American Bar Association
www.supremecourtpreview.org

No. 12-547

In the Supreme Court of the United States

LINDA METRISH, WARDEN, PETITIONER

v.

BURT LANCASTER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Laura L. Moody
Appellate Division Chief

Andrea M. Christensen
Assistant Attorney General
Appellate Division

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the Michigan Supreme Court's recognition that a state statute had abolished the long-maligned diminished-capacity defense was an "unexpected and indefensible" change in a common-law doctrine of criminal law under this Court's retroactivity jurisprudence. See *Rogers* v. *Tennessee*, 532 U.S. 451 (2001).

2. Whether the Michigan Court of Appeals' rejection of Lancaster's due-process claim was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" so as to justify habeas relief. *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011).

PARTIES TO THE PROCEEDING

There are no parties to the present proceeding other than those listed in the caption. The Petitioner is Linda Metrish, Warden of a Michigan correctional facility. The Respondent is Burt Lancaster, an inmate. In the proceedings below, Patricia L. Caruso, Director of the Michigan Department of Corrections, was also a habeas respondent.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved.... 2

Introduction 4

Statement of the Case 6

A. Toni King's murder 6

B. Lancaster's 1994 trial 7

C. Lancaster's 2005 trial 7

D. Federal habeas corpus proceedings 8

Summary of Argument 10

Argument 12

I. The Michigan state courts did not deny Lancaster due process by declining to allow him to present a diminished-capacity defense at his second trial. 12

A. Retroactive application of a state-law decision does not violate due process if the decision was expected and defensible. .. 12

B. The Michigan Supreme Court's *Carpenter* decision did not change Michigan law but merely recognized clear language of a pre-existing statute. 15

1. *Carpenter* correctly rejected the diminished-capacity defense based on a plain reading of the Michigan Legislature's 1975 enactment. 15

2. The federal courts should be hesitant before castigating a state's highest court for misreading its own state law and precedent.................................. 21

C. The Michigan Supreme Court's *Carpenter* decision was expected and defensible. 23

II. The Michigan Court of Appeals' decision rejecting Lancaster's due-process claim was objectively reasonable under AEDPA................ 26

Conclusion.. 29

TABLE OF AUTHORITIES

Cases

Allen v. *Duffy*,
4 N.W. 427 (Mich. 1880) 19

Arizona v. *Laffoon*,
610 P.2d 1045 (Ariz. 1980) 24

Barnett v. *Alabama*,
540 So. 2d 810 (Ala. Crim. App. 1988) 24

Batson v. *Kentucky*,
476 U.S. 79 (1986) 4, 7

Bouie v. *City of Columbia*,
378 U.S. 347 (1964) .... passim

Cardine v. *Indiana*,
475 N.E.2d 696 (Ind. 1985) 24

Cuypers v. *Minnesota*,
711 N.W.2d 100 (Minn. 2006) 24

Davis v. *Texas*,
313 S.W.3d 317 (Tex. Crim. App. 2010) 25

Demorest v. *City Bank Farmers Trust Co.*,
321 U.S. 36 (1944) 21

Engle v. *Isaac*,
456 U.S. 107 (1982) 22

Gruber v. *Owens-Illinois Inc.*,
899 F.2d 1366 (3d Cir. 1990) 17

Hagan v. *Caspari*,
50 F.3d 542 (8th Cir. 1995) 8, 20, 22

Harrington v. *Richter*,
131 S. Ct. 770 (2011) .... passim

Hawaii v. *Klafta*,
831 P.2d 512 (Haw. 1992) 24

Hodges v. *Florida*,
885 So. 2d 338 (Fla. 2003) 24

Howlett v. *Rose*,
496 U.S. 356 (1990) 5, 10, 21

In re Apportionment of State Legislature—1982,
321 N.W.2d 565 (Mich. 1982) 19

In re Christian S.,
872 P.2d 574 (Cal. 1994) 24

Iowa v. *Plowman*,
386 N.W.2d 546 (Iowa Ct. App. 1986) 24

Kansas v. *Pennington*,
132 P.3d 902 (Kan. 2006) 24

Keats v. *Wyoming*,
115 P.3d 1110 (Wyo. 2005) 25

LaGuerre v. *Reno*,
164 F.3d 1035 (7th Cir. 1998) 26

Lancaster v. *Adams*,
324 F.3d 423 (6th Cir. 2003) 7

Louisiana v. *Thompson*,
665 So. 2d 643 (La. Ct. App. 1995) 24

Maryland v. *Greco*,
24 A.3d 135 (Md. Ct. Spec. App. 2011) 24

Massachusetts v. *Finstein*,
687 N.E.2d 638 (Mass. 1997) 24

Memphis Natural Gas Co. v. *Beeler*,
315 U.S. 649 (1942) 21

Mincey v. *Head*,
206 F.3d 1106 (11th Cir. 2000) 24

New York Times v. *Sullivan*,
376 U.S. 254 (1964) 21

Niederstadt v. *Nixon*,
505 F.3d 832 (8th Cir. 2007) 5, 17

North Carolina v. *Adams*,
354 S.E.2d 338 (N.C. Ct. App. 1987) 24

O'Brien v. *United States*,
962 A.2d 282 (D.C. 2008) 24

Ohio v. *Wilcox*,
436 N.E.2d 523 (Ohio 1981) 24

Pannapula v. *Ashcroft*,
373 F.3d 480 (3d Cir. 2004)................................ 26

People v. *Burton*,
240 N.W.2d 239 (Mich. 1976)............................. 18

People v. *Carpenter*,
627 N.W.2d 276 (Mich. 2001)..................... passim

People v. *Doyle*,
545 N.W.2d 627 (Mich. 1996)....................... 19, 27

People v. *Fernandez*,
398 N.W.2d 311 (Mich. 1986)............................. 18

People v. *Griffin*,
444 N.W.2d 139 (Mich. 1989)............................. 18

People v. *Langworthy*,
331 N.W.2d 171 (Mich. 1982)............................. 18

People v. *Lloyd*,
590 N.W.2d 738 (Mich. 1999)............................. 18

People v. *Lynch*,
208 N.W.2d 656 (Mich. App. 1973) 15, 16

People v. *Mangiapane*,
271 N.W.2d 240 (Mich. Ct. App. 1978) 17, 18

People v. *Pickens*,
521 N.W.2d 797 (Mich. 1994)............................ 18

People v. *Ramsey*,
375 N.W.2d 297 (Mich. 1985)............................ 19

People v. *Wells*,
202 P.2d 53 (Cal. 1949) 23

People v. *White*,
172 Cal. Rptr. 612 (Cal. Ct. App. 1981)............ 24

Renico v. *Lett*,
130 S. Ct. 1855 (2010) 27, 28

Rogers v. *Tennessee*,
532 U.S. 451 (2001) .... passim

South Carolina v. *Santiago*,
634 S.E.2d 23 (S.C. Ct. App. 2006) 24

State v. *Burlison*,
583 N.W.2d 31 (Neb. 1998) 20

State v. *Redmond*,
262, 631 N.W.2d 501 (Neb. 2001) 20

Stevens v. *Mississippi*,
806 So. 2d 1031 (Miss. 2001)............................. 24

Stogner v. *California*,
539 U.S. 607 (2003) 25

Stop the Beach Renourishment, Inc. v. *Florida Dep't of Envtl. Protection*,
130 S. Ct. 2592 (2010) 22

Tennessee v. *Gosse*,
982 S.W.2d 349 (Tenn. Crim. App. 1997) 25

Ward v. *Love County Bd. of Comm'rs*,
253 U.S. 17 (1920) 21

Wiggins v. *Smith*,
539 U.S. 510 (2003) 27

Wolfe v. *North Carolina*,
364 U.S. 177 (1960) 21

Woodford v. *Viscotti*,
537 U.S. 19 (2002) 27

Yarborough v. *Alvarado*,
541 U.S. 652 (2004) 27

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254(d)(1) 27

28 U.S.C. § 2254(d)(1)(D) 11

28 U.S.C. § 2254(d)(2) 27

Cal. Penal Code § 25(a) 24

Mich. Comp. Laws § 330.1400a 3

Mich. Comp. Laws § 768.21a 3

Mich. Comp. Laws § 768.36(3) 15

Mich. Comp. Laws §768.21a(1) 15

Constitutional Provisions

28 U.S.C. § 2241 *et seq*. .... passim

U.S. Const. amend XIV 2

OPINIONS BELOW

The court of appeals' opinion, Pet. App. 1a–35a, is reported at 683 F.3d 740. The district court's amended opinion, Pet. App. 37a–54a, is reported at 735 F. Supp. 2d 750. The Michigan Court of Appeals' opinion, Pet. App. 76a–78a, is not reported but is available at 2006 WL 3751420.

JURISDICTION

The court of appeals' judgment was entered on June 29, 2012. Pet. App. 36a. A petition for rehearing en banc was denied on August 27, 2012, App. 83a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law[.]

Section 2254 of AEDPA, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 *et seq*.), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

At the time Lancaster committed murder in 1993, Mich. Comp. Laws § 768.21a defined legal insanity as follows:

> (1) A person is legally insane if, as a result of mental illness as defined in section 400a of Act No. 258 of the Public Acts of 1974, being section 330.1400a of the Michigan Compiled Laws, or as a result of mental retardation as defined in section 500(g) of Act No. 258 of the Public Acts of 1974, being section 330.1500 of the Michigan Compiled Laws, that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

At that same time, Mich. Comp. Laws § 330.1400a defined "mental illness" as follows:

> As used in this chapter, "mental illness" means a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.

INTRODUCTION

Burt Lancaster murdered his girlfriend in a parking lot in 1993. A jury rejected Lancaster's insanity and diminished-capacity defenses and convicted him of first-degree murder. But the conviction was vacated when a federal court found a *Batson* violation. Between Lancaster's first and second trials, the Michigan Supreme Court interpreted for the first time Michigan's 1975 statutory framework regarding mental incapacity. Because the statute was silent about diminished capacity, the court reasonably concluded that diminished capacity was not a valid defense to a crime. *People* v. *Carpenter*, 627 N.W.2d 276 (Mich. 2001). Accordingly, the state trial court forbade Lancaster from asserting the diminished-capacity defense at his second trial, and, following a bench trial, Lancaster was again convicted of murder.

The issue presented is whether the state trial court violated due process by barring Lancaster from asserting the diminished-capacity defense at his second trial. For two reasons, the answer is "no."

First, 18 years before Lancaster murdered his girlfriend, Michigan enacted a comprehensive law to determine when a person's mental incapacity excuses criminal responsibility. The statute does not allude to any mental condition other than insanity. Anyone reading the law could have concluded that diminished-capacity was not an enumerated affirmative defense. So the Michigan Supreme Court's *Carpenter* decision did not change the law at all; it merely recognized the law the Legislature had already enacted nearly two decades before Lancaster's criminal act.

And even if *Carpenter* is construed incorrectly as changing Michigan law, such change was readily foreseeable and did not deny Lancaster fair warning that he was barred from claiming diminished capacity if he killed someone. Thus, *Carpenter*'s application here does not violate due process. *Rogers* v. *Tennessee*, 532 U.S. 451, 462 (2001); *id.* at 470 (Scalia, J., dissenting).

Second, in analyzing Lancaster's claim, the Michigan state courts are entitled to two layers of deference. To begin, federal courts should respect the Michigan Supreme Court's pronouncement that it was the 1975 statute that abolished the diminished-capacity defense. *Howlett* v. *Rose*, 496 U.S. 356, 366 (1990); *Rogers*, 532 U.S. at 469 (Scalia, J., dissenting). Even in the absence of clear statutory language, until a "state's highest court has spoken on a particular point of state law, the law of the state necessarily must be regarded as unsettled." *Niederstadt* v. *Nixon*, 505 F.3d 832, 837 (8th Cir. 2007) (en banc) (quotation omitted). And a "ruling on an unsettled issue of state law will rarely if ever be unexpected and indefensible." *Id.*

In addition, the Michigan Court of Appeals held that *Carpenter* did not change Michigan law and was foreseeable. Pet. App. 77a–78a. Applying AEDPA deference, that holding was not an error "so well understood and comprehended in existing law" that it was "beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011). Indeed, of the 15 state and federal judges to whom this case has been presented, only the two in the Sixth Circuit majority have said there was constitutional error. The court of appeals should be reversed.

STATEMENT OF THE CASE

A. Toni King's murder

On April 22, 1993, Burt Lancaster spent several hours talking with his mother. Lancaster told her that his girlfriend, Toni King, had lied to him, hurt him, and she needed to die. J.A. 106–107, 143–44, 148–49, 151. Lancaster was a former Detroit police officer, and he asked his mother if he could have a gun. J.A. 107. She refused to give him one, so Lancaster broke into his mother's hallway closet, stole a gun, and fled. *Id.* Lancaster disabled his mother's phone, forcing her to run to the neighbor's home to call the police. *Id.*

Meanwhile, King and a co-worker, Julie Garner, departed work for lunch. J.A. 17. King drove the two of them to a bank, J.A. 17–18, where Garner noticed that Lancaster was following them in his black car. J.A. 18–19. At the bank, Lancaster got out of his car and talked with King while Garner went inside to cash a check. J.A. 19–24. Lancaster appeared "pretty calm." J.A. 23.

King rejoined Garner, and the two of them left the bank and drove to a Coney Island for lunch. J.A. 25. Lancaster again tailed them. J.A. 26. After the women parked at the Coney Island, Lancaster pulled into the parking lot behind them and asked to speak with King. J.A. 29. Lancaster still appeared calm. *Id.*

Garner left Lancaster and King to talk together privately and turned to enter the restaurant. J.A. 29–30. Just then, Garner heard King exclaim either "Burt" or "what." J.A. 33. Garner spun, heard something that sounded like "firecrackers," and saw King crumple to the ground. J.A. 34. A gun protruded from the driver's side of Lancaster's black car. J.A. 34, 36. Lancaster was the car's only occupant.

King died from injuries caused by the shooting.

B. Lancaster's 1994 trial

At his first trial, Lancaster asserted the defenses of insanity and diminished capacity. The jury rejected both defenses and found Lancaster guilty as charged.

After failing to obtain relief on his direct appeal in state court, Lancaster filed a petition for habeas relief in federal district court. The district court granted Lancaster habeas relief, concluding that there had been an error during jury selection under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The Sixth Circuit affirmed. *Lancaster* v. *Adams*, 324 F.3d 423 (6th Cir. 2003).

C. Lancaster's 2005 trial

The State retried Lancaster in 2005. But before trial, the court ruled that Lancaster could not present a diminished-capacity defense because the Michigan Supreme Court's intervening decision in *Carpenter* confirmed that the defense was not available in Michigan. J.A. 11. Lancaster made an offer of proof on his proposed "diminished capacity" defense after he failed to win an interlocutory appeal. J.A. 155–61, 164–

65. In response, the prosecutor made a counter-offer of proof that included Dr. Gail Farley's report from the forensic center that challenged Lancaster's claim of diminished capacity. J.A. 161–64. Following a bench trial, the state trial court again found Lancaster guilty of first-degree murder. J.A. 166–68.

On direct appeal, the Michigan Court of Appeals affirmed the conviction and held that the trial court did not violate Lancaster's due-process rights. The Michigan Court of Appeals concluded that the Michigan Supreme Court's *Carpenter* decision did not change state law and in any event was not unforeseeable. Pet. App. 77a–78a.

D. Federal habeas corpus proceedings

The district court denied Lancaster habeas relief because it also understood *Carpenter* to be a foreseeable application of Michigan law. The Michigan Supreme Court "never specifically authorized [the defense's] use in the Michigan courts," the defense had "never been codified by the legislature," and the theory "never enjoyed a solid foothold in Michigan's law," having "never served as a ground of decision in any murder case." Pet. App. 49a–51a. Accordingly, *Carpenter* was not "unexpected and indefensible" such as to result in a due-process violation. Pet. App. 51a. "The Supreme Court of [Michigan] is entitled to correct a lower court's mistaken reading of a state statute without running afoul of the Due Process Clause." Pet. App. 51a (quoting *Hagan* v. *Caspari*, 50 F.3d 542, 547 (8th Cir. 1995)).

The Sixth Circuit panel majority reversed, determining that the Michigan Court of Appeals unreasonably applied this Court's decisions in *Rogers* and *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). Pet. App. 26a–27a. The majority said that the Michigan Court of Appeals disregarded its own prior cases suggesting that a diminished-capacity defense might be available in Michigan, as well as the Michigan court rule that says published Michigan Court of Appeals opinions are binding on lower courts until reversed by the Michigan Supreme Court. Pet. App. 27a. The majority also relied on the fact that Michigan's standard jury instructions referenced the defense. Pet. App. 18a–19a.

Sixth Circuit Chief Judge Batchelder dissented, concluding that the Michigan Court of Appeals' decision was reasonable under *Rogers* and *Bouie* because the diminished-capacity defense was not well-established in Michigan, and the Michigan Supreme Court's decision in *Carpenter* was foreseeable. Pet. App. 29a–35a. The defense "never served as the basis for any court's decision," and even before *Carpenter*, "neither the Michigan legislature nor the Michigan courts gave diminished capacity standing as a separate defense." Pet. App. 32a. "Surely the legislature's choice not to codify diminished capacity is more significant than the state bar association's choice to include it in its publication of standard jury instructions." *Id*.

Since the Michigan Court of Appeals' conclusion was "consistent with *Rogers* and *Bouie*," the decision "was not 'so lacking in justification' as to entitle Lancaster to habeas relief." Pet. App. 31a (quoting *Harrington*, 131 S. Ct. at 786–87).

SUMMARY OF ARGUMENT

The Sixth Circuit's opinion granting habeas relief is flawed in two fundamental ways.

1. The Sixth Circuit misapplied this Court's decisions in *Rogers* v. *Tennessee*, 532 U.S. 451 (2001), and *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). Under those precedents, retroactive application of a state-court decision abolishing an affirmative defense violates federal due process *only* if the decision unexpectedly and indefensibly abrogated a consistent line of decisions recognizing the defense as well as adopted an interpretation that the governing statute's plain language does not support. The paramount questions under this standard focus on notice, foreseeability, and fair warning. *Rogers*, 532 U.S. at 462; *Bouie*, 378 U.S. at 458–59.

The diminished-capacity defense was not well-established in Michigan law before Lancaster murdered Toni King. Quite the opposite, Michigan abolished the defense in 1975, some 18 years before King's murder. It is true that intervening Michigan decisions assumed the diminished-capacity defense's viability without actually deciding that issue. But no Michigan appellate case ever affirmatively stated that this defense existed as a matter of Michigan law, and the Michigan Supreme Court in *Carpenter* did not view itself as changing Michigan law at all. That reasonable reading of the Michigan legal landscape is entitled to respect. *Howlett* v. *Rose*, 496 U.S. 356, 366 (1990).

At a bare minimum, the Michigan Supreme Court's interpretation of the 1975 statute and rejection of the diminished-capacity defense in *Carpenter* was expected and defensible. Nationwide, the defense had lost credibility, and many state courts and legislatures had repudiated the doctrine. As this Court noted in *Rogers*, common-law courts "frequently look to the decisions of other jurisdictions in determining whether to alter or modify a common law rule in light of changed circumstances, increased knowledge, and general logic and experience." 532 U.S. at 464. Given this trend in the law, it was entirely foreseeable that the Michigan Supreme Court would refuse to recognize the diminished-capacity defense when finally confronted squarely with the question of the doctrine's existence.

2. Under § 2254(d)(1)(D) of the Antiterrorism and Effective Death Penalty Act, a federal court may vacate a state conviction only if the conviction was "contrary to, or involved an unreasonable application of" this Court's "clearly established" law. 28 U.S.C. § 2254(d)(1)(D). Such a decision must constitute an error so "well understood and comprehended in existing law" that it was "beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011).

The state courts committed no such error here. To the contrary, the Michigan Court of Appeals result is entirely consistent with the reasoning of this Court's decisions in *Rogers* and *Bouie*. It cannot be said that the result is "beyond any possibility for fairminded disagreement."

Michigan respectfully asks this Court to reverse the court of appeals.

ARGUMENT

I. The Michigan state courts did not deny Lancaster due process by declining to allow him to present a diminished-capacity defense at his second trial.

A. Retroactive application of a state-law decision does not violate due process if the decision was expected and defensible.

In *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), this Court held that the South Carolina Supreme Court deprived two African-American college students their right to due process when a 1961 statutory construction was used to support convictions based on a sit-in that took place in 1960. The students sat down at an Eckerd's drug store lunch counter. *Id*. at 348. The restaurant department was reserved only for whites, but there were no signs or notices posted indicating that African-Americans would not be served. *Id*. An employee put up a "no trespassing" sign, and the manager twice asked the students to leave; they refused, and the manager phoned the police. *Id*. A police officer then asked the students to leave. When they again refused, the students were arrested and charged with breach of the peace and criminal trespass. *Id*. at 348–49.

The *Bouie* defendants claimed that they were denied due process of law because the statute failed to afford fair warning that the conduct for which they had been convicted had been made a crime. *Id*. at 349. This Court agreed, holding that the South Carolina Supreme Court violated due process by applying a

brand new statutory construction (the statute covered not only the act of *entering* the premises of another after receiving notice not to enter, but also the act of *remaining* on the premises after receiving notice to leave) to conduct that took place one and a half years before the decision. *Id*. at 350. There was no fair warning that the defendants' conduct was prohibited at the time they engaged in it. *Id*. at 350–51.

Significantly, the legal rule the South Carolina Supreme Court announced in *Bouie* conflicted directly with the relevant statutory language. Whereas the statute required notice "prohibiting such *entry*," *id*. at 349 n.1 (emphasis added), the South Carolina Supreme Court held the *Bouie* defendants criminally responsible for *remaining* on premises after being asked to leave. This was an "unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id*. at 352. A judicial construction of a criminal statute must not be given retroactive effect if it is "unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue." *Id*. at 354 (internal quotations omitted).

This Court applied the *Bouie* analysis in *Rogers*. There, the Tennessee Supreme Court abolished the common-law rule that the death of a victim within a year and a day after being assaulted is a prerequisite to a homicide prosecution. The state court applied that abolition when it upheld a murder conviction where, because of a coma and resulting complications, the victim died 15 months after the assault. On direct review, this Court upheld the conviction, holding that the Tennessee Supreme Court's retroactive abolition of the "year and a day" rule did not violate due process.

First, the Court reasoned that abolition of the "year and a day" rule was not unexpected or indefensible because it was based on an "outdated relic of the common law." *Rogers*, 532 U.S. at 462. Second, "the fact that a vast number of [other] jurisdictions have abolished a rule that has so clearly outlived its purpose is surely relevant to whether the abolition of the rule in a particular case can be said to be unexpected and indefensible by reference to the law as it then existed." *Id*. at 463–64. Because the state court's abolition of the year-and-a-day rule was foreseeable, the Tennessee Supreme Court did not violate Rogers' due-process rights.

In sum, leaving aside the deference owed on habeas review, the federal courts' role in this dispute is to determine whether the Michigan Supreme Court's decision in *Carpenter* was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers*, 532 U.S. at 461 (quoting *Bouie*, 378 U.S. at 354).

As explained below, *Carpenter* was not unexpected and indefensible. Indeed, *Carpenter* is the exact opposite of the situation presented in *Bouie*. Whereas the Tennessee Supreme Court effected an "unforeseeable and retroactive judicial expansion of narrow and precise statutory language," *Bouie*, 378 at 352, the Michigan Supreme Court properly applied narrow and precise statutory language that had existed for many years before Lancaster committed murder. When a state court follows the plain language of a state statute, it is not *changing* state law, it is *applying* it.

B. The Michigan Supreme Court's *Carpenter* decision did not change Michigan law but merely recognized clear language of a pre-existing statute.

1. *Carpenter* correctly rejected the diminished-capacity defense based on a plain reading of the Michigan Legislature's 1975 enactment.

A panel of the Michigan Court of Appeals first suggested the possibility of a diminished-capacity defense in 1973. *People* v. *Lynch*, 208 N.W.2d 656 (Mich. App. 1973). But only two years later, the Michigan Legislature adopted Public Act 180, a comprehensive statutory framework addressing mental incapacity as a defense to criminal acts. Significantly, the statute addresses persons who are mentally ill but not legally insane, authorizing them to be found "guilty but mentally ill." Mich. Comp. Laws § 768.36(3). But the statute said nothing about diminished capacity as an available defense:

> A person is legally insane if, as a result of mental illness as defined in section 400a of Act No. 258 of the Public Acts of 1974, being section 330.1400a of the Michigan Compiled Laws, or as a result of mental retardation as defined in section 500(g) of Act No. 258 of the Public Acts of 1974, being section 330.1500 of the Michigan Compiled Laws, that person *lacks substantial capacity* either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. [Mich. Comp. Laws §768.21a(1) (emphasis added).]

In enacting this statutory framework, the Michigan Legislature "conclusively determined when mental incapacity can serve as a basis for relieving one from criminal responsibility." *Carpenter*, 627 N.W.2d at 283. In essence, it is an "all or nothing insanity defense." *Id.* And by expressly providing for the mentally ill yet not legally insane, "the Legislature has demonstrated its policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent." *Id.* In other words, the Legislature left no room in Michigan law for the diminished-capacity defense that *Lynch* had suggested.

Most important, the Michigan Supreme Court did not view itself as changing Michigan law. The court noted that "[s]ince its inception in the United States, the diminished capacity defense has been the subject of much debate." *Id.* at 282. But the court said it "need not join the affray." *Id.* That is because the Michigan "Legislature, by enacting the comprehensive statutory framework . . ., has *already* conclusively determined when mental incapacity can serve as a basis for relieving one from criminal responsibility." *Id.* (emphasis added). In other words, the court did not believe it was reversing a Michigan common law precedent. The court viewed itself as "*declin[ing] to adopt* an alternative defense to legal insanity 'that could swallow up the insanity defense and its attendant commitment provisions." *Id.* at 284 (emphasis added, quotation omitted). The "insanity defense as established by the Legislature is the *sole* standard for determining criminal responsibility as it relates to mental illness or retardation." *Id.* at 285 (emphasis added).

So the decision did not change Michigan law; it merely recognized the plain language of the governing statute. And as the first Michigan Supreme Court decision interpreting the statute, the Michigan Supreme Court's reasonable reading is binding on this Court. *Rogers*, 532 U.S. at 469 (Scalia, J. dissenting).

The Sixth Circuit panel majority viewed Michigan precedent differently. According to the majority, the Michigan Court of Appeals continued to recognize diminished capacity in *People* v. *Mangiapane*, 271 N.W.2d 240 (Mich. Ct. App. 1978), and its progeny. Pet. App. 10a–11a. As a threshold matter, such precedent is irrelevant given the plain import of the 1975 statute. Moreover, even in the absence of clear statutory language, until a "state's highest court has spoken on a particular point of state law, the law of the state necessarily must be regarded as unsettled." *Niederstadt*, 505 F.3d at 837 (quotation omitted).[1] And a "ruling on an unsettled issue of state law will rarely if ever be unexpected and indefensible." *Id.*

Equally important, the Sixth Circuit panel majority misinterpreted Michigan law. As the Michigan Supreme Court explained in *Carpenter*, the Michigan Court of Appeals decision in *Mangiapane* involved a defendant who did not raise the diminished-capacity defense at trial or provide the prosecution

---

[1] This is consistent with how federal courts undertake a traditional *Erie* analysis. While state supreme court decisions are binding, in the absence of a state supreme court decision, the federal court must *predict* how the state supreme court would rule, taking into account all relevant data including decisions of the state intermediate appellate courts. *Gruber* v. *Owens-Illinois Inc.*, 899 F.2d 1366, 1369–70 (3d Cir. 1990).

notice, as the mental-capacity statute required. *Carpenter*, 627 N.W.2d at 282. Assuming (but not deciding) that such a defense even existed, the Michigan Court of Appeals simply said that a defendant asserting the defense "had to fully comply" with the statutory notice provisions. *Id.* (citing *Mangiapane*).

Other Michigan Court of Appeals cases that the panel majority cited also assumed the doctrine's existence without deciding that point. Pet. App. 11a. So did a number of Michigan Supreme Court cases. *People* v. *Lloyd*, 590 N.W.2d 738, 745 (Mich. 1999) (defense counsel's presentation of merged defense of no premeditation and diminished capacity did not constitute ineffective assistance); *People* v. *Pickens*, 521 N.W.2d 797, 812 (Mich. 1994) (defense counsel's decision to pursue insanity defense but not diminished-capacity defense was not ineffective assistance); *People* v. *Griffin*, 444 N.W.2d 139, 140 (Mich. 1989) (three-paragraph summary order remanding so trial court could consider whether counsel was ineffective for failing to explore defenses of diminished capacity and insanity); *People* v. *Fernandez*, 398 N.W.2d 311, 320 (Mich. 1986) (declining to address diminished capacity vis-à-vis voluntary intoxication as the question was not presented); *People* v. *Langworthy*, 331 N.W.2d 171, 178 (Mich. 1982) (declining to adopt California's diminished-capacity, voluntary-intoxication defense due to it being significantly undermined by California statute and case law); *People* v. *Burton*, 240 N.W.2d 239, 241 (Mich. 1976) (trial judge need not advise a defendant pleading guilty of "potential" defenses such as provocation and diminished capacity).

But under Michigan law, a judicial opinion's mere *assumption* of a point is not considered to have been decided. *In re Apportionment of State Legislature—1982*, 321 N.W.2d 565, 571 (Mich. 1982); *Allen* v. *Duffy*, 4 N.W. 427, 434 (Mich. 1880). And as early as 1985—eight years *before* Lancaster murdered King—the Michigan Supreme Court expressed its disapproval of a diminished-capacity defense. *People* v. *Ramsey*, 375 N.W.2d 297, 304 (Mich. 1985) ("A finding of mental illness, even when defined as a substantial disorder of thought or mood, does not inexorably lead to the conclusion that the defendant did not entertain the requisite malice aforethought for murder."). In fact, prior to *Carpenter*, no Michigan appellate case ever affirmatively stated that the defense existed as a matter of Michigan law. Pet. App. 51a. As the district court below recognized, it was not until *Carpenter* that the Michigan Supreme Court "addressed the question[ ] which it had left open." Pet. App. 51a.

The Sixth Circuit panel majority also misinterpreted Michigan law in other ways. For example, it is of no moment that published Michigan Court of Appeals decisions are binding on Michigan trial courts. Pet. App. 9a–12a. The Michigan Supreme Court has recognized that principle yet nonetheless held that such "law" cannot trump statutory language that, as here, is "unambiguous and clear." *People* v. *Doyle*, 545 N.W.2d 627, 635 (Mich. 1996).

Nor is it relevant that some Michigan standard jury instructions included the diminished-capacity defense. Pet. App. 18a–19a. The panel majority below recognized that the instructions are authorized by the state bar association and are "not officially sanctioned

by the Michigan Supreme Court." Pet. App. 18a. And as Chief Judge Batchelder correctly observed: "Surely the legislature's choice not to codify diminished capacity is more significant than the state bar association's choice to include it in its publication of standard jury instructions." Pet. App. 32a.

This legal history makes this case much easier than the Tennessee Supreme Court's abolishment of the so-called year-and-a-day rule at issue in *Rogers*. Unlike the year-and-a-day rule, the diminished-capacity defense had been superseded not by a common law decision, but by a comprehensive mental-illness *statute* that left no room for the defense and pre-dated Lancaster's crime by nearly two decades.[2]

"The interpretation and exposition of state law is the prerogative of the state's highest court." *Hagan*, 50 F.3d at 547. Thus, when the Michigan Court of Appeals issues a line of cases that assumes (without definitively deciding) that a common-law defense is available, the "Supreme Court of [Michigan] is entitled to correct a lower court's mistaken reading of a state statute without running afoul of the Due Process Clause." *Id.* *Carpenter* therefore did not effect a change in Michigan law.

[2] The most significant source for interpreting a state statute is, of course, the provision's plain language. *State* v. *Redmond*, 262, 631 N.W.2d 501, 508–509 (Neb. 2001) ("Although [*State* v.] *Burlison*[,] 583 N.W.2d 31 (Neb. 1998)] overruled a line of cases, the prior cases were not without obvious disagreement. Further, this court's interpretation of [the statute] before *Burlison* was in direct contradiction to the plain meaning of the statute.").

2. The federal courts should be hesitant before castigating a state's highest court for misreading its own state law and precedent.

This Court conducts limited, highly deferential review of state-court interpretations of state law that a party challenges as violating federal rights. Indeed, state-law questions are "conclusively settled by the decisions of the state court save only as this Court, in the performance of its duty to safeguard an asserted constitutional right, may inquire whether the decision of the state question rests upon a fair or substantial basis." *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649, 654 (1942) (citation omitted). This Court will reject a state-court interpretation of a state-law issue only if the state court's decision was "without any fair or substantial support." *Howlett*, 496 U.S. at 366; *New York Times* v. *Sullivan*, 376 U.S. 254, 265 n.4 (1964); *Wolfe* v. *North Carolina*, 364 U.S. 177, 185–86 (1960); *Ward* v. *Love County Bd. of Comm'rs*, 253 U.S. 17, 22 (1920). In other words, if the state-court ruling "has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court." *Demorest* v. *City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944) (quotation omitted).

There are good reasons why federal courts should show more caution in reviewing state interpretations of state law than did the Sixth Circuit panel majority. To begin, state courts are more familiar with their own law and have a significant advantage relative to federal courts. More significant, it is difficult to discern

a common-law rule from intermediate state court decisions. Those decisions' meaning and significance is often subject to disagreement, especially when assessed by someone who is not a regular participant in the state judicial system. Such considerations should dissuade the federal courts from correcting allegedly erroneous interpretations of state law. Otherwise, "every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question." *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982) (citation omitted).

These considerations are even stronger in the specific context presented here. As the Eighth Circuit has explained, it is doubtful "whether a state supreme court's overruling of an intermediate appellate court decision *ever* can constitute a change in state law for due process purposes." *Hagan*, 50 F.3d at 547 (emphasis added). In the absence of a clear statute, "until the state's highest court has spoken on a particular point of state law, the law of the state necessarily must be regarded as unsettled." *Id*.

Thus, the "reasonable reading of state law by the State's highest court is binding upon [this Court]." *Rogers*, 532 U.S. at 469 (Scalia, J., dissenting). Cf. *Stop the Beach Renourishment*, *Inc*. v. *Florida Dep't of Envtl*. *Protection*, 130 S. Ct. 2592, 2612 (2010) (Scalia, J., plurality opinion) (deferring to state-court precedent even though the "result under Florida law may seem counter-intuitive"). The Sixth Circuit erred in second-guessing the Michigan Supreme Court's (and Michigan Court of Appeals') interpretation of Michigan law.

C. The Michigan Supreme Court's *Carpenter* decision was expected and defensible.

As this Court explained in *Rogers*, *Bouie*'s due-process restriction on judicial interpretation of criminal statutes is limited to those interpretations "that are 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Rogers*, 532 U.S. at 461 (quoting *Bouie*, 378 U.S. at 354). This Court described the touchstones of the due-process analysis as "notice, foreseeability, and, in particular, the right to fair warning." 532 U.S. at 459 (citing *Bouie*, 378 U.S. at 351, 352, 354–55). Accordingly, while due process "does not require a person to apprise himself of the common law of all 50 States in order to guarantee that his actions will not subject him to punishment in light of a developing trend in the law," the "fact that a vast number of jurisdictions have abolished a rule that has so clearly outlived its purpose is surely relevant to whether the abolition of the rule in a particular case can be said to be unexpected and indefensible." *Id*. at 464.

Here, wholly aside from the plain import of Michigan's 1975 mental-illness statute, the nationwide trend regarding the diminished-capacity defense foreshadowed *Carpenter*. Thus, *Carpenter* was both foreseeable and defensible.

The diminished-capacity defense has a checkered history. In 1949, California became the first state to acknowledge the defense. *People* v. *Wells*, 202 P.2d 53 (Cal. 1949). Other states began to follow suit. But the defense began losing its legitimacy after a California jury used it to convict a defendant of a reduced charge of manslaughter (rather than murder) for the killing of

two individuals in San Francisco. The defendant in that case argued that a chemical imbalance caused by consuming too much "junk food" (including most famously "twinkies") exacerbated his pre-existing mental difficulties. *People* v. *White*, 172 Cal. Rptr. 612 (Cal. Ct. App. 1981). The California Legislature abolished the defense in response to public outcry. *In re Christian S.*, 872 P.2d 574, 575 (Cal. 1994).

Consequently, the "twinkie" defense (diminished capacity) had been receding in state jurisprudence long before Lancaster's trials. Some state legislatures wrote the defense out of their state laws, while in other jurisdictions, the state courts held that their case law did not support such a defense. Pet. App. 33a, n.1 (Batchelder, C.J., dissenting) (citing Cal. Penal Code § 25(a)); *Mincey* v. *Head*, 206 F.3d 1106, 1139 (11th Cir. 2000); *Barnett* v. *Alabama*, 540 So. 2d 810, 812 (Ala. Crim. App. 1988); *Arizona* v. *Laffoon*, 610 P.2d 1045, 1047 (Ariz. 1980); *O'Brien* v. *United States*, 962 A.2d 282, 300–01 (D.C. 2008); *Hodges* v. *Florida*, 885 So. 2d 338, 352 n.8 (Fla. 2003); *Hawaii* v. *Klafta*, 831 P.2d 512 (Haw. 1992); *Cardine* v. *Indiana*, 475 N.E.2d 696, 698 (Ind. 1985); *Iowa* v. *Plowman*, 386 N.W.2d 546, 548 (Iowa Ct. App. 1986); *Kansas* v. *Pennington*, 132 P.3d 902, 908 (Kan. 2006); *Louisiana* v. *Thompson*, 665 So. 2d 643, 647 (La. Ct. App. 1995); *Maryland* v. *Greco*, 24 A.3d 135, 144 (Md. Ct. Spec. App. 2011); *Massachusetts* v. *Finstein*, 687 N.E.2d 638, 640 (Mass. 1997); *Cuypers* v. *Minnesota*, 711 N.W.2d 100, 105 (Minn. 2006); *Stevens* v. *Mississippi*, 806 So. 2d 1031, 1051 (Miss. 2001); *North Carolina* v. *Adams*, 354 S.E.2d 338, 343 (N.C. Ct. App. 1987); *Ohio* v. *Wilcox*, 436 N.E.2d 523, 533 (Ohio 1981); *South Carolina* v. *Santiago*, 634 S.E.2d 23, 28 (S.C. Ct. App. 2006);

Tennessee v. *Gosse*, 982 S.W.2d 349, 353 (Tenn. Crim. App. 1997); *Davis* v. *Texas*, 313 S.W.3d 317, 328 (Tex. Crim. App. 2010); *Keats* v. *Wyoming*, 115 P.3d 1110, 1119 (Wyo. 2005)).

As this Court noted in *Rogers*, common-law courts "frequently look to the decisions of other jurisdictions in determining whether to alter or modify a common law rule in light of changed circumstances, increased knowledge, and general logic and experience." 532 U.S. at 464. Like the Tennessee Supreme Court's decision in *Rogers*, there was nothing about the Michigan Supreme Court's *Carpenter* decision that was "unexpected and indefensible," *id*. at 466, even if one ignores the plain language of the 1975 mental-illness statute.

It is also difficult to discern how Lancaster can argue that he lacked "fair warning" of the possibility that he might not be able to assert a diminished-capacity defense if he killed someone. *Rogers*, 532 U.S. at 459; *id*. at 470 (Scalia, J. dissenting); *Stogner* v. *California*, 539 U.S. 607, 650 (2003) (Kennedy, J., dissenting) ("We should consider whether it is warranted to presume that criminals keep calendars so they can mark the day to discard their records or to pace a gloating phone call to the victim. . . . The reliance . . . does not exist as part of our traditions or social understanding."). Such an argument assumes that Lancaster relied on the defense's existence when he murdered Toni King. And as the Third and Seventh Circuits have reasoned, "it would border on the absurd" to argue that a person would refrain from committing crimes or conduct his trial differently if he had known that a mental-capacity defense would no longer be

available to him. *Pannapula* v. *Ashcroft*, 373 F.3d 480, 495–96 n.14 (3d Cir. 2004) (quoting *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998)). Objectively, a person cannot assert that he had the mental ability to appreciate the availability of a defense while simultaneously arguing that he lacked the mental capacity to form the intent required to support a murder conviction.

Indeed, this paradox is categorically true of all defendants seeking to avoid criminal responsibility by the application of a mental-capacity defense. The very nature of the defense (lack of mental capacity) precludes such reliance. If Lancaster is truthful when he asserts that he lacked the capacity to form the intent for murder, then it is equally true that Lancaster could not have relied on the diminished-capacity defense as the way to avoid being convicted of first-degree murder.

II. The Michigan Court of Appeals' decision rejecting Lancaster's due-process claim was objectively reasonable under AEDPA.

The state trial court's decision preventing Lancaster from asserting a diminished-capacity defense at his retrial is consistent with this Court's decisions in *Bouie* and *Rogers*. But the issue before the Sixth Circuit on federal habeas review was even more limited: whether, through the lens of AEDPA, the Michigan Court of Appeals' rejection of Lancaster's due-process claim was an objectively unreasonable application of clearly established federal law.

AEDPA authorizes a federal court to issue a writ of habeas corpus only if the state-court decision on a federal issue "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or it amounted to "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). Under AEDPA's standard of review, mere error by the state court does not justify the issuance of the writ; rather, the state court's application of federal law must have been objectively unreasonable. *Wiggins* v. *Smith*, 539 U.S. 510, 520–21 (2003).

An unreasonable application of federal law is different from an incorrect application of federal law. In *Harrington*, this Court reiterated that AEDPA requires federal habeas courts to review state-court decisions with "deference and latitude," and "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." 131 S. Ct. at 786 (quoting *Yarborough* v. *Alvarado*, 541 U.S. 652, 661 (2004)). AEDPA thus imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be "given the benefit of the doubt." *Renico* v. *Lett*, 130 S. Ct. 1855, 1862 (2010) (citing *Woodford* v. *Viscotti*, 537 U.S. 19, 24 (2002)).

The Michigan Court of Appeals rejected Lancaster's due-process claim because it reasonably concluded that *Carpenter* did not represent a change in state law. That is true as a matter of Michigan law. *People* v. *Doyle*, 545 N.W.2d 627, 634–35 (Mich. 1996)

(a Michigan Supreme Court decision that interprets an unambiguous statute for the first time does not change the law even if it reverses a contrary Michigan Court of Appeals decision). Accord Part I.B., *supra*.

The Michigan Court of Appeals' holding was also reasonable for a second reason. Based on *Rogers*'s analysis, any purported change in Michigan law was not "unexpected and indefensible." See Part I.C, *supra*.

Moreover, it cannot be said that a state-court decision was so lacking in justification and "beyond any possibility for fairminded disagreement" in a case where the trial court judge adjudicated the issue, a three-judge panel of a state intermediate appeals court affirmed, seven state supreme court justices saw no error sufficient to warrant further review, a federal district judge declined to set aside the result under habeas review, and a chief judge of a federal circuit agreed with the district court. Indeed, of the 15 state and federal judges who have been presented with this case, only two judges—the members of the Sixth Circuit panel majority—have issued an opinion concluding that there was a constitutional violation.

In sum, the Michigan Court of Appeals' decision rejecting Lancaster's due-process claim was not an objectively unreasonable application of this Court's precedent. So the Sixth Circuit has done precisely what AEDPA proscribes: "using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico* v. *Lett*, 130 S. Ct. 1855, 1866 (2010).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Laura Moody
Appellate Division Chief

Andrea M. Christensen
Assistant Attorney General
Appellate Division

Attorneys for Petitioner

Dated: MARCH 2013