No. SC96159

In the
Supreme Court of Missouri

STATE EX REL. STEPHANIE WINDEKNECHT,

Petitioner,

v.

ANGELA MESMER,

Respondent.

Original Petition for a Writ of Habeas Corpus

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

In 2013, the State charged Stephanie Windeknecht with stealing over $500, a C felony, in Scott County Circuit Court Case no. 13SO-CR00951-01. Windeknecht pleaded guilty on January 9, 2014, and the Circuit Court of Scott County sentenced her to six years' incarceration in the Missouri Department of Corrections on March 13, 2014. Windeknecht did not appeal her conviction.

On August 23, 2016, this Court issued its opinion in *State v. Bazell*, 497 S.W.3d 263 (Mo. 2016) (per curiam). *Bazell* was a direct appeal challenge to a conviction after a jury trial for one count of first-degree burglary, two counts of stealing a firearm, one count of stealing over $500, and one count of stealing. The Court took transfer of the case after the court of appeals affirmed the conviction. *Bazell* presented two questions: 1) whether the jury's verdicts for two counts of stealing a firearm violated double jeopardy, and 2) whether the trial court abused its discretion when it overruled the defense's objection and request for a mistrial after a detective testified that he had compiled a photo lineup from jail photos. The Court found no error with the trial court's failure to grant a mistrial. However, rather than address the double jeopardy issue, the Court held that the defendant's stealing firearms offenses could not be enhanced to felonies because "enhancement pursuant to section 570.030.3 does not apply to Defendant's stealing convictions for the

theft of firearms." *Id.* at 265. The Court reversed the defendant's convictions in part and remanded the case for proceedings consistent with the opinion. *Id.* Notably, the Court refused to consider the defendant's felony conviction for stealing over $500 because the defendant had not challenged that conviction in her original brief. *Id.* at 267 n.4.

Subsequently, on October 27, 2016, Windeknecht filed her first petition for a writ of habeas corpus challenging her stealing conviction in Audrain County Circuit Court Case no. 16AU-CC00056. Windeknecht alleged that *Bazell* entitled her to relief. She argued that the felony enhancement provision of Section 570.030 does not apply to her conviction for stealing over $500. Thus, Windeknecht believed that she could only be guilty of an A misdemeanor. The habeas court issued a summons and Respondent timely responded on December 30, 2016. Respondent argued that the *Bazell* decision does not apply retroactively to cases which have completed review and, even if it did, *Bazell* does not affect convictions for stealing over $500. The habeas court denied Windeknecht's petition. *See* (Pet. Ex. 5). Windeknecht then filed a petition for habeas relief in the Missouri Court of Appeals in Case no. ED105165, which was also denied. *See* (Pet. Ex. 7). This petition follows.

ARGUMENT

I. Windeknecht's request for habeas relief should be denied because the offense of stealing property or services worth five hundred dollars or more but less than twenty-five thousand dollars was a class C felony under the version of RSMo. § 570.030 in effect at the time of Windeknecht's conviction, in that this offense was undoubtedly one "in which the value of property or services is an element" under the prior version of § 570.030.3. – Responds to Petitioner's Points I and II.

This case raises the interpretative question whether the offense of stealing over $500—which requires a showing that "***the value of property or services*** appropriated is five hundred dollars or more but less than twenty-five thousand dollars"—constitutes "***any offense*** in which ***the value of property or services*** is an ***element***," under the version of RSMo. § 570.030 that was in effect from 2002 to 2017.[1]

This is not a close question. Missouri courts have repeatedly held that the value of property or services appropriated is an "element" of the offense of

[1] Unless otherwise stated, all references to RSMo. § 570.030 and its subparts refer to the version of the statute that was in effect from 2002 to 2017. *See* RSMo. § 570.030 (2009).

stealing over $500. Likewise, Missouri courts have frequently held that stealing over $500 is a distinct "offense" from basic misdemeanor stealing. Because it is a distinct "offense," and because its "elements" include the value of property or services appropriated, stealing over $500 plainly constitutes "*any* offense in which the value of property or services is an element." *Id.* (emphasis added). Under the statute's plain and unambiguous language, stealing over $500 is a class C felony. Moreover, even if the statute was ambiguous on this point—which it is not—every applicable canon of interpretation confirms that the stealing over $500 is a felony under the statute. The petition for writ of habeas corpus should be denied.

A. Standard of Review

Habeas corpus is a common law remedy used to inquire into the legality of a person's restraint. Rule 91.01(b). A habeas petitioner has the burden of showing that he or she is entitled to habeas corpus relief. *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 513 (Mo. 2010). "The decision whether to grant relief is limited to determining the facial validity of confinement, which is based on the record of the proceeding that resulted in confinement." *Id.* (quotation and citation omitted). Whether this Court's holding in *Bazell* affects convictions for stealing over $500 is a question of law. This Court considers questions of law *de novo*. *See Doughty v. Director of Revenue*, 387 S.W.3d 383, 386 (Mo. 2013).

B. The plain language of § 570.030 demonstrates that stealing over $500 is "*any offense* in which the value of property or services is an *element*."

In *Bazell*, this Court emphasized that "the primary rule of statutory interpretation" is "to give effect to the plain and ordinary meaning of the statutory language." *State v. Bazell*, 497 S.W.3d 263, 266 (Mo. 2016) (per curiam). Here, the plain and ordinary meaning of the language of § 570.030 clearly demonstrates that stealing over $500 is an "offense in which the value of property or services is an element," and thus it is a class C felony. RSMo. § 570.030.3. This conclusion is supported by the plain meaning of the word "element," the plain meaning of the word "offense," the plain meaning of the word "any," numerous cases holding that the value of property stolen is an "element" of stealing over $500, and numerous cases holding that stealing over $500 is a distinct "offense" from misdemeanor stealing.

1. The value of property or services is an "element" of stealing over $500.

First, it is indisputable that the value of the property stolen is an "element" of the crime of stealing over $500. Missouri courts have repeatedly held that it is an element, and the point is not subject to reasonable dispute. "Stealing is felonious if the property's value was $500 or more. . . . 'Absent substantial evidence as to the value, an essential ***element*** of the felony

stealing charge is not proved.'" *State v. Miller*, 466 S.W.3d 635, 636 (Mo. App. S.D. 2015) (quoting *State v. Slocum*, 420 S.W.3d 685, 687 (Mo. App. E.D. 2014)) (emphasis added); *State v. Calicotte*, 78 S.W.3d 790, 794 (Mo. App. S.D. 2002) ("[T]he value of the property stolen determines the severity of the crime of stealing. . . . Absent substantial evidence as to value, an essential element of the felony stealing charge is not proved.") (quotation omitted); *State v. Brown*, 457 S.W.3d 772, 785 (Mo. App. E.D. 2014) (same); *see also State v. Tivis*, 948 S.W.2d 690, 694 (Mo. App. W.D. 1997) (same).

In fact, under U.S. Supreme Court decisions, the Sixth Amendment mandates that such punishment-enhancing factors must be treated as elements of the relevant offenses. The "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the *elements* of the crime with which he is charged." *United States v. Booker*, 543 U.S. 220, 230 (2005) (emphasis added) (quoting *United States v. Gaudin*, 515 U.S. 506, 511 (1995)). In the long line of cases including *Booker* and *Apprendi*, the U.S. Supreme Court has instructed that the factors that result in sentencing enhancements are to be treated as "elements" of the relevant offenses—which must be found by a jury and proven beyond a reasonable doubt—regardless of whether they are classified by statute as "elements" or "sentencing factors." *See id.* at 241–42 (holding that the "authority to identify the facts relevant to sentencing decisions and to determine the impact of such facts on federal

sentences is precisely the same whether one labels such facts 'sentencing factors' or 'elements' of such crimes"). *See also Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Jones v. United States*, 526 U.S. 227, 230 (1999). In other words, under governing case law, the Sixth Amendment effectively mandates that "the value of property or services appropriated is five hundred dollars or more but less than twenty-five thousand dollars" must be treated as an "element" of the crime of stealing over $500. RSMo. 570.030.3(1).

In accordance with these authorities, it is common for elements of higher-class offenses to be stated in later subsections of a statute after the base offense has been defined in an earlier subsection. For example, the class C felony of first-degree sexual abuse under § 566.100.1 is defined as follows: "A person commits the offense of sexual abuse in the first degree if he or she subjects another person to sexual contact when that person is incapacitated, incapable of consent, or lacks the capacity to consent, or by the use of forcible compulsion." RSMo. § 566.100.1 (2013). But subsection 2 adds the element of age to enhance the crime to a class B felony. *See* RSMo. § 566.100.2 (2013). Even though age is not an element of the base crime of first-degree sexual abuse, if the State charges and proves beyond a reasonable doubt that the victim was under 14 years old, that is an element that enhances the class of the crime. Other statutes are organized similarly. *See, e.g.,* RSMo. § 565.050 (2000) (assault in the first degree); RSMo. § 566.060 (2013) (sodomy in the

first degree); RSMo. § 566.030 (2013) (rape in the first degree). For each such statutory scheme, the liability-enhancing factor set forth later in the statute is unquestionably an "element" of the more serious offense. *See, e.g., State v. Dixon*, 70 S.W.3d 540, 544–45 (Mo. App. W.D. 2002) ("As statutorily defined, both first degree statutory rape and first degree statutory sodomy contain the *element* that the victim must be 'under fourteen years old' at the time of the alleged criminal conduct.") (emphasis added) (overruled on other grounds by *State v. Claycomb*, 470 S.W.3d 358, 361 n.4 (Mo. 2015)).

Because the value of property stolen is unquestionably an "element" of the offense of stealing over $500, the plain and ordinary meaning of the statute is perfectly clear. One "element" of the offense is that "*the value of property or services* appropriated is five hundred dollars or more but less than twenty-five thousand dollars," and thus "*the value of property or services*" is an "element" of that "offense." RSMo. § 570.030.3 (emphases added). This language unambiguously directs that stealing over $500 is a class C felony, because it is an "offense in which the value of property or services is an element." *Id.*

2. Stealing over $500 is a distinct "offense" from misdemeanor stealing, and therefore it constitutes "*any* offense" that has the value of property or services as an element under § 570.030.3.

In an attempt to defeat this plain and ordinary meaning, Windeknecht effectively argues that the word "offense" in the phrase "any *offense* in which the value of property or services is an element," must refer solely to the base offense of misdemeanor stealing as defined in 570.030.1, not to the various specific stealing offenses created by the enhancing elements listed in 570.030.3. In other words, on Windeknecht's interpretation, the word "offense" refers solely to the base offense of stealing, not the specific, more serious offense of stealing over $500. This interpretation contradicts the plain meaning of the word "offense" and the plain meaning of the word "any."

First, Missouri law directly confirms that stealing over $500 is a distinct "offense" from misdemeanor stealing under § 570.030.1, because the latter is a lesser-included "offense" of the former. "Class-A misdemeanor stealing is a lesser-included offense of felony stealing," and stealing over $500 is a "greater offense" than misdemeanor stealing. *Brown*, 457 S.W.3d at 785; *see also State v. Ecford*, 239 S.W.3d 125, 128 (Mo. App. E.D. 2007) (stating that "misdemeanor stealing . . . is a lesser-included offense of felony stealing" over $500).

The recognition that stealing over $500 is a distinct "offense" from misdemeanor stealing flows from the conclusion that the value of the property is an "element" of stealing over $500, and thus stealing over $500 includes an "element" that misdemeanor stealing does not. In criminal law, an "offense" is defined by its "elements," and the "elements" thus determine the nature of the "offense." For example, a criminal information "must define a specific offense, and to define a specific offense, our Rules provide the information shall state plainly, concisely and definitely the essential facts constituting the offense charged. 'Essential facts' simply means *the elements of the offense*." *State v. Ladner*, 613 S.W.2d 951, 952 (Mo. App. E.D. 1981) (emphasis added) (citing Rule 23.01(b)(2)). In other words, "to define a specific offense," one must simply state "the elements of the offense." *Id.* As noted above, it is indisputable that the value of property stolen is an "element" of the crime of stealing over $500, and it is not an element of the base crime of misdemeanor stealing. Thus, the two offenses have different elements, and they constitute distinct "offenses" under the plain and ordinary meaning of that word.

Against this plain meaning, Windeknecht's argument that the word "offense" in § 570.030.3 refers solely to misdemeanor stealing in § 570.030.1 is plainly incorrect. There is simply no language in the statute that restricts "offense" to the generic offense of stealing. On the contrary, § 570.030.3

specifically refers to "***any*** offense," not just to "the offense defined in § 570.030.1." RSMo. § 570.030.3 (emphasis added). The word "any" demonstrates that the statute includes *all* offenses that meet the stated criterion, not just the offense identified at the beginning of the statutory section. For this reason, it is non-controversial that the phrase "*any* offense" in § 570.030.3 includes other offenses in entirely different statutory sections, such as receipt of stolen property in § 570.080. *See* RSMo. § 570.080 (2013). So there is no textual support for Windeknecht's view that the word "offense" refers solely to the base offense of misdemeanor stealing defined in § 573.070.1(1)-(3). Stealing over $500 is a distinct "offense" from misdemeanor stealing, and § 570.030.3 explicitly includes "***any*** offense" that has the value of property or services as an element. By disregarding the word "any," Windeknecht's reading contravenes the plain and ordinary meaning of the statute. *See Bazell*, 497 S.W.3d at 267.

Windeknecht argues that this Court in *Bazell* held that the word "offense" in § 570.030.3 refers solely to the base offense of misdemeanor stealing as defined in § 570.030.1, but this argument plainly misconstrues *Bazell*. To be sure, this Court in *Bazell* quoted § 570.030.1 and stated that "[t]he value of property or services appropriated is not an element of the offense of stealing." *Bazell,* 497 S.W.3d at 266. But this statement was made in the context of discussing a conviction for stealing "[a]ny firearms" under

§ 570.030.3(3)(d). Thus, in *Bazell*, it was unquestionable that the *value* of property stolen was not an element added by 570.030.3(3)(d)—which simply requires a showing that "any firearms" were stolen, without reference to value. *Bazell* did not address or decide the question whether an enhancing element listed in subsection 3 constitutes part of the "offense" referred to in § 570.030.3. On the contrary, the Court quoted from both Section 570.030.1 and Section 570.030.3(3)(d) to demonstrate that the element charged by the State in *Bazell—i.e.*, "[a]ny firearms" under subsection 3(3)(d)—did not include the value of the property. It was only after quoting from *both* subsection 1 and subsection 3 that the Court held that "section 570.030.3 *does not apply here*." *Bazell*, 497 S.W.3d at 267 (emphasis added).

Furthermore, this Court in *Bazell* explicitly stated that it was *not* deciding whether stealing over $500 constituted "any offense in which the value of property or services is an element" under § 570.030.3, because the appellant in *Bazell* had not adequately preserved the issue. *See Bazell*, 497 S.W.3d at 267 n.4. Accordingly, Windeknecht's argument that *Bazell* pre-judged this interpretative question lacks merit, because the question was not

presented or decided in *Bazell*, and this Court explicitly stated that it was *not* deciding the question.[2]

Finally, Windeknecht appears to believe that the value element of 570.030.3(1) cannot satisfy the requirement that the offense include a value element in § 570.030.3, because the same provision (*i.e.*, § 570.030.3(1)) establishes both the *fact* that a value must be shown, and the *amount* of the value that must be shown (*i.e.* property worth $500-$25,000). But there is no basis in the statute's plain language that would foreclose the same provision—paragraph (1) of subsection 3—from both satisfying the "value-element" requirement of 570.030.3, and setting forth a "value-amount" threshold for the felony. For example, consider a hypothetical statute with the same linguistic structure as § 570.030:

> 570.030.1 – Any meal is a "dinner" if it involves eating in the evening.
>
> 570.030.3 – Notwithstanding any other provision of law, any dinner at which turkey is eaten is a "feast" if:

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[2] The State respectfully suggests that the opinions of the Court of Appeals that have adopted this argument have likewise misinterpreted this Court's opinion in *Bazell*. *See State v. Metternich*, WD79253; *State v. Turrentine*, SD34257; *State v. Bowen*, ED103919.

(1) The weight of the turkey eaten is between 5 lbs. and 25 lbs.

Under this hypothetical statute, a person who eats 20 lbs. of turkey in the evening has obviously engaged in a "feast," even though the *fact* that turkey must be eaten and the *amount* of turkey that must be eaten are both provided by 570.030.3(1). Likewise, 570.030.3(1) provides both the *fact* that a showing of value is required, and the *amount* of value that must be shown, to prove stealing over $500.

In sum, under the plain and ordinary meaning of § 570.030.3, stealing over $500 unquestionably constitutes "any offense" in which "the value of property or services is an element." Therefore, it is a class C felony.

3. Even if the question whether stealing over $500 is a felony were ambiguous, every applicable canon of interpretation confirms that stealing over $500 is a felony under the statute.

Moreover, even if the plain language of the statute were ambiguous on the question whether stealing over $500 is a felony—which it is not—several relevant canons of interpretation would resolve this ambiguity and confirm that the offense is a felony. These canons include (1) the rule that related statutory provisions should be interpreted in harmony with each other; (2) the rule that each provision of a statute should be given independent effect,

and no part of the statute should be treated as mere surplusage; (3) the rule that an ambiguous statute should be interpreted to give effect to the underlying legislative purpose or policy; and (4) the rule that statutes should be interpreted to avoid unreasonable or absurd results.

First, it is axiomatic that this Court will interpret statutory language in the context of the statute as a whole, in order to harmonize all parts of the statute. When attempting to resolve ambiguity in statutes, "no portion of a statute is read in isolation, but rather is read in context to the entire statute, harmonizing all provisions." *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 4 (Mo. 2012). Here, another provision of the same statutory section dispels any possible doubt and directly confirms that stealing over $500 is a class C felony under 570.030. In particular, § 570.030.5 provides that "[t]he theft of any item of property or services pursuant to subsection 3 of this section which exceeds five hundred dollars may be considered ***a separate felony*** and may be charged in separate counts." RSMo. § 570.030.5 (emphasis added). In other words, for each item of property stolen worth over $500, the offender commits "a separate *felony*" of stealing over $500. *Id.* This language makes no sense at all unless stealing over $500 is a "felony" in the first place. This Court rejects statutory interpretations that make nonsense out of closely related statutory provisions, as Windeknecht's would do here. Instead, this Court presupposes

that statutory provisions "are intended to be read consistently and harmoniously in their several parts and provisions." *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. 1991).

Second, this Court rejects interpretations of statutes that would render certain words or phrases meaningless or without effect. "When ascertaining the legislature's intent in statutory language, it commonly is understood that each word, clause, sentence, and section of a statute should be given meaning. The corollary to this rule is that a court should not interpret a statute so as to render some phrases mere surplusage." *Middleton v. Missouri Dep't of Corr.*, 278 S.W.3d 193, 196 (Mo. 2009) (citation omitted). Under Windeknecht's interpretation of § 570.030.3—whereby the phrase "any offense" refers solely to misdemeanor stealing in § 570.030.1—there is *no offense at all* that satisfies the phrase "any offense in which the value of property or services is an element" in § 570.030.3. As a result, under Windeknecht's interpretation, the *entirety* of § 570.030.3 has no effect whatsoever, and that whole subsection becomes "mere surplusage." *Id.* Likewise, on Windeknecht's interpretation, the specific enhancing element set forth in § 570.030.3(1) plainly becomes "mere surplusage," because Windeknecht claims that there is no offense for which this enhancing element ever creates a class C felony. For both reasons, this counter-textual interpretation should be rejected.

Similarly, § 570.030.7 separately provides that "[a]ny offense in which the value of property or services is an element is a class B felony if the value of the property or services equals or exceeds twenty-five thousand dollars." RSMo. § 570.030.7. The language of this provision directly tracks the language of § 570.030.3 and (1). If Windeknecht believes, based on this language, that stealing over $25,000 is still a misdemeanor, like stealing over $500, then subsection 7 becomes "mere surplusage." On the other hand, if Windeknecht believes that stealing over $25,000 is a class B felony, then the statutory penalty for stealing jumps from misdemeanor liability for thefts up to $24,999, to class B felony liability for thefts over $25,000. This interpretation fails to harmonize subsection 3 and subsection 7, which plainly contemplate a multiple-step increase in criminal liability for stealing as the value of property or services increases. Either way, Windeknecht's interpretation of subsection 3 violates a fundamental canon of interpretation: Either it renders subsection 7 mere surplusage, or it fails to harmonize subsection 3 and subsection 7.

Third, in cases of statutory ambiguity, this Court gives effect to the probable intention of the legislature in enacting the statute, and rejects statutory interpretations that contravene evident legislative intent. "This Court resolves ambiguities in statutes by determining the intent of the legislature and by giving effect to its intent whenever possible." *Aquila*, 362

S.W.3d at 4. Here, it is virtually inconceivable that the legislature actually intended the result that Windeknecht advocates—*i.e.* that stealing property worth up to $25,000 is a misdemeanor. If the legislature had intended this result, it would have been at odds with the universal consensus of American justice systems. In virtually every criminal justice system in America, the theft of property worth thousands of dollars is a felony—and virtually all jurisdictions include a minimum value threshold for felony stealing that is comparable to $500. *See* Ala. Code § 13A-8-4.1 (theft of property exceeding $500 is a class D felony); Alaska Stat. Ann. § 11.46.130(a)(1) (theft of property of $1,000 or more is a class C felony); Ariz. Rev. Stat. Ann. § 13-1802(G) (theft of property of $1,000 or more is a class 6 felony); Ark. Code Ann. § 5-36-103(b)(3) (theft of property exceeding $1,000 is a class D felony); Cal. Penal Code § 487(a) (theft of property exceeding $950 is a grand theft); Colo. Rev. Stat. Ann. § 18-4-401 (theft of property of $2,000 or more is a class 6 felony); Conn. Gen. Stat. Ann. § 53a-124 (theft of property exceeding $2,000 is a class D felony); Del. Code Ann. tit. 11, § 841 (theft of property of $1,500 or more is a class G felony); Fla. Stat. Ann. § 812.014 (theft of property of $300 or more is a felony of the third degree); Ga. Code Ann. § 16-8-12 (theft of property exceeding $1,500 punishable as a felony); Haw. Rev. Stat. Ann. § 708-831 (theft of property exceeding $750 is a class C felony); Idaho Code Ann. §§ 18-2407, 18-2408 (theft of property exceeding $1,000 is a grand theft

punishable as a felony); 720 Ill. Comp. Stat. Ann. 5/16-1 (theft of property exceeding $500 is a class 3 felony); Ind. Code Ann. § 35-43-4-2 (theft of property of $750 or more is a level 6 felony); Iowa Code Ann. § 714.2 (theft of property exceeding $1,000 is a class D felony); Kan. Stat. Ann. § 21-5801 (theft of property of $1,500 or more is a level 9 felony); Ky. Rev. Stat. Ann. § 514.030 (theft of property of $500 or more is a class D felony); La. Stat. Ann. § 14:67 (theft of property of $750 or more is punishable by incarceration up to five years); Me. Rev. Stat. tit. 17-A, §§ 353, 1252 (theft of property exceeding $1,000 is a class C crime, punishable by incarceration up to five years); Md. Code Ann., Crim. Law § 7-104 (theft of property of $1,500 or more is a felony); Mass. Gen. Laws Ann. ch. 266, § 30 (theft of property exceeding $250 is punishable by incarceration up to five years); Mich. Comp. Laws Ann. § 750.356 (theft of property of $1,000 or more is a felony); Minn. Stat. Ann. § 609.52 (theft of property exceeding $1,000 is punishable by incarceration of up to five years); Miss. Code. Ann. § 97-17-41 (theft of property of $1,000 or more is a felony); Mont. Code Ann. § 45-6-301 (theft of property exceeding $1,500 is punishable by incarceration up to ten years); Neb. Rev. Stat. Ann. § 28-518 (theft of property of $1,500 or more is a class IV felony); Nev. Rev. Stat. Ann. §§ 205.220-222 (theft of property of $650 or more is a category C felony); N.H. Rev. Stat. Ann. § 637:11 (theft of property exceeding $1,000 is a class B felony); N.J. Stat. Ann. §§ 2C:20-2, 2C:43-6 (theft of property

exceeding $500 is a crime of the third degree, punishable by incarceration up to five years); N.M. Stat. Ann. § 30-16-1 (theft of property exceeding $500 is a fourth degree felony); N.Y. Penal Law § 155.30 (theft of property exceeding $1,000 is a class E felony); N.C. Gen. Stat. Ann. § 14-72 (theft of property exceeding $1,000 is a class H felony); N.D. Cent. Code Ann. § 12.1-23-05 (theft of property exceeding $1,000 is a class C felony); Ohio Rev. Code Ann. § 2913.02 (theft of property of $1,000 or more is a felony of the fifth degree); Okla. Stat. Ann. tit. 21, §§ 1704, 1705 (theft of property exceeding $1,000 is a felony); Or. Rev. Stat. Ann. § 164.055 (theft of property of $1,000 or more is a class C felony); 18 Pa. Cons. Stat. Ann. § 3903 (theft of property exceeding $2,000 is a felony of the third degree); R.I. Gen. Laws Ann. § 11-41-5 (theft of property exceeding $1,500 is punishable by incarceration up to ten years); S.C. Code Ann. § 16-13-30 (theft of property exceeding $2,000 is a felony); S.D. Codified Laws § 22-30A-17 (theft of property exceeding $1,000 is a class 6 felony); Tenn. Code Ann. § 39-14-105 (theft of property exceeding $1,000 is a Class E felony); Tex. Penal Code Ann. § 31.03 (theft of property of $2,500 or more is a felony); Utah Code Ann. § 76-6-412 (theft of property of $1,500 or more is a third degree felony); Vt. Stat. Ann. tit. 13, § 2501 (theft of property exceeding $900 is grand larceny punishable by incarceration up to ten years); Va. Code Ann. § 18.2-95 (theft of property of $200 or more is grand larceny, punishable by incarceration up to twenty years); Wash. Rev. Code

Ann. § 9A.56.040 (theft of property exceeding $750 is a class C felony); W. Va. Code Ann. § 61-3-13 (theft of property of $1,000 or more is a felony); Wis. Stat. Ann. § 943.20 (theft of property exceeding $2,500 is a class I felony); Wyo. Stat. Ann. § 6-3-402 (theft of property of $1,000 or more is a felony); D.C. Code Ann. § 22-3212 (theft of property of $1,000 or more is theft in the first degree and punishable by incarceration up to 10 years); 9 Guam Code Ann. § 43.20 (theft of property exceeding $500 is a felony in the third degree). It would be astonishing if the General Assembly intended for Missouri to be the sole exception to this universal consensus, and there is no evidence of such an astonishing legislative intent in the statutory language or elsewhere.

Fourth, this Court resolves ambiguity in statutes by rejecting interpretations that would generate unreasonable or absurd results. "[C]onstruction of a statute should avoid unreasonable or absurd results." *Aquila*, 362 S.W.3d at 4 (citing *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. 2010)). For the reasons stated above, the result that stealing property worth up to $25,000 should not be a felony is so at odds with the universal consensus of American criminal justice systems that it would plainly constitute an "unreasonable or absurd result." *Id.*

Finally, though not raised by Windeknecht, it is worth noting that the rule of lenity does not undermine this correct interpretation of § 570.030. "The rule of lenity . . . is not applicable unless there is a grievous ambiguity

or uncertainty in the language and structure of the Act, such that even after a court has seized everything from which aid can be derived, it is still left with an ambiguous statute." *Chapman v. United States*, 500 U.S. 453, 463 (1991) (quotation marks and alterations omitted) (quoting *Huddleston v. United States*, 415 U.S. 814, 831 (1974), *United States v. Bass*, 404 U.S. 336, 347 (1971), and *United States v. Fisher*, 2 Cranch 358, 386, 2 L.Ed. 304 (1805). "The rule of lenity comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Id.* (brackets omitted) (quoting *Callanan v. United States*, 364 U.S. 587, 596 (1961)). Thus, "the rule of lenity . . . should only be used in the event the other canons are inapplicable," and "only after employing other measures to determine legislative intent, which, of course, is the ultimate objective of statutory interpretation." *Turner v. State*, 245 S.W.3d 826, 828 (Mo. 2008). This is not a case of such "grievous ambiguity." Rather, the "plain and ordinary meaning of the statutory language," *Bazell*, 497 S.W.3d at 267, squarely forecloses Windeknecht's interpretation; and even if it did not, every applicable canon of construction would apply to resolve any ambiguity against Windeknecht.

In sum, the plain and ordinary meaning of § 570.030.3, as it was in effect at the time of Windeknecht's conviction, clearly defines stealing over $500 as Class C felony. Even if the statute were ambiguous on this point—

which it is not—every applicable canon of interpretation would resolve that ambiguity in favor of finding that stealing over $500 is a class C felony. Windeknecht's contentions to the contrary should be rejected.

II. In the alternative, Windeknecht is not entitled to habeas relief because *Bazell* does not apply retroactively to cases that were already final at the time of the decision, in that *Bazell* overruled a prior, authoritative judicial construction of RSMo. § 570.030.3, as well as Missouri approved jury instructions and charges that were approved and distributed by this Court, and in identical circumstances, this Court has held that such decisions apply only to still-pending cases. – Responds to Petitioner's Point I.

For the reasons stated above, this Court can and should resolve this case on grounds of statutory interpretation without reaching the question of *Bazell*'s retroactive application, because the plain and ordinary meaning of the statutory language clearly establishes that stealing over $500 is a class C felony. In the alternative, if this Court reaches the question of retroactive application, the Court should hold that *Bazell* applies only to cases still pending on direct review at the time *Bazell* was decided. *Bazell* overruled a prior, authoritative judicial interpretation of § 570.030.3 that had statewide effect, as well as Missouri approved jury instructions and charges. In identical circumstances, this Court has held that such a decision applies only to cases that were still pending at the time of the decision.

A. Standard of Review

Habeas corpus is a common law remedy used to inquire into the legality of a person's restraint. Rule 91.01(b). A habeas petitioner has the burden of showing that he or she is entitled to habeas corpus relief. *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 513 (Mo. 2010). "The decision whether to grant relief is limited to determining the facial validity of confinement, which is based on the record of the proceeding that resulted in confinement." *Id.* (quotation and citation omitted). Whether this Court's holding in *Bazell* should be applied to cases that have completed direct review is a question of law. This Court considers questions of law *de novo*. *See Doughty v. Director of Revenue*, 387 S.W.3d 383, 386 (Mo. 2013).

B. Under this Court's cases, substantive decisions that are silent about their retroactive effect apply retroactively, but only to cases that are still pending at the time of the decision.

It is indisputable that state courts are free to adopt their own rules of retroactivity for judicial decisions involving state law. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932) ("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."); *Solem v. Stumes*, 465 U.S. 638, 642 (1984) (stating that retroactive application of

judicial decisions is not constitutionally required); *Wainright v. Stone*, 414 U.S. 21, 23–24 (1973) (holding that a state court was not constitutionally compelled to retroactively apply a new construction of a criminal statute). Accordingly, Missouri law, not federal law, determines the retroactive effect of new judicial interpretations of state criminal statutes.

In Missouri, the question of retroactive application of new judicial interpretations depends on whether the decision involved procedural or substantive law. *State v. Walker*, 616 S.W.2d 48, 48–49 (Mo. 1981). Cases dealing with procedural law are always applied prospectively only, while substantive decisions may be applied retroactively. *State v. Ferguson*, 887 S.W.2d 585, 587 (Mo. 1994). The general rule, however, is that when a new substantive decision is *silent* as to its retroactive application, the decision "is limited to those cases subject to direct appeal or to all pending cases not finally adjudicated, and is sometimes further limited to those cases where the issue has been preserved." *Id.* (citations and internal quotations omitted). Respondent does not dispute that the *Bazell* decision involved substantive law. Accordingly, under the rule that this Court announced in *Ferguson*,

"retrospective application is limited to those cases 'subject to direct appeal' or 'to all pending cases not finally adjudicated.'" *Id.* (citations omitted).[3]

Here, the Court's silence as to *Bazell's* retroactive application demonstrates that Windeknecht is not entitled to relief. Under *Ferguson*, retroactive application of *Bazell* is limited to the cases that were pending at

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[3] Certain petitioners argue that the retroactivity language in *Ferguson* was merely dicta and should not be followed. That is incorrect. In fact, retroactive application of new case law was a central issue in *Ferguson*. *Ferguson* came to the Court on appeal from the denial of a Rule 29.15 motion for post-conviction relief, not on direct review. The Court had to address retroactivity to decide *Ferguson*. Moreover, *Ferguson* has routinely been cited as a pronouncement of Missouri's law regarding retroactive application of new decisions. *See Johns v. Bowersox*, 208 F.3d 724, 725 (8th Cir. 2000) (Arnold, J., concurring in denial of rehearing en banc, noting that the Missouri rule of only applying a Missouri Supreme Court decision to cases still on direct review adequately explained the denial of a motion to recall the mandate in a capital case); *State v. Wurtzberger*, 40 S.W.3d 893, 897 (Mo. 2001) (citing *Ferguson* with approval); *State v. Hayes*, 23 S.W.3d 783, 791 (Mo. App. W.D. 2000) (citing *Ferguson* with approval). Thus, the rule announced in *Ferguson* was not dicta.

the time of its decision and to cases which were still subject to direct appeal. Habeas corpus is a form of post-conviction relief and is not a substitute for direct review. *Wiglesworth v. Wyrick*, 531 S.W.2d 713, 715–16 (Mo. 1976) (stating that relief in habeas corpus falls within post-conviction relief); *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. 1993) (holding that habeas corpus is not a substitute for appeal or for a motion under Rules 24.035 and 29.15). The time for direct review of Windeknecht's conviction has passed, and the case is finally adjudicated. *Bazell* does not entitle Windeknecht to habeas relief.

C. *Bazell* does not apply retroactively to already-final cases because *Bazell* overruled a prior authoritative judicial interpretation of the same statute.

Windeknecht argues that there is no issue of retroactivity here because *Bazell* created no new law. This argument relies principally on *Thornton v. Denney*, 467 S.W.3d 292 (Mo. App. W.D. 2015), which held that "where [a habeas petitioner] relies on a judicial opinion interpreting a statute which was in effect at the time of his conviction, and that judicial opinion 'created no new law,' no retroactivity issue arises." *Id.* at 298. Windeknecht's reliance on *Thornton* is misplaced. This Court's retroactivity analysis should be guided by its own indistinguishable holding in *State v. Stewart*, not by the lower court's ruling in *Thornton*.

1. *Bazell*'s retroactive application is governed by *Stewart*.

Rather than simply interpreting a statute for the first time, *Bazell* overruled a prior, contrary judicial interpretation of that statute that had statewide binding effect. *Bazell* also overruled Missouri approved jury instructions and charges that had been approved and distributed by this Court. In fact, everything available to the State, the courts, and criminal defendants before *Bazell* plainly suggested that stealing crimes *could* be enhanced to felonies under Section 570.030.3.

First, there was a prior judicial decision of the Court of Appeals—which authoritatively interpreted the statute and was binding on every circuit court in the State—that squarely held that enhanced stealing offenses under § 570.030.3 were felonies prior to *Bazell*. In *State v. Passley*, 389 S.W.3d 180 (Mo. App. S.D. 2012) (abrogated by *Bazell*), a criminal defendant charged with stealing a credit card argued that § 570.030.3 did not authorize the enhancement of the crime from class A misdemeanor to class C felony. *Id.* at 182–85. The defendant relied on precisely the same language that this Court interpreted in *Bazell* as not authorizing felony enhancements for offenses for which value was not an element: "In 2002, however, by H.B. 1888, this language was changed by the legislature to read '*Notwithstanding any other provision of law, any offense in which the value of property or services is an element* is a class C felony. . . ." *Id.* at 183 (emphasis added by the *Passley*

court). "Therefore, [Passley] argues, 'if value is not an element of the offense, subsection 3 to § 570.030, which contains the list of enhancement factors (including credit card), does not apply because, by its own terms, the list only applies to '*any offense in which the value of property or services is an element*.'" *Id.* (emphasis added by the *Passley* court). In short, the defendant in *Passley* argued for exactly the same interpretation of § 570.030 that this Court later adopted in *Bazell*.

In *Passley*, however, the Court of Appeals explicitly rejected this interpretation. *Id.* at 183–85. *Passley* reasoned that the 2002 amendment had been adopted to clarify that the liability-enhancing factors listed in subsection 3 were to be treated as elements of the offense that must found by a jury and proven beyond a reasonable doubt under *Apprendi* and its progeny. *Id.* *Passley* held as follows: "When read in light of *Apprendi* and *Jones*, the clear and plain words used in section 570.030.3 show the legislative intent to treat the property types increasing the punishment for stealing from a class A misdemeanor to a class C felony as elements of a greater offense where the value of the appropriated property is put in issue." *Id.* at 184. The Court of Appeals also held that "[a]ny other reading of the clear and plain words used in the statute" would lead to an "absurd and illogical result." *Id.* In other words, the reasoning and holding of *Passley* were directly contrary to *Bazell*, and thus this Court in *Bazell* explicitly

overruled *Passley*. *Bazell*, 497 S.W.3d at 267 n.3 ("To the extent that *State v. Passley*, 389 S.W.3d 180 (Mo. App. S.D. 2012) holds otherwise, that decision should no longer be followed.").

Until it was overruled, however, *Passley* constituted an authoritative statement of the meaning of the statute that had binding effect statewide, on both litigants and the circuit courts. Even if *Passley* erred in its interpretation of the statute, *Passley*'s interpretation was plainly definitive unless and until overruled by this Court. As this Court has stated, Article V, § 1 of the Missouri Constitution "establishes one court of appeals for the entire state of Missouri." *Akins*, 303 S.W.3d at 567 n.4. Accordingly, "[t]he southern, western and eastern districts of the court of appeals established pursuant to article V, section 13 are not separate courts but simply different districts of a unitary court of appeals." *Id.* "There is no provision in the Missouri Constitution requiring a circuit court to follow a decision from a particular district of the court of appeals." *Id.* In short, because Missouri has a "unitary court of appeals," *id.*, the Court of Appeals' decision in *Passley* was binding on all circuit courts in the State.

This definitive judicial interpretation of § 570.030.3 provided an authoritative statement of the meaning of that statute for all legal purposes, until this Court overruled *Passley*. Effectively, while *Passley* was still good law, the statute's meaning was what *Passley* held it to be. As the U.S.

Supreme Court has stated in a related context, "[a] new decision that explicitly overrules an earlier holding obviously 'breaks new ground' or 'imposes a new obligation.'" *Butler v. McKellar*, 494 U.S. 407, 412 (1990) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989)). Therefore, retroactive application of a new interpretation of a criminal statute is not required "where a court announces a 'change' in substantive law which does not clarify existing law but *overrules prior authoritative precedent on the same substantive issue*." *Goosman v. State*, 764 N.W.2d 539, 544 (Iowa 2009) (emphasis added). Here, *Bazell* indubitably "overrule[d] prior authoritative precedent on the same substantive issue," by overruling *Passley*. *Id.*

In addition to *Passley*, the Missouri approved jury instructions for stealing, which were approved and distributed by this Court, include a section for felony enhancement based on Section 570.030. *See* MAI-CR 324.02.1 (2012); *see also* Notes on Use ("Stealing is a class C felony if: (a) the value of the property or services appropriated is $500 or more but less than $25,000"). Additionally, the Missouri approved charge for stealing, also approved and distributed by this Court, clearly indicates that stealing may be charged as a felony when the value of the property stolen is at least $500. *See* MACH-CR 21.02.1 (2013). Assuming that this Court determines that stealing over $500 is a misdemeanor under *Bazell* (which it should not, for

the reasons stated in Point I, above), *Bazell* would effectively invalidate both the approved jury instruction and the approved charge for stealing over $500.

Under these circumstances, where there was a preexisting, definitive judicial interpretation of the statute, which was also reflected in Missouri approved jury instructions and charges distributed by this Court, the Court should conclude that *Bazell* applies only to cases that were still pending at the time of the decision. In fact, this is the precise holding of *State v. Stewart*, 832 S.W.2d 911 (Mo. 1992), a case that is on all fours with *Bazell*.[4]

The question in *Stewart* was whether the State had to plead and prove two or three prior convictions to establish "persistent offender" status for a DWI offender under RSMo. § 577.023 (1991). *Stewart*, 832 S.W.2d at 912. As in *Bazell*, this Court in *Stewart* held that, under the "plain words" and "clear import" of the statute, the State was required to prove three prior convictions, not two. *Id.* at 913. As in *Bazell*, this Court noted that "[t]his may not have been the intent of the legislature, but the clear words of the statute govern interpretation." *Id.* As in *Bazell*, the *Stewart* Court's holding abrogated both preexisting case law and Missouri approved charges, both of which explicitly held to the contrary: "That the amended information here

[4] *Stewart* was superseded by statute, but its holding on retroactive effect remains good law.

tracked Supreme Court approved MACH-CR 31.02 and the Notes on Use 4.d.ii (1985 Rev.) does not mandate support for the state's position. To the extent that the recommended charge and accompanying Notes are contrary to this opinion, they shall no longer be followed." *Id.* at 914.

Because *Stewart* imposed a clear change on settled law, moreover, this Court in *Stewart* explicitly concluded that the opinion would apply only to still-pending cases: "Because this opinion results in an extended burden upon the state in charging and sentencing under the intoxication-related recidivist provisions, this Court deems the decision to be substantive; therefore it has both retrospective and prospective application. *The retrospective application is as to all pending cases not finally adjudicated as to the date of this opinion.*" *Id.* (emphasis added) (citation omitted).[5]

[5] To be sure, in *Stewart*, the principal opinion announced its own retroactive effect, while the opinion in *Bazell* was silent on this question. But in *Bazell*, the Court had no need state explicitly the opinion's retroactive effect, because *Ferguson* states the default rule: When a new, substantive decision is silent as to its retroactive application, the decision is "limited to those cases subject to direct appeal or to all pending cases not finally adjudicated." *Ferguson*, 887 S.W.2d at 587 (citation omitted). *Ferguson* was

On the question of retroactive application, *Bazell* is indistinguishable from *Stewart*. In particular, *Bazell* involved an interpretation of statutory language that the Court determined to be clear and unambiguous, but that overruled a prior court decision and prior approved charging documents. This Court should conclude that *Bazell*'s retroactive application is the same as that of *Stewart*—*i.e.*, "to all pending cases not finally adjudicated as to the date of [*Bazell*'s] opinion." *Id.*

The Court of Appeals' decision in a post-*Stewart* case, *Hawkins v. State*, further confirms that *Bazell* instituted a change in the law that should be given effect only to cases still pending at the time of the decision. *Hawkins v. State*, 854 S.W.2d 606, 607–08 (Mo. App. S.D. 1993). In *Hawkins*, the Court of Appeals held that a prior and persistent DWI offender who had only two prior qualifying DWI offenses could not obtain the benefit of *Stewart*, which changed the law to require three instead of two prior DWI offenses, because *Stewart* was decided after his case had become final. *Id.* at 607. The offender argued that his trial counsel had been ineffective by failing to anticipate *Stewart*, but the Court of Appeals held that trial counsel had not been ineffective in relying preexisting case law that contradicted *Stewart* and on

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not yet decided at the time of *Stewart*, so it is unsurprising that *Stewart* made this rule on retroactive application explicit in its own holding.

charges previously approved by this Court: "Counsel could not be ineffective in not anticipating *Stewart*. The opinion appears contrary to MACH-CR 31.02 (1985 rev.), 'Driving While Intoxicated,' than in effect, and the Notes on Use 4.d.ii following it, as well as prior decisions." *Id.* (citing *Miles v. State*, 763 S.W.2d 379 (Mo. App. S.D. 1989)). Accordingly, the Court of Appeals held, "[t]rial counsel is not ineffective for not anticipating *a change in the law*." *Id.* (emphasis added).

In other words, a judicial opinion on a question of statutory interpretation that overruled prior, binding judicial precedent on that same question, and invalidated prior approved jury instructions, constituted "a change in the law," to be applied only to cases still pending at the time of the decision under *Stewart*. *Id.* As with *Stewart*, *Bazell* "appears contrary to" Missouri approved charges, "as well as prior decisions," such as *Passley*. *Id.* As in *Stewart*, *Bazell* should apply only to cases that were still pending at the time of decision.

2. Windeknecht's reliance on *Thornton v. Denney* is misplaced.

Against this clear authority, Windeknecht relies heavily on the Court of Appeals' decision in *Thornton v. Denney*, 467 S.W.3d 292 (Mo. App. W.D. 2015). Windeknecht's reliance on *Thornton* is misplaced. This Court should

follow its own opinion in *Stewart*, not the lower court's opinion in *Thornton*, in deciding the retroactive application of *Bazell*.

Thornton dealt with a petition for a writ of habeas corpus stemming from this Court's decision in *Turner v. State*, 245 S.W.3d 826 (Mo. 2008). The *Turner* Court held that municipal driving while intoxicated ("DWI") offenses which resulted in a suspended imposition of sentence ("SIS") could no longer be used to enhance punishment for subsequent DWI offenses under RSMo. § 577.023 (2000). Following *Turner*, the Court overturned a felony DWI conviction which had been enhanced based on a prior municipal court SIS in *State v. Severe*, 307 S.W.3d 640 (Mo. 2010). *Severe* was pending on direct appeal when *Turner* was decided. *Id.* at 641. In *Severe*, the Court stated that *Turner's* reading of Section 577.023 was not a change in the law, but rather, a clarification of the statute. *Id.* at 642–43. "In *Turner*, this Court made no new law; it merely clarified the language of an existing statute." *Id.*

Critically, this Court in *Severe* did *not* hold that *Turner* should apply retroactively to cases that were already final at the time *Turner* was decided. Quite the contrary—*Severe* quoted with approval the very same paragraph in the *Stewart* opinion that explicitly stated that *Stewart* would apply only to cases still pending at the time *Stewart* was decided. *See Id.* at 643–44 (quoting *Stewart*, 832 S.W.2d at 914). *Severe* thus strongly implied that the same rule of retroactivity that this Court announced in *Stewart* and *Ferguson*

should govern *Turner* as well. Certainly, *Severe* did not purport to overrule *Stewart* and *Ferguson sub silentio*.

When this Court in *Severe* stated that "*Turner* created no new law," *id.* at 644, it was addressing the question whether *the State would be allowed to supplement the record with new evidence on remand* in a case that was still pending at the time *Turner* was decided. *Severe* was not addressing whether the *Turner* decision applied retroactively to cases that were already final at the time of *Turner*. *See Id. Severe*, therefore, did not purport to overrule this Court's explicit holdings on the question of retroactivity in *Stewart* and *Ferguson*. *See id.*

The Court of Appeals in *Thornton*, therefore, misconstrued *Severe* when it quoted the "created no new law" standard to decide the question of retroactive application under state law. Specifically, *Thornton* held that *Turner* applied retroactively to an already-final case because "where [a habeas petitioner] relies on a judicial opinion interpreting a statute which was in effect at the time of his conviction, and that judicial opinion 'created no new law,' no retroactivity issue arises." *Thornton*, 467 S.W.3d at 298 (quoting *Severe*, 307 S.W.3d at 642–43). In other words, *Thornton* misconstrued *Severe* as holding that whether a decision applies to already-final cases depends on whether that decision "created new law." *Id.* But *Severe* did not consider or address that question, because it was not at issue

in *Severe*, which was still pending when *Turner* was decided. Rather, *Severe*'s observation that *Turner* "created no new law" was made to support the Court's holding that the State should not be given the opportunity to adduce new evidence of prior DWI offenses against Severe on remand. *Severe*, 307 S.W.3d at 644. Simply put, nothing in *Severe* purported to depart from the retroactivity standard adopted in *Stewart* and *Ferguson*, and the Court of Appeals in *Thornton* simply misconstrued the proper standard.

3. Due process does not require this Court to apply *Bazell* retroactively to cases that were already final when *Bazell* was decided.

Thornton also cited *Fiore v. White*, 531 U.S. 225 (2001), to support its reasoning, but *Fiore* is not controlling here. Fiore was charged with the crime of operating a hazardous waste facility without a permit, even though he had a permit. *Id.* at 226–27. Fiore's criminal conviction had been summarily affirmed by the Pennsylvania Court of Appeals and further review was declined, while his co-defendant's conviction, under the same facts and law, was later reversed by the Pennsylvania Supreme Court. *Id.* at 227. On federal habeas review, the United States Supreme Court certified a question to the Pennsylvania Supreme Court, inquiring if the decision in the co-defendant's case "stated the correct interpretation of the law of Pennsylvania at the date Fiore's conviction became final." *Id.* at 228. The Pennsylvania

Supreme Court responded that the latter ruling "merely clarified the plain language of the statute." *Id.* Based on that response, the U.S. Supreme Court held that Fiore's conviction could not stand. *Id.* at 228–29.

Fiore does not hold that opinions like *Stewart* and *Bazell* must apply retroactively in collateral attacks on criminal convictions. First, *Fiore* is critically different from the case of *Bazell*, because the Pennsylvania Supreme Court's interpretation of the statute in the decision after Fiore's conviction became final did not overrule a prior, definitive judicial interpretation to the contrary—as *Bazell* did when it overruled *Passley*. *See Fiore*, 531 U.S. at 228. Rather, it was the *first* interpretation of the statute by the Pennsylvania court. "After Fiore's conviction became final, the Pennsylvania Supreme Court interpreted the statute *for the first time*, and made clear that Fiore's conduct was not within its scope." *Id.* at 226 (emphasis added).

Fiore's own conviction had been affirmed on direct appeal by the Pennsylvania appellate court, but that affirmance was a summary disposition that contained no reasoning and had no precedential effect, but simply stated "Quashed and affirmed." *Commonwealth v. Fiore*, 391 Pa. Super. 634, 569 A.2d 189 (May 12, 1989), *cited in Fiore*, 531 U.S. at 227. In other words, unlike in *Bazell*, there was no preexisting, definitive, binding judicial interpretation of the statute in *Fiore* that the Pennsylvania Supreme Court's

decision overruled. Under those facts, the Supreme Court readily concluded that the intervening decision had "merely clarified" statutory language that was already on the books. *Fiore*, 531 U.S. at 228. No such conclusion is possible here, and this difference clearly distinguishes *Fiore* from this case. As the Iowa Supreme Court held, addressing *Fiore*, "where a court announces a 'change' in substantive law which does not clarify existing law but *overrules prior authoritative precedent on the same substantive issue*, federal due process does not require retroactive application of the decision." *Goosman* N.W.2d at 544 (emphasis added). Here, *Bazell* unquestionably "overrule[d] prior authoritative precedent on the same substantive issue," *id.*, and there is no constitutional obligation to apply *Bazell* to already-final cases under *Fiore*.

Moreover, the result in *Fiore* was reached because one co-defendant was precluded from seeking relief that the other co-defendant had been afforded by the state Supreme Court interpreting a statute for the first time, creating patently unequal treatment between the two co-defendants. In such a unique situation, it was a just result to give both co-defendants the same relief even though one co-defendant's case had completed direct review. The Supreme Court of Kansas discussed *Fiore's* effect in *Easterwood v. State*, 44 P.3d 1209 (Kan. 2002), and held that *Fiore* did not apply in the Kansas case because its holding depended on those unique circumstances in *Fiore*. *Id.* at 1223.

Likewise, other states have examined *Fiore* and declined to extend it to situations like those at issue here. Critically, these decisions observe that a state-court decision that overrules prior binding precedent lies outside the scope of *Fiore*. For example, in *Clem v. State*, 81 P.3d 521, 527 (Nev. 2003), the Nevada Supreme Court held that *Fiore*'s holding applies only when the intervening decision interprets a statute "for the first time," thus echoing *Goosman*'s holding that a state-court decision overruling a prior definitive interpretation does not implicate *Fiore*. "We read *Fiore* to hold only that constitutional due process requires the availability of habeas relief when a state's highest court interprets *for the first time* and clarifies the provisions of a state criminal statute to exclude a defendant's acts from the statute's reach." *Id.* (emphasis added). Thus, "*Fiore* does not undermine the rule that a change of law does not invalidate a conviction obtained under an earlier law. Even considering *Fiore*, a change in the law properly remains subject to retroactivity rules." *Id.* (internal quotations omitted). *See also State v. Lagundoye*, 674 N.W.2d 526, 540 n.23 (Wis. 2004) (distinguishing *Fiore* and holding that "a state is not constitutionally compelled to make retroactive its new construction of a statute").

Similarly, *Schriro v. Summerlin*, 542 U.S. 348, 351-352 (2004), does not support the retroactive application of *Bazell* to already-final cases. *Schriro* addressed retroactive application of decisions of the United States Supreme

Court, not this Court. As stated above, decisions regarding retroactive application of state court decisions under state law are subject to state rules governing retroactivity. *Great Northern Ry. Co.*, 287 U.S. at 364; *Solem*, 465 U.S. at 642; *Wainright*, 414 U.S. at 23–24. *Schriro* does not control here; *Stewart* and *Ferguson* do. Moreover, *Schriro* involved a change in the law on a *procedural* question, not a substantive question, so it is inapplicable for that reason as well. *Schriro*, 542 U.S. at 353. In these circumstances, *Schriro* "is inapplicable" because it "constitutes a procedural rather than substantive change in the law." *Goosman*, 764 N.W.2d at 544–45.

For all these reasons, should it reach the issue, this Court should hold that *Bazell* does not apply retroactively to cases that were already final at the time of the decision.

CONCLUSION

The Court should quash the preliminary writ of habeas corpus and deny the petition.

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CERTIFICATE OF COMPLIANCE AND SERVICE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 11,430 words, excluding the cover and certification, as determined by Microsoft Word 2010 software, and that a copy of this brief was sent through the electronic filing system on April 19, 2017 to:

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