

No. 17-8683

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*

**BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI**

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CAPITAL CASE – NO EXECUTION DATE SET

QUESTION PRESENTED

In *Wainwright v. Stone*, 414 U.S. 21 (1973), this Court reaffirmed the longstanding principle that state courts are the final arbiters of state law and upheld the ability of state courts to decide whether changes in state law have retroactive effect. Did *Hicks v. Oklahoma*, 447 U.S. 343 (1980), *Fiore v. White*, 531 U.S. 225 (2001), or *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), overrule this longstanding principle?

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INTRODUCTION

In 1996, David Barnett broke into his grandparents' home while they were away, waited for them to return, and then killed them both with a set of kitchen knives. Following this Court's cases and Missouri law, the trial court instructed the jury on first-degree murder and conventional second-degree murder, but refused to give additional instructions on second-degree felony murder or voluntary manslaughter. The jury chose to convict Barnett of two counts of first-degree murder. The Missouri Supreme Court affirmed. Additional jury instructions were not required, the court explained, because the second-degree murder instruction sufficiently tested the jury's belief that Barnett committed first-degree murder. Nearly two decades later, Barnett asked the Missouri Supreme Court to re-open his case and apply an intervening ruling, which, he argued, would now require all four jury instructions. The Missouri Supreme Court denied the motion, and this Court should decline to review that decision. Missouri courts decide if changes to Missouri law apply retroactively, and here, Barnett misreads the intervening decision.

There is no split of authority on the retroactivity question Barnett presents. The courts below agree on two fundamental principles. First, state courts are the final arbiters of state-law issues, including whether a change in state decisional law applies retroactively to a criminal defendant who has already exhausted his direct appeal. *See Wainwright v. Stone*, 414 U.S. 21 (1973). Second, this Court is the final arbiter of whether a state law, or application of state law, violates the federal Constitution. State laws may not be enforced arbitrarily. But a state court does not act arbitrarily when it makes a change in statutory law non-retroactive. *Solem v.*

Stumes, 465 U.S. 638, 642 (1984). To the contrary, the finality of a judgment usually bars retroactive application of even constitutional laws, and here, Barnett concedes that Missouri’s alleged change in law is not constitutionally required.

None of Barnett’s cases conflicts with these two principles. *Fiore v. White*, 531 U.S. 225 (2001), applies only when an intervening state-court decision “clarifies” state substantive law as it already existed at the time of petitioner’s original conviction. In *Fiore*, this Court went out of its way to certify the state-law question to the state court. Only when the state court explained that state law at the time of the defendant’s conviction did not support that conviction did this Court find the conviction arbitrary. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), while a retroactivity case, says little about the question presented here. *Montgomery* governs the retroactivity of substantive rules of federal constitutional law, not the retroactivity of procedural rules of state statutory law. Finally, *Hicks v. Oklahoma*, 447 U.S. 343 (1980), and the four state-court cases Barnett cites that follow it, simply reviewed state action for arbitrariness. All five cases were decided on direct review, and they all applied the general rule that a state cannot arbitrarily ignore state law, or arbitrarily convict under an unconstitutional statute.

Furthermore, Barnett’s petition has many vehicle problems. First, the change of decisional law does not apply to Barnett’s case. The intervening decision, *State v. Jackson*, 433 S.W.3d 390 (Mo. 2014), is limited to instructions for “nested” lesser offenses, and second-degree felony murder and voluntary manslaughter are not nested lesser offenses of first-degree murder. Retroactive or not, *Jackson* would

not change the outcome here. Second, the Missouri Supreme Court’s one-line denial of Barnett’s motion does not say whether *Jackson* is retroactive. This Court usually does not pass on questions not addressed below, and certainly does not issue advisory opinions on constitutional issues that might not even arise. Third, even if this Court did review the constitutionality of making this state-court decision non-retroactive, it would find that even under *Teague*’s stringent test, the rule should not be applied retroactively. The Constitution does not require multiple lesser-offense instructions, and fundamental fairness cannot either.

JURISDICTION

The Missouri Supreme Court entered its judgment on November 24, 1998. Barnett filed a “motion to recall mandate and alternative petition for writ of habeas corpus” in the Missouri Supreme Court on December 7, 2017. The Missouri Supreme Court overruled the motion on January 23, 2018. The petition for a writ of certiorari was filed April 23, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

COUNTERSTATEMENT

A. A Missouri jury convicted Barnett of two counts of first-degree murder for killing his grandparents.

A Missouri jury convicted David Barnett of two counts of first-degree murder, one count of first-degree robbery, and two counts of armed criminal action. *See State v. Barnett*, 980 S.W.2d 297, 301 (Mo. 1998). While his grandparents were at church in February 1996, Barnett broke into their home. *Id.* As they came in the door, he knocked them down, kicked his grandfather in the head, and stabbed him

repeatedly with a kitchen knife until he died. *Id.* He went back to the kitchen for another knife and began stabbing his grandmother, stopped again for more knives, and then finished killing her. *Id.* All told, he stabbed her neck and face twelve times. *Id.* He hid one of the knives beneath a mattress, took \$120 from his grandmother's purse, locked up the house, and drove off in their car. *Id.* When confronted the next day, he confessed to the murders. *Id.*

Barnett initially received the death penalty. *Id.* at 301. As noted below, his sentence was reduced to life imprisonment by a federal habeas court in 2015—a decision currently on appeal before the Eighth Circuit.

B. In 1998, The Missouri Supreme Court upheld Barnett's conviction, including the trial court's lesser-included-offense instructions.

The Missouri Supreme Court affirmed Barnett's conviction and sentence on direct review. *Id.* at 301. Relevant here, Barnett contended on appeal that the trial court erred by failing to instruct the jury on second-degree felony murder and voluntary manslaughter. *Id.* at 305-06. The trial court had submitted instructions on first-degree murder and conventional second-degree murder. *Id.* at 305. The Missouri Supreme Court explained that the second-degree murder instruction "sufficiently tested the jury's belief that Barnett had met all the elements for first degree murder." *Id.* "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." *Id.* at 305-06.

Barnett filed for state post-conviction review, and the Missouri Supreme Court again denied relief. *Barnett v. State*, 103 S.W.3d 765, 768 (Mo. 2003). This Court denied certiorari. *Barnett v. Missouri*, 540 U.S. 862 (2003). The U.S. District Court for the Eastern District of Missouri initially denied habeas relief, and the Eighth Circuit affirmed. *Barnett v. Roper*, 541 F.3d 804, 807 (8th Cir. 2008). This Court again denied certiorari. *Barnett v. Roper*, 558 U.S. 830 (2009).

C. In 2015, a federal court granted Barnett’s Rule 60(b) motion, now on appeal before the Eighth Circuit, and reduced his sentence to life imprisonment without parole.

Barnett obtained habeas relief from his capital sentence in 2015. *Barnett v. Roper*, No. 4:03-cv-614-ERW, 2015 WL 13662176 (E.D. Mo. Aug. 18, 2015). Barnett had procedurally defaulted his ineffective-assistance-of-counsel claims in state court. *Id.* at *2-3. Several years later, however, the federal district court chose to consider Barnett’s Rule 60(b)(6) motion for relief based on the suggestion that *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), excused the procedural default and allowed the federal court to reach the merits of the underlying claims. *Id.* at *3-4. That court then held a nine-day evidentiary hearing under Rule 59(e) to determine if Barnett’s sentencing-phase counsel had been ineffective. *Id.* at *4. The district court ultimately granted Barnett habeas relief from his death sentence. *Id.* at *86. That decision is currently on appeal before the Eighth Circuit. *See Barnett v. Roper*, No. 16-1467 (8th Cir.).

D. In 2018, the Missouri Supreme Court denied Barnett’s motion to recall the mandate or alternative writ for habeas corpus.

In December 2017, Barnett filed a “Motion to Recall the Mandate or Alternative Writ For Habeas Corpus” in the Missouri Supreme Court. App. 41a. In his motion, he argued that the Missouri Supreme Court had changed its reading of the state statute governing jury instructions for lesser included offenses in *State v. Jackson*, 433 S.W.3d 390 (Mo. banc 2014). App. 41a. Barnett argued that this change in decisional law would have led to a different outcome on appeal in his case, and that the change should be applied retroactively. App. 42a. The Missouri Supreme Court denied the motion in a one-sentence order. App. 1a.

REASONS FOR DENYING THE WRIT

I. ALL LOWER COURTS AGREE THAT STATE COURTS, NOT FEDERAL COURTS, DECIDE WHETHER A NEW READING OF A STATE STATUTE APPLIES RETROACTIVELY TO A CRIMINAL DEFENDANT WHO HAS ALREADY EXHAUSTED HIS DIRECT APPEAL.

A. This Court and the lower courts agree on two principles that govern Barnett’s case. First, this Court has explained time and again that “[t]he highest court of each State” is “the final arbiter of what is state law.” *Montana v. Wyoming*, 563 U.S. 368, 377 n.5 (2011) (citation omitted). “[T]he meaning of the [state] statute” is “a problem for the [state] courts, and not one for us after they [have] had their say.” *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 363 (1932); *see also New York v. Ferber*, 458 U.S. 747, 767 (1982) (“the construction that a state court gives a state statute is not a matter subject to our review”). “Respect for the independence of state courts,” in fact, means this Court does not

even have jurisdiction to review a decision that rests on an “adequate and independent state ground.” *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

Applying this deferential principle, *Wainwright v. Stone*, 414 U.S. 21 (1973), explained that whether a change in state decisional law applies retroactively is itself a question of state law. “A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions.” *Stone*, 414 U.S. at 24 (quoting *Great Northern Ry.*, 287 U.S. at 364). “[T]he Federal Constitution has no voice upon the subject.” *Great Northern Ry.*, 287 U.S. at 364.

Second, “this Court is the final arbiter of whether the Federal Constitution necessitate[s] the invalidation of a state law.” *Ferber*, 458 U.S. at 767. As a baseline, a state may not enforce its laws arbitrarily. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986) (“the Due Process Clause, like its forebear in the Magna Carta, was ‘intended to secure the individual from the arbitrary exercise of the powers of government’ (citations omitted)); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). But a state court does not act arbitrarily when it determines that a change in decisional law is non-retroactive. *See Solem v. Stumes*, 465 U.S. 638, 642 (1984) (holding that retroactive application of judicial decisions is not constitutionally required). “It is fully consistent with a government of laws to recognize that the finality of a judgment may bar relief.” *Danforth v. Minnesota*, 552 U.S. 264, 291 (2008). Indeed, principles of finality are so strong that even “a new *constitutional*

rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced.” *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016) (emphasis added). Only a small subset of new constitutional rules—*i.e.*, “watershed rules” implicating “fundamental fairness”—receive retroactive effect. *Id.* at 728.

Lower courts uniformly follow these two principles. *See, e.g., Henry v. Ricks*, 578 F.3d 134, 141 (2d Cir. 2009) (“We hold that, under the circumstances presented here, the Due Process Clause does not require the retroactive application of a new interpretation of a criminal statute by the New York Court of Appeals in our collateral review of a conviction.”); *Warren v. Kyler*, 422 F.3d 132, 137 (3d Cir. 2005) (explaining that federal courts must “heed the state court’s application of its own retroactivity principles”); *Volpe v. Trim*, 708 F.3d 688, 700 (6th Cir. 2013) (“[T]he retroactive application of new state decisional law to a petitioner’s conviction after she has exhausted her appellate remedies is a state-law question, on which state courts have the last word.”); *Gladney v. Pollard*, 799 F.3d 889, 897 (7th Cir. 2015) (“States are free to choose whether a change in state law is retroactive without running afoul of the federal Constitution.”); *Graves v. Ault*, 614 F.3d 501, 512 (8th Cir. 2010) (holding that a defendant is not “entitled to have his conviction scrutinized in light of intervening case law in a collateral attack” because “the Constitution does not require a state’s highest court to make retroactive its new construction of a criminal statute” (brackets and citation omitted)); *Kleve v. Hill*, 243 F.3d 1149, 1151 (9th Cir. 2001) (holding that a change in California law would

not “invalidate a conviction obtained under an earlier law”); *Chapman v. LeMaster*, 302 F.3d 1189, 1197–98 (10th Cir. 2002) (“When a state’s highest criminal court has resolved the question of retroactivity, that determination is a matter of state law and a federal *habeas* court has no power to grant relief.”).

B. Barnett cites three of this Court’s opinions and six state-court decisions that, he says, conflict with these general principles. A closer look shows that there is no conflict. Two of Barnett’s cases follow the first principle that state courts determine whether a change in state decisional law should apply retroactively. Two cases fall outside of either principle: one involved the retroactivity of this Court’s constitutional decisions, and another relied only on state law. The remaining five cases are straightforward *direct-review* decisions following the second principle that a state court cannot act arbitrarily, either by not following state law at all, or by arbitrarily applying unconstitutional state laws.

Start with the principle that state courts decide state-law questions. Barnett relies on *Fiore v. White*, 531 U.S. 225 (2001), *see* Pet. at 8, 12, but *Fiore* recognizes that state courts determine the retroactivity of state laws. In *Fiore*, the defendant was convicted under state law. *Id.* at 226-27. The court of appeals summarily affirmed the conviction. *Id.* His co-defendant appealed to the Pennsylvania Supreme Court, which vacated the co-defendant’s conviction and held that the statute did not criminalize their joint conduct. *Id.* at 227. *Fiore* then filed a federal habeas petition. This Court certified the case to the Pennsylvania Supreme Court to determine whether its intervening decision “represented a change in the law”

between the date of Fiore's conviction and the date of the decision overturning the conviction for his co-defendant, or if the intervening decision announced what the law was at the time of Fiore's conviction. *Id.* at 228. The Pennsylvania Supreme Court said it had not announced a new rule; the statute had the same meaning "at the date Fiore's conviction became final." *Id.* This Court deferred to the state court. Because the intervening decision "was not new law," *Fiore* presented "no issue of retroactivity." *Id.* This Court simply held that due process prohibited Pennsylvania from convicting Fiore "for conduct that its criminal statute . . . does not prohibit." *Id.*

Commonwealth v. Tarver, 357 A.2d 539, 542 (Pa. 1976), also fully supports Missouri's position, rightly explaining that there is "no obstacle in applying a procedural rule which is not constitutionally based in a manner which is prospective only." *Id.* Barnett cites *Tarver* to show that *Stone* should be read narrowly, Pet. 9, but *Tarver*'s precise holding contradicts Barnett's position.

Two more of Barnett's cases, while discussing retroactivity, do not contradict the general principle that state courts determine the retroactivity of state law. Barnett argues that *Stone*'s deference to state-court retroactivity decisions was limited by *Montgomery*. Pet. 12-13. Barnett concedes, however, that *Montgomery*'s holding is limited to "substantive rules of [federal] constitutional law." Pet. 12. *Montgomery* says little about procedural rules of state statutory law, which the question raised by Barnett's petition addresses. See Pet. *i*.

Another case cited by Barnett, *Flores v. State*, 572 P.2d 746 (Wy. 1977), was nominally framed as a retroactivity case, *see* Pet. 9, but was a direct-review retroactivity case about an unconstitutional statute. The trial had been bifurcated in a way required by state law, and defendant made no objection. *Flores*, 572 P.2d at 747. “[A]fter the trial and prior to argument” on appeal, the Wyoming Supreme Court held the bifurcation statute unconstitutional in another case. *Id.* The Wyoming Supreme Court simply applied the law as it was at the time of the direct appeal and reversed. *Id.*

Barnett’s remaining five cases were all decided on direct review and reviewed lower-court proceedings for arbitrariness. Different retroactivity rules apply on direct review than on collateral review, because different finality considerations govern. *See Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987); *see also Teague*, 489 U.S. at 303-04 (adopting the view that new constitutional rules generally should apply to cases still on direct review, but generally should not apply to cases on collateral review). *Hicks v. Oklahoma*, 447 U.S. 343 (1980), and cases relying on it, applied the general rule that a state cannot arbitrarily ignore state law, or arbitrarily convict a defendant under an unconstitutional statute.

Barnett argues that *Hicks* limited *Stone* by placing due process limits on a state’s authority to determine if a change in state law applies retroactively. Pet. at 7-9. *Hicks* does not even cite *Stone*, however, because *Hicks* was a direct-review case involving an unconstitutional statute. 447 U.S. at 345. A jury sentenced Hicks to forty years under the state habitual offender statute. *Id.* On direct appeal, Hicks

challenged the constitutionality of that statute and the appeals court agreed “that the provision was unconstitutional.” *Id.* But the court of appeals reasoned that Hicks was not prejudiced by this constitutional error, because his sentence was “within the range of punishment” that could have been imposed even without the habitual-offender statute. *Id.* The State conceded that Hicks’ sentence was for an offense—offending habitually—that was unconstitutional at the time of the direct appeal. *Id.* at 347. Noting that concession, this Court found it unconstitutionally “arbitrary” for the state appeals court to impose Hicks’s sentence anyway. *Id.* at 346-47.

The last four state court cases, Pet. 9-10, are similar. *Stewart v. State*, 662 So.2d 552 (Miss. 1995), also a direct review case, also involved a constitutional error and subsequent arbitrariness analysis. There, the Mississippi Supreme Court held that the trial court misapplied *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). *See Stewart*, 662 So.2d at 557-560. As a result, the court decided that the defendant was arbitrarily denied his peremptory challenges. *Id.* at 560. In *Golden v. State*, 127 P.3d 1150 (Okla. Crim. App. 2006), the trial court did not follow a state law providing first-degree-murder defendants nine peremptory challenges, *id.* at 1152. The court’s decision not to follow state law violated due process. *Id.* at 1153. The Oklahoma court also said the error was structural, *id.* at 1155, but that holding was later overruled, *Robinson v. State*, 255 P.3d 425, 428 (Okla. Crim. App. 2011). *People v. Presson*, 315 P.3d 198 (Col. Ct. App. 2013), was also decided on direct appeal. The appeals court held that the trial court misapplied state law and found

that the error was not harmless. It cited *Hicks* for general principles of due process arbitrariness, but ultimately did not resolve whether its ruling was constitutionally required. *Id.* at 201. Finally, a concurring opinion in *Helmcamp v. State*, 511 S.W.3d 546 (Tex. Crim. App. 2017), stated that “once conferred,” a statutory right to appeal a motion for DNA testing “cannot be arbitrarily taken away.” *Id.* at 547 (Yeary, J., concurring). That opinion recommended that the court adopt a procedural rule to make sure criminal appellants received timely notification of appealable orders. *Id.* It said nothing about retroactivity.

In sum, none of these cases conflicts with the holdings of *Stone* and *Great Northern Railway*, and none conflicts with the outcome of Barnett’s case. The Missouri Supreme Court determined the meaning of state law in Barnett’s case on direct review. That Court did not act arbitrarily when it refused to re-open the case many years later.

II. THIS CASE WOULD BE A POOR VEHICLE EVEN IF THERE WERE A SPLIT OF AUTHORITY.

Even if state court decisions about the retroactivity of state law did create a split (they do not), this case would be a poor vehicle to review that question. At least three significant vehicle problems counsel that this Court should deny the petition for writ certiorari.

A. Missouri’s alleged change of law would not apply to the jury instructions Barnett requested.

Most important, nothing in the Missouri Supreme Court’s intervening decision in *State v. Jackson*, 433 S.W.3d 390 (Mo. 2014), or its progeny would have changed the outcome in Barnett’s case. The trial court instructed Barnett’s jury on

conventional first-degree murder and conventional second-degree murder. *Barnett*, 980 S.W.2d at 305-06. The conventional second-degree murder instruction “sufficiently tested the jury’s belief that Barnett had met all the elements for first degree murder.” *Id.* There was no need for additional lesser-included instructions on second-degree felony murder or voluntary manslaughter. *Id.* The law has not changed on that point. In fact, subsequent to *Jackson*, the Missouri Supreme Court re-affirmed similar reasoning on similar instructions.

Jackson concerned jury instructions for nested lesser included offenses. 433 S.W.3d at 392; *see also State v. Blurton*, 484 S.W.3d 758, 766 (Mo. 2016); *State v. Smith*, 522 S.W.3d 221, 227 (Mo. 2017). Missouri law provides “[t]he court shall not be obligated to charge the jury with respect to an included offense unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.” Mo. Rev. Stat. § 556.046.2. Earlier decisions suggested this statute required defendants to explain to the “jury precisely how or why” they can acquit of the greater offense and convict of the lesser. *Jackson*, 433 S.W.3d at 401-402. *Jackson* explained that this requirement was unnecessary for nested lesser included offenses. *Id.* A nested lesser included offense is one “comprised of a subset of the elements of the charged offense.” *Id.* at 404. Nested lesser offenses satisfy Mo. Rev. Stat. § 556.046.2’s requirements by definition: “it is impossible to commit the greater [offense] without necessarily committing the lesser.” *Id.* (citation and emphases omitted). Thus, the statute required jury instructions for nested lesser included offenses.

Jackson does not affect Barnett's case. First, Barnett's requested jury instructions were not for nested lesser offenses. "Unlike [the instructions] in *Jackson*," second-degree felony murder is "not a 'nested' lesser included offense" of first-degree capital murder. *Blurton*, 484 S.W.3d at 766 (Mo. 2016). Second-degree felony murder requires "proof of additional facts" beyond the elements of first-degree capital murder—namely, proof of a felony apart from the murder itself. *Id.* Similarly, it is possible to commit first-degree murder without committing voluntary manslaughter. *State v. Jensen*, 524 S.W.3d 33, 40 (Mo. 2017). Indeed, the two crimes seem mutually exclusive: first-degree murder requires deliberation, Mo. Rev. Stat. § 565.020.1, while voluntary manslaughter requires sudden passion, Mo. Rev. Stat. § 565.023.1. So voluntary manslaughter is not a nested lesser offense of first-degree murder either. The Missouri Supreme Court recently employed the same reasoning post-*Jackson* to explain why voluntary manslaughter was not a nested lesser offense of second-degree murder. *See Jensen*, 524 S.W.3d at 40. *Jensen*'s reasoning confirms that Missouri law has not changed on this point.

Second, *Jackson* does not change the outcome of Barnett's case because the instruction on conventional second-degree murder sufficiently tested the elements of conventional first-degree murder. "When a jury convicts on first degree murder after having been instructed on both first degree and second degree murder, there is no prejudice to the defendant by the refusal to submit a second degree felony murder instruction." *State v. Kinder*, 942 S.W.2d 313, 330 (Mo. 1996); *see Blurton*, 484 S.W.3d at 785-88 (Fischer, J., concurring) (explaining why *Jackson* does not

change the analysis); *State v. McLaughlin*, 265 S.W.3d 257, 270 (Mo. 2008) (“it was not error to refuse to submit felony murder so long as the trial court did submit second-degree murder”); *State v. Hall*, 982 S.W.2d 675, 682 (Mo. 1998) (same); *State v. Roberts*, 948 S.W.2d 577, 603 (Mo. 1997) (same); *State v. Six*, 805 S.W.2d 159, 164 (Mo. 1991) (same). There is no need to submit multiple instructions to test the same differential element.

Identical reasoning applies to Barnett’s requested instruction on voluntary manslaughter. “The failure to give a different lesser-included offense instruction is neither erroneous nor prejudicial when instructions for the greater offense and *one* lesser-included offense are given and the defendant is found guilty of the greater offense.” *State v. Johnson*, 284 S.W.3d 561, 575 (Mo. 2009) (citing *State v. Glass*, 136 S.W.3d 496, 515 (Mo. 2004)). *Johnson* and *Glass* “held that a defendant convicted of first degree murder is not prejudiced by the trial court’s refusal to instruct on lesser included offenses other than second degree murder because the ‘jury has already been given an opportunity to reject the element of deliberation and did not do so.’” *Jensen*, 524 S.W.3d at 39 (quoting *Glass*, 136 S.W.3d at 515); *see also State v. Payne*, 488 S.W.3d 161, 166 (Mo. Ct. App. 2016) (holding a defendant convicted of first degree murder was not prejudiced by the trial court’s refusal to instruct on both second-degree murder and voluntary manslaughter because both tested the element of deliberation). The jury in Barnett’s case, like the juries in *Johnson* and *Glass*, “necessarily and completely rejected the possibility of a

conviction on any lesser homicide offense.” *Jensen*, 524 S.W.3d at 39. This analysis “is consistent with *Jackson*” and remains the law today. *Id.* at 38-39.

Barnett’s contrary arguments are mistaken. Pet. 3-5. Barnett reads *Jackson* and its progeny to apply to *all* instructions for lesser included offenses. Pet. 4. But as *Blurton* and *Jensen* explain, *Jackson*’s reasoning is limited to nested offenses, and felony murder and voluntary manslaughter are not nested offenses of capital murder. Barnett also argues that instructing the jury on one lesser included offense does not always test all the elements of a greater offense. Pet. 4. True enough. But instructing the jury on second-degree murder *does* fully test the elements of first-degree murder. It ensures the jury has “rejected the possibility of a conviction on any lesser homicide offense.” *Jensen*, 524 S.W.3d at 39. Finally, Barnett cites the dissenting opinion in *State v. Pierce*, 433 S.W.3d 424, 448 n.3 (Mo. 2014), which warned that *Pierce* and *Jackson*—read broadly—might apply in Barnett’s case if the rule were made retroactive. Pet. 5. The dissent does not determine the breadth of the majority’s rule, however. Subsequent cases show *Jackson*’s change in law does not apply to Barnett, because its holding is limited to nested lesser offenses. *Blurton*, 484 S.W.3d at 766 (distinguishing *Jackson* because the offense at issue was not a nested lesser included offense).

B. The Missouri Supreme Court determines whether *Jackson* is retroactive, it did not make that determination in this case, and opining on the constitutionality of such a decision would be wholly advisory.

This Court should also deny certiorari because the Missouri Supreme Court did not decide, and has not decided, whether its *Jackson* decision is or is not

retroactive. That court only issued a one-line decision denying Barnett’s motion. App. 1a. Barnett concedes as much. Pet. at 6 (“The Missouri Supreme Court has not issued an opinion on the issue of the retroactivity of the *Jackson* rule.”). But he suggests that the Missouri Supreme Court would likely find that *Jackson* applies only prospectively. *Id.*

First, under this Court’s precedent, whether *Jackson* applies retroactively is wholly up to the state court. “[T]he Federal Constitution has no voice upon the subject.” *Great Northern Ry.*, 287 U.S. at 364; see *Stone*, 414 U.S. at 24. Second, even if this Court did want to review the Missouri Supreme Court’s decision about *Jackson*’s retroactivity, this case would not be the right vehicle, because the Missouri court did not rule on that question. This “Court does not ordinarily decide questions that were not passed on below.” *City and Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1773 (2015). Third, this Court does not give advisory opinions about whether hypothetical state-court decisions *might* violate the Constitution. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.” (citation omitted)). So this is not the right vehicle for Barnett’s due-process questions either.

C. Even analyzed under *Teague*, Missouri’s alleged change in criminal procedure would not apply retroactively on collateral review because it does not implicate fundamental fairness.

At any rate, there is no basis for this Court to apply *Jackson*’s change of law retroactively. Even if principles announced in *Teague v. Lane* applied here (which

they do not), those principles would dictate that the change in decisional law should not apply to the final judgment in Barnett's case.

As a general rule, principles of finality require that “a new constitutional rule of criminal procedure does not apply . . . to convictions that were final when the new rule was announced.” *Montgomery*, 136 S. Ct. at 728 (citing *Teague*, 489 U.S. at 728). There are two exceptions to this “general retroactivity bar.” *Id.* First, courts must give retroactive effect to new substantive constitutional rules. *Id.* Second, courts must give retroactive effect to new “watershed rules of criminal procedure” which implicate “fundamental fairness.” *Id.* (citation omitted).

Barnett concedes that the federal Constitution does not require multiple lesser-included offense instructions. Pet. at 8 (citing *Schad v. Arizona*, 501 U.S. 624, 646 (1991)). Due process requires trial courts to give one lesser-included offense instruction in capital cases, so that the jury has a viable third option between a capital conviction and acquittal. *See Beck v. Alabama*, 447 U.S. 625, 636 (1980). But the Constitution's “central concern” is to ensure the jury is “not faced with an all-or-nothing choice.” *Schad*, 501 U.S. at 647. It does not require multiple lesser-included instructions. *Id.* Here, the jury had the option of convicting Barnett of second-degree murder, and instead convicted him of first-degree murder. *Barnett*, 980 S.W.2d at 305-06. For constitutional purposes, that was sufficient.

“Fundamental fairness” is limited to a subset of constitutionally dictated procedures. *See Medina v. California*, 505 U.S. 437, 443 (1992) (“In the field of criminal law, we have defined the category of infractions that violate ‘fundamental

fairness’ very narrowly” (citation omitted)). So a conviction “free from federal constitutional error at the time it became final,” and still free of constitutional error today, cannot be a watershed rule implicating fundamental fairness. *See Teague*, 489 U.S. at 311 (citation omitted).

CONCLUSION

For the foregoing reasons, the Court should deny Barnett’s petition for writ of certiorari.

Respectfully submitted,

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