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Brief of Law Professors, Timothy P. O'Neill, et al as Amici Curiae in Support of Petitioner-Appellee Addolfo Davis, People v. Davis, 6 N.E.3d 709 (Illinois Supreme Court 2013) (No. 115595)

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No. 115595

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellant, vs. ADDOLFO DAVIS, Petitioner-Appellee.	On Petition for Leave to Appeal from the Appellate Court of Illinois, First District, Second Division, No. 1-11-2577 There Heard on Appeal from the Circuit Court of Cook County, Criminal Division, No. 91 CR 3548 The Honorable Angela Munari Petrone, Judge Presiding

BRIEF OF LAW PROFESSORS TIMOTHY P. O'NEILL, *et al.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLEE ADDOLFO DAVIS

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INTRODUCTION

When he was just fourteen years old, Addolfo Davis was convicted as an accomplice of two counts of murder, attempted murder, and home invasion. Based on his offense, Illinois law mandated a natural life sentence without consideration of any mitigating circumstances. Last year, however, the United States Supreme Court held that a mandatory life-without-parole sentence for a youth like Davis constitutes cruel and unusual punishment and thus violates the Eighth and Fourteenth Amendments. *Miller v. Alabama*, 132 S. Ct. 2455 (2012). Consequently, the First District Appellate Court granted Davis a new sentencing hearing, holding that *Miller* should apply retroactively to his case on post-conviction review under the retroactivity analysis established by *Teague v. Lane*, 489 U.S. 288 (1989), and adopted by this Court in *People v. Flowers*, 138 Ill. 2d 218 (1990). Davis now comes before this Court on the State's petition to consider whether Davis is entitled to a new sentencing hearing under *Miller*.

The focus of this *amicus* brief is narrow. It recognizes that the Appellate Court below correctly applied *Teague* to find *Miller* retroactive to petitioners like Davis on post-conviction review. Still, should this Court disagree that *Miller* applies retroactively under *Teague*, *amici*[1] contend that this Court need not be bound by *Teague*—because this Court's powers to grant collateral relief in state proceedings are broader. And *Miller* is precisely the kind of landmark case for which this Court should exercise its broad power

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[1] *Amici* consist of the following law professors, who represent a diverse body of clinical and academic scholarship in Illinois law schools: Professors Timothy P. O'Neill, John Marshall School of Law; William K. Carroll, John Marshall Law School; Herschella G. Conyers, University of Chicago Law School; Daniel T. Coyne, IIT Chicago-Kent College of Law; Marc D. Falkoff, Northern Illinois University College of Law; Jane E. Raley, Northwestern University School of Law; Alan Raphael, Loyola University Chicago School of Law; and Ronald C. Smith, John Marshall Law School.

to grant post-conviction relief to defendants like Davis. Accordingly, *amici* urge this Court to affirm the Appellate Court's decision vacating Davis's sentence and ordering a new sentencing hearing under *Miller*.

ARGUMENT

THIS COURT IS NOT BOUND TO APPLY *TEAGUE* TO PROVIDE RETROACTIVE RELIEF IN STATE COLLATERAL PROCEEDINGS.

Neither *Teague* nor this Court's adoption of *Teague* in *Flowers* should constrain Illinois courts in providing post-conviction relief. In reviewing a federal habeas corpus petition from a state prisoner, *Teague* held that principles of federalism—specifically, comity and deference to state court judgments—trump the individual justice concerns of a convicted state prisoner. These federalism concerns, however, do not apply to a state court evaluating the validity of its own criminal judgments.

Decided twenty-three years ago, *Flowers* adopted *Teague* too rigidly. First, *Teague* was concerned with the proper balance between the federal court system and the state court system; its focus was not on delivering ultimate justice *solely within a state court system itself.* If unclear at the time *Teague* was decided in 1989, a decision five years ago by the U.S. Supreme Court in *Danforth v. Minnesota*, 552 U.S. 264 (2008), makes explicit what was implicit in *Teague*: that because comity was *Teague*'s overriding concern, it only has relevance to the issue of how much deference federal courts should extend to state court judgments. Indeed, the Court in *Danforth* held that "considerations of comity militate *in favor of* allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*." *Id.* at 279-80 (emphasis added). Notably, this Court decided *Flowers* in 1990 without the benefit of *Danforth*.

Second, application of *Teague* within the state court system is self-defeating—the very point of *Teague* is to honor the final judgments of state courts, and yet *Teague* restrains state courts' power to correct clear constitutional violations. Finally, the most conceivable reason supporting the *Flowers* "non-retroactivity" rule is the value of finality in criminal cases. Closer analysis, though, shows that finality is not a strong enough reason to let constitutional violations suffered by post-conviction defendants stand. In short, *Teague* is at most a floor, but certainly no ceiling for retroactive relief in Illinois.

A. *TEAGUE* WAS EXCLUSIVELY CONCERNED WITH FEDERAL HABEAS REVIEW OF FINAL STATE JUDGMENTS.

Teague was a landmark decision by the U.S. Supreme Court that limited federal habeas review of state criminal cases. The petitioner there had exhausted direct review of his conviction—which was "final" for purposes of federal habeas review. *See Teague*, 489 U.S. at 292-94, 311. Only after the petitioner's conviction became final did the U.S. Supreme Court decide *Batson v. Kentucky*, 476 U.S. 79 (1986), finding that racial discrimination by the state in exercising peremptory challenges in jury selection violated the Equal Protection Clause. Teague filed a petition for federal habeas corpus; the Seventh Circuit, sitting *en banc* after *Batson* was decided, held that Teague could not benefit retroactively from the *Batson* rule. *See Teague*, 489 U.S. at 294.

Justice O'Connor's plurality opinion[2] in *Teague* re-configured the role of federal habeas corpus in reviewing state convictions. Justice O'Connor observed that federal

[2] Although *Teague* was a plurality opinion garnering only four votes, the rule was quickly applied by a majority of the Court. *See 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)), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

habeas review should not function to reverse a final judgment of a state court merely because recent changes in the law could dictate a different result. *See id.* at 306-10. Nor should it be used as a vehicle to announce new constitutional rules. *Id.* at 316. Rather, the sole function of federal habeas review is to correct seriously flawed state court decisions—where a state court had improperly flouted constitutional principles that existed at the time the state court decided the case.[3] *See* Wayne R. LaFave et al., *Criminal Procedure* 1372 (5th ed. 2009). The rationale for this limited review is that "interests of comity and finality must . . . be considered in determining the proper scope of habeas review." *Teague*, 489 U.S. at 308. Thus, the non-retroactivity principle announced in *Teague* is only germane to the work of federal courts, *i.e.*, it establishes the degree of deference that federal courts must give state court criminal judgments. Exclusively based on federalism and comity principles, *Teague* has little relevance to how a state court system should govern itself.

In *Flowers*, in contrast, this Court was faced with the question of whether an *Illinois* prisoner could seek relief in an *Illinois* post-conviction proceeding by relying on a case decided after his conviction became final. Flowers filed a petition under Illinois's Post-Conviction Hearing Act (now codified at 725 ILCS 5/122), arguing for relief under *People v. Reddick*, 123 Ill. 2d 184 (1988), which reversed a murder conviction based on seriously flawed jury instructions. *See Flowers*, 138 Ill. 2d at 224, 234-36. This Court held that Flowers could not obtain post-conviction relief because *Reddick*, decided after

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[3] *Teague* recognized two exceptions where "new rules" would be given retroactive effect on federal habeas review. One is for a new rule which "places 'certain kinds of primary, private individual conduct beyond the power of criminal law-making authority.'" *Teague*, 489 U.S. at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring)). The second is for a new rule that concerns "watershed rules" of criminal procedure. *Id.* at 311.

Flowers's conviction had become final, constituted a new rule. *Flowers*, 138 Ill. 2d at 239-40. Relying on *Teague*, this Court reasoned that if new rules of constitutional law do not apply retroactively to state prisoners on federal habeas corpus review, the same rule should apply to state prisoners on state post-conviction review. *Id.* at 238-42.

At first blush, the analogy seems plausible. But closer analysis shows its fatal flaws. In fact, this Court in *Flowers* spent only a few paragraphs deciding the issue. *Id.* at 237-39. Though defendants in both cases sought retroactive application of favorable case law decided after their state convictions became final, *Flowers* concerned review within a single court system, whereas *Teague* addressed the relations *between* federal courts and state courts. Thus, *Teague's* underlying values of federalism and comity are irrelevant to Illinois courts deciding Illinois cases. Indeed, *Flowers* adopted *Teague* without discussing how *Teague's* underlying values of federalism and comity are relevant to Illinois courts deciding Illinois cases.

And the reason for the absence of such a discussion is this: principles of federalism presume that both the state and federal court systems are each doing their jobs properly. The Supreme Court in *Teague* saw state courts as fully capable of doing justice in their own criminal law systems. *See Teague*, 489 U.S. at 310. Thus, it saw the liberal use of federal habeas corpus as an insult to state courts' abilities to administer criminal justice. *See, e.g.,* Sandra D. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 812-14 (1981) (arguing against a perceived lack of respect for the ability of state court judges to apply federal constitutional law). Comity *demanded* that federal courts treat state court criminal judgments with due deference, with the presumption being that

state courts had already "gotten it right" and that federal courts should interfere only in egregious cases. But the deference to state courts embodied in *Teague* is predicated on the philosophy that federal review should presume that a state court reached a fair and just decision.

Ultimately, *Teague* functions as a barrier *between* federal and state courts, denying federal courts the power to interfere with state court convictions that have presumptively been thoroughly vetted within the state court system. Based on the principles of comity inherent in our federal system, *Teague* is willing to assume that the state court has done its best to come to a correct result. When considering relief within their own systems, however, state courts are not bound by *Teague*. *See* Timothy P. O'Neill, *New Law, Old Cases, Fair Outcomes: Why The Illinois Supreme Court Must Overrule People v. Flowers*, 43 LOY. U. CHI. L.J. 727 (2012) (arguing that *Flowers* was wrongly decided because *Teague*'s concerns of comity and federalism do not apply within state court systems).

B. THE U. S. SUPREME COURT HAS CONFIRMED THAT THE POLICIES BEHIND *TEAGUE* PERMIT BROADER HABEAS RELIEF BY STATE COURTS.

The Court in *Flowers* adopted *Teague* without the clarity provided by the U.S. Supreme Court in *Danforth v. Minnesota*, 552 U.S. 264 (2008), decided eighteen years later in 2008. The issue in *Danforth* was whether *Teague*'s retroactivity analysis binds state as well as federal courts. In holding that *Teague* does not limit state courts' ability to grant broader retroactive relief in state post-conviction cases, *Danforth* reveals the flaws in this Court's decision in *Flowers*.

Appealing the dismissal of his state post-conviction petition, Danforth made two arguments. First, he argued that under *Teague* he was entitled to retroactive application of

Crawford v. Washington, 541 U.S. 36 (2004), which tightened the rules concerning the use of out-of-court statements under the Sixth Amendment's Confrontation Clause. Alternatively, Danforth argued that the Minnesota Supreme Court was "'free to apply a broader retroactivity standard than that of *Teague*,' and should apply the *Crawford* rule to [his] case even if federal law did not require it to do so." *Danforth*, 552 U.S. at 267-68 (citation omitted). The Minnesota Supreme Court held that it had no choice in the matter, and was legally bound to apply *Teague* whenever the retroactivity of a new federal rule was at issue. *Id.* at 268 & n.2. Under a *Teague* analysis, it found that *Crawford* was not retroactive. *Id.* at 267-68. The U.S. Supreme Court, however, made clear that Minnesota was free to reject the *Teague* analysis within its own state court system and apply a broader standard of retroactivity. *Id.* at 282. Notably, this Court in *Flowers* recognized it was not legally bound to apply *Teague* to its state post-conviction law. *See Flowers*, 138 Ill. 2d at 237-38 (recognizing it was not compelled to adopt *Teague* in Illinois).

In explaining why a state was not constitutionally *forced* to follow *Teague*, the U.S. Supreme Court's decision in *Danforth*, however, not only held that state courts are not required to apply *Teague*, it shows why a state court's application of *Teague* would be unwise. As discussed above, *Danforth* emphasized that *Teague* was a narrow decision only relevant to relations *between* federal courts and state courts: "[*Teague*] was tailored to the unique context of federal habeas and therefore had no bearing on whether States could provide broader relief in their own post-conviction proceedings." *Danforth*, 552 U.S. at 277. *Teague*, in fact, said nothing about limitations on states; it was simply interpreting a federal statute. *See id.* at 278-79 (citing 28 U.S.C. § 2243).

Particularly relevant here, *Danforth* explained that *Teague* "was meant to apply only to federal courts considering habeas corpus petitions challenging state court criminal convictions." *Id.* at 279. *Teague* is not germane to how a state court should deal with retroactivity within its own state system. The decision itself stressed that its holding was based on concerns of federalism and comity, and, as *Danforth* noted, these concerns "are unique to *federal* habeas review of state convictions." *Id.* Importantly, *Danforth* observed:

> *If anything*, considerations of comity *militate in favor* of allowing state courts to grant [post-conviction] relief to a broader class of individuals than is required by *Teague*. . . . It is a matter that States should be free to evaluate . . . .

Id. at 279-80 (emphasis added). The Court went on to note that "[s]tates are independent sovereigns with plenary authority to make and enforce their own laws." *Id.* at 280. Thus, the Court in *Teague* had no intention of limiting "a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions." *Id.* at 280-81.

While *Danforth* reasserts that the main considerations behind *Teague* were federalism and comity, the word "federalism" is nowhere to be found in the few paragraphs that analyze *Teague* in *Flowers*. *Cf. Flowers*, 138 Ill. 2d at 237-40. And although *Flowers* acknowledges that "comity" issues underlie *Teague*, *see id.* at 239, it offers no analysis of why this principle of *federalism* should impact whether Illinois should apply *Teague* to its own state post-conviction proceedings.

C. ADOPTION OF *TEAGUE* FOR STATE POST-CONVICTION PROCEEDINGS DEFEATS THE INTENT OF *TEAGUE* ITSELF.

Not only is this Court not bound by *Teague*, there are compelling reasons why it should not apply *Teague* to settle retroactivity on state collateral review. When a state

court system applies *Teague* to its own decisions, it limits its own power to reach optimal results. The use of *Teague* denies a post-conviction petitioner the benefit of a favorable rule *already given to another person within the state itself.* When the federal system applies *Teague*, it restrains federal courts from interfering with a state's efforts to reach the best possible result in a case using the law in place at that time. But when a state applies *Teague* to its own cases, it only restrains itself from reaching the best result. Indeed, it undermines the very point of the Post-Conviction Hearing Act, which is to empower state courts to correct constitutional violations that could not be remedied on direct review.

Thus, a state's adoption of *Teague* destroys the whole reason why federal courts apply *Teague*: to defer to state court judgments in the first place. A supreme court justice in Louisiana captured this point perfectly when he noted that a state court's adoption of *Teague* "does not promote the goals of federalism; instead, in self-defeating circularity, [the state court] blindly replicates the very federal habeas rule by which the High Court attempts to accord comity to our state laws and decisions." *State ex rel. Taylor v. Whitley,* 606 So. 2d 1292, 1303 (La. 1992) (Dennis, J., dissenting).

Similarly, *Flowers* misunderstood the framework in which *Teague*'s solution should apply. The retroactivity solution offered by *Teague* is geared to problems *between* sovereigns, *i.e.*, federal habeas review of state judgments. But the *Flowers* situation concerns retroactivity *within* a sovereign's own system. Whereas federal courts may sacrifice the optimal result to promote comity between state and federal courts, no such comity issue in dealings *within* a sovereign justify letting constitutional violations persist.

Like *Teague, Flowers* was willing to sacrifice optimal results; unlike *Teague,* however, it made that sacrifice for a less compelling purpose.

D. FINALITY IS NOT A STRONG ENOUGH REASON TO DENY RETROACTIVE APPLICATION OF FAVORABLE CHANGES IN THE LAW ON STATE COLLATERAL REVIEW.

Flowers cited two reasons for denying retroactive application of favorable changes in the law to state prisoners on post-conviction review: comity and finality. *See Flowers*, 138 Ill. 2d at 239. As previously demonstrated, federal-state comity has no relevance to issues within an individual state court system. It is true, however, as Chief Justice John Roberts noted in his dissenting opinion in *Danforth*, that "finality" was a value mentioned in *Teague*. *See Danforth*, 552 U.S. at 300 (Roberts, C.J., dissenting). Yet finality concerns in state post-conviction proceedings are less significant than those in federal habeas review and do not justify the application of *Teague* in state post-conviction cases. Where constitutional jurisprudence has not evolved sufficiently until after a conviction has become final, Illinois courts through the Post-Conviction Hearing Act are authorized to protect interests of justice that prevail over finality concerns.

In important ways, a federal habeas corpus case is procedurally distinct from an Illinois post-conviction case. In a federal habeas corpus proceeding, a state prisoner must show that he has "exhausted" his claim, that is, that he has given the state court system an adequate opportunity to rule on his claim by taking advantage of every state forum. *See Rose v. Lundy,* 455 U.S. 509, 515 (1982). Moreover, if the claim was never properly raised under state court rules, the claim is considered "procedurally defaulted" and barred from being raised in a habeas corpus petition. *See Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977).

Illinois post-conviction petition procedure is the mirror-image of this. Any issue previously decided on state direct review will be denied post-conviction consideration on the grounds of *res judicata*; conversely, any issue that could have been raised on direct appeal, but was not, is considered procedurally defaulted. *See People v. Ligon*, 239 Ill. 2d 94, 103 (2010). Thus, the only issues cognizable under the Post-Conviction Hearing Act are those constitutional issues that *could not have been raised* on direct review because the issues relied on material beyond the trial record. By definition, then, state prisoners must raise issues in every possible state forum in order to preserve them for federal review. It is one thing for a federal court to deny retroactivity of a new rule to an issue on which the petitioner had already obtained several reviews in state court. But it is very different to deny retroactivity to a prisoner who was *compelled* by state procedure to raise an issue for the *first time* on post-conviction review. Ordinary retroactivity rules allow a defendant to take advantage of new rules throughout the course of his direct appeal. *See Griffith v. Kentucky,* 479 U.S. 314, 328 (1987). To *compel* a prisoner to raise an issue *for the first time* in a post-conviction context—and then to deny him the retroactivity he would have received on direct appeal—is both arbitrary and unjust. "Just as finality is not a strong enough interest to overcome the need for retroactive application of new rules on direct review, so too to the extent state post-conviction proceedings serve as a first round of litigation for certain types of claims, finality must fail as a justification for nonretroactivity." Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," After* Danforth v. Minnesota, 46 AM. CRIM. L. REV. 1, 61 (2009) (footnote omitted).

In fashioning a rule to replace *Flowers,* this Court might consider a retroactivity test once used by the U.S. Supreme Court in *Linkletter v. Walker*, 381 U.S. 618 (1965), *overruled by Griffith v. Kentucky,* 479 U.S. 314 (1987), *and overruled by Teague v. Lane*, 489 U.S. 288 (1989). This flexible test weighs several factors: 1) the purpose of the new rule; 2) prior reliance on the "old" rule; and 3) the administrative burden of retroactivity. *See Linkletter*, 381 U.S. at 636-38. Several states have replaced reliance on *Teague* with the *Linkletter* test. *See, e.g., State v. Jess,* 117 Haw. 381, 402 n.20 (2008); *see also State ex rel. Taylor v. Steele,* 341 S.W.3d 634, 661 & n.5 (Mo. 2011). Unsurprisingly, application of *Linkletter* here bears out the result requested by Davis. The purpose of *Miller* is to remedy unconstitutional punishment, and to provide an unconstitutionally denied guarantee that both age and individuality be considered in sentencing—particularly when that sentence condemns a child to prison until death. Prior reliance on the authority to automatically impose life-without-parole sentences on children has been limited to an estimated 105 cases prior to Miller. See *People v. Williams*, 982 N.E. 2d 181, 198 (Ill. App. Ct. 2012). Administratively then, allowing retroactive application of Miller does not unduly burden the judicial system.

But whatever rule this Court decides to use in lieu of *Teague,* it must recognize the compelling reasons Davis—who is serving a natural life sentence for an act committed when he was fourteen years old—deserves a new sentencing hearing pursuant to the rule of *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

CONCLUSION

Teague is a U.S. Supreme Court case concerned with comity and federalism, rather than the inner workings of a state court system at issue here. For all of the reasons discussed above, this Court should not be constrained by *Teague* in granting collateral relief to Davis under *Miller*. Accordingly, *amici* urge this Court to affirm the Appellate Court's decision granting Davis a new sentencing hearing.

Dated: August 19, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and 341(b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, and the Rule 341(c) certificate of compliance, is 13 pages.

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