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

REPLY BRIEF

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INTRODUCTION

Judicial construction of a criminal statute is ordinarily given retroactive effect unless the construction is "unexpected *and* indefensible by reference to the law which has been expressed prior to the conduct in issue." *Rogers* v. *Tennessee*, 532 U.S. 451, 457 (2001) (quoting *Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964)) (emphasis added). Thus, in *Bouie*, this Court struck down the South Carolina Supreme Court's construction of a statute "because it was so clearly at odds with the statute's plain language *and* had no support in prior South Carolina decisions." *Rogers*, 532 U.S. at 458 (emphasis added).

The Michigan Supreme Court's decision in *People* v. *Carpenter*, 627 N.W.2d 276 (Mich. 2001), was not indefensible. When Burt Lancaster murdered Toni King in 1993, Michigan's statutory criminal code contained a comprehensive treatment of mental capacity as a defense to criminal charges but did not mention the diminished-capacity defense. And in Michigan, the judicial branch will not recognize additional criminal defenses when the legislature has specified the defenses available. *People* v. *Reese*, 815 N.W.2d 85, 99 (Mich. 2012).

Nor was *Carpenter* unexpected. In 1993, the Michigan Supreme Court had never approved the diminished-capacity defense. And the Michigan Court of Appeals had referred to the defense in only one opinion that bound other Michigan Court of Appeals panels. (Under Michigan Court Rule 7.215(J)(1), the Court of Appeals need only follow a prior published decision issued on or after November 1, 1990.) That

decision, *People* v. *Caulley*, 494 N.W.2d 853 (Mich. Ct. App. 1992), simply assumed the defense's existence without discussion. Because even the Michigan Court of Appeals could have disavowed the defense at any time, a plain-language interpretation of the relevant statute was hardly unexpected.

That is why the Michigan Supreme Court did not consider *Carpenter* a change at all. The court did not say, for example, that it was disavowing or overruling established Michigan law. Instead, the court "declined to adopt" a defense the comprehensive statute did not mention. *Carpenter*, 627 N.W.2d at 284. And the Michigan Court of Appeals' application of *Carpenter* here is entitled to double deference: first, federal-court respect for state-court interpretations of state law, *Howlett* v. *Rose*, 496 U.S. 356, 366 (1990), and second, AEDPA's admonition that federal courts may only vacate a state conviction constituting an error "beyond any possibility of fairminded disagreement." *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011).

Recognizing his inability to satisfy this heavy burden, Lancaster reframes the question altogether, as follows: "Whether retroactive abolition of a common law defense violates due process." Resp. Br. 21. But the situation here is not a post-crime, judicial abolition of a common-law defense; it is a pre-crime, legislative abolition. That distinction is essential, for it reveals Lancaster was on notice that his conduct was criminal.

The Michigan Court of Appeals did not commit an error beyond any possibility of fairminded disagreement when holding, unanimously, that *Carpenter* was neither indefensible nor unexpected. The Sixth Circuit should be reversed.

ARGUMENT

I. *Carpenter* was neither indefensible nor unexpected.

In *Bouie*, this Court reversed the South Carolina Supreme Court's retroactive application of a new construction of the state's criminal trespass statute because the construction was "clearly at odds with the statute's plain language and had no support in prior South Carolina decisions." *Rogers*, 532 U.S. at 458 (citing *Bouie*, 378 U.S. at 356). Conversely, in *Rogers*, this Court upheld the Tennessee Supreme Court's retroactive abrogation of the common-law year-and-a-day rule because the abrogated rule was an "outdated relic of the common law" that had been abolished in many jurisdictions. *Rogers*, 532 U.S. at 463–64. Significantly, the year-and-a-day rule "did not exist as part of Tennessee's statutory criminal code." *Id.* at 464.

The present case is similar to *Rogers* and the exact opposite of *Bouie*. The diminished-capacity defense does not exist as part of Michigan's statutory criminal code, and the defense is "clearly at odds with" Michigan's comprehensive mental-capacity scheme, which does not include diminished capacity in its enumerated defenses. The fact that the Michigan Supreme Court in *Carpenter* recognized this reality was neither indefensible nor unexpected.

A. *Carpenter* was not indefensible.

The Michigan Supreme Court held that the Michigan Legislature excluded the diminished-capacity defense by omitting it from a comprehensive 1975 statute articulating mental-capacity defenses:

> [T]he Legislature, by adopting a comprehensive framework concerning mental illness and retardation as it relates to criminal responsibility, has established that defendants suffering from mental deficiencies amounting to legal insanity "should be acquitted on that ground and treated for their disease. Persons with less serious mental deficiencies should be accountable for their crimes just as everyone else." [*Carpenter*, 627 N.W.2d at 284 n.9 (quoting *Chestnut* v. *State*, 538 So.2d 820, 825 (Fla. 1989)).]

The Michigan Supreme Court had sound legal and policy reasons for this statutory interpretation.

Regarding the statutory text, it has long been Michigan law that, in the absence of express language leaving open the possibility, it is not the judiciary's role to create new criminal defenses when the legislature has specified what defenses are available. For example, in *People* v. *Reese*, 815 N.W.2d 85, 99 (Mich. 2012), the court held that the doctrine of imperfect self-defense does not exist as a freestanding defense mitigating murder to voluntary manslaughter. In so holding, the court reversed *People* v. *Springer*, 298 N.W.2d 750 (Mich. Ct. App. 1980), in which the Court of Appeals purported to change Michigan common law *after* the Michigan Legislature's codification of murder and

manslaughter crimes. The Michigan Supreme Court "emphatically stated that once the Legislature codifies a common law crime and its attendant common law defenses, the criminal law of this state concerning that crime should not be tampered with except by legislation." *Reese*, 815 N.W.2d at 99 (quoting *People* v. *Riddle*, 649 N.W.2d 30 (Mich. 2002), and *In re Lamphere*, 27 N.W. 882 (1886)).[1]

Here, the Michigan Legislature "enacted a comprehensive statutory scheme setting forth the requirements for and the effects of asserting a defense based on either mental illness or retardation." *Carpenter*, 627 N.W.2d at 285. By excluding diminished capacity from this comprehensive scheme, the Michigan Legislature "signified its intent not to allow evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent." *Id.* This is far from an indefensible interpretation of the statute.

The fact that the Michigan Legislature was acting intentionally is buttressed by the fact that the 1975 enactment was not merely a codification of then-existing Michigan common law regarding mental capacity. The statute added the possibility of a jury finding a defendant "guilty but mentally ill," a result that empowered Michigan trial courts to order

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[1] See also, e.g., *United States* v. *Johnson*, 529 U.S. 53, 57–58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."); *Bates* v. *United States*, 522 U.S. 23, 29 (1997) (declining to read an additional element into a criminal statute).

psychiatric confinement of a duration commensurate with the sentence that could have been imposed if the defendant had been found guilty but not mentally ill. Mich. Comp. Laws § 768.36. Yet the Legislature saw no reason to add a diminished-capacity defense that had existed at common law since at least 1867 outside the United States, Pet. App. 67a (citing *State* v. *Wilcox*, 436 N.E.2d 523 (1982)), and since at least 1949 within it, see *People* v. *Wells*, 202 P.2d 53 (Cal. 1949).

The Michigan Supreme Court in *Carpenter* also recognized two significant rationales behind the legislative "policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent." *Carpenter*, 627 N.W.2d at 283.

The first is the critical difference between "the subtle gradations of mental illness recognized in the psychiatric field" and the lack of such gradation in the criminal law, which "requires a final decisive moral judgment" of the accused's culpability. *Carpenter*, 627 N.W.2d at 283 (quotations omitted). Whereas "the insanity concept operates as a bright-line test separating the criminally responsible from the criminally irresponsible," the diminished-capacity defense "posits a series of rather blurry lines." *Id.*

The second is the substantial disparity in consequences for a defendant acquitted based on insanity versus diminished capacity. "Persons acquitted by reason of insanity, particularly where the facts are grave, cannot be allowed simply to walk out the front door of the courthouse." *Carpenter*, 627 N.W.2d at 283 (quotation omitted). Such offenders "may be confined and required to undergo evaluation and treatment." *Id.*

(citing Mich. Comp. Laws § 330.2050). In stark contrast, if "psychiatric testimony were generally admissible to cast a reasonable doubt upon whatever degree of *mens rea* was necessary for the charged offense," the "future safety of the offender as well as the community would be jeopardized by the possibility that one who is genuinely dangerous might obtain his complete freedom." *Id.* at 284 (quoting *Bethea* v. *United States*, 365 A.2d 64, 90–91 (D.C. 1976)).

To reiterate, however, the Michigan Supreme Court's decision did not rest its decision on these policy rationales, nor even the "wide divergence of views among the states concerning the admissibility of evidence of mental illness short of insanity." *Carpenter*, 627 N.W.2d at 282 (citation omitted). The court did not need to "join the affray" because the "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.* at 283.

Lancaster spends little time explaining why *Carpenter* was indefensible, arguing only that the 1975 enactment was "entirely silent as to diminished capacity." Resp. Br. 17. But that's precisely the point. By enacting a comprehensive statutory scheme for mental-capacity defenses and excluding diminished capacity, the Michigan Legislature made its choice. And the Michigan's Supreme Court's interpretation of the statute's plain language is not "incapable of being maintained as right or valid." *Merriam-Webster Online Dictionary* (defining "indefensible").[2]

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[2] http://www.merriam-webster.com/dictionary/indefensible.

B. *Carpenter* was not unexpected.

Lancaster spends the vast majority of his brief arguing that *Carpenter* was unexpected. But Lancaster's unexpectedness argument misapprehends both the applicable test and various aspects of Michigan law.

To begin, the correct test is *Carpenter*'s unexpectedness "by reference to the law which had been expressed *prior to the conduct in issue*." *Rogers*, 532 U.S. at 462 (quoting *Bouie*, 378 U.S. at 354) (emphasis added). There is no legal relevance to the authorities Lancaster cites that postdate his 1993 murder of Toni King. Resp. Br. 4, 6–14, A-3–A-9.

Next, under Michigan law, the only Michigan Court of Appeals decisions that bind subsequent appellate panels are those issued after November 1, 1990. Mich. Ct. R. 7.215(J)(1).[3] Before then, a panel did not have to follow a prior one. As noted above, the universe of published Michigan Court of Appeals decisions that postdate November 1, 1990, and predate Lancaster's 1993 murder includes only one opinion, *People* v. *Caulley*, 494 N.W.2d 853 (Mich. Ct. App. 1992). And *Caulley* simply assumed without discussion that the diminished-capacity defense existed. Because even the Court of Appeals could have disavowed the diminished-capacity doctrine at any time, it was hardly unexpected for the Michigan Supreme Court to do so.

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[3] Lancaster says that a "published decision of the Court of Appeals has precedential effect under the rule of stare decisis." Resp. Br. 7 (quoting Mich. Ct. R. 7.215(C)(2)). But he ignores that the Court of Appeals need only follow the rule of law established by decisions published "*after* November 1, 1990." Mich. Ct. Rule 7.215(J)(1) (emphasis added).

As for the Michigan Supreme Court, it made clear in *Carpenter* that it had "never specifically authorized [the diminished-capacity defense's] use in Michigan courts." 627 N.W.2d at 281. And 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). This is so because, even when a state's lower courts provide a reasonable construction of a state statute, federal courts are bound *only* by a contrary conclusion of the state's highest court. *O'Brien* v. *Skinner*, 414 U.S. 524, 531 (1974); accord *Missouri* v. *Hunter*, 459 U.S. 359, 368 (1983).

Contrary to *Carpenter*'s pronouncement, Lancaster argues that the Michigan Supreme Court accepted the diminished-capacity defense in *People* v. *Ramsey*, 375 N.W.2d 297, 304 (Mich. 1985). Resp. Br. 9–10. Not so. *Ramsey* "decline[d] to accept Ramsey's invitation to hold that a finding of mental illness negates malice aforethought as a matter of law." *Ramsey*, 375 N.W.2d at 304. Indeed, the issue was not even presented, because Ramsey possessed the requisite *mens rea*:

> The trial court in this case found that *Ramsey entertained the malice aforethought necessary to support a conviction* of second-degree murder. . . . Had the trial judge indicated a refusal to consider the defendant's malice aforethought, we would find it necessary to address the question of the extent to which mental illness could diminish the intent requirement for second-degree murder. *But he did not*. [*Id.* at 304 (emphasis added).]

The dearth of pre-1993 authority leaves Lancaster with two Hail Mary passes: Michigan jury instructions, Resp. Br. 11 n.9, and hyperbole, Resp. Br. 19 ("Re-writing history may be common in despotic regimes, but it is incompatible with fundamental notions of fairness . . . . Act III of *Rigoletto* cannot be re-written in order to save Gilda.").

As to the instructions, they are creations of the state bar, "not officially sanctioned by the Michigan Supreme Court." Pet. App. 18a. "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 (Batchelder, C.J., dissenting).

As for the hyperbole, it does not diminish the absence of pre-1993 Michigan case law specifically authorizing the diminished-capacity defense. Because the comprehensive 1975 statutory enactment said nothing about the defense, and Michigan courts were able to disavow the defense at any time, *Carpenter* could not be unexpected.[4]

Lancaster concludes his brief with an addendum containing a litany of Michigan appellate cases "*recognizing* diminished capacity defense." Resp. Br. A-1; *id.* at 4, 8–11, 30, 31 (emphasis added).

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[4] Lancaster also argues that the *Carpenter* court conceded the validity of the diminished-capacity defense through 2001 by titling a section of the opinion "The *Continued* Viability of the Diminished Capacity Defense in Michigan." Resp. Br. 13. But this heading prefaced a discussion of the defense's viability *after* the 1975 enactment. *Carpenter*, 627 N.W.2d at 283–85.

"Mentioning" would be more accurate. And of the 133 listed cases, 96 postdate Lancaster's 1993 murder of Toni King, and 32 are pre-November 1, 1990 Court of Appeals decisions that did not bind subsequent Court of Appeals panels (much less the Michigan Supreme Court).

That leaves only five cases: *Ramsey* and *Caulley* (both discussed above) plus three additional and entirely innocuous Michigan Supreme Court decisions. In *People* v. *Fernandez*, 398 N.W.2d 311, 320 (Mich. 1986), the court declined to address diminished capacity vis-à-vis voluntary intoxication because the issue was not presented. In *People* v. *Beach*, 418 N.W.2d 861 (Mich. 1988), the court made no mention of diminished capacity other than noting that defendant claimed drug-influenced diminished capacity. And in *People* v. *Griffin*, 444 N.W.2d 139, 140 (Mich. 1989), the court issued a three-paragraph summary order remanding so the trial court could consider whether counsel was ineffective for failing to explore defenses of diminished capacity and insanity. As Chief Judge Batchelder explained in her dissent, this "reemphasizes only the point that the defense was available. It does not indicate that the defense was so well established that its elimination was unexpected." Pet. App. 33a (Batchelder, C.J., dissenting).

The addendum fails even when giving closer consideration to pre-1993 Court of Appeals decisions that could be changed at any time. For example, *People* v. *Managiapane*, 271 N.W.2d 240, 247–49 (Mich. Ct. App. 1978), does not represent an unequivocal recognition of the diminished-capacity defense as Lancaster asserts. Resp. Br. 8 & n.6. The court there

said that while the "categories of the mentally retarded, as defined in the statute, and of those with diminished capacity have striking similarities," the court was "*not* prepared to say they are identical." *Id.* at 247 (emphasis added). Thus, *assuming* "mentally retarded" is equivalent to "diminished capacity," a defendant claiming diminished capacity must give notice of the defense because the 1975 statutory scheme requires all mental-capacity claims to be properly noticed. *Id.* at 249.

The diminished-capacity defense's tenuous status is corroborated further by the fact that Michigan courts conflated insanity, diminished capacity, and mental illness by using the phrases interchangeably. *People* v. *Smith*, 326 N.W.2d 434, 436–37 (Mich. Ct. App. 1982). One Court of Appeals panel even said that "[i]t is irrelevant whether . . . [it] is labeled as insanity, diminished capacity, or some other name." *People* v. *Adkins*, 324 N.W.2d 38, 41 (Mich. Ct. App. 1982).

In sum, while it is "indisputable that defendants were able to raise the [diminished-capacity] defense prior to *Carpenter*," "the availability of the defense alone does not make its elimination unexpected." Pet. App. 32a (Batchelder, C.J., dissenting). In *Rogers*, for example, the year-and-a-day rule had been available for nearly a century, but this Court still approved its retroactive elimination based on all the circumstances, which showed the change to be neither indefensible nor unexpected. The same is true here. For similar reasons, "the Michigan Court of Appeals's adjudication of Lancaster's due process claim was consistent with Supreme Court precedent." Pet. App. 35a (Batchelder, C.J., dissenting).

II. The Michigan Court of Appeals' ruling below satisfies AEDPA.

When it comes to AEDPA, Lancaster's burden is even higher. To prevail, he must show not only that the Michigan Court of Appeals below was wrong when it concluded that *Lancaster* was neither indefensible nor unexpected, he must demonstrate that the Court of Appeals' error was "so well understood and comprehended in existing law" that the court's unanimous decision was "beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011). Or, to put it another way, Lancaster must show that the Michigan Court of Appeals' application of federal law was objectively unreasonable. *Wiggins* v. *Smith*, 539 U.S. 510, 520–21 (2003). And he must make that showing relying only on the clearly established precedent of this Court. 28 U.S.C. § 2254(d)(1).

As the warden explained in her initial brief, Pet. Br. 26–28, an unreasonable application of federal law is very different from an incorrect application of federal law. And it is very difficult to characterize the Michigan Court of Appeals' unanimous opinion as "objectively unreasonable," *Wiggins*, 539 U.S. at 520–21, or "beyond any possibility for fairminded disagreement." *Harrington*, 131 S. Ct. at 786–87. "[U]sing federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts" is precisely what AEDPA prohibits. *Parker* v. *Matthews*, 132 S. Ct. 2148, 2149 (2012) (per curiam) (quoting *Renico* v. *Lett*, 130 S. Ct. 1855, 1866 (2010)).

Lancaster's contention is that the Michigan Court of Appeals' analysis was manifestly contrary to this Court's decisions in *Bouie* and *Rogers*. Resp. Br. 24–38. Not so. In *Bouie*, the South Carolina Supreme Court engaged in an "unforseseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie*, 378 U.S. at 352. The result was a conviction for conduct "not enumerated in the statute" at the time of the defendants' conduct. *Id.* at 363 (quotation omitted). In contrast here, the Michigan Supreme Court *applied* the relevant statutory language in accord with long-held Michigan principles of statutory interpretation.

As for *Rogers*, the Tennessee Supreme Court expressly admitted that it was changing the law by abolishing a century-old common-law rule. *Rogers*, 532 U.S. at 455. Here, the Michigan Supreme Court said that it was not changing the law, but simply applying the plain language of the 1975 mental-capacity statute. *Rogers* also involved a state court's change in the common law after the underlying crime had already been committed. *Id.* In contrast, the change in law here was the result of a pre-crime legislative enactment. And the Tennessee Supreme Court said that the year-and-a-day rule was truly established in Tennessee, a "reasonable reading of state law by the State's highest court [that] is binding on this Court." *Id.* at 468–69 (Scalia, J., dissenting); see also *id.* at 480 ("the Supreme Court of Tennessee is the authoritative expositor of Tennessee law, and has said categorically that the year-and-a-day rule was the law") (Scalia, J., dissenting). The Michigan Supreme Court said the exact opposite here. *Carpenter*, 627 N.W.2d at 284 (declining "to adopt" the defense).

Where the posture of this case is better than the best U.S. Supreme Court precedents that Lancaster can muster, it is not possible to say that the Michigan Court of Appeals' decision was manifestly contrary to such precedents. Emphasizing the point, another Michigan Court of Appeals panel—composed of entirely different judges than the panel that decided the present case—reached the exact same conclusion as the court here in an opinion that issued shortly after the *Carpenter* decision. *People* v. *Talton*, No. 231986, 2002 WL 1375894, at *3–5 (Mich. Ct. App. June 25, 2002). Citing *Bouie*, the court held that "retroactive application of *Carpenter* . . . does not violate the Ex Post Facto Clauses of the state and federal constitutions or implicate due process concerns." *Id.* at *4. "[T]he *Carpenter* Court addressed a question of statutory interpretation that had neither been previously decided at that level, nor, for that matter, in the Court of Appeals cases cited therein which, in other contexts, recognized the diminished capacity defense." *Id.* (citations omitted).

It is one thing to fault the Michigan Court of Appeals for failing to address an issue that was never squarely presented to them, as was the case with the diminished-capacity defense. It is quite another to say the court was objectively unreasonable in concluding that the Michigan Supreme Court's plain-language interpretation was neither indefensible nor unexpected.

This Court should reverse.

III. Lancaster's other arguments lack merit.

Lancaster's remaining points can be disposed in summary fashion.

First, Lancaster says that before 2001, appellate-court decisions do not reflect that any prosecutor argued on appeal that the 1975 insanity statute abolished diminished capacity as a defense, and it was at the Michigan Supreme Court's request in *Carpenter* that the parties addressed it. Resp. Br. 17–18. But that observation has no bearing on the question whether the decision was unexpected and indefensible. A court will entertain an issue when there is a case that presents a proper vehicle to address it. The Michigan Supreme Court determined that *Carpenter* was the proper vehicle to address the relationship between the 1975 insanity statute and the so-called diminished-capacity defense. Whether Michigan courts should have entertained the question previously, if at all, is exclusively a matter of state law. See *Virginia* v. *Hicks*, 539 U.S. 113, 120 (2003).

Second, Lancaster says that *Carpenter* is distinguishable from *Rogers* because the Michigan Supreme Court did not address the issue of retroactivity. Resp. Br. at 32. While it is true that the Michigan Supreme Court did not specifically provide a retroactivity holding, the court did express its view that it was not breaking new ground. The court said that it "need not join the affray" involving the diminished-capacity defense's propriety because the Legislature, "by enacting the comprehensive statutory framework . . ., has *already*" rejected the defense. The court was merely "*declin[ing] to adopt*" the defense.

Carpenter, 627 N.W.2d at 282, 284. As a result, *Carpenter* declared the law as the Michigan Legislature had enacted it some 26 years earlier. *People* v. *Doyle*, 545 N.W.2d 627, 636 (Mich. 1996).

Third, Lancaster says that the circumstances here are not fair because, if the Michigan Court of Appeals had correctly decided his *Batson* claim following his first trial, he would have been able to raise his previously unsuccessful diminished-capacity defense during his retrial. Resp. Br. 34. But the vagaries of litigation sometimes result in windfalls, and sometimes result in disadvantages. When this Court announces a new rule of criminal procedure that does not apply retroactively, defendants whose cases are not yet final due to slow-moving state processes receive the benefit of the new rule. Defendants whose cases are final due to efficient state adjudication are left out. Such disparities have never constituted a due-process violation.

Fourth, Lancaster conflates the idea that evidence can be used to negate *mens rea* and the idea of diminished capacity. Resp. Br. 28–29. But the warden cited the Sixth Circuit dissenting opinion for the proposition that diminished capacity as a defense "had been receding in state jurisprudence long before Lancaster's trials" and that "[s]ome 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. Br. 24–25. This is true because even when a state allows evidence of mental illness to be presented to negate *mens rea*, (i.e., insanity), it does not follow that the state recognizes

diminished capacity as a defense to escape criminal culpability.

Thus, the warden correctly indicated that some states wrote the diminished-capacity defense out of their law books. See *Barnett* v. *Alabama*, 540 So. 2d 810, 812 (Ala. Crim. App. 1988); *Kansas* v. *Pennington*, 132 P.3d 902, 908 (Kan. 2006). And the warden also correctly indicated that numerous other states had determined that their case law did not support a diminished-capacity defense. See Cal. Penal Code § 25(a); *Mincey* v. *Head*, 206 F.3d 1106, 1139 (11th Cir. 2000); *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); *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).

These cases establish that diminished capacity is disfavored nationally. Lancaster's contrary claim is belied by these authorities.

Finally, Lancaster relies on medical-science advances as a justification for perpetuation of the diminished-capacity defense. Resp. Br. 26. While such advances may make it easier for psychologists to distinguish the fine gradations of an individual's mental capacity, they do not change the fact that blurry mental-capacity lines are incompatible with the "decisive moral judgment" that criminal law requires. *Carpenter*, 627 N.W.2d at 283. Nor do they fix the problem of allowing dangerous murderers like Lancaster to roam free in the community. *Id.* at 283–84.

In other words, Lancaster may disagree with the Michigan Legislature's policy decision to eliminate the diminished-capacity defense, but that is not a valid ground to set aside Lancaster's murder conviction. Nor does that disagreement show that it was unreasonable to apply the plain meaning of the 1975 enactment to Lancaster's 1993 crime.

* * *

Lancaster received a windfall when the trial court allowed him to assert an ultimately unsuccessful diminished-capacity defense in his first trial. But that windfall does not create an entitlement to a continuing misapplication of Michigan's criminal code for his second trial. The Michigan Court of Appeals' conclusion that *Carpenter* is neither indefensible nor unexpected is not so unreasonable as to be beyond any possibility for fairminded disagreement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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