, 483 U.S. 1306, 1309-10 (1987).

213. *Smith*, 496 U.S. 167; *Scheiner*, 483 U.S. 266.

214. Danforth v. Minnesota, 128 S. Ct. at 1043-46.

215. *Id.* (citing *Scheiner*, 483 U.S. at 303 (Scalia, J., dissenting)).

216. *Scheiner*, 483 U.S. at 303-06 (Scalia, J., dissenting).

217. *Smith*, 496 U.S. at 182.

218. *Id.* at 200 (Scalia, J., concurring).

219. *Id.* at 200-01.

220. *Id.* at 204-05.

his constitutional view, however, is his belief that once the *Scheiner* majority found the tax unconstitutional, it could not arbitrarily limit relief such that the underlying holding itself reflected a new interpretation of the Constitution.[221]

Justice Scalia argued that the Court could not simply change the meaning of the Constitution prospectively. If the Pennsylvania taxation scheme violated it then, he contended, the tax had always been levied in violation of the Constitution.[222] The *Smith* plurality held that Arkansas and out-of-state

---

221. Thus, litigants were entitled to rely on their understanding of the law—that states could impose taxes disproportionately greater on out-of-state entities prior to the Court's decision in *Scheiner*, but once the Court announced its decision in *Scheiner*, it was no longer acceptable for other states to levy comparable taxes. However, in his view in *Smith*, taxes levied by Arkansas after the announcement of the decision in *Scheiner* were subject to refund, according to Justice Scalia, while those levied prior to the announcement of *Scheiner* were not.

222. *Smith*, 496 U.S. at 204-05. This raises a point never addressed in the retroactivity decisions. Given Justice Scalia's doctrinal position with regard to the Court's interpretation of the Constitution, one might question how a "new rule" could ever be identified, since all rules of constitutional source are immutable. Yet, Justice Scalia seems to have succumbed to *Teague*'s "new rule" formulation since he did not dissent in *Whorton v. Bockting*, 549 U.S. 406 (2007), where the Court unanimously rejected retroactive application of *Crawford v. Washington*, 541 U.S. 36 (2004). If true to his view of *Scheiner* and *Smith*, he might have been expected to argue in favor of retroactive application of *Crawford*, at least with respect to the requirement that accomplice testimony be tested by adequate cross-examination. Retroactive application of the holding in *Crawford* would have been implicit in the Court's recognition that its confrontation reasoning in *Ohio v. Roberts*, 448 U.S. 56 (1980), and *Lee v. Illinois*, 476 U.S. 530 (1986) had departed from the correct meaning of the Sixth Amendment. That is unless, of course, explication of constitutional language means one thing when considering unfair taxation and another when the issue involves criminal prosecution resulting in imprisonment or execution.

For instance, Justice Scalia did not join four other Justices who dissented from the denial of a stay of execution in *Aguilar v. Dretke*, 547 U.S. 1161 (2006), where Justices Stevens, Souter, Ginsburg and Breyer voted to stay the execution of a Texas petitioner asserting a *Crawford* claim based on admission of an accomplice's uncrossed statement to police at the capital sentencing phase of his state court trial. The petitioner applied for the stay following the Court's grant of certiorari on May 15, 2006, in *Whorton v. Bockting*, 547 U.S. 1127 (2006). *See Ex parte* Aguilar, No. WR-36242-03, 2006 WL 1412666, at *1 (Tex. Crim. App. May 22, 2006). Aguilar's *Crawford* claim was preserved and properly before the state court and United States Supreme Court on the question of *Crawford*'s retroactivity. *Id.* at *6 (Price, J., dissenting). Because Aguilar did not get the fifth vote for a stay, despite the votes of four Justices needed for grant of certiorari on his claim, he was executed on May 20, 2006, and his pending cert petition was dismissed by the Court as moot on June 19th (Aguilar v. Quarterman, 547 U.S. 1204 (2006)), months before the Court actually rejected retroactive application of *Crawford* in *Bockting* on February 28, 2007. Whorton v. Bockting, 549 U.S. 406.

In fact, the *Smith* plurality argued that retroactive application in the *Griffith* context—application of new rules to cases pending on direct review at the time the new rule is announced—represents a far more persuasive circumstance in criminal than civil contexts, where retroactive application that favors one party necessarily disadvantages another. *Smith*,

trucker taxpayers were not necessarily entitled to a refund because *Scheiner* did not apply retroactively to statutory schemes existing prior to the date on which the Court declared the tax unconstitutional.[223] The dissent[224] agreed that the Arkansas statute was invalid based on the holding in *Scheiner*,[225] but concluded that the refund right was not resolved simply by retroactive application of *Scheiner* as a matter of federal retroactivity doctrine because retroactivity might also be predicated on state law concerns.[226] Instead, the dissent argued for application of a *Griffith*-like rule that prescribed retroactive application as a matter of federal law for those similarly-situated litigants whose claims were pending at the time of announcement of a controlling constitutional decision.[227] But, the dissent also observed that the Arkansas court had considered itself bound not to afford retroactive effect to *Scheiner* as a matter of federal law and argued that the question of retroactive application should also be decided by the state courts in accord with state law.[228] Ultimately, the effect of the holding in *Smith* was to require Arkansas to refund taxes paid after the date of the decision in *Scheiner*, rather than extending the decision to include all taxes paid after the date on which the legal challenge to the tax was initiated.[229]

Presumably, Justice Scalia would have voted for retroactive application of *Scheiner*, including a right to refund of taxes paid, had he agreed with the *Scheiner* majority that the taxation scheme was, in fact, unconstitutional.[230]

---

496 U.S. at 197-99. But, as Justice Scalia suggested in his opinion concurring in the judgment in *Smith*, his real concern may simply lie in his criticism of the "jurisprudential quagmire" that he believed characterized the Court's "negative" Commerce Clause decisions, resulting in "destabilization" of the law in this area. *Id.* at 202 (Scalia, J., concurring).

223. *Id.* at 200.

224. *Id.* at 205 (Stevens, J., dissenting).

225. *Id.* at 211, 218 (Stevens, J., dissenting) (citing Am. Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266 (1987)). The Court had previously vacated an Arkansas decision upholding the tax, American Trucking Ass'ns, Inc. v. Gray, 707 S.W.2d 759 (Ark. 1986), *rev'd* 483 U.S. 1306 (1987), in light of *Scheiner*, 483 U.S. 266., and on remand, the Arkansas Supreme Court held the tax unconstitutional. Am. Trucking Ass'ns, Inc. v. Gray, 746 S.W.2d 377 (Ark. 1988).

226. *Smith*, 496 U.S. at 224-25 (Stevens, J., dissenting).

227. *Id.* at 214-15 (Stevens, J., dissenting).

228. *Id.* at 225 (Stevens, J., dissenting). The state supreme court, on remand, had concluded that it could only apply *Scheiner* prospectively as a matter of federal constitutional law. *Gray*, 746 S.W.2d at 378. But, that court also acknowledged that the taxes held in escrow were subject to refund. *Id.* at 378-79.

229. Am. Trucking Ass'ns, Inc. v. Smith, 792 S.W.2d 616, 616 (Ark. 1990), *on remand from* 496 U.S. 167 (finding that not only was refund of taxes paid into the escrow account on order of Justice Blackmun, American Trucking Ass'ns, Inc. v. Gray, 483 U.S. 1306 (1987), required, but that taxes paid following the date of issuance of the *Scheiner* decision, 483 U.S. 266, were also subject to refund).

230. *Smith*, 496 U.S. at 204 (Scalia, J., concurring). Justice Scalia observed:

According to Justice Stevens, the proper view of *Smith*'s retroactivity question would have been resolved by looking to the dissenting justices' position, factoring in Justice Scalia's general approach to constitutional interpretation.[231] But, he also expressly observed that nothing written in *Smith* had indicated that Arkansas could not order a refund of the taxes collected as a matter of state law.[232]

Justice Stevens then explained that the unresolved question of retroactive application of its decisions, which in the taxation area includes the refund of taxes paid as a matter of due process, had been addressed subsequently in *Harper v. Virginia Department of Taxation*.[233] Because of its imprecision, however, the *Harper* Court's explanation of the federal due process requirement left the ultimate refund question up to the states.[234] In fact, the *Harper* Court merely admonished states to fashion a remedy consistent with federal due process principles, ultimately leaving the question to be resolved by individual states as matters of state law, so long as the remedy adopted complies with federal due process standards.[235]

The *Danforth* majority, therefore, concluded that neither of the decisions relied on by the Minnesota Supreme Court supported the state court's conclusion that it could provide no greater retroactive application to the Court's decisions than that imposed by the Court itself within the *Teague* framework.[236] In fact, the majority concluded: "They [*Payne* and *Smith*] provide no support for the proposition that federal law places a limit on state authority to provide remedies for federal constitutional violations."[237] Consequently, the majority held that state courts are free to apply Supreme

---

> Something is wrong, however, if I must take that position with respect to the pre-*Scheiner* taxes at issue in the present case. Believing that Arkansas was fully entitled to impose the taxes, I would nonetheless make the fifth vote to penalize it for having done so even during the period (pre-*Scheiner*) when our opinions announced it could lawfully do so-and I would impose this injustice in the name of stare decisis, that is, in the interest of protecting settled expectations.

Id. (Scalia, J., concurring).

231. Danforth v. Minnesota, 128 S. Ct. 1029, 1045 (2008).

232. *Id.* at n.22. But, as Justice Stevens noted in his dissenting opinion in *Smith*, Arkansas follows the common law rule that taxes voluntarily paid cannot be recovered. *Smith*, 496 U.S. at 207 (Stevens, J., dissenting).

233. Danforth v. Minnesota, 128 S. Ct. at 1045 (citing Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993)).

234. *Id.* (citing *Harper*, 509 U.S. at 100) ("[W]e declared the similar tax unconstitutional–but that this did not necessarily entitle the petitioners to a full refund.").

235. *Harper*, 509 U.S. at 101-02.

236. Danforth v. Minnesota, 128 S. Ct. at 1045.

237. *Id.* at 1045-46.

Court decisions recognizing "new rules" retroactively according to their own retroactivity policies.[238]

B. Addressing the Dissent's Concern for National Application of Law

The dissenting opinion in *Danforth*, written by Chief Justice Roberts and joined by Justice Kennedy, argued primarily from a policy position favoring a uniform application of federal constitutional law.[239] Having rejected the argument that prior decisions had mandated extension of the *Teague* doctrine to govern state courts in the retroactive application of federal constitutional rules, the majority then addressed the issue pressed by Chief Justice Roberts in his dissent.[240]

The Chief Justice stressed that the Supreme Court "is the final arbiter of federal law" and thus, argued that the question of retroactivity of its decisions should be resolved by the Court, rather than by state courts.[241] To permit states to determine retroactivity as a matter of state law or policy, as opposed to consistently with the Court's own retroactivity determination, would create a situation in which a defendant in one jurisdiction might benefit from a retroactive application of a new rule, while a defendant in another—convicted of the same offense—would not; one might escape a death sentence as a consequence while the other would be executed.[242] For Chief Justice Roberts, this result would be "startling."[243] He cautioned: "That result is contrary to the Supremacy Clause and the Framers' decision to vest in 'one supreme Court' the responsibility and authority to ensure the uniformity of federal law."[244]

Following the full development of his argument countering the majority's analysis, the Chief Justice finally explained, "This dissent is compelled not simply by disagreement over how to read those cases, but by the fundamental issues at stake—our role under the Constitution as the final arbiter of federal law, both as to its meaning and its reach, and the accompanying duty to ensure the uniformity of that federal law."[245] Thus, from his perspective, the issue presented in *Danforth* was primarily concerned with the preservation of a uniform interpretation and application of federal constitutional law.[246]

238. *Id.* at 1042.
239. *Id.* at 1047-48 (Roberts, CJ., dissenting).
240. *Id.* at 1047.
241. *Id.*
242. *Id.*
243. *Id.* at 1047-48.
244. *Id.* at 1048.
245. *Id.* at 1058.
246. *See id.* at 1047-59.

Uniformity of interpretation is, of course, consistent with the Court's determination in reserving the right to review state court decisions construing federal constitutional provisions claimed in *Michigan v. Long*.[247] But the Chief Justice offered very little in the way of compelling argument for the proposition that federalism is threatened in any way by state court autonomy in the determination of when to apply Supreme Court precedent retroactively. Instead, he suggested in his dissent that state courts should logically be permitted to decide whether to retroactively apply new rules even when the Court has dictated that they must be applied retroactively consistent with due process.[248] In support of his argument, he pointed to the reservation of the question of mandatory retroactive application of new rules fitting within the second *Teague* exception in the state postconviction process.[249] The majority noted:

> We note at the outset that this case does not present the questions whether States are required to apply "watershed" rules in state post-conviction proceedings, whether the *Teague* rule applies to cases brought under 28 U.S.C. § 2255 (2000 ed., Supp. V), or whether Congress can alter the rules of retroactivity by statute. Accordingly, we express no opinion on these issues.[250]

For the dissent, the majority's express refusal to answer these questions in *Danforth* reflected recognition that its conclusion was not consistent with the Court's prior decisions.[251] But the majority's refusal to answer the questions it recognized does not necessarily mean that the answers would undermine its decision.

1. The Import of the Majority's Unanswered Questions

Clearly, two of the three questions reserved by the majority further implicate federalism values. The first unanswered question, relating to state application of "watershed" rules in state post-conviction proceedings, directly implicates the scope of the Court's authority to enforce its own retroactivity determination. This issue did not need to be addressed in *Danforth* in order to resolve the issue before the Court, but it is interesting that the majority would hold that this question of application in state post-conviction proceedings remains in doubt. Assuming that the Court were to identify a "new,"

247. 463 U.S. 1032 (1983).

248. Danforth v. Minnesota, 128 S. Ct. at 1058.

249. *Id.* ("The majority carefully reserves that question, see *ante*, at 1034, n. 4, confirming that the majority regards it as open.").

250. *Id.* at 1034 n.4.

251. *Id.* at 1058.

"watershed" rule of constitutional criminal procedure, a possibility that the Court itself has viewed as doubtful,[252] the rule would be subject to retroactive application as a matter of federal due process, consistent with the second exception to the general principle of non-retroactivity adopted in *Teague*.

a) Teague *Retroactivity and State Post-conviction Litigation*

It is difficult to imagine that such a hypothetical "watershed" rule would not then be applicable in state post-conviction proceedings as a matter of federal due process. Otherwise, the retroactivity promise of *Teague* in recognizing the second exception for "watershed" rules would make little sense. Those state cases still pending in the trial process or direct appeal would be controlled by the "new rule" by application of *Griffith*. The only state court cases which would invoke retroactive application of the "watershed" rule promised by *Teague* would be those cases finalized at the time of the announcement of the "new rule," and the only reasonable application of the retroactivity guarantee would be in state post-conviction proceedings.

However, state courts would not necessarily be required to grant relief on the announcement of a new rule because requirements for preservation of error could be applied to frustrate litigants attempting to rely on the new rule. Failure to claim the right ultimately recognized by the Supreme Court would arguably follow a state's regular and consistent use of procedural default to bar relief on claims not preserved in the trial process. Thus, even though *Teague* might require that state litigants be entitled to claim the benefit of the "watershed" rule, a failure to have asserted a claim to reliance on the rule ultimately recognized might result in forfeiture of the claim. Failure to anticipate and preserve the claim could frustrate prospects for relief, even though preservation of the claim would have been futile based on existing precedent at the time that a timely objection or other action necessary for preservation would have been required.[253]

Additionally, even assuming that state litigants would be entitled to rely on a "new," "watershed" rule warranting retroactive application, some litigants likely would not obtain relief simply because the violation would prove harmless. Because the new rule would necessarily implicate a federal constitutional protection, the *Chapman* harmless error doctrine[254] would apply

252. Tyler v. Cain, 533 U.S. 656, 667 n.7 (2001) ("As we have recognized, it is unlikely that any of these watershed rules 'ha[s] yet to emerge.'").

253. For consideration of the "futility exception" in constitutional litigation, see Brent E. Newton, *An Argument for Reviving the Actual Futility Exception to the Supreme Court's Procedural Default Doctrine*, 4 J. APP. PRAC. & PROCESS 521 (2002).

254. Chapman v. California, 386 U.S. 18 (1967). Under *Chapman*, the burden is placed on the prosecution to demonstrate that constitutional trial error was harmless beyond a reasonable

unless the rule addressed a matter of structural error,[255] requiring reversal without proof of any actual prejudice to the accused.[256]

Thus, even though a federal constitutional protection recognized as a "new," "watershed" rule by the Supreme Court would apply retroactively in state litigation, the retroactivity requirement would not necessarily result in uniformity with regard to the actual application of the rule. Instead, the availability of the rule would not compromise state procedural default doctrines and harmlessness determinations, so that the retroactivity would guarantee only access, not relief.

b) Teague *and Federal Post-conviction Litigation*

The second question deliberately left unanswered by the *Danforth* Court involves the application of the *Teague* retroactivity doctrine to post-conviction actions brought by federal defendants pursuant to 28 U.S.C. § 2255. To the extent that *Teague* rests on a policy decision arising from the relationship of federal and state courts in the protection of federal constitutional rights, the decision does not implicate the same core federalism value when federal convictions are involved.[257] Thus, in a pre-*Teague* decision, *Davis v. United States*, a petitioner convicted in a federal proceeding was entitled to rely on an intervening change in the controlling legal principle to challenge his conviction in a federal post-conviction action under § 2255.[258]

---

doubt in order to avoid reversal. *Id.* at 24.

255. Structural error involves error that cannot be subjected to analysis for harm precisely because harm cannot be assessed in light of the trial record. Arizona v. Fulminante, 499 U.S. 279, 309 (1991). For instance, claims of improper exclusion of jurors based on ethnicity, *see* Batson v. Kentucky, 476 U.S. 79 (1986), or attitudes toward capital punishment, *see* Witherspoon v. Illinois, 391 U.S. 510 (1968), are not susceptible to prejudice analysis because it is impossible to accurately assess the behavior of a jury had the excluded juror been seated and served.

256. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the Court held that a constitutionally-defective jury instruction that impermissibly altered the burden of proof imposed upon the prosecution in a criminal case constituted "structural error" not amenable to prejudice analysis. The Court explained that any attempt to assess harm would require speculation on consequences of the error that would be "unquantifiable and indeterminate." *Id.* at 281-82. In contrast, trial error claims, or those that occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented . . ." are evaluated in terms of prejudice to the accused. *Fulminante*, 499 U.S. at 307-08.

257. *See* State v. Evans, 114 P.3d 627, 633 (Wash. 2005) ("As Chief Justice Rehnquist sagely noted, *Teague* was 'grounded in important considerations of federal-state relations.' Limiting a state statute on the basis of the federal court's caution in interfering with State's self-governance would be, at least, peculiar." (citation omitted)).

258. Davis v. United States, 417 U.S. 333 (1974).

But lower courts have concluded that the Court's post-*Davis* decision in *Teague* changed the "legal landscape of retroactivity on collateral review," as the District Court for the Eastern District of Virginia observed in *Price v. United States*.[259] The *Price* court held that *Davis* was effectively limited, first by *Teague*, and then by the retroactivity limitations imposed by the amendment of the federal habeas process in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[260] The unresolved question was framed in *Price* in terms of *Teague*'s effect on retroactivity principles relating to substantive decisions:

> Because *Teague* arose in the context of a so-called procedural constitutional rule, some have concluded that *Teague* is limited to only procedural constitutional rules, and that the *Davis* case continues to control cases involving substantive changes in statutory law. Analytically, then, the key questions to be answered are: what scope did the Supreme Court intend for *Teague*, and whether *Teague* abrogated *Davis*. In other words, does *Davis* survive *Teague*? Neither the Court of Appeals for the Fourth Circuit, nor the Supreme Court itself has offered lower courts any clear guidance on this issue, and no higher precedent guides this Court.[261]

The Second Circuit, in *Ianniello v. United States*,[262] disagreed with the suggestion that *Davis* had been abrogated by *Teague*, holding that changes in substantive law—such as questions of evidentiary sufficiency in light of a new

259. 959 F. Supp. 310, 314 (E.D. Va. 1997).

260. *Id.* at 314-15; *see* Nuñez v. United States, 96 F.3d 990 (7th Cir. 1996) (finding that AEDPA effectively limited retroactivity doctrine with respect to successive federal petitions, although not initial petitions). Although the amended federal habeas statute permits a litigant to assert a claim in a second or successive petition based upon a new rule declared retroactive by the Supreme Court, 28 U.S.C. § 2244(b)(2)(A) (1996), the Seventh Circuit observed that the change in law relied upon by Nuñez did not involve recognition of a new rule of constitutional procedure, but rather a change in the interpretation of a statute by the Court in *Bailey v. United States*, 516 U.S. 137 (1995), relating to proof required to support conviction for "us[ing] or carry[ing]" a firearm during the commission of a drug trafficking offense. *Nuñez*, 96 F.3d at 992. Consequently, even if Nuñez could have claimed a change of law consistent with *Davis*, it would not have applied to a successive petition following the change in the habeas statute with passage of AEDPA.

261. *Price*, 959 F. Supp. at 315.

262. 10 F.3d 59, 63 (2d Cir. 1993).

interpretation of statutory language by the Supreme Court[263]—continue to be cognizable in federal habeas proceedings under *Davis*.[264]

The split in authority regarding the scope of the *Teague* retroactivity doctrine suggests that the *Danforth* Court properly decided not to express a view on its application in the federal habeas process. But this unresolved question does not implicate federalism concerns because it does not address retroactivity issues in state proceedings.

c) Legislative Action and Retroactivity

The third unresolved question, relating to possible congressional action in altering the rules of retroactivity, would perhaps have particular impact in the disposition of federal constitutional claims in the federal habeas process. Congress could theoretically undercut the scope of *Teague* to require that federal habeas courts apply Supreme Court decisions announcing "new" rules retroactively to petitions brought by state court defendants. With regard to amendment of the federal habeas statute to expand retroactive reliance on "new" rules announced by the Court in actions brought by state inmates, the impact on federalism would be considerable because this action would alter the deference paid to finality of state court judgments by the federal courts. However, given the now-entrenched statutory limitations imposed on federal habeas courts in reviewing state court decisions, it would seem doubtful that Congress would reverse the course taken in adopting AEDPA to restrict federal court intervention in state court prosecutions.

Alternatively, Congress could expand the retroactivity doctrine to include federal post-conviction actions, addressing concerns about the continuing viability of *Davis* by expressly providing that federal petitioners could rely on "new" substantive or procedural rules in challenging convictions under previous law. Similarly, it could legislatively resolve the issue by holding that collateral relief is not available based on a change in substantive interpretation by the Court. In either of the latter events, however, the change in retroactivity policy would not implicate federalism issues.

2. Uniformity in Administration of Federal Constitutional Law

The argument favoring a uniform administration of federal constitutional law advanced by the Chief Justice makes some sense. But, in reality, there is precious little uniformity in the *application* of any system or body of law while the Supreme Court's preference for unity of *interpretation* claimed in

263. *See Nuñez*, 96 F.3d at 992; *see also* discussion *supra* note 260.

264. *Ianniello*, 10 F.3d at 62-63; *accord* Triestman v. United States, 124 F.3d. 361, 368 (2d Cir. 1997).

Michigan v. Long clearly has established a well-defined line of authority between it and state courts. Similarly, the *Teague* retroactivity doctrine, which prevents federal habeas courts from engaging in interpretation of constitutional guarantees resulting in new rules or new applications of existing precedent to novel situations, expands the parameters of the Court's exclusive authority within the federal judicial system.[265]

a) The "Illusion" of Uniformity and Practical Reality

The simple fact is that even when trial and appellate courts apply Supreme Court precedent governing federal constitutional criminal procedure protections, the actual application will never be uniform. Some trial judges will undoubtedly apply precedent from a perspective favoring the prosecution; fewer will apply precedent in a manner favoring the criminal defendant, particularly in state courts where prosecutions focus on street crimes, rather than dealing in greater part with white collar criminal activity. Even when judges strive to apply precedent faithfully, similar fact situations will nevertheless result in different rulings based on the differences in witness credibility and the persuasiveness of counsel. One of the fascinating features of the criminal law is that similar fact patterns prove so dissimilar when the peculiar personalities of the actors are factored into the overall equation.

The subjective evaluations made by trial judges of similar factual contexts necessarily result in some lack of uniformity in the application of federal constitutional protections. This lack of uniformity occurs even when judges strive earnestly to apply constitutional protections in a way that ensures uniformity of interpretation. The suggestion that the United States Constitution must be applied uniformly ignores the practical realities that characterize practice and decision-making in the trial courts, where application of constitutional protections is less dependent on the text of precedent than on the perception of the individual judge exercising her discretion in applying that precedent.

This is particularly true in litigation of issues that are almost wholly dependent on the perceptions of trial judges and, consequently, are committed to their discretion as decisionmakers on questions of fact. One generic class of issues that is dependent on the discretion of trial judges involves the legality of searches and seizures. In these cases, when challenges to the admission of seized evidence are based on lack of probable cause or insufficient support for a search warrant, the issuance of the warrant is ultimately dependent in some sense on assessment of the credibility of the information in the supporting

265. *E.g.*, Caspari v. Bohlen, 510 U.S. 383, 389-90 (1994); *see supra* note 91 and accompanying text.

affidavit.[266] These issues, moreover, are perhaps the most often litigated federal constitutional claims precisely because suppression of the seized evidence often precludes the prosecution from going forward regardless of the accused's actual guilt.[267]

Yet, in *Stone v. Powell*, the United States Supreme Court held that relitigation of search and seizure claims based upon alleged violations of the Fourth Amendment would no longer remain within the scope of review by federal habeas courts if the litigants had already been afforded an opportunity to fully and fairly litigate the claim in the state courts.[268] In so holding, the Court effectively insulated the bulk of state court determinations from review in the federal system except by petition for writ of certiorari to the Supreme Court itself.[269] The general rule precluding federal habeas review of these claims results, almost necessarily, in a lack of uniformity in the administration of federal constitutional law throughout the nation, committing to state courts

---

266. For instance in *Davis v. State*, the Arkansas Supreme Court reiterated its standard of review of trial court findings in examining search and seizure claims: "'[W]e have given considerable weight to the findings of the trial judge in the resolution of evidentiary conflicts. We must defer to the superior position of the trial judge to pass upon the credibility of witnesses.'" 94 S.W.3d 892, 894-95 (Ark. 2003) (quoting State v. Osborn, 566 S.W.2d 139, 140 (Ark. 1978)) (citations omitted). The court also explained that this approach is consistent with that taken by the United States Supreme Court in *Ornelas v. United States*, 517 U.S. 690, 699-700 (1996), where the Court noted:

> [W]e hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.
>
> * * *
>
> In a similar vein, our cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists. . . . An appeals court should give due weight to a trial court's finding that the officer was credible and the inference was reasonable.

Davis, 94 S.W.3d at 895 (quoting *Ornelas*, 517 U.S. at 699-700 (citations omitted)).

267. With respect to the cost of suppression of illegally seized evidence, the Supreme Court observed in *Stone v. Powell*:

> The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.

428 U.S. 465, 489-90 (1976) (footnotes omitted).

268. *Id.* at 493-94.

269. The majority's action drew criticism from Justice Brennan, who questioned the Court's authority to exclude a class of claims from consideration in the federal habeas process. *Id.* at 502-06 (Brennan, J., dissenting).

not only the primary duty, but almost certainly the entire duty, for enforcing federal constitutional privacy protections in state proceedings.

Because the function of the exclusionary rule is deterrence of police misconduct,[270] arguably the restriction imposed in *Stone v. Powell* does not vindicate personal privacy rights of individual defendants. But the holding does permit a lack of uniformity in the enforcement of Fourth Amendment protections against potential offending law enforcement officers and, in this sense, results at least theoretically in an uneven application of Fourth Amendment protection by the state courts. Of course, if state courts consistently apply Supreme Court Fourth Amendment precedent uniformly, the threat to a goal of uniform administration of federal constitutional law remains only theoretical.[271] In contrast, Chief Justice Roberts's concerns in *Danforth* are not simply theoretical; instead, he correctly observes that the holding opens the door to inconsistent application of federal constitutional law in the administration of state court retroactivity doctrine or policy.[272] But it would be naïve to suggest that state trial and appellate judges always rule in a consistent fashion in applying Supreme Court precedent.[273]

b) State Constitutional Law and Non-Uniformity

Moreover, uniform application of federal constitutional precedent is, in a sense, compromised by the existence of state constitutional law. Although state courts may view rights expansively as matters of state constitutional law without directly implicating federal constitutional values, state constitutional protections have largely been recognized with reference to analogous federal constitutional language. Often, the recognition of a more expansive protection

---

270. *Id.* at 492.

271. Yet, as the Court itself continues to address novel questions arising in the context of search and seizure claims, the potential for lack of uniformity in understanding or application of its precedents increases, regardless of any lack of uniformity attributable to disparity in state court retroactivity doctrines.

272. Danforth v. Minnesota, 128 S. Ct. 1029, 1052-54 (2008) (Roberts, CJ., dissenting).

273. Some hostility to the rule requiring exclusion of evidence, quite rational, is evident in the Court's own characterization of the consequence of its exclusion:

> Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.

Stone, 428 U.S. at 490. It would be difficult not to believe that state trial judges face a difficult task in excluding evidence that results in the release of probably guilty defendants, at least in cases involving serious crimes or acts of violence and that some state judges simply fail to apply Supreme Court precedent faithfully, or as is more likely, simply accept improbable or incredible testimony in order to reach determinations not requiring suppression of evidence.

as a matter of state constitutional law is strained as the state court explains its reasoning.

This is not to suggest that state court decision-making is in any sense disingenuous. Instead, the burden placed upon state appellate courts is inherently conflicting. State courts are bound under the rationale of *Michigan v. Long* to enforce federal constitutional protections and, consequently, to rule on the merits of properly preserved federal constitutional claims.[274] When a claim is novel, or represents a novel application of existing federal constitutional precedent, the state court is obligated to consider the claim and rule on it as part of its role in the federalized judicial scheme.[275] When the disposition appears to exceed the scope of recognized federal constitutional protections, however, the state attorney general will likely seek review of the decision by certiorari in the United States Supreme Court. And the Court, in *Michigan v. Long*, has clearly reserved authority to resolve those questions.[276] Consequently, a state court is placed in the position of having to provide an interpretation of the Federal Constitution, while at the same time recognizing that its interpretation will presumptively be subject to scrutiny by the Court. When the state court expands upon existing precedent, no matter how reasonably, the more conservative posture of the Court is likely to result in reversal.

This situation is not inconsistent with the dual responsibilities imposed upon state appellate courts for resolution of federal and state constitutional claims. But what it does suggest is that a state appellate court, having discerned an understanding of the meaning of a federal constitutional protection later discredited on certiorari by the Supreme Court, may be induced to apply that same reasoning once the issue is subsequently presented and framed in terms of state constitutional protections or state law. The results may appear strained because the state court essentially searches for a justification to validate its rejected interpretation of the Federal Constitution in its holding under state law.[277]

A classic example of this arguably strained interpretation is demonstrated in the Michigan Supreme Court's view of a mandatory life sentence, without the possibility of parole, imposed for first-time offenders convicted of certain

274. 463 U.S. 1032, 1037-42 (1983).

275. *Id.* at 1042 n.8.

276. *Id.* at 1038-40.

277. *See, e.g.*, Arkansas v. Sullivan, 532 U.S. 769, 771 (2001) (reversing "[b]ecause the Arkansas Supreme Court's decision on rehearing is flatly contrary to this Court's controlling precedent . . . .") and the subsequent decision in *State v. Sullivan*, 74 S.W.3d 215, 220-21 (Ark. 2002) (pretextual arrest illegal under article II, section fifteen of the Arkansas Constitution).

drug trafficking offenses.[278] When the Michigan Court of Appeals considered the constitutionality of the sentence mandated by the legislature, it found that the sentence did not violate the "cruel *and* unusual" punishment provision of the Eighth Amendment or the comparable provision of the state constitution.[279]

The Supreme Court also rejected the Eighth Amendment[280] argument, deferring to the legislature's judgment in proscribing sentences for serious offenses in *Harmelin v. Michigan*.[281] Following the Court's disposition in *Harmelin*, the state supreme court upheld a challenge to the sentencing scheme in *People v. Bullock*,[282] this time predicating its holding on the state constitutional protection against imposition of "cruel *or* unusual punishments."[283] The court explained: "In the case of a divided United States Supreme Court decision, we may in some cases find more persuasive, and choose to rely upon, the reasoning of the dissenting justices of that Court, and not the majority, for purposes of interpreting our own Michigan Constitution."[284]

Interestingly, the Michigan court concluded that one rationale for interpreting state constitutional provisions differently than the interpretation of a comparable provision in the Federal Constitution by the United States Supreme Court involves examination of the text itself.[285] Here, the state court noted that the phrasing of the state constitution in prohibiting "cruel *or* unusual" punishments, as opposed to the language of the Eighth Amendment prohibiting "cruel *and* unusual punishments," offered a basis for distinguishing

---

278. People v. Bullock, 485 N.W.2d 866 (Mich. 1992).

279. People v. Harmelin, 440 N.W.2d 75 (Mich. Ct. App. 1989). The court rather summarily held:

> Defendant's last claim is that the mandatory sentence of life in prison is entirely out of proportion to the seriousness of his crime and constitutes a cruel and unusual punishment proscribed by U.S. Const., Am. VIII, and Const. 1963, art. 1, § 16. We disagree.

Id. at 80.

280. The eighth amendment provides, in pertinent part: "nor cruel and unusual punishments be imposed." U.S. CONST. amend. VIII.

281. 501 U.S. 957, 994-96 (1991).

282. *Bullock*, 485 N.W.2d at 872-76.

283. *Id.* at 870 n.8 (applying MICH. CONST. art. 1, § 16).

284. *Id.* at 870.

285. *Id.* at 872. Differences of language in federal and state constitutional provisions addressing comparable protections affords a basis for broader or more expansive protection of rights under state constitutions than that recognized under the Federal Constitution. *See, e.g.*, State v. Hunt, 450 A.2d 952, 965 (N.J. 1982) (Handler, J., concurring) ("A state constitution's language may itself provide a basis for reaching a different result from that which could be obtained under federal law.").

between the scope of protection contemplated by the two documents.[286] Moreover, the *Bullock* court noted its previous observation that the precise language of the state constitutional provision suggested that some punishments that are not necessarily cruel, such as incarceration, might still fall under the prohibition for unusual punishments, such as an unusually oppressive length of imprisonment.[287] This distinction is not irrational, but the question remains whether the authors of the state constitution and those electors ratifying it actually understood there to be any distinction between the meaning of the Eighth Amendment and the comparable provision of the Michigan Constitution.

The Michigan court's reliance on textual differences between the federal and state constitutional provisions addressing punishments does not reflect any particular flaw in analysis. Nor does the expansive effect given the state constitutional protection implicate any problem with lack of uniformity of administration of federal constitutional law. In fact, it may well achieve precisely the opposite because in differentiating between the two sources of protection, the state court has formally recognized the limitations placed upon the application of federal constitutional law by the Supreme Court's interpretation of the federal guarantee.

However, in some real sense, the development of state constitutional law doctrine as an alternative to Supreme Court interpretation of federal rights imposes a lack of uniformity in terms of actual practice, based not only on the protections afforded by the different constitutions, but their interpretation as well. The state courts are pressed into reevaluation of their constitutions because they are prohibited from interpreting and applying federal constitutional protections in any way that deviates from the Supreme Court's views.

Or, the shifting views of the Supreme Court itself may lead state courts to engage in assessment of the protections afforded by state constitutional provisions. For instance, in *State v. Breit*,[288] the New Mexico Supreme Court declined to follow the Supreme Court's lead in *Oregon v. Kennedy*[289] in holding that a defense motion for mistrial waives a prior jeopardy claim except when the defense is "goaded" into moving for mistrial by the prosecution's

---

286. *Id.* The court noted that in *People v. Collins*, 475 N.W.2d 684, 694 (Mich. 1991), it had observed that a "'significant textual difference[ ] between parallel provisions of the state and federal constitutions' may constitute a 'compelling reason' for a different and broader interpretation of the state provision."

287. *Bullock*, 485 N.W.2d at 872 (citing People v. Lorentzen, 194 N.W.2d 827, 829 (Mich. 1972)).

288. 930 P.2d 792 (N.M. 1996).

289. 456 U.S. 667 (1982).

misconduct.[290] Breit claimed prior jeopardy based on prosecutorial misconduct so extensive at his first trial that the trial court sustained his claim and granted a new trial, then dismissed the case.[291] The state court of appeals reversed the dismissal on appeal by the State, and Breit was convicted at a second trial.[292]

On appeal from his conviction and sentence of life imprisonment, the New Mexico Supreme Court ruled that double jeopardy should have barred Breit's second trial.[293] The court noted that under *Kennedy*, Breit's reprosecution would not have been barred.[294] But, the court also noted the pervasive misconduct by the prosecutor in the case so extensive that it declined to follow the limitation imposed by the Supreme Court in *Kennedy*.[295]

Instead, the court noted that its prior formulation announced in *State v. Day*[296] had been based upon Supreme Court decisions rendered prior to *Kennedy*, particularly *United States v. Dinitz*,[297] where the Court had condemned prosecutorial misconduct in far more aggressive terms.[298] The *Breit* court observed that the Supreme Court had referred to the prosecution's "gross negligence," "misconduct," "bad faith or malice," "oppressive tactics," or strategies designed to "seriously prejudice and harass the defendant" as all potentially warranting the imposition of the jeopardy bar to retrial.[299]

Rather than conform its view of double jeopardy to the more limited approach of *Kennedy*, the *Breit* court found that *Day* continued to properly express New Mexico law,[300] grounding its decision in the protection afforded by the state constitution.[301] It concluded that the Supreme Court had failed in *Kennedy* to properly assess the potential negative effects of misconduct when the prosecutor's subjective intent is not to provoke a mistrial motion.[302]

Instead, the court embraced *Day*, expressly holding:

> Retrial is barred under Article II, Section 15, of the New Mexico Constitution, when improper official conduct is so unfairly

290. *Breit*, 930 P.2d at 795 (citing *Kennedy*, 456 U.S. at 679).

291. *Id.* at 796 (recounting procedural history of case).

292. *Id.* The New Mexico Supreme Court denied certiorari following the reversal and remand ordered by the state court of appeals. Breit v. State, 820 P.2d 435 (N.M. 1991).

293. *Breit*, 930 P.2d 792.

294. *Id.* at 796 (citing *Kennedy*, 456 U.S. at 679).

295. *Id.* at 804.

296. 617 P.2d 142, 146 (N.M. 1980).

297. 424 U.S. 600 (1976).

298. *Breit*, 930 P.2d at 798 (citing *Dinitz*, 424 U.S. at 611).

299. *Id.*

300. *Id.* at 801 (citing *Day*, 617 P.2d at 146) ("Th[e *Day*] standard was an amalgam of various pronouncements of the United States Supreme Court.").

301. *Id.* at 803 (citing N.M. CONST. art. II, § 15).

302. *Id.* at 798, 801.

> prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial, and if the official knows that the conduct is improper and prejudicial, and if the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.[303]

Moreover, the court did not announce this approach in a vacuum, spending considerable time in its opinion in noting the rejection of *Kennedy* by other state courts.[304]

The Supreme Court's refinement of existing doctrine or retreat from positions previously held may thus lead to rejection of its more recent pronouncements by state appellate courts resorting to state constitutional or legal protections to maintain a jurisprudential status quo. Looming on the litigation horizon is the continuing viability of the federal exclusionary rule itself. When the Court adopted the "good faith" exception to the requirement for exclusion of evidence seized in violation of Fourth Amendment privacy protections,[305] a significant number of state courts refused to apply a similar exception to claims raised under state constitutional provisions,[306] or on statutory grounds.[307]

The exclusionary rule has been subjected to repeated limitations by the Court in recent years. Initially the Court crafted the "good faith" exception in *United States v. Leon*, which applies when an officer relies on the magistrate's error in issuing a search warrant in the absence of probable cause.[308] The Court subsequently held in *Illinois v. Krull* that a "good faith" reliance on a statute declared unconstitutional justified an exception to the requirement for exclusion of evidence.[309]

---

303. *Id.* at 803.

304. *Id.* at 798-800.

305. Massachusetts v. Sheppard, 468 U.S. 981 (1984); United States v. Leon, 468 U.S. 897, 922 (1984).

306. For state courts rejecting a good faith exception on constitutional grounds see, e.g., State v. Marsala, 579 A.2d 58, 59 (Conn. 1990); Mason v. State, 534 A.2d 242, 254-55 (Del. 1987); State v. Guzman, 842 P.2d 660, 677 (Idaho 1992); State v. Novembrino, 519 A.2d 820, 856-57 (N.J. 1987); People v. Bigelow, 488 N.E.2d 451, 458 (N.Y. 1985); State v. Carter, 370 S.E.2d 553, 554 (N.C. 1988); Commonwealth v. Edmunds, 586 A.2d 887, 894 (Pa. 1991); State v. Oakes, 598 A.2d 119, 120-21 (Vt. 1991).

307. *E.g.*, Gary v. State, 422 S.E.2d 422, 428-29 (Ga. 1992).

308. *Leon*, 468 U.S. at 925-26.

309. 480 U.S. 340, 349-50 (1987).

More recently, in *Michigan v. Hudson*,[310] the Court rejected exclusion of evidence obtained on the basis of probable cause where the search of the home was executed without properly knocking and announcing their presence and purpose. And finally, in *Herring v. United States*,[311] the Court extended the reach of the "good faith" except to the exclusionary rule where officers relied on a previously withdrawn warrant as their basis for probable cause for the search and arrest of the defendant.[312] The application of "good faith" on these facts would perhaps appear no more troubling to proponents of exclusion than those in *Leon*, but the majority's language certainly is. The *Herring* Court examined the legitimate purpose of exclusion, which in its view is the deterrence of police illegality:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, *the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.* The error in this case does not rise to that level.[313]

The suggestion implicit in the majority's view is that once police officers testify that they acted in good faith in conformity with their understanding of probable cause, the burden will shift to the defense to rebut the claim of good faith in order to establish that they, in fact, either acted with intent to violate the defendant's rights or were reckless or grossly negligent with regard to the legal requirements for lawful searches or seizures.

State courts adopting the *Herring* formula will contribute to a non-uniform application of Fourth Amendment law as individual trial judges will make determinations based on their assessment of the credibility of officers pleading "good faith" in their conduct of searches. Moreover, officers may find it less valuable to seek warrants because their ability to plead "good faith" will ease the State's burden of proving probable cause and exigent circumstances in the absence of a warrant issued by a magistrate.[314]

---

310. 547 U.S. 586 (2006). Justice Kennedy concurred in part and concurred in the judgment, providing the fifth vote to uphold admission of the evidence. *Id.* at 602 (Kennedy, J., concurring).

311. 129 S. Ct. 695, 704 (2009).

312. *Id.* at 704. The warrant had been recalled, but not removed from the active list as a result of a clerical error. *Id.* at 698.

313. *Id.* at 702 (emphasis added).

314. *See* Welsh v. Wisconsin, 466 U.S. 740, 749-50 (1984).

State courts that have already rejected *Leon*'s "good faith" exception will likely find the *Herring* majority's limited rationale for exclusion equally troubling. For example, in *State v. Gutierrez*, the New Mexico court rejected *Leon*, holding that protection of personal privacy, rather than deterrence of police misconduct, is the core protection provided by the state constitution.[315] New Mexico courts have consistently held that the exclusionary rule is essential for the protection of personal privacy,[316] serving to restore the parties to their respective positions had the illegal intrusion of privacy never occurred.[317]

For jurisdictions like New Mexico, heavily invested in exclusion as an ingrained component of state constitutional policy or state law,[318] the Court's decision in *Herring* will likely be rejected. The Court's retreat from rigorous and inclusive application of the exclusionary principle may well simply enhance the divide between jurisdictions following its lead and those rejecting it, again precipitating a lack of uniformity in the administration of the criminal law.

The creative expansion of state constitutional doctrine by state appellate courts, in some instances a direct response to shifting Supreme Court doctrine, is a logical alternative for state judges interested in retaining more liberal constructions of individual rights than those provided by the Court in interpreting federal constitutional provisions. It furthers the goal of a uniform understanding of federal law, but it also promotes a far more complicated matrix of constitutional doctrine for trial courts and practitioners, who must work from multiple sources in assessing the proper scope of rights afforded criminal defendants.

All this is only to say that in practice, the goal of any true national uniformity in criminal process is undermined by the inconsistent views of procedural protections afforded defendants within the states. The Chief Justice's plea for uniformity in federal law is straightforward in concept, but *Danforth*'s recognition of state court autonomy in the retroactive application of federally-defined rights is hardly significant in light of the realities of practice in the state courts. Unless there is evidence that state courts are extending retroactive application of "new" constitutional criminal procedure rules announced by the Supreme Court in an irrational fashion, *Danforth*

315. State v. Gutierrez, 863 P.2d 1052, 1067-68 (1993) (citing N.M. CONST. art. II, § 10; United States v. Leon, 468 U.S. 897, 916 (1984)).

316. *See* State v. Lujan, 175 P.3d 327, 329-32 {N.M. Ct. App. 2007); State v. Wagoner, 24 P.3d 306 (N.M. Ct. App. 2001); State v. Snyder, 967 P.2d 843, 844 (N.M. Ct. App. 1998).

317. *Gutierrez*, 863 P.2d at 1067.

318. *See, e.g.*, State v. Novembrino, 519 A.2d 820, 851 (noting that over twenty-five years, the exclusionary rule had become "imbedded" in New Jersey's jurisprudence).

represents but a minor deviation from the Chief Justice's goal of a nationally uniform application of federal law.

In fact, the Court has long recognized the unique approaches states may take in regulating conduct through their criminal laws. The Court recognized in *Patterson v. New York*, for instance, that defining criminal offenses and defenses is primarily the role of state legislatures.[319] There, the Court upheld a New York statute requiring a defendant attempting to rely on the lesser offense of manslaughter as a defense to second degree murder to prove that he acted under the influence of "severe emotional disturbance."[320] But this mental element, according to the Court, which might establish the intent for a charged offense of manslaughter under state law,[321] did not negate the mental state required for second degree murder, which required proof that the killing was intentional.[322] In so holding, the Court distinguished New York's statutory homicide scheme from Maine's, where the Court had earlier held it violated due process to require the accused to disprove justification for homicide or suffer the effect of a presumption that his lack of proof established the mental element required for a murder conviction.[323] The Court concluded that due process problems arose by improperly shifting the burden of proof for a necessary element of the prosecution's case to the defense.[324]

Patterson simply recognized that lack of uniformity in the legislative determination of the elements of criminal offenses and defenses did not necessarily offend any protection afforded by the Federal Constitution.[325] Still, the Chief Justice's concern may readily be reconciled with *Patterson*'s recognition of the autonomy of state legislatures in formulating local criminal law, despite the fact that doing so will result in an uneven approach to criminalization nationally.[326] In contrast, the protections afforded by the

---

319. 432 U.S. 197, 201-02 (1977).

320. *Id.* at 202, 205-06.

321. *Id.* at 199 n.3 (citing N.Y. PENAL LAW § 125.20(2) (McKinney 1975)).

322. *Id.* at 198 n.2, 205-08 (citing N.Y. PENAL LAW § 125.25).

323. *Id.* at 212-16 (citing Mullaney v. Wilber, 421 U.S. 684, 698-701 (1975)).

324. *Id.* (citing *Mullaney*, 421 U.S. at 698-701).

325. *E.g.*, Clark v. Arizona, 548 U.S. 735, 770-73, 779 (2006) (holding that Arizona was free to exclude expert forensic evidence on defendant's mental impairment unless offered in support of insanity defense under state law).

326. Justice Stevens, the author of the majority opinion in *Danforth*, responded to Chief Justice Roberts's hypothetical problem of disparate dispositions:

> [T]he dissent contends that the "end result [of this opinion] is startling" because "two criminal defendants, each of whom committed the same crime, at the same time, whose convictions became final on the same day, and each of whom raised an identical claim at the same time under the Federal Constitution" could obtain different results. This assertion ignores the fact that the two hypothetical criminal defendants did not actually commit the "same crime." They violated different

Federal Constitution should be administered with regard to a national uniform standard, and the Court's jealous reservation of the right to be the ultimate and only arbiter of federal constitutional questions in *Michigan v. Long* certainly furthers that goal.

c) The Non-Uniformity Imposed in Federal Habeas

Third, and perhaps most importantly, it is not clear that there exists any real consensus that a uniform national application—as opposed to interpretation—of federal constitutional law is an important part of constitutional policy. This is evident in Congress's treatment of state court application of Supreme Court precedent when reviewed in the federal habeas process. State court defendants are permitted to challenge their convictions based on claims of federal constitutional error through federal habeas proceedings brought pursuant to 28 U.S.C. § 2254.[327] This has traditionally been a significant avenue for relief. For example, in *Reed v. Quarterman*,[328] the Fifth Circuit recently granted relief in federal habeas, ordering a new trial for a Texas inmate who had spent thirty years on death row based on his claim that prosecutors had discriminatorily removed minority jurors through exercise of their peremptory challenges during the selection of his capital trial jury.[329]

However, the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[330] resulted in a significant restriction on the authority of

---

> state laws, were tried in and by different state sovereigns, and may–for many reasons–be subject to different penalties. As previously noted, such nonuniformity is a necessary consequence of a federalist system of government.

Danforth v. Minnesota, 128 S. Ct. 1029, 1047 (2008) (citation omitted).

327. 28 U.S.C. § 2254(a) (2006). The section provides that relief may be afforded a "person in custody of pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." *Id.*

328. 555 F.3d 364 (5th Cir. 2009).

329. *Id.* at 380. The circuit court held that the State's proffered explanations for its exercise of strikes against two black venirepersons were unsupported by the record of voir dire and constituted "mere pretexts for discrimination." *Id.* The use of peremptory challenges to exclude otherwise qualified jurors from service based on race, ethnicity or gender violates the Fourteenth Amendment. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 135, 137 n.6 (1994); Batson v. Kentucky, 476 U.S. 79, 85-86 (1986). The *Reed* court noted that the claim had been preserved prior to the Court's announcement of *Batson* in 1986, but rejected by the Texas Court of Criminal Appeals in his direct appeal. *Reed*, 555 F.3d at 368-70, 373. Under the Supreme Court's decision in *Griffith*, the preservation of his claim remained viable throughout the direct appeal process and, thus, he was entitled to rely on *Batson* when it was announced during the pendency of his appeal in state court. *Reed*, 555 F.3d 364 (citing Griffith, 479 U.S. 314, 321 n.6).

330. Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 18, 19, 21, 22, 28, 42, & 49 U.S.C.).

federal habeas courts under § 2254.[331] The amended statute provides, in § 2254(d)(1), that a federal habeas court can only grant relief on a claim of legal error where a state court disposition "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[332]

The requirement that the state court decision challenged be "contrary to," or that it "involve an unreasonable application of" Supreme Court precedent is particularly important because it not only prevents federal habeas courts from formulating new rules[333] or applying existing rules in new ways, but also prevents those courts from correcting erroneous state court decisions.[334] Thus, state court decisions that misinterpret Supreme Court precedent, but do so reasonably, are insulated from attack in the federal habeas process.[335] Similarly, incorrect interpretations of constitutional law that do not directly contravene Supreme Court precedent are not subject to correction by federal habeas courts, which would functionally be supplying constitutional interpretation in so doing.[336]

---

331. For an informative perspective on the passage of AEDPA, see John H. Blume, *AEDPA: The "Hype" and the "Bite*", 91 CORNELL L. REV. 259, 269-70 (2006) (noting the Court itself had severely restricted availability of habeas relief by decisions rendered during roughly two decades preceding passage of AEDPA, which the author argues was made possible by convicted Oklahoma City Murrah Federal Building bomber Timothy McVeigh).

332. 28 U.S.C. § 2254(d)(1). For cases construing "contrary to" and "unreasonable application" of existing Supreme Court precedent, see *Wiggins v. Smith*, 539 U.S. 510, 520 (2003), and *Williams v. Taylor*, 529 U.S. 362, 405-408 (2000).

A federal habeas court can also grant relief on a claim that a state court disposition "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). However, as the *Reed* court observed, state court factual findings are presumed correct in the federal habeas process unless rebutted by "clear and convincing evidence" under section 2254(e)(1). *Reed*, 555 F.3d at 368 (citing 28 U.S.C. § 2254(e)(1)).

333. *See, e.g.*, Goeke v. Branch, 514 U.S. 115, 120-21 (1995) (per curiam) (citing Teague v. Lane, 489 U.S. 288, 301 (1989) (plurality opinion), for the principle that federal habeas courts cannot announce new rules of constitutional criminal procedure).

334. Williams v. Taylor, 529 U.S. 362, 411 (2000) ("Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."). For a thoroughly intellectual discussion of federal habeas decisionmaking predicated on interpretation and application of subsection (d)(1), see Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality and Federalism*, 82 TULANE L REV. 443, 488-502 (2007) (noting the difference in assessing reasonableness of a state court decision objectively and reviewing the rationale by which the state court reached its conclusion).

335. *See* 28 U.S.C. § 2254(d)(1).

336. *See id.*

The effect of the deferential approach imposed on federal habeas courts by Congress in amending § 2254 to require federal habeas court deference to state court legal interpretations has been dramatic precisely because state court dispositions of federal constitutional claims are not subject to correction unless the "contrary to" or "unreasonable application" standards are met. The impact of the AEDPA amendment is demonstrated by an Arkansas case again raising the question of cruel and unusual punishment. The Eighth Circuit found that the life sentence imposed by an Arkansas jury for a first time offender convicted of selling less than one-quarter gram of cocaine (an amount less than the weight of a paper clip) constituted cruel and unusual punishment in *Henderson v. Norris*.[337]

In reaching its conclusion, the court relied on the Supreme Court's decision in *Harmelin v. Michigan*, in which the Court held that imposition of a life sentence without parole for a first-time offender convicted of possessing a substantial quantity of controlled substances with intent to distribute did not offend the Eighth Amendment.[338] The Arkansas Supreme Court upheld Henderson's conviction and sentence on a 4-3 vote.[339] Prior to the amendment of the federal habeas statute in the AEDPA, effective April 24, 1996,[340] federal habeas courts did not have to defer to reasonable, but incorrect, decisions of state courts.[341] Henderson filed his federal habeas action prior to the effective date of AEDPA,[342] and consequently, the circuit court was not restricted in concluding that his sentence was cruel and unusual, even in light of the recognition of broad state power in setting punishments by the *Harmelin* Court.[343] Under AEDPA, however, the state court's ruling would not have been unreasonable, nor contrary to the decision in *Harmelin*, and Henderson's life sentence would not have been vacated.

Further, in terms of uniformity of administration of federal constitutional law, the Court itself has seemingly undermined uniformity in the application of federal constitutional protections in the federal habeas process.

For example, in *Stone v. Powell*, the Court generally excluded claimed violations of Fourth Amendment privacy protection from review in federal habeas corpus, unless the petitioner could show that the state courts had not

337. 258 F.3d 706 (8th Cir. 2001).

338. *Id.* (citing Harmelin v. Michigan, 501 U.S. 957 (1991)).

339. Henderson v. State, 910 S.W.2d 1056 (Ark. 1995).

340. Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 18, 19, 21, 22, 28, 42, & 49 U.S.C.).

341. *See* Lindh v. Murphy, 521 U.S. 320, 323-33 (1997) (holding that federal habeas petitions pending on April 24, 1996, the effective date of the Act, were not governed by the provisions of AEDPA.

342. Henderson v. Norris, 258 F.3d at 707.

343. *Id.* at 712-14 (discussing *Harmelin*, 501 U.S. at 1005).

afforded him an opportunity to fully and fairly litigate the search and seizure claim in state proceedings.[344] The decision effectively promotes some degree of lack of uniformity in administration of Fourth Amendment protections because it insulates most state court holdings resting on factual determinations from federal habeas review.[345] But it also has the effect of insulating state court application of Supreme Court legal precedent in this area from review for legal error. The majority apparently accepted this possibility, while dismissing its significance in reaching its decision.

The Court noted two important policy considerations in holding that Fourth Amendment claims would generally not be subject to relitigation in federal habeas. First, the majority observed that exclusion of probative evidence entails significant social costs because the excluded evidence is typically reliable and often the most critical evidence in establishing the accused's guilt.[346] Second, the majority found that the deterrent effect of the exclusionary rule would not be significantly improved as a result of the prospect for relitigation in federal habeas.[347] Justice Powell, writing for the majority, also dismissed criticism that suggested that state courts would not properly apply Fourth Amendment precedents once the accused's option of re-litigating search and seizure claims in federal habeas was generally barred.[348]

However, excluding a significantly large class of federal constitutional claims from review in federal habeas corpus effectively insulates state court interpretation and application of federal constitutional precedent from review other than by certiorari. This is not to suggest that the Court does not continue to engage in active interpretation of Fourth Amendment values,[349] but given the limitations imposed on the Court by sheer numbers and the relatively small number of cases afforded review,[350] the effect of *Stone v. Powell* is to accept

---

344. 428 U.S. 465, 494 (1976).

345. *See supra* notes 268-71 and accompanying text.

346. *Stone*, 428 U.S. at 489-90. The Court stated, "Application of the rule thus deflects the truthfinding process and often frees the guilty." *Id.* at 490.

347. *Id.* at 493-94.

348. *Id.* at 493 n.35. Justice Powell concluded:

> Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.

Id.

349. *E.g.*, Georgia v. Randolph, 547 U.S. 103, 106 (2006) (holding that co-occupant's express refusal to consent to search of residence in person must be honored by law enforcement officers despite co-occupant spouse's consent).

350. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting) ("Since

the likelihood that federal constitutional protections will not be uniformly applied in the Fourth Amendment context.

In a similar vein, the Court's imposition of a burden of proof of probable prejudice upon federal habeas petitioners claiming that their state court convictions were tainted by violations of their constitutional rights results in some necessary lack of uniformity in the application of federal constitutional protections. The standard for proof of probable prejudice is greater for the inmate/petitioner than if the same claim of violation has been addressed properly on direct appeal in the state courts.

When a state court reviews a federal constitutional claim on direct appeal, it must apply the harmlessness standard of *Chapman v. California*.[351] Under *Chapman*, the burden is placed on the prosecution to demonstrate that constitutional trial error was harmless beyond a reasonable doubt in order to avoid reversal.[352] In *Brecht v. Abrahamson*,[353] however, the Court held that when that same error is recognized by the federal habeas court, the petitioner is not entitled to relief unless he can also establish that "the error 'had a substantial and injurious effect or influence in determining the jury's verdict'" such that it resulted in "'actual prejudice.'"[354] When the federal habeas court is in "grave doubt" as to whether the prejudice standard has been met, the petitioner is entitled to relief.[355]

In *Brecht*, the Court rejected the argument that the more difficult burden of obtaining relief on federal constitutional claims in the habeas process might lead some state courts to simply fail to apply *Chapman* rigorously, assured that relief would be less likely once these claims surfaced in the federal courts.[356]

---

the majority is as aware of the limits of our capacity as I am, there is little fear that the grant of certiorari in a case of this sort will often be repeated–which is to say little fear that today's grant has any generalizable principle behind it.").

351. 386 U.S. 18 (1967).

352. *Id.* at 24.

353. 507 U.S. 619 (1993).

354. *Id.* at 637 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). The *Kotteakos* test is applied for review of non-constitutional error on direct appeal in federal cases. *Kotteakos*, 328 U.S. at 764-65.

355. O'Neal v. McAninch, 513 U.S. 432, 437 (1995).

356. *Brecht*, 507 U.S. at 636. Chief Justice Rehnquist responded to this argument:

> Petitioner argues that application of the *Chapman* harmless-error standard on collateral review is necessary to deter state courts from relaxing their own guard in reviewing constitutional error and to discourage prosecutors from committing error in the first place. Absent affirmative evidence that state-court judges are ignoring their oath, we discount petitioner's argument that courts will respond to our ruling by violating their Article VI duty to uphold the Constitution.

Id. Of course, if Chief Justice Rehnquist was correct, there would have been little need for legislation creating the federal habeas remedy for state court defendants.

But in fact, the application of the *Brecht* standard in numerous cases demonstrates that, whether intentional or not, state courts failed to vigorously enforce constitutional protections. The Eighth Circuit alone took the position that if state courts failed to recognize federal constitutional claims and apply the *Chapman* standard in their review, the *Chapman* harmlessness test should be applied when the same claims were shown to be meritorious in the federal habeas process.[357] However, the Supreme Court recently rejected this approach in a case arising in the Ninth Circuit, *Fry v. Pliler*, holding that the *Brecht* prejudice standard applies in all federal habeas proceedings.[358]

The statutory requirement for deference to state court interpretation or application of federal constitutional precedent and the Court's imposition of a prejudice requirement for proof of a constitutional violation warranting federal habeas relief in *Brecht* both implicate a lack of concern for uniformity in the interpretation and application of federal constitutional law. If uniformity were truly a paramount national and constitutional policy, it seems doubtful that enforcement of federal constitutional guarantees would be compromised by legislative and judicial policy alternatives limiting the authority of federal habeas courts reviewing state court convictions.

3. The Prospects for Greater State Court Autonomy After Danforth

Notwithstanding the theoretical significance of Chief Justice Roberts's concern that *Danforth* will promote a lack of uniformity in the administration of federal constitutional law, pre-*Danforth* action by state courts suggests that the impact may be less problematic than the Chief Justice foresees. Admittedly, prior to *Danforth*, some state courts had anticipated its holding that *Teague* does not bar retroactive application of federal constitutional decisions when retroactive application would be authorized as a matter of state law.[359] These rulings present the possibility of differential treatment of

357. Orndorff v. Lockhart, 998 F.2d 1426, 1429-30 (8th Cir. 1993).

358. Fry v. Pliler, 127 S. Ct. 2321, 2328 (2007).

359. *E.g.*, Smart v. State, 146 P.3d 15, 25 (Alaska Ct. App. 2006) ("State courts remain free to reach the merits of a prisoner's federal constitutional claim even when federal habeas corpus relief would be barred because of *Teague*."); Johnson v. State, 904 So. 2d. 400, 408-09 (Fla. 2005) ("[S]tate courts are not bound by *Teague* in determining retroactivity of decisions. . . . We continue to apply our longstanding *Witt* analysis, which provides more expansive retroactivity standards than those adopted in *Teague*.") (citation omitted); Figarola v. State, 841 So. 2d 576, 577 n.1 (Fla. Dist. Ct. App. 2003) ("Teague is not binding on state courts when they are determining if their own decisions are retroactive.") (citing Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 ALA. L. REV. 421. 457 (1993)); State v. Whitfield, 107 S.W. 253, 267 (Mo. 2003) (en banc) ("It is up to each state to determine whether to apply the rule set out in *Teague* . . . . So long as the state's test is not narrower than that set forth in *Teague*, it will pass constitutional muster."); Colwell v.

similarly situated petitioners in different states. Significantly, however, a number of states had already deferred to *Teague* as controlling, concluding themselves barred from affording relief to state court defendants petitioning for postconviction relief in state proceedings on the basis of Supreme Court decisions announcing new rules of constitutional criminal procedure.[360] Another group of states, moreover, had adopted *Teague* as the formula for retroactivity analysis under state law, despite conceding that *Teague* does not bind state courts.[361] A third group of state courts had anticipated the decision in *Danforth* in holding that *Teague* does not bar retroactive application of federal constitutional decisions when retroactive application would be authorized as a matter of state law.[362]

State, 59 P.3d 463, 470-71 (Nev. 2002) ("*Teague* is not controlling on this court, other than in the minimum constitutional protections established by its two exceptions. In other words, we may choose to provide broader retroactive application of new constitutional rules of criminal procedure than *Teague* and its progeny require."); State v. Fair, 502 P.2d 1150, 1152 (Or. 1972) (en banc) ("[W]e are free to choose the degree of retroactivity or prospectivity which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires."); Cowell v. Leapley, 458 N.W.2d 514, 517 (S.D. 1990) ("The federal government controls how it permits access to [habeus corpus] in its courts, and South Dakota establishes grounds that will provide access to habeas corpus in our courts."); State v. Evans, 114 P.3d 627, 633 (Wash. 2005) (en banc) ("There may be a case where our state statute would authorize or require retroactive application of a new rule of law when *Teague* would not. . . . As Chief Justice Rehnquist sagely noted, *Teague* was 'grounded in important considerations of federal-state relations.'") (quoting Collins v. Youngblood, 497 U.S. 37, 41 (1990)); *see also* Hughes v. State, 901 So. 2d 837, 847-48 (Fla. 2005); State v. Lark, 567 A.2d 197, 203 (N.J. 1989).

360. *E.g.*, Page v. Palmateer, 84 P.3d 133, 137-38 (Or. 2004) ("[State courts are not] free to determine the degree to which a new rule of federal constitutional law should be applied retroactively . . . ."); *see also* Johnson v. Warden, 591 A.2d 407, 410 (Conn. 1991); Whisler v. State, 36 P.3d 290, 296 (Kan. 2001); State v. Egelhoff, 900 P.2d 260, 267 (Mont. 1995), *rev'd on other grounds*, 518 U.S. 37 (1996); People v. Eastman, 648 N.E.2d 459, 464-65 (N.Y. 1995); Agee v. Russell, 751 N.E.2d 1043, 1046-47 (Ohio 2001); Thomas v. State, 1994 OK CR 85, ¶ 13, 888 P.2d 522, 527; Commonwealth v. Hughes, 865 A.2d 761, 780-81 (Pa. 2004).

361. *E.g.*, Edwards v. People, 129 P.3d 977, 981-82 (Colo. 2006) (en banc) (recognizing the possibility that *Teague* does not bind the states, then circumventing the problem by deciding, as a matter of state law, to adopt the *Teague* rule); *see also* People v. Flowers, 561 N.E.2d 674, 682 (Ill. 1990) (adopting *Teague* as a matter of state law); State v. Mohler, 694 N.E.2d 1129, 1132 (Ind. 1998); Daniels v. State, 561 N.E.2d 487, 489 (Ind. 1990); Brewer v. State, 444 N.W.2d 77, 81 (Iowa 1989); State *ex rel.* Taylor v. Whitley, 606 So. 2d 1292, 1296-97 (La. 1992), *cert. denied* 508 U.S. 962 (1993); State v. Tallard, 816 A.2d 977, 979-81 (N.H. 2003) (recognizing the possibility that *Teague* did not bind the states, then circumventing the problem by deciding, as a matter of state law, to apply the *Teague* rule).

362. *E.g.*, Smart v. State, 146 P.3d 15, 25 (Alaska Ct. App. 2006); Johnson v. State, 904 So. 2d 400, 408-09 (Fla. 2005); Hughes v. State, 901 So. 2d 837, 839-48 (Fla. 2004); State v. Whitfield, 107 S.W.3d 253, 266-68 (Mo. 2003) ("It is up to each state to determine whether to

For many jurisdictions, then, *Teague* clearly expressed at least a preferred, if not mandatory, retroactivity policy even before *Danforth*. In the wake of *Danforth*, therefore, the retroactivity question might now be considered as a matter of state constitutional or procedural law in which state courts are free to apply federal constitutional principles in conformity with their normal schemes for retroactivity determination, even when those decisions are not predicated on state constitutional protections.[363] Thus, Kansas and other states filing as amici in *Danforth* couched their interest in the case in this way: "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."[364] *Danforth* validates that posture.

It is not clear, however, that *Danforth* will dramatically alter the approach already taken by many jurisdictions in considering how to administer their post-conviction retroactivity rules. It is clear that *Teague* does not control the retroactive application of federal constitutional decisions after *Danforth*, and also does not bear on state retroactivity doctrine with regard to application of "new" rules of state constitutional or state law origin in the state post-conviction process.[365] The significance of the latter proposition lies in the

---

apply the rule set out in *Teague*, [or] to continue to apply the rule set out in *Linkletter* . . . or to apply yet some other rule appropriate for determining [the] retroactivity of a new constitutional rule to cases on collateral review. So long as the state's test is not narrower than that set forth in *Teague*, it will pass constitutional muster."); Colwell v. State, 59 P.3d 463, 470-71 (Nev. 2002), *cert. denied*, 540 U.S. 981 (2003); State v. Lark, 567 A.2d 197, 203 (N.J. 1989); State v. Fair, 502 P.2d 1150, 1152 (Or. 1972); Cowell v. Leapley, 458 N.W.2d 514, 517-18 (S.D. 1990); State v. Evans, 114 P.3d 627, 633 (Wash. 2005) (noting that *Teague* is ultimately "'grounded in important considerations of federal-state relations,'" and holding that "[t]here may be a case where our state statute would authorize or require retroactive application of a new rule of law when *Teague* would not."). In *Figarola v. State*, 841 So. 2d 576 (Fla. App. 2003), the court observed:

> Some states have adopted *Teague* without discussing the fact that *Teague* is not binding on state courts when they are determining if their own decisions are retroactive. The Supreme Court's opinion in *Teague* reflected that court's narrowing view of the rule of federal habeas corpus. The policy considerations behind *Teague* are not necessarily the same as those for state court post-conviction relief.

Id. at 577 n.1 (relying on Hutton, *supra* note 359, at 457).

363. *See* Laura Denvir Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 VAL. U. L. REV. 421, 438-49 (2004) (discussing state court authority to expand upon federal retroactivity principles in extending relief to state court habeas petitioners relying on new rules announced by United States Supreme Court).

364. *See* Brief of Kansas and the Amici States in Support of Neither Party, Danforth v. Minnesota, 128 S. Ct. 1029 (2008) (No. 06-8273), 2007 WL 2088650, at *1.

365. *See, e.g.*, State v. Jess, 184 P.3d 133, 154 n.20 (Haw. 2008) ("We do not believe that

development of state constitutions and alternative theories for relief under state process that have characterized the increasing role of state appellate courts in articulating procedural rights accorded criminal defendants in their respective courts.

Thus, *Teague* might be viewed in different ways by state courts considering retroactivity after *Danforth*. State courts might simply view *Teague* as a wise policy approach in limiting retroactive application of new rules of constitutional criminal procedure announced by the United States Supreme Court. Or, in a broader sense, *Teague* might provide a framework for retroactivity determinations for new rules or interpretations of state law, including state constitutional provisions. Or, as the Nevada Supreme Court held in *Colwell v. State*, *Teague* might provide a framework for retroactivity, while the court reserves to itself the option of broadening the *Teague* exceptions when necessary to address significant constitutional deprivations.[366] For instance, the *Colwell* court criticized the extremely narrow scope of the second exception, which requires retroactive application of watershed rules of criminal procedure. Instead, the court concluded that the thrust of the exception should be whether the likelihood that a conviction has been wrongfully imposed would be "seriously diminished" by retroactive application of a new rule.[367]

State courts have not, in fact, been held bound to retroactively apply new rules arising in the context of state law as a matter of *federal* due process.[368]

---

either *Danforth* or *Teague* is particularly germane to our analysis regarding whether the new charging rule that we announce today should apply retroactively, because the rule is grounded not in the United States Constitution but, rather, in article I, sections 5 and 10 of the Hawai'i Constitution. . . . Therefore, we are guided by our own independent state law jurisprudence in determining whether the rule applies retroactively.").

366. Colwell v. State, 59 P.3d 463, 470-72 (Nev. 2002).

367. *Id.* at 471-72.

368. *See, e.g.*, Murtishaw v. Woodford, 255 F.3d 926, 955-56 (9th Cir. 2001) (holding *Griffith v. Kentucky* does not require retroactive application by state courts of new rules or constructions of state law, even to cases pending on direct appeal at the time of announcement of the new rule); Mason v. Duckworth, 74 F.3d 815, 818-19 (7th Cir. 1996) (holding newly adopted evidentiary rule in Indiana did not apply retroactively); Lackey v. Scott, 28 F.3d 486, 491 (5th Cir. 1994) (rejecting due process argument that announcement of a new rule relating to definition of "reasonable doubt" in Texas trials and given prospective effect by state court because the new rule is not a federal constitutional requirement requiring retroactive application (citing Victor v. Nebraska, 511 U.S. 1, 5 (1994)); Diggs v. Owens, 833 F.2d 439, 442 (3d Cir. 1987) (holding "*Griffith* should be confined to constitutional rules of criminal procedure and thus does not require retroactive application of new procedural decisions not constitutionally grounded."); People v. Erickson, 513 N.E.2d 367, 374-75 (Ill. 1987) (declining retroactive application of rule prohibiting questioning of jurors concerning death penalty when jury sentencing waived prior to trial); Commonwealth v. Waters, 511 N.E.2d 356, 357 (Mass. 1987)

One viable argument for state court autonomy in formulation and application of retroactivity doctrine focuses on the desirability of states to apply new rules consistently regardless of whether the rules flow from federal constitutional guarantees, as interpreted by the United States Supreme Court, or the construction of state constitutional provisions, statutes, or rules. As opposed to uniformity in terms of retroactive application of new federal constitutional rules, this approach would recognize the desirability of permitting each jurisdiction to formulate a policy of uniformity so that all state court defendants would be treated equally. To the extent that *Teague* provides a retroactivity model for state court decisions resting on adequate and independent state law grounds, rather than federal constitutional grounds, it may afford direction for state courts. It does not, however, mandate retroactivity policy consistent with *Teague*'s retroactivity doctrine for application of "new" rules of federal constitutional criminal procedure.

Perhaps more importantly, the substantial number of jurisdictions reporting rejection of the *Teague* retroactivity doctrine in state post-conviction litigation, demonstrated no significant harm to federal constitutional doctrine offered by Chief Justice Roberts in support of his dissenting position in *Danforth*. The pre-*Danforth* declarations of independence from *Teague* in these jurisdictions has apparently not been translated into any demonstrably adverse consequences to the overall administration of federal constitutional criminal procedure, suggesting that the criminal justice system is neither unable to accommodate flexibility in retroactivity, nor paralyzed by uncertainty of federal constitutional criminal procedure at all.

V. Application of Danforth*, Prospectively*

The *Danforth* Court rejected the argument that *Teague* circumscribed all state court retroactivity discretion. The significance of this conclusion lies practically in the question of whether state inmates—whose convictions were final at the time a new rule of federal constitutional criminal procedure was announced—can benefit from those rules. But, theoretically, it lies in questions of state autonomy in formulating retroactivity doctrine based on the traditions of an individual jurisdiction.

(new rule from *Commonwealth v. Allen*, 480 N.E.2d 630, 636 (Mass. 1985), requiring trial court to make voluntariness inquiry when accused confesses to private citizen not applied retroactively because rule not based on federal constitutional requirement); People v. Sexton, 580 N.W.2d 404, 410-11 (Mich. 1998); State v. Abronski, 678 A.2d 659, 660 (N.J. 1996) (new rule requiring police to inform arrestees of presence of counsel applied prospectively only).

At the outset, it is important to note that Danforth, while prevailing on his claim that Minnesota could apply *Crawford* retroactively in his case,[369] found that on remand, the Minnesota Supreme Court declined to do so.[370] The court had previously opted for a retroactivity doctrine consistent with *Teague* in *O'Meara v. State*,[371] and followed in *State v. Houston*.[372] Considering the Court's holding, the state supreme court observed: "States may follow *Teague* if they wish, but states may also choose to apply a broader retroactivity standard than stated in *Teague*. . . . Thus, we may elect to retain the *Teague* standard even for non-federal cases, or we may determine retroactivity by a different standard of our choosing."[373] Considering the options of returning to its prior reliance on the *Linkletter*/*Stovall* retroactivity doctrine or fashioning a more flexible approach, the court ultimately concluded that *Teague* represented the preferable option.[374] It thus elected to follow a course circumscribed by *Teague* and denied relief on Danforth's confrontation claim.[375]

Now unconstrained by the Court's holding in *Danforth*, other state courts might consider a range of alternative approaches to retroactivity, including reliance on the *Linkletter* approach, or others, as explained by the New Jersey

---

369. Danforth v. Minnesota, 128 S. Ct. 1029, 1033 (2008).

370. Danforth v. State, 761 N.W.2d 493, 499 (Minn. 2009) (adopting *Teague* as "preferable rule to alternatives"); *see also Ex parte* Lave, 257 S.W.3d 235, 237 (Tex. Crim. App. 2008) (adhering to pre-*Danforth* decision in *Ex parte* Keith, 202 S.W.3d 767 (Tex. Crim. App. 2006) in rejecting retroactive application of *Crawford* following *Danforth*). In *People v. McDowell*, No. 07CA1358, 2009 WL 540665 (Colo. Ct. App. Mar. 5, 2009), the Colorado court rejected the post-conviction petitioner's argument for retroactive application of *Missouri v. Siebert*, 542 U.S. 600, 609 (2004), arguing that *Siebert* required suppression of a statement given pursuant to a confession technique rejected by the Court as unconstitutional. The state trial court and court of appeals both held that *Siebert* does not apply retroactively. *McDowell*, 2009 WL 540665, at *1. The court of appeals found that *Siebert* did not constitute a "watershed" rule of criminal procedure to be applied retroactively under the second exception to the *Teague* non-retroactivity doctrine. *Id.* at *6.

The petitioner argued, however, that Colorado could apply *Siebert* retroactively in light of the Court's holding in *Danforth*. *Id.* Acknowledging *Danforth*, the Colorado court nevertheless declined to consider retroactive application in light of *Edwards v. People*, 129 P.3d 977, 982-83 (Colo. 2006), where the Colorado Supreme Court had previously held that the state conforms its retroactivity doctrine to the limitations imposed by *Teague*. *McDowell*, 2009 WL 540665, at *5-6.

371. 679 N.W.2d 334, 339 (Minn. 2004), *abrogated as recognized in* Danforth v. State, 761 N.W.2d 334.

372. 702 N.W.2d 268, 270 (Minn. 2005).

373. Danforth v. State, 761 N.W.2d at 497.

374. *Id.* at 498.

375. *Id.* at 499.

Supreme Court. That court has observed that with regard to retroactive application of new rules of criminal procedure:

> [W]e note that this Court has four options open to it in any decision involving retroactivity: (1) make the new rule of law purely prospective, applying it only to cases whose operative facts arise after the new rule is announced; (2) apply the new rule to future cases and to the parties in the case announcing the new rule, while applying the old rule to all other pending and past litigation; (3) grant the new rule limited retroactivity, applying it to cases in (1) and (2) as well as to pending cases where the parties have not yet exhausted all avenues of direct review; and, finally, (4) give the new rule complete retroactive effect, applying it to all cases, even those where final judgments have been entered and all avenues of direct review exhausted.[376]

The first option discussed by the court denies even the successful litigant the benefit of the new rule announced, but in so doing, does not penalize the prosecutor who relied on an existing rule in trying the case. The second option benefits the individual litigant successfully arguing for a change in the law, but fails to reward those litigants raising identical issues as those resulting in the announcement of the new rule. The third option basically anticipated the Court's approach in *Griffith*,[377] extending the benefit of a new rule to all litigants whose preserved claims of error are still pending on direct appeal when the rule is announced. The fourth approach affords full retroactivity, clearly inconsistent with the constitutional requirement for retroactive application announced in *Teague*.[378]

A. The New Mexico Supreme Court's Approach in Earnest

The New Mexico Supreme Court afforded retroactive application of *Crawford* to a state court defendant prior to the disposition of the retroactivity issue in *Whorton v. Bockting* and the Court's decision in *Danforth*. The defendant, Earnest, was convicted of capital murder on the uncrossed confession given to police by Boeglin, who admitted participation in the crime.[379] On direct appeal, the New Mexico Supreme Court reversed, holding

376. State v. Burstein, 427 A.2d 525, 529 (N.J. 1981); *see also* State v. Lark, 567 A.2d 197, 201 (N.J. 1989); State v. Nash, 317 A.2d 689, 691-92 (N.J. 1974).

377. Griffith v. Kentucky, 479 U.S. 314, 322-23 (1987).

378. Teague v. Lane, 489 U.S. 288, 307-08 (1989).

379. State v. Earnest, 703 P.2d 872, 874 (N.M. 1985) (*Earnest I*). Boeglin was later convicted of capital murder when jurors rejected his claim that his participation in the capital murder was the product of duress. State v. Boeglin, 731 P.2d 943, 949-50 (N.M. 1987).

that admission of Boeglin's statement in the absence of any opportunity for the defense to test the credibility of Boeglin's claims by cross-examination violated Earnest's Sixth Amendment confrontation right,[380] relying on the Supreme Court's decision in *Douglas v. Alabama*.[381]

The Court granted the state's petition for certiorari, however, and vacated the judgment reversing Earnest's conviction and remanded for reconsideration[382] in light of its intervening decision in *Lee v. Illinois*.[383] In *Lee*, the Court had extended the rationale of *Ohio v. Roberts* authorizing admission of uncrossed hearsay that bears "sufficient indicia of reliability" to warrant admission even in the absence of a meaningful opportunity for cross-examination by the accused.[384] However, the *Lee* Court had reversed Lee's conviction, finding that the admission of her accomplice's statement had violated her confrontation rights, noting that the statements given by accomplices to the police have traditionally been characterized as "inherently suspect."[385]

On remand from the Supreme Court, the New Mexico court followed then-Associate Justice Rehnquist's suggestion in his concurrence to the remand order that state courts could admit statements of nontestifying codefendants assuming that the prosecution could overcome the "weighty presumption of unreliability attaching" to those statements by demonstrating that the particular statement at issue bears sufficient "indicia of reliability" to satisfy Confrontation Clause concerns.[386] On remand, the state court held that Boeglin's confession did bear sufficient indicia of reliability as a declaration against his penal interest to warrant its admission despite the lack of cross-

---

380. *Earnest I*, 703 P.2d at 875. The court concluded:

> [B]oeglin's prior statement made to police officers shortly after his arrest was not made during the course of any judicial proceeding and defendant was in no way afforded an opportunity to cross-examine Boeglin. We therefore determine that admission of Boeglin's prior statement was highly prejudicial, violated defendant's confrontation rights, and deprived defendant of meaningful cross-examination.

Id.

381. 380 U.S. 415, 418-19 (1965).

382. New Mexico v. Earnest, 477 U.S. 648, 649 (1986) (per curiam).

383. 476 U.S. 530 (1986).

384. *Id.* at 543 (discussing Ohio v. Roberts, 448 U.S. 56, 65-66 (1980)).

385. *Id.* at 54; *see also* Lilly v. Virginia, 527 U.S. 116, 131 (1999) (noting the "presumptive unreliability of the 'non-self-inculpatory' portions" of an accomplice's statement); Cruz v. New York, 481 U.S. 186, 195 (1987) (White, J., dissenting) (such statements "have traditionally been viewed with special suspicion"); Bruton v. United States, 391 U.S. 123, 136 (1968) (such statements are "inevitably suspect").

386. State v. Earnest, 744 P.2d 539, 540 (N.M. 1987) (discussing New Mexico v. Earnest, 477 U.S. at 649-50 (Rehnquist, J., concurring)).

examination, and the court affirmed Earnest's conviction.[387] Earnest then pursued a federal habeas action attacking his conviction, but was unsuccessful because the federal district and circuit courts credited the state court's analysis with respect to the reliability of Boeglin's confession.[388]

Nine years later, the Court's decision in *Crawford* suggested the possibility for retroactive application of its holding and the potential for relief for defendants convicted on the basis of accomplice confessions made to police and not tested by cross-examination at trial. Earnest petitioned for state post-conviction relief in the New Mexico trial court.[389] He argued that because the Court in *Crawford* had admitted that its Confrontation Clause jurisprudence had essentially taken an incorrect turn in *Ohio v. Roberts*,[390] he had been improperly denied his reliance on *Douglas v. Alabama* that initially resulted in reversal of his conviction.[391] The New Mexico trial court agreed with Earnest and ordered relief on his petition.[392]

The state supreme court upheld the trial court's grant of habeas corpus in *State v. Forbes*,[393] an original action on the application for writ of superintending control filed by the Attorney General challenging the trial court's action ordering Earnest's release.[394] The court noted that it had originally rejected *Ohio v. Roberts* as controlling authority when Earnest's conviction was initially reversed based on Sixth Amendment confrontation

387. *Id.*

388. Earnest v. Dorsey, 87 F.3d 1123, 1131 (10th Cir. 1996), *cert. denied*, Earnest v. Dorsey, 519 U.S. 1016 (1996). Initially, the *Earnest I* court relied on the Tenth Circuit's application of *Roberts* in *United States v. Rothbart*, 653 F.2d 462, 465 (10th Cir. 1981), limiting the application of the *Roberts* rationale to instances in which the prosecution offered prior testimony that had been subjected to cross-examination, a formulation correctly anticipating *Crawford*. *Earnest I*, 703 P.2d 872, 876 (N.M. 1985). Following the Supreme Court's order remanding, the Tenth Circuit, possibly influenced by Justice Rehnquist's observations, expanded its view of the applicability of the *Roberts* formulation to include admission of uncrossed statements of accomplices, like Boeglin. Earnest v. Dorsey, 87 F.3d at 1131-34.

389. Petition for Writ of Habeas Corpus, Earnest v. State, No. CR-82-54 (N.M. Dist. Ct. Oct. 1, 2004); *see* N.M. R. ANN. 5-8026, Rules of Criminal Procedure for the District Courts.

390. Crawford v. Washington, 541 U.S. 36, 67 (2004) ("[W]e view this as one of those rare cases in which the result below is so improbable that it reveals a *fundamental failure on our part* to interpret the Constitution in a way that secures its intended constraint on judicial discretion." (emphasis added)).

391. *Earnest I*, 703 P.2d at 875.

392. State v. Earnest, No. 82-54 (N.M. Dist. Ct. Feb. 11, 2005 (order granting writ of habeas corpus); State v. Earnest, No. CR-82-54 (N.M. Dist. Ct. Jan. 1, 2005) (decision of district court holding that writ of habeas corpus should be granted).

393. State v. Forbes, 119 P.3d 144, 145 (N.M. 2005), *cert. denied*, New Mexico v. Forbes, 549 U.S. 1274 (2007).

394. *Id.*

grounds.[395] It then explained that following the Supreme Court's remand, it construed the remand order as compelling a reexamination of the admission of Boeglin's statement in light of *Roberts* and the Court's decision in *Lee v. Illinois*,[396] issued following the reversal in *Earnest*.[397] Concluding that Boeglin's statement bore sufficient "indicia of reliability" to warrant admission under *Roberts* and *Lee*, it then affirmed the conviction.[398]

The New Mexico court treated *Crawford* as not announcing a "new rule" of constitutional criminal procedure: "Applying the *Teague* analysis to this case, we conclude that as to the unique facts and procedural posture of Earnest's case, *Crawford* does not announce a new rule because the result was 'dictated by precedent existing at the time' we [initially] decided *Earnest I*."[399] Although this approach would later appear to be rejected by the unanimous Court in *Whorton v. Bockting*,[400] in fact, Justice Chávez, writing for the majority, carefully limited the analysis in describing the legal landscape at the time of the initial appellate review of Earnest's conviction.[401] At that point in time, according to Justice Chavez, *Douglas* was the controlling rule of law and had not been overruled in *Ohio v. Roberts*.[402] In explaining this conclusion, he noted the *Crawford* Court's reaffirmation of *Douglas*: "Of paramount significance is the United States Supreme Court's observation that it had historically excluded accomplice confessions where the defendant had no opportunity to cross-examine, citing to *Douglas*, the very case we relied on when we initially reversed Earnest's convictions in 1985."[403] The New Mexico Supreme Court's retroactive application of *Crawford* to benefit Earnest amounted, at least in part, to an affirmation of its reasoning in initially reversing his conviction.[404] But it also addressed the issue of fundamental fairness in the conduct of the trial of the case, where Earnest and his counsel

395. *Id.* at 146 (citing *Earnest I*, 703 P.2d at 876).

396. 476 U.S. 530 (1986).

397. State v. Forbes, 119 P.3d at 146.

398. *Id.* (citing *Lee*, 476 U.S. 530; Ohio v. Roberts, 448 U.S. 56 (1980)).

399. *Id.* at 147 (quoting Teague v. Lane, 489 U.S. 288, 301 (1989) (plurality opinion)). In reaching this conclusion, Justice Chávez reached the same conclusion for the *Forbes* majority that Judge Noonan of the Ninth Circuit later relied on in his concurring opinion in *Bockting v. Bayer*, 399 F.3d 1010, 1022-23 (9th Cir. 2005) (Noonan, J., concurring), *rev'd by* Whorton v. Bockting, 549 U.S. 406 (2007).

400. Whorton v. Bockting, 549 U.S. 406.

401. *Forbes*, 199 P.3d at 148.

402. *Id.* at 147.

403. *Id.* at 147-48 (citing Crawford v. Washington, 541 U.S. 36, 57 (2004)).

404. *Id.* at 148 ("In *Crawford*, therefore, the United States Supreme Court confirmed what the New Mexico Supreme Court announced in *Earnest I*—that a custodial statement by an alleged accomplice to a police officer is not admissible unless the declarant is unavailable and the defendant had an opportunity to cross-examine the declarant.").

tried the case based on the applicability of *Douglas v. Alabama*, only to find after the case was appealed the Supreme Court would essentially repudiate *Douglas*, by implication, in favor of the "indicia of reliability" analysis it had adopted in *Ohio v. Roberts*.[405]

While the New Mexico Supreme Court afforded Earnest relief based on its reading of the confrontation principle affirmed in *Crawford*, it did not adopt a general retroactive application approach to *Crawford* claims in state cases.[406] Instead, it fashioned a ruling based upon *limited* retroactivity, rather than formulating a general rule applicable to all *Crawford* claims.[407] Arguably, in doing so, the court intended that only Earnest among New Mexico litigants would ever benefit from this ruling. The court phrased its holding: "Our decision is *limited to the very special facts of this case*, highlighted by the fact that the very law this Court applied to Earnest's case twenty years ago has now been vindicated, which entitles him now to the same new trial he should have received back then."[408] In *Forbes*, the New Mexico court faced two compelling considerations in the facts of the case. First, the court had already determined that the admission of Boeglin's confession had been found to be prejudicial in the original direct appeal.[409] Second, the court found the fact that at the time of Earnest's trial, *Douglas v. Alabama* was the controlling Supreme Court precedent, relied upon by Earnest's trial counsel and on his direct appeal.[410] Only when the Supreme Court vacated the state court's reversal of Earnest's conviction was that rule governing admission of codefendant confessions undermined, influenced strongly by then-Justice Rehnquist's concurring opinion.[411] Thus, the rules for trial changed after the fact and without any possibility for trial counsel to have advised Earnest and to have represented him at trial with reasonable knowledge that he could not rely on *Douglas* in the preparation of the defense.

Of course, the holding itself left the court the option of extending the benefit of this approach to any other similarly situated state defendant. Thus, another

---

405. *Id.* at 147-48.

406. *Id.* at 148-49.

407. *Id.*

408. *Id.* (emphasis added).

409. *Earnest I*, 703 P.2d 872, 876 (N.M. 1985), *vacated*, New Mexico v. Earnest, 477 U.S. 648 (1986).

410. *Id.* at 875.

411. *See* New Mexico v. Earnest, 477 U.S. 648, 649 (1986) (per curiam) (Rehnquist, J. concurring). Justice Rehnquist, joined by Chief Justice Burger, Justices Powell and O'Connor, assessed the impact of *Lee* on *Douglas*: "As *Lee v. Illinois* makes clear, to the extent that *Douglas v. Alabama* interpreted the Confrontation Clause as requiring an opportunity for cross-examination prior to the admission of a codefendant's out-of-court statement, the case is no longer good law." *Id.*

state defendant who would be able to show that counsel had relied on *Douglas v. Alabama* at trial in objecting to the admission of a nontestifying accomplice's confession never subjected to cross-examination would arguably be able to claim *Forbes* as precedent in a state post-conviction action. But the court reserved the option of denying reliance on *Forbes* for trials conducted after its opinion affirming and following the remand in *Earnest*.[412] Once it established that it would apply the "indicia of reliability" test for admission of even uncrossed accomplice statements, it could consistently hold that the conduct of a subsequent trial was not unfair. In fact, it appears there may simply be no defendant other than Earnest himself for whom relief will be ever be available based on a retroactive application of *Crawford*. Thus, the New Mexico court's unique holding rested on those peculiar factors in the *Earnest* litigation justifying relief as a matter of basic fairness, rather than reflecting a broader retroactivity doctrine extending the benefit of *Crawford* to all previously convicted defendants whose trials included admission of uncrossed testimonial hearsay.

The decision in *Forbes* represents a reasonable alternative for state courts concerned that new constitutional doctrine undermines the credibility of state court convictions obtained under now-discarded precedent. Where the conviction itself appears to have been undermined by the recognition of a "new rule" articulated by the Supreme Court, *Danforth* removes any constitutional bar to a state court granting relief for those defendants for whom relief is deemed appropriate.[413] In fact, given the choice between an absolute policy of non-retroactivity or the freedom to fashion retroactivity doctrine that would require uniform retroactive application of new rules as a matter of state process, state courts might well prefer the New Mexico approach. Review of prior convictions called into question by "new" rules of federal constitutional criminal procedure and a prejudice or harm assessment of the implication of the new rule for the underlying conviction itself affords state courts the freedom "to do justice to each litigant on the merits of his own case."[414]

*B. A Post-*Danforth *Framework for Retroactive Application of* Crawford

The New Mexico Supreme Court's disposition of Earnest's claim for retroactive application of *Crawford* reflects the range of creativity for state courts in fashioning remedies now afforded by *Danforth*. In assessing the scope of any retroactive application of *Crawford*, for example, the state court responding to *Danforth*'s rejection of federal due process limitations on

412. *See Forbes*, 119 P.3d at 148-49.
413. Danforth v. Minnesota, 128 S. Ct. 1029, 1032 (2008).
414. Desist v. United States, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting).

retroactivity might well consider a number of factors in fashioning a doctrine of limited, or selective, retroactivity.

1. The Nature of the Uncrossed, Hearsay Statement

At the outset, a state court considering retroactive application of the "new rule" announced in *Crawford* might first consider the precise scope of claims fitting within the Supreme Court's articulation of the cross-examination right. Because the Court has expanded the *Crawford* principle to different types of statements that are custodial in nature, as in *Davis v. Washington*,[415] the danger in admission of any of these subsets of statements in terms of potential prejudice may well vary depending upon the character of the statement itself. The unifying theme of *Crawford* is, after all, the absence of cross-examination of a witness whose out-of-court statement was made with the reasonable expectation of its use as evidence in official proceedings.[416] Thus, the decision does not reach to classes of statements not made in this context, such as the dying declaration, recognized as an exception to the hearsay rule because of its traditional characterization as reliable or trustworthy.[417]

Crawford, like *Lee v. Illinois*, involved admission of a statement characterized as inherently suspect—the statement of an accomplice to police that could well be motivated by self-interest of the declarant in shifting blame to the accused.[418] Although the Court affirmed the *Crawford* principle in both *Bockting* and *Danforth*, the statements under consideration there do not threaten the integrity of a conviction in so obvious a fashion as the statement of an accomplice. Although the statements of children relating incidents of abuse, as in *Bockting* and *Danforth*, may be suspect because they could well be the product of manipulation or fantasy on the part of a child, those considerations may not implicate reliability to the extent that the self-motivated bias of an accomplice suggests. They have not traditionally been subject to the same "inherently suspect" characterization used to describe accomplice statements made to police.[419]

Consequently, rather than applying *Crawford* retroactively across the board and affording relief to defendants convicted of the entire range of hearsay

415. 547 U.S. 813, 826-27 (2006) (considering admissibility of 911 emergency call messages).

416. Crawford v. Washington, 541 U.S. 36 (2004).

417. *E.g.*, Mattox v. United States, 146 U.S. 140, 151 (1892).

418. *Crawford*, 541 U.S. at 65.

419. Cruz v. New York, 481 U.S. 186, 195 (1987) (White, J., dissenting) (such statements "have traditionally been viewed with special suspicion"); Lee v. Illinois, 476 U.S. 530, 541 (1986); Bruton v. United States, 391 U.S. 123, 136 (1968) (such statements are "inevitably suspect").

admitted improperly in the absence of a meaningful opportunity for cross-examination, a state court might view its need to afford relief more restrictively. Thus, retroactive application might be selective, based primarily on the nature of the statement in issue. Of course, this is not to suggest that only accomplice statements would warrant reconsideration. Minnesota might well conclude that statements made by a young child ruled incompetent to testify due to an inability to differentiate truth from non-truth threatened the integrity of a conviction precisely because the allegation could be the product of manipulation or fantasy. The latitude afforded by *Danforth* presumably permits a state court to make exactly this type of determination, formulating a limited retroactivity rule that would authorize a post-conviction court to consider the reliability of the conviction in terms of the particular circumstances surrounding the statement actually admitted at trial.

2. Preservation of Error

A second factor that a state court might consider in determining whether a full or limited principle of retroactivity should be applied to a "new rule" of constitutional criminal procedure would be the defendant's assertion of error in the trial court.[420] Typically, a failure to preserve error by timely motion or objection will result in a waiver of even a federal constitutional right,[421] unless the jurisdiction authorizes review of the claim as a matter of fundamental or plain error.[422] Thus, a state court might only apply a holding retroactively to admission of evidence over trial counsel's timely objection based on the federal constitutional right compromised. In terms of *Crawford*, this would

420. Preservation of constitutional claims, like all claims, is often deemed critical to appellate review, even when the case may involve a novel issue ultimately considered by the Supreme Court. *See, e.g.*, Smith v. Texas, 550 U.S. 297, 300-01, 312-14 (2007) (holding the petitioner properly preserved his claim based on reliance on the Supreme Court's decision that a Texas mitigation instruction was constitutionally insufficient in capital sentencing proceeding); Clark v. Arizona, 548 U.S. 735, 789 (2006) (Kennedy, J., dissenting) (noting that in challenging exclusion of forensic evidence of his inability to form required culpable mental state in prosecution for intentional murder of a police officer Clark had "preserved this issue at all stages, including in this Court").

421. *See, e.g.*, State v. Fudge, 206 S.W.3d 850, 858 (Ark. 2005) (alleging ineffective assistance in capital counsel's "failure to include federal grounds in his motion for directed verdict, thereby foreclosing Fudge's opportunity to present the claim in a federal *habeas corpus* proceeding . . . .").

422. *E.g.*, United States v. Olano, 507 U.S. 725, 732-38 (1993) (explicating federal plain error rule); State v. Meiers, 412 S.W.2d 478, 480-81 (Mo. 1967); Blue v. State, 41 S.W.3d 129, 133 (Tex. Crim. App. 2000) (fundamental error of constitutional dimension requires no objection); Carter v. State, 656 S.W.2d 468, 468 (Tex. Crim. App. 1983) (rejecting State's argument that appellate court lacks authority to consider unpreserved claims as matters of fundamental error).

simply mean that a defendant whose trial counsel had failed to preserve a Sixth Amendment confrontation claim through objection to the admission of an uncrossed hearsay statement would have waived the claim.[423]

This application of usual preservation rules might appear harsh precisely because the accused and his trial counsel would essentially be required to engage in what might be a futile process of objecting to what had been considered a well-settled constitutional rule.[424] But, application of preservation rules often appears unfair to the accused who suffers from counsel's inaction.[425]

3. Prejudice or Likely Harm from Admission of the Hearsay

Any limited retroactivity rule applied to a Supreme Court decision announcing a "new rule" of constitutional criminal procedure not made retroactive based on the *Teague* exceptions could be fashioned to authorize relief only in the event the defendant could demonstrate prejudice. The

423. For instance, even the Court's retroactivity requirement under *Griffith* only requires that lower courts apply the benefits of a new rule of constitutional criminal procedure in those cases still pending on direct appeal where the claim of error has been preserved. Griffith v. Kentucky, 479 U.S. 314, 322-23 (1987). The Court required retroactive benefit for the new rule for all "similarly situated" litigants. *Id.* Implicit in *Griffith* is the requirement that a state court litigant hoping to avail himself of a new rule of federal constitutional criminal procedure preserve the claim in the direct appeal process. *See* Trevino v. Texas, 503 U.S. 562, 567 (1992).

424. For a plea for revitalization of the "futility exception," whereby a litigant is excused from the requirement to engage in futile efforts at preservation of error without suffering procedural default, see Newton, *supra* note 253, at 544-59.

425. A clear example of this is presented in *Hinkston v. State*, 10 S.W.3d 906, 908 (Ark. 2000), a capital case in which the defendant was convicted and sentenced to life imprisonment. The defense proffered the expert testimony of a forensic clinical psychologist that the defendant's mental impairment affected his capacity to form the requisite culpable mental state for the capital offense charged. *Id.* at 909. This type of evidence is made admissible in ARK. CODE ANN. § 5-2-303 (2006) ("Evidence that the defendant suffered from a mental disease or defect is admissible to prove whether the defendant had the kind of culpable mental state required for commission of the offense charged."). The trial court excluded the evidence. *Hinkston*, 10 S.W.3d at 909. On direct appeal, the defendant argued that the exclusion of the expert testimony violated his right to present a defense under the Sixth Amendment. Because trial counsel had not asserted the Sixth Amendment claim as a basis for admission of the expert opinion, however, the Arkansas Supreme Court refused to consider the argument based on the federal constitutional right to compulsory process. *Id.* Thus, even federal constitutional claims resting on established principles of constitutional law, as articulated in the decisions of the United States Supreme Court, may be treated as waived as a result of trial counsel's failure to preserve error. The *Hinkston* court tersely concluded: "We do not consider arguments, even constitutional ones, raised for the first time on appeal." *Id.* The court then addressed the defendant's nonconstitutional evidentiary argument which was raised below and, thus, preserved for appellate review. *Id.* The court held that exclusion of the expert opinion did not constitute an abuse of discretion under the Arkansas evidence rules. *Id.*

significance of tying relief through retroactive application to proof of prejudice lies in the fact that a state's retroactivity determination would be designed to afford relief only to those claims that actually implicate the integrity of the conviction or sentence. When a state appellate court reviews a federal constitutional claim on direct appeal, it must apply the harmlessness standard of *Chapman v. California*.[426] Under *Chapman*, the burden is placed on the prosecution to demonstrate beyond a reasonable doubt that constitutional trial error was harmless in order to avoid reversal.[427] This burden, imposed on the prosecution, is heavy by design and serves to promote compliance with constitutional protections afforded the accused in the criminal process.

However, as discussed previously, in *Brecht v. Abrahamson*, the Court recognized that competing interests, including finality,[428] warrant application of a different standard for proof of harm in evaluating claims of constitutional error asserted in federal habeas proceedings.[429] But when that same error is recognized by the federal habeas court, the petitioner is not entitled to relief unless the petitioner can also establish that the error affected the course of the proceedings.[430] The standard adopted in *Brecht* mirrors that applied to non-constitutional errors reviewed in appeals in federal cases.[431] This test, the *Kotteakos* standard, "under which an error requires reversal only if it 'had substantial and injurious effect or influence in determining the jury's verdict,'"[432] essentially shifts the burden to the federal habeas petitioner to demonstrate prejudice resulting from the constitutional error. Finally, when the federal habeas court is in "grave doubt" as to whether the prejudice standard has been met, the petitioner benefits from the unresolved question and is entitled to relief.[433]

State courts may determine that the *Brecht* standard should apply to claims of federal constitutional error in state post-conviction process.[434] For instance,

426. 386 U.S. 18, 24 (1967).

427. *Id.*

428. Brecht v. Abrahamson, 507 U.S. 619, 633-35 (1993). The majority observed: "The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system." *Id.* at 635.

429. *Id.*; *see also* 28 U.S.C. § 2254(d)(1) (2000) (affording state court defendants the federal habeas corpus remedy in challenging their convictions based on federal constitutional error in their state prosecutions when state courts rejected their constitutional claims based on wholly contrary or unreasonable interpretations of Supreme Court precedent).

430. *Brecht*, 507 U.S. at 638-39.

431. Kotteakos v. United States, 328 U.S. 750, 776 (1946).

432. *Brecht*, 507 U.S. at 631 (quoting *Kotteakos*, 328 U.S. at 776).

433. O'Neal v. McAinich, 513 U.S. 432, 445 (1995).

434. *Ex parte* Fierro, 934 S.W.2d 370, 371-72 (Tex. Crim. App. 1996).

the Texas Court of Criminal Appeals expressly relied on *Brecht* in explaining its approach to a claim of prosecutorial misconduct in *Ex parte Fierro* where the claim related to the use of perjured testimony at a suppression hearing.[435] The Texas court explained that, generally, federal constitutional claims, except *knowing* use of perjury, are reviewed for prejudice under a test requiring the defendant to prove prejudice by a preponderance of the evidence.[436] An allegation of *knowing* use triggers review under the rule applicable on direct appeal, which requires reversal unless the court concludes that the "error made no contribution to the conviction or punishment."[437] Because the petitioner could not demonstrate that the prosecutor *knowingly* used false testimony, his claim was evaluated under the test requiring him to carry the burden of demonstrating prejudice, and the error was deemed harmless.[438]

The different treatment of constitutional claims in the state post-conviction process by the Texas court in *Fierro* suggests that state courts considering retroactive application of new rules might justifiably impose a duty on the petitioner claiming their benefit to demonstrate prejudice or probable prejudice resulting from the error.[439] But the *Fierro* Court discussed one additional consideration that might factor into a retroactivity determination.[440] The Court concluded that the claim under consideration was one properly characterized as trial error, rather than structural error because the post-conviction applicant could not demonstrate that the prosecutor *knowingly* used perjury.[441] This distinction was critical to the court's application of its prejudice standard because, as it explained,[442] structural error is *not* subject to harmlessness analysis, based on the Supreme Court's descriptions of structural and trial error

435. *Id.* at 372.

436. *Id.*

437. *Id.* at 372 n.4 (citing TEX. R. APP. PROC. 81(b)(2)).

438. *Id.* at 374-75.

439. The Supreme Court denied certiorari in *Fierro v. Texas*, 521 U.S. 1122 (1997). Although the denial of certiorari does not have precedential value, see *Carpenter v. Gomez*, 516 U.S. 981, 981 (1995) (Stevens, J., opinion respecting denial of petition for writ of certiorari), the denial of certiorari in *Fierro* nevertheless might serve to inform state courts considering similar issues. In 1991, for instance, the Court had suggested that South Carolina used an erroneous standard in assessing prejudice arguably resulting from a constitutionally-flawed jury instruction in a case litigated in the state post-conviction process. Yates v. Evatt, 500 U.S. 391, 400 (1991). *Yates* was soon discredited in *Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991), and the correction was apparently addressed to the actual consideration of the effect of the instruction, rather than the general test applied for review of constitutional error addressed in the state post-conviction process.

440. *Fierro*, 934 S.W.2d at 374.

441. *Id.* (citing Arizona v. Fuliamente, 499 U.S. 279, 307-12 (1991); *see supra* note 255 (discussing structural and trial error under *Fulminante*).

442. *Fierro*, 934 S.W.2d at 372-74.

in *Arizona v. Fulminante*.[443] Thus, under the Texas approach, a postconviction petitioner claiming relief based on constitutional trial error[444] would be required to demonstrate that the error contributed to the conviction or punishment.

The unresolved question for *Danforth* analysis might be whether a state court should approach the issue of retroactive application of a structural error claim arising in the context of a "new rule." For instance, the *Danforth* Court noted that Pennsylvania had applied *Batson* retroactively.[445] *Batson*'s rule, prohibiting discriminatory exclusion of ethnic minorities from jury service through exercise of peremptory challenges, involves imposition of a prophylactic rule designed to address a problem of "structural error," as the Court noted in *Fulminante*.[446] The Court refused to direct federal habeas courts to apply the "new rule" retroactively in federal habeas litigation brought by state inmates.[447]

Arguably, a state court might fashion a relatively reasonable prejudice requirement for even some structural claims, such as that implicated by *Batson*. For instance, the court could direct that relief be granted on retroactive consideration of a *Batson* violation only upon a showing of some likelihood of prejudice. A likelihood of prejudice might then be demonstrated by a showing that the case involved some question of ethnic or gender-based prejudice such that discriminatory exclusion of a prospective juror could

---

443. *Fulminante*, 499 U.S. 307-09.

444. The *Fulminante* Court described "trial" error as error which occurs during the presentation of evidence at trial and may "be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 307-08. It also provided a number of examples of "structural" error: "total deprivation of counsel at trial, a biased judge, the unlawful exclusion of members of the defendant's race from a grand jury, denial of the right to self-representation at trial, and denial of the right to a public trial." *Fierro*, 934 S.W.2d at 372 (citing *Fulminante*, 499 U.S. at 310).

445. Danforth v. Minnesota, 128 S. Ct. 1029, 1043 (2008) (citing Commonwealth v. McCormick, 519 A.2d 442, 448 (Pa. Super. Ct. 1986)). However, the state court's decision is limited because the issue arose in the context of direct appeal, rather than in collateral review. *McCormick*, 519 A.2d at 446. *McCormick* was decided a year prior to *Griffith*, where the Supreme Court held that "new rules" decisions apply to non-final cases on direct appeal when the decision is announced. Griffith v. Kentucky, 479 U.S. 314, 322 (1987). Thus, although the *McCormick* Court clearly held that Pennsylvania was not bound by federal retroactivity principles, the conclusion in the decision was consistent with the retroactivity policy subsequently adopted as the federal due process rule in *Griffith*. The state court engaged in extensive discussion of state autonomy in retroactivity decisions and discussion of Pennsylvania's history of making retroactivity determinations advancing its position on state court autonomy. *McCormick*, 519 A.2d at 445-50.

446. *Fulminante*, 499 U.S. at 291.

447. Allen v. Hardy, 478 U.S. 255, 261 (1986).

logically have influenced the verdict or sentence imposed. If one or more minority jurors were excluded through discriminatory use of peremptory challenges, for example, the likely, probable, or potential prejudice threshold might be demonstrated if the case involved an issue of a cross-racial crime or identification, or an issue of race-bias motivation for the offense.

The mere imposition of a prejudice formula, however, is not likely to apply fairly to all structural errors, even theoretically.[448] For example, exclusion of a *Witherspoon*-qualified juror from a capital trial might not be subject to any prejudice analysis without resort to speculation if a death sentence was, in fact, imposed. But if jurors imposed a life sentence and the evidence supporting conviction was legally sufficient, the error in excluding the juror could be characterized as harmless beyond a reasonable doubt, thus meeting even the rigorous standard of *Chapman*.[449]

Similarly, while some questions of constitutionally-flawed jury instructions present questions of structural error,[450] such as an instruction that improperly mischaracterizes the burden of proof or denial of an instruction on a defensive theory raised by the evidence,[451] other omissions are not necessarily beyond harm analysis.[452]

Finally, and most importantly with respect to the *Crawford* issue, the harmlessness/prejudice determination applicable in confrontation cases actually requires a showing of probable prejudice in a related context.[453] When a Sixth Amendment confrontation claim is based on a trial court's limitation on cross-examination, rather than when the defendant is wholly deprived of an

448. The Supreme Court recognized the "structural/trial error" distinction in *California v. Roy*, 519 U.S. 2, 5 (1996), holding that the *Kotteakos* test imposed for claims of constitutional error recognized in the federal habeas process announced in *Brecht* is appropriate for review of trial error claims, but not claims of structural error.

449. Chapman v. California, 368 U.S. 18 (1967).

450. Sullivan v. Louisiana, 508 U.S. 275, 281-82 (1993).

451. *See, e.g.*, Teater v. State, 201 S.W.3d 442, 447 (Ark. Ct. App. 2005) (trial court's refusal to instruct on insanity defense supported by evidence constituted structural error requiring reversal); Teater v. State, No. CACR 06-936, 2007 WL 987814, at *3-4 (Ark. Ct. App. Apr. 4, 2007) (trial court's refusal to instruct on insanity at retrial following remand required reversal; law of the case doctrine dictated instruction where expert testimony offered at retrial substantially conformed to opinion at initial trial determined to warrant instruction on defense).

452. Concurring in *Roy*, 519 U.S. at 6, Justice Scalia explained that the harmlessness test, as applied where the issue raises a jury instruction flawed by omission of a necessary element of the offense, should be phrased in terms of the following inquiry: "The error in the present case can be harmless only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well." *Id.* at 7.

453. Delaware v. Van Arsdall, 475 U.S. 673, 674 (1986).

opportunity for meaningful cross-examination, a finding of constitutional error rests on a showing of probable prejudice.[454] In *Delaware v. Van Arsdall*, the Court held that a limitation on cross requires reversal only when the defendant's right to test the evidence was compromised by the limitation.[455]

Rather, the *Van Arsdall* Court applied a test that begins with the assumption that the cross-examination not permitted by the trial court would have achieved its intended purpose, or in other words, it would have been successful.[456] Starting from this perspective, the assumed successful cross-examination is measured against the same types of factors that would be relied on by reviewing courts in assessing any claim of trial error: the importance of the witness's testimony to the prosecution's case; whether the evidence offered by the witness was cumulative; whether the witness's testimony was corroborated or contradicted by other evidence on key points; the extent of cross-examination actually permitted by the trial court; and the overall strength of the prosecution's case.[457] Thus, the reviewing court can determine if the denial or limitation on the defendant's cross-examination was harmless beyond a reasonable doubt.

In dissent, Justice Marshall noted the majority's conclusion that a complete denial of cross-examination would demonstrate a Confrontation Clause-required reversal.[458] On direct appeal, his observation, when applied to admission of testimonial hearsay in the absence of a meaningful opportunity for cross-examination, is consistent with the holding in *Crawford*. But, in the context of a state court's decision to afford retroactive application to *Crawford*, the application of the *Van Arsdall* formula might prove reasonable in determining which claimants should be afforded relief to prevent the miscarriage of justice flowing from a conviction obtained in violation of the Sixth Amendment confrontation guarantee.

Conclusions

The decision in *Danforth* recognizes the autonomy of state courts in developing and implementing retroactivity doctrine, particularly when applied to the possible reliance by state court defendants on new rules of constitutional criminal procedure recognized by the Court, but not held to apply retroactively under *Teague*. This autonomy affirms the significant role of state courts within the federal system in the development of law operating within a

454. *Id.* at 680.
455. *Id.* at 683-84.
456. *Id.* at 684.
457. *Id.*
458. *Id.* at 686 (Marshall, J., dissenting).

particular jurisdiction, while recognizing the supremacy of the United States Supreme Court in interpreting the Federal Constitution.

Moreover, the pre-*Danforth* decision by the New Mexico Supreme Court in *State v. Forbes* demonstrates how the flexibility ultimately afforded by *Danforth* might be exercised in state court proceedings in which individual considerations of fundamental fairness might result in limited retroactive applications of federal constitutional precedent, while other considerations would militate against broader retroactive application. *Danforth* arose in the context of a particularly troubling constitutional question regarding the admissibility of certain classes of hearsay without the opportunity for the defense to meaningfully cross-examine the declarant.

Yet, the factual context of *Danforth* is particularly important when compared to *Crawford*. In *Crawford*, as in the *Earnest* case in New Mexico in which retroactive relief was afforded for the convicted defendant, the declarant was an accomplice and his statement to the police implicating others fell within that class of testimony traditionally considered "inherently suspect." The declarant in *Danforth*, in contrast, was a child deemed incompetent to testify in court, but whose statement did not suggest any likelihood of motive or bias to report falsely. Consequently, any state court considering the issue of retroactive application of *Crawford*, might well look to discrete factors in assessing whether admission of the uncrossed hearsay likely prejudiced the accused or contributed to his conviction. *Danforth* permits a state court making a retroactivity determination—particularly on a *Crawford* issue—to consider the likelihood of unfairness to the accused. State courts may apply federal constitutional decisions retroactively, but creatively, by limiting the scope of retroactivity. In that sense, *Danforth* implicitly respects not only the autonomy of state courts within the federal system, but their sensitivity to basic issues of justice in the administration of the criminal law.