

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LINDSEY BROOKE LOWE,
Petitioner

v.
STATE OF TENNESSEE,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE

PETITION FOR A WRIT OF CERTIORARI

DAVID L. RAYBIN
RAYBIN & WEISSMAN, PC
Fifth Third Center, # 2120
424 Church St.,
Nashville, TN 37219
DRaybin@nashvilletnlaw.com

J. ALEX LITTLE
BONE MCALLESTER NORTON,
PLLC
511 Union Street # 1600
Nashville, TN 37219
alex.little@bonelaw.com

Counsel for Petitioner

QUESTION PRESENTED

For nearly a century, Tennessee courts have required strict adherence to the statutory requirements for the issuance of a search warrant. Without warning, the Tennessee Supreme Court changed that practice in 2016, after the petitioner's criminal conduct, trial, and while her case was on direct appeal. As a result, the rules that she reasonably believed would govern her trial changed dramatically, affecting her ability to consider a plea agreement and evaluate the strength of the government's case against her.

The question presented is:

Whether the limitations on *ex post facto* judicial decision-making that this Court recognized in *Bouie v. City of Columbia* and *Rogers v. Tennessee*, and which are inherent in the notion of due process, prevent state courts from retroactively applying a good-faith exception to the exclusionary rule to the detriment of a defendant when the unforeseeable change in law occurred after the defendant's crime, charge, and trial.

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The opinion of the Circuit Court for the State of Tennessee, Eighteenth Judicial District, is included in the appendix to the Petition. App. 39–43. The opinion of the Court of Criminal Appeals of Tennessee is included in the appendix to the Petition. App. 38. The opinion of the Supreme Court of Tennessee is reported at 552 S.W.3d 842 (Tenn. 2018). App. 2–37.

STATEMENT OF THE BASIS OF JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on July 20, 2018. Ms. Lowe then filed a timely petition for rehearing, which was denied on July 26, 2018. On October 4, 2018, Ms. Lowe requested a sixty-day extension from this Court to file a petition for a writ of certiorari; the honorable Justice Kagan granted an extension to and including December 17, 2018. This petition was timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides, in pertinent part, that “[n]o . . . ex post facto Law shall be passed,” U.S. CONST. art. I, § 9, cl. 3, and “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law,” U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

Tennessee has long protected its citizens against unreasonable searches. This protection has included reading the Fourth Amendment's warrant requirement in a manner that compels strict compliance by the State with the rules for obtaining a search warrant. To this end, courts in Tennessee routinely have suppressed evidence that was obtained as the result of search warrants that failed to comply with *all* the requirements of Tennessee Rule of Criminal Procedure 41.

This regime has been demanding. Pursuant to Tenn. R. Crim. P. 41(d), for example, a magistrate must prepare an original and two *exact* copies of each search warrant. If she fails to do so, the resulting warrant is deemed invalid, and any evidence obtained from the resulting search is suppressed. *See, e.g., State v. Hayes*, 337 S.W.3d 235, 255-56 (Tenn. Crim. App. 2010). There is no room for error; even minor deviations in the “exact copy” requirement render a warrant void. *Hayes* provides a prime example of this rule. There, the magistrate prepared the original copy of the warrant and *one* of the copies with an incorrect time designation of “10:35 p.m.” rather than “10:35 a.m.” *Id.* Due to this discrepancy, and the lack of “exact copies,” the Tennessee Court of Criminal Appeals ruled that the evidence obtained from the warrant was inadmissible and reversed the resulting convictions. *Id. at* 255-56.

The Tennessee Court of Appeals decided *Hayes* in 2010. It was no outlier; it relied on clear precedent from the Supreme Court of Tennessee reaching back more

than ninety years. *State v. Lowe*, 552 S.W.3d 842, 851 (Tenn. 2018). The next year, the Defendant in this case, Ms. Lowe, was charged with two counts of first-degree murder for the killing of her two newborn children. *Id.* After the commission of her crime, and while her conviction was on appeal, the Tennessee Supreme Court changed the rules; it decided for the first time—contrary to decades of consistent precedent—that the State need not adhere precisely to the rules for issuing warrants. *See State v. Davidson*, 509 S.W.3d 156, 185 (Tenn. 2016), *cert. denied*, 138 S. Ct. 105 (2017). This change dramatically altered the environment in which Ms. Lowe’s plea negotiations, trial, and appeal occurred.

Ms. Lowe was charged with murder after her mother, who did not know her daughter was pregnant, discovered one of the infants in a laundry basket in Ms. Lowe’s bedroom on the morning of September 14, 2011. *Lowe*, 552 S.W.3d at 848. Ms. Lowe’s father quickly alerted the police. *Id.* Police and medical personnel arrived at the scene and determined that the infant was dead. *Id.* Although Mr. Lowe reportedly consented to the police officers’ search of the home, the police began the process of obtaining a search warrant for the Lowe residence. *Id.*

While the police were waiting for the warrant, Detective Steve Malach drove to the dental practice where Ms. Lowe was employed. *Id.* The Detective spoke briefly to Ms. Lowe at her workplace and then asked her to come to the police department to be interviewed. *Id.* She agreed to do so. During the ensuing interview, Ms. Lowe explained that she had given birth to not one but two infants.

Id. Detective Malach alerted the officers still at the scene of this fact, and the officers discovered the second infant at the bottom of the same laundry basket. *Id.*

Ms. Lowe told Detective Marsh that she had unexpectedly given birth to the twins in her bathroom two days prior. *Id.* She told him that she placed her hand over each one's mouth in order to stop them from crying. *Id.* She cleaned up the bathroom and stayed home from work the next day, September 13, 2011, to recover from the deliveries. *Id.* Ms. Lowe did not inform any family member what had happened nor did she call for medical assistance. *Id.*

By this time, the police had executed the search warrant it obtained earlier that morning. *Id.* The search uncovered maternity pads and bloody towels, sheets, and clothes. *State v. Lowe*, No. M2014-00472-CCA-R3CD, 2016 WL 4909455, at *6 (Tenn. Crim. App. July 12, 2016). In addition, testing done during the search indicated that there was blood or biological material on the bathroom floor, covering the toilet, and on a patch of carpet in Ms. Lowe's bedroom. *Id.* The police took a picture of a series of books or videos of "The Vampire Diaries," which the court admitted and deemed "very relevant" to the issue of *mens rea*. *Id.* After her interview with Detective Marsh, Ms. Lowe was taken to the hospital where she was later arrested and charged with two counts of premeditated murder, among other charges.

After she was charged, it was revealed that the search warrant that police obtained suffered the same fatal flaw as the warrant the police obtained in *Hayes*. See *State v. Lowe*, 552 S.W.3d at 848. That is, the "copies" of the warrant were not

exact and contained different time designations. As detailed above, at the time of the commission of her crime, and at the start of her prosecution, Tennessee courts upheld a long-standing rule requiring strict adherence to the state's warrant requirements, as codified in Tenn. Crim. R. 41. Thus, under this rule of some nine decades, all evidence obtained from the faulty warrant issued in Ms. Lowe's case should have been suppressed and inadmissible at her trial.

This was not to be. Ms. Lowe filed a motion to suppress, on the same exact grounds raised and affirmed in *Hayes*, but the trial court denied relief. She was then tried and convicted, and her convictions were upheld by the Tennessee Court of Criminal Appeals.¹ After this decision by the intermediate appellate court, the Tennessee Supreme Court decided *State v. Davidson*. 509 S.W.3d at 185. There, the higher court, without any prior indication that it might do so, reversed its well-established precedent of requiring exclusion of evidence obtained from a search when the search warrant did not comply with Rule 41 in all its particulars. *Id.* The court's new rule meant that evidence obtained under an invalid search warrant issued on an unsigned affidavit was admissible under a newly minted "good faith" exception. *Id.* The Supreme Court of Tennessee then granted a discretionary appeal in this case.

In its decision below, the Supreme Court of Tennessee recognized that it first "applied the exclusionary rule to evidence obtained pursuant to a defective search

¹ The trial court and intermediate appellate court relied on a newly enacted statute to deny the suppression motion. The Tennessee Supreme Court subsequently determined this statute violated the Separation of Powers doctrine.

warrant in 1923.” *Lowe*, 552 S.W.3d at 851. It similarly recognized that the procedural safeguards against abuse enshrined in state law and Rule 41 have been “mandatory” for more than a half-century. *See id.* at 854. As the court recognized, the resulting rule has been clear: when “a search warrant on its face [does] not meet the requirements of Tennessee Rule of Criminal Procedure 41(c)[, the] warrant [i]s invalid, the search [i]s illegal, and the evidence obtained [is] thereby inadmissible.” *Id.* at 855 (quotations and citations omitted). Nonetheless, after reviewing the facts related to the magistrate’s failure to comply with Rule 41 in this case, the Court “h[e]ld that the exclusionary rule should *not* be applied under these circumstances.” *Id.* at 859 (emphasis added). The court, in applying and extending its new rule in *Davidson*, held for the first time, contrary to decades-old precedent, “that a good-faith clerical error that results in an inconsequential variation between the three copies of a search warrant required pursuant to Rule 41, in and of itself, does not entitle the moving party to suppression of the evidence collected pursuant to the warrant.” *Id.* As a result, the court upheld the denial of Ms. Lowe’s suppression motion and affirmed her convictions.

Ms. Lowe filed a Petition to Rehear on July 26, 2018, arguing that the court’s retroactive application of its new “good faith” exception to Rule 41 violated the Due Process and Ex Post Facto provisions of the Tennessee and United States Constitutions. The petition was denied. Ms. Lowe seeks review of the Tennessee Supreme Court decision by this Court.

REASONS FOR GRANTING THE PETITION

The decision below establishes a dangerous precedent. If allowed to stand, it would permit state courts to change long-standing rules on matters as significant as the admissibility of evidence to the detriment of a defendant well after the defendant's crime, charge, or trial. The due process and *ex post facto* problems that arise are enormous. A defendant, when considering decisions as weighty as whether to accept a plea agreement or proceed to trial, and evaluate the strength of the government's case against her, has no certainty about what she faces. Courts across the country have grappled with similar questions and arrived at divergent results. This Court's review is necessary to protect defendants and ensure that defendants across the country receive uniform protection from the due process and *ex post facto* clauses.

I. THE RETROACTIVE APPLICATION OF JUDICIAL DECISIONS THAT REMOVE LONG-HELD PROTECTIONS FOR CRIMINAL DEFENDANTS PRESENTS A CONSTITUTIONAL QUESTION OF SURPASSING IMPORTANCE THAT THIS COURT HAS NOT ADDRESSED.

Change is not always for the best. The Founders recognized this, placing a prohibition against *ex post facto* laws in the body of the Constitution itself. The animating principle of the prohibition against *ex post facto* laws is basic fairness. These clauses prohibit, *inter alia*, "law[s] that make[] an action, done before the passing of the law, and which was innocent when done, criminal" and "law[s] that change[] the punishment, and inflict[] a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

These constitutional provisions are fundamental—new crimes and greater punishments cannot be applied retroactively—and this Court has spent considerable time detailing their contours.

The law can change in other ways to the detriment of criminal defendants, however, and the *Ex Post Facto* Clause is not their only remedy. This Court has recognized that “[l]imitations on *ex post facto* judicial decision-making are inherent in the notion of due process.” *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001). For example, “an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law,” and therefore is prohibited. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). As this Court later explained, “a judicial alteration of a common law doctrine of criminal law [also] violates the principle of fair warning, and hence must not be given retroactive effect, . . . where it is ‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.’” *Rogers*, 532 U.S. at 461. The driving motivation for this rule has been “concern with fundamental fairness and protect[ion] against vindictive or arbitrary judicial lawmaking.” *Id.* The Due Process Clause thus stands as a bulwark that protects defendants from “unjustified and unpredictable breaks with prior law.” *Id.*

The due process principles espoused in *Bouie* and *Rogers* are most often applied in the context of a judicial change in the interpretation of the elements of a crime, generally rendering the scope of the crime unexpectedly broader than before. So, too, has the Due Process Clause been held to prohibit substantial, unexpected

changes in the evidentiary rules that relate to the necessary quantum of evidence, such as the *corpus delicti* rule. But this Court has not applied these sorts of protections to unexpected changes in another Constitutional regime meant to protect defendants—the Fourth Amendment’s warrant requirement and prohibition against unreasonable searches.

This case demonstrates the critical need for application of the due process clause’s “fair notice” requirement to issues related to the suppression of evidence. Few, if any, considerations are more central to the plea bargaining and trial process than a clear understanding of what evidence the state will be allowed to present to the jury. These pre-trial decisions about a plea are undermined entirely if the state can profoundly change the substantive rules as the case proceeds. Because “[c]riminal justice today is for the most part a system of pleas, not a system of trials,” *Lafler v. Cooper*, 566 U.S. 156, 170 (2012), it is essential that the most important variable in that system—the evidence available to the state to convict a defendant at trial—not be subject to change by retroactive judicial decisionmaking. Here, for the reasons explained above, the playing field for Ms. Lowe changed after plea negotiations, trial, and direct appeal. Fundamental fairness demands otherwise.

II. DECISIONS OF STATE AND FEDERAL COURTS ON THIS QUESTION PRESENT A SPLIT OF AUTHORITY THAT THE COURT SHOULD RESOLVE.

More than a dozen federal appellate and state supreme courts have confronted the issue of judicial changes to the common law, and whether those

changes amount to a violation of due process. *See In re Surrick*, 338 F.3d 224 (3d Cir. 2003); *Proctor v. Cockrell*, 283 F.3d 726 (5th Cir. 2002); *United States v. Barton*, 455 F.3d 649 (6th Cir. 2006); *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600 (7th Cir. 2014); *United States v. Waseta*, 647 F.3d 980 (10th Cir. 2011); *Magwood v. Warden*, *Ala. Dept. of Corr.*, 664 F.3d 1340 (11th Cir. 2011); *State v. Plastow*, 873 N.W.2d 222 (S.D. 2015); *People v. LaRosa*, 293 P.3d 567 (Colo. 2013) (en banc); *State v. Jess*, 117 Hawai'i 381 (2008); *People v. Sandoval*, 41 Cal.4th 825 (2007); *State v. Picotte*, 261 Wis.2d 249 (2003); *State v. Redmond*, 262 Neb. 411 (2001).

Their decisions are not uniform. *Compare Plastow*, 873 N.W.2d 222 (denying retroactive application of new trustworthiness rule); *LaRosa*, 293 P.3d 567 (refusing to retroactively apply court's abandonment of *corpus delicti* rule); *Magwood*, 664 F.3d at 1349 (upholding grant of habeas relief because change of Alabama law violated the fair-warning requirement of the Due Process Clause); *with In re Surrick*, 338 F.3d 224 (upholding retroactive application of new statutory interpretation); *Proctor*, 283 F.3d 726 (allowing retroactive application where prior rule was not clearly established); *Barton*, 455 F.3d 649 (allowing application of rule where primary change in law occurred before crime was committed); *Gibson*, 760 F.3d 600 (allowing retroactive application where change was not "unexpected and indefensible"); *Waseta*, 647 F.3d 980 (allowing retroactive application of post-*Booker* sentencing rules where change was not "unexpected and indefensible"); *Redmond*, 262 Neb. 411 (allowing retroactive application of new crime definition where change

was not unexpected and indefensible); *Sandoval*, 41 Cal.4th at 825 (rejecting due process claim related to sentencing).

The divergent results, and the inconsistent reasoning that led to them, demonstrate the need for review by this Court. Without further guidance, state and federal courts will continue to struggle with the proper application of the Due Process Clause in these difficult circumstances.

III. THIS DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

This Court has held “that a judicial alteration of a common law doctrine of criminal law violate[s] the principle of fair warning . . . where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.” *Rogers*, 532 U.S. at 462. Here, the judicial alteration at issue was both unexpected and indefensible by reference to the law at the time of the conduct.

This case is far different than *Rogers*. There, the year-and-a-day rule was not well-established common law in Tennessee. *Id.* at 462-64. As the court described, the rule was “widely viewed as an outdated relic of common law.” *Id.* In addition, the rule had appeared in Tennessee cases only in dicta. *Id.* Thus, the Court’s abandonment of the year-and-a-day rule was neither unexpected nor indefensible.

Here, however, the rule that changed in Ms. Lowe’s case was clearly established. It had been applied consistently by Tennessee courts for decades. *See, e.g., Talley v. State*, 345 S.W.2d 867 (Tenn. 1961). And the Tennessee Supreme Court made its reasons for the strict rule abundantly clear along the way. In *State v. Coffee*, for instance, the court excluded evidence because the judicial

commissioner that issued the search warrant “failed to keep an exact copy of the original of said search warrant as part of his official records as required by Rule 41(c).” 54 S.W.3d 231 (Tenn. 2001). The court described its reasons for demanding strict adherence to the statute this way:

These procedural safeguards are intended “to secure the citizen against carelessness and abuse in the issuance and execution of search warrants.” *Talley v. State*, 345 S.W.2d 867 (1961) . . . The provision at issue, that a magistrate prepare and retain a copy of the search warrant, endeavors to prevent improper searches and facilitate judicial review of whether a search was executed within the scope of the warrant. The rule achieves its goals in that a written record of the specifics of the search stifles the ever-present temptation for an officer to conduct a search and justify it later. Additionally, the copy of the warrant enables review of the original boundaries of the search . . . As stated in *Talley*, “Words could not be plainer, and [the procedural safeguards against abuse] are mandatory.” 345 S.W.2d at 869 (citation omitted).

Coffee, 54 S.W.3d at 233-34. The Tennessee Supreme Court again relied on its precedent in excluding evidence in a case because the search warrant did not contain an endorsement of the hour of its issuance, as required by Rule 41(c). *See State v. Bobadilla*, 181 S.W.3d 641, 645 (Tenn. 2005). The trial court attempted to make an exception to the rule by claiming that the defendant’s rights were protected and displayed “on the written parts of th[e] warrant and affidavit,” but the Tennessee Supreme Court explained that the rule “is designed to ensure that if a search warrant is executed prior to its issuance, such a discrepancy will be apparent on the face of the warrant.” *Bobadilla*, 181 S.W.3d at 645. The Court’s

rationale did not waiver. And there was never any indication the court would reverse course.

The rule at issue in Ms. Lowe's case was so well known and commonly followed that the Tennessee legislature sought to change it in 2011 by passing a law in clear violation of the Separation of Powers. Had the legislature been able to foresee that the Tennessee Supreme Court would reverse its decades-long precedent, it likely would not have spent the time and resources to attempt to change the rule. Moreover, the rule's unpopularity in the halls of the state capitol makes it no more likely or foreseeable that the state Supreme Court might then change the rule. As the Tennessee Supreme Court has held, judges "must be independent of the will or whim of the political departments." *Summers v. Thompson*, 764 S.W.2d 182 (Tenn. 1988). Thus, the legislature's intentions cannot be said to have provided Ms. Lowe any notice that the law would change to her detriment just before her appeal to the state supreme court.

This case is also unlike *Metrish v. Lancaster*, 569 U.S. 351 (2013), which this Court acknowledged was a closer case than *Rogers*. There, this Court denied habeas relief because the defendant's claim did not represent an unreasonable application of *Bouie* and *Rogers*. *Id.* The Court held that it was not unexpected that the "state supreme court, squarely addressing a particular issue for the first time, rejected a consistent line of lower court decisions based on the supreme court's reasonable interpretation of the language of a controlling statute." *Id.* at 353.

Here, again, the rule at issue was not one of first impression for the Tennessee Supreme Court—it was well-established precedent. This case is like *Bouie*. All prior Tennessee cases uniformly applied the same rule the same way. And there was no indication from any prior decision that the rule might change. The judicial alteration in this case was not foreseeable and is not defensible by reference to the law which had been expressed prior to the conduct in issue.

Ms. Lowe had no way of knowing at the plea-bargaining phase, trial, or on direct appeal to the Court of Criminal Appeals that the Tennessee Supreme Court would reverse settled precedent that it had emphatically supported for decades. She certainly could not expect that it would apply the new rule to her detriment. The fact that the court did so offends the principles of fair warning and basic fairness, and it violated due process. The Tennessee Supreme Court's decision in this case thus directly contradicts this Court's decisions in *Bouie* and *Rogers*.

CONCLUSION

For the above reasons, Ms. Lowe respectfully requests that this Court GRANT her Petition.

Respectfully submitted,



J. ALEX LITTLE
BONE MCALLESTER NORTON, PLLC
511 Union Street Suite 1600
Nashville, TN 37219
Main – (615) 238-6300
Direct – (615) 238-6395
alex.little@bonelaw.com

-AND-

DAVID L. RAYBIN
RAYBIN & WEISSMAN, PC
Fifth Third Center, # 2120
424 Church St.,
Nashville, TN 37219
Main – (615) 237-8934
Facsimile – (615) 254-4254
DRaybin@nashvilletnlaw.com

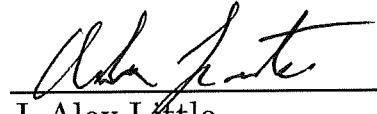
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of December 2018, a true and correct copy of the foregoing document was served upon the Office of the Attorney General of Tennessee by depositing same in the United States Mail with sufficient postage thereon, addressed to:

Herbert H. Slatery III
Andree S. Blumstein
Leslie Price
Office of the Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202-0207

By:



J. Alex Little
Counsel for Lindsey Lowe