

No. 17-7693

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IN THE  
SUPREME COURT OF THE UNITED STATES

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JOSHUA HOLMAN, Petitioner

v.

JENNIFER SACHSE, Respondent

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On Petition for Writ of Certiorari  
to the Supreme Court of The State Of Missouri

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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42 Pa. Cons.Stat. §762(a)(2)(ii)

## **ARGUMENT**

The Warden's brief in opposition is focused on semantics, urging essentially that a State Court may circumvent its constitutional obligations and arbitrarily decide whether an interpretation of State law applies retroactively so long as it characterizes that arbitrary decision as a question of whether the interpretation is a "new rule of law." It further asserts that this is a matter of established law and that there is no conflict over a state's authority to do this.

In so arguing, the Warden misconstrues established law in this Court and other courts, as well as the Missouri Supreme Court's decision in this particular case. While there is admittedly some confusion about what limitations due process may place on states when analyzing how changes in interpretations of questions of purely state law apply to cases that have already completed the direct review process, the Warden's argument that there are none simply does not comport with the clearly established law. Lower courts, however, could certainly benefit from some clarification of this issue, which is exactly why this Court should grant Certiorari.

### **V. There is a split among lower courts about how to handle the issue and the Warden's assertion to the contrary is wrong.**

The Warden is correct that there are some lower court decisions that eliminate from their analysis any constitutional questions, leaving solely to state

courts the question what constitutes a “new rule” and how to apply new statements of the law to cases that have already completed direct review. See e.g. *Volpe v. Trim*, 708 F.3d 688, 700 (6th Cir. 2013); *Warren v. Kyler*, 422 F.3d 132, 137 (3d Cir. 2005); *Graves v. Ault*, 614 F.3d 501, 512 (8th Cir. 2010); *Chapman v. LeMaster*, 302 F.3d 1189, 1197–98 (10th Cir. 2002).<sup>1</sup>

But the Warden mischaracterizes several lower court decisions in petitioner’s brief in urging that they were strictly decisions of state law. The Georgia Supreme Court based its decision in *Luke v. Battle* almost solely on the Supreme Court decision in *Bousley v. United States*, 523 U.S. 614 (1998), finding that this Court’s precedent in that case dictated that substantive changes in criminal law must be applied retroactively as a matter of “the doctrinal underpinnings of habeas review.” 565 S.E.2d 816, 818-819 (Ga. 2002). The State court decision cited in *Luke*, *Scott v. Hernandez-Cuevas*, 396 S.E.2d 900 (1990) was a two paragraph decision with little analysis as to the holding, and was presented by the Court in *Luke* as simply being

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<sup>1</sup> Not all the cases cited by the Warden for this proposition actually stand for this proposition. In *Gladney v. Pollard*, 799 F.3d 889, 896–98 (7th Cir. 2015), the petitioner presented the court only with the question of whether a change in State law could get the petitioner through the actual innocence gateway. The Seventh Circuit ruled that it could not because the state court had ruled that the law was not retroactive. The Court emphasized that there was no federal question presented that could be the grounds for habeas relief, implying that the question of whether the state court’s failure to apply its decision retroactively was a violation of due process had not even been presented. In *Kleve v. Hill*, the Ninth Circuit Court of Appeals did not rule that retroactivity was purely a question of state law but rather determined the question itself, urging that “A change of law does not invalidate a conviction obtained under an earlier law.” 243 F.3d 1149, 1151 (9th Cir. 2001)(further citations omitted).

consistent with this Court's *Bousley* decision. The Minnesota Supreme Court in *Hutchinson v. State*, 679 N.W.2d 160 (Minn. 2004) correctly announced the rule in *Fiore v. White*, 531 U.S. 225 (2001) as establishing that due process precludes a state court from granting defendants who have completed direct review the benefit of a new interpretation of the plain language of the statute, but found in that particular case that *Fiore* did not require that benefit be extended because—unlike the situation here--the change in law was based on an amendment to the statute made by the legislature. The federal due process principal announced in *Fiore*, however, guided the analysis and dictated the result. In Iowa, the court in *Nguyen* correctly stated the rule in *Fiore* as requiring application to cases that have completed direct review where the new rule merely clarified existing law. *Nguyen v. State*, 878 N.W.2d 744, 756–58 (Iowa 2016) (citing *Goosman v. State*, 764 N.W.2d 539, 545 (Iowa 2009))<sup>2</sup>; The Court in *In re Hinton*, 100 P.3d 801, 804 (Wash. 2004) could not have been clearer in its language, finding that *Fiore* stood for the proposition that it was a violation of due process to uphold a conviction for something that, under the current interpretation of the statute of conviction, does not constitute a crime.

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<sup>2</sup> The court in *Nguyen* actually dealt more specifically with the question of whether the state due process clause differed from the mandates of the federal due process clause with regard to this issue. The court had previously conducted an extensive analysis in *Goosman*, 764 N.W.2d 539 asserting that federal due process as articulated in *Fiore* and *Bunkley v. Florida*, 538 U.S. 835 (2003) required lower courts to ask whether the new rule merely clarifies existing law or overrules prior authoritative precedent on the issue.

While the distinction between the cases is subtle, it is significant. The rule proposed by the Warden and supported by the courts in *Volpe*, *Warren*, *Graves*, and *Chapman* focuses on what the state court **says** when analyzing retroactivity. If the State court simply **says** the rule is a new rule, as opposed to a clarification in existing law, than under the rule proposed by those courts and by the warden, there are no constitutional implications to that decision, no matter how arbitrary or inapposite that declaration by the State court may be. In contrast, the lower courts in *Luke*, *Hutchingson*, *Nguyen*, and *Goosman* focus not on what the state court said when later interpreting the new law, but rather on what it **did** when announcing it. Those courts hold that if the rule announced simply clarifies the plain language of a statute, due process precludes a court from denying the benefit of that rule to those who have completed direct review. Mr. Holman submits that the latter is a better rule, and one that is more consistent with hundreds of years of jurisprudence in this Court surrounding issues of jurisdiction, due process, and fundamental fairness, as well as principals articulated and clarified more recently in this Court's decision in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). The Warden disagrees, as do several lower courts cited by the Warden in its briefing. This Court should grant certiorari in order to resolve this question.

**VI. The rule that the Warden claims is “universally applied” is entirely inconsistent with precedent of this Court and other courts.**

The rule the Warden contends is “well-established and universally followed,” that *Wainwright v. Stone*, 414 U.S. 21 (1973) gives states carte blanche power to determine whether or not to apply a rule retroactively, is simply not an accurate statement of the law. This Court and others have ruled repeatedly that due process concerns must dictate the result when analyzing questions of retroactivity. First, it is absolutely clear and well-established in this and other courts that the question of whether changes in state law are applied retroactively is governed by due process concerns. An unforeseeable judicial enlargement of a criminal statute, applied retroactively, violates the federal due process right to fair warning of what constitutes criminal conduct. See *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964); see also *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001) (Due process implications governed the question of whether state judicial court’s decision abolishing the “year and a day rule” could be applied retroactively); *Oxborrow v. Eikenberry*, 877 F.2d 1395, 1399 (9th Cir.1989) (“An unforeseeable, albeit legitimate, construction of a state law by the courts may not be retroactively applied to a defendant” because it fails to meet the notice requirement of the due process clause). In light of these cases, it clear that there are Constitutional limits on a state court’s determinations regarding the retroactivity of its own laws.

**VII. None of the cases cited by the Warden address the specific issue presented here.**

None of the cases cited by the Warden address the specific issue here, i.e. where the interpretation of State law meant that there was no jurisdiction to impose the prison sentence in the first place. Even where this Court is clear that decisions are non-retroactive, it suggests that there may be exceptions for cases which "... necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Bousley* at 523 U.S. at 620 (citing *Davis v. United States*, 417 U.S. 333, 346 (1974)). In such cases, the principles of fundamental fairness underlying the federal due process clause may dictate a different result. That is the very troublesome case presented here, where the lower court's interpretation of the plain language of the state statute means that the legislature did not create a felony offense. The Warden's suggestion of what the "established law is" does not answer whether there should be any exception for such cases.

**VIII. The Warden mischaracterizes the Missouri Supreme Court's decisions in *State v. Bazell*, 497 S.W.3d 263 (2016) and *State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500 (Mo. 2017).**

Contrary to the Warden's implication, neither *Bazell* nor *Windenecht* specifically held that the rule announced *Bazell* was a new rule of law. Moreover, the *Bazell* court made it absolutely clear it was basing its decision on the law as it

was written in 2002 and solely and completely on the plain language of the law. 497 S.W.3d 266-267 (“Here, there is no need to resort to tools of interpretation because the language . . . is clear. We cannot know why the legislature, in 2002, decided to amend section 570.030.3 . . . but this is what the legislature clearly and unambiguously did”). This was not a case, as in *Bunkley*, 538 U.S. 835 where the law evolved over time, and the rule in *Bazell* emerged. The Court in *Bazell* did not abrogate the rule of the intermediate appellate court in *State v. Passley*, 389 S.W.3d 180 (Mo. Ct. App. 2012) because the law evolved. Rather, it clearly determined that the subordinate court of appeals had simply been wrong as to what the law was at the time it made its decision<sup>3</sup>. In *Bazell*, it emphasized that the defendant in *Passley* had never sought transfer to the Missouri Supreme Court.

In interpreting what a “new rule of law” is under Missouri law, the Missouri Supreme Court itself has previously ruled that where it abrogates existing precedent from a mid-level court of appeals based on unchanged plain language of the law, it

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<sup>3</sup> The Warden attempts to distinguish Missouri from Pennsylvania based on the fact that the rules of the mid-level courts of appeals are not based on their geographical boundaries. However, in Pennsylvania, there is similarly no geographical distinction in the courts of criminal appeals, rather the distinction between the courts is based on issues over which they have jurisdiction. See 42 Pa. Cons.Stat. §762(a)(2)(ii) (1998); 42 Pa.Cons.Stat § 742. The Warden makes much of the fact that the precedential value of the decision of a court of appeals in Missouri goes beyond the geographical borders of the court itself, but cites to no law suggesting this is different in any other state. Additionally, federal courts have not always maintained that mid-level appellate courts accurately state the law, ruling in some cases based on how they believed the Missouri Supreme Court would have ruled if presented with the issue. See, e.g. *McIntyre v. Caspari*, 35 F.3d 338 (8<sup>th</sup> Cir. 1994).

does not create a new rule of law, but rather interprets existing law. In 2010, the Missouri Supreme Court dealt with this exact issue in *State v. Severe*, 307 S.W.3d 640 (Mo. 2010). That case posed the question of whether a Missouri Supreme Court decision which was based on the plain language of the statute, but which overruled a prior decision of the court of appeals that had been in effect for more than ten years created new law. The court ruled unequivocally, that the decision “created no new law,” emphasizing that the plain language of the statute “was of paramount importance” in interpreting the question. Significantly, in that case the Court used the exact same language as the Warden says here implicates a new rule of law was being created, acknowledging that the interpretation was “different” than that of the mid-level appellate court, but finding that, “the “clear words of the statute govern interpretation.” *Id.* at 647.

To any extent then this Court agrees with the Warden’s argument that the question is entirely determined by whether or not a new rule is created under state law, the Missouri Supreme Court has spoken clearly on the issue and this Court should grant the petition, vacate the decision of the Missouri Supreme Court, and remand the case with instructions that Mr. Holman’s petition for writ of habeas corpus be granted and he be immediately released.

## CONCLUSION

For the foregoing reasons and those discussed in the petition, the petition for writ of certiorari should be granted. In the alternative, this Court should grant certiorari, vacate the decision of the Missouri Supreme Court, and remand for further proceedings in light of *Montgomery*, 136 S.Ct. 718 and *Fiore*, 531 U.S. 225.

Respectfully submitted,

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