

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID BARNETT, Petitioner

v.

STATE OF MISSOURI, Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a state court, consistent with the Due Process Clause of the Fourteenth Amendment to the Constitution, as interpreted in *Hicks v. Oklahoma*, 447 U.S 343 (1980) refuse the retroactive application of a change in decisional law interpreting a procedural right created by state statute, and deny a criminal defendant a new trial where he has been deprived of a jury instruction on a lesser-included offense supported by the evidence?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

David Barnett is the Petitioner in this case and was represented in the Court below by Elizabeth Carlyle, Kathryn Parish, and Richard Sindel.

The State of Missouri is the Respondent and was represented in the court below by Attorney General Joshua Hawley and Assistant Attorney General Michael Joseph Spillane.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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IN THE
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DAVID BARNETT, Petitioner

v.

STATE OF MISSOURI, Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioner David Barnett prays that a writ of certiorari be granted to review the judgment of the Missouri Supreme Court entered in *Barnett v. State*, Case Number SC79985 on January 23, 2018.

OPINIONS BELOW

The order of the Missouri Supreme Court in *Barnett v. State* is printed at Appendix (hereinafter “App.”) p. 1a. No opinion accompanied the decision or was reported.

JURISDICTION

The judgment and opinion of the Supreme Court of Missouri were entered on January 23, 2018 denying Petitioner's motion to recall mandate and alternative petition for writ of habeas corpus. *See* App. pp. 1a.

The jurisdiction of this Court to review the judgment of the Missouri Supreme Court is invoked under 28 U.S.C. §1257 "on the ground of its being repugnant to the Constitution, treaties, or laws of the United States."

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend XIV

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.

Statement of the Case

David Barnett was charged with two counts of first degree murder, two counts of robbery, and two counts of armed criminal action in St. Louis County, Missouri for incidents involving the stabbing death of his grandparents in their Webster Groves, Missouri home. His jury heard that for two weeks prior to the killing of his grandparents and the theft of their car on February 4, 1996, he was homeless. He would spend every day at a Steak N Shake restaurant, staying until

the early morning hours. He would wear the same clothes for days at a time, and was not bathing. The night before the killings, it was very cold. David Barnett spent the night standing in the vestibule of a grocery store; he told people there he was waiting for a ride. He appeared very nervous, but did not disrupt any activities at the store or steal anything. The jury also heard that the manner in which Mr. and Mrs. Barnett died indicated “rage homicides” involving the infliction of more injuries than necessary to cause death.

The jury was provided with written, audio and videotaped statements given by Mr. Barnett admitting the killings. He said that his grandmother said something to him and he “just snapped” and became enraged: “All of a sudden, I just got this rage.” He denied that he had gone to his grandparents’ house with the purpose of killing or robbing them.

Trial counsel requested jury instructions on three lesser included offenses: conventional second degree murder, second degree felony murder, and voluntary manslaughter. Instructions A and J1 would have given the jurors the option of finding Mr. Barnett guilty of second degree felony murder on each of the two counts of first degree murder. The trial court granted the request for an instruction on conventional second degree murder, but refused to give the other two requested instructions. He was convicted of two counts of first degree capital murder, and sentenced to death on each count. He was also convicted of one count of robbery and two counts of armed criminal action.

On direct appeal, Mr. Barnett raised the issue of the failure to give the requested lesser-included offense instructions as to the murder counts. The Missouri Supreme Court affirmed the convictions and sentences, holding that

The trial court did . . . submit a conventional second degree murder instruction that sufficiently tested the jury's belief that Barnett had met all the elements for first degree murder. [citation omitted.] Because the jury convicted Barnett of first degree murder and rejected the second degree murder submission, there is no reasonable basis to suggest that the jury would not have convicted Barnett of first degree murder had other lesser included offenses been submitted.

State v. Barnett, 980 S.W.2d 297, 305-306 (1998), App. p. 29a.

In a series of decisions over the past three years, the Missouri Supreme Court essentially overruled this analysis, holding that a trial court's refusal to instruct on a lesser included offense is presumed prejudicial. *State v. Jackson*, 433 S.W.3d 390 (Mo. banc 2014); *State v. Pierce*, 433 S.W.3d 424 (Mo. banc 2014); *State v. Kuehnlein*, 456 S.W.3d 510, 515 (Mo. App. 2015); *State v. Jensen*, 524 S.W.3d 33 (Mo. banc 2017); *State v. Smith*, 522 S.W.3d 221, (Mo. banc 2017); *State v. Brown*, 524 S.W.3d 44 (Mo. banc, 2017). It further made absolutely clear that, contrary to its own analysis in Mr. Barnett's direct appeal, the determination of prejudice is not negated by the fact that the trial court may have instructed on a different lesser-included offense unless the elements of the greater offense challenged by the lesser included offense instruction given are identical to the elements tested by the instruction the trial court failed to give. *Smith*, at 226, *Jensen*, at 40, *Brown*, at 49 ("the erroneous failure to instruct on a nested lesser included offense is prejudicial when 'the lesser offense that was actually submitted at trial did not "test" the same

element of the greater offense that the omitted lesser offense would have challenged.”) quoting from *Briggs v. State*, 446 S.W.3d 221 714, 720 n.9 (Mo. App. 2014)). In one of the cases, *State v. Pierce*, 433 S.W.3d 424, 448 n. 3 (Mo. banc 2014), a dissenting Judge even cited specifically to Mr. Barnett’s case, pointing out that the Supreme Court’s ruling contradicted its decision in *Barnett*. This line of cases constituted a new interpretation and application of §556.046 RSMo, Missouri’s lesser included offense statute.

Mr. Barnett filed in the Missouri Supreme Court a Motion to Recall the Mandate or Alternative Writ for habeas corpus in his case on December 7, 2017, arguing that under these decisions, he should be granted a new trial. The motion was denied without opinion on January 23, 2018. *See App.* pp. 40a-67a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE WHEN A STATE COURT MUST GIVE A CRIMINAL DEFENDANT THE BENEFIT OF A SUBSEQUENT STATE COURT PROCEDURAL DECISION WHICH APPLIES TO HIM.

In *State v. Jackson*, 433 S.W.3d 390 (Mo. banc 2014), and *State v. Pierce*, 433 S.W.3d 424 (Mo. banc 2014), the Missouri Supreme Court overruled its decision in Mr. Barnett’s case that the fact that he was convicted of the charged offense after receiving one lesser included offense instruction eliminated any possible prejudice from the failure to give another requested lesser-included offense instruction which was supported by the evidence. The dissenting judge in *State v. Pierce* identified Mr. Barnett’s case as affected by this ruling. *Id.* at 448, n.3.

The Missouri Supreme Court has not issued an opinion on the issue of the retroactivity of the *Jackson* rule. But the court's recent decision in *State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500 (Mo. 2017) which was handed down just four months prior to its summary decision in Mr. Barnett's case, may shed some light on the Missouri Supreme Court's reasoning for denying Mr. Barnett the relief he requested as well. In that case the court addressed the question of whether a recent ruling reinterpreting the plain language of the State's stealing statute would apply to benefit Defendants whose cases had already completed direct review at the time of the court's decision reinterpreting the statute. The Missouri Supreme Court ruled that it would not, citing *Wainwright v. Stone*, 414 U.S. 21, 23-24 (1973) for the proposition that a state has complete discretion to determine whether or not to retroactively apply decisions of state law.

The Missouri Supreme Court's decisions in both *Windeknecht* and Mr. Barnett's case were consistent with decisions of courts across the country which rely on *Stone* to assert nearly limitless discretion for determining how and when to apply benefits of changes in case-law to persons who have already completed the direct review process. See *State v. Leonard*, 243 N.W.2d 75 (Iowa. 1979) ("Under the United States Constitution we are neither required to apply, nor prohibited from applying a decision retrospectively. . . . It would appear this court has the power to set forth its own standard of retroactivity of a new rule."); *Harrell v. State*, 386 So.2d 390 (Miss. 1980) (Citing *Stone* for the proposition that the State court decide whether or not to apply retroactively a decision that a prior criminal statute was

unconstitutional, and choosing not to); *State v. Gates*, 118 Ariz. 357, 360 (Ariz. 1978) (“[A] state court may make the choice for itself between prospective or retrospective application of its decisions.”); *Easterwood v. State*, 273 Kan. 361 (Kan. 2002) (“[S]tate courts are under no constitutional obligation to apply their own criminal decisions retroactively. . . . [and] are free to adopt their own retroactivity rules”); *Harry R. Carlile Trust v. Cotton Petroleum Corp.*, 732 P.2d 438, 448, n. 48 (Ok 1986); *State v. Lo*, 264 Wis.2d 1, 34 (Wi. 2003) (“[A] state is not constitutionally compelled to make retroactive its new construction of a statute.”)

However, it is well-established that the Due Process Clause does set some limits on a state’s retroactivity decisions, even where the retroactivity issue involves a ruling of state law. Seven years after *Stone*, this Court decided *Hicks v. Oklahoma*, 447 U.S 343 (1980). *Hicks* involved the retroactive application of an Oklahoma Supreme Court decision that Oklahoma’s habitual offender statute was unconstitutionally vague. Mr. Hicks, whose conviction became final before the new decision, sought to have it applied to him. The Oklahoma court held that because his actual sentence was still statutorily authorized, so that the jury could have imposed the same sentence, he was not prejudiced by the failure to apply the new rule. Rejecting the State’s argument that the issue before it was involved nothing more than “the denial of a procedural right, of exclusively state concern” this Court found that Oklahoma’s decision violated the 14th amendment: “Where . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that

discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion. . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.” *Id.* at 346 (further citations omitted). *See also Fiore v. White*, 531 U.S. 225 (2001) (Where a state court’s interpretation of the plain language of its own statute establishes that a person’s conduct was not actually criminal due process required that the benefits of that interpretation extend to defendants already on direct review).

Mr. Barnett’s case is on all fours with *Hicks*. Like Mr. Hicks, who had a right to a jury determination of his sentence, Mr. Barnett had a right to a jury determination of the exact offense of which he was guilty. Since there is no constitutional right to jury sentencing, the error in Mr. Barnett’s case is far more egregious than that in Mr. Hicks’. But this Court, even where the right denied was not of constitutional dimension, required the Oklahoma courts to apply its new rule retroactively. Mr. Barnett is entitled to the same remedy. Because the jury in his case was improperly instructed, he was deprived of the same right deemed significant in *Hicks*, the right to a jury determination as provided by state statute. While the Constitution does not require multiple lesser-included offense instructions (*see Schad v. Arizona*, 501 U.S. 624, 646 (1991)), the Supreme Court of Missouri has interpreted Missouri law to so require, and further now holds that under the same law, prejudice must be presumed where the fact that an instruction

was denied means that a relevant element of the offense went unchallenged. Mr. Barnett should be granted the benefit of that law despite the fact that his case predated it.

State courts differ in their interpretation of the constitutional retroactivity requirements. *See Flores v. State*, 572 P.2d 746 (Wy. 1977) (citing *Hankerson v. North Carolina*, 432 U.S. 233 (1977), for the proposition that, “This oft-repeated rule [stated in *Stone*], however, ha[s] certain limitations” and finding that a ruling regarding a statute involving the introduction of evidence must be retroactively applied because failing to do so would “inhibit the court’s truth-finding function”); *Luke v. Battle*, 565 S.E.2d 816 (Ga. 2002) (citing *Bousley v. United States*, 523 U.S. 614 (1998), for the proposition that a decision regarding the meaning of a criminal statute placing the conduct of the defendant beyond the reach of the statute must be applied retroactively). Just three years after *Wainwright* was decided, at least one court recognized a very limited application of the case, citing it together with other cases, only for the very limited proposition that the law created “no obstacle in applying a procedural rule which is not constitutionally based in a manner which is prospective only.” *Comm. v. Tarver*, 467 Pa. 401, 357 A.2d 539 (Pa. 1976).

A number of lower courts have determined, based on *Hicks*, that the denial of a state-created procedural right carries with it due process implications. *People v. Presson*, 315 P.3d 198, 201 (Col. App. 2013) (citing *Hicks* for the proposition that, “substantial and legitimate [procedural] expectation” constituted a due process violation” and holding that a failure to follow certain statutory procedures with

regard to a competency evaluation required a complete reversal); *Stewart v. State*, 662 So.2d 552 (Miss. 1995) (citing *Hicks* for the proposition that “the arbitrary denial of a state right rises to a violation of the Due Process Clause of the Fourteenth Amendment” and holding that the right to peremptory strikes was one such state created right); *Golden v. State*, 127 P.3d 1150, 1157 (Okla. Crim. App. 2006) (denial of state created right to peremptory strikes violated due process under *Hicks*) (overruled on other grounds in *Robinson v. State*, 255 P.3d 425 (Okla. Crim. App. 2011) (finding that the denial of said right, while a constitutional error under *Hicks*, was subject to harmless error analysis); *Helmcamp v. State*, 511 S.W.3d 546 (Tex. Crim. App. 2017) (right to appeal conferred by the state could not be arbitrarily denied under *Hicks*).

The decision of the Missouri Court in Mr. Barnett’s case as well as the statements of the law as articulated by the courts in Iowa (*Leonard*, 243 N.W.2d 75) Kansas (*Easterwood*, 273 Kan. 361) and Wisconsin (*Lo*, 264 Wis.2d 1) and as well as statements at times from courts in Oklahoma (*Harry v. Carliele Trust*, 732 P.2d 438) and Mississippi (*Harrell*, 386 So.2d 390) are inconsistent with the holdings of the courts in Colorado (*Presson*, 315 P.3d 198), Mississippi (*Stewart*, 662 So.2d 552), Oklahoma (*Golden*, 127 P.3d 1150) and Texas (*Helmcamp*, 511 S.W.3d 546) indicating that a state-created procedural right creates due process concerns, as well as with the decisions of this Court and numerous lower courts that establish that due process concerns limit a State’s discretion in its retroactivity decisions. *Fiore, Flores, Luke, Tarver*. This Court should grant certiorari and hold that a state

court's discretion in its retroactivity decisions is subject to the Due Process Clause, and that the deprivation of a state-created procedural right constitutes a violation of procedural due process that must be considered in a State court's retroactivity analysis.

II. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO ANSWER QUESTIONS LEFT OPEN BY THIS COURT'S DECISIONS IN *TEAGUE V. LANE* AND *MONTGOMERY V. LOUISIANA*.

This Court's jurisprudence regarding retroactivity has a long and troubled history. The analysis turns largely on three questions: 1) Whether the rule to be applied is substantive or procedural; 2) Whether the rule to be applied is "a new rule of law", and 3) Whether the rule to be applied is an interpretation of federal law or state law. In 1989, this Court handed down a landmark decision regarding retroactivity, *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* set forth a framework for retroactivity in cases on federal collateral review. It established that as a general matter in federal courts (with some exceptions), a new constitutional rule of criminal ***procedure*** does not apply to convictions that were final when the new rule was announced, but ***substantive*** rules of criminal law were retroactive. However, *Teague* left many questions open, including questions regarding what constituted a procedural vs. a substantive rule and what constituted a "new rule of law." These questions have proved difficult for state courts, since *Teague's* procedural posture as federal habeas corpus petition meant that its applicability in state courts remained unclear. As one State Supreme Court Judge simply stated back in 2003: "I do not

think retroactivity is an easy area of the law. I agree with a commentator who explained the confusing state of U.S. Supreme Court cases relating to retroactivity as follows: ‘Over the course of the past thirty-six years, the [U.S. Supreme] Court has grappled with the issue of retroactivity and has crafted a theoretically incoherent doctrine that has proven difficult to apply.’” *State v. Lo*, 665 N.W.2d 756, 780, 264 Wis.2d 1, 49 (Wis. 2003) (Abrahamson, dissent) (citing to Christopher S. Strauss, *Collateral Damage: How the Supreme Court's Retroactivity Doctrine Affects Federal Drug Prisoners' Apprendi Claims on Collateral Review*, 81 N.C. L. REV. 1220, 1222 (2003)).

Together with *Fiore*, this Court’s 2016 decision in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), firmly establishes that a state’s discretion in retroactivity decisions is not limitless. There can be no doubt that this Court’s 2016 ruling in *Montgomery* overruled *Stone* at least to some extent. In *Montgomery*, this Court ruled that state courts must apply retroactively substantive rules of constitutional law, and made absolutely clear that *Teague’s* exception to non-retroactivity of substantive rules of law is based in the United States Constitution, not merely in federal habeas statutes, and therefore imposes a clear requirement on state courts. Because *Stone* dealt with the constitutional validity of a state statute, it is clear that had *Stone* decided under the law as announced in *Montgomery*, the result would have been different. However, while *Montgomery* stated its rule as applying

generally to questions of substantive law¹, the analysis in that case dealt with a constitutional decision of substantive state law. It leaves open the question presented by this petition: Whether the due process clause places limits on a state court's discretion to deny retroactive application. This Court should grant certiorari in order to answer this question.

¹ This Court specifically stated: "This Court's precedents addressing the nature of substantive rules, their differences from procedural rules, and their history of retroactive application establish that the Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final." 136 S.Ct at 729. See also *Schriro v. Summerlin*, 542 U.S. 348, 351-352 (2004) ("New substantive rules generally apply retroactively. 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")(further citations omitted).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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