No. 12-547

IN THE
Supreme Court of the United States

LINDA METRISH, Warden,

Petitioner,

v.

BURT LANCASTER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, ARIZONA, COLORADO, IDAHO, ILLINOIS, IOWA, KANSAS, KENTUCKY, MONTANA, NEW MEXICO, SOUTH CAROLINA, UTAH, WASHINGTON AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

Counsel for *Amici Curiae*

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER
Solicit General
(Counsel of Record)
ASHLEY TATMAN HARWEL
HEATHER HAGAN MCVEIGH
Deputy Attorneys General

(Additional counsel listed on inside cover)

ADDITIONAL COUNSEL

LUTHER STRANGE
Attorney General
State of Alabama

TOM HORNE
Attorney General
State of Arizona

JOHN W. SUTHERS
Attorney General
State of Colorado

LAWRENCE G. WASDEN
Attorney General
State of Idaho

LISA MADIGAN
Attorney General
State of Illinois

TOM MILLER
Attorney General
State of Iowa

JACK CONWAY
Attorney General
State of Kentucky

DEREK SCHMIDT
Attorney General
State of Kansas

TIMOTHY C. FOX
Attorney General
State of Montana

GARY KING
Attorney General
State of New Mexico

ALAN WILSON
Attorney General
State of South Carolina

JOHN E. SWALLOW
Attorney General
State of Utah

ROBERT W. FERGUSON
Attorney General
State of Washington

GREGORY A. PHILLIPS
Attorney General
State of Wyoming

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).

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INTEREST OF THE *AMICI* STATES

The *amici* States hae a compelling interest in ensuring that federal courts uphold criminal convictions absent state court rulings that are "contrary to or an unreasonable application of" the Court's precedents. They also have a more specific interest in defending their own courts' determinations of state law against federal court interference. Furthermore, as sovereign operators of the nation's front-line criminal justice systems, states have a compelling interest in maintaining flexibility in developing substantive criminal law standards, consistent with due process and other Constitutional protections.

The decision below contravenes these interests. The Sixth Circuit overrode the Michigan judiciary's retroactive application of its conclusion that the legislature had eliminated diminished capacity as a defense to premeditated murder. For purposes of applying the Court's due process retroactivity precedents, however, there is a logical disconnection between a criminal defendant's asserted "diminished capacity" to form the specific intent necessary for premeditated murder, and the interests of "fair notice" that underlie the due process rule applied below. Furthermore, it is not clear how the Michigan courts could have unreasonably applied *this* Court's precedents when interpreting *state law* to support retroactive application of the diminished capacity defense rule.

SUMMARY OF THE ARGUMENT

The decision below invalidated the premeditated murder conviction of Burt Lancaster because he lacked "fair warning" before he killed his girlfriend that his supposed "diminished capacity" would not be a defense to prosecution. According to the Sixth Circuit, refusing to permit Lancaster to assert a diminished capacity defense that supposedly existed when he murdered Toni King burdened his right to due process, which "turns upon . . . the *appearance to the individual* of the status of state law as of that moment [when the crime was allegedly committed]." Pet. App. at 6a-7a (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (emphasis added)). The Sixth Circuit did not address whether, if such "fair warning" could possibly have impacted Lancaster's decision to kill King, he could nonetheless plausibly have suffered from the diminished mental capacity he asserted at trial.

On a basic level, it makes no sense to apply the *Bouie* foreseeability test to a diminished capacity defense. Fair warning can be important in situations involving, for example, claims of self-defense, where a defendant might actually have relied on knowledge of the law when deciding whether to use deadly force. But where, as is true here, such cognitive reliance would itself render the defense (lack of sufficient cognition) wholly inapplicable, there can be no due process concern.

Furthermore, the Sixth Circuit did not give the Michigan courts proper deference under AEDPA. Retroactivity is a matter of interpreting state law and is not subject to federal habeas review.

ARGUMENT

I. Retroactive Elimination of a "Diminished Capacity" Defense Cannot Be an "Unreasonable Application" of "Fair Warning" Due Process Precedents

The due process right vindicated by *Bouie* and *Rogers* is "[t]he basic principle that a criminal statute must give *fair warning* of the conduct that it makes a crime . . . ." *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964) (emphasis added); *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001) (explaining that *Bouie*'s "rationale rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning"). "Courts are concerned about notice, forseeability, and fair warning because it is expected that both statutes and judicial interpretations of those statutes affect the behavior of the public. . . . If, however, the change in question would not have had an effect on anyone's behavior, notice concerns are minimized." *United States v. Barton*, 455 F.3d 649, 654-55 (6th Cir. 2006).

In the context of a diminished capacity defense, the *Bouie* standard makes little sense. If Burt Lancaster had truly suffered from diminished

capacity at the time he killed Toni King, he would not have had the mental capacity to foresee that he could rely on the defense at trial. The diminished capacity defense "allows a defendant, even though legally sane, to offer evidence of some mental abnormality to negate the specific intent required to commit a particular crime." *People v. Carpenter*, 627 N.W.2d 276, 280 (Mich. 2001). A person who does not possess the mental capacity necessary for premeditation of murder cannot have the mental capacity to forecast whether that incapacity may be a defense to prosecution. Yet the decision below premised its decision on precisely that fantastical conceit. Pet. App. at 23a ("Lancaster could not have reasonably foreseen in 1993—when his crime was committed—that the consistent line of Michigan Court of Appeals' decisions upholding the diminished-capacity defense would have been overturned before his retrial in 2005."). The specific circumstance of a diminished capacity defense consequently eliminates the primary rationale—to require "fair warning"—for applying *Bouie*.

1. For most traditional affirmative defenses, such as self-defense and coercion, it makes sense that criminal defendants might plausibly consider the availability of the defense when choosing to engage in the conduct the state nonetheless charges as a crime. For example, if "Jane Doe chooses to kill John Smith when he threatens her with substantial bodily harm or death[,] Doe has a right to rely on the representation of her state legislature that her

conduct is legal. If the State then were to . . . not permit her to plead self-defense, [that denial] undoubtedly would violate principles of fundamental fairness." *Gilmore v. Taylor*, 508 U.S. 333, 359 (1993) (Blackmun, J., dissenting). Similarly, a defendant compelled to abet a murder must be able to invoke that defense if the law at the time did not give notice that the defense was unavailable. *United States ex rel. Reed v. Lane*, 759 F.2d 618, 623-24 (7th Cir. 1985).

The nature of the defenses at issue in *Gilmore* and *Reed* did not inherently negate the defendant's capacity to consider the law. Thus, even if the defendants had not actually studied state criminal statutes and court decisions before committing the crime, it makes sense in those cases to presume that they knew (and relied upon) the law. *See Atkins v. Parker*, 472 U.S. 115, 130 (1985).

Indeed, defendants legitimately benefit from the "fair notice" standard when it applies to retroactive judicial negation of many defenses listed in the Model Penal Code. Accused criminals might feasibly be deterred from illegal conduct in at least some cases by fair notice that the judiciary may be poised to eliminate the following MPC defenses:

- intoxication (MPC § 2.08)
- duress (MPC § 2.09)[1]
- military order (MPC § 2.10)
- consent (MPC § 2.11)
- de minimis infraction (MPC § 2.12)
- entrapment (MPC § 2.13)
- defense of self (MPC § 3.04)[2]
- defense of others (MPC §§ 3.05, 3.08)
- defense of property (MPC § 3.06)
- effectuation of arrest (MPC § 3.07)
- prevention of escape (MPC § 3.07)
- prevention of crime (MPC § 3.07)

Accordingly, as a general matter the Court's "fair notice" standard sensibly applies to most cases where courts retroactively vitiate affirmative defenses.

2. With a few MPC defenses, however, a defendant who commits a crime based on assumptions about the defense could not plausibly make use of the defense, so "fair notice" about judicial elimination should not be relevant. This category includes factual ignorance or mistake (MPC § 2.04) and insanity (MPC § 4.01), and may also include most cases of assisting an unlawful arrest

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[1] *See Reed*, 759 F.2d at 623-24 (holding that fair warning was the proper standard for retroactive vitiation of the coercion/duress defense).

[2] *See Gilmore*, 508 U.S. at 359 (Blackmun, J., dissenting) (observing that fair warning should be the proper standard for retroactive vitiation of the ability to assert self-defense).

(MPC § 3.07) and entrapment (MPC § 2.13). All presuppose action predicated on a lack of awareness of some sort (whether merely of a particular fact or more generally). Postulating that a criminal defendant would act based on the availability of the defense negates the lack-of-awareness predicate.

Accordingly, this Court and lower courts have distinguished situations where *Bouie* is inapplicable because notice is unwarranted or unhelpful. In *Bradshaw v. Richey*, 546 U.S. 74, 74-75 (2005) (per curiam), the defendant committed arson in an attempt to kill his former girlfriend and her new boyfriend, but only a neighbor's daughter died in the fire. The Court upheld the conviction for aggravated felony murder on a theory of transferred intent against a *Bouie* due process claim in part because "[i]t is doubtful whether this principle of fair notice has any application to a case of transferred intent, where the defendant's *contemplated* conduct was *exactly* what the relevant statute [*sic*] forbade[.]" *Id.* at 76-77 (citation omitted).

The Ninth Circuit has similarly demarcated a zone where "[a]pplying *Bouie* [] would not further the principle underlying that decision" in *Gonzalez v. Wong*, 667 F.3d 965, 997 (9th Cir. 2011). There, the court rejected a murder defendant's claim that he lacked "fair notice" that, notwithstanding the invalidity of the search warrant the police officer was attempting to serve when murdered, a trial court would instruct jurors to infer that the officer

was engaged in the "lawful pursuit of his duties." *Id.* at 971-73. The court dismissed as irrelevant the question whether the defendant had "fair notice" such an instruction would be given under those circumstances because "[a]n individual who sees an officer serving a warrant would not ordinarily know at the time that the warrant was not valid." *Id.* at 997; *see also United States v. Barton*, 455 F.3d 649, 656 (6th Cir. 2006) (refusing to invalidate retroactive application of *United States v. Booker*, 543 U.S. 220 (2005), to justify an upward sentencing departure because "[f]or this court to find that notice is a significant concern in this situation, it would have to find that a defendant would likely have changed his or her conduct because of a possible increase in jail time").

Diminished capacity falls into this category. A defendant who actually suffers from diminished capacity could never benefit from "fair warning" that the defense may be unavailable. A person with mental capacity so diminished that he cannot premeditate the murder he commits could not possibly benefit from notice that his condition is not a defense. Such a person is by definition out of mental control, and due process does not require courts to afford a criminal defendant the benefit of a hypothetical mental state at war with the defendant's own contentions. It is, therefore, logical to differentiate between mentally competent defendants and persons with diminished capacity when applying the *Bouie* test. *See* Model Penal Code

§ 4.01 cmt. at 185 (1985) ("human experience teaches . . . that those who are clearly not responsible should [not] be categorized in the same way as those who clearly are").

3. At the very least, it was surely reasonable in light of this Court's precedents—not only *Bouie* and *Rogers*, but also *Bradshaw*—for the Michigan Court of Appeals to eschew an understanding of due process that allows Lancaster to prove insufficient mental capacity to commit premeditated murder on the assumption that he was perfectly lucid when he killed his victim.

Even setting aside the unlikely scenario where a *compos mentis* Burt Lancaster methodically appraises the legal landscape before deciding to kill Toni King, the supposition that an addled Lancaster might have done so, and decided to proceed only once he read the teachings of the Michigan appellate courts on diminished capacity, is farcical. *But see* Pet. App. at 23a (focusing on whether Lancaster could have "reasonably foreseen" when he committed his crime that there would be no diminished capacity defense available at his trial). Not only that, but even indulging in this thought experiment—which is necessary for Lancaster to prevail on his due process claim—could only confirm that Lancaster acted with *exactly* the calculation and premeditation he was convicted of having.

In no event were Lancaster's due process rights violated by the retroactive application of Michigan's *Carpenter* decision. The Court should rule in favor of Petitioner either because the *Bouie* foreseeability test does not apply in cases involving the rejection of a diminished capacity defense, or because, given the Court's holding in *Bradshaw* that lack of prejudice from retroactivity counts, it was not clearly established that *Bouie* should apply here. For if it was not clearly established that *Bouie* should even apply, the Michigan Court of Appeals cannot be faulted for (allegedly) applying it incorrectly.

II. In the Alternative, the Court Should Hold that Under AEDPA, Federal Courts May Not Decide that State Court Elimination of an Affirmative Defense Was "Unexpected and Indefensible" in Light of State Precedent

A. Michigan's courts based their holdings on *state* law, and federal courts should defer to such state court analysis

The decision below finds that the determination whether the elimination of a state criminal defense was foreseeable under state law is a *federal* law question. *See* Pet. App. at 23a-25a. Even assuming that Lancaster may generally maintain a *Bouie* claim pertaining to the elimination of a diminished capacity defense, however, the Court should rule that federal courts may not second-guess a state

court evaluation of the predictability of its criminal law doctrine.

Here, the Michigan Court of Appeals held that the Michigan Supreme Court's holding in *Carpenter* that the defense of "diminished capacity" did not exist was not a change in the law precluding retroactivity. Pet. App. at 76a-77a. Rather than defer to this seeming state law determination, however, the Sixth Circuit analyzed the state court cases and found that "the district court materially understated the 'foothold' that the diminished-capacity defense had established in Michigan law and failed to recognize the plethora of state appellate court cases recognizing the validity of the defense." Pet. App. at 8a.

In dissent, Chief Judge Batchelder stated that "[i]n concluding that *Carpenter* did not constitute a change in Michigan law, the [Michigan] court of appeals applied Michigan state law; it did not apply *Bouie*, *Rogers*, or any other Supreme Court precedent." Pet. App. at 30a (Batchelder, C.J., dissenting). Thus, said the Chief Judge, even if the Michigan court's decision were somehow "illogical," such a conclusion "is not relevant to our review because it was based on state, not federal, law." Pet. App. at 30a-31a. The Michigan Court of Appeals' decision, therefore, should have been given "the benefit of the doubt required under AEDPA's highly deferential standard[.]" Pet. App. at 30a.

Historically, this Court has deferred to state courts on matters of state law. *See, e.g.*, *Mullaney v. Wilbur*, 421 U.S. 684, 691 & n.11 (1975) ("[t]his Court . . . repeatedly has held that state courts are the ultimate expositors of state law . . . and that we are bound by their constructions except in extreme circumstances," such as when such a construction "appears to be an obvious subterfuge to evade consideration of a federal issue") (internal citation and quotations omitted); *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977) ("it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts").

Regarding habeas cases, the Court has stated that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Indeed, the Court has "repeatedly held that federal habeas corpus relief does not lie for errors of state law." *Wilson v. Corcoran*, 131 S. Ct. 13, 16 (2010) (citation and internal quotations omitted); *see also Pulley v. Harris*, 465 U.S. 37, 41 (1984) (holding that "[a] federal court may not issue the writ on the basis of a perceived error of state law"). Instead, "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Accordingly, where a question of state substantive law is "either the only one[ ] raised by a petitioner or

[is] in [itself] dispositive of his case," the Court has held that federal habeas review is "effectively barred." *Wainwright*, 433 U.S. at 81.

In *Fiore v. White*, 531 U.S. 225, 228-29 (2001) (per curiam), the Court relied on a state court assessment of the retroactive application of an intervening decision to conclude that due process was not at issue. Fiore was convicted of operating a hazardous waste facility without a necessary permit. After he was convicted, the state supreme court decided a case making it clear that Fiore had not violated the relevant statute. 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 collateral review." *Id.* at 226. The Court "asked the Pennsylvania Supreme Court 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." *Id.* The Pennsylvania Supreme Court responded that the intervening case had "merely clarified" the statute and was not new law. *Id.* at 228. The Court accepted this assessment and found that the "case presents no issue of retroactivity." *Id.*

Thus, threshold retroactivity determinations are based on how to apply state law doctrine. In *Fiore*, the question was whether, under state law, the intervening decision actually represented a new rule,

or whether it was instead simply a "clarification" of an old rule. *Id.* Here, similarly, the threshold question was whether the intervening decision represents a departure from precedent or merely clarifies extant principles. *See* Pet. App. at 8a.

And while it may seem unexceptional in the abstract for federal due process doctrine to defer to state court *refusals* to apply intervening decisions retroactively, AEDPA deference to state court resolutions of threshold state law questions should be the same regardless of the outcome. AEDPA requires deference to state courts in order to promote the goals of "comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). More generally, "[f]ederal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts." *Id.*; *see also, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 726 (1991) ("This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus"); *McCleskey v. Zant,* 499 U.S. 467, 493 (1991) ("the doctrines of procedural default and abuse of the writ are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments").

In order to advance the principles of comity, finality, and federalism, the Court should afford the Michigan courts the same deference concerning their state-law decisions here that it afforded the Pennsylvania courts in *Fiore*.

B. The availability of a diminished capacity defense in particular is a state law issue

The Court has made it clear that state criminal law and procedure rules are "not subject to proscription under the Due Process Clause" unless they "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) (internal quotations omitted); *see also, e.g.*, *Montana v. Egelhoff*, 518 U.S. 37, 42, 51 (1996) (explaining that "not every widespread experiment with a procedural rule favorable to criminal defendants establishes a fundamental principle of justice" and that "the proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible").

1. The ability to plead a diminished capacity defense is *not* a fundamental principle of justice. It is, instead, a recent legal concept of uncertain legitimacy. Indeed, the Court has previously observed that the availability *vel non* of a diminished capacity defense is particularly a question of *local*

law. *See Fisher v. United States*, 328 U.S. 463, 473 (1946) (affirming under District of Columbia law that "an accused in a criminal trial is not entitled to an instruction based upon evidence of mental weakness, short of legal insanity, which would reduce his crime from first to second degree murder"). "Diminished capacity" is a case-specific defense that "allows a defendant, even though legally sane, to offer evidence of some mental abnormality to negate the specific intent required to commit a *particular* crime." *Carpenter*, 627 N.W.2d at 280 (emphasis added). The diminished capacity defense represents such "a radical departure from common law concepts" that it could only be "a matter peculiarly of local concern." *Fisher*, 328 U.S. at 476; *see also Powell v. Texas*, 392 U.S. 514, 536 (1968) (questions relating to the mental state necessary to be guilty of a crime have "always been thought to be the province of the States."); *Clark v. Arizona*, 548 U.S. 735, 779 (2006) (holding that the availability of a diminished capacity defense is a matter of state prerogative, not federal constitutional law).

In contrast, insanity *is* a venerable and enduring defense. *See generally Clark*, 548 U.S. at 749-53 (acknowledging American jurisprudence's adoption of an insanity defense test over two centuries ago and the survival of the insanity defense in forty-six states); Daniel N. Robinson, *Wild Beasts & Idle Humours: The Insanity Defense from Antiquity to the Present* 8, 43, 56, 163, 193, 200-01 (Harvard University Press 1996) (tracing the history of the

insanity defense from the *Iliad* to Roman civil law to the writings of St. Augustine to the trial of Daniel McNaughtan in 1843 to *Durham v. United States* decided in 1954 to modern Supreme Court decisions). The insanity defense has general application, no matter the particular elements of a crime. *See United States v. Scott*, 437 U.S. 82, 97-98 (1978) ("The defense of insanity . . . arises from the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, where other facts established to the satisfaction of the trier of fact provide a legally adequate justification for otherwise criminal acts.") (internal quotations and citation omitted).

2. While many states have allowed diminished capacity defenses at some point, the trend now, as demonstrated by California, is to eliminate the defense. *See* Pet. App. at 33a. California was the first state to recognize the diminished capacity defense in *People v. Wells*, 202 P.2d 53 (Cal. 1949). The *Wells* court stated that there were "states of mind, other than insanity, which render a person incapable of crime in the commission of an overt act while in such mental state[.]" *Id*. at 64. Then, in *People v. Gorshen*, the California Supreme Court upheld a trial court's use of psychiatric testimony to reduce a defendant's sentence from capital to second degree murder because "it was evidence of defendant's mental infirmity short of insanity that tended to prove the defendant did not have the

necessary specific mental state to commit first degree murder." *People v. Saille*, 820 P.2d 588, 591 (Cal. 1991) (discussing *Gorshen*).

California eliminated the diminished capacity defense 30 years later because of public outrage following the "Twinkie Defense" in *People v. White*, 172 Cal. Rptr. 612 (Cal. Ct. App. 1981), which arose from the murder of San Francisco mayor George Moscone and city supervisor Harvey Milk. At trial, psychiatric experts testified that defendant "lacked the capacity to deliberate," *id.* at 615, based at least in part on depression worsened by eating too much junk food such as Twinkies and Coke. Robert Lindsey, *Dan White, Killer of San Francisco Mayor, A Suicide*, N.Y. Times, Oct. 22, 1985, http://www.nytimes.com/1985/10/22/us/dan-white-killer-of-san-francisco-mayor-a-suicide.html. The jury found White guilty of two counts of voluntary manslaughter, which precipitated rioting because "[t]he punishment so poorly matched the brutal killings that most San Franciscans believed White got away with murder." John Geluardi, *Dan White's Motive More About Betrayal than Homophobia*, SF Weekly News, Jan. 30, 2008, http://www.sfweekly.com/2008-01-30/news/white-in-milk/.

In 1982, California voters approved a Victims' Bill of Rights, which, among other things, "prohibited the use of evidence concerning a defendant's intoxication, trauma, mental illness, disease, or defect for the purpose of proving or

contesting whether a defendant had a certain state of mind in connection with the commission of a crime." Ballotpedia, Califonia Proposition 8, Victims' Bill of Rights (June 1982), http://ballotpedia.org/wiki/index.php/California_Proposition_8,_Victims%27_Bill_of_Rights_(June_1982). Later, in *People v. Saille*, 820 P.2d at 593, the Supreme Court of California confirmed that 1982's Proposition 8 had eliminated the diminished capacity defense in California.

3. The point is that, while some defenses have roots in the common law and are therefore culturally understood to be available in the vast majority of states, the defense of diminished capacity is a state-specific defense. Pet. App. at 33a. The Model Penal Code's treatment of the diminished capacity defense underscores this point. First, the MPC does not even accord the defense a specific name, but rather treats it as species of insanity. Model Penal Code § 4.02. Second, the MPC conspicuously acknowledges that its inclusion of a version of the diminished capacity defense "was designed to resolve an issue as to which there was and is a division of authority. Some jurisdictions decline to accord to evidence of mental disease or defect an admissibility coextensive with its relevance to prove or disprove a material state of mind." Model Penal Code § 4.02 cmt. at 217-18 (1985). The MPC conceded that while "[s]ome states with recent revisions have adopted the principle of [Section 4.02] . . . most do not address the issue." *Id.* at 220.

In short, as a defense to criminal prosecution, diminished capacity does not possess the renown and longevity essential for its denial amidst murky state law precedent to offend the due process principle of "fair warning." As a consequence, a state court determination that it was foreseeable that the State would reject a diminished capacity defense warrants all the more deference.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER
Solicitor General
(Counsel of Record)
ASHLEY TATMAN HARWEL
HEATHER HAGAN MCVEIGH
Deputy Attorneys General

Counsel for Amici States

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