No. 98-942

In The

Supreme Court of the United States

WILLIAM FIORE,

Petitioner,

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONER'S REPLY BRIEF

JAMES BRANDON LIEBER, ESQUIRE
Counsel of Record
M. JEAN CLICKNER, ESQUIRE
APRIL L. BOYER, ESQUIRE
LIEBER & HAMMER, P.C.
5528 Walnut Street
Pittsburgh, PA 15232-2312
(412) 687-2231

HAROLD GONDELMAN, ESQUIRE
PLOWMAN SPIEGEL & LEWIS, P.C.
310 Grant Street
Pittsburgh, PA 15219-2204
(412) 263-1833

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

FEDERAL CASES

STATE CASES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

ADDITIONAL STATUTORY PROVISIONS AT ISSUE

In response to Respondent, Petitioner has cited to regulatory procedures in effect at the time of the alleged violations. The applicable code provisions are found in Chapter 75 (Solid Waste Management), Subchapter D (Hazardous Waste), 25 Pa. Code § 75.259 through 25 Pa. Code § 75.282 (1986).[1] Due to their length and expired status, Petitioner has included the relevant provisions in an attached Appendix.

SUMMARY OF THE ARGUMENT

In their Brief, Respondents attempt to sound an alarm that the grant of relief to Petitioner would place settled jurisprudence about state retroactivity on a slippery slope. The argument is ill-founded because the pending case does not challenge state retroactivity options. Rather it is a simple and narrow request for relief from a prisoner who is factually and legally innocent.

Respondents posit the novel suggestion that relief would overrule *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) and undercut an interest in finality. The same sort of claim of upheaval in the law could have been made when the Court ruled in *Bousley v. United States*, 514 U.S. 614 (1998), which assuredly has not occurred. Neither *Sunburst Oil* nor *Wainwright v. Stone*, 414 U.S. 21 (1973) controls because neither case addressed the key issue here: a federal court's independent duty to ensure that a habeas petitioner is afforded his rights under the Due Process Clause when he is factually and legally innocent. By relying on these cases Respondents are attempting a radical sweep of settled jurisprudence by undermining the *Teague v. Lane*, 489 U.S. 288 (1989) protections for innocent prisoners.

Respondents inaccurately present the record and the law to this Court. First, at the time of the trial and conviction in

---

[1] The relevant provisions were enacted in 1980 and not amended until well after the conviction.

the instant case, there was no controlling precedent on point by the Supreme Court of Pennsylvania. *Scarpone* was the first authorative construction of the statute under which Petitioner was convicted. Second, Respondents incorrectly argue that Petitioner's due process issue was not exhausted. Petitioner raised and exhausted an insufficiency of the evidence claim which, under well-established Pennsylvania law ignored by Respondents, preserves the due process claim. Finally, Respondents' explanation of Pennsylvania's permit process obscures that the statute and regulations were clear at the time of the alleged offense. The regulations defined "permit" and required specific official action to revoke a permit.

The *Scarpone* holding also is distorted by Respondents. First, contrary to their Brief, *Scarpone* does not create a "new principle of law." The statute – requiring the government to prove beyond a reasonable doubt that Petitioner did not have a permit – is clearly written. The Pennsylvania Supreme Court's *Scarpone* decision was thus foreshadowed by constitutional principles and statutory construction rules, which as a matter of due process obligate the courts to construe strictly criminal statutes and provide prior notice of the elements of an offense. *Scarpone* simply adopted what the statutory and regulatory language foreshadowed. It did not create new law. Second, *Scarpone* held that absence of a permit is a necessary element of the offense. Because the defendant there had a permit – the same one held by Petitioner – he was factually innocent of the charged offense.

Respondents' rhetorical attempts to nevertheless paint Petitioner as a "bad man" who is in some sense culpable are unavailing. This Court cannot ignore the violation of Petitioner's constitutional right to be convicted on legally sufficient evidence because he may have violated some "other" provision of the SWMA.

ARGUMENT

A. PETITIONER'S *JACKSON v. VIRGINIA* CLAIM, THAT HE WAS CONVICTED ON THE BASIS OF FACTS WHICH DID NOT ESTABLISH AN ELEMENT OF THE CRIME CHARGED, DOES NOT IMPLICATE ANY STATE LAW RETROACTIVITY CONCERNS.

Neither Respondents nor their Amici quarrel with the maximum that Due Process requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime . . . charged." *In re Winship*, 397 U.S. 358, 364 (1970). In their zeal to define this case as one involving solely issues of retroactivity of state law, however, Respondents fail to address a primary question presented by this case: when defining the elements that must be proved to sustain a conviction, must a federal court ignore an authoritative state articulation of those elements solely because that construction was rendered after the defendant's conviction became final. This question is *not* answered by the retroactivity cases relied upon by Respondent: *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) or *Wainwright v. Stone*, 414 U.S. 21 (1973). Therefore, Petitioner asks this Court – on the narrow facts presented by this case – to hold that where a state high court has authoritatively construed a statute to include an element not proved at a criminal defendant's trial, such a construction is binding on a federal court considering a properly filed and presented habeas corpus claim.[2]

The threshold question is not whether *Scarpone* must be applied "retroactively" to Petitioner's original conviction, but whether that decision – decided *before* Petitioner filed his habeas petition – may be applied to Petitioner's habeas

---

[2] Respondents do not dispute that Petitioner has properly exhausted his claim based on *Jackson v. Virginia*, 443 U.S. 307 (1979) (R.Br. at 12) [Respondents' Brief on the Merits will be referred to hereafter as "R.Br."], and thus this basis for granting Petitioner habeas relief is unquestionably presented to this Court. As discussed *infra*, Petitioner has also properly exhausted his other claims based on the Due Process Clause.

petition as authoritative law. On this issue, the primary case relied upon by Respondents, *Sunburst Oil*, simply has nothing to say. Petitioner's due process claim is not centered on retroactive application of *Scarpone;* it is based on Respondents' failure to prove every element of the offense charged. *Compare, Sunburst Oil* at 361-364. Nor is *Sunburst Oil* a criminal case wherein due process/notice issues were addressed and an individual's liberty was at stake. Rather, it dealt with basic economic issues involving tariffs on intrastate shipments. *Id.* at 359.

The procedural posture and substantive holding of *Sunburst Oil* demonstrate its inapplicability here. The *Sunburst Oil* trial court applied statutory construction tenets prescribed by the state's highest court and applicable at the time of the complained of transactions, despite a subsequent decision reversing the previously approved construction. Here, contrary to Respondents' assertions, absolutely no precedential support existed at the time of Petitioner's trial. *Compare,* R.Br. at 4-5. The issue raised in state court in *Sunburst Oil* was not of constitutional dimension, but instead:

> whether, under the law of this state, a board of railroad commissioners has power and authority to make a retroactive order finding that the rates charged and collected on the shipment [ ] were unjust and unreasonable, thus permitting the plaintiff to recover the amount charged and collected on the basis of such tariff and the amount found by the commission to be a reasonable rate [ ].

Sunburst Oil & Refining Co. v. Great Northern Ry. Co., 7 P.2d 927, 928 (Mont. 1932), *aff'd Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). In resolving that controversy, the Montana Supreme Court ruled:

> Under our statutes, so long as the rates established by the commissions are in force, they are presumed to be reasonable, and neither the commissions nor the courts have power to retroactively declare such established rates unreasonable[.]

Id. at 929. This ruling overruled a prior decision, but the Montana Supreme Court declined to apply the new rule to the parties before it. As presented to this Court, the issue in

Sunburst Oil whether any constitutional principle required Montana's Supreme Court, in overruling a prior decision, to apply the new rule to the parties before it. *Id.* at 361. This Court concluded that retroactive application of the Montana court's decision was not required. Significantly, the court explained its decision as follows:

> We have no occasion to consider whether this division in time of the effects of a decision is a sound or unsound application of the doctrine of stare decisis as known to the common law. Sound or unsound, *there is involved in it no denial of a right protected by the Federal Constitution.*

Id. at 364 (emphasis added). Contrary to Respondents' broad reading of this language, to the extent that a state court's retroactivity decision can *never* implicate federal constitutional principles, this quoted passage expressly limits *Sunburst Oil* to those instances where refusals to apply the law retroactively do not implicate some other constitutional right. The holding is thus inapplicable here, where Petitioner's due process right under *Jackson v. Virginia*, 443 U.S. 307 (1979) and its progeny, to be convicted upon evidence of every element of the crime charged, has been infringed. Unlike in *Sunburst Oil*, where a state statute presumed promulgated rates in effect at the time to be valid, *id.* at 359, a federal habeas court is required to assess independently Petitioner's sufficiency of the evidence claim according to federal due process principles. *Sunburst Oil* does not suggest that state retroactivity rules would dictate what law applies in a federal proceeding.

Petitioner here is seeking to attack the constitutionality of the trial proceeding on its face. In the alternative, he seeks retroactive application of a decision which found earlier decisional law to be unconstitutional in a manner that directly implicates his liberty rights. Respondents' extensive reliance on that case is its attempt to blur the fact that Petitioner's retroactivity argument, should this Court reach that issue, is premised squarely on the innocence exception in *Teague v. Lane*, 489 U.S. 288 (1989). Respondents' excessive reference to *Sunburst Oil* appears to be an attempt to have

this Court undermine the protections afforded to innocent prisoners by the *Teague* exceptions. *Sunburst Oil* was decided long before *Teague*, in which this Court spoke authoritatively on retroactivity in the criminal context. If Petitioner's case is denied on the basis of *Sunburst Oil*, even clearly innocent state court prisoners will be denied the established protections afforded by *Teague*.

Nor does *Wainwright v. Stone*, 414 U.S. 21 (1973), in any sense control. Far from being "virtually identical" to *Stone* (R.Br. at 21), Petitioner's case is critically different. In *Stone, prior to the time that the defendants engaged in the conduct for which they were charged*, the Florida Supreme Court had authoritatively construed the state's sodomy statute to cover the acts they committed. *Id.* at 22. The sole issue in *Stone* was whether the defendants had been accorded due process notice, and this Court held that the Fifth Circuit had erred in independently determining that Florida's sodomy statute was unconstitutionally vague where cases of the Florida courts "afforded appellees ample notice that their conduct was forbidden by law." *Id.* at 23. The Court did not hold, under sufficiency principles, that the defendants' conduct was *not a crime* covered by the statute of conviction. In the instant case, to the contrary, the state high court has ruled that the precise conduct engaged in by Petitioner is not sufficient to convict him of the crime charged.

The "retroactivity" question in *Stone* was secondary to the issue of notice, and arose *only* because the state itself had voided the sodomy statute on vagueness grounds after the defendants were convicted. *Id.* at 23. The ruling did *not* amount to a holding that the defendant had not violated the law. In the situation presented, the change in Florida's decisional law did not affect the defendants' convictions: "[T]his holding did not remove the fact that when appellees committed the acts with which they were charged, they were on clear notice that their conduct was criminal under the statute then construed." *Id.* The opposite is true here: at the time Petitioner and Scarpone engaged in the conduct for which they were convicted, *no* case put them on notice that such conduct was violative of section 401 of the SWMA. More

importantly, the issue here is not merely one of notice, but whether the statute as drafted and construed covers the very conduct for which Petitioner was convicted and imprisoned. The Court in *Stone* expressly acknowledged that the defendants' conduct was covered by the statute under which they were convicted. *Id.* Thus, *Stone* has nothing to say on the issue of whether a defendant can be constitutionally imprisoned for conduct that does not violate the statute of conviction.

Whereas the Florida Supreme Court had overruled prior precedent, the Pennsylvania Supreme Court decision in *Scarpone* changed no law but rather rendered the *first* authoritative construction of the elements of section 401. As recognized by the Pennsylvania Supreme Court, the theory used to convict Petitioner was not a well-settled interpretation of state law, but a "bald fiction" (J.A. 122). The conduct Petitioner engaged in, as a factual and legal matter, was not the crime charged. Sustaining his conviction in the face of a state decision – on identical facts – establishing that one element of the charged crime was not proved at trial would violate due process; *Stone* is not to the contrary.

B. RESPONDENTS MISSTATE THE RECORD AND THE LAW.

1. There Was No Case Law Support For The Conviction.

Respondents' representation that the trial court rejected Petitioner's sufficiency of the evidence argument on "settled case law from the Pennsylvania Supreme Court" (R.Br. at 4-5) is belied by the trial court's opinion (J.A. 38-44). Aside from citing standard cases regarding the Commonwealth's duty to prove every element of a crime beyond a reasonable doubt and the defendant's right to clear notice of the charges, the trial court cited no cases ruling on or even discussing the offense or conviction.

2. Petitioner's "Sufficiency Of The Evidence" Claim In State Court Exhausted His Due Process Claim.

The exhaustion doctrine seeks to afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary. *Rose v. Lundy*, 455 U.S. 509, 515 (1982). A state prisoner may initiate a federal habeas petition "[o]nly if the state courts have had the first opportunity to hear the claim sought to be vindicated. . . . " *Picard v. Connor*, 404 U.S. 270, 276 (1971). "It follows, of course, that once the federal claim has been **fairly presented** to the state courts, the exhaustion requirement is satisfied." *Id.* at 275 (emphasis supplied).[3]

Pleading legal claims in the state courts for exhaustion purposes requires reasonable clarity and specificity. A petitioner should present a claim in a form that is sufficiently understandable and gives the state courts a meaningful opportunity to address it. The majority approach among the circuits is that claims may be fairly presented to state courts without citing the Constitution if they contain terms sufficiently particular as to call to mind the specific constitutional protection.[4] The question then is whether Petitioner "fairly presented" his due process claim in state court.

---

[3] This Court's recent decision in *Duncan v. Henry*, 513 U.S. 364 (1995), did not change the *Picard* rule that a federal claim which has been "fairly presented" in state court satisfies the exhaustion requirement. *Id.* at 366. In *Duncan*, the issue in state court was that testimony was erroneously admitted because it was irrelevant and inflammatory. The state court reviewed the habeas petitioner's claim by a standard that was not the substantial equivalent of a due process/fair trial analysis. The Court in *Duncan* clearly did not intend to diminish *Picard*. Rather, that decision is based on well-established law that the issue presented in state court must be "virtually identical" to the constitutional issue, not "somewhat similar." *Id.* at 366.

[4] *See, e.g., Beam v. Paskett*, 3 F.3d 1301, 1305 (9th Cir. 1993) (state court challenge of penalty statute as "unconstitutionally arbitrary" necessarily reflected Eighth Amendment prohibition of arbitrary aggravating circumstances); *Verdin v. O'Leary*, 972 F.2d 1467, 1480 (7th Cir. 1992) (references to accused's "right 'to be present at critical stages of his trial' and his right 'to a fair trial' " were "particular enough to call to mind" underlying Sixth and Fourteenth Amendment rights); *Stewart v. Scully*, 925 F.2d 58, 62 (2d Cir. 1991) (petitioner's "claim that enhancement of the sentence violated constitutional decisions was sufficiently particular to [invoke] double jeopardy principles"); *Hawkins v. West*, 706 F.2d 437, 439 (2d Cir. 1983) ("reasonable doubt" references "qualifi[ed] as an 'assertion of the claim so particularized to call to mind a specific right protected by the Constitution' ").

In *Smith v. Goguen*, 415 U.S. 566, 577 (1974), this Court rejected the state's exhaustion defense, holding that where a prisoner presented to state courts the argument that Massachusetts' flag misuse statute was vague as applied, the prisoner preserved his due process claim for purposes of federal habeas corpus jurisdiction. *Ford v. Georgia*, 498 U.S. 411 (1991), held that although petitioner's "pretrial motion made no mention of the Equal Protection Clause, and his later motion cited the Sixth Amendment, not the Fourteenth," because the petitioner's challenge to the "pattern of excluding black persons from juries 'over a long period of time'. . . . could reasonably have been intended and interpreted to raise a claim under the Equal Protection Clause," it was deemed as having done so. *Id.* at 418-419. In the instant case, there is no doubt that Petitioner presented the operative facts and a sufficiently similar legal theory to fairly present a Due Process Clause violation to the Pennsylvania courts.

Despite this Court's direction that briefs address only due process and retroactivity, Respondents briefed procedural exhaustion and, in doing so, miscast the nature of Petitioner's claims raised in state proceedings. Respondents misrepresent that Petitioner's direct appeal argument was "largely one of statutory construction" and claim he did not raise or exhaust his due process claim (R.Br. at 5-6). To the contrary, the fifth issue raised by Petitioner in his direct

appeal was one of sufficiency of evidence to support the verdict (J.A. 68).

Evans v. Court of Common Pleas, 959 F.2d 1227, 1231-33 (3d Cir. 1992), is persuasive on the proposition that under Pennsylvania law a sufficiency of the evidence claim "fairly represents" constitutional due process. In *Evans*, the habeas petitioner had not stated due process as a claim for relief in state court; rather, she challenged the sufficiency of the evidence to support her conviction. Noting that the test for sufficiency is the same under Pennsylvania and federal law, the court ruled that the due process claim was exhausted. *Id.* Although "[s]ubstantive deviations between superficially similar federal and state claims often exist," *Nadworny v. Fair*, 872 F.2d 1093, 1100 (1st Cir. 1989), if an individual's claim, asserted in terms of state law, is "functionally identical – a point of more than trifling concern" to a federal claim, "we must regard the federal claim as fairly presented." *Id.* at 1099-1100. *Accord, Pilon v. Bordenkircher*, 444 U.S. 1 (1979).

Respondents likewise inaccurately state that Petitioner waived his due process claim by failing to raise it in his post-conviction relief petition (R.Br. at 40). Pennsylvania's post-conviction law allows review only of claims "not previously litigated." 42 Pa. Cons. Stat. § 9543(a)(3). As discussed above, Petitioner litigated his due process claim on direct appeal and, thus, could not do so in a collateral attack.

3. State Regulations Do Provide Definitional Guidelines For The Term "Permit" And Specify The Process To Be Followed By The DER For Permit Revocation.

In an attempt to compensate for the incorrect charging of Petitioner, Respondents assert that "permit" under Pennsylvania's Solid Waste Management Act ("SWMA"), 35 Pa. Cons. Stat. § 6018.101, *et seq.*, is not defined (R.Br. at 1). The

regulations promulgated pursuant to the SWMA[5] define "permit" as follows:

> A written document issued by the Department [of Environmental Resources] under the act [the SWMA] which authorizes the recipient to undertake the treatment storage or disposal of hazardous waste under the act.

25 Pa. Code § 75.260 (Pet.R.Br. App. 3). Respondents argue that Petitioner violated 35 Pa. Cons. Stat. § 6018.401(a) because he deviated from the terms of the permit (R.Br. at 45 ["Mr. Fiore and/or Mr. Scarpone so altered the monitoring system and so significantly departed from the terms of the permit. . . . "]). *See also id.* at 1-4, 8, 27, 46, and 49. This theory was summarily rejected as a "bald fiction" in *Scarpone* (J.A.

---

[5] Pennsylvania's SWMA regulates and controls the solid waste practices in the Commonwealth of Pennsylvania. 35 P.S. § 6018.102. The Legislature of Pennsylvania delegated to the Environmental Quality Board ("EQB") the duty of establishing and implementing rules and regulations to achieve the purpose of the SWMA. *Id.* at § 6018.105. The EQB, however, is not permitted to create new crimes or to expand the rules beyond the SWMA. To the contrary, the rules only can amplify the SWMA. *See Baumgardner Oil Co. v. Commonwealth of Pennsylvania*, 606 A.2d 617, 623-624 (Pa. Commw. 1992). Article V of the SWMA (35 P.S. §§ 6018.501-6018.508) governs this application and permit process.

Relevant regulations governing issues surrounding the management of hazardous waste – identifying and listing hazardous waste, establishing the permitting requirements, and creating the process by which permits are granted, modified, suspended or revoked – were set forth in Title 25 of Pennsylvania's Administrative Code under Chapter 75 "Solid Waste Management"; Subchapter D "Hazardous Waste". The implementing code provisions cited herein refer to the provisions in effect at the time of Petitioner's trial and conviction. Subchapter D was added August 2, 1980, 10 Pa. B. 3163 (1980). In light of the fact that these are historical code provisions, Petitioner has included the relevant provisions in an Appendix to this Reply Brief ("Pet.R.Br. App.").

121). It remains illogical for two reasons: a different provision makes it a violation of the SWMA to deviate or depart from the terms of a permit, 35 Pa. Cons. Stat. § 6018.302(a); second, the SWMA and its regulations set forth explicit procedures for issuing, modifying and revoking a permit (Pet.R.Br. App. 3-13).

Although Petitioner argued at trial that the SWMA explicitly provides procedures for revoking, suspending or modifying a permit as the result of a violation, (Pet.R.Br. App. 15-23)[6] the court adopted the Commonwealth's theory and instructed the jury:

> The allegations in this case are that Mr. Fiore and/or Mr. Scarpone so altered the monitoring system and also significantly departed from the terms of the permit that the operation of the hazardous waste facility thereafter was an unpermitted operation of a hazardous waste facility.
>
> The question of fact for you to decide is. . . . was the violation or the alteration so substantial as part of the condition of the permit that the operation of the facility thereafter was an operation of a facility without a permit?

(Pet.R.Br. App. at 21 [Trial Transcript (2/18/86)]).

Despite *Scarpone's* burial of this theory, Respondents exhume it today. Although a person or entity may violate the terms of a SWMA permit, a revocation cannot occur automatically or *sua sponte*. Regulatory procedures require the DER to issue a notice of intent to revoke based upon violation of the permit. *See, e.g.*, 25 Pa. Code §§ 75.278-75.280 (1986). That did not occur here. Under the SWMA, regulations, and legal principles applicable at the time of the trial and conviction, Petitioner's violation of the permit could not constitute a revocation without official government action pursuant to established procedures. *Id.*

C. RESPONDENTS MISCHARACTERIZE THE HOLDING OF *SCARPONE*.

1. The Pennsylvania Supreme Court's *Scarpone* Decision Did Not Establish A "New Principle of Law."

Respondents contend that the *Scarpone* decision was a "new principle of law" for retroactivity purposes because it did not adopt the Superior Court's *Fiore* decision (R.Br. at 18-19, 24-28). They maintain that this Court is bound by the Superior Court's *Fiore* decision on direct appeal; rather than the Pennsylvania Supreme Court's decision in *Scarpone*. In support, Respondents cite *Brown v. Ohio*, 432 U.S. 161, 167 (1977), and *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965), wherein the Court looked to the ruling of state intermediate appellate courts for an authoritative construction of state statutes.[7] Those cases do not stand for the proposition,

---

[6] The procedures and rules governing permit issuance, modification, revocation and reissuance were set forth in 25 Pa. Code §§ 75.259-75.282 (1986). The key provisions – 25 Pa. Code §§ 75.260, 75.278-75.280 were enacted on August 2, 1980, 10 Pa. B. 3163 (1980) and remained unaltered through the charging of Petitioner as well as his trial and conviction.

Although the Department of Environmental Resources had (and still has) some discretion on when or whether to revoke a permit (*see* 25 Pa. Code. §§ 75.278-75.279 (1986)), it must adhere to the specific procedures set forth in 25 Pa. Code § 75.280 (1986) if it chooses to issue, modify or revoke a permit. Under these procedures, if the Department wishes to revoke a permit for a violation, the Department must issue a notice of intent to revoke. *See id.* at § 75.280(o)(5). If the Department intends to modify or revoke a permit, it also must issue a draft permit. The draft permit is a type of temporary permit which includes such items as restrictions on activities and compliance dates. *See id.* at § 75.280(g)-(i) (Pet.R.Br. App. 3-13).

[7] The key to Respondents' position is their statement that this Court "d[oes] not limit itself" to pronouncements of state high courts in interpreting state statutes (R.Br. at 27). That is certainly true – when a state supreme court has not spoken on

as Respondents suggest, that the Court is bound by a state's intermediate decision in the face of a subsequent decision on the same issue by the highest court of the state. In each case, the state's highest court had *denied review*. Here, Pennsylvania's Supreme Court has spoken and its ruling should be followed.[8]

It is well-established that an unpublished memorandum opinion of the Superior Court of Pennsylvania (such as its *Fiore* decision) is not precedential or intended to be authoritative. *Commonwealth v. McPherson*, 533 A.2d 1060, 1062 (Pa.Super. 1987). *See also, Vetter v. Fun Footwear Co.*, 668 A.2d 529, 535 (Pa.Super. 1995) (*en banc*), appeal denied, 676 A.2d 1199 (Pa. 1996) (an unpublished memorandum has no precedential value); *see, also* Internal Operation Procedures of the Superior Court § 65.37 – Unpublished Memoranda Decisions, implementing Pa. R.A.P. 3501-3517. The Superior Court's unpublished *Fiore* decision had no bearing in Scarpone's case. The Commonwealth and Supreme Court's *Scarpone* decisions were the first published decisional statements about the section in question.

Respondents contend that *Scarpone* was a "new" rule in that it was not "foreshadowed" by previous case law (R.Br.

---

an issue of state law, the decisions of intermediate appellate courts "is datum for ascertaining state law" which should not be disregarded unless a federal court "is convinced . . . that the highest court of the state would decide otherwise." *West v. American Telephone and Telegraph Co.*, 311 U.S. 223, 237 (1940). This rule applies in habeas corpus cases. *E.g., Hicks v. Feiock*, 485 U.S. 624, 630 n.3 (1988); *Olsen v. McFaul*, 843 F.2d 918, 929 (6th Cir. 1988). The *Scarpone* decision is of course convincing evidence that the Pennsylvania Supreme Court would not follow the lower courts' construction of section 401 of the SWMA in Petitioner's case, and thus it should not be followed by this Court.

[8] It recently has been reaffirmed that judicial construction of a statute by the Pennsylvania Supreme Court becomes part of the legislation from the time of the statute's enactment. *Commonwealth v. Shaffer*, 1999 WL 512138 (Pa., July 21, 1999).

at 25-26). They cite to wholly inapposite decisions interpreting the Clean Streams Law, a separate and distinct state environmental statute. Respondents submit that the Commonwealth Court's distinguishing of those cases (J.A. 108) proves that the *Scarpone* decision was not "foreshadowed." In reality, the Commonwealth Court quickly disposed of the Clean Streams Law cases as inapplicable and resolved *Scarpone* by application of the governing statutory language to the facts of that case (J.A. 108-110).

Furthermore, as discussed above in Section B-3, the *Scarpone* decision was mandated by the language of the statute and implementing regulations. A permit cannot be revoked without official government action in which the Department follows specified procedures. *See, e.g.*, 25 Pa. Code §§ 75.278-75.280 (Pet.R.Br. App. 3, Pet.R.Br. App. 13). The offense in question – 35 Pa. Cons. Stat. § 6018.401(a) – criminalizes operations of a hazardous waste facility without a permit. Under the applicable statutes and regulations, Petitioner had a permit that could not be revoked through his own actions. *Scarpone's* holding – that lack of a permit is an element of the crime in § 401 – was not a new principle of law. It was foreshadowed by the incontestably clear language of the statute and its regulations.

2. *Scarpone* Did Not Create A Defense; It Recognized That Not Having A Permit Was An Element Of The Offense.

In addition to claiming that *Scarpone* constitutes a new rule of law, Respondents and their Amici strain to characterize *Scarpone* as establishing an affirmative defense to the crime at issue (R.A.Br.[9] at 2, 5-6; R.Br. at 6-7). In so doing, Respondents would improperly shift the burden of proving each element of the offense to Petitioner. This would effectively constitute an independent deprivation of due process under the penal statute and was *not* the holding in *Scarpone*.

---

[9] Respondents' Amici's Brief will be referred to hereafter as "R.A.Br."

See Martin v. Ohio, 480 U.S. 228, 231-236 (1987) (although burden of proving affirmative defenses can be placed on defendant, it is a due process violation to shift the burden of proving elements of offense to defendant). *Scarpone* held that the Commonwealth bore the burden of proving each element of the offense, and it failed to do so. Both *Scarpone* opinions were based on insufficiency of the evidence. The Pennsylvania Supreme Court did not suggest that Petitioner's possession of a permit constituted an affirmative defense. *Id.* at 1112 (J.A. 121) (upholding insufficiency of the evidence/due process attack on the conviction).

D. RESPONDENTS MISCONSTRUE *BOUSLEY*.

Respondents attempt to diminish this Court's recent ruling in *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604 (1998), by limiting that decision to one of retroactive application of a federal court's construction of federal law. *Bousley* rejected application of *Teague* procedural restrictions because Bousley's claim was not based on a new rule of procedure, but on a settled right. The Court aptly noted, "[t]he only constitutional claim made here is that petitioner's guilty plea was not knowing and intelligent. There is surely nothing new about this principle[.]" *Id.* at 1609. Likewise, the issues presented here are based on the settled right articulated in *Jackson v. Virginia* and the Due Process Clause.

Despite concerns with finality, this Court emphasized that even *Teague* provided an exception for individuals who are actually innocent as charged and recalled that *Teague* is founded on the notion that one of the "principle functions of habeas corpus [is] 'to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.' " *Bousley*, 118 S.Ct. at 1610 (citations omitted). "[I]t would be inconsistent with the doctrinal underpinnings of habeas review to preclude [Bousley] from relying on our decision in *Bailey v. United States*, 516 U.S. 137 (1995), in support of his claim that his guilty plea was constitutionally invalid." *Id.* at 1610. The Court did not indicate that Bousley's case would have been

decided differently if the ruling had concerned a state court judgment. Indeed, in *Bousley*, the Court cited *Murray v. Carrier*, 477 U.S. 478 (1986) and *Smith v. Murray*, 477 U.S. 527 (1986), in support of the "actual innocence" exception to exhaustion. Both cases were brought under 28 U.S.C. § 2254 seeking collateral review of state court convictions.

Bousley cannot be ignored, as Respondents suggest, because it was a collateral attack on a federal conviction. *Bousley* must be regarded for its insight into the issue of an appeal involving basic constitutional error at the trial court level – involving guilt or innocence of the crime charged. As in *Bousley*, the instant record supports – indeed mandates – a finding of actual innocence as a matter of law.

E. RESPONDENTS ARE ATTEMPTING TO COMPENSATE FOR THE COMMONWEALTH'S MISTAKE IN CHARGING PETITIONER WITH THE WRONG OFFENSE.

Respondents cloud the issue by alluding that Petitioner's claim for federal habeas relief should be denied because Petitioner may have committed other environmental infractions (R.Br. at 1-4, 49).[10] They seek to convince this Court that although Petitioner may not have violated 35 Pa. Cons. Stat. § 6018.401(a), he probably violated some other provision; therefore, his incarceration should be upheld – on the basis of propensity. The argument is an unsubtle attempt to distract this Court with matter that has no proper bearing on the legal issue in the case. Respondents' request for a result-oriented decision must be ignored. Respondents have

---

[10] For example, Petitioner was charged with and convicted of violating a misdemeanor, 35 P.S. § 6018.302(a), which prohibits processing or disposing of waste "in a manner which is contrary to . . . any permit or the terms and conditions of any permit or any order issued by the department." However, Respondents wish to see Petitioner convicted of 35 P.S. § 6018.401(a), because it is a felony charge which carries a longer sentence.

spent over a decade trying to uphold Petitioner's conviction and incarceration because the prosecution erred at the outset by incorrectly charging Petitioner.

Petitioner need not address Respondents' suggestion that his actions could have made him culpable under another environmental section. *Scarpone* reversed that conviction despite its recognition that other charges may have been "appropriate."

> A more appropriate charge may have been brought under alternative provisions of the statute, viz, 35 Pa. Cons. Stat. §§ 6018.606(g) and 6018.601. . . . But to conclude that the alteration constituted the operation of a new facility without a permit is a bald fiction we cannot endorse . . . [T]he statutory language here cannot be stretched to include criminal activities which clearly fall under another statutory section or subsection.

Scarpone, 634 A.2d at 1112 (J.A. 121).

In so ruling, *Scarpone* vindicated a key tenet of criminal justice. An individual cannot be convicted of violating one law because the government believes that he committed the elements of a different offense.[11] The *Winship* reasonable doubt requirement is not " 'limit[ed] to those facts which, if not proved, would wholly exonerate' " petitioner. *Jackson v. Virginia*, 443 U.S. at 324, *quoting*, *Mullaney v. Wilbur*, 421 U.S. 684, 697-698 (1975). In evaluating whether or not the government met its burden, this Court should look solely at facts that relate to Petitioner's alleged violation of 35 Pa. Cons.

---

[11] In Respondents' zeal to divert this Court's attention from the issues at hand, they refer to Petitioner's prior conduct and criminal record although both are outside the record and irrelevant to the instant case. *See, e.g.*, R.Br. at 1 n.1, 1-4. Such an attempt cannot be justified. A cornerstone of justice is that a defendant cannot be convicted because he is a *bad person* or because he has committed other "crimes, wrongs or [bad] acts." *See, e.g.*, Fed. R. Evid. 404(b). Petitioner requests that this Court dismiss Respondents' thrust in this regard.

Stat. § 6018.401(a). As this Court has noted "[u]nder our criminal justice system even a thief is entitled to complain that he has been unconstitutionally imprisoned as a burglar." *Jackson*, 443 U.S. at 323-324. Regrettably, Respondents seek to wash away bedrock due process protections and careful retroactivity analysis because of their flawed charging of Petitioner.[12]

CONCLUSION

This case presents a unique and egregious deprivation of constitutional rights. Contrary to Respondents' view, granting relief would not create a sea change. As Respondents' Amici aptly concede:

> Admittedly, the adverse effect on finality in this particular case would not be substantial. It appears that only one finally decided conviction would be affected.

(R.A.Br. at 17; *see also id.* at 12 n.2). But validating the Commonwealth's position would have oppressive implications. If a prosecutor's fictional construct, however well-

---

[12] Relying upon *Herrera v. Collins*, 506 U.S. 390 (1993), Respondents suggest the option of clemency (R.Br. at 21). However, *Herrera* held that actual innocence claims based solely upon newly discovered evidence do not establish a constitutional violation that can ground a habeas petition. *Id.* at 400. But, Petitioner's innocence claim rests upon an independent *Jackson v. Virginia* constitutional issue that arises out of the record.

Also, in *Herrera*, the Court did not hold, as Respondents suggest, that if clemency is an option the Court need not weigh a federal habeas corpus petition. The existence of alternative, discretionary relief is irrelevant to the determination of this case. As Justice Souter recently reiterated in a concurring opinion, state prisoners "do not have to invoke extraordinary remedies" such as a clemency to satisfy federal habeas exhaustion requirements. *O'Sullivan v. Boerckel*, ___ U.S. ___, 119 S. Ct. 1728, 1735 (1999) [citations omitted].

intended, can substitute for real proof, of real elements, with real notice, then the government is freer and the individual more at risk.

For the foregoing reasons, the decision of the Third Circuit should be reversed and the District Court's granting of Petitioner's federal habeas relief should be reinstated.

Respectfully submitted,

LIEBER & HAMMER, P.C.

JAMES BRANDON LIEBER, ESQUIRE
Counsel of Record
M. JEAN CLICKNER, ESQUIRE
APRIL L. BOYER, ESQUIRE
5528 Walnut Street
Pittsburgh, PA 15232-2312
(412) 687-2231

HAROLD GONDELMAN, ESQUIRE
PLOWMAN SPIEGEL & LEWIS, P.C.
310 Grant Street
Pittsburgh, PA 15219-2204
(412) 263-1833

Title 25

ENVIRONMENTAL RESOURCES

Ch. 75 SOLID WASTE MANAGEMENT

Subchapter D. HAZARDOUS WASTE

Sec.