

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 NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS AS *AMICUS  
CURIAE* IN SUPPORT OF RESPONDENT**

---

DAVID PORTER  
Co-CHAIR, *AMICUS*  
COMMITTEE  
NATIONAL ASSOCIATION  
OF CRIMINAL DEFENSE  
LAWYERS  
801 I Street, 3rd Floor  
Sacramento, CA 95814  
(916) 498-5700

JEFFREY T. GREEN\*  
CHRISTOPHER A. BATES  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000  
jgreen@sidley.com

SARAH O'ROURKE SCHRUP  
NORTHWESTERN  
UNIVERSITY SUPREME  
COURT PRACTICUM  
375 East Chicago Ave.  
Chicago, IL 60611  
(312) 503-8576

*Counsel for Amicus Curiae*

April 10, 2013

\* Counsel of Record

---

TABLE OF CONTENTS

|                                                                                                                                         | Page |
|-----------------------------------------------------------------------------------------------------------------------------------------|------|
| TABLE OF AUTHORITIES .....                                                                                                              | ii   |
| INTEREST OF <i>AMICUS CURIAE</i> .....                                                                                                  | 1    |
| SUMMARY OF THE ARGUMENT .....                                                                                                           | 2    |
| ARGUMENT .....                                                                                                                          | 3    |
| PROSECUTORS AND DEFENDANTS<br>MUST BE ABLE TO RELY ON THE PRE-<br>SENT STATE OF SUBSTANTIVE LAW IN<br>THEIR DECISION-MAKING PROCESSES.. | 3    |
| CONCLUSION .....                                                                                                                        | 11   |

## TABLE OF AUTHORITIES

| CASES                                                                                                                                            | Page(s) |
|--------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| <i>Bouie v. City of Columbia</i> , 378 U.S. 347 (1964).....                                                                                      | 5       |
| <i>People v. Griffin</i> , 444 N.W.2d 139 (Mich. 1989).....                                                                                      | 10      |
| <i>People v. Lardie</i> , 551 N.W.2d 656 (Mich. 1996) <i>overruled on other grounds by People v. Schaefer</i> , 703 N.W.2d 774 (Mich. 2005)..... | 10      |
| <i>Rogers v. Tennessee</i> , 532 U.S. 451 (2001)...                                                                                              | 3, 4, 5 |
| <i>Salazar v. Ramah Navajo Chapter</i> , 132 S. Ct. 2181 (2012).....                                                                             | 4       |
| <i>United States v. Patane</i> , 542 U.S. 630 (2004).....                                                                                        | 4       |
| STATUTES                                                                                                                                         |         |
| Mich. Comp. Laws § 750.163 .....                                                                                                                 | 6, 7    |
| RULE                                                                                                                                             |         |
| Sup. Ct. R. 37.....                                                                                                                              | 1       |
| OTHER AUTHORITIES                                                                                                                                |         |
| United States Attorneys' Manual, Tit. 9, Ch. 27.....                                                                                             | 6, 7, 8 |

## INTEREST OF *AMICUS CURIAE*

*Amicus curiae* is the National Association of Criminal Defense Lawyers (“NACDL”).<sup>1</sup>

NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL’s approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

In furtherance of NACDL’s mission to safeguard fundamental constitutional rights, the Association frequently appears as *amicus curiae* in cases involving defendants’ due process rights, speaking to the importance of ensuring defendants receive the notice and assistance they need consistent with the Constitution’s guarantee of due process for all persons. As relates to the issues before the Court in this case, NACDL has an interest in protecting defendants’ right to fair warning of the laws with which

---

<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsel of record for both parties received timely notice of *amicus curiae*’s intent to file this brief and have consented to its filing in letters on file with the Clerk’s office.

they may be charged and the defenses they may raise.

### SUMMARY OF THE ARGUMENT

Michigan attempts to rewrite this Court's decision in *Rogers v. Tennessee*, 532 U.S. 451 (2001), in a way that disregards the way parties litigate criminal prosecutions in the real world and that undermines significant, and very real, reliance interests on the part of *both* prosecutors and criminal defendants. First, Michigan implausibly assumes that prosecutors and defense counsel plan plea negotiations and trial strategy based on prognostications of how the law might “develop” in the coming years rather than in reliance on the facts and law actually at hand.

Second, Michigan—and the states *amici*—ask the Court to adopt a rule authorizing retroactive application of changes to substantive law based, not on the foreseeability of the change, but on the defendant's subjective state of mind. By inviting the Court to divorce retroactivity analysis from foreseeability and sanction retroactive application of even unexpected changes, Michigan and the states *amici* ignore that prosecutors and defendants alike must be able to rely on the current state of the law in making charging decisions, negotiating pleas, and planning for trial. Both sides' ability to strategize and to advocate their clients' interests will be undercut if they must always look over their shoulder, wondering whether unforeseeable changes to current law might add, alter, or eliminate applicable defenses.

## ARGUMENT

**PROSECUTORS AND DEFENDANTS MUST BE ABLE TO RELY ON THE PRESENT STATE OF SUBSTANTIVE LAW IN THEIR DECISION-MAKING PROCESSES.**

Retroactive changes in substantive law that violate the “core due process concepts of notice, foreseeability, and, in particular, the right to fair warning,” are unconstitutional. *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001). Michigan argues that the *Rogers* test is not satisfied here because of the nature of the diminished capacity defense. Pet. Br. 26 (“The very nature of the defense (lack of mental capacity) precludes such reliance.”). Specifically, Michigan posits that “it would border on the absurd to argue that a person would refrain from committing crimes or conduct his trial differently if he had known that a mental-capacity defense would no longer be available to him.” Pet. Br. 25-26 (internal quotations omitted); see also *id.* at 26 (“[A] person cannot assert that he had the mental ability to appreciate the availability of a defense while simultaneously arguing that he lacked the mental capacity to form the intent required to support a murder conviction.”)

But Michigan’s claims ignore the reality that *both* prosecutors and criminal defendants rely upon the availability of particular defenses in developing trial strategies and negotiating plea agreements. And in expecting parties to prognosticate trends in decisional law—even to the point of ignoring binding intermediate appellate court precedent on a guess that the state supreme court might come out the other way, see Pet. Br. 19—Michigan also overlooks that busy prosecutors and defense counsel make decisions based on current law, not hazy predictions of where it might be in ten years. These are trial attorneys, not

*Restatement* writers. Thus, even if it “borders on the absurd” to suggest that criminal defendants weigh possible defenses before committing crimes, it is equally unlikely that prosecutors and defense counsel preparing for trial would ignore available defenses or somehow discount their importance because of some vague possibility that in the future a particular defense might be challenged as a matter of law.<sup>2</sup> *Cf. Rogers*, 532 U.S. at 464 (“Due process, of course, does not require a person to apprise himself of the common law of all 50 states in order to guarantee that his actions will not subject him to punishment in light of a developing trend in the law that has not yet made its way to his State.”).

In the moment, counsel on both sides of the table must rely upon all available tools to convince one another that a particular disposition is appropriate or to persuade discerning jurors. If, in Michigan’s world, a prosecutor were to warn defense counsel that: “you know, someday the diminished capacity defense might be overturned; I mean, look what’s happened

---

<sup>2</sup> Michigan’s claim that it is “absurd” to argue that individuals order their conduct based on the availability of certain defenses also runs headlong into the legal presumption that all persons, especially criminal defendants, “know the law.” *See Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2194 (2012) (“Ignorance of the law is no excuse.”). Nor does it make sense to limit the reliance inquiry to the time of the alleged offense, because some defenses are not viable unless some event happens at trial. For example, this Court has held that a *Miranda* violation does not occur unless and until the prosecution attempts to introduce an unwarned confession at trial. *See United States v. Patane*, 542 U.S. 630, 641 (2004). Thus, a defendant’s right to “fair warning” under *Rogers* obviously extends beyond his conduct at the time of the alleged offense: at the very least it runs through trial. Otherwise *Miranda* and other exclusionary-type defenses could be abolished without warning, and the abolition given retroactive effect.

in California,” see Pet. Br. 23-24 (describing trend in California law), an entirely appropriate response for defense counsel would be: “Could be, but you have to worry what this jury is going to think of the evidence that we get to present.” The oddity of such a conversation in the first place reflects just how far Michigan’s world is from reality.

Further, in claiming that none of the due process concepts identified by the Court in *Rogers* are at play in this case, the upshot of Michigan’s argument is that the retroactive application of the Michigan Supreme Court’s decision in *Carpenter* is permissible *even if Carpenter* was “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.” *Rogers*, 532 U.S. at 462. Under Michigan’s unduly expansive construction of *Rogers*, the test is not whether a change in the law was foreseeable, but rather whether the particular defendant could have “relied” on that law in forming the intent for his alleged crime. Pet. Br. 25. (“It is also difficult to discern how Lancaster can argue that he lacked ‘fair warning’ of the possibility that he might not be able to assert a diminished-capacity defense if he killed someone. Such an argument assumes that Lancaster relied on the defense’s existence when he murdered Toni King.” (citations omitted)); see also *id.* at 26 (“The very nature of the defense (lack of mental capacity) precludes such reliance.”).

Not only is that not the law, see *Bouie v. City of Columbia*, 378 U.S. 347, 355 n.5 (1964) (“The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an ad hoc appraisal of the subjective expectations of particular defendants.”), but it



would also destabilize the entire prosecutorial system by making retroactivity determinations turn on case-specific subjective intent. A given prosecutor or defense attorney could not be sure what law would ultimately apply in his case, because it would all depend on what was in the defendant's mind, not whether the change was foreseeable. (And in any event an attorney cannot plan for a change that is "unforeseeable.") This would in turn impair both sides' ability do their jobs, as defense attorneys and prosecutors alike must rely on the present state of the law to perform their duties.<sup>3</sup>

At the outset of a criminal prosecution, prosecutors rely on the present state of the law to select charges to pursue against the defendant. According to the United States Attorneys' Manual, for example, "the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction." U.S. Attorneys' Manual, Tit. 9, Ch. 9-27.300.<sup>4</sup> The selection of charges may be complicated where the defendant's conduct is prosecutable under different statutes with different proof requirements. *Id.* For example, in Michigan, there are four degrees of criminal child abuse. Mich. Comp. Laws § 750.136b. To determine whether an individu-

---

<sup>3</sup> *Amicus* acknowledges that a decision of a state supreme court resolving an active split among panels of lower courts in the state would not necessarily violate a defendant's due process right to fair warning. *Amicus* deals here with a situation where the change in substantive law is unforeseeable and unexpected in light of existing, unified precedent.

<sup>4</sup> The Manual, of course, applies only to United States Attorneys and their Assistants, but it is illustrative of how prosecutors make decisions in state courts as well.

al should be charged with first degree child abuse, which encompasses “knowingly or intentionally” causing “serious physical or serious mental harm to a child,” *id.* § 750.136b(2), or with a lesser crime, a prosecutor must assess the available defenses.

If, for example, it is likely that a defendant might be able to negate the specific intent element of first degree child abuse because there is significant evidence of diminished capacity, then a first degree child abuse charge is not “likely to result in a sustainable conviction” and the prosecutor should pursue a charge of a lesser degree. See, *e.g.*, *id.* § 750.136b(3)(a) (a person is guilty of second degree child abuse if the person’s “reckless act” causes serious harm to a child). But if the diminished capacity defense is not available to the defendant, the prosecutor should proceed on a first degree child abuse charge. Petitioner’s formulation of *Rogers* introduces pervasive uncertainty into the prosecutor’s decision-making calculus, because the substantive law upon which the prosecutor considers charges is vulnerable to retroactive amendment.

Prosecutors will be forced to grapple with similar uncertainties in the context of plea negotiations. As stated in the United States Attorney’s Manual, before engaging in plea discussions, a prosecutor should evaluate the likelihood of conviction at trial. U.S. Attorneys’ Manual, Tit. 9, Ch. 9-27.420. “[T]he prosecutor should weigh the strength of the government’s case relative to the anticipated defense case.” *Id.* But it is not feasible for a prosecutor to evaluate the likelihood of conviction at trial without knowing whether the diminished capacity defense (or other defenses susceptible to challenge under Michigan’s transmogrification of *Rogers*) is available to the defendant. If the prosecutor does proceed with plea negotiations,

the Attorneys' Manual instructs him to require the defendant to plead to the charge "[t]hat is the most serious readily provable charge consistent with the nature and extent of his/her criminal conduct." *Id.* at Ch. 9-27.430. Because the provability of a charge is inextricably linked to the availability of defenses, this instruction is entirely unhelpful in the face of retroactive amendments. Likewise, a defendant cannot differentiate between a favorable and an unfavorable plea deal if he cannot rely on the present state of the law to evaluate his legal position.

In Michigan's world, instability and uncertainty would only increase if the parties could not reach an agreement. In preparing for and participating in a trial, prosecutors and defense counsel are not going to treat one available defense differently than another on the basis of some suspicion that one defense might someday be retroactively overturned and become unavailable on retrial. Many defenses require substantial investigative resources to prove; for example, diminished capacity typically requires hiring expert witnesses to evaluate the defendant's mental state and then explain it to the jury. The prosecutor in turn may present a counter-expert and adduce his own evidence through investigation in order to rebut the anticipated defense.<sup>5</sup>

Michigan seems to think both sides are going to ratchet up or down their efforts depending on how stable they think the law on a particular subject is. But that is not the way trials work, and it is certainly not how defense counsel think. The defense is aiming for an acquittal—or at least for a conviction on a less-

---

<sup>5</sup> Trial judges, too, rely on the stability of substantive law, for instance when ruling on issues like the admissibility of evidence or the wording of jury instructions.

er charge—and if it succeeds, the state of the law ten years hence is irrelevant. Neither side is going to calibrate its efforts to fit hypothetical future holdings. Expanding *Rogers* the way Michigan suggests will thus only result in more blindsiding, more confusion, and more instability.

The states *amici* also ignore the fact that defendants rely upon substantive law past the time of the commission of an offense, in plea negotiations and trial preparations, and that defendants should be entitled to notice under the due process clause as a result of that reliance. See Br. of States as *Amici Curiae* in Support of Pet. 8 (“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.”). On the flawed premise that the due process right to fair warning protects defendants only at the time of the offense (and not through trial), the states conclude that defenses “predicated on a lack of awareness of some sort” may be retroactively eliminated. *Id.* at 7. Accordingly, the states contend that a criminal defendant has no due process right to fair notice of the abolition of the defenses of insanity, factual ignorance or mistake, assisting an unlawful arrest, and entrapment. See *Id.* at 6-7.

The states’ proposed “lack of awareness” standard, however, sweeps far broader than they admit, and would in fact eliminate a defendant’s due process right to fair warning with respect to a large number of defenses. The awareness defenses the states identify attack the mens rea element of a crime and, in that sense at least, are indistinguishable from other mens rea defenses such as coercion, duress, withdrawal, and good faith. Mens rea is an element of most common law and statutory crimes. See *People v. Lardie*,

551 N.W.2d 656, 660 (Mich. 1996), *overruled on other grounds by People v. Schaefer*, 703 N.W.2d 774 (Mich. 2005) (“Criminal intent is ordinarily an element of a crime even where the crime is created by statute. Statutes that create strict liability for all of their elements are not favored.” (internal citations omitted)).

Consequently, it is unsurprising that a substantial number of defenses exist to rebut mens rea. In fact, a defense counsel who does not raise a mens rea defense where the facts support one is vulnerable to an ineffective assistance of counsel attack. See *People v. Griffin*, 444 N.W.2d 139, 140 (Mich. 1989) (remanding for a hearing on defendant’s claim that his counsel was ineffective for failure to explore the diminished capacity defense). By inviting prosecutorial challenges to, and the retroactive elimination of, mens rea defenses, the states’ “lack of awareness” standard will result in further destabilization of the present state of the law, to the detriment of prosecutors and defendants who must rely on the law in pressing charges, negotiating plea agreements, and preparing for trial.

**CONCLUSION**

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

DAVID PORTER  
CO-CHAIR, *AMICUS*  
COMMITTEE  
NATIONAL ASSOCIATION  
OF CRIMINAL DEFENSE  
LAWYERS  
801 I Street, 3rd Floor  
SACRAMENTO, CA 95814  
(916) 498-5700

JEFFREY T. GREEN\*  
CHRISTOPHER A. BATES  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000  
jgreen@sidley.com

SARAH O'ROURKE SCHRUP  
NORTHWESTERN  
UNIVERSITY SUPREME  
COURT PRACTICUM  
375 East Chicago Ave.  
Chicago, IL 60611  
(312) 503-8576

*Counsel for Amicus Curiae*

April 10, 2013

\* Counsel of Record