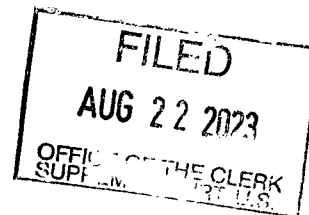


23-5588

No. _____

ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

Roger A. Libby — PETITIONER
(Your Name)

VS.

Tim Carvett, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Nevada Supreme Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Roger A. Libby # 30842
(Your Name)

1200 Prison Rd., LCC
(Address)

Lovelock, Nevada 89419
(City, State, Zip Code)

NA
(Phone Number)

QUESTION(S) PRESENTED

- I. Whether the due process and equal protection Clause of the Fourteenth Amendment render Nevada State law Statutes unconstitutional? Statutes that were enacted to bar the retroactive application of any new substantive rule of law to Criminal Cases after an offense has been committed or where a prosecution has been already begun.
- II. Whether the due process Clause of the Fourteenth Amendment prohibits petitioner's conviction and continued incarceration for conduct a new substantive rule of Constitutional law did not make criminal at the time of conviction, despite Nevada's state law bar to the retroactive application of new rules of law to Criminal Cases?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Aaron Ford
Nevada Attorney General
100 N. Carson Street
Carson City, NV. 89701

Michael MacDonald
Humboldt County District Attorney
Post Office Box 909
Winnemucca, NV. 89446

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the Nevada Court of Appeals court appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

JURISDICTION

☐ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was _____

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from state courts:

The date on which the highest state court decided my case was July 24, 2023
A copy of that decision appears at Appendix C.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment V: "No person shall be held to answer for a Capital, or otherwise infamous Crime, unless on a presentment or indictment of a Grand Jury, except in Cases arising in the land or Naval Forces, or in the militia, when in actual service in time of War or public danger; Nor shall any person be subject for the same offense to be twice in Jeopardy of life or limb; Nor shall be Compelled in any Criminal case to be a Witness against himself, Nor be deprived of life, liberty, or property, without due process of law; Nor shall private property be taken for public use, without Just Compensation."

United States Constitution Amendment XIV: "All persons born or Naturalized in the United States, and Subject to the Jurisdiction thereof, are Citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; Nor shall any State deprive any person of life, liberty, or property, without due process of law; Nor deny to any person within its Jurisdiction the equal protection of the laws."

Nevada Revised Statute 169.235. See Appendix

Nevada Revised Statute 193.075(2) See Appendix

STATEMENT OF THE CASE

In 1990, petitioner was tried on Multiple Felony Counts of an indictment stemming from alleged acts occurring on September 14-15, 1988. Four of the included Grand larceny Counts were based upon the taking of property in the precise amount of \$200.00 dollars. On October 1, 1989, a new substantive rule of law changed the value the statute criminalized from \$100.00 to \$250.00 dollars. As a result, petitioner was convicted for acts the new substantive rule did not criminalize at the time of conviction.

On March 15, 2015, petitioner sought a writ of habeas Corpus with the State trial Court, alleging, in part, that his convictions for Grand larceny for acts state law did not make criminal were improper. The trial Court denied relief on November 1, 2016. On Appeal to the Nevada Supreme Court, it determined that "the legislature did not clearly express its intent to apply the amendments retroactively", so the amendments do not apply here. Noting that, "Nevada law requires the application of the law in effect at the time of the commission of a crime". See e.g. NRS 169.235 and NRS 193.075(2) at Appendix E-F. The Nevada Supreme Court affirmed the trial Court's denial on January 10, 2018. A petition for rehearing and rehearing in banc were denied without comment on March 30, 2018 and May 24, 2018.

Thereafter, on April 9, 2021, Petitioner returned to State trial Court seeking relief via a Rule 60(b) motion

to vacate the Grand Juror's Judgments as being void. Again, the trial Court denied the motion on August 22, 2022. See: Appendix B. Petitioner appealed and on April 21, 2023, the Court of Appeals Affirmed the trial Court's denial. Rehearing was denied on June 28, 2023. Appendix A.

Finally, on July 10, 2023, Petitioner sought review with Nevada Supreme Court (Appendix D.) which was denied by the Full Court on July 24, 2023. This timely petition for writ of Certiorari now follows.

The Nevada State Courts have had no less than seven (7) opportunities to address the Constitutional retroactivity of the new rule at issue in petitioners case under this Courts controlling precedents and the Federal Constitution, yet have declined to do so. It has declined to do so because they are bound by state law and state law currently bars the retroactivity of new substantive rules of law to criminal cases under NRS 169.235 and 193.075 (2).

Thus, the only question being presented is the constitutionality of those state statutes and whether petitioners convictions are in violation of a new substantive rule of law due to that state law prohibition.

REASONS FOR GRANTING THE PETITION

- I. Whether the due process and equal protection clause of the Fourteenth Amendment render Nevada state law statutes unconstitutional? Statutes that were enacted to bar the retroactive application of any new substantive rule of law to criminal cases after an offense has been committed or where a prosecution has been already begun.

The Nevada state legislature has enacted two (2) state law statutes to govern the procedure in criminal cases for new rules of law that may occur to its criminal statutes. A procedure that requires a bar to the retroactive application of new rules of law to all Nevada defendants, as defined by statute.

The first of these, Nevada Revised Statute 169.035, states as follows:

"The superseding of any law creating a criminal offense shall not be held to constitute a bar to the prosecution and punishment of a crime already committed; or to bar the trial and punishment of a crime where a prosecution has been already begun, for a violation of the law so superseded, unless the intention to bar such prosecution and punishment or trial and punishment where a prosecution has been already begun is expressly declared in the superseding

act". Appendix E.

The Second, Nevada Revised Statute 193.075(a) states as follows:

"The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed unless the intention to bar the indictment or information and punishment is expressly declared in the repealing statute". Appendix F.

Petitioner believes that, based on this Court's precedents interpreting the Federal Constitution, any state law statute which seeks to bar application of new substantive rules of Constitutional law retroactively or the application of "new interpretations" of existing laws to all Nevada defendants, based upon the timing of when an act has been committed or where a prosecution has been already begun, clearly violates the due process and equal protection clause of the Fourteenth Amendment.

The plain, unambiguous language of the statutes make clear that Nevada state courts must apply the law as it existed at the time of an offense or at the time when a prosecution has been already begun, with no regard to this Court's Constitutional retroactivity requirements for new substantive rules of Constitutional law to criminal statutes.

Retroactivity requirements applicable in every Criminal Case pending on direct review, and with equal legal force during Collateral proceedings.

The retroactivity requirements for new substantive rules to primary Criminal offenses are well established. First, any state law creating a Criminal offense is made up of "essential elements" which collectively constitute the underlying offense. See Mathis v. United States, 579 U.S. —, 195 LEd 2d 604, 610 (2016) ("Elements are the constituent parts of a crime's legal definition — the things the prosecution must prove to sustain a conviction". At trial, they are what the jury must find beyond a reasonable doubt to convict the defendant"). In accord Fione v. White, 531 U.S. 225, 228-29 (2001) ("we have held that the due process clause of the Fourteenth Amendment forbids a state to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt").

Modifications, amendments, or changes to the "essential elements" of any law creating a Criminal offense through a repeal or superseding act of law which narrows the scope of any Criminal statute are classified as "new substantive rules of constitutional law". See: Welch v. United States, 578 U.S. —, 194 LEd 2d 387, 399 (2016) ("A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. This includes decisions that narrow the scope of a Criminal statute, by interpreting its terms, as well as

Constitutional determinations that place particular conduct or persons covered by the statute beyond the state's power to punish").

More specifically, *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny recognize two categories of decisions that fall outside any general bar of retroactivity. Under the *Teague* framework, new substantive rules apply retroactively. Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of an act that the law cannot impose upon him". *Welch*, 194 LEd 2d at 399-401 (quoting *Schirio v. Summerlin*, 542 U.S. 348, 351-52 (2004)).

Furthermore, new substantive rules of constitutional law apply retroactively with equal force during collateral review. See: *Montgomery v. Louisiana*, ___ U.S. ___, 193 LEd 2d 599, 612-614 (2016) ("If the Constitution establishes a rule and requires that the rule has retroactive application, then a state court's refusal to give the rule retroactive effect is reviewable by the United States Supreme Court. States may not disregard a controlling, constitutional command in their own courts... The Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final").

With respect to both Nevada statutes, the superseding or repeal of any state law creating a criminal offense, by definition, involves a substantive change to its criminal proscription; either by decriminalizing conduct initially

deemed Criminal, narrowing the reach of the statute by altering the range of Conduct or the Class of persons that the law punishes, or invalidating a law entirely. Thus, all New rules of law require a threshold retroactivity analysis under Teague and retroactive application in most all circumstances that involve modifications to the essential elements of Criminal Statutes.

Fiore is but one example. When an exonerating Change to a Criminal Statute occurs after an act has been Committed but prior to the Commencement of a defendant's trial or Conviction, either via a New substantive rule of law or "new interpretation" of existing law, no jury could find that a defendant violated an element of the Statute for an act the new rule or new interpretation did not make Criminal. Fiore made clear that any such Conviction and Continued incarceration for an act the State Criminal Statute did not Criminalize at the time of Conviction violated due process under the Fourteenth Amendment.

Conversely, NRS 169.235 and 193.075(2) do exactly that. These state law statutes were enacted to bar the retroactive application of any New rule of law or New interpretation of the law anytime after an act has been Committed or Where a prosecution has been already begun, unless the intention to bar such prosecution and punishment is expressly declared in the Superseding or repealing Statute. This total retroactivity bar clearly violates the Federal Constitution. In particular:

(1) Nevada's state law bar to the retroactive application of new substantive rules of Constitutional law - including any subsequent new interpretation of the law - violates due process under the Fourteenth Amendment by allowing the conviction and continued incarceration of Nevada defendants for acts any new rule or interpretation failed to make criminal at the time of their conviction under *Flower v. White*, 531 U.S. 225, 228-29 (2001).

(2) Nevada's state law bar to the retroactive application of new substantive rules of Constitutional law to criminal cases pending on direct review violates basic norms of Constitutional adjudication under *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987); see also: *Henderson v. United States*, 568 U.S. 266, 185 L.Ed.2d 85, 93-96 (2013) ("The general rule is that an appellate court must apply the law in effect at the time it renders its decision").

(3) Nevada's state law bar to the retroactive application of new substantive rules of Constitutional law, regardless of when a conviction becomes final - as is required by the Constitution under this Court's *Montgomery* holding - results in unjustifiably dissimilar treatment for all Nevada defendants, based on similar situated criminal defendants who do receive Fourteenth Amendment protection and the retroactive application of new substantive rules of law to their criminal convictions. *Griffith*, 479 U.S. at 323; *Henderson*, 185 L.Ed.2d at 95.

In sum, the Fourteenth Amendment states that no

State shall deprive any person of life, liberty, or property, without due process of law; Nor deny to any person within its Jurisdiction the equal protection of the laws. Nevada's attempt at regulating the manner by which new substantive rules of Constitutional law are barred from application in every Nevada Criminal Case including Libby's, as presented below in complete disregard of Constitutional retroactivity, renders any attempt by a State to regulate or bar their application unconstitutional. Furthermore, these Fundamental Constitutional rights are not a gift of the State and no State can lawfully regulate, restrain or bar Constitutional retroactivity through state legislative act in order to exempt itself from Federal Constitutional Compliance.

This Court has long recognized that the Fourteenth Amendment's due process clause, like its Fifth Amendment counterpart, "guarantees more than fair process". The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests". See e.g. Troxel v. Granville, 530 U.S. 57, 141 LEd 2d 49, 56 (2000).

For the reasons presented, this Court should exercise its Judicial discretion and grant Certiorari to determine whether NRS 169.235 and NRS 193.075(2) unconstitutionally infringe upon the Federal Constitutional right to due process and equal protection under the Fourteenth Amendment of all Nevada defendants who seek entitlement

to the application of New Substantive rules of Constitutional law in Criminal Cases.

II. Whether the due process Clause of the Fourteenth Amendment prohibits petitioner's Conviction and Continued incarceration for Conduct a New Substantive rule of Constitutional law did Not make Criminal at the time of Conviction, despite Nevada's State law bar to the retroactive application of New rules of law to Criminal Cases?

Here, similar circumstances give rise to the Constitutional question this Court confronted in *Fiore v. White*, 531 U.S. 225 (2001) and later in *Bunkley v. Florida*, 538 U.S. 835 (2003). In *Fiore*, this Court granted Certiorari to determine when, or whether, the Federal due process Clause requires a State to apply a "new interpretation" of a State Criminal statute retroactively to Cases on Collateral review.

Fiore involved a Pennsylvania Criminal statute that the Pennsylvania Supreme Court interpreted for the first time after *Fiore*'s conviction became final. Because this Court was unsure whether the Pennsylvania Supreme Court's decision in *Scarpone* represented a change in the law, it certified a question to the Pennsylvania Supreme Court asking whether its interpretation of the statute "stated the correct interpretation of the law of

Pennsylvania at the date Fiore's Conviction became final."

When the Pennsylvania Supreme Court replied that its ruling "merely clarified the plain language of the statute", the retroactivity question on which this Court originally granted Certiorari disappeared. Because Pennsylvania law — as interpreted by the later state supreme court decision — made clear that Fiore's Conduct did not violate an element of the statute, his Conviction did not satisfy the strictures of the due process Clause. Consequently, "retroactivity was not at issue". See: Bunkley, 538 U.S. at 839 (outlining the Fiore Case).

Thus, Fiore involved the application of a "new interpretation" of an existing state statute at the time of Conviction, while this case involves a "new substantive exonerating rule" of law to the Criminal statute prior to Commencement of trial and petitioner's Convictions, and whether such Convictions violate the due process Clause of the Fourteenth Amendment under Fiore's holding despite Nevada's state law bar to the retroactivity of the rule in this case.

The Facts are without dispute. At the time of the alleged offenses in September of 1988, and subsequent April 18, 1989 Grand Jury indictment of the Charges, Nevada's Grand larceny Statute, NRS 205.220 Charged the following:

"Any person who feloniously steals, takes and carries away . . . the personal property of another having the value of one-hundred dollars, or more . . . is guilty

of Grand Larceny, a Felony punishable by up to ten (10) years in Nevada State prison. Boley v. State, 85 Nev. 466, 469 (1969) ("Grand Larceny is the Stealing of Property of the value of \$100.00 dollars or more").

However, effective October 1, 1989, the Nevada legislature effectuated a substantive change to the Criminal Statute's essential value element by way of amendment, increasing the minimum property value that the Statute Criminalized to \$250.00 dollars, or more. As a result, the new value element narrowed the scope of the Statute's Criminal proscription, decriminalizing any property value of less than \$250.00 dollars to a misdemeanor offense with a maximum penalty of up to one year in the County Jail.

Because the Indictment Charged petitioner with Four (4) Counts of Grand Larceny via the taking of personal property in the precise amount of \$200.00 dollars in each Count, it is a value not made Criminal under the new rule. Thus, a correct statement of Nevada's new Grand Larceny Statute at the time of petitioner's June 25, 1990 Conviction date required a minimum value of \$250.00 dollars or more for lawful conviction of Felony Grand Larceny. However, because Nevada has enacted State law bars to the retroactive application of new substantive rules of Constitutional law to Criminal Cases, petitioner remains convicted on all Four (4) Counts of Grand Larceny, serving ten years unlawful imprisonment each count, consecutive, for acts that a new

Substantive rule of Constitutional law did not Criminalize at the time of those Convictions.

There is no doubt that the Nevada legislature's October 1, 1989 Value element modification to the Criminal larceny Statute, From \$100.00 to \$250.00 dollars, was a Substantive Change and a Constitutional determination that must be proven by the prosecution and Found to exist by a Jury beyond a reasonable doubt, Because the new rule became effective October 1, 1989, Six months prior to the Commencement of petitioners trial and Conviction, retroactivity should not be at issue. Rather, Consistent with Fiore's holding, Petitioner's Convictions and Continued incarceration on these Counts far exceeds no Nevada law Criminalized at the time of Conviction violate due process under the Fourteenth Amendment.

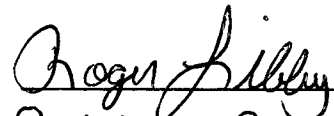
In the alternative, the due process and equal protection Clause of the Fourteenth Amendment require Substantive New rules to have retroactive effect regardless of when a Conviction became final, *Montgomery v. Louisiana*, — U.S. —, 193 LEd 2d 599, 612-614 (2016), and Nevada's state law bar to the application of such a rule to petitioners Criminal Case renders both, the Convictions and state law unconstitutional.

Conclusion

For the reasons presented, Petitioner prays this Court will exercise its Judicial discretion by granting

Certiorari to determine whether Nevada state law barring the retroactive application of new substantive rules of law violates the Federal Constitutional rights of All Nevada Criminal defendants, including the petitioners, for the reasons outlined herein.

Respectfully Submitted this 22 day of August, 2023


Petitioner, Pro Se.