IN THE SUPREME COURT OF MISSOURI
AT JEFFERSON CITY

In re: JOSHUA A. HOLMAN, Petitioner, v. JENNIFER SACHSE, in her official capacity as Warden, Missouri Eastern Correctional Center Respondent.	)	No. SC96160

PETITIONER JOSHUA A. HOLMAN'S REPLY BRIEF

Respectfully submitted,

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I. *STATE V. BAZELL* BARS ALL § 570.030.3 ENHANCEMENTS FROM BEING APPLIED TO A STEALING OFFENSE CHARGED UNDER § 570.030, INCLUDING STEALING OVER $500.

Respondent argues that all three divisions of the Court of Appeals have misconstrued this Court's *Bazell* decision by applying it to the offense Stealing Over $500. Missing from Respondent's 20 pages of argument is the text of the statute:

> 1. A person commits the crime of stealing if he or she appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion.
>
> . . .
>
> 3. Notwithstanding any other provision of law, any offense in which the value of property or services is an element is a class C felony if:
>
> (1) The value of the property or services appropriated is five hundred dollars or more but less than twenty-five thousand dollars; . . .

§ 570.030, RSMo. It is difficult to imagine how the statute could more clearly indicate that the definition of Stealing in Subsection 1 does not include "the value of property or services" as an element. Nowhere in Respondent's extensive briefing does Respondent address this fundamental point.

Furthermore, this Court fully answered Respondent's argument in *Bazell*:

> [The State's] reading of section 570.030.3, however, critically ignores the fact that the felony enhancement provision, by its own terms, only applies if the offense is one "in which the value of the property or services is an

element." Stealing is defined in section 570.030.1 as "appropriat[ing] property or services of another with the purpose to deprive him or her thereof, either without his consent or by means of deceit or coercion." *The value of the property or services appropriated is not an element of the offense of stealing*.

Bazell at 5 (emphasis added). While *Bazell* itself did not expressly apply to Stealing Over $500, the decision's logic, reasoning, and language are just as applicable to Stealing Over $500 as Stealing a Firearm. Since "[t]he value of the property or services appropriated is not an element of the offense of stealing," Respondent has not – and cannot – offer a rationale for treating Stealing Over $500 and Stealing a Firearm differently under *Bazell*.

Respondent treats its brief's readers to an extensive discussion of the canons of statutory interpretation, a survey of the stealing statutes of many other jurisdictions (including Guam!), and a hypothetical turkey statute. But this Court's ruling in *Bazell* makes it all beside the point:

> In ascertaining what the phrase "in which the value of the property or services is an element" means, this Court employs the primary rule of statutory interpretation, which is to give effect to the plain and ordinary meaning of the statutory language. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. banc 2012). If the words are clear, the Court must apply the plain meaning of the law. *Id.* When the meaning of a statute is clear, the Court should not employ canons of construction to achieve a

desired result. *Goerlitz v. City of Maryville*, 333. S.W.3d 450, 455 (Mo. banc 2011).

Here, there is no need to resort to tools of interpretation because the language of section 570.030.3 is clear. We cannot know why the legislature, in 2002, decided to amend section 570.030.3 to add the requirement that only offenses for which "the value of property or services is an element" may be enhanced to a felony, but this is what the legislature clearly and unambiguously did.

Id.

II. WHERE A LATER JUDICIAL DECISION CLARIFIES THE MEANING OF A STATUTE IN EFFECT AT THE TIME OF CONVICTION, THERE IS NO ISSUE OF RETROACTIVITY.

Respondent continues to assert that this case is about whether *Bazell* applies "retroactively" to cases that have completed direct review. But Petitioner does not seek "retroactive" application – and does not have to. The concept of "retroactivity" applies only when there has been a *change* in the law, and there has been no change. *Bazell* merely clarified the meaning of the "clear and unambiguous" Stealing statute, which had been in effect since 2002 – long before Mr. Holman's conviction. Thus, Mr. Holman does not seek to take advantage of a *change* in the law retroactively – rather, he seeks application of the law, properly construed, that was in effect at the time of his plea. Anything else is a violation of the Due Process Clause.

Respondent relies heavily on a passage in this Court's decision in *State v. Stewart*, 832 S.W.2d 911 (Mo. 1992). In that case, which concerned the DWI statute, this Court held that "the charge and the proof required to find and punish a person as a persistent offender under § 577.023.1(2) must involve a total of three offenses prior to the one at bar." *Id.* at 913. This Court further noted that its holding "may not have been the intent of the legislature, but the clear words of the statute govern interpretation." *Id.* (citing cases). Then, in the passage on which Respondent relies, this Court went on to address the issue of retroactivity as follows:

> 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. *State v. Walker*, 616 S.W.2d 48, 49 (Mo. banc 1981). *Cf. State v. Shafer*, 609 S.W.2d 153, 157 (Mo. banc 1980). The retrospective application is as to all pending cases not finally adjudicated as to the date of this opinion, *T.C.H. v. K.M.H.*, 693 S.W.2d 802, 805 (Mo. banc 1985).

Id. at 914.

It is important to note that this Court did not say that *Stewart* would not apply in a habeas case to a petitioner whose criminal case had completed direct review. That issue was not before the Court in *Stewart* – as it was before the Court of Appeals in *Thornton v. Denny*, 467 S.W.3d 292 (Mo. App. 2015), and *Culp v. Lawrence*, Case No. WD 80220

(Mo. App. W.D. 2017). And the undersigned's research has not turned up a case where a petitioner sought habeas relief based on *Stewart*.

But the most straightforward and substantive answer to Respondent's argument is that *Stewart* predated the United States Supreme Court's decisions in *Fiore v. White*, 531 U.S. 225 (2001), and *Bunkley v. Florida*, 538 U.S. 835 (2003). In *Fiore*, a federal habeas petitioner had been convicted in Pennsylvania state court of conduct that Pennsylvania courts later determined in *Commonwealth v. Scarpone*, 634 A.2d 1109 (1993), not to be a crime. Nonetheless, Pennsylvania courts refused to grant Mr. Fiore collateral relief. The United States Supreme Court certified a question to the Pennsylvania Supreme Court asking "whether its decision [in *Scarpone*] interpreting the statute not to apply to conduct like Fiore's was a new interpretation, or whether it was, instead, a correct statement of the law when Fiore's conviction became final." 531 U.S. at 225. The Pennsylvania Supreme Court responded that "*Scarpone* did not announce a new rule of law." *Id.* at 226. Rather, it "merely clarified the plain language of the statute" and was a "proper statement of law at the date Fiore's conviction became final." *Id.*

In granting habeas relief, the U.S. Supreme Court held, "this case presents no issue of retroactivity." *Id.* Specifically, the Pennsylvania Supreme Court's decision in *Scarpone* "merely clarified" the statute and was the law of Pennsylvania – properly interpreted – at the time of Fiore's conviction. *Id.* In other words, there had been no "change" in the law, and therefore, there was nothing to apply "retroactively." The Supreme Court went on to grant habeas relief, finding it a violation of Due Process to

convict the petitioner for conduct that its criminal statute – properly construed – does not prohibit. *Id.*

Two years later, the U.S. Supreme Court extended its holding in *Fiore* in *Bunkley v. Florida*, 538 U.S. 835 (2003). Instead of an improper conviction (like *Fiore*), *Bunkley* concerned an improper enhancement (like *Bazell*). Mr. Bunkley's crime was enhanced from Burglary 3rd Degree to Burglary 1st Degree, which resulted in a much longer sentence. The enhancement was later determined to be improper by the Florida Supreme Court in a different case. Florida courts refused to allow postconviction relief, and Mr. Bunkley appealed directly to the U.S. Supreme Court, which vacated the Florida Supreme Court's decision. The U.S. Supreme Court held that the Florida Supreme Court must determine whether the change in the law was clear at the time of Bunkley's conviction, and if it was, then it is a violation of Due Process to convict him. 538 U.S. at 840, 841-42.

Therefore, the crucial issue in this case is whether *Bazell* was a correct statement of the law at the time of Mr. Holman's conviction in 2008. The holding and reasoning in *Bazell* leave no doubt that it was. In *Bazell*, this Court held the language of the Stealing statute (which had been in effect since 2002) to be "clear and unambiguous." *Bazell* at 2. This Court refused to resort to tools of interpretation because the statutory language was clear. *Id.* at 5. "We cannot know why the legislature, in 2002, decided to amend section 570.030.3 to add the requirement that only offenses for which 'the value of property or services is an element' may be enhanced to a felony, but this is what the legislature clearly and unambiguously did." *Id.* Therefore, it would be a violation of Mr. Holman's

Due Process rights to subject him to the felony enhancement provision of 570.030.3 – even if the pre-*Fiore/Bunkley* language in *Stewart* can be interpreted to suggest otherwise.

Respondent takes issue with this conclusion because *Bazell* overruled the Southern District's decision in *State v. Passley*, 389 S.W. 3d 181 (Mo. App. 2012). Thus, so the argument goes, *Bazell* marked a "change" in the law.

As a response, first and foremost, Mr. Holman's conviction in 2008 was *before Passley* in 2012. It is unclear from Respondent's brief why an *intervening* (intervening, as in *after* Holman's conviction and before *Bazell*) and now overruled court decision has anything to do with what the law was at the time of Holman's conviction in 2008. The best – indeed, *the only* – evidence of what the law was at the time of Holman's conviction in 2008 is the statute itself, which binding precedent from this Court (*Bazell*) holds had been clear and unambiguous since 2002.

Second, the fact that this Court and the Southern District disagreed about whether the Stealing statute was "clear and unambiguous" does not mean that there was a "change" in the law. Courts and lawyers often disagree about whether a statute, contract, regulation, or constitutional provision is "clear and unambiguous." But throughout, the statute remained the same: before *Passley*, between *Passley* and *Bazell*, and after *Bazell*. What changed was not the statute itself (obviously only the Legislature can do that), but courts' opinions about whether the statute was clear and unambiguous.

Third, Respondent's argument fails to account for *Thornton v. Denny* and all of the analysis in that case, which depended on this Court's decisions in *Turner v. State*, 245

S.W.3d 826 (Mo. banc 2008), and *State v. Severe*, 307 S.W.3d 640 (Mo. banc 2010). Respondent's argument on this point is inconsistent with these decisions.

III. CONCLUSION

Petitioner has served the maximum sentence allowed by law for the offense of Stealing, namely one year. Accordingly, Respondent has no basis to continue to detain Petitioner, and this Court should issue the writ of habeas corpus and order Respondent to release Petitioner on the Stealing charge immediately. This Court should also order Respondent to credit all time that Petitioner has served in excess of one year on the Stealing charge toward his sentence on Burglary 2nd Degree and further order Respondent to consider Petitioner for parole on the charge of Burglary 2nd Degree in the normal manner. This Court should further order that Petitioner's record of conviction be amended to reflect a conviction for a Class A misdemeanor, rather than a felony.

CERTIFICATE REGARDING LENGTH

I hereby certify that this brief complies with the limitations contained in Rule 84.06(b) in that, not counting the cover, Certificate of Service, this Certificate, signature block, and appendix, it contains 2,279 words, according to the word processing software used to draft it.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 1st day of May, 2017, a true and correct copy of the foregoing was served through the Missouri e-Filing System or via first-class mail to each of the following:

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