

No.

In the Supreme Court of the United States

RICHARD D. DIGUGLIELMO,

Petitioner,

v.

NEW YORK,

Respondent.

**On Petition for a Writ of Certiorari to
the New York Court of Appeals**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition presents the question on which this Court granted certiorari, but was unable to reach, in *Fiore v. White*, 531 U.S. 225 (2001) (per curiam):

Whether the Federal Due Process Clause permits a state court to refuse retroactive application of a decision holding that the conduct underlying the defendant's conviction is legally insufficient to satisfy the elements of the offense.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard D. DiGuglielmo respectfully petitions for a writ of certiorari to review the order of the New York Court of Appeals denying his motion to vacate his conviction.

OPINIONS BELOW

The opinion of the New York Court of Appeals, denying Petitioner's motion to vacate his conviction, is reported at 17 N.Y.3d 771. App., *infra*, 1a. The opinion of the New York Supreme Court, Appellate Division, is reported at 75 A.D.3d 206. *Id.* at 2a–17a. The opinion of the Westchester County Court is unpublished but reported at 873 N.Y.S.2d 236. *Id.* at 18a–100a.

JURISDICTION

The order of the New York Court of Appeals was entered on June 23, 2011. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: “No State shall * * * deprive any person of life, liberty, or property, without due process of law.”

STATEMENT

Petitioner Richard D. DiGuglielmo is serving a 20-to-life sentence for conduct which, the State concedes, is not legally sufficient to support a conviction under what is now acknowledged as the correct interpretation of New York's depraved indifference murder statute. Indeed, in 2008 he was ordered released by the Westchester County Court upon a finding that he is legally innocent of that offense. Yet af-

ter more than a year and a half at liberty, petitioner was ordered back to prison by the state appellate courts—not because they disagreed with the County Court’s determination that he is legally innocent of this crime, but because they refuse to give retroactive effect to the recent decisions correcting prior, erroneous interpretations of the statute. The New York courts’ refusal to give retroactive effect to decisions establishing petitioner’s legal innocence fails to comport with constitutional due process.

A. Factual Background

This case stems from a tragic episode that lasted less than five minutes but destroyed two families forever. On October 3, 1996, petitioner Richard D. DiGuglielmo, an off-duty New York City police officer, was helping out at his parents’ deli in Dobbs Ferry. He was there in part out of concern for his father, Richard B. DiGuglielmo, who was recovering from a recent heart attack and was not supposed to do any heavy lifting.

Charles Campbell drove up to the deli and parked in one of the parking spaces in front of it. These spaces were owned by the deli and reserved for its customers (App., *infra*, 3a), but Campbell instead walked to a pizzeria across the street.

When Campbell got to the pizzeria, one of its employees told him that the elder DiGuglielmo might place a sticker on his car for having parked in the deli’s reserved space. Campbell—“a big guy” who was an amateur boxer and had just spent several hours working out (COA App. 92–95, 185, 225)—responded, “if he puts a sticker on my car you know I’m going to kick his ass.” *Id.* at 402. Shortly thereafter, petitioner’s father did indeed place a sticker on

the car's passenger-side window, and Campbell ran across the street to confront him. At that point petitioner emerged from the deli and stepped between Campbell and his father. Although the witnesses at trial disagreed about how and by whom the first blow was struck, it is undisputed that the two men began fighting. The fight was joined by the father and DiGuglielmo's brother-in-law, who was also working at the store. The DiGuglielmos ultimately subdued Campbell, and the altercation appeared to be over. Petitioner re-entered the deli, but his father paused to give Campbell back his cell phone and his shirt, which had come off during the fight. App., *infra*, 3a.

Campbell, however, did not take the phone or the shirt. Instead, he pulled a metal baseball bat from the trunk of his car. With full force, he swung it at the elder DiGuglielmo (App., *infra*, 3a), striking him with such power that prosecution witnesses some distance away could hear the sound of the blow. COA App. 230, 696, 922–23, 943. Observing Campbell attacking the father, one of the prosecution's eyewitnesses recalled saying “my God. He's going to take his head clean off his shoulder like this * * * I expected his head to explode like a watermelon.” *Id.* at 189, 230.

Petitioner watched through a window as Campbell swung the bat at his father. He grabbed a licensed firearm that was kept behind the counter in the deli and rushed back outside. When he got there Campbell was facing his father with the bat raised again, in the stance of a batter who was about to hit a baseball. App., *infra*, 3a–4a. With Campbell

poised to strike his father again with the bat,¹ DiGuglielmo fired three shots into Campbell’s “center mass,” as he had been trained by police instructors. *Id.* at 29a–30a. Campbell died shortly thereafter.

B. Indictment And Trial

The Westchester County District Attorney’s Office charged DiGuglielmo, his father, and his brother-in-law with assault for the fistfight with Campbell. DiGuglielmo was also charged with both intentional murder and depraved indifference murder. N.Y. PENAL LAW §§ 125.25(1), (2). The trial was held in 1997. At the time, the prevailing New York Court of Appeals decisions held that the deadly use of a weapon aimed at a particular victim, even at close range, could serve as the predicate for a depraved indifference murder conviction.

With regard to the depraved indifference count, the indictment alleged that DiGuglielmo, “under circumstances evincing a depraved indifference to human life did recklessly engage in conduct which created a grave risk of death of another person, and thereby caused the death of CHARLES CAMPBELL.” The defense sought specification of “the nature of the alleged ‘depravity’ and/or indifference” by demanding a bill of particulars, and the prosecution responded by identifying Charles Campbell as the sole object of that depravity, stating that DiGuglielmo’s conduct “recklessly created a grave risk of death to Charles Campbell, and in fact, caused his death.” Bill of Particulars ¶ 1.

¹ There was conflicting testimony regarding whether Campbell swung the bat again before petitioner intervened or if he was only on the verge of swinging. See App., *infra*, 4a–5a, 8a–9a.

The defense at trial was justification. The defense argued that DiGuglielmo had acted lawfully and reasonably: his father was about to be struck full force—for a second (or, depending on testimony, third) time—with a metal baseball bat. The prosecution, on the other hand, contended that DiGuglielmo should have tried something short of deadly force rather than firing three shots in succession into Campbell’s “center mass.”

The jury wrestled with its decision, asking for re-instruction on reasonable doubt. COA App. 2380–84. After more than three days of deliberation, the jury delivered its verdict. It acquitted DiGuglielmo of intentional murder. It acquitted him (along with the other defendants) of the assault charges. But he was convicted of depraved indifference murder. The sentencing judge, finding that the shooting “was the product of genuine love and concern for the well being of his father,” COA App. 2461, declined to sentence DiGuglielmo to the maximum term of imprisonment. DiGuglielmo is currently serving a term of 20 years to life.

C. The New York Depraved Indifference Murder Statute

Since petitioner’s conviction became final, New York’s understanding of depraved indifference murder has undergone a sea change. While the statute reads exactly as it has for decades, New York courts now interpret it to categorically exclude the type of case that is presented here. It is undisputed that under today’s interpretation of the depraved indifference murder statute, DiGuglielmo’s conviction could not stand.

Under New York law, a person is guilty of depraved indifference murder when “[u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.” N.Y. PENAL LAW § 125.25(2). Unlike the lesser charge of manslaughter, a defendant convicted of depraved indifference murder is subject to the same punishment as one convicted of intentional murder. See *id.* § 125.25 (proscribing forms of second-degree murder). Proof that the defendant acted with depraved indifference to human life has been a statutorily required element of this offense since its inception. *Rivera v. Cuomo*, --- F.3d ---, 2011 WL 3447445, at *3–5 (2d Cir. 2011).

At the time of DiGuglielmo’s conviction, the New York courts interpreted “depraved indifference” to permit a conviction under this statute for acts that were not simply reckless or indifferent, but purposely directed at the victim. See *People v. Register*, 457 N.E.2d 704 (N.Y. 1983); see also *People v. Sanchez*, 777 N.E.2d 204 (N.Y. 2002). Rejecting the argument that one who acts with *intent* to harm cannot also be described as *indifferent* to that harm—and thus that a defendant cannot simultaneously be charged with both intentional murder and depraved indifference murder—courts held that the depraved indifference requirement “focuses not on the subjective intent of the defendant, ‘but rather upon an objective assessment of the degree of risk presented by defendant’s reckless conduct.’” *Sanchez*, 777 N.E.2d at 207 (quoting *Register*, 457 N.E.2d at 707). Intentional discharge of a weapon, even in self-defense, would virtually always support a conviction. See, e.g., *id.* at 206 (affirming conviction where “[t]he shooting itself

appeared to have been sudden, spontaneous, and not well-designed to cause imminent death”); see also *Policano v. Herbert*, 859 N.E.2d 484, 493 (N.Y. 2006) (“[U]nder the *Register* formulation the very facts establishing a risk of death approaching certainty [in an intentional killing] likewise demonstrated depraved indifference.”).

Under this interpretation, depraved indifference murder often served “as a fallback crime” when prosecutors were unable to convince a jury to convict the defendant of intentional murder. See *People v. Suarez*, 844 N.E.2d 721, 730–31 (N.Y. 2005) (per curiam). Thus, in *Register*, a defendant who fatally shot a friend “[f]or no explained reason” after a night of heavy drinking was acquitted of intentional murder, but convicted of depraved indifference murder. 457 N.E.2d at 705. Likewise, the defendant in *Sanchez*, who shot a relative after an argument, was acquitted of intentional murder but convicted of depraved indifference murder. 777 N.E.2d at 205–06.

The New York Court of Appeals has now rejected that interpretation of the depraved indifference murder statute, overruling *Register* and *Sanchez*. See *People v. Feingold*, 852 N.E.2d 1163, 1167 (N.Y. 2006). *Feingold* marked the culmination of a series of cases, beginning with *People v. Hafeez*, 792 N.E.2d 1060 (N.Y. 2003), restricting the circumstances in which an intentional killing can also be charged as depraved indifference murder. Hafeez and an accomplice were accused of luring their victim out of a bar, where the accomplice then stabbed the victim to death. Hafeez insisted that they meant only to rough up the victim and that the escalation was unplanned; the jury acquitted him of intentional murder, but convicted him of depraved indifference mur-

der. The Court of Appeals overturned that conviction, holding that “a quintessentially intentional attack directed solely at the victim” cannot support a charge of depraved indifference murder. *Id.* at 1063.

The Court of Appeals further solidified its new interpretation of “depraved indifference” in *People v. Gonzalez*, stating that “a person cannot act both intentionally and recklessly with respect to the same result. The act is either intended or not intended; it cannot simultaneously be both. Because guilt of one necessarily negates guilt of the other, intentional and depraved indifference murder are inconsistent counts.” 807 N.E.2d 273, 276 (N.Y. 2004) (internal quotation marks and citation omitted); see also *People v. Payne*, 819 N.E.2d 634, 635 (N.Y. 2004) (“Indifference to the victim’s life * * * contrasts with the intent to take it.”). Depraved indifference murder “involves a killing in which the defendant *does not have a conscious objective to cause death* but instead is recklessly indifferent, depravedly so, to whether death occurs.” *Gonzalez*, 807 N.E.2d at 276 (emphasis added). Thus, “[w]hen depraved indifference murder is properly understood, ‘twin-count’ indictments—charging both intentional homicide and depraved indifference murder—should be rare.” *Suarez*, 844 N.E.2d at 731.

Having now cast aside the erroneous judicial interpretations of *Register* and *Sanchez* and restored the correct statutory meaning to “depraved indifference,” the courts of New York do not permit defendants like DiGuglielmo to be charged with depraved indifference murder. “[W]here twin-count indictments are lodged, trial courts should presume that the defendant’s conduct falls within only one category of murder and, unless compelling evidence is

presented to the contrary, dismiss the count that is least appropriate to the facts.” *Suarez*, 844 N.E.2d at 731 (internal quotation marks omitted). In a case “where the evidence produced at trial indicated that if the defendant committed the homicide at all, he committed it with the conscious objective of killing the victim,” *Policano*, 859 N.E.2d at 493 (internal quotation marks omitted), the defendant can only be charged with intentional murder, not depraved indifference murder.

The New York Court of Appeals has applied this new understanding of depraved indifference to overturn the convictions of defendants whose cases remain on direct review, including defendants whose conduct and trial took place before the new interpretation was announced. See, e.g., *People v. Jean-Baptiste*, 901 N.E.2d 192, 194–96 (N.Y. 2008). But it has pointedly refused relief for one class of defendants: those who are now known to be legally innocent, but whose convictions have already become final. Applying a state-law retroactivity test, the Court of Appeals held in *Policano*, 859 N.E.2d at 495–96, that its corrected reading of the depraved indifference murder statute will not be applied on collateral review.

D. Motion To Vacate The Conviction

On November 9, 2006, DiGuglielmo filed a motion to vacate his conviction under Section 440.10 of the New York Criminal Procedure Law. He pointed out that the state courts’ reinterpretation of the depraved indifference statute, a statute that is unchanged since DiGuglielmo was convicted, leaves no doubt that he could not be convicted of depraved indifference murder today.

Justice Rory Bellantoni granted the motion and vacated the conviction. App., *infra*, 24a–44a. Justice Bellantoni held that cases decided after DiGuglielmo’s conviction made clear that “by allowing a jury to consider depraved indifference murder where no evidence of an unintentional killing existed, a conviction for depraved indifference murder was improper.” *Id.* at 25a. The court also found that:

Defendant’s crime, if it was a crime at all, was intentional (although an intentional crime was rejected by the jury). In the case at bar, there was *no* evidence of an *unintentional* killing.

Id. at 26a. The court went on:

In the present case * * * the trial record contains direct evidence of intent. Indeed, by raising the justification defense, as it applied to Campbell’s actions, Defendant concedes that he intentionally pointed a gun at the victim and intentionally shot 3 rounds at the victim based on his police training, in order to stop the victim from beating his father with a baseball bat. Defendant’s actions cannot be seen as reckless.

Indeed, it has always been the People’s theory in the case at bar that, upon seeing Campbell beating his father with a baseball bat, Defendant went into the Venice Deli, retrieved a handgun, returned to the parking lot and shot the victim. This, the People allege, was an act of “revenge”, “payback” and “retribution”, as laid out more fully in the People’s opening and closing statements at trial. It is unquestionable that there is

no evidence that Defendant DiGuglielmo acted unintentionally.

Id. at 31a.²

None of the appellate courts reversed, or even questioned, these findings. Nevertheless, the Appellate Division reversed and reinstated the conviction. App., *infra*, 7–8a. That court expressly declined to consider the change in the law since DiGuglielmo’s conviction. It found only that DiGuglielmo could not argue that the evidence was insufficient to convict him of depraved indifference murder because he had “contested the sufficiency of the evidence, and the issue was decided against him under the law in effect at the time of the judgment.” *Id.* at 7a. Relying on *Policano*, it observed that “the Court of Appeals has unequivocally instructed that the new depraved in-

² Petitioner also argued that the conviction should be vacated under *Brady v. Maryland*, 373 U.S. 83 (1963), because the prosecution had failed to disclose that two of its key witnesses changed their stories as a result of pressure by the police. The County Court granted the motion on that ground as well, finding that prosecutors “failed to disclose the patently exculpatory evidence of multiple exculpatory statements in the face of repeated interrogation,” App., *infra*, 94a, and used “overbearing tactics” to convince key witnesses to recant their original exculpatory accounts in favor of prosecutors’ “preconceived story,” *id.* at 64a. The County Court found credible the testimony of the two eyewitnesses who confessed at the evidentiary hearing that their trial testimony had been untruthful. *Id.* at 51a–55a, 71a–77a, 86a–87a. The appellate court reversed, holding as matter of law that there was no reasonable probability these two recantations would have affected the outcome of the trial. *Id.* at 16a. Although petitioner disputes that holding, he does not seek certiorari on the *Brady* issue.

difference standard is not to be applied retroactively by way of CPL 440 motion.” *Id.* at 8a.³

The New York Court of Appeals granted review and affirmed. App., *infra*, 1a. The court addressed the depraved indifference issue in a single sentence, asserting that:

The standard enunciated in *Feingold* simply does not apply retroactively to cases on collateral review, and defendant’s claim that such a result violates the federal Due Process Clause is without merit.

Ibid. (citing *Policano*, 859 N.E.2d at 495–96, on retroactivity and *Wainwright v. Stone*, 414 U.S. 21, 23–24 (1973), on due process).

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari To Decide The Question It Was Unable To Resolve In *Fiore*.

A. This Court Has Previously Recognized The Critical Importance Of The Question Presented.

In *Fiore v. White*, 531 U.S. 225, 226 (2001) (per curiam), this Court “granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on

³ DiGuglielmo was briefly released from prison in 2008 following the County Court’s ruling in his favor. He resumed gainful employment and made up for lost years with family and friends. Twenty months later, however, after the Appellate Division reversed that decision, DiGuglielmo was ordered back into custody. He voluntarily reported back to prison and continues to serve his lengthy sentence.

collateral review.” However, due to a subsequent decision by the Pennsylvania Supreme Court, this Court ultimately was unable to reach that issue, leaving this critical question open and ripe for decision. In the succeeding years, and as discussed more fully below, the federal circuit courts and state courts of last resort have continued to divide on this question. See generally *Luurtsema v. Comm’r of Corr.*, 12 A.2d 817, 825 n.13 (Conn. 2011) (reviewing cases).

The petitioner in *Fiore* was convicted of violating a Pennsylvania statute prohibiting the operation of a hazardous waste facility without a permit. 531 U.S. at 226. After the petitioner’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.” *Ibid.* The Pennsylvania courts, however, refused to grant collateral relief.

After granting certiorari, this Court asked the Pennsylvania Supreme Court to clarify “whether its decision 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.” *Ibid.* The Pennsylvania Supreme Court responded that its ruling “‘merely clarified’ the statute and was the law of Pennsylvania—as properly interpreted—at the time of Fiore’s conviction.” *Id.* at 228 (quoting *Fiore v. White*, 757 A.2d 842, 848–49 (Pa. 2000)). Further, because the Pennsylvania Supreme Court ruling at issue “interpreted the statute for the first time,” *id.* at 226, the ruling was not a change or departure from any past interpretations. As a result, the case as clarified “present[ed] no issue of retroactivity,” *id.* at 228, leaving this Court unable to address the fun-

damental question whether due process is violated when a state refuses to apply a new interpretation of a state criminal statute retroactively to cases on collateral review.

B. The Lower Courts Have Continued To Divide On This Question In The Years Since *Fiore*.

In the years since *Fiore* failed to resolve this question, the conflict among the lower courts has only deepened.

In 2004, after overruling more than three decades of precedent interpreting the state's felony murder statute to allow a conviction based on the predicate felony of assault, the Washington Supreme Court concluded that it would be "a fundamental due process violation" to refuse relief for defendants who seek to reopen their convictions on collateral review. *In re Hinton*, 100 P.3d 801, 804 (Wash. 2004). Like New York's new approach to depraved indifference murder, Washington's new approach to felony murder resulted from a new judicial interpretation of a longstanding statute, not from any recent change to the statute itself. Because the new interpretation must therefore indicate what the statute has meant all along, see *id.* at 804 n.2, failure to give it retroactive effect would violate due process by allowing convictions to stand for defendants who are (and were) legally innocent.

By contrast, considering *the exact same development* in felony murder law that was at issue in *Hinton*, the Iowa Supreme Court "concluded that [the defendant's] federal due process claim is without merit." *Goosman v. State*, 764 N.W.2d 539, 545 & n.1 (Iowa 2009). Some other courts have come to

similar conclusions, insisting—like the New York Court of Appeals—that when a new interpretation of a state criminal statute ***overrules a prior interpretation*** announced in earlier high-court decisions, the State may choose to apply the new interpretation only to convictions that have not yet become final. See *Chapman v. LeMaster*, 302 F.3d 1189, 1197 n.4 (10th Cir. 2002); *Henry v. Ricks*, 578 F.3d 134, 138 (2d Cir. 2009). These courts acknowledge that *Fiore* requires a newly announced interpretation to be applied retroactively when the state court is construing the statute *for the first time*, but refuse to give the same retroactive effect when the new decision overrules a prior interpretation—a distinction that cannot be squared with the Washington court’s analysis in *Hinton*.

As the Connecticut Supreme Court observed in *Luuritsema*, the lower courts show no hope of convergence and will remain intractably divided “until the United States Supreme Court resolves this conflict.” 12 A.3d at 825 n.13. The Court should take up the invitation to dispel this confusion and restore consistency to the Nation’s courts on this vitally important issue.

C. This Case Presents An Ideal Vehicle To Resolve The Question *Fiore* Was Unable To Reach.

This issue is now ripe for consideration. Unlike *Fiore*, this case presents an express change in a state high court’s interpretation of a state criminal statute. Compare *People v. Register*, 457 N.E.2d 704 (N.Y. 1983) (permitting defendant to be convicted of depraved indifference murder based on evidence that the defendant intentionally shot the victim), *People v. Sanchez*, 777 N.E.2d 204 (N.Y. 2002) (same), and

Policano v. Herbert, 859 N.E.2d 484, 494 (N.Y. 2006) (“[U]nder the *Register* formulation the very facts establishing a risk of death approaching certainty [in an intentional killing] likewise demonstrated depraved indifference.”), with *People v. Gonzalez*, 807 N.E.2d 273, 276 (N.Y. 2004) (“[A] person cannot act both intentionally and recklessly with respect to the same result. * * * Because guilt of one necessarily negates guilt of the other, intentional and depraved indifference murder are inconsistent counts.”), *People v. Payne*, 819 N.E.2d 634, 635 (N.Y. 2004) (“Indifference to the victim’s life * * * contrasts with the intent to take it.”); and *People v. Feingold*, 852 N.E.2d 1163, 1167 (N.Y. 2006) (overruling *Register* and *Sanchez*).

The outcome in this case rises or falls on the issue of retroactivity. The county court issued detailed findings supporting its conclusion that the evidence is legally insufficient to sustain DiGuglielmo’s conviction under the current interpretation of the depraved indifference murder statute. App., *infra*, 24a–44a. That conclusion has never been disturbed on appeal. The state appellate courts have refused to vacate the conviction solely because they will not apply the new interpretation of state substantive law retroactively to cases on collateral review. App., *infra*, 7a–8a (citing *Policano*, 859 N.E.2d at 495–96); *id.* at 1a (same). This case therefore presents an ideal vehicle to finally resolve this critically important question that remains unanswered more than a decade after the Court first granted certiorari in *Fiore*.

II. Certiorari Should Be Granted To Clarify That State Criminal Defendants Are Entitled To The Same Federal Due Process Protections Afforded To Federal Defendants.

A. This Court Recognized In *Bousley* That New Interpretations Of Substantive Federal Criminal Statutes Apply Retroactively On Collateral Review.

This Court has already recognized that new interpretations of substantive *federal* criminal statutes apply retroactively to cases on collateral review. *Schriro v. Summerlin*, 542 U.S. 348, 351–52 (2004); *Bousley v. United States*, 523 U.S. 614, 620–21 (1998). This retroactivity rule from *Bousley* “includes decisions that narrow the scope of a criminal statute by interpreting its terms,” *Schriro*, 542 U.S. at 351–52 (citing *Bousley*, 523 U.S. at 620–21), which would encompass the New York Court of Appeals’ decisions adopting a narrower interpretation of the term “depraved indifference” in its murder statute.

The *Bousley* retroactivity rule is grounded in fundamental principles of constitutional due process. This Court has long held that the Due Process Clause of the Fourteenth Amendment “forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.” *Fiore*, 531 U.S. at 228–29 (citing *Jackson v. Virginia*, 443 U.S. 307, 316 (1979), and *In re Winship*, 397 U.S. 358, 364 (1970)). *Bousley* and *Schriro* thus explain that new interpretations which narrow the scope of substantive criminal statutes must “apply retroactively because they ‘necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal.’”

Schriro, 542 U.S. at 352 (quoting *Bousley*, 523 U.S. at 620 (internal quotation marks omitted)).

The fundamental nature of this retroactivity principle is reflected elsewhere in American criminal law. In the realm of criminal procedure, where new decisions generally are not retroactive, see *Teague v. Lane*, 489 U.S. 288 (1989), this Court has recognized an important exception ensuring retroactive application of new rules that “place[] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,” *id.* at 311 (internal quotation marks omitted), again reflecting the principle that a defendant may not remain imprisoned for an act that is not a crime. The Court likewise has maintained an exception to *Teague* preserving retroactivity for “watershed rules of criminal procedure,” *ibid.*, an exception that serves “to assure that no man has been incarcerated under a procedure that creates an impermissibly large risk that the innocent will be convicted,” *id.* at 312 (quoting *Desist v. United States*, 394 U.S. 244, 262 (1969)).

This Court has thus made abundantly clear that when one of its decisions “necessarily carr[ies] a significant risk that a defendant stands convicted of ‘an act that the law does not make criminal,’” federal due process requires that the decision be applied retroactively to cases on collateral review. *Bousley*, 523 U.S. at 620 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

B. Due Process Does Not Permit A State Court To Refuse Retroactive Application Of New Interpretations Holding That A Defendant's Conduct Is Legally Insufficient To Support His Conviction.

The *Bousley* rule cannot be understood as an exercise merely of this Court's authority to discern the meaning of federal statutes, announcing principles of statutory construction that state courts have no obligation to follow when deciding the meaning of their own laws. *Bousley* is a rule of constitutional pedigree, grounded in notions of fundamental fairness which, as incorporated by the Due Process Clause of the Fourteenth Amendment, are equally authoritative over both federal and state courts.

To be sure, States retain wide discretion to decide the content of their substantive criminal law. The New York state legislature is free to declare that depraved indifference murder shall no longer be treated as a distinct crime, yet to refuse relief to those convicted of the crime when it was proscribed.

But that is not what happened here. Instead, while the legislature left the statute unchanged, the New York Court of Appeals determined that its prior interpretation of the statutory text was incorrect. See, e.g., *Payne*, 819 N.E.2d at 635 ("Indifference to the victim's life * * * contrasts with the intent to take it."); cf. *Fiore*, 531 U.S. at 228 (Pennsylvania Supreme Court "did not announce a new rule of law," but rather "merely clarified the plain language of the statute").

In the criminal law, as elsewhere, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in

accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.” *Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (collecting cases). The New York courts now acknowledge that, under a correct interpretation of the depraved indifference murder statute, DiGuglielmo was legally innocent of that crime. And because the statute itself has not changed, the courts’ new interpretation of that statute must also have been the correct interpretation at the time DiGuglielmo’s conviction became final. See App., *infra*, 8a. Since DiGuglielmo was legally innocent of the crime at the time his conviction became final, the State’s refusal to apply this interpretation on collateral review violates constitutional due process. Cf. *Fiore*, 531 U.S. at 228–29 (citing *Jackson*, 443 U.S. at 316, and *In re Winship*, 397 U.S. at 364).

III. Review Is Warranted Because Petitioner Is Legally Innocent Of The Crime For Which He Stands Convicted.

There is no dispute that the facts here would not be legally sufficient to support a conviction for depraved indifference murder if the case were brought today. The State conceded as much in the lower courts. See Tr. of Oral Argument 27, *People v. DiGuglielmo*, 17 N.Y.3d 771 (2011). That concession is supported by the extensive findings issued by Justice Bellantoni, App., *infra*, 24a–44a—findings which have never been disturbed on appeal.

The sole reason that DiGuglielmo remains incarcerated is that the New York Court of Appeals refuses to apply its new interpretation retroactively to cases on collateral review. App., *infra*, 1a (citing *Policano*, 859 N.E.2d 484). Yet the retroactivity analysis in *Policano* bases that refusal on the very

same reasons this Court rejected as grounds for denying retroactivity in *Bousley*. Because the state courts' new interpretation of the depraved indifference murder statute establishes that DiGuglielmo is legally innocent of the crime for which he stands convicted, the Federal Due Process Clause requires that he be allowed invoke this new interpretation when challenging his conviction on state collateral review.

A. Petitioner's Conviction Under A Prior Interpretation Of The Depraved Indifference Murder Statute Could Not Be Sustained Under The State Courts' New Interpretation.

Depraved indifference murder traditionally has been reserved for acts that, while not deliberately intended to kill a particular victim, are so depravedly indifferent to their risk of harm that they are thought the moral equivalent of malice aforethought, *Register*, 457 N.E.2d at 707 & n.1—acts such as firing wild gunshots in the direction of a crowd or driving an automobile along a busy sidewalk at high speed. See *Rivera v. Cuomo*, --- F.3d ---, 2011 WL 3447445, at *7 (2d Cir. 2011) (collecting examples); Abraham Abramovsky & Jonathan I. Edelstein, *Depraved Indifference Murder Prosecutions in New York: Time for Substantive and Procedural Clarification*, 55 SYRACUSE L. REV. 455, 456–57 (2005).

Yet after the New York legislature codified the current version of its depraved indifference murder statute, the New York Court of Appeals initially departed from this traditional formulation and interpreted the depraved indifference element to require only that the circumstances of the crime present an exceptional risk of death, not that the defendant pos-

sess the characteristic mental state. See *Sanchez*, 777 N.E.2d at 208; *Register*, 457 N.E.2d at 707. On this interpretation, every intentional murder could also be charged as depraved indifference murder, because “the very facts establishing a risk of death approaching certainty and thus presenting compelling circumstantial evidence of intent * * * likewise demonstrated depraved indifference.” *Policano*, 859 N.E.2d at 493; accord *id.* at 492–93 (“*Register’s* standard for determining whether there are circumstances evincing a depraved indifference to human life was fulfilled if a defendant’s actions created an almost certain risk of death by, for example, shooting the victim in the head multiple times at close range.”).

After years of mischarging defendants like DiGuglielmo, the New York courts have now revised their interpretation of this statute to align the elements of the offense with its statutory language and tradition by recognizing “deliberate indifference” to require a characteristic *mens rea*—a *mens rea* that cannot exist “where the evidence produced at trial indicate[s] that if the defendant committed the homicide at all, he committed it with the conscious objective of killing the victim.” *Policano*, 859 N.E.2d at 493 (internal quotation marks omitted). This is because “a person cannot act both intentionally and recklessly with respect to the same result. * * * [I]ntentional and depraved indifference murder are inconsistent counts.” *Gonzalez*, 807 N.E.2d at 276.

DiGuglielmo could not be convicted of depraved indifference murder under this new interpretation. Under the statute as it is now understood, “[d]epraved indifference murder does not mean an extremely, even heinously, intentional killing.

Rather, it involves a killing in which the defendant *does not have a conscious objective to cause death* but instead is recklessly indifferent, depravedly so, to whether death occurs.” *Ibid.* (emphasis added). By contrast, all evidence in this case indicates that DiGuglielmo consciously intended to shoot his victim, albeit in a perceived act of defense. “[W]here, as here, a defendant’s conduct is specifically designed to cause the death of the victim, it simply cannot be said that the defendant is indifferent to the consequences of his or her conduct.” *Ibid.* Accordingly, DiGuglielmo could *only* be charged with intentional murder, ***a charge of which he was acquitted.*** DiGuglielmo is not guilty—and has never been guilty—of depraved indifference murder, the crime for which he stands convicted.⁴

⁴ Although the New York courts’ interpretation of “depraved indifference” has changed, the law itself has not. See App., *infra*, 8a. Depraved indifference murder is a statutory offense created by the state legislature, see N.Y. PENAL LAW § 125.25(2), and any changes to the statute must likewise be made by the legislature. Cf. *Register*, 457 N.E.2d at 707 (reviewing legislative development of current depraved indifference murder statute and its predecessor statutes). Since the legislature has not made any intervening changes to the statute in the time since DiGuglielmo’s conviction, the New York courts’ current interpretation of “depraved indifference” can only be understood as a clarification of what the statute has meant all along. “[I]t is not accurate to say that the [c]ourt’s decision[s] ‘changed’ the law”; they in fact “decided what [the statute] had always meant.” *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 323 n.12 (1994); see also *Bousley*, 523 U.S. at 620–21 (because “it is only Congress, not the courts, which can make conduct criminal,” a defendant may rely on subsequent court interpretations to demonstrate that the evidence underlying his earlier conviction was legally insufficient at the time of conviction).

B. The New York Court Of Appeals’ Refusal To Give Retroactive Effect To This New Interpretation Is Inconsistent With This Court’s Decision In *Bousley* And Violates Due Process.

Although legally innocent of the offense for which he was convicted, DiGuglielmo still sits in prison for a charge that is concededly invalid, solely because the New York Court of Appeals refuses to apply its new interpretation of the statute retroactively to cases on collateral review. See *Policano*, 859 N.E.2d at 495–96. The *Policano* court advanced three reasons for denying retroactivity: (1) retroactive application “would potentially flood the criminal justice system” with motions to vacate old convictions; (2) state prosecutors frequently relied on the former interpretation when making past charging decisions; and (3) “nonretroactivity poses no danger of a miscarriage of justice.” *Ibid.*

Whatever the merits of this analysis as a matter of state law, it does not satisfy the strictures of the Federal Due Process Clause. Indeed, the reasons recited by the *Policano* court are precisely those reasons that this court *rejected* when it held in *Bousley* that due process requires retroactivity for new interpretations of substantive federal criminal statutes.

In *Bousley* a dissenting justice raised the identical argument that allowing defendants to reopen final convictions on collateral review would “generate[] a flood” of litigation, 523 U.S. at 633, and would “plac[e] upon the criminal-justice system a burden it will be unable to bear,” *id.* at 634.⁵ Yet a majority of

⁵ Notably, the dissent limited this critique to the Court’s decision to apply new substantive rulings retroactively to convic-

this Court, rejecting that argument, held that due process requires a defendant who is legally innocent of a crime to be able to challenge that conviction on collateral review, notwithstanding whatever administrative burdens may follow. That position has become only sounder with time, as *Bousley* came and went without the sky falling on the federal justice system.

With respect to the State’s reliance argument, the *Bousley* dissent again raised similar concerns that prosecutors who rely on erroneous judicial interpretations of a criminal statute will be unfairly hobbled by retroactive corrections because, when a narrower interpretation is adopted years after a conviction becomes final, discarded evidence and faded memories may deprive prosecutors of a chance to produce additional facts that could sustain the conviction. See *id.* at 630–31. Once again, however, a majority of this Court found these concerns insufficient to deprive a defendant of his due process right to argue, on collateral review, that the evidence shows him to be legally innocent of the offense of conviction.

Nor can the State seriously maintain that denying retroactive application of its new interpretation “poses no danger of a miscarriage of justice.” To the contrary, just as in *Bousley*, “[p]etitioner’s conviction and punishment * * * ‘are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and present[s] ex-

tions *resulting from a guilty plea*. Even the dissent appears to have agreed with the majority that retroactive application is required for “cases that have actually gone to trial.” *Bousley*, 523 U.S. at 630.

ceptional circumstances that justify collateral relief.” *Id.* at 626 (Stevens, J., concurring in part and dissenting in part) (quoting *Davis*, 417 U.S. at 346–47 (internal quotation marks and alteration omitted)).

Finally, in its summary order stating that *Policano* precludes relief for DiGuglielmo, the New York Court of Appeals offered a single citation to *Wainwright v. Stone*, 414 U.S. 21, 23–24 (1973) (per curiam), for the proposition that *Policano* does not violate constitutional due process. App., *infra*, 1a. But *Wainwright* was a case about whether the defendants had *sufficient notice* that their conduct was proscribed, not whether their conduct *satisfied the elements* of the offense, and the sole sentence referencing retroactivity in *Wainwright* has no bearing on this case.⁶ Indeed, that *Wainwright* cannot support a court’s refusal to give retroactive effect to new interpretations of state criminal statutes should have been clear from this Court’s grant of certiorari in

⁶ *Wainwright* concerned a statute alleged to be void for vagueness, a flaw that can be cured by judicial adoption of a limiting construction. At the time of the defendants’ conduct, the Florida Supreme Court had adopted such a limiting construction, so the defendants could not show that the statute was vague as applied to them. See *Wainwright*, 414 U.S. at 22–23. Several years later, the Florida court declared that it was no longer willing to maintain that limiting construction without formal ratification by the state legislature; as a result, with no limiting construction in place, the statute was left unconstitutionally vague as applied against subsequent defendants. See *id.* at 23–24. This Court held that the *Wainwright* defendants, who had contemporaneous notice that their conduct was illegal, could not put themselves in the shoes of other defendants who did not have adequate notice of what conduct was proscribed. *Wainwright* thus turned on what notice was available to the defendants at the time of their conduct, not on what elements had to be proven at trial to establish guilt.

Fiore, which acknowledged that this critically important question was—and today remains—unsettled.

As *Bousley* illustrates, none of the State’s asserted justifications for refusing retroactive application of its new interpretation of the depraved indifference murder statute can support the denial of due process to DiGuglielmo and others who are unable to obtain relief despite being legally innocent of that crime. The “simple, inevitable conclusion” is that DiGuglielmo’s continued incarceration “fails to satisfy the Federal Constitution’s demands.” *Fiore*, 531 U.S. at 229. This Court should therefore grant review to ensure that innocent defendants like DiGuglielmo can continue to avail themselves of the fundamental protections guaranteed by the Federal Due Process Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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