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LINDA METRISH, WARDEN, :

Petitioner : No. 12-547

v. :

BURT LANCASTER :

Wednesday, April 24, 2013

APPEARANCES:

JOHN J. BURSCH, ESQ., Michigan Solicitor General,
Lansing, Michigan; on behalf of Petitioner.

KENNETH M. MOGILL, ESQ., Lake Orion, Michigan; on behalf
of Respondent.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 12-547, Metrish v. Lancaster.

5 Mr. Bursch?

6 ORAL ARGUMENT OF JOHN J. BURSCH

7 ON BEHALF OF THE PETITIONER

8 MR. BURSCH: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 This is a Sixth Circuit habeas appeal
11 involving AEDPA deference. Harrington v. Richter holds
12 that a Federal court may only overturn a State court
13 conviction that is such an erroneous misapplication of
14 this Court's clearly established precedent as to be
15 beyond any possibility of fair-minded disagreement, that
16 is, an extreme malfunction.

17 Here, a fair-minded jurist could conclude
18 that the Michigan Supreme Court's Carpenter decision was
19 neither indefensible, nor unexpected, when it simply
20 applied plain statutory language in accord with
21 well-established Michigan interpretive principles.

22 Accordingly, the Michigan Court of Appeals
23 application of Carpenter was not error, and the Sixth
24 Circuit should be reversed.

25 I'd like to begin with the statutory text.

1 In 1975, the Michigan legislature passed a comprehensive
2 mental capacity affirmative defense statute. In it, the
3 defenses are defined for mental illness and mental
4 retardation, but it says nothing about diminished
5 capacity.

6 And that silence is crucial here because, in
7 Michigan, for over 200 years, it has been a code
8 jurisdiction, which means that, if the statutes address
9 a particular area of criminal law, only that statute
10 applies, and the Michigan courts are not allowed to
11 either add to or subtract from that statutory text.

12 So only the Michigan legislature had the
13 power to add a diminished capacity defense.

14 JUSTICE GINSBURG: Well, what --

15 JUSTICE SCALIA: 200 years -- 200 years?
16 Did you say that?

17 MR. BURSCH: Yes. Actually, even before
18 Michigan was a territory -- I'm -- before it was a
19 State, in 1810, it passed a law that abolished common
20 law criminal principles when there was a statute that
21 addressed the -- the subject matter.

22 JUSTICE GINSBURG: There was some law in
23 effect in Michigan on this subject from the year 1973
24 till the year 2001. There was no statute, and there was
25 no ancient common law. But what was it? If I asked you

1 the question, what was the law in Michigan on diminished
2 capacity from 1973 to 2001, what would you respond?

3 MR. BURSCH: It changed one time. In 1973,
4 there was a Michigan Court of Appeals decision that
5 recognized, as a matter of common law, the diminished
6 capacity defense, but that was set aside by the 1975
7 statute, which established all the comprehensive
8 diminished capacity defenses available and left out
9 diminished capacity.

10 So in 1975, 1976 -- you know, 1978 --

11 JUSTICE GINSBURG: How -- how was the
12 Michigan Court of Appeals construing the defense? Did
13 it say -- it didn't say anything about the 1975 statute.

14 MR. BURSCH: Well, what the Michigan Court
15 of Appeals did, beginning in 1978, in the Mangiapane
16 case, was to ask, is diminished capacity part of the
17 statutory code? And it never held, expressly, that it
18 was. What it did in Mangiapane and in subsequent cases,
19 it assumed that the defense existed, but it never held
20 that. And that dicta could not override the plain
21 language of the statute.

22 And, in fact, counsel on the other side has
23 not pointed to a single Michigan decision where a
24 conviction or an exoneration on acquittal or even a
25 finding of ineffective assistance was ever based on the

1 diminished capacity defense.

2 JUSTICE KENNEDY: Was the 1973 case that you
3 mentioned based on a statute, or was it based on,
4 allegedly, a vacuum that the statutory structure allowed
5 the court to fill? I mean, is that the way the 1973
6 case came about? And was the 1973 case followed by
7 other courts? Or was it just an isolated precedent?

8 MR. BURSCH: The 1973 case was a common law
9 vacuum, Justice Kennedy, where the Michigan legislature
10 had not yet spoken about mental incapacity defenses, and
11 so it stood alone, as the court was able to do, as a
12 common law decision.

13 There were no other cases that relied on it
14 before the '75 statute was enacted. And, after that
15 point, the Michigan appellate courts did not look to the
16 '72 decision as the source of the doctrine. They
17 assumed that, if it existed, it must be somewhere within
18 the statute.

19 And then, in Carpenter, in 2001, the
20 Michigan Supreme Court, when, finally, the very first
21 Michigan court to look at the question explicitly says,
22 well, it's not in the statute, diminished capacity isn't
23 there, we've got mental retardation, we've got mental
24 illness, no diminished capacity. As the Michigan
25 judiciary, we lack the power to add the diminished

1 capacity defense.

2 JUSTICE KAGAN: Well --

3 JUSTICE ALITO: Well, we don't --

4 JUSTICE KAGAN: Please.

5 JUSTICE ALITO: Well, we don't really have
6 to reach this issue in this case, according to your
7 submission, but what would happen if a State -- an
8 intermediate State appellate court said the law is
9 such-and-such and then a -- a person is tried in the
10 interim -- is tried and, subsequently, the State supreme
11 court says that intermediate State court decision was
12 incorrect, that never was the law of this State; the law
13 was exactly the opposite?

14 MR. BURSCH: I think you would apply the
15 same principles to that hypothetical as you did in
16 Rogers, and -- and, in Rogers, you had a nearly 100-year
17 common law history of the year and a day rule in the
18 Tennessee Supreme Court, that the defense was available
19 to use that term for nearly 100 years, and, yet, it
20 didn't violate due process in Rogers for the Tennessee
21 Supreme Court to abolish the rule because it was neither
22 indefensible nor unexpected.

23 Now, this case is much easier than Rogers or
24 your hypothetical, for several reasons. First, as I
25 mentioned, it's a habeas case, and so we've got the

1 layer of AEDPA deference that wasn't there.

2 Second, we're not talking about the
3 evolution of the common law, like we were in Rogers.
4 We're talking about a statute, and the statute meant
5 what it said in '75, just like it did in '01, just like
6 it does today.

7 And the last thing is that, in the Rogers
8 case, even the Tennessee Supreme Court acknowledged
9 there was a change. And, here, the Michigan Supreme
10 Court said there was no change because the statute said
11 what it said in 1975, and that meant no diminished
12 capacity.

13 JUSTICE ALITO: Well, what I'm wondering is
14 how we even get beyond the statement, the holding by a
15 State supreme court regarding the -- the law of the
16 State. Don't we have to accept that as the -- as the
17 law of the State? Isn't that what our decision in Fiore
18 says?

19 If the State supreme court says, this is the
20 law, and it's always been the law, then how can we
21 second-guess that?

22 MR. BURSCH: Well, Justice Alito, I would
23 think about it in -- in two pieces. And the first piece
24 is can you second-guess the Michigan Supreme Court's
25 interpretation of the statute? And I think the answer

1 there, everybody has to agree, is no. The State's
2 interpretation of its own statute binds this Court,
3 binds all Federal courts, just like the South Carolina
4 Supreme Court decision in -- in Bouie did.

5 With respect to the Michigan Supreme Court's
6 analysis of the retroactive effect, I agree that Fiore
7 stands for that very proposition, and I think Indiana
8 makes that case very forcefully in the multi-State amici
9 brief.

10 You don't have to reach that question here,
11 however, because given the AEDPA standard and the fact
12 that the Michigan Supreme Court decision was so clearly
13 not a misapplication of Rogers and Bouie, it makes this
14 a relatively easy case.

15 But I think you'd be fully within your right
16 to follow the Fiore holding.

17 JUSTICE KAGAN: You -- you suggested,
18 General, that the -- the fact that this is statutory
19 makes your position easier.

20 MR. BURSCH: Yes.

21 JUSTICE KAGAN: And I wonder if that's true.
22 I mean, you could see an -- an argument the exact other
23 way, which suggests that we all understand that common
24 law changes and evolves over time, but that it's rare
25 for a court to reverse a decision on what a statute

1 means and that that's not foreseeable in the same way.

2 So -- now, especially if it were a single
3 court, saying the statute means A today, and then,
4 tomorrow, it comes back, and it says, no, it means B,
5 whether that isn't actually -- whether that wouldn't cut
6 against your position.

7 MR. BURSCH: Justice Kagan, I think this is
8 the easiest case because it's not just statutory
9 interpretation; it's statutory interpretation of a
10 statute that is just plain on its face. If you had an
11 ambiguous statute, yes, then maybe there would be some
12 more uncertainty.

13 But where you've got a statute that
14 enumerates several defenses, does not include diminished
15 capacity, and, under Michigan law, if it's not
16 enumerated, it's not there, and the courts can't add it.
17 That does make this easier.

18 I think it was probably a bigger challenge
19 in Rogers, for example, to acknowledge that, one,
20 Tennessee law had changed right out from underneath the
21 defendant; and, yet, even given that change, this Court
22 was comfortable that it was not indefensible or
23 unexpected.

24 I think when --

25 JUSTICE SOTOMAYOR: What about the Michigan

1 Court of Appeals? There's only one court of appeals,
2 right?

3 MR. BURSCH: Correct, Justice Ginsburg.

4 JUSTICE GINSBURG: And so that court,
5 several times, recognized diminished capacity as a
6 defense.

7 MR. BURSCH: Well, it -- it didn't recognize
8 it as a defense, in the sense that it analyzed the
9 statute and said, yes, the defense is available. It, in
10 many instances, assumed that it might exist, and, if it
11 did, then this is the result.

12 The closest it comes is this Mangiapane
13 decision in 1978, and the court says, very specifically,
14 there that the definition of mental illness in the
15 statute is similar to diminished capacity, but the court
16 says, at page 247 of the Northwest Second Report, the
17 court was not prepared to say they are identical.

18 JUSTICE GINSBURG: The --

19 MR. BURSCH: So --

20 JUSTICE GINSBURG: Your colleague said that
21 there were 130 appellate decisions -- I take it that's
22 the court of appeals decisions -- recognizing diminished
23 capacity as a defense.

24 MR. BURSCH: Recognizing it as a possible
25 defense. Again, in every single one of those cases, all

1 of which would be contrary to the statutory language,
2 incidentally, not a single one of them did a conviction
3 or an acquittal or a finding of ineffective assistance
4 ever turn on that point. And so, in that sense, it's
5 also, again, very much like Rogers, where this Court
6 said that the year and a day rule had never been used
7 for an acquittal or a conviction in any Tennessee case.

8 And so the question is, again, through the
9 AEDPA deference lens, which is very high, was the
10 Carpenter decision defensible and expected? And we
11 would submit that any time that a State supreme court
12 applies the plain language of the statute in accord with
13 established principles of interpretation in that State,
14 it could almost never be indefensible or unexpected.

15 JUSTICE SOTOMAYOR: That seems a little
16 strange, for the following reason -- just as I think
17 this case presents an example, you're claiming it's
18 clear because the supreme court said it was clear, but
19 the court of appeals in -- in Mangiapane, whether or not
20 it assumed it or not, did an analysis that clearly says
21 that it believes that the definition of legal insanity
22 includes diminished capacity.

23 Its holding didn't need that analysis,
24 because it could have assumed it and then just said, but
25 no notice was given, so the defense fails here. It took

1 the time to analyze just this question and came to a
2 contrary conclusion. Its contrary conclusion was that
3 "legal insanity" was a broad enough term under Michigan
4 law to encompass this defense.

5 The court of -- the State supreme court has
6 now said, no, it's not. But I don't know that that
7 makes the statute any less ambiguous, merely because a
8 court announces that it thinks it's not.

9 MR. BURSCH: Well, two responses to that,
10 Justice Sotomayor. First, I want to be, again, very
11 careful about what Mangiapane actually held. It did
12 look at the statutory language and, at page 247, said,
13 "We are not prepared to say they are identical," meaning
14 the definition of mental illness and the concept of
15 diminished capacity.

16 There, the question was procedural because
17 the defendant had not given the prosecutor notice of any
18 defense, based on mental capacity in the trial court,
19 and so the court said, well -- you know, assuming that
20 the -- the defense exists, we are not prepared to decide
21 that today --

22 JUSTICE SCALIA: Well, I --

23 MR. BURSCH: -- because you would have to
24 give statutory notice.

25 The second --

1 JUSTICE SCALIA: I -- I would have thought
2 your -- you can get to your second one, but I would have
3 thought your first response to -- to the question would
4 have been to deny that you say it's clear because the
5 supreme court of Michigan has said so. I thought your
6 argument is it's clear because it's clear.

7 MR. BURSCH: Justice Scalia, that was my
8 second point.

9 JUSTICE SCALIA: Ah, okay.

10 (Laughter.)

11 JUSTICE SCALIA: It should have been your
12 first point. The premise is simply wrong. You're
13 saying it was clear because the statute's clear.

14 MR. BURSCH: It was clear. And if any
15 Michigan court had had the opportunity to actually
16 decide it on the merits in light of this 200-year
17 history of Michigan being a criminal code State, it was
18 clear. And so this is the point when a State court
19 decision is most defensible and most expected, applying
20 the plain language of a clear statute in accord with
21 State principles.

22 JUSTICE KENNEDY: Are there any States with
23 a statute identical or -- or close to the Michigan
24 statute that have interpreted the statute to say it does
25 include diminished capacity?

1 MR. BURSCH: Justice Kennedy, I'm not aware
2 of --

3 JUSTICE KENNEDY: This statute is -- fairly
4 well tracks the common law tradition, which indicates
5 that diminished capacity is not a defense.

6 MR. BURSCH: Right.

7 JUSTICE KENNEDY: I'm just curious to know
8 if any State courts have reached an opposite conclusion
9 under a statute like this.

10 MR. BURSCH: I'm not aware of any other
11 States that have the same statute and have addressed the
12 question one way or the other. I do know that the
13 language of the Michigan statute is fairly unique. If
14 you look in the criminal law treatises, we're kind of in
15 a category of only a very few States that -- you know,
16 on the one hand, define mental illness and mental
17 retardation, do not define or mention diminished
18 capacity, and, yet, still have this guilty, but insane
19 option, which is something that Michigan common law did
20 not have, but then that was added in the '75 statute.
21 So it's a little bit unique.

22 I think it's also unique to Michigan that we
23 have this 200-year criminal code history, which, if
24 you're interested, you can read all about it in the In
25 re Lamphere case that we cite on page 4 to 5 of our

1 reply brief. But it's when you put those things
2 together that really make this such an easy case.

3 JUSTICE KAGAN: Well, General, I guess I
4 wonder whether it's relevant what the statute really
5 says, as opposed to what courts said it says. I mean,
6 sometimes, judges make errors, and our law is dotted
7 with places where courts have made errors and said that
8 things mean what they don't mean or don't mean what they
9 do mean, and -- you know, we expect people to follow
10 what the court says is the law, even if there's really a
11 better reading out there.

12 And, also, we think that people should rely
13 on what the court says is the law, even though there's
14 really a better reading out there. And so -- you know,
15 what does it matter if we come out and said -- and
16 say -- you know, what were these crazy Michigan courts
17 doing?

18 If that's what they were doing, it seems as
19 though people had a right to rely on that.

20 MR. BURSCH: Well, the expectation,
21 certainly, is that people would rely on Michigan
22 statutory law. And I concede that this would be a more
23 difficult case if the Michigan Supreme Court in, say,
24 1990 had come out in a published opinion and said the
25 exact opposite of what it said in 2001. Obviously,

1 that's not what happened here.

2 But -- but ultimately -- you know, the
3 question that would have been on -- on Mr. Lancaster's
4 mind back in 1993 when he shot and killed Toni King was,
5 does Michigan law prohibit me -- will it punish me if
6 I -- I kill someone?

7 And -- and, clearly, he had to know that.
8 And, if he had looked at the 1975 statute, he would have
9 seen that diminished capacity was not mentioned there.
10 So to the extent that he -- he wanted to rely on that
11 defense, he wouldn't have found it in Michigan's
12 codified law.

13 Now, I know the argument on the other side
14 is, well, we have these other cases which -- you know,
15 mention the doctrine, kind of assume without deciding
16 that -- that it's out there. And he wants to assume
17 that he has all the knowledge of that, but not the
18 knowledge of the background principle that Michigan
19 won't add affirmative defenses to a statute through a
20 judicial action.

21 And, if you're going to impute any knowledge
22 to him -- and -- and we submit that you probably
23 shouldn't, then you've got to impute all the knowledge
24 of Michigan law, the plain language of the statute and
25 the interpretive principles that should guide what that

1 statute means.

2 He knew that killing someone was wrong,
3 unquestionably, he was on fair notice of that. And --
4 and just like in Rogers, this diminished capacity
5 defense after 1975 was never relied on by any Michigan
6 court to either hold someone guilty or to acquit them or
7 to find that there was ineffective assistance. It just
8 was not the kind of well-established principle that
9 could possibly make the Carpenter decision either
10 indefensible or unexpected.

11 And then, when you layer that on top with
12 AEDPA deference -- you know, really, this is about as
13 simple as it gets. There is no decision of -- of this
14 Court, not Rogers, not Bouie, not Fiore, not Bunkley,
15 any Court decision that is contrary to or misapplied in
16 this Michigan Court of Appeals opinion.

17 Unless the Court has any further questions,
18 I'll reserve the balance of my time.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Mr. Mogill.

21 ORAL ARGUMENT OF KENNETH M. MOGILL

22 ON BEHALF OF THE RESPONDENT

23 MR. MOGILL: Mr. Chief Justice -- excuse
24 me -- and may it please the Court:

25 At the time of his offense in this matter,

1 Respondent had a well-established, uncontested right to
2 present evidence of diminished capacity in order to
3 negate the elements of premeditation and deliberation in
4 the first-degree murder charge against him, and he did
5 assert that defense at his first trial. That trial was
6 rendered unfair by the prosecutor's Batson error.

7 Respondent was not allowed to present the
8 same defense at his retrial, however, because, 8 years
9 after his offense, the Michigan Supreme Court
10 unexpectedly changed the rules in midstream, holding in
11 Carpenter that a statute that had been enacted 26 years
12 before and that did not use the words "diminished
13 capacity" did not express an intent to abolish any
14 defense of diminished capacity, but the Supreme Court
15 held that it had been abolished.

16 That was fundamentally unfair to Respondent,
17 all the more so, because, if the Michigan courts had
18 ruled correctly on the Batson issue, retrial would have
19 occurred before 2001, and there's no question, but that
20 Respondent would have been able to raise the diminished
21 capacity as --

22 JUSTICE SCALIA: He would have been able to
23 raise it. There's a lot of question about whether it
24 would have been successful because, if it had gone up to
25 the Michigan Supreme Court -- the statute was in effect

1 during his first trial?

2 MR. MOGILL: That's correct.

3 JUSTICE SCALIA: He could have raised it,
4 but, if it went up to the Michigan Supreme Court, it
5 would have had the same result as here.

6 MR. MOGILL: With all due respect -- I'm
7 sorry.

8 JUSTICE SCALIA: And your only -- your only
9 defense would have been, oh, it's a great surprise. But
10 I don't see how it's a surprise if the Michigan law has
11 been, as -- as the Solicitor General of Michigan has
12 described it, that -- that there's a clear tradition.
13 If -- if the statute addresses the area, the courts will
14 not -- will not supplement it by -- by common law
15 additions.

16 Did he not know that?

17 MR. MOGILL: With all due respect to
18 opposing counsel, I -- the view -- our view of the law
19 is -- is entirely different. Michigan recognizes the
20 common law in its constitution. Michigan law has -- was
21 firmly established that the diminished capacity defense
22 existed. By 1973 --

23 JUSTICE SCALIA: Why do you say it was
24 firmly -- do you -- do you contest the -- the assertion
25 by the solicitor general that there is no case

1 which -- which acknowledged and held the defense of
2 diminished capacity?

3 MR. MOGILL: I disagree.

4 JUSTICE SCALIA: Is that wrong?

5 MR. MOGILL: Yes.

6 JUSTICE SCALIA: What -- what case --

7 MR. MOGILL: Well, first of all -- I'm
8 sorry, Justice Scalia.

9 JUSTICE SCALIA: -- lets the defendant off
10 on the basis of diminished capacity?

11 MR. MOGILL: The -- let somebody off? Well,
12 first of all, we're not talking about --

13 JUSTICE SCALIA: What case has a holding --
14 a holding that diminished capacity excuses the crime or
15 mitigates the crime.

16 MR. MOGILL: Mitigates.

17 Justice Scalia, in Lynch itself in 1973,
18 Ms Lynch was charged with first-degree murder for the
19 starvation -- in relation to the starvation death of her
20 infant. The trial judge declined to permit -- declined
21 to permit her to offer psychiatric testimony to mitigate
22 to second degree.

23 The court of appeals reversed, indicating
24 that evidence -- mental health evidence of the kind she
25 wanted to offer was admissible to establish diminished

1 capacity, that is, to negate the element of
2 premeditation and deliberation.

3 Once that case was decided, there is one
4 direction only in Michigan law from 1973 until
5 Carpenter, by surprise, in 2001. Yes, the statute was
6 passed in 1975, and just 3 years later, in 1978,
7 Mangiapane decided that diminished capacity comes within
8 the definition of legal insanity.

9 The phrasing in the -- in the court's
10 opinion is very significant and it's much more than
11 opposing counsel suggests. The court stated explicitly,
12 "we find that the" -- "the defense known as diminished
13 capacity is codified within the definition of legal
14 insanity."

15 Once that happened, then that required an
16 accused who wanted to raise a diminished capacity
17 partial defense to comply with the procedural
18 requirements of the new statute. From that point
19 forward, it was clear that diminished capacity -- and --
20 and these are published court of appeals decisions, so
21 they are binding precedent statewide in Michigan, unless
22 or until reversed or modified by the State supreme
23 court, the legislature, or a constitutional amendment.

24 Once that happened, there is not a case,
25 including in Carpenter itself, where the prosecution

1 objected to the admissibility of diminished capacity
2 evidence. It was so well-established, it was beyond
3 question. It was so well --

4 JUSTICE GINSBURG: I think the question that
5 was asked was, at the bottom line, at the end of the
6 day --

7 MR. MOGILL: Yes.

8 JUSTICE GINSBURG: -- did anybody get
9 sentenced less? Did it affect the outcome? You gave a
10 case where a defendant was allowed to raise diminished
11 capacity, but was -- are there cases where the defense
12 was successful on the merits?

13 MR. MOGILL: Justice Ginsburg, I think
14 that's a very important question. The -- the closest I
15 can come -- the first part of my answer is, in the
16 Griffin case, in 1989, in an order which was a
17 dispositive order and, therefore, was precedent, the
18 Michigan Supreme Court disposed of an application for
19 leave to appeal by remand -- vacating and remanding a
20 case for an ineffective assistance hearing because of
21 defense counsel's failure, inter alia, to consider a
22 diminished capacity defense.

23 That order could not have occurred unless
24 the supreme court had determined that diminished
25 capacity was a valid defense. The second part --

1 JUSTICE SCALIA: Or -- is that correct?
2 Wouldn't -- wouldn't the supreme court have done that if
3 it -- if it thought that at least -- at least it was
4 arguable?

5 MR. MOGILL: I -- I respectfully submit
6 that, under Strickland analysis, no. If it -- if it's
7 not an established defense, if it's not something that
8 would, arguably, come within the Strickland framework,
9 there would not have been a remand. That would have
10 been a -- a question of a lawyer trying to be creative,
11 but it wouldn't implicate Strickland principles.

12 JUSTICE KENNEDY: Well, I'm -- I'm a little
13 surprised at your answer, and Justice Scalia's question
14 indicates the same. If the law was as well settled as
15 you say it was in the appellate courts, then it seems to
16 me, certainly, counsel should raise it and is arguably
17 deficient for not doing so. Whether or not he'll
18 prevail at the end of the day is something quite
19 different.

20 MR. MOGILL: Well, Justice Kennedy, I
21 believe that the basis for a remand in a case like
22 this -- and this is not an unusual kind of a situation
23 in practice, is where the law is clear, then you -- then
24 the remand is to determine the factual basis for the
25 defendant's claim, were the facts such that a reasonably

1 competent attorney should have been expected to
2 investigate and -- and raise it.

3 CHIEF JUSTICE ROBERTS: You said your view
4 of the law was -- you know, so well-established --

5 MR. MOGILL: Yes.

6 CHIEF JUSTICE ROBERTS: -- as to be beyond
7 question. That is the standard under AEDPA, right?

8 MR. MOGILL: Well -- I'm sorry.

9 CHIEF JUSTICE ROBERTS: You have to be --
10 you have to be -- you have to be that right to prevail,
11 right?

12 MR. MOGILL: What I have to establish is
13 that the decision of the Michigan Court of Appeals here
14 was objectively unreasonable. And, whether it's beyond
15 question, I think we, certainly, have objectively
16 unreasonable ruling for the reasons that it was
17 without -- not only was it well-established -- and I
18 want to weave into this the second part of what I'd like
19 to answer of Justice Ginsburg's question.

20 I think it's very important in understanding
21 the question of reversals or not what the lay of the
22 land was because, where you have a framework that allows
23 a defense to be raised and prosecutors aren't objecting,
24 the -- the application's going to be a factual matter
25 for a jury to decide.

1 So it's not going to be something that's
2 going to percolate up into appellate legal issues. It's
3 going to be successful sometimes, it's not going to be
4 successful sometimes, and there are no statistics on
5 that. But it doesn't -- it won't present a legal issue,
6 and that's in no small part why the question of, well,
7 what about a reversal --

8 JUSTICE ALITO: In Griffin -- you describe
9 Griffin in your brief as follows: "The court vacated,
10 reversed, and remanded the decision below based on,"
11 quote, "defendant's claim that trial counsel was
12 ineffective for failing to explore defenses of
13 diminished capacity and insanity."

14 MR. MOGILL: Yes.

15 JUSTICE ALITO: "And insanity." So it
16 wasn't specifically -- wasn't limited to diminished
17 capacity.

18 MR. MOGILL: And that's why in my --

19 JUSTICE ALITO: It was insanity in general.

20 MR. MOGILL: No, it was both. The -- the
21 insanity defense is separate from diminished capacity,
22 which is a partial defense. In fact, at Respondent's
23 first trial, prior counsel had raised both. At retrial,
24 I only wished to raise the diminished capacity defense.

25 The law recognizes the difference between

1 the two in Michigan. Had diminished capacity not been a
2 recognized defense, the court's order, I respectfully
3 submit, would have been worded just with respect to
4 insanity. There would have been no legal basis for
5 arguing -- or, excuse me, for including the -- the
6 reference to diminished capacity.

7 JUSTICE SCALIA: Mr. Mogill, as -- as I
8 understand your burden here, it's -- it's not enough to
9 show that Michigan law seemed to be what you -- what you
10 say it was; but it has to have been --

11 MR. MOGILL: Yes.

12 JUSTICE SCALIA: -- what you say it was.

13 MR. MOGILL: Yes.

14 JUSTICE SCALIA: And it -- there was an
15 avulsive change by the supreme court.

16 MR. MOGILL: I agree with that,
17 Justice Scalia, and I think that's what we have. We
18 have, from --

19 JUSTICE SCALIA: It's -- it's hard to
20 believe that, given -- given the clear text of the
21 statute.

22 MR. MOGILL: The problem, I -- I
23 respectfully submit, is that nobody in Michigan until
24 Carpenter -- and -- and I -- it -- that sounds like an
25 extreme statement, but, again, the record is clear.

1 Prosecutors weren't objecting. There is a
2 State bar committee on criminal jury instructions whose
3 responsibility it is to come up with standard jury
4 instructions on areas of law that are agreed upon
5 and -- and routinely enough raised in court to warrant a
6 standard instruction.

7 That committee is comprised of judges,
8 prosecutors, and defense attorneys. In 1989, that
9 committee promulgated a diminished capacity instruction.
10 That's how well-established it is.

11 JUSTICE SCALIA: Now, if -- if a prosecutor
12 raised that objection, knowing that the court of appeals
13 would -- would reverse the exclusion, right -- I mean,
14 it's clear what the court of appeals would have done,
15 right?

16 MR. MOGILL: Yes.

17 JUSTICE SCALIA: And, once the court of
18 appeals reversed it and said the trial was infected with
19 that error, could -- could the defendant be retried?

20 MR. MOGILL: The -- what would happen --

21 JUSTICE SCALIA: Because he's -- he's
22 convicted and the -- I'm sorry -- he's -- he's --

23 MR. MOGILL: Convicted -- convicted of
24 second instead of first, could he be tried on first?

25 JUSTICE SCALIA: That's right.

1 MR. MOGILL: No. But that's the question.

2 JUSTICE SCALIA: Could he be retried?

3 MR. MOGILL: On first, no. But --

4 JUSTICE SCALIA: Well, then -- then you
5 would be crazy to raise it as a prosecutor.

6 MR. MOGILL: No. What I -- but I --
7 Justice Scalia, the answer to your question is -- is
8 encompassed by the statutory scheme which requires
9 advanced notice. The -- a defendant can't offer
10 diminished capacity evidence in the middle of trial. A
11 defendant has to give 30 days or whatever other time set
12 by the judge notice -- or it had to at the time.

13 If the prosecutor, in any case, believed
14 that such evidence wasn't admissible, the prosecutor had
15 plenty of time, prior to trial, to seek an in limine
16 ruling from the trial court, to seek an interlocutory
17 appeal from the Michigan Court of Appeals.

18 JUSTICE SCALIA: But he could get an -- an
19 interlocutory appeal on that?

20 MR. MOGILL: Absolutely.

21 JUSTICE SCALIA: Okay.

22 MR. MOGILL: And -- and I will tell you the
23 prosecutors in Michigan are aggressive in -- in seeking
24 interlocutory appeals. We have -- again, it is so
25 well-established, there is not a contrary decision,

1 there is not a question raised in any opinion or any
2 decision.

3 JUSTICE BREYER: How many holdings are
4 there?

5 MR. MOGILL: There are many mentions with
6 the -- the holdings --

7 JUSTICE BREYER: I take it the answer is
8 zero, right? I mean, I --

9 MR. MOGILL: No.

10 JUSTICE BREYER: -- I looked at your brief,
11 and then I looked at their brief, and they say the
12 answer is zero.

13 MR. MOGILL: Lynch is a holding.

14 JUSTICE BREYER: All right. And the -- the
15 holding is that -- the pure holding would be, if the
16 trial court judge says no, you cannot raise it, okay?
17 The defendant is convicted and appeals.

18 MR. MOGILL: Yes.

19 JUSTICE BREYER: And then he says to the
20 appellate court, they wouldn't let me raise it. And the
21 appellate court says, you have a right to raise it.

22 MR. MOGILL: And that's exactly Lynch,
23 Justice Breyer.

24 JUSTICE BREYER: That is Lynch. And Lynch
25 is what year?

1 MR. MOGILL: 1973.

2 JUSTICE BREYER: In 1973. Okay. So we have
3 one.

4 MR. MOGILL: And -- I'm sorry.

5 JUSTICE BREYER: And -- and was there any
6 other case in 1973 -- this is 10 years before. Was
7 there any other case in which the same pattern of facts
8 and they said the same thing as Lynch?

9 MR. MOGILL: I -- I'm not aware --

10 JUSTICE BREYER: No, but we -- we have got
11 Lynch on one side. Is there any case -- this is an
12 intermediate appeals court -- is there any case in which
13 the defendant says, I would like to raise it, the judge
14 says no, convicted, appeal, and the intermediate court
15 of appeals says, defendant, you are wrong?

16 MR. MOGILL: The answer to your question,
17 Justice Breyer, is there is no such case. And the
18 reason --

19 JUSTICE BREYER: Okay. And so all this
20 period from 1973 until 1995 or whatever --

21 MR. MOGILL: '93 was the offense.

22 JUSTICE BREYER: Carpenter.

23 MR. MOGILL: No, 2001 was Carpenter --

24 JUSTICE BREYER: 2001. All right.

25 MR. MOGILL: The offense was '93.

1 JUSTICE BREYER: There is exactly one case
2 on point which does favor you, and there are zero cases
3 that favor them; is that right?

4 MR. MOGILL: If you talk holding only and if
5 you discount Mangiapane.

6 JUSTICE BREYER: Well, Mangiapane was a -- a
7 lot of words, but the holding was not notice; isn't that
8 right?

9 MR. MOGILL: I'm -- the holding was he
10 didn't -- but there was no reason for the court --

11 JUSTICE BREYER: Okay.

12 MR. MOGILL: -- to reach that question,
13 unless diminished capacity exists.

14 JUSTICE BREYER: So we've got one.
15 That's -- I'm trying to find out what the state of the
16 art.

17 MR. MOGILL: Thank you.

18 JUSTICE BREYER: The state of the art is one
19 for you, zero for them.

20 MR. MOGILL: If I can supplement that,
21 Justice Breyer?

22 JUSTICE BREYER: Yes.

23 MR. MOGILL: One of the things -- one of the
24 points this Court looked to in Rogers was how many times
25 the year-and-a-day rule had been "mentioned," and

1 that -- this is -- that's this Court's word -- in
2 Tennessee decisions.

3 And so one of the things we did, and that's
4 the addendum in our red brief, is look at how many times
5 there are mentions -- all of which are favorable, not
6 one of which raises even a question, of diminished
7 capacity in Michigan. And that --

8 JUSTICE SCALIA: Was that -- how often was
9 it mentioned in intermediate court opinions?

10 MR. MOGILL: We have 4 mentions in the
11 Michigan Supreme Court and 33 in the Michigan Court of
12 Appeals between 1975 and 1993, and we have over
13 100 -- or about 100 --

14 JUSTICE SCALIA: Four mentions in the
15 supreme court that say what? That are inconclusive --

16 MR. MOGILL: Well, Griffin is one of them.
17 And then you have --

18 JUSTICE SCALIA: Yeah.

19 MR. MOGILL: Yeah.

20 JUSTICE SCALIA: Have we ever held that a
21 State law has been determined to be X, simply because
22 intermediate State courts have uniformly held it to be
23 X? Never mind assumed it to be X, have held it to be X?

24 MR. MOGILL: I don't know of a particular
25 case.

1 But, to answer your question,
2 Justice Scalia, the law in Michigan is clear, as stated
3 by the Michigan Supreme Court, that a published court of
4 appeals decision is precedentially binding statewide
5 unless and until reversed by the Supreme Court.

6 So the fact that --

7 JUSTICE SCALIA: It doesn't mean it's right.

8 MR. MOGILL: No, but in terms of it --

9 JUSTICE SCALIA: You have to show it's
10 right.

11 MR. MOGILL: No, I have to show that it is
12 the law of the --

13 JUSTICE SCALIA: That it's the law.

14 MR. MOGILL: I have to show that it is the
15 law of the State, and it was the law of the State from
16 1973 forward. And I would like to supplement that, if I
17 might.

18 CHIEF JUSTICE ROBERTS: Could you -- I'm
19 sorry. Go ahead.

20 MR. MOGILL: When -- when Lynch was decided,
21 it wasn't acting on something new. The -- the court of
22 appeals opinion indicates that what we're doing is
23 nothing novel because the diminished -- the right to
24 present diminished capacity evidence to rebut an -- the
25 elements of premeditation and deliberation, grows out of

1 a 100-year history in Michigan.

2 CHIEF JUSTICE ROBERTS: Well, but the
3 Lynch -- the Lynch case was 2 years before the Michigan
4 legislature adopted --

5 MR. MOGILL: Yes.

6 CHIEF JUSTICE ROBERTS: -- the statute that
7 we are dealing with here, right?

8 MR. MOGILL: Yes.

9 CHIEF JUSTICE ROBERTS: And that's where you
10 are putting -- not all of your eggs, most of your eggs,
11 right?

12 MR. MOGILL: No, I'm -- that -- that
13 is -- that's an egg, and I think I've got a pretty full
14 basket.

15 CHIEF JUSTICE ROBERTS: Well, that's
16 the -- that's the whole case. The whole -- the whole
17 point is that the law made that moot because the law
18 under Michigan did not specify diminished capacity, and
19 it's a code State, so you only get what they specified.
20 I --

21 MR. MOGILL: I respectfully disagree with that
22 statement by brother counsel. The -- and that's why I
23 quoted Article 3, Section 7.

24 CHIEF JUSTICE ROBERTS: Well, but you'll at
25 least -- well, maybe not. I mean, would -- would you

1 acknowledge that the force of Lynch was arguably
2 diminished by the fact that Michigan passed a statute
3 that did not mention the diminished capacity defense 2
4 years after it?

5 MR. MOGILL: I would if the facts of the
6 subsequent litigation supported that interpretation of
7 the statute. To the contrary, every case -- Mangiapane,
8 it wasn't --

9 CHIEF JUSTICE ROBERTS: I'm talking about
10 Lynch.

11 JUSTICE BREYER: There were no others, so,
12 now, I've reduced your one to nothing to like .01 to
13 nothing because it favors you, Lynch, yes, as the Justice
14 -- Chief Justice just pointed out, and, now, you've
15 already said there were no other cases.

16 MR. MOGILL: No other holdings, but we have
17 many, many mentions. We have on-the-ground consistent
18 reliance by prosecutors, defense attorneys, and judges.

19 JUSTICE SOTOMAYOR: That's -- that's your
20 whole point, isn't it?

21 MR. MOGILL: Yes.

22 JUSTICE SOTOMAYOR: You can't prove a
23 negative because, if everybody accepts, after
24 Mangiapane, that the defense exists, then trial courts
25 are not going to be excluding it on the basis that the

1 statute excludes it because --

2 MR. MOGILL: Absolutely.

3 JUSTICE SOTOMAYOR: That's the whole point
4 you are making.

5 MR. MOGILL: And which gets me to -- to
6 Rogers, and -- and we turn to the questions of
7 fundamental fairness.

8 JUSTICE SOTOMAYOR: Do you have any -- is
9 there any evidence of a trial court holding an
10 exclusion?

11 MR. MOGILL: There is nothing. And even --

12 JUSTICE SOTOMAYOR: Or even suggesting one?

13 MR. MOGILL: It -- it is so extreme, Justice
14 Sotomayor, that, even in Carpenter itself, the
15 prosecution did not contest the admissibility of
16 diminished capacity evidence as a trial court --

17 JUSTICE BREYER: All right. But that's
18 because -- everybody agrees with you, I think -- I agree
19 with you on this anyway. I agree the bar puts it in the
20 instructions, and, if the bar puts it in the
21 instructions, people tend to follow it. That's true.
22 So it's not surprising that a lot of people tended to
23 follow it.

24 But, as far as court decisions are
25 concerned, we have no -- what I'm trying to think of is

1 a pre-statute. I give you a little credit on that.
2 That's Lynch. Pre-statute -- and we have what I might
3 sort of exaggeratedly refer to as the great mentioner.
4 We've noticed the great mentioner is often wrong,
5 and -- and, here, even though there are judicial
6 mentioners, they get something.

7 I don't know how much in the scale to -- to
8 give them.

9 MR. MOGILL: Well, with all due respect, the
10 standard that this Court set in Rogers is whether the --
11 the decision in Carpenter, in this case, would have been
12 unforeseeable and indefensible by reference to the law
13 as previously expressed so that it could be applied
14 retroactively.

15 JUSTICE BREYER: Can you think of a Federal
16 case where -- I see what we have. I'm now adding up the
17 something for Lynch, the something for the bar, which is
18 a -- which is a something, and -- and then the fact that
19 some courts have quite, not surprisingly, tended to
20 follow it, and there were others that mentioned it
21 favorably, but not the Michigan Supreme Court.

22 MR. MOGILL: No, the Michigan Supreme Court
23 did mention it favorably as well.

24 JUSTICE BREYER: Alright, it did mention it
25 favorably. Okay. So -- so we've got that. Now, actually,

1 that Kentucky case, was it? Tennessee?

2 MR. MOGILL: Rogers?

3 JUSTICE BREYER: Yeah, Rogers. That went
4 against you.

5 MR. MOGILL: I think the principle that the
6 Court established there was very much --

7 JUSTICE BREYER: Alright. Alright. But
8 can you think of any Federal precedent on this issue
9 that's come even close to that being sufficient? What's
10 your best?

11 MR. MOGILL: I think the closest point --
12 and it's important, and it goes, Justice Scalia, to
13 respond to your point about lower court -- reliance on
14 lower court opinions, is in Lanier, when the question
15 concerned what's the scope of the statute that's at
16 issue here.

17 And this Court very explicitly stated that
18 its permissible for the world outside of court to look
19 at lower court decisions, court of appeals decisions, in
20 terms of what had been reasonably expressed. That's
21 consistent --

22 JUSTICE KENNEDY: If you -- if you prevail
23 here, it may well change the dynamic for State supreme
24 courts. State supreme courts, much like us, they wait
25 until courts of appeals have issued their opinions.

1 They wait to see how the practical application of those
2 works, insofar as of the fairness of the trial. They
3 wait to see about scholarly commentaries, and then
4 they -- and then they take the case.

5 If you prevail, State supreme courts
6 are -- are going to say -- you know, if we don't take
7 this case, even though it's -- does not present the
8 issue as clearly as some late case might, we don't rush
9 in, then we're going to be foreclosed. I think you're
10 proposing a dynamic which makes the Federal courts
11 intrude on the way in which State courts choose to
12 develop their law.

13 MR. MOGILL: Justice Kennedy, thank you for
14 that question, but I respectfully disagree. The relief
15 we are requesting here is simply that, while the
16 Michigan Supreme Court was entirely free to interpret
17 this statute any way it wanted to prospectively, so long
18 as it didn't conflict with some other decision of this
19 Court, the question is, what about applying it
20 retroactively?

21 And this Court in Bouie and Rogers has set
22 out clear principles for when a court that wants to
23 reverse ground can do that or not, consistent with
24 fundamental fairness, principles of notice,
25 foreseeability, et cetera, all of which go in our

1 direction here. An -- an interesting contrast, and I
2 think a useful contrast --

3 JUSTICE ALITO: Well, what is the
4 unfairness --

5 MR. MOGILL: I'm sorry?

6 JUSTICE ALITO: What is the unfairness here?
7 Do you think there's a reliance?

8 MR. MOGILL: There's not a reliance, nor is
9 that an element --

10 JUSTICE ALITO: What is the -- so what is
11 the unfairness here?

12 MR. MOGILL: In both -- in both Bouie and
13 Rogers, this Court made it clear that reliance is not an
14 issue. The unfairness -- and that's a very important
15 point, Justice Alito -- is that by eliminating the right
16 to present this category of evidence, the mental health
17 evidence that would show, if accepted by a jury, that
18 the Respondent was guilty of second-degree murder,
19 instead of first-degree murder, what the court was doing
20 was expanding the -- the scope of premeditation and
21 deliberation; they were aggravating the offense. That
22 is a fundamental unfairness.

23 JUSTICE GINSBURG: But this -- the case
24 is -- is very different from Bouie, which you -- which
25 you rely on. In -- in Bouie, it was the question of a

1 rule that is governing conduct. People come on to
2 premises; they have no reason to think that they are
3 committing an offense if they don't leave when somebody
4 asks them to if they came onto the premise lawfully.

5 So what the Court said in Bouie was that
6 this is a regulation of primary conduct, and, at the
7 time these people acted, they had no reason to believe
8 that what they did was unlawful. That's quite a
9 different --

10 MR. MOGILL: Yeah, I agree with that,
11 Justice Ginsburg, except that, at footnote 5 in Bouie,
12 this Court explicitly rejected the notion that
13 subjective reliance by the accused is -- is even an
14 aspect of the test for determining --

15 JUSTICE GINSBURG: It -- it isn't subjective
16 reliance; it's -- it's what was the law.

17 MR. MOGILL: And --

18 JUSTICE GINSBURG: And the Court said that
19 the State supreme court interpretation of the statute
20 was quite a surprise.

21 MR. MOGILL: Yes. And what the Court did in
22 both Bouie and in Rogers was look at the underlying
23 State law. In Bouie, the Court looked at the history of
24 South Carolina law regarding trespass and found that,
25 until a year and a half later, it hadn't been construed

1 to apply to a failure to leave, as opposed to an entry.

2 In Rogers, the Court surveyed the very -- a
3 very sparse Tennessee authority on the year-and-a-day
4 rule. That same analysis here will -- must lead to a
5 conclusion that all of the law in Michigan -- and,
6 again, there are minimal holdings, for the reasons
7 Justice Sotomayor indicated -- the -- the minimal
8 holdings, but all the mentions and the holding go in the
9 direction of this existed.

10 It was relied on, it wasn't contested --

11 JUSTICE ALITO: I -- I don't see how the
12 question can be whether there was a change in Michigan
13 law because we can't second-guess the Michigan Supreme
14 Court about what Michigan law was. Michigan law is
15 whatever the State supreme court says it was. We might
16 agree, we might disagree. So I think we have to start
17 from the proposition that the law didn't change because
18 that's what the Michigan Supreme Court said.

19 So there must be some other ex post facto
20 principle that applies when there's a certain type of
21 unfairness. And I wonder if you could articulate what
22 that principle is.

23 MR. MOGILL: I would be happy to,
24 Justice Alito, but, first, I want to address your point
25 about having to rely on Michigan Supreme Court's

1 determination of Michigan law because this Court has
2 made it very clear that you can't let a State court
3 relabel something in a way that avoids Federal
4 constitutional review.

5 Chief Justice Rehnquist spoke to that point
6 in Collins v. Youngblood. Justice Kennedy, you spoke to
7 that in your dissent in Clark. Justice Scalia, in your
8 dissent in Rogers, you spoke to the point, I think, in
9 an apt phrasing, that this Court will rely on a State
10 court's reasonable determination of State law. I --

11 CHIEF JUSTICE ROBERTS: So two -- two
12 dissents is what you're relying on?

13 MR. MOGILL: I'm sorry? No. The
14 majority -- the opinion of the Court in Collins, but
15 it's also a well-established principle -- and I also
16 wanted to note that the two other mentions, but it's not
17 a principle that's been in dispute.

18 The -- the Court's analysis in both Bouie
19 and Rogers also supports what I'm saying because the
20 Court independently looked at South Carolina law in
21 Bouie. The Court independently looked at Tennessee law
22 in Rogers and --

23 JUSTICE ALITO: Well, I think you're -- what
24 you're arguing is that, under certain -- in evaluating
25 certain constitutional claims, the -- the question of

1 what State law is, is not dispositive. I don't think
2 you're arguing that a Federal court has a right to tell
3 a State court what State law is.

4 MR. MOGILL: This Court certainly does not
5 have a right to tell the Michigan Supreme Court, going
6 forward, what State law is with respect to diminished
7 capacity. But --

8 JUSTICE ALITO: Well, I mean, suppose this
9 were a diversity case. Can -- can a Federal court
10 say -- you know, we -- we think that the -- the
11 decisions of the intermediate State supreme court were
12 correct and this new decision by the State supreme court
13 is incorrect, so we're not going to follow that?

14 MR. MOGILL: No, but this is not -- that's
15 not this case. This case involves reliance --

16 JUSTICE ALITO: It's not -- it's not this
17 case because, there, you're trying to figure out what
18 State law is. Here you're applying a constitutional
19 principle.

20 MR. MOGILL: We're trying -- we're applying
21 a constitutional principle --

22 JUSTICE ALITO: So what is that -- that gets
23 me to the second part of my question.

24 MR. MOGILL: Yes, exactly.

25 JUSTICE ALITO: What is the -- the

1 constitutional principle that doesn't depend on what
2 State law was?

3 MR. MOGILL: The constitutional principle is
4 that Respondent had a right to present a defense that
5 existed at the time of his offense, unless it was
6 clearly unforeseeable -- excuse me -- unless it was
7 unforeseeable and -- and indefensible by reference to
8 law that had been expressed prior to the time of the
9 conduct, that that law might change, which we don't have
10 here.

11 And, Justice Breyer, I think that the
12 phrasing also goes to respond to your question.
13 The -- the formulation in -- in Rogers that confines
14 looking to the law as of the time that the conduct
15 occurred, and -- and, even if you go forward, there was
16 nothing to suggest an alternate interpretation of the
17 statute, a questioning opinion, nothing that would
18 suggest that the law in Michigan was about to change.

19 We also have the fact that, unlike the
20 year-and-a-day rule, diminished capacity as -- as a
21 doctrine is well-supported and increasingly supported by
22 medical and mental health evidence. It's the -- the
23 exact opposite of the year-and-a-day rule in that
24 regard. It also furthers --

25 JUSTICE ALITO: This is -- this is the due

1 process issue, right?

2 MR. MOGILL: It's -- that's exactly it --

3 JUSTICE ALITO: So why is it unfair? Why is
4 there an entitlement under due process to assert what
5 appears under the law of the State's intermediate court
6 decisions to be a valid defense, but is later determined
7 never to have been or not to have been, at that time, a
8 valid defense? What is the unfairness involved there?

9 MR. MOGILL: The unfairness is because it
10 was sufficiently well-established -- it was thoroughly
11 well-established as a matter of Michigan law, so
12 Respondent and everybody else in Michigan had a right to
13 rely on it.

14 In fact, if this Court were to reverse the
15 Sixth Circuit, Respondent would be the only person in
16 Michigan charged with a crime prior to Carpenter who
17 would not be allowed to present a diminished capacity
18 defense at a fair trial. That's how extreme the
19 violation was.

20 JUSTICE BREYER: I guess the alternative is
21 you are going to allow the bar associations, helpful as
22 they are, by writing instructions to determine issues
23 that courts themselves have never determined -- or at
24 least not authoritative supreme courts. And that's a
25 worrying matter, where you are trying to create coherent

1 systems of law.

2 MR. MOGILL: If I can briefly -- quickly
3 respond, Justice Breyer, the -- I disagree that
4 we're -- that I'm in any way suggesting that turning
5 anything over to the Bar Association. That -- the fact
6 of that instruction is I think strong evidence of the
7 reasonableness of reliance of the bench and bar in
8 Michigan, but not looking to turn authority over to
9 anybody.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 MR. MOGILL: Thank you very much.

12 CHIEF JUSTICE ROBERTS: Mr. Bursch, you have
13 13 minutes remaining.

14 REBUTTAL ARGUMENT OF JOHN J. BURSCH

15 ON BEHALF OF THE PETITIONER

16 MR. BURSCH: Thank you, Mr. Chief Justice.

17 I -- I think we actually have a lot of areas
18 of agreement after 45 minutes of oral argument.

19 Number one, Justice Breyer, is that there
20 really is only one case in Michigan that reaches the
21 holding that Mr. Carpenter would like that you can
22 assert this defense, and that was the Lynch case in
23 1973, which preceded the 1975 statute.

24 And so, under well-established Michigan law,
25 again -- you know, In re Lamphere, Reese, which was

1 their 2012 decision reapplying In re Lamphere, that code
2 occupies the field, and at that point, the common law
3 decision no longer existed.

4 JUSTICE SCALIA: I think he contested that.
5 I think he never went further into it, but he seemed to
6 disagree with the proposition that, where there is a
7 Michigan statute, it can't be supplemented by the common
8 law.

9 MR. BURSCH: I did not hear him say that.
10 And, if you go back and you read Reese and In re
11 Lamphere, I don't know how anyone could possibly
12 disagree with that. There are certainly areas --

13 CHIEF JUSTICE ROBERTS: I hate just to
14 interrupt you.

15 MR. BURSCH: Sure.

16 CHIEF JUSTICE ROBERTS: But he did challenge
17 my premise when I presented that to him.

18 MR. BURSCH: Okay.

19 CHIEF JUSTICE ROBERTS: So I do think he
20 disagrees with it.

21 MR. BURSCH: Okay. Well, then I disagree
22 with that. If you look at In re Lamphere and Reese,
23 it's well-settled in Michigan that when the Michigan
24 legislature speaks to a particular subject matter in
25 criminal law that the code controls and the common law

1 cannot supplement it.

2 The words of the Michigan Supreme Court in
3 Reese itself were, "The courts have no power to add an
4 affirmative defense that the legislature did not
5 create."

6 And -- and I really don't think there can be
7 a dispute about that.

8 JUSTICE GINSBURG: Is this -- is this a one
9 of a kind, in that, whatever the law was, it's clear
10 from 2001 on? Are -- are there any other people who
11 were similarly situated, who committed a crime before
12 2001, but were tried after?

13 MR. BURSCH: I'm -- I'm not aware of any,
14 Justice Ginsburg, and -- and the reason for that -- that
15 quirk is because his habeas process, by coincidence,
16 happened to take such a long time. It's pretty rare
17 that we're up here on a case where the murder actually
18 took place 20 years ago and the trial is shortly after
19 that.

20 But -- but quirks in how long litigation
21 happens don't determine whether people get the benefit
22 of changes in law or not. What matters is the standard
23 that this Court applied in Rogers and Bouie, was the
24 change -- if there was a change -- indefensible and not
25 expected.

1 JUSTICE KAGAN: Was there anyone prior to
2 2001 who couldn't raise a defense like this, who was
3 precluded from doing so because a court thought, oh --
4 you know, the -- the statute really clears the field,
5 and -- and this defense is not available?

6 Was it -- can you point to anything?

7 MR. BURSCH: We can't point to anything,
8 just like they can't point to anything. You've got a --
9 you know, in 1975 --

10 JUSTICE KAGAN: Well, I guess they can point
11 to just a lot of people who were raising this defense.

12 MR. BURSCH: Right. And they can point to
13 cases that assume, without deciding, that the defense
14 might exist. And then it wasn't until 2001, when the
15 Michigan Supreme Court became the first Michigan court
16 to look at it -- and I forget now who mentioned this, I
17 think it was Justice Kennedy -- that the Michigan
18 Supreme Court did what this Court often does, it waited
19 for the right case to present itself.

20 And, when it did, it applied the plain
21 statutory language in accordance with Michigan
22 interpretive law.

23 JUSTICE GINSBURG: Why -- why was it --

24 JUSTICE KAGAN: This is -- I'm sorry.

25 JUSTICE GINSBURG: Why was it the right

1 case? The parties didn't even raise it, did they?

2 MR. BURSCH: Well -- you know, it could be
3 because the Michigan Supreme Court thought -- you know,
4 there's enough confusion, because of the mentions in the
5 lower court, that it's time that -- that we address
6 this.

7 I don't know why the Michigan Supreme Court
8 took it up in Carpenter. What I do know is that
9 fair-minded jurists, which is the habeas standard, could
10 agree that Carpenter was neither indefensible nor
11 unexpected. And -- you know, it's not a head-counting
12 business, but I would note that the Michigan Court of
13 Appeals here was unanimous.

14 Previously, the Michigan Court of Appeals in
15 Talton, decided the year after Carpenter, reached the
16 exact same conclusion with respect to the due process
17 question. So we've got six Michigan appellate judges
18 looking at this.

19 You know, going back to -- to what the
20 Michigan law said, I -- I also heard my friend mention
21 the Griffin case, this is the three-paragraph order
22 where they -- they remand for ineffective assistance.
23 Well, Griffin is one of the cases that the Michigan
24 Supreme Court discusses in Carpenter.

25 And, in the very next sentence, the supreme

1 court says, "However, we have never specifically
2 authorized the defense's use in Michigan courts." You
3 know, it just wasn't there. What you have are these
4 mentions, and, then, as Justice Breyer mentioned, he's
5 got jury instructions, which are promulgated by the
6 State bar, not the State supreme court -- or by any
7 court, for that matter.

8 And what you have to ask yourself, is it
9 objectively unreasonable, is it beyond any possibility
10 of fair-minded disagreement that a Michigan Court of
11 Appeals panel could conclude that Carpenter was both
12 indefensible and unexpected. And --

13 JUSTICE BREYER: Do you have any idea -- a
14 rough estimate, how many cases there were between, say,
15 '75 and '93, where this defense was raised?

16 MR. BURSCH: Well, all we have are the
17 mentions in the appellate courts.

18 JUSTICE BREYER: Do you know about how many?
19 About.

20 MR. BURSCH: About 37, I believe. It was
21 four Michigan Supreme Court opinions and 33 Court of
22 Appeals, so it was 37.

23 Now, of those the Michigan Supreme Court
24 itself said their four, decisions didn't say one way or
25 the other. Of the other 33, 32 of them weren't even

1 binding in other Michigan Court of Appeals panels. As
2 we explained in our brief, the Michigan Court of Appeals
3 wasn't bound to follow any panel decision prior to
4 November 1st, 1990. So those weren't even binding on
5 the court of appeals itself.

6 If you are thinking about what's firmly
7 established -- you know, there were no roots at all to
8 these mentions. It would be like walking past your
9 neighbor's yard -- you know, if there is an oak tree
10 there, you expect it to be there the next day. You
11 know, but if there is a small weed, you expect it to be
12 pulled up and rooted out.

13 And that's exactly what happened here when
14 the Michigan Supreme Court finally addressed the
15 question.

16 JUSTICE SCALIA: You -- you rely on Reese as
17 establishing the principle that you cannot supplement
18 the defenses in a criminal statute, but Reese was a 2012
19 case.

20 MR. BURSCH: Right. I mentioned Reese
21 because it's the most recent application. It cites In
22 re Lamphere, which is an 1886 decision, which itself
23 references the 1810 Territorial Act which abolished
24 common law criminal principles -- if you have the
25 statute --

1 JUSTICE KAGAN: Do you have something like
2 in the middle?

3 (Laughter.)

4 MR. BURSCH: There are many cases in the
5 middle. There is at least a 1990 case, although I can't
6 recall the name. If you just KeyCite or Shepardize In
7 re Lamphere --

8 (Laughter.)

9 MR. BURSCH: -- you -- you will find scores
10 of cases that rely on this proposition. It's -- it's
11 not in dispute.

12 JUSTICE SOTOMAYOR: I'm sorry. Then you're
13 arguing that Lynch was wrong to begin with because what
14 you are arguing is that it created a common law defense
15 that the courts say you can't do under Michigan law.

16 MR. BURSCH: Right, exactly. You've got
17 Lynch, which was the common law --

18 JUSTICE SOTOMAYOR: No, no, but you're
19 saying to me it was wrongly decided under this general
20 Michigan --

21 MR. BURSCH: Oh, no, no, no.

22 To be perfectly clear, what In re Lamphere
23 and Reese and everything else say is that, when the
24 legislature has spoken to a particular area, then the
25 courts cannot supplement. They had never spoken about

1 mental capacity defenses prior to 1975, and so the slate
2 was free for the courts to do what they wanted.

3 So there's nothing wrong with Lynch in '73.
4 The problem is continuing to assume that there was a
5 defense that wasn't in the '75 statute.

6 CHIEF JUSTICE ROBERTS: If you were
7 representing a defendant in this position, you certainly
8 would have raised the diminished capacity defense prior
9 to Carpenter, wouldn't you?

10 MR. BURSCH: Undoubtedly. But I don't think
11 it means that fair-minded jurists could not possibly
12 conclude that Carpenter was both indefensible and not
13 expected.

14 JUSTICE KAGAN: And, if you were a
15 prosecutor, you would not have objected to that defense,
16 would you have?

17 MR. BURSCH: Well, I don't know. If I was a
18 prosecutor, I would have looked at the plain language of
19 the statute --

20 JUSTICE KAGAN: Do you have any --

21 MR. BURSCH: -- and I probably would have.

22 JUSTICE KAGAN: -- have any reason to think
23 that any prosecutor ever objected to such a defense?

24 MR. BURSCH: I don't know one way or the
25 other. We -- we just don't have the data for that.

1 Yeah, so, ultimately, what we are talking
2 about here --

3 JUSTICE SCALIA: I assume you'd need a case
4 in which the prosecutor was pretty -- pretty clear that
5 a diminished capacity defense would prevail. Otherwise,
6 it wouldn't -- the game wouldn't be worth the camel,
7 right?

8 MR. BURSCH: That's exactly right, Justice.

9 JUSTICE BREYER: But what's in the 37 cases
10 then? I -- they got up there. I assume the defendant
11 must have brought them. They must have brought them.
12 They must have wanted to -- to raise the defense, and
13 somebody said no.

14 MR. BURSCH: No, I don't believe that there
15 was a single case in those 37 where someone tried to
16 raise the defense and the court said no, nor was there a
17 case where the prosecutor said, you can't raise the
18 defense, and the court said yes. It was just a number
19 of cases. And -- you know, Mangiapane is really the
20 paradigm example.

21 JUSTICE BREYER: Yeah.

22 MR. BURSCH: But the question was did they
23 give notice? If the defense exists, is it part of the
24 statute? And -- and all the Michigan courts agree that
25 that has to be the case. But it's not till Carpenter,

1 where the court finally says, is it part of the statute,
2 and it says no.

3 JUSTICE KAGAN: Just to go back to
4 Justice Breyer's question -- I mean, there may be no way
5 you can answer this, but are we talking about -- you
6 know, do five people a year -- did five people a year
7 raise this or -- or 20 or 100? I mean, what kind of
8 numbers?

9 MR. BURSCH: You know, all we've got are the
10 appellate decisions referencing it.

11 JUSTICE KAGAN: Right.

12 MR. BURSCH: So if we've got 37 cases --

13 JUSTICE KAGAN: You can't really tell
14 because nobody was objecting to anything --

15 MR. BURSCH: Correct.

16 JUSTICE KAGAN: -- right?

17 MR. BURSCH: So you've got 37 cases over a
18 course of 18 years, '75 to -- to '93. Now, that -- that
19 tells us maybe two cases a year in a system that
20 processes thousands of criminal cases.

21 You know, there was nothing here that would
22 make the Supreme Court's application of the plain
23 language so indefensible, so unexpected, that no
24 reasonable jurist could possibly have reached the same
25 conclusion as now two unanimous Michigan Court of

1 Appeals panels have.

2 I wanted to touch, briefly, on the
3 unfairness point. And Justice Ginsburg, I -- I believe
4 brought up Bouie, and Bouie is really the perfect
5 analogy because, again, under the AEDPA standard, it's
6 Lancaster's burden to show that the court of appeals
7 decision here was contrary to our misapplication. And,
8 to the contrary, it was the exact application of Bouie.

9 In Bouie, you had a clear statute that was
10 very narrow, and the State court expanded it in a very
11 unexpected way. And this Court found that was
12 indefensible and unexpected.

13 The exact opposite happened here. You had
14 the Michigan Supreme Court applying very narrow
15 statutory language exactly the way it was written, in
16 accord with 200 years of interpretive principles.

17 So -- so, really, the problem here is not
18 any unfairness. The problem is the Sixth Circuit, yet
19 again, not applying habeas deference under the statute
20 or this Court's precedent and disregarding another
21 Michigan State court decision where reasonable jurists
22 could have reached different conclusions on this.

23 It's not our burden to -- to demonstrate
24 what the law was or wasn't. All we have to show is that
25 a reasonable jurist could have reached the conclusion

1 the Michigan Court of Appeals did here, and there
2 doesn't appear to be any question that's the case.

3 JUSTICE SCALIA: You want us to say, "yet
4 again," when we write our opinion?

5 MR. BURSCH: Yes, Justice Scalia.

6 (Laughter.)

7 MR. BURSCH: If there are no further
8 questions, thank you very much.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 The case is submitted.

11 (Whereupon, at 11:01 a.m., the case in the
12 above-entitled matter was submitted.)

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