RIGHTS AND REMEDIES IN STATE HABEAS PROCEEDINGS

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In 2008, in *Danforth v. Minnesota*, the United States Supreme Court held that state courts, in their own post-conviction proceedings, were entitled to give broader retroactive effect to new rules of federal constitutional criminal procedure announced by the Court than would be available to state inmates on federal habeas review.[1] This short essay examines the effects of *Danforth* on the practices of state courts to date and its likely impact in the future. Part I briefly reviews the Court's retroactivity jurisprudence and state court retroactivity practices prior to *Danforth*, and then discusses *Danforth* itself. Part II examines state court decisions involving retroactivity after *Danforth* in order to assess *Danforth's* effects so far on state court practices. The essay concludes that while *Danforth* gives state courts the opportunity to apply federal rules more generously, it is hard for state courts to escape the influence of the Supreme Court's own retroactivity analysis; even when state courts elect to exercise independence, there may be practical limits on how much they are able to accomplish.

I. RETROACTIVITY: PAST AND PRESENT

Most of the provisions of the Bill of Rights apply to state government via the Fourteenth Amendment's Due Process Clause, just as they apply to the federal government.[2] Application of the criminal procedural provisions of the Bill of Rights to the states raises a basic question: when the Supreme Court rules for the first time that a state practice violates a provision of the Bill of Rights,

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[1] Danforth v. Minnesota, 552 U.S. 264 (2008).

[2] McDonald v. Chicago, 130 S. Ct. 3020 (2010) ("In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict), the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines."). *Id.* at 3035 n.13 (citation omitted) (holding that the Second Amendment is fully applicable to the states).

do defendants who have already been convicted benefit from that ruling?

A. Linkletter and Stovall

The Supreme Court first confronted this question in 1965, in *Linkletter v. Walker*.[3] In that case, the Court held that "the Constitution neither prohibits nor requires" the retroactive application of new rules of criminal procedure.[4] Instead, the Court explained, determining retroactivity required "weigh[ing] the merits and demerits in each case."[5] Two years later, in *Stovall v. Denno*, the Court identified three criteria to guide the case-by-case analysis for determining retroactivity: (1) "the purpose to be served by the new [rule], (2) the extent of reliance by law enforcement authorities on the old [rule], and (3) the effect on the administration of justice of a retroactive application of the new [rule]."[6] In announcing these criteria, the Court drew no general distinction between cases in which the conviction was final—so that only habeas review was available—and cases still in the trial or appellate stages.[7] This was because the *Linkletter*/*Stovall* approach was intended to be flexible enough to allow for the full scope of any retroactivity to be determined after a new rule was announced.[8] But therein lies the problem. As Justice Harlan quickly pointed out in urging that "[r]etroactivity must be rethought," the three-prong test was also unpredictable—and it produced seemingly inconsistent results.[9]

[3] Linkletter v. Walker, 381 U.S. 618 (1965).

[4] *Id.* at 629. The Court has explained that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government, or, in other words, if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague v. Lane, 489 U.S. 288, 301 (1989).

[5] *Linkletter*, 381 U.S. at 629.

[6] Stovall v. Denno, 388 U.S. 293, 297 (1967).

[7] *Id.* at 300.

[8] *Id.* at 296–97.

[9] Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting).

B. Griffith and Teague

The Court soon heeded Justice Harlan's advice. In a pair of cases, *Griffith v. Kentucky*[10] and *Teague v. Lane*, [11] the Court provided clearer rules to govern retroactivity, and it drew a sharp line between habeas cases and cases in which the defendant's conviction had not yet worked its way through the appellate process (and so was not yet final). In *Griffith*, the Court held that *all* new rules announced by the Court applied retroactively to all cases, state or federal, pending on direct review or not yet final.[12] In place of the three-prong analysis of *Linkletter*/*Stovall*, there would be blanket retroactivity. By contrast, under *Teague*, a new rule applies retroactively to cases that were final when the rule was announced in just two circumstances: (1) where a new substantive rule places certain kinds of private conduct beyond the power of the government to proscribe; and (2) where a new procedural rule defines procedures "'implicit in the concept of ordered liberty.'"[13] A new procedural rule satisfies the second exception only if it is a "watershed rule[]"[14] that implicates fundamental fairness and the accuracy of the criminal proceeding, such that without the rule "the likelihood of an accurate conviction is seriously diminished."[15]

As a result, habeas petitioners generally benefit from new substantive rules because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him."[16] However, new procedural rules rarely qualify for retroactive application under the *Teague* standard. Indeed, the *only* watershed rule the Court has recognized is the right to trial counsel established by *Gideon v. Wainwright*.[17] The Court has also stated that it is unlikely that there are any new watershed rules yet to be

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[10] Griffith v. Kentucky, 479 U.S. 314 (1987).

[11] Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion). The *Teague* rule was affirmed by a majority of the Court in *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) ("Because Penry is before us on collateral review, we must determine, as a threshold matter, whether granting him the relief he seeks would create a new rule. Under *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions.") (citation omitted).

[12] *Griffith*, 479 U.S. at 322–23.

[13] *Teague*, 489 U.S. at 307–10 (citations omitted).

[14] *Id.* at 311.

[15] *Id.* at 313.

[16] Schriro v. Summerlin, 542 U.S. 348, 351 (2004) (citations omitted).

[17] Gideon v. Wainwright, 372 U.S. 335 (1963); *see also* Beard v. Banks, 542 U.S. 406, 417 (2004) (identifying *Gideon* as a watershed rule).

announced.[18] In other words, under *Teague*, once a conviction is final there is virtually no chance that the convicted defendant will be able to seek in a habeas petition the benefit of a new procedural rule that the Court announces.

Or so it seemed. *Teague* involved a state inmate who filed his habeas petition in federal court.[19] While the restrictive *Teague* approach applied to all federal habeas petitions, the case said nothing about whether the approach also applied to habeas petitions (or other post-conviction applications) brought by state inmates in state court. Did *Teague* also mean that state courts could only apply new federal rules in state habeas proceedings if the rules were watershed rules? The Supreme Court only answered that question in 2008 when it decided *Danforth v. Minnesota*,[20] holding that state courts could indeed apply new rules more broadly than *Teague* mandated.

C. State Court Practices Following Teague

State courts, of course, did not have the luxury of waiting almost two decades after *Teague* was decided to determine whether the retroactivity approach of that case governed state habeas proceedings. Most state courts, confronted with habeas petitioners seeking the benefit of new procedural rules announced by the Supreme Court, simply adhered to the narrow *Teague* standard.[21] In so doing, some state courts took the position that they were required to follow *Teague* and could not adopt a retroactivity standard that would give a broader class of habeas petitioners the benefit of new Supreme Court rules.[22] Yet, most state courts that followed *Teague* observed they were not required to do so, and were adopting *Teague* as the appropriate retroactivity standard to apply in state court proceedings.[23] Some state courts even adopted the

[18] *Schriro*, 542 U.S. at 352.

[19] *Teague*, 489 U.S. at 288.

[20] Danforth v. Minnesota, 552 U.S. 264 (2008).

[21] Rhoades v. State, 233 P.3d 61, 65–66 (Idaho 2010) (collecting cases that show that thirty states and the District of Columbia followed *Teague*).

[22] *See*, *e.g.*, Page v. Palmateer, 84 P.3d 133, 136–37 (Or. 2004) (In declining to apply *Apprendi* retroactively to a state post-conviction proceeding, writing that "although Oregon courts are free to apply pronouncements of *Oregon* constitutional law that have a federal equivalent to a broader range of cases than the federal constitution requires, Oregon courts are *not* free to apply pronouncements of *federal* constitutional law to a broader range of cases than federal law requires."); State v. Egelhoff, 900 P.2d 260, 267 (Mont. 1995) (writing in a Fourteenth Amendment due process case that *Teague* "is binding upon this Court").

[23] *See*, *e.g.*, Daniels v. State, 561 N.E.2d 487, 490 (Ind. 1990) ("Because the purposes for

Teague standard in determining the retroactivity of *state* law rules of criminal procedure.[24]

Nonetheless, some state courts did not follow *Teague* and instead implemented a different approach to retroactive application of new federal rules in state habeas proceedings. These approaches varied in terms of their proximity to the *Teague* standard itself.

The Nevada Supreme Court adopted a modified version of *Teague*. In *Cowell v. Nevada*,[25] that court asserted its authority to "provide broader retroactive application of new constitutional rules of criminal procedure than *Teague* and its progeny require."[26] While describing *Teague* to be "sound in principle," the Nevada court observed that "the Supreme Court has applied it so strictly in practice that decisions defining a constitutional safeguard rarely merit application on collateral review."[27] The Nevada court recognized the reason for *Teague*'s narrowness: "[s]trictly constraining retroactivity serves the Supreme Court's purpose of circumscribing federal habeas review of state court decisions."[28] Nonetheless, the court explained, "as a state court we choose not to bind quite so severely our own discretion in deciding retroactivity."[29] The court in *Cowell* therefore adopted "the general framework of *Teague*," while reserving its "prerogative to define and determine within this framework whether a rule is new and whether it falls within the two exceptions to nonretroactivity."[30] In other words,

which this Court affords the remedy of post-conviction relief are substantially similar to those for which the federal writ of habeas corpus are made available, we elect to follow the approach of *Teague* . . . in addressing the retroactivity of new law to cases on review pursuant to petitions for post-conviction relief under Indiana procedure.") (holding that *Booth v. Maryland*, 482 U.S. 496 (1987), did not apply retroactively to cases undergoing collateral review); State *ex rel.* Schmelzer v. Murphy, 548 N.W.2d 45, 49 (Wis. 1996) ("We . . . hereby explicitly endorse the rule of *Teague* for application of new rules to collateral appeals in Wisconsin."); State *ex rel.* Taylor v. Whitley, 606 So. 2d 1292, 1296–97 (La. 1992) ("We now . . . adopt the *Teague* standards for all cases on collateral review in our state courts. In doing so, we recognize that we are not bound to adopt the *Teague* standards.") (citations omitted); Edwards v. People, 129 P.3d 977, 992 (Colo. 2006) ("[E]ven if we are not bound to follow *Teague*, we have the discretion to do so.").

[24] *See*, *e.g.*, State v. Slemmer, 823 P.2d 41, 49 (Ariz. 1991) ("The law regarding retroactivity is complex enough without requiring counsel and trial judges to apply different retroactivity rules, depending on whether the substantive decision is grounded on state or federal constitutional principles—especially when many decisions are grounded on both."); Commonwealth v. Bray, 553 N.E.2d 538, 541 (Mass. 1990); Pailin v. Vose, 603 A.2d 738, 742 (R.I. 1992).

[25] Cowell v. Nevada, 59 P.3d 463 (Nev. 2002).

[26] *Id.* at 470.

[27] *Id.* at 471.

[28] *Id.*

[29] *Id.*

[30] *Id.*

Teague's components applied, but the state court would determine exactly how. Under the Nevada approach,

> when a rule is new, it will still apply retroactively in two instances: (1) if the rule establishes that it is unconstitutional to proscribe certain conduct as criminal or to impose a type of punishment on certain defendants because of their status or offense; or (2) if it establishes a procedure without which the likelihood of an accurate conviction is seriously diminished.[31]

This approach allows for broader retroactive application of new rules than does *Teague* because the first exception is not limited to cases involving "primary, private individual" conduct and the second exception does not require the new rule to be a "watershed" rule.[32] *Cowell* involved the question of whether the ruling of *Ring v. Arizona,*[33] that that the Sixth Amendment requires a jury to find the aggravating factors necessary for imposing the death penalty, applied retroactively to death penalty cases already final; applying its modified *Teague* approach, the Nevada court held there was no retroactive application of *Ring*.[34]

Instead of following *Teague*, Missouri elected to adhere to the *Linkletter*/*Stovall* three-prong test that *Teague* replaced.[35] Explaining its decision, the Missouri Supreme Court announced:

> It is up to each state to determine whether to apply the rule set out in *Teague*, to continue to apply the rule set out in *Linkletter*/*Stovall*, or to apply yet some other rule appropriate for determining 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.[36]

The *Linkletter*/*Stovall* standard, the court said, "comports better with Missouri's legal tradition."[37] Applying *Linkletter*/*Stovall*, the Missouri Supreme Court held that *Ring* did apply retroactively to the benefit of state court habeas petitioners.[38]

The Supreme Court of South Dakota also continued to follow the

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[31] *Cowell*, 59 P.3d at 472.
[32] *Id.*
[33] Ring v. Arizona, 536 U.S. 584 (2002).
[34] *Cowell*, 59 P.3d at 469 (citing *Ring*, 536 U.S. 584).
[35] State v. Whitfield, 107 S.W.3d 253 (Mo. 2003) (en banc).
[36] *Id.* at 267.
[37] *Id.* at 268.
[38] *Id.* at 268–69.

Linkletter/*Stovall* approach after *Teague*. In *Cowell v. Leapley*,[39] the Supreme Court of South Dakota rejected the application of *Teague* in state court proceedings. The case involved a state court habeas petition brought by a defendant convicted of first degree murder. The defendant argued that *Edwards v. Arizona*[40] and *Arizona v. Robertson*[41] should be retroactively applied to bar the admission of a confession he made during a custodial interrogation.[42] The lower court viewed itself bound by *Teague*.[43] The Supreme Court of South Dakota disagreed. It explained: "[w]hile the substance of what is to be applied is a federal constitutional matter, the decision on what criteria to use to determine prospective or retroactive application is a nonconstitutional state decision."[44] Thus, while "[t]he federal government controls how it permits access to [habeas corpus] in its courts . . . South Dakota establishes grounds that will provide access to habeas corpus in our courts."[45] Describing the *Teague* standard as "unduly narrow," the court explained that under state statutory and case law, the three-prong test derived from *Linkletter*/*Stovall* governed.[46] Under this approach, the court concluded that "*Edwards* and *Robertson* should not be applied retroactively under our rule."[47]

Meanwhile, the Florida Supreme Court took a different approach. In 1980, in *Witt v. State*, it held that a new rule applies retroactively if it: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance."[48] The court continued to apply this standard after *Teague*.[49]

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[39] Cowell v. Leapley, 458 N.W.2d 514 (S.D. 1990).

[40] Edwards v. Arizona, 451 U.S. 477 (1981) (holding that once a suspect in custody invokes his right to counsel, interrogation may not continue until counsel has been made available to him or the suspect himself initiates further communication with the police).

[41] Arizona v. Robertson, 486 U.S. 675 (1988) (holding that the *Edwards* rule applies to bar police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation).

[42] *Cowell*, 458 N.W.2d at 516.

[43] *Id.*

[44] *Id.* at 517.

[45] *Id.*

[46] *Id.* at 519 (citing McCafferty v. Solem, 449 N.W.2d 590, 591–92 (S.D. 1989)).

[47] *Id.*

[48] Witt v. State, 387 So.2d 922, 931 (Fla. 1980)

[49] *Id.*; *see also* Hughes v. State, 901 So.2d 837, 838 (Fla. 2005) (declining to apply *Apprendi* retroactively under this standard); 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*.") (citations omitted).

D. Danforth

In 1996, Stephen Danforth was convicted in Minnesota state court of first-degree criminal sexual conduct with a child.[50] The prosecutor introduced into evidence a videotaped interview of the victim, who did not testify at trial.[51] Danforth's conviction was affirmed on appeal.[52] In 2004, after Danforth's conviction became final, the Supreme Court held in *Crawford v. Washington* that the Confrontation Clause of the Sixth Amendment prohibits the admission of testimonial out-of-court statements unless the defendant has had a prior opportunity to cross-examine the speaker.[53] Danforth thereafter filed a post-conviction petition in state court arguing that he was entitled to a new trial because the introduction of the videotaped interview violated *Crawford*.[54] Applying *Teague*, the state trial court and the court of appeals held that *Crawford* did not apply retroactively to Danforth's case.[55]

Danforth argued to the Minnesota Supreme Court that it was free to apply a broader retroactivity standard than that of *Teague* and that he was entitled to the benefit of *Crawford* under state retroactivity principles.[56] The Minnesota Supreme Court rejected Danforth's argument. It explained that "Danforth is incorrect when he asserts that state courts are free to give a Supreme Court decision of federal constitutional criminal procedure broader retroactive application than that given by the Supreme Court," and it held that "the retroactivity of *Crawford* to Danforth's case must be analyzed under *Teague*."[57] Affirming the lower court, the state supreme court held that under *Teague*, *Crawford* did not apply retroactively to Danforth's case.[58] That turned out to be the correct analysis under *Teague*: in *Whorton v. Bockting*, the Supreme Court held, in a federal habeas case, that under the *Teague* standard, the *Crawford* rule does not apply retroactively to cases that were final when *Crawford* was decided.[59] Nonetheless, the Supreme Court subsequently granted review in *Danforth* to consider whether state

[50] State v. Danforth, 573 N.W.2d 369 (Minn. Ct. App. 1997).
[51] *See id.* at 372.
[52] *Id.* at 377.
[53] Crawford v. Washington, 541 U.S. 36, 68–69 (2004).
[54] Danforth v. State, 700 N.W.2d 530, 531 (Minn. Ct. App. 2005).
[55] *Id.* at 532.
[56] Danforth v. State, 718 N.W.2d 451, 455 (Minn. 2006).
[57] *Id.* at 456–57.
[58] *Id.* at 460–61.
[59] Whorton v. Bockting, 549 U.S. 406, 421 (2006).

courts were bound by the *Teague* standard, or could instead adopt a state "retroactivity test that affords application of Supreme Court decisions to a broader class of criminal defendants than the class defined by *Teague*."[60]

In an opinion by Justice Stevens, the Court, by a vote of 7–2, reversed the Minnesota Supreme Court and remanded the case. The Court held that *Teague* does not constrain the authority of state courts in their own post-conviction proceedings to give broader effect to new rules of federal criminal procedure announced by the Supreme Court than would be available in federal habeas proceedings.[61] Justice Stevens explained that "[a] close reading of the *Teague* opinion makes clear that the rule it established was tailored to the unique context of federal habeas and therefore had no bearing on whether States could provide broader relief in their own postconviction proceedings than required by that opinion."[62]

According to Stevens, *Teague*'s very presumption that a new rule is not retroactive was based on the Court's interpretation of the federal habeas statute: "[s]ince *Teague* is based on statutory authority that extends only to federal courts applying a federal statute, it cannot be read as imposing a binding obligation on state courts."[63] More generally, Stevens reasoned, *Teague* was grounded in principles of federalism, comity, and "respect for the finality of state convictions."[64] True, *Teague* was also concerned with uniformity—the deficiency of the *Linkletter*/*Stovall* approach—but any interest in uniformity "does not outweigh the general principle that States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees."[65] Accordingly, Stevens concluded that

> the *Teague* rule of non-retroactivity was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings. It was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when

[60] Petition for Writ of Certiorari, Danforth v. State of Minnesota, 2006 WL 4541279 (No. 60–8273) (2007).

[61] Danforth v. Minnesota, 552 U.S. 264, 275 (2008).

[62] *Id.* at 277.

[63] *Id.* at 278–79.

[64] *Id.* at 279.

[65] *Id.* at 280.

reviewing its own State's convictions.[66]

While a state court could not independently determine whether a federal constitutional violation had occurred, it was free to provide a remedy beyond that available to habeas petitioners in federal court.[67]

Chief Justice Roberts, joined by Justice Kennedy, dissented.[68] In his dissenting opinion, Roberts viewed the question of retroactivity to be a question of federal law so that state courts were bound by the Supreme Court's retroactivity determinations.[69] He emphasized *Teague*'s concerns with finality and with uniformity,[70] and wrote that the majority's approach produces the "startling" result that "[o]f 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, one may be executed while the other is set free."[71] Roberts rejected the majority's distinction between the scope of a right and the remedy for a violation of the right,[72] and he viewed the majority's federalism concerns to be misplaced.[73]

II. OPPORTUNITIES AND LIMITATIONS AFTER *DANFORTH*

For state courts that viewed themselves bound by *Teague*, *Danforth* represents an opportunity to reconsider their own state retroactivity rules and to give broader effect to new procedural rules announced by the Supreme Court. State courts have several motivations to adopt a broader retroactivity approach. As the Nevada Supreme Court and the South Dakota Supreme Court have explained, state courts might view the *Teague* approach as too

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[66] *Id.* at 280–81.

[67] *Id.* at 290–91.

[68] *Id.* at 291.

[69] *Id.* at 291–92 (Roberts, C.J., dissenting).

[70] *Id.* at 300–01.

[71] *Id.* at 292.

[72] *Id.* at 303 ("When this Court decides that a particular right shall not be applied retroactively, but a state court finds that it should, it is at least in part because of a different assessment by the state court of the nature of the underlying federal right—something on which the Constitution gives this Court final say.").

[73] *Id.* at 308 ("Principles of federalism protect the prerogative of States to extend greater rights under their own laws than are available under federal law. The question here, however, is the availability of protection under the Federal Constitution—specifically, the Confrontation Clause of the Sixth Amendment. It is no intrusion on the prerogatives of the States to recognize that it is for this Court to decide such a question of federal law, and that our decision is binding on the States under the Supremacy Clause.").

narrow.[74] State courts might elect not to follow *Teague* in order to preserve their own authority with respect to state court proceedings. State courts might give a broader class of convicted defendants the benefit of a new rule because of features unique to the state's criminal justice system. For example, there might be a long history of abuses of a particular constitutional right within the state for which a broader rule of retroactivity is a useful cure.

States might adopt a broader approach precisely because at the federal level, *Teague* limits the likelihood of federal relief. Justice Anstead of the Supreme Court of Florida has set forth this rationale as a reason why state courts should not follow *Teague*:

> It would make little sense for state courts to adopt the *Teague* analysis when a substantial part of *Teague*'s rationale is deference to a state's substantive law and review. If anything, the more restrictive standards of federal review place increased and heightened importance upon the quality and reliability of the state proceedings. In other words, if the state proceedings become the only real venue for relief, as they in fact have become, it is critically important that the state courts provide that venue and "get it right" since those proceedings will usually be the final and only opportunity to litigate collateral claims. In fact, it is the presumed heightened quality of state proceedings that allows the federal courts to defer to the state proceedings as adequate safeguards to the rights of state prisoners. To then further restrict the state proceedings would undermine the entire rationale for restricting federal proceedings because of the reliability of state proceedings.[75]

Despite these reasons for departing from *Teague*, state courts have not rushed to adopt their own retroactivity frameworks in the wake of *Danforth*. Indeed, the record suggests that *Danforth*'s invitation to state courts to adopt broader retroactivity standards has had little direct impact so far. As discussed in this section, the highest courts of two states (Texas and Minnesota) have affirmed their pre-*Danforth* commitment to *Teague*.[76] A third state supreme court (in Idaho) has adopted *Teague* as the retroactivity standard in state proceedings.[77] And in two other states (Alaska and Michigan)

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[74] *See supra* Part I.C.
[75] Hughes v. Florida, 901 So.2d 837, 863 (Fla. 2005).
[76] *See infra* Parts II.A, II.B.
[77] *See infra* Part II.C.

the highest courts have continued to adhere to pre-*Danforth* tests based on *Linkletter*/*Stovall*.[78]

At the same time, *Danforth* has not been irrelevant to how state courts analyze questions of retroactivity. A close look at state court decisions since *Danforth* reveals two ways in which *Danforth* impacts the retroactivity practices of state courts, even if state courts do not adopt new and more generous retroactivity standards. First, even when state courts are free to apply a broader retroactivity standard than *Teague*, they still need to ensure that they apply at least as much retroactivity as *Teague* requires. If the Supreme Court has not yet held whether a new rule is required to be applied retroactively under *Teague*, the state court needs to consider that question. The way in which the state court does so can potentially affect the scope of a state retroactivity standard. Second, two state courts that have adhered to *Teague* after *Danforth* have nonetheless asserted the authority to independently determine when *Teague* requires retroactivity. *Danforth* might not lead state courts to abandon *Teague*, but it can lead them to think differently about how *Teague* itself applies.

A. Danforth's Constraints

Since *Danforth*, the highest courts of Texas, Alaska, and Michigan—as well as Minnesota—have reaffirmed the retroactivity standards they followed before *Danforth* was decided.[79] In *Ex Parte Lave*, the Texas Criminal Court of Appeals applied *Teague* and held that the right of confrontation under *Crawford* did not apply retroactively in state habeas proceedings.[80] The Supreme Court

[78] *See infra* Part II.A.

[79] Lower state courts, asked to take up the opportunity *Danforth* presents, have deferred to past decisions of their own state supreme courts. *See*, *e.g.*, People v. McDowell, 219 P.3d 332, 338 (Colo. App. 2009) ("Defendant's reliance on *Danforth v. Minnesota* . . . for a different result is misplaced. . . . [T]he Colorado Supreme Court has explicitly adopted the *Teague* standard, explaining that it would adopt it even if not required to do so.") (citing Edwards v. People, 129 P.3d 977, 982–83 Colo. 2006)); Commonwealth v. Kartell, 886 N.E.2d 125 (Mass. App. Ct. 2008) ("We recognize that Federal law does not require a State court to limit retroactive consideration of newly established Federal constitutional principles to the criteria of *Teague*. Nevertheless, the Supreme Judicial Court has consistently followed the rule of *Teague*.") (citing Commonwealth v. Bray, 553 N.E.2d 538 (Mass. 1990)); People v. Davis, 904 N.E.2d 149, 157–58 (Ill. App. Ct. 2009) ("[T]he Supreme Court of Illinois has never held that it was required to apply the holding in *Teague*. However, the Supreme Court of Illinois has applied it on numerous occasions. . . . [T]his court lacks the authority to not follow the decisions of our supreme court, which are binding on all lower courts. . . . Consequently, we apply the analysis in *Teague*.").

[80] *Ex parte* Lave, 2007 WL 2655888 (Tex. Crim. App. 2007) (citing *Ex parte* Keith, 202

vacated that judgment and remanded for consideration in light of *Danforth*.[81] On remand, the Texas Court of Criminal Appeals, while acknowledging that it was free to apply a broader retroactivity standard, adhered to *Teague* and dismissed the habeas petition.[82] One possible impact of *Danforth*, then, is none: state courts will continue to apply *Teague*.

The highest courts of Alaska and Michigan have affirmed the use of a pre-*Danforth* retroactivity standard that differs from *Teague*. The decisions of these state courts illustrate how even if state courts in the future take up *Danforth*'s invitation to adopt a broader retroactivity standard, application of that standard can remain constrained by Supreme Court rules of retroactivity. Prior to *Danforth*, the Alaska Supreme Court used a state retroactivity test based on *Linkletter*/*Stovall*.[83] In *State v. Smart*, a case decided after *Danforth*, the Alaska Supreme Court reaffirmed its commitment to the so-called *Judd* test,[84] and applied the test to hold that *Blakely v. Washington*[85] does not apply retroactively.[86] In *Blakely*, the petitioner pleaded guilty in state court to kidnapping; the facts admitted in the plea supported a maximum sentence of 53 months but the sentencing judge found that the petitioner had acted with deliberate cruelty and departed from the standard sentencing range to impose a 90-month sentence.[87] Applying the rule of *Apprendi* v. *New Jersey,*[88] that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt,"[89] the *Blakely* Court held that because the facts supporting the petitioner's exceptional sentence were neither admitted by the petitioner nor found by a jury, the sentence violated the Sixth Amendment right to trial by jury.[90] In

S.W.3d 767 (Tex. Crim. App. 2006)).

[81] Lave v. Texas, 552 U.S. 1228 (2008).

[82] *Ex parte* Lave, 257 S.W.3d 235, 237 (Tex. Crim. App. 2008).

[83] Judd v. State, 482 P.2d 273 (Alaska 1971).

[84] State v. Smart, 202 P.3d 1130 (Alaska 2009). The Court recognized Justice Harlan's criticism of *Linkletter*, but explained that "[n]o party argues that any standard other than those discussed in *Teague* and [*Linkletter*] should be applied here on collateral review. Absent meaningful argument on the issue, we decline to consider whether to apply some other standard." *Id.* at 1138.

[85] Blakely v. Washington, 542 U.S. 296 (2004).

[86] *Smart*, 202 P.3d at 1146–47.

[87] *Blakely*, 542 U.S. at 298.

[88] 530 U.S. 466 (2000).

[89] *Id.* at 490.

[90] *Blakely*, 542 U.S. at 305.

ruling that *Blakely* did not apply retroactively, the Alaska court in *Smart* observed that "*Danforth* . . . allows us to apply either the *Teague* test for full retroactivity or a state constitutional test so long as the state test is at least as comprehensive as the federal test."[91] In order to "confirm that *Judd* is no less protective than the federal standard," the Alaska court first assessed whether *Blakely* would be fully retroactive under *Teague*; to do that, the court stated it would "look to how the federal courts have applied *Teague* to *Blakely*."[92] Because federal and state courts applying *Teague* have held that *Blakely* is not retroactive,[93] the court concluded that the *Judd* standard "is no less protective than the federal standard."[94] Like the *Linkletter*/*Stovall* approach, the first *Judd* factor asks about the purpose of the new rule. Under Alaska precedent, this factor only points in favor of retroactive application when the new rule raises "serious questions about the accuracy of previous verdicts."[95] Here, the court found that fact-finding by a judge rather than a jury does not "substantially impair the truth-finding function of the criminal trial" so as to warrant retroactive application of the *Blakely* rule.[96] In reaching this conclusion, the court found "persuasive" the Supreme Court's assessment, in *Schiro v. Summerlin,*[97] that, under *Teague*, "judicial fact-finding . . . does not 'so *seriously* diminish[ ] accuracy as to produce an impermissibly large risk of injustice.'"[98] Similarly, the court did not view the reasonable doubt requirement of *Blakely* as sufficiently tied to the accuracy of verdicts so as to justify full retroactivity of the *Blakely* rule.[99] In reaching this conclusion, the court invoked the assessments by federal courts that neither *Blakely* nor *Apprendi* created watershed rules of criminal procedure under *Teague*.[100]

The Michigan Supreme Court has followed a path similar to that of the Alaska Supreme Court. As in Alaska, the Michigan courts traditionally used a state test based on *Linkletter*/*Stovall*. In *People v. Maxson*,[101] a case decided after *Danforth*, the Michigan Supreme

[91] *Smart*, 202 P.3d at 1136.
[92] *Id.* at 1138.
[93] *Id.* at 1138–39.
[94] *Id.* at 1139.
[95] *Id.* at 1141 (citations omitted).
[96] *Smart*, 202 P.3d at 1143.
[97] Schiro v. Summerlin, 542 U.S. 348 (2004) (holding that *Ring v. Arizona*, 536 U.S. 584 (2002), does not apply retroactively to cases already final on direct review).
[98] *Smart*, 202 P.3d at 1142 (quoting Schiro v. Summerlin, 542 U.S. 348, 356 (2004)).
[99] *Id.* at 1145.
[100] *Id.* at 1144–45.
[101] People v. Maxson. 759 N.W.2d 817 (Mich. 2008).

Court considered whether the rule announced in *Halbert v. Michigan*,[102] that under the Due Process and Equal Protection Clauses indigent defendants who plead guilty are entitled to appointed counsel on direct appeal, should be applied retroactively.[103] The court first analyzed whether *Halbert* is retroactive under *Teague* and concluded it is not.[104] The court reasoned that the rule could not be a watershed rule because states are not required to provide any appellate proceedings for defendants in the first place, and therefore providing counsel is not "implicit in the concept of ordered liberty" under *Teague*.[105] The court then applied its own state retroactivity test, and concluded that *Halbert* is not retroactive under that test either.[106] All three prongs weighed against retroactivity. The purpose of the *Maxson* rule did not affect the integrity of the fact-finding process: few defendants would have detrimentally relied upon the old rule and not pursued an appeal, and the state's interest in finality would be undermined by retroactive application of the new rule.[107] Writing in dissent, Justice Michael F. Cavanagh argued that "*Teague* is inapplicable to this case" because *Danforth* authorizes state courts to apply broader remedies,[108] and that under the state's own retroactivity test, the rule of *Halbert* should apply in state habeas proceedings.[109]

The decisions of the Alaska and Michigan supreme courts illustrate how even when state courts take up *Danforth*'s invitation and depart from *Teague*, *Teague* still casts a shadow. When the Supreme Court has not yet determined whether a new rule applies under the *Teague* analysis, state courts must answer that question because they must apply a rule that *Teague* requires to be applied. When state courts conduct this analysis, and then conduct an analysis under their own state court retroactivity standards, the analysis under the state standard can be influenced by the analysis of, and answer to, the federal retroactivity question. Even when the Supreme Court has determined that a new rule does not apply retroactively—so that the state court does not need to determine that issue on its own—the Court's own analysis can influence how a

[102] Halbert v. Michigan, 545 U.S. 605 (2005).
[103] *Maxson*, 759 N.W.2d at 820.
[104] *Id.* at 821.
[105] *Id.* (quoting Teague v. Lane, 489 U.S. 288, 290 (1989)).
[106] *Id.* at 827.
[107] *Id.* at 823–25.
[108] *Id.* at 828 (Cavanagh, J., dissenting).
[109] *Id.* at 830–833.

state courts thinks about the retroactivity question under the state standard. Because state courts cannot simply ignore *Teague*, they cannot easily escape its shadow either.

B. Danforth's Hidden Opportunity

The fourth court that has reaffirmed its pre-*Danforth* approach is the Minnesota Supreme Court itself. On remand, Stephen Danforth argued that the Minnesota Supreme Court should not follow *Teague*, but instead should adopt the *Linkletter*/*Stovall* approach or adopt the approach of the Nevada Supreme Court in *Colwell*.[110] The Minnesota Supreme Court elected not to depart from the *Teague* standard by giving broader retroactive effect to *Crawford*.[111] In affirming its use of the *Teague* approach, the Minnesota Supreme Court recognized that while *Teague* is grounded in part in concerns with federal courts unduly interfering with state court criminal cases, other benefits of *Teague* also apply in state court habeas proceedings. In particular, state courts also have an interest in the finality of convictions: "[w]ithout finality, the criminal law is deprived of much of its deterrent effect."[112] According to the court, neither *Linkletter*/*Stovall* nor *Cowell* confers the same benefit of finality.[113]

Yet, that was not the end of the matter. The Minnesota Supreme Court also announced that in applying *Teague* in future cases, it was not bound by the Supreme Court's interpretation of which new rules were watershed rules, and therefore retroactively applicable. "[E]ven as we formally adopt the *Teague* standard of our own volition," the court stated, "we are not bound by the U.S. Supreme Court's determination of fundamental fairness. Rather, we will independently review cases to determine whether they meet our understanding of fundamental fairness."[114] Thus, the Minnesota Supreme Court both adhered to the framework of *Teague* while reserving to itself the right to decide when *Teague* requires retroactivity.

After *Danforth*, the Supreme Court of Idaho adopted *Teague* as the retroactivity standard.[115] The case involved whether the Court's

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[110] Danforth v. State, 761 N.W.2d 493, 498 (Minn. 2009).

[111] *See id.*

[112] *Id.* at 498.

[113] *Id.* at 498–99.

[114] *Id.* at 500.

[115] Fields v. State, 234 P.3d 723, 725 (Idaho 2010); Rhoades v. State, 233 P.3d 61, 67 (Idaho 2010).

holding in *Ring v. Arizona*[116] applied retroactively in state habeas proceedings. The state trial court had denied the petitioners' applications for relief on this basis, and the Idaho Supreme Court affirmed.[117] The U.S. Supreme Court vacated and remanded in light of *Danforth*.[118] On remand, the state court applied *Teague* and held that *Ring* did not apply retroactively.[119] This resolved some confusion in the state courts as to whether the *Linkletter* standard, which the court had previously applied, still governed.[120] The court reasoned that *Teague* supplied a preferable approach to retroactivity because it "provides a simpler and more predictable test for determining whether decisions are given retroactive effect," and thereby "advances an important interest: the finality of judgments."[121]

At the same time, recognizing criticisms of *Teague*, the Idaho court, "follow[ing] the lead of the Minnesota Supreme Court" in *Danforth*, held that "Idaho courts must independently review requests for retroactive application of newly-announced principles of law under the *Teague* standard."[122] Specifically, because state courts do not have the same

> concern for comity when interpreting whether a decision pronounces a new rule of law for purposes of applying *Teague* . . . [and state courts are not] required to blindly follow [the Supreme Court's] view of what constitutes a new rule or whether a new rule is a watershed rule, . . . the decisions of the courts of this state whether to give retroactive effect to a rule of law should reflect independent judgment, based upon the concerns of this Court and the "uniqueness of our state, our Constitution, and our long-standing jurisprudence."[123]

As these cases illustrate, a state court might, therefore, adhere to *Teague* while reserving to itself the authority to determine when *Teague* requires the retroactive application of a new federal rule. In other words, state courts might seek to have things both ways: decline *Danforth*'s invitation to adopt a different standard, but

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[116] Ring v. Arizona, 536 U.S. 584 (2002).
[117] *Rhoades*, 233 P.3d at 63.
[118] Rhoades v. Idaho, 552 U.S. 1227 (2008).
[119] *Rhoades*, 233 P.3d at 71.
[120] *Id.* at 66–67.
[121] *Id.* at 69.
[122] *Id.* at 67.
[123] *Id.* at 70 (quoting State v. Donato, 20 P.3d 5, 8 (Idaho 2001)).

apply the Supreme Court's own standard in an independent fashion. *Danforth* does not appear to foreclose this approach, although questions might emerge in the future, akin to those in the independent and adequate state law ground context,[124] about whether a state court decision truly is based on a state standard or is the application of what the state court believes federal law requires.

For this reason, even when state courts assert they are applying *Teague* independently, their application of *Teague* can also easily operate in the shadow of the Supreme Court's own analysis. After announcing its independent authority to apply *Teague*, the Idaho Supreme Court held that *Ring v. Arizona*[125] does not apply retroactively in state habeas proceedings.[126] In *Schiro v. Summerlin*, the Supreme Court had held that *Ring* announces a new procedural rule that does not apply retroactively to cases already final.[127] The Idaho court agreed with this assessment: "we also conclude that *Ring* announced a new procedural rule rather than substantive rule. . . . The rule announced in *Ring* is also not subject to any exception to *Teague* . . . ."[128] The court went on to explain how this outcome did not undermine the court's commitment to independently apply *Teague*:

> [W]hile we adopt the U.S. Supreme Court's interpretation of *Ring* in this instance, we are still committed to independently analyzing requests for retroactive application of newly-announced principles of law with regard for the uniqueness of our state, our Constitution and our long-standing jurisprudence. However, jury participation in the sentencing process of a capital case is not required under the Idaho Constitution. Accordingly, this Court's independent analysis of the *Teague* standard yields the same result as the U.S. Supreme Court.[129]

As this opinion suggests, a state court can seek to remain vigilant about the influence the Supreme Court's answer to whether a new rule applies retroactively could exert on the state court's own analysis. Nonetheless, in practice, a state court might end up

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[124] *See* Jason Mazzone, *When the Supreme Court is Not Supreme*, 104 NW. U. L. REV. 979 (2010).

[125] Ring v. Arizona, 536 U.S. 584 (2002).

[126] *Rhoades*, 233 P.3d at 70–71.

[127] Schiro v. Summerlin, 542 U.S. 348, 358 (2004).

[128] *Rhoades*, 233 P.3d at 71.

[129] *Id.* at 71 (citations omitted).

reaching the same result as did the Supreme Court under *Teague*.

III. CONCLUSION

Danforth presents state courts with an opportunity to give broader retroactive effect to new federal rules of criminal procedure than the Supreme Court itself requires. Whether *Danforth* will result in state habeas petitioners receiving the benefit of new federal rules remains to be seen. Even when state courts adopt a broader retroactivity approach, they cannot easily escape the shadow of the Supreme Court. State retroactivity tests are necessarily influenced by the Supreme Court's own analysis in *Teague*; state courts that assert independence in applying *Teague* also operate under the influence of the Court's analysis. As a practical matter, the opportunity *Danforth* presents might remain beyond the reach of many state courts.