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

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Brief of Wayne County, Michigan as Amicus Curiae in Support of Petitioner

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Question Presented

I.

1. Whether the Michigan Supreme Court's recognition that a state statute 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' retroactive application of the Michigan Supreme Court's decision 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).**

*Amicus will address only question 1.

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Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within her jurisdiction, has a vital interest in the outcome of the current litigation, as it may well affect the execution of her constitutional and statutory duties.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits Amicus to file a supporting brief without permission of the parties. No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing.

Summary of Argument

There has never been a statutory defense of "diminished capacity" or "partial responsibility" caused by mental retardation or mental disease in Michigan, nor has the Michigan Supreme Court ever recognized such a defense. For a time, the Michigan Court of Appeals held that, as a matter of "materiality and relevancy," expert testimony was competent at trial on the issue of whether specific intent had been proven when the offense charged has an element of specific intent. After Michigan codified the insanity defense, the Michigan Court of Appeals held that this rule of evidentiary competency was subsumed within the statutory scheme, requiring notice and submission to examination, but still—mistakenly—allowed this form of proof as going to specific intent rather than to the defense of insanity as defined in statute. But the Michigan Supreme Court never adopted this rule of evidentiary competency.

In holding that there is no such rule of evidentiary competency, at least after the legislative codification of the insanity defense in 1975, the Michigan Supreme Court overruled none of its prior decisions, disapproving only of Michigan Court of Appeals decisions. Because only decisions from an intermediate court were disapproved, there was no "law changing" decision cognizable under due process.

Further, the Michigan Supreme Court in no way changed or redefined the elements of the offense in rejecting the rule of evidentiary competency of expert testimony on the issue of specific intent. Nor did that decision change the quantum of proof

required to convict. Respondent was thus in no way denied fair notice of that conduct which constituted the offense charged.

Argument

A. There Was Never An Established Common-Law Or Statutory Defense of Diminished Capacity Based On Mental Disease or Defect in Michigan

(1) The common law and criminal offenses and defenses in Michigan

The law made by judges at the common law was made under the sovereign authority of the king. Though the judges "made law" under the fiction of "discovering" it in immutable or natural principles, they did not discover the law by finding it in any source outside themselves, such as a written constitution. The law thus made—precedent—was binding on future similar cases, or else it could not be called law at all. Judges plainly had the lead role in creating substantive law, necessarily making policy decisions that would today unquestionably be viewed as legislative. But things changed—"a trend in government that has developed in recent centuries, called democracy."[1] Our form of government includes the principle of separation of powers, quite clearly designed, in part, to keep law making out of the hands of judges: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge*

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[1] Scalia, *A Matter of Interpretation* (Princeton University Press: 1997), p.9.

would then be *the legislator*."[2] In a constitutional democracy judges no longer should play a role regard to creating or altering substantive "common law."

In Michigan, the notable Justice Campbell stated long ago that "[w]hatever elasticity there may be in civil matters, it is a safe and necessary rule that criminal law should not be tampered with except by legislation."[3] Some penal statutes in Michigan employ terminology with an understood common-law meaning, without elaboration or further definition, and it has long been settled that when the legislature in enacting a statute simply employs a common-law term with a well understood and recognized meaning, the "legislature intended no alteration or innovation of the common law not specifically expressed"; indeed, "it is never to be presumed that the Legislature intended to make any innovation upon the common law any further than the case absolutely require(s) in order to carry the act into effect."[4] This principle applies in criminal cases, for once the common-law definition of a term has been determined, then where "the legislature (shows) no disposition to depart from the common-law definition, . . . it

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[2] *The Federalist* No. 47, at 326 (Madison)(Jacob E. Cooke, ed. 1961) (emphasis in the original).

[3] 61 Mich. at 109-110.

[4] *Wales v Lyon,* 2 Mich. 276, 283 (1851). See also *Garwols v Bankers Trust*, 251 Mich. 420, 232 N.W. 239 (1933).

remains."[5] The use of a common-law term without alteration is as much an *enactment* of the meaning of that term into statutory law as if the legislature had spelled out the common-law meaning in detail in the statute, and the judiciary, of course, is not free to amend a statute.

This principle applies as much to common-law defenses as penal statutes employing common-law terms. In *People v Riddle*[6] the court considered whether the self-defense "no-retreat" rule when one is assaulted in his or her dwelling extends to the curtilage, concluding that it did not, the rule extending only to the structure and attached appurtenances.[7] The court stated that "because our Legislature has not acted to change the law of self-defense since it enacted the first Penal Code in 1846, *we are proscribed from expanding or contracting the defense as it existed at common law*.

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[5] *People v Schmitt*, 275 Mich. 575, 267 N.W. 741 (1936). See also *People v Utter*, 217 Mich. 74, 185 N.W. 830 (1921); *People v Potter*, 5 Mich 1 (1858).

The same rule holds true federally: "'[w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' " *Neder v United States*, 527 U.S. 1, 3, 119 S.Ct. 1827, 1831 (1999).

[6] *People v Riddle*, 467 Mich. 116, 649 N.W.2d 30 (2002).

[7] In the "Self-Defense Act" of 2006 the Michigan legislature changed this rule statutorily.

We therefore apply the common law as it was understood when the crime of murder was codified to clarify the concepts of retreat and the castle doctrine."[8] In short, then, there is no "common law of crimes" in Michigan; there are only statutory crimes, with the definition of some terms in the statutes being found in the common law, but still as unalterable by the judiciary as if the legislature had spelled out the definitions chapter and verse.[9] And the same is true as to defenses established at the common law.

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[8] 467 Mich. at 126, 649 N.W.2d at 38 (emphasis supplied).

[9] It is true that Michigan has a "catch-all" statute, which makes criminal all offenses at the common law that are not otherwise covered by a specific statute. But this statute itself, MCL 750.505, *enacts* those offenses into law, so that the role of the judiciary is to discover them, the judiciary having no authority to *modify* them. As Justice Campbell said long ago, ". . . while we have kept in our statute-books a general statute resorting to the common law for all non-enumerated crimes, there has always been a purpose in our legislation to have the whole ground of criminal law defined, as far as possible by statute. There is no crime whatever punishable by our laws except by virtue of a statutory provision." *In re Lamphere*, 61 Mich. 105, 108, 27 N.W. 882 (1886).

(2) A *defense* of diminished capacity apart from the defense of insanity has never been established law in Michigan, there being, at best, a principle of evidence regarding crimes with an element of specific intent

If a common-law defense of diminished capacity or "partial responsibility" existed in Michigan based on mental disease or defect, it is remarkable that no reference was made to it for almost one hundred and two score years after Michigan's statehood. Michigan had no statutory scheme concerning the defense of insanity until 1975. Until that time, then, the common-law understanding prevailed:

> Before 1975, the test for determining legal insanity in Michigan was controlled by *People v. Durfee,* 62 Mich. 487, 29 N.W. 109 (1886). . . . the "salient elements" of the *Durfee* test were: "1) whether defendant knew what he was doing was right or wrong; and 2) if he did, did he have the power, the will power, to resist doing the wrongful act?"[10]

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[10] People v. *Shahideh*, 482 Mich. 1156, 1160, 758 N.W.2d 536, 540 (2008). And the predicate for the application of these principles was mental disease or defect, as the "*Durfee* test, in turn, was based in part on the *M'Naghten* rule: '[A]t the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or,

There is nothing in the Michigan jurisprudence of the common-law insanity defense that even hints at a defense of diminished capacity or "partial responsibility" before 1973. This is not surprising, as there was no such defense at the common law:

> No one doubts that there are more possible classifications of mentality than the sane and the insane . . . . It may be that psychiatry has now reached a position of certainty in its diagnosis and prognosis which will induce Congress to enact the rule of responsibility for crime for which petitioner contends. For this Court to force the District of Columbia to adopt such a requirement for criminal trials *would involve a fundamental change in the common law theory of responsibility.*[11]

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if he did know it, that he did not know he was doing what was wrong.' " *People v. Carpenter,* 464 Mich. 223, 234, 627 N.W.2d 276, 282 (2001).

[11] *Fisher v. United States*, 328 U.S. 463, 475-476, 66 S.Ct. 1318, 1324 - 1325 (1946) (emphasis supplied).

See also *State v. Wilcox*, 436 N.E.2d 523, 533 (Ohio, 1982): ". . . the diminished capacity theory forcefully challenges conventional concepts of culpability and "involve(s) a fundamental change in the common law theory of responsibility." . . . "(w)e conclude that the potential impact of concepts such as diminished capacity or partial insanity—however labeled—is of a scope and magnitude which precludes their proper adoption by an expedient modification of the rules of evidence. If such principles are to be incorporated into our law of criminal

In 1973, before the codification of the insanity defense by the Michigan legislature in 1975, an intermediate Michigan appellate court decision first raised the notion of "diminished capacity," but the case concerns not the recognition of some new defense but a *principle of evidence*. That court in *People v Lynch*[12] considered a first-degree murder conviction of the mother of a newborn child that had been starved to death. No insanity notice was filed, nor any insanity defense offered. The defense was not permitted to present expert testimony on the issues of premeditation and intent to the effect that the defendant had "a history of unfortunate childhood experiences, an insecure marriage, a dull normal intelligence, a feeling of chronic rejection, suggestibility, a marked impairment of ability to understand or comprehend and apprise the immediate and future consequences of her actions, and that all of these deficiencies would increase under stress."[13] Though recognizing that some jurisdictions had rejected the admission of such evidence, the court held that this "medical proof, sometimes called proof of diminished or partial responsibility," should be admitted, at least where

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responsibility, the change should lie within the province of the legislature." See similarly *State v. Thompson* 695 S.W.2d 154, 158 (Mo.App. S.D. 1985).

[12] *People v Lynch*, 47 Mich.App 8, 208 N.W.2d 656 (1973).

[13] 47 Mich.App at 14, 208 N.W.2d at 659.

a specific intent is required to be proven.[14] But the matter was entirely one of the law of evidence, the court considering whether the excluded testimony was material and relevant,[15] finding that it was, and reversing because of its exclusion on the issue of specific intent: "The proposed testimony of Drs. Willis and Basel being material and relevant, and there appearing to be no good reason in law or public policy for excluding the same, the matter is reversed for new trial."[16]

But in 1975 the Michigan legislature codified the common-law defense of insanity, providing, as part of a comprehensive scheme, that:

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[14] 47 Mich.App at 20, 208 N.W.2d at 662. The court remarked also "That such testimony may be drawn from a new and evolving discipline of medical-behavioral science does not alter the basic evidentiary rules. Nor, if it did, would the fact that such testimony was previously unknown to the state's jurisprudence be a reason for excluding it." 47 Mich.App. at 21, 208 N.W.2d at 663.

[15] "Is there a good reason for admitting testimony of this nature? . . . . *The . . . question involves tests of materiality and relevance*. That the offered testimony was material cannot be doubted in view of the definition of murder as an intentional killing, and the statutory definition of first-degree murder as that murder which is willful, deliberate, and premeditated. Nor can it be doubted that such evidence is relevant, that is, of some probative value, to the material element of intent." 47 Mich.App at 16, 662 N.W. 2d at 660 (emphasis supplied).

[16] 47 Mich.App. at 22, 208 N.W.2d at 663.

> (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.[17]

Soon after, the Michigan Court of Appeals held that the legislature had thereby manifested "an intention to bring under one procedural blanket all defenses to criminal charges that rest upon legal insanity as defined in the statute."[18] The court concluded that "the defense known as diminished capacity comes within this codified definition of

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[17] MCL 786.21a(1). The statute was amended in 1994 to place the burden of persuasion on the defendant by a preponderance of the evidence. 1994 Public Acts, No. 56. Before that time, though the prosecution had the burden of proof of sanity beyond a reasonable doubt, sanity was *not* considered an element of an offense; rather, the defense was a burden-shifting affirmative defense, the prosecution's duty of proof only arising upon the presentation by the defense of some competent evidence of insanity. *In re Certified Question,* 425 Mich. 457, 467, 390 N.W.2d 620, 624 (1986).

[18] *People v. Mangiapane*, 85 Mich.App. 379, 394-395, 271 N.W.2d 240, 248 (1978).

legal insanity," so that, though evidence on the issue of the defendant's capacity to form any specific intent required by the statute was still admissible, it was admissible only if the defendant complied with the statutory requirement of filing a notice of insanity, as well as all other statutory requirements regarding the defense.[19] But despite the statutory definition of insanity—that, as a result of mental disease or mental retardation the accused lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law—and inconsistent, then, with its terms, the opinion continued to allow expert testimony on the question of whether the accused entertained specific intent where the crime charged contained that element. In short, the evidentiary rule of *Lynch* continued, but constrained by the procedural requirements of Michigan's codified insanity-defense scheme.

It has been the law in Michigan for well over a century that a point assumed in an opinion without specific consideration is not considered to have been decided.[20] In *none* of the Michigan Supreme

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[19] 85 Mich.App at 395, 271 N.W.2d at 279.

[20] "A point thus assumed without consideration is, of course, not decided."*Allen v. Duffy*, 43 Mich. 1, 11, 4 N.W. 427, 434 (1880). See also *In re Apportionment of State Legislature--1982,* 413 Mich. 96, 113-114, 321 N.W.2d 565, 571 (1982): "The Court's actions . . . taken without addressing or definitively considering fundamental questions, are not precedentially binding for it is well-established in this state that '[a] point thus

Court cases cited by the Sixth Circuit opinion did the Michigan Supreme Court give specific consideration to whether a diminished-capacity *defense* existed in Michigan either before or after the legislature's codification of that defense, and in none did that court ever approve of the evidentiary rule of the *Lynch* case, as continued but constrained in *Mangiapane*. In *People v Ramsey*,[21] the issue specifically considered was whether the creation of the verdict of "guilty but mentally ill" violated due process.[22] The majority opinion of the Sixth Circuit here mistakenly takes a quotation by the majority from a treatise, including language concerning "partial responsibility," in its rejection of the constitutional challenge to the guilty but mentally ill verdict, as an "acknowledge[ment] of the substantive components of the diminished-capacity defense," leaving "open" only "whether, and to what degree, the defense would apply to a general-intent crime like second-degree murder."[23] But the quotation is scarcely a holding or acceptance of the diminished-capacity defense as a part of Michigan law, and indeed, the Michigan Supreme Court opinion said only that "while his mental illness *may be* a consideration *in evaluating*

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assumed without consideration is of course not decided.'"

[21] *People v Ramsey*, 422 Mich. 500, 375 N.W.2d 297 (1985).

[22] 422 Mich. at 510, 375 N.W.2d at 300.

[23] *Lancaster v. Metrish*, 683 F.3d 740, 747 (CA 6, 2012).

the requisite state of mind for the crime charged, we decline to accept Ramsey's invitation to hold that a finding of mental illness negates malice aforethought as a matter of law."[24]

People v Fernandez,[25] also cited by the Sixth Circuit majority, is even more beside the point. The issue was whether conviction of conspiracy to commit first-degree murder "requires a mandatory nonparolable life sentence . . . and whether conspiracy to commit second-degree is a lesser included offense. . . ."[26] The case had nothing to do with insanity or diminished-capacity defenses. The court found that no instruction on conspiracy to commit second-degree murder was required because, even if that offense were hypothetically possible, no facts supported it. The court observed in passing that California allowed that the offense could exist because of the possibility of "diminished capacity." But the California opinion quoted[27] by

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[24] 422 Mich at 518, 375 N.W.2d at 304 (emphasis supplied). Ramsey was convicted of second-degree murder..

[25] *People v Fernandez*, 427 Mich. 321, 398 N.W.2d 311 (1986).

[26] 427 Mich. at 323, 398 N.W.2d at 312.

[27] The instruction quoted referred repeatedly to intoxication: "if the defendants, due to diminished capacity caused by intoxication, did not have the capacity to form the mental state necessary to premeditate murder, they cannot be found guilty of conspiracy to commit first degree murder, but may be

the Michigan Supreme Court was not considering the "partial responsibility" insanity defense of diminished capacity, but the defense of *intoxication*, which is also, unhelpfully, often referred to as "diminished capacity." When the Michigan Supreme Court thus said that "While the California rule of the effect of diminished capacity on degrees of homicides varies significantly from the Michigan rule, see *People v Langworthy*, 416 Mich 630, 331 N.W.2d 171 (1982) (voluntary intoxication only negates specific intent, not general intent), the possibility exists under Michigan law that diminished capacity might possibility militate for the existence of the charge of conspiracy to commit second-degree murder. We do not rule on this question. . . ."[28] it was not referring to diminished capacity/insanity, but evidence of intoxication—and even then holding nothing as to its applicability. And the principle under discussion was actually an *evidentiary* one; that is, the admissibility of certain evidence on the question of specific intent.

Nor does any other Michigan Supreme Court case cited by the majority opinion below specifically consider whether diminished capacity falls within the Michigan statutory scheme concerning the

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found guilty of conspiracy to commit second degree murder." Quoted at 427 Mich. at 342, 398 N.W.2d at 320.

[28] 427 Mich. at 342, 398 N.W.2d at 320.

insanity defense. *People v Griffin*[29] is simply an order remanding for an evidentiary hearing as to whether trial counsel was ineffective in not "exploring" the defenses of diminished capacity and insanity." This cryptic order hardly establishes the defense in Michigan as a part of the insanity defense (and, for all one knows, could have been referring to intoxication). And in *People v Pickens*[30] the court said only that counsel was not ineffective in presenting a defense of lack of premeditation and diminished capacity, which is not a holding that diminished capacity is a recognized form of insanity defense in Michigan.

The *Carpenter*[31] decision, the first Michigan Supreme Court decision to directly confront the question, and rejecting the admission of expert testimony on the issue of specific intent, makes clear that the Michigan Supreme Court had never before that time found that a diminished-capacity "defense" exists in Michigan: "This Court has several times acknowledged in passing the concept of the diminished capacity defense. . . . *However, we*

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[29] *People v Griffin*, 433 Mich. 880, 444 N.W.2d 139 (1989).

[30] *People v Pickens*, 446 Mich. 298, 521 N.W.2d 797 (1994).

[31] *People v Carpenter*, 464 Mich. 223, 627 N.W.2d 276 (2001).

have never specifically authorized its use in Michigan courts."[32]

The Michigan Supreme Court, then, before *Carpenter*, had never held that "diminished capacity" exists in Michigan either as part of the common law, before enactment of the statutory scheme, or as part of the statutory scheme. And uses of this term in Michigan opinions went to the admissibility of expert testimony on proof of specific intent, not to a true "defense." In concluding that a defense was established in Michigan through the passing references to it by the Michigan Supreme Court, and through statements by the Michigan Court of Appeals, the Sixth Circuit majority opinion "chewed more than it bit off."[33] The most that can be said is that in 1973 the Michigan Court of Appeals held that expert testimony was admissible on the question of whether the accused entertained a required specific intent, and in 1975 that court constrained that ruling by finding that the codification of the insanity defense by the legislature had occupied the field, so that the statutory procedural requirements

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[32] 464 Mich. at 233, 627 N.W.2d at 281 (emphasis supplied).

[33] Allegedly said by Mrs. Henry Adams, referring to Henry James.

It should also be noted that the Michigan Standard Jury Instructions, referred to by the Sixth Circuit majority, are not only not "law," they are not even mandatory in Michigan. *People v. Petrella*, 424 Mich. 221, 277, 380 N.W.2d 11 (1985).

were prerequisites to the admissibility of the evidence, though expert testimony on specific intent remained admissible, despite the statutory definition of insanity.

(3) Because the Michigan Supreme Court disapproved only of intermediate court decisions, which were inconsistent with the statutory text of Michigan's insanity-defense scheme, no "change" in law occurred with the decision in *People v Carpenter*

At the time defendant committed the murder here, then, a statutory scheme existed which defined insanity as when, as a result of mental disease or mental retardation, the accused lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. A successful defense resulted, under the statute, in a verdict of "not guilty by reason of insanity," which triggered a diagnostic commitment.[34] There was also an intermediate appellate court decision, finding that the statutory scheme occupied the field, but stating, nonetheless, that expert testimony as to whether the accused was capable of forming a required specific intent—a question of the competency of evidence—fell within the statutory scheme, despite its inconsistency with the statutory definition of insanity, the verdict of not guilty by reason of insanity, and the consequence of that verdict of diagnostic commitment of the defendant.

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[34] MCL 768.29a(2); MCL 330.2050(1).

And there was no Michigan Supreme Court decision that accepted diminished capacity as either a form of insanity defense, that term being mentioned only in passing by that court, or as a rule of evidentiary competency permitting expert testimony as to the capability of an accused to form a required specific intent.

That the Michigan Supreme Court had, as the *Carpenter* opinion put it, "never specifically authorized its use [the diminished-capacity defense] in Michigan courts," is consequential. The court in *Carpenter* overruled none of its prior decisions, impliedly overruling only several Michigan Court of Appeals cases as inconsistent with the statutory scheme and text. *Carpenter* was thus *not* a law-changing decision. *Hagan v Caspari*[35] makes the point.

In *Caspari*, the defendant was charged with first-degree robbery for a robbery at a gas station involving use of a weapon, and second-degree robbery for the theft a car keys several days later, along with theft of that victim's vehicle. He pled to all charges, but later on post-conviction relief argued that conviction for both the second-degree robbery for stealing the vehicle keys, and theft of the vehicle, violated double jeopardy. The Missouri Court of Appeals agreed, and vacated the vehicle theft conviction. The Supreme Court of Missouri reinstated the conviction, overruling a Missouri

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[35] *Hagan v Caspari*, 50 F.3d 542 (CA 8, 1995).

Court of Appeals case[36] that Hagan had relied on. On federal habeas review, the district court found this overruling to be an "unforeseeable change" in state law, violating Hagan's right to due process. The Eighth Circuit disagreed.

Not only did the Eighth Circuit find that the overruling of the intermediate state court decision was "eminently foreseeable," in that "anyone reading the pertinent Missouri statutes could easily have concluded that [the intermediate decision] was contrary to their plain meaning,"[37] it expressed "some doubt 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." Indeed, the court remarked that "we are strongly inclined to agree with the state that until the state's highest court has spoken on a particular point, the law of the state necessarily must be regarded as unsettled."[38]

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[36] *State v Lewis*, 633 S.W.2d 110 (Mo.App. 1982).

[37] 50 F.3d at 547. The court also eschewed the course taken by the majority opinion here; "[t]he reliance of prosecutors, et al., and the citation of authorities does not make the overruling of *Lewis* more or less foreseeable. To resolve the foreseeability issue, we must examine *Lewis* and its legal underpinnings." 50 F.3d at 545.

[38] 50 F.3d at 547. The court did not so hold, however, because of its conclusion that, given the statutory text, that the intermediate appellate court opinion was mistaken and contrary to the plain meeting of the statute was readily ascertainable.

The Eighth Circuit took this same view more firmly in *Niederstadt v Nixon*.[39] There the Missouri Supreme Court construed the state sodomy statute's requirement of "forcible compulsion" to include "the force inherent in a sex offense committed on a sleeping victim, who cannot resist."[40] The Missouri Supreme Court had never before construed the statute, and distinguished an intermediate court decision. The Eighth Circuit held that

> In this case, the Supreme Court of Missouri did not overrule prior law . . . . Indeed, as the Supreme Court of Missouri had not previously considered the statute, there was no prior law to overrule. As we said in *Hagan v Caspari* . . . '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.' A ruling on an unsettled issue of state law will rarely if ever be unexpected and indefensible.[41]

Also to the same effect is *Armstrong v. State*:[42]

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[39] *Niederstadt v Nixon,* 505 F.3d 832 (2007).

[40] 505 F.3d at 836.

[41] 505 F.3d at 837.

[42] *Armstrong v. State*, 848 N.E.2d 1088, 1094 (Ind.,2006).

> 'That courts have rendered decisions later deemed erroneous by higher authority does not entitle criminal defendants to the benefits of those mistakes. *Bouie* applies only to unpredictable shifts in the law, not to the resolution of uncertainty that marks any evolving legal system." . . . ; *see also Hagan v. Caspari,* 50 F.3d 542, 547 (8th Cir.1995) (questioning 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.").[43]

The dissent of Judge Easterbrook in *Cole v Young*[44] is also most instructive, Judge Easterbrook expressing the view that

> The Supreme Court of the United States has never suggested that the construction of a criminal statute by an *intermediate* state court requires the state to apply that decision to all crimes committed before the date of its reversal or overruling. If there were such an entitlement, every conflict among the circuits on the construction of a federal statute would vest in defendants throughout the country the right to receive the most favorable construction

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[43] And see to similar effect *State v Myers*, 150 N.M. 1, 19-20, 256 P.3d 13 (N.M., 2011).

[44] *Cole v Young*, 817 F.2d 412, 434 (CA 7, 1987)(emphasis supplied) (Easterbrook, J., dissenting).

> adopted by any circuit. The Supreme Court of the United States, however, regularly resolves conflicting interpretations of federal criminal law, in the process affirming (or reinstating) convictions that could not have been obtained under the law of one or more courts of appeals at the time the acts were committed. *Bouie* holds not that decisions of intermediate courts may not be altered retrospectively, but that the state's law must give fair notice of what is prohibited. *The . . . statute gives this notice . . . .*

This point is certainly applicable in Michigan. While Michigan has had a "first-rule" since November of 1990, the first opinion out by a Michigan Court of Appeals panel governing later cases in that court, it had no such rule before 1990, and even now a later panel may express its disagreement with an existing Michigan Court of Appeals opinion, triggering a conflict-resolution" panel that may set aside the earlier precedent.[45]

Because, then, there is no "law-changing" decision here, the premise of the Sixth Circuit majority opinion is mistaken, and no violation of due process could have occurred.

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[45] MCR 7.215(J).

B. If the *Carpenter* Decision Constitutes A Change in Law, Respondent Was Not Denied Fair Notice, the Change Going Only to the Competency of Evidence On the Element of Specific Intent

(1) The ex post facto clause has no application to judicial proceedings

The ex post facto clauses of the United States Constitution are not a restraint on the judiciary. The text makes the point plain. Article I, § 10 restricts state legislatures from passing ex post facto laws: "No State shall . . . pass any . . . ex post facto Law. . . ." That the restriction is on the legislature is express in the text, and this Court has repeatedly so held.[46]

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[46] See e.g. *Calder v Bull*, 3 U.S. 386, 1 L.Ed. 648 (1798); *Ross v Oregon*, 227 U.S. 150, 33 S.Ct. 220, 57 L.Ed. 458 (1913); *Frank v Mangun*, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915); *Marks v United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed. 2d 260 (1977); *Dobbert v Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); *Collins v Youngblood*, 497 U.S. 37, 110 S.Ct.2715, 111 L.Ed2d 30 (1990).

(2) Neither the due process clause, in the case of legislation, nor the due process clause, in the case of judicial decisions, preclude retrospective application of evidentiary principles that do not diminish the quantum of proof required to convict

Where the retrospective application of a statute is at issue, the constraints on the legislature imposed by the ex post facto clause are four-fold:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime,* or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment,* and inflicts a *greater punishment,* than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence,* and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.[47]

In the *Carmell* case, this Court considered the fourth category of ex post facto laws, as Texas had statutorily changed its rule that evidence of certain

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[47] *Carmell v. Texas,* 529 U.S. 513, 522, 120 S.Ct. 1620, 1627, 146 L.Ed.2d 577 (2000) (quoting *Calder v Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798).

sexual offenses was insufficient to convict without corroboration of the victim's testimony to a rule that the victim's testimony alone was sufficient. This was not, this Court said, simply application of an altered rule of evidence, but a rule of sufficiency of evidence, as, before the statutory change, if no corroborating proof was offered the accused could not be convicted. The ex post facto clause, said the Court, precludes retrospective application of a statute reducing the quantum of evidence *required* to convict to conduct occurring before that change. But the Court was careful to distinguish these sufficiency rules from ordinary rules of evidence or witness competency, saying that

> We do not mean to say that every rule that has an effect on whether the defendant can be convicted implicates the *Ex Post Facto* Clause. Ordinary rules of evidence, for example, do not violate the Clause. . . . to the extent one may consider changes to such laws as "unfair" or "unjust," they do not implicate the same *kind* of unfairness implicated by changes in rules setting forth a sufficiency of the evidence standard. Moreover, while the principle of unfairness helps explain and shape the Clause's scope, it is not a doctrine unto itself, invalidating laws under the *Ex Post Facto* Clause by its own force.[48]

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[48] 529 U.S. at 533, 120 S.Ct. at 1633.

If, then, a statutory change in a rule or principle of evidence does not reduce the quantum of evidence required to convict, the change may be applied retroactively; this has often been done, and upheld.[49] And such a change cannot possibly work a denial of fair notice to an accused of that conduct which constitutes the offense.

(3) The due process clause does not require application of the ex post facto clauses to judicial acts, requiring instead that a criminal statute give fair warning of the conduct that it makes a crime, and respondent received fair notice

While it is true that a portion of the protections afforded by the ex post facto clauses coincides substantially with the protection of fair notice

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[49] See e.g. *Schroeder v Tilton*, 493 F.3d 1083 (CA 9, 2007)(statutory change allowing evidence of defendant's prior sex crimes); *Gentry v. Sinclair,* 2013 WL 174441, 19 (CA 9, 2013)("admitting victim impact statements did not change the elements of Gentry's crime"); *Doe v. Busby*, 661 F.3d 1001, 1023 (CA 9, 2011); *Palmer v. Clarke,* 408 F.3d 423, 431 -432 (C A 8, 2005); *State v Rose*, 42 A.3d 172 (N.J.Super.Ct., 2012) (retroactive application of forfeiture by wrongdoing rule); *Carpenter v Commonwealth*, 654 S.E.2d 345 (Va.App, 2007)(retroactive application of amended marital-communications privilege); *United States v Alexander*, 805 F.2d 1458 (CA 11, 1986) (retroactive application of federal rule of evidence forbidding expert witness from statement of opinion as to legal insanity of the accused).

provided by the due process clause, there is no actual "analogy" to be applied. Rather, accepted fair-notice principles are simply applied to law-changing decisions of state supreme courts. To say that the due process clause "enacts" or promulgates an ex post facto clause applicable to the judiciary identical in scope to the specific constitutional limitation on legislative power stretches the point; it cannot be said that the due process clause creates a precise image of the ex post facto clause to be applied to judicial decisions, for, as Professor LaFave has put it, "all case-law, including that interpreting criminal statutes, operates retroactively, and such retroactivity is an essential part of our legal system. It is fair to conclude that: (1) the prohibition of retroactive judicial decisions is not as extensive as the prohibition of ex post facto statutes; and (2) the law regarding the former is not as clearly developed as that concerning the ex post facto clause."[50] It is not a correct approach to the question, then, to take ex post facto principles and apply them to judicial decisions which alter previous judicial decisions, or interpret a statute for the first time. The due process restriction is more limited than that.

The lead case, of course, concerning the requirement under due process of fair notice as applied to judicial law-changing decisions is *Bouie v*

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[50] 1 LaFave, *Substantive Criminal Law* (2d ed) § 2.4.

City of Columbia,[51] and its rationale is thus critical to the inquiry here. It is familiar history that the prosecution there arose from a "sit-in" demonstration in a drug store in South Carolina in 1960, where, after the defendants, who were African-Americans, were seated at a booth in the restaurant department of the drug store, an employee put up a chain with a "no trespassing" sign attached, and the manager called the police when the defendants continued to sit quietly in the booth. When the police arrived, the manager asked the defendants to leave, and they did not do so. The police asked also, stating it was a "breach of the police" for the defendants to refuse to leave, and arrested the defendants when they did not leave. They were charged with criminal trespass and convicted.

The defendants argued that "they were denied due process of law either because . . . the statute failed to afford fair warning that the conduct for which they have now been convicted had been made a crime."[52] That fair notice is required by due process had long been understood, this Court stating, for example, in *Connally v. General Const. Co.*[53] that a penal statute which forbids the doing of an act "in terms so vague that men of common

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[51] *Bouie v City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed. 2d 894 (1964).

[52] 387 U.S. at 349, 84 S.Ct. at 1700.

[53] *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Put another way, "criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process of law."[54]

Bouie was unusual in that the penal statute itself was "admirably narrow and precise."[55] It defined the prohibited conduct as "*entry* upon the lands of another. . . *after* notice from the owner or tenant prohibiting such entry...." The state supreme court, however, construed the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of *remaining* on the premises of another after receiving notice to leave, a construction at once contrary to the "narrow and precise" statutory text and inconsistent with prior judicial constructions of the statute, thereby expanding the conduct covered by the terms of the statute in a way which was unforeseeable to a person of ordinary intelligence.

Applying well-established fair-notice doctrine, this Court held that if a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," the decision may not

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[54] *Jordan v. De George* 341 U.S. 223, 230, 71 S.Ct. 703, 707 (U.S. 1951).

[55] 387 U.S. at 351, 84 S.Ct. at 1701.

be applied retroactively. Because the interpretation of the statute given by the South Carolina Supreme Court was "clearly *at variance with the statutory language*," and had "not the slightest support in prior South Carolina decisions"; indeed, those decisions had emphasized that proof of notice *before* entry was required to sustain a conviction, retroactive application of the statute as newly construed thus violated due process.[56]

Though unnecessary to the decision—established fair-notice principles were sufficient for the task—the Court noted that when a statute is "enlarged" by an "unexpected and indefensible"[57] judicial construction its retroactive application "operates precisely *like* an ex post facto law," and the Constitutional expressly forbids an expost facto law, one that "makes an action done before the passing of the law, and which was innocent when done, criminal . . . ."[58] But that application of an unexpected and indefensible construction of a penal statute to conduct occurring before that construction is "precisely like" an ex post facto law does not mean that it is barred by the ex post facto clause, or that, because the ex post facto clause bars such legislation due process for that reason precludes application of these sorts of judicial

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[56] See 12 L Ed 2d at 900-901 (emphasis supplied).

[57] 387 U.S. at 354, 84 S.Ct. at 1703.

[58] 387 U.S. at 353, 84 S.Ct. at 1702 (emphasis supplied), quoting *Calder v Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798).

constructions of statutes. That the Court continued on to say that if "a state legislature is barred by the Ex post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction,"[59] is unfortunate, as it is a non sequitur. It does not necessarily follow that the judiciary may not do that which the constitutional limitations on ex post facto legislation prohibit, for those limitations are *not* limitations on judicial power. And *if the ex post facto clauses did not exist* the result in *Bouie* would *still* be required, for it is the fair notice required by due process that compelled the result there, and in all indistinguishable cases, not an application of the ex post facto clause by analogy through due process.

The other critical case is *Rogers v Tennessee*.[60] Tennessee had long considered it necessary that death occur within a year and a day of the injuries inflicted for criminal homicide to be proven. But the Tennessee Supreme Court abrogated the rule, and applied the murder statute *sans* the year-and-a-day requirement to Rogers. The petitioner took this Court's language in *Bouie* that where "a state legislature is barred by the Ex post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by

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[59] 387 U.S. at 353-354, 84 S.Ct. at 1702.

[60] *Rogers v Tennessee*, 532 U.S. 451, 121 S.Ct 1693, 149 L.Ed.2d 693 (2001).

judicial construction" to mean that *Bouie* had in effect *held* that "'[i]n evaluating whether the retroactive application of a judicial decree violates Due Process, a critical question is whether the Constitution would prohibit the same result attained by the exercise of the state's legislative power.' Brief for Petitioner 12."[61] This Court disagreed. *Bouie*, as amicus has said, is a fair-notice case, and those principles stand—and required reversal of the convictions there—without application of the ex post facto clauses in any fashion.

This Court concluded that the abolition of the year-and-a-day causation rule for homicide by the Tennessee Supreme Court was not "unexpected and indefensible." Important to the court was that the case involved not a judicial construction of an admirably precise and narrow statutory text, as in *Bouie*, that was indefensible in light of that text and prior judicial decisions applying that text, but "but rather the continuing viability of a common law rule." The Tennessee Supreme Court's decision was but a "routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense."[62] Because the alteration of the common-law rule was

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[61] 532 U.S. at 458, 121 S.Ct. at 1698.

[62] 532 U.S. at 467, 121 S.Ct. at 1703.

not unexpected and indefensible, its application to the petitioner did not deny fair notice.[63]

Because *Rogers* was a close case, and because even under the view of the dissenting justices to that decision the conviction in the present case should be affirmed, review of the principal dissent of four justices is appropriate.[64] The fundamental difference between the dissent and the opinion of the Court was the meaning of fair-notice principles under due process, the dissent arguing that the "'fair warning' to which *Bouie* and subsequent cases referred was not 'fair warning that the law might be changed,' but fair warning *of what constituted the crime at the time of the offense,"* so that *"Bouie* did not express disapproval of 'unexpected and indefensible changes in the law' . . . .[but] disapproval of '*judicial construction* of a criminal statute' that is 'unexpected and indefensible *by reference to the law which had been expressed prior to the conduct in issue.*'"[65]

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[63] 532 U.S. at 464, 121 S.Ct. at 1701. The Court also observed that in its view "the year and a day rule had only the most tenuous foothold as part of the criminal law of the State of Tennessee."

[64] Justice Breyer joined in only part II of Justice Scalia's dissenting opinion, which was joined in full by Justices Thomas and Stevens.

[65] 532 U.S. at 470, 121 S.Ct. at 1704-1705 (emphasis supplied in the dissent).

One does not have to reject the logical force of the *Rogers* dissent[66] to find it readily distinguishable from the present case. Before the Tennessee Supreme Court's decision, one could not be convicted of murder where the victim died more than one year and a day after the assault, and after it one could. In the present case, the elements of the offense have not changed at all; rather, at most, evidence that was competent to counter proof of an element is no longer competent. This is no different that if the rules of evidence were changed to ban character proof of the accused in the form of opinion. In either case, the evidentiary change can be applied to conduct occurring before the change.

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[66]In Michigan, the year-and-day rule was abolished by case decision, but applied in a "purely prospective manner." *People v Stevenson*, 416 Mich. 383, 331 N.W.2d 143 (1982) (and note that Tennessee has a statute providing with regard to the penal code that "The provisions of this title shall be construed according to the fair import of their terms, including reference to judicial decisions and *common law interpretations*, to promote justice, and effect the objectives of the criminal code" T. C. A. § 39-11-104(emphasis supplied)). While this avoids notice problems under due process, it raises the specter of the opinion being purely advisory. See *James Beam Distilling v Georgia*, 501 US 529, 115 L Ed 2d 481, 111 S Ct 2439 (1991), concurring opinion of Justice Scalia, finding purely prospective opinions to lie outside the judicial power. This counsels courts to follow the wisdom of Michigan's Justice Campbell and leave the alteration of statutes—including those that embrace common-law terms—to the legislature.

Because, then, the most that can be said is that the Michigan Supreme Court in *Carpenter* made clear that there is no evidentiary rule in Michigan that allows as competent evidence expert testimony on the issue of specific intent when that intent is an element of the offense, that decision in no way lessening the quantum of proof necessary to convict nor in any way changing the elements of the crime, it cannot be said that respondent was denied fair notice of that conduct which constitutes the offense charged.

Conclusion

Wherefore, amicus submits that the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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