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IN THE SUPREME COURT OF THE UNITED STATES

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LINDA METRISH, WARDEN, :

Petitioner : No. 12-547

v. :

BURT LANCASTER :

- - - - - x

Washington, D.C.

Wednesday, April 24, 2013

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:03 a.m.

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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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 12-547, *Metrish v. Lancaster*. Mr. Bursch?

ORAL ARGUMENT OF JOHN J. BURSCH

ON BEHALF OF THE PETITIONER

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

This is a Sixth Circuit habeas appeal involving AEDPA deference.

Harrington v. Richter holds that a Federal court may only overturn a State court conviction that is such an erroneous misapplication of this Court's clearly established precedent as to be beyond any possibility of fair-minded disagreement. That is, an extreme malfunction.

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

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

1 I'd like to begin with the statutory text.
2 In 1975, the Michigan legislature passed a comprehensive
3 mental capacity affirmative defense statute. In it, the
4 defenses are defined for mental illness and mental
5 retardation, but it says nothing about diminished
6 capacity. 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 a
9 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 SCALIA: 200 years -- 200 years?
15 Did you say that?

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

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

1 diminished capacity from 1973 to 2001, what would you
2 respond?

3 MR. BURSCH: It -- it changed one time. In
4 1973, there was a Michigan Court of Appeals decision
5 that 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 case
16 was to ask, is diminished capacity part of the statutory
17 code, and it never held expressly that it was. What it
18 did in Mangiapane and in subsequent cases, it assumed
19 that the defense existed, but it never held that. And
20 that dicta could not override the plain language of the
21 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. There were no other cases that
13 relied on it before the '75 statute was enacted. And
14 after that point, the Michigan appellate courts did not
15 look to the '72 decision as the source of the doctrine.
16 They assumed that if it existed, it must be somewhere
17 within the statute.

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

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

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

19 Now, this case is much easier than Rogers or
20 your hypothetical for several reasons. First, as I
21 mentioned, it's a habeas case and so we've got the layer
22 of AEDPA deference that wasn't there.

23 Second, we're not talking about the
24 evolution of the common law like we were in Rogers.
25 We're talking about a statute and the statute meant what

1 it said in '75, just like it did in '01, just like it
2 does today.

3 And the last thing is that in the Rogers
4 case even the Tennessee Supreme Court acknowledged there
5 was a change. And here the Michigan Supreme Court said
6 there was no change because the statute said what it
7 said in 1975 and that meant no diminished capacity.

8 JUSTICE ALITO: Well, what I'm wondering is
9 how we even get beyond the statement, the holding by a
10 State supreme court regarding the -- the law of the
11 State. Don't we have to accept that as the -- as the
12 law of the State? Isn't that what our decision in Fiore
13 says? If the State supreme court says this is the law
14 and it's always been the law, then how can we
15 second-guess that?

16 MR. BURSCHE: Justice Alito, I would think
17 about it in -- in two pieces. And the first piece is
18 can you second-guess the Michigan Supreme Court's
19 interpretation of the statute, and I think the answer
20 there everybody has to agree is no. The State's
21 interpretation of its own statute binds this Court,
22 binds all Federal courts, just like the South Carolina
23 Supreme Court decision in -- in Bouie did.

24 With respect to the Michigan Supreme Court's
25 analysis of the retroactive effect, I agree that Fiore

1 stands for that very proposition, and I think Indiana
2 makes that case very forcefully in the -- the
3 multi-State amici brief. You don't have to reach that
4 question here, however, because given the AEDPA standard
5 and the fact that the Michigan Supreme Court decision
6 was so clearly not a misapplication of Rogers and Bouie,
7 it makes this a relatively easy case. But I think you'd
8 be fully within your right to follow the Fiore holding.

9 JUSTICE KAGAN: You -- you suggested,
10 General, that the -- the fact that this is statutory
11 makes your position easier.

12 MR. BURSCH: Yes.

13 JUSTICE KAGAN: And I wonder if that's true.
14 I mean, you could see an -- an argument the exact other
15 way, which suggests that we all understand that common
16 law changes and evolves over time, but that it's rare
17 for a court to reverse a decision on what a statute
18 means, and that that's not foreseeable in the same way.
19 So -- now, especially if it were a single court saying
20 the statute means A today, and then tomorrow it comes
21 back and it says, no, it means B, whether that isn't
22 actually -- whether that wouldn't cut against your
23 position.

24 MR. BURSCH: Justice Kagan, I think this is
25 the easiest case, because it's not just statutory

1 interpretation; it's statutory interpretation of a
2 statute that is just plain on its face. If you had an
3 ambiguous statute, yes, then maybe there would be some
4 more uncertainty. But where you've got a statute that
5 enumerates several defenses, does not include diminished
6 capacity, and under Michigan law it's not enumerated,
7 it's not there, and the courts can't add it, that does
8 make this easier.

9 I think it was probably a -- a bigger
10 challenge in Rogers, for example, to acknowledge that,
11 one, Tennessee law had changed right out from underneath
12 the defendant; and yet, even given that change, this
13 Court was comfortable that it was not indefensible or
14 unexpected. I think when --

15 JUSTICE GINSBURG: Counsel, what about the
16 Michigan Court of Appeals? There's only one court of
17 appeals, right?

18 MR. BURSCH: Correct, Justice Ginsburg.

19 JUSTICE GINSBURG: And so that court several
20 times recognized diminished capacity as a defense.

21 MR. BURSCH: Well, it -- it didn't recognize
22 it as a defense in the sense that it analyzed the
23 statute and said yes, the defense is available. It in
24 many instances assumed that it might exist and if it did
25 then this is the result. The closest it comes is this

1 Mangiapane decision in 1978, and the court says very
2 specifically there that the definition of mental illness
3 in the statute, it's similar to diminished capacity, but
4 the court says at page 247 of the North West Second
5 Report the court was not prepared to say they are
6 identical.

7 JUSTICE GINSBURG: The --

8 MR. BURSCH: So --

9 JUSTICE GINSBURG: Your colleague said that
10 there were 130 appellate decisions -- I take it that's
11 the court of appeals decisions -- recognizing diminished
12 capacity as a defense.

13 MR. BURSCH: Recognizing it as a possible
14 defense. Again, in every single one of those cases, all
15 of which would be contrary to the statutory language,
16 incidentally, in not a single one of them did a
17 conviction or an acquittal or a finding of ineffective
18 assistance ever turn on that point. And so in that
19 sense, it's also again very much like Rogers, where this
20 Court said that the year and a day rule had never been
21 used for an acquittal or a conviction in any Tennessee
22 case.

23 And so the question is, again through the
24 AEDPA deference lens, which is very high, was the
25 Carpenter decision defensible and expected? And we

1 would submit that any time that a State supreme court
2 applies the plain language of the statute in accord with
3 established principles of interpretation in that State,
4 it could almost never be indefensible or unexpected.

5 JUSTICE SOTOMAYOR: This -- that seems a
6 little strange for the following reason, just as I think
7 this case presents an example. You're claiming it's
8 clear because the supreme court said it was clear, but
9 the court of appeals in Mangiapane, whether or not it
10 assumed it or not, did an analysis that clearly says
11 that it believes that the definition of legal insanity
12 includes diminished capacity.

13 Its holding didn't need that analysis,
14 because it could have assumed it and then just said:
15 But no notice was given, so the defense fails here. It
16 took the time to analyze just this question and came to
17 a contrary conclusion. Its contrary conclusion was that
18 "legal insanity" was a broad enough term under Michigan
19 law to encompass this defense.

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

24 MR. BURSCH: Well, two responses to that,
25 Justice Sotomayor. First, I want to be again very

1 careful about what Mangiapane actually held. It did
2 look at the statutory language and at page 247 said:
3 "We are not prepared to say they are identical," meaning
4 the definition of mental illness and the concept of
5 diminished capacity. There the question was procedural
6 because the defendant had not given the prosecutor
7 notice of any defense based on mental capacity in the
8 trial court, and so the court said, well, you know,
9 assuming that the -- the defense exists, we are not
10 prepared to decide that today --

11 JUSTICE SCALIA: Well, I --

12 MR. BURSCH: -- because you would have to
13 give statutory notice.

14 The second --

15 JUSTICE SCALIA: I -- I would have thought
16 your -- you can get to your second one, but I would have
17 thought your first response to -- to the question would
18 have been to deny that you say it's clear because the
19 Supreme Court of Michigan has said so. I thought your
20 argument is it's clear because it's clear.

21 MR. BURSCH: Justice Scalia, that was my
22 second point.

23 JUSTICE SCALIA: Ah, okay. It should have
24 been your first point. The premise is simply wrong.
25 You're saying it was clear because the statute's clear.

1 MR. BURSCH: It was clear. And if any
2 Michigan court had had the opportunity to actually
3 decide it on the merits in light of this 200-year
4 history of Michigan being a criminal code State, it was
5 clear. And so this is the point when a State court
6 decision is most defensible and most expected, applying
7 the plain language of a clear statute in accord with
8 State principles.

9 JUSTICE KENNEDY: Are there any States with
10 a statute identical or -- or close to the Michigan
11 statute that have interpreted the statute to say it does
12 include diminished capacity?

13 MR. BURSCH: Justice Kennedy, I'm not aware
14 of --

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

18 MR. BURSCH: Right.

19 JUSTICE KENNEDY: I'm just curious to know
20 if any State courts have reached an opposite conclusion
21 under a statute like that.

22 MR. BURSCH: I'm not aware of any other
23 States that have the same statute and have addressed the
24 question one way or the other. I do know that the
25 language of the Michigan statute is fairly unique. If

1 you look in the criminal law treatises, we're kind of in
2 a category of only a very few States that, you know, on
3 the one hand, define mental illness and mental
4 retardation, do not define or mention diminished
5 capacity, and yet still have this guilty but insane
6 option, which is something that Michigan common law did
7 not have, but then that was added in the '75 statute.
8 So it's a little bit unique.

9 I think it's also unique to Michigan that we
10 have this 200-year criminal code history, which if
11 you're interested you can read all about it in the In Re
12 Lamphere case that we cite on page 4 to 5 of our reply
13 brief. But it's when you put those things together that
14 really make this such an easy case.

15 JUSTICE KAGAN: Well, General, I guess I
16 wonder whether it's relevant what the statute really
17 says as opposed to what courts said it says. I mean,
18 sometimes judges make errors and our law is dotted with
19 places where courts have made errors and said that
20 things mean what they don't mean or don't mean what they
21 do mean, and, you know, we expect people to follow what
22 the court says is the law even if there's really a
23 better reading out there.

24 And also, we think that people should rely
25 on what the court says is the law, even though there's

1 really a better reading out there.

2 And so, you know, what does it matter if we
3 come out and said -- and say, you know, what were these
4 crazy Michigan courts doing? If that's what they were
5 doing, it seems as though people had a right to rely on
6 that.

7 MR. BURSCH: Well, the expectation certainly
8 is that people would rely on Michigan statutory law.
9 And I concede that this would be a more difficult case
10 if the Michigan Supreme Court in, say, 1990 had come out
11 in a published opinion and and said the exact opposite
12 of what it said in 2001. Obviously, that's not what
13 happened here.

14 But -- but ultimately, you know, the
15 question that would have been on Mr. Lancaster's mind
16 back in 1993 when he shot and killed Toni King was, does
17 Michigan law prohibit me, will it punish me if I -- I
18 kill someone? And -- and clearly, he had to know that.
19 And if he had looked at the 1975 statute, he would have
20 seen that diminished capacity was not mentioned there.
21 So to the extent that he -- he wanted to rely on that
22 defense, he wouldn't have found it in Michigan's
23 codified law.

24 Now, I know the argument on the other side
25 is, well, we have these other cases which, you know,

1 mention the doctrine, kind of assume without deciding
2 that -- that it's out there. And he wants to assume
3 that he has all the knowledge of that, but not the
4 knowledge of the background principle that Michigan
5 won't add affirmative defenses to a statute through a
6 judicial action.

7 And if you're going to impute any knowledge
8 to him, and -- and we submit that you probably
9 shouldn't, then you've got to impute all the knowledge
10 of Michigan law, the plain language of the statute and
11 the interpretive principles that should guide what that
12 statute means.

13 He knew that killing someone was wrong.
14 Unquestionably, he was on fair notice of that. And --
15 and just like in Rogers, this diminished capacity
16 defense after 1975 was never relied on by any Michigan
17 court to either hold someone guilty or to acquit them or
18 to find that there was ineffective assistance. It just
19 was not the kind of well-established principle that
20 could possibly make the Carpenter decision either
21 indefensible or unexpected.

22 And then when you layer that on top with
23 AEDPA deference, you know, really, this is about as
24 simple as it gets. There is no decision of -- of this
25 Court, not Rogers, not Bouie, not Fiore, not Bunkley,

1 any Court decision that is contrary to or misapplied in
2 this Michigan Court of Appeals opinion.

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

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Mr. Mogill.

7 ORAL ARGUMENT OF KENNETH M. MOGILL
8 ON BEHALF OF THE RESPONDENT

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

11 At the time of his offense in this matter,
12 Respondent had a well-established uncontested right to
13 present evidence of diminished capacity in order to
14 negate the elements of premeditation and deliberation in
15 the first-degree murder charge against him, and he did
16 assert that defense at his first trial. That trial was
17 rendered unfair by the prosecutor's Batson error.

18 Respondent was not allowed to present the
19 same defense at his retrial, however, because 8 years
20 after his offense, the Michigan Supreme Court
21 unexpectedly changed the rules in midstream, holding in
22 Carpenter that a statute that had been enacted 26 years
23 before and that did not use the words "diminished
24 capacity," did not express an intent to abolish any
25 defense of diminished capacity, but the Supreme Court

1 held that it had been abolished.

2 That was fundamentally unfair to Respondent,
3 all the more so, because if the Michigan courts had
4 ruled correctly on the Batson issue, retrial would have
5 occurred before 2001, and there's no question but that
6 Respondent would have been able to raise the diminished
7 capacity as --

8 JUSTICE SCALIA: He would have been able to
9 raise it. There's a lot of question about whether it
10 would have been successful, because if it had gone up to
11 the Michigan Supreme Court -- the statute was in effect
12 during his first trial?

13 MR. MOGILL: That's correct.

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

17 MR. MOGILL: With all due respect --

18 JUSTICE SCALIA: And your only -- your only
19 defense would have been, oh, it's a great surprise. But
20 I don't see how it's a surprise if the Michigan law has
21 been, as -- as the Solicitor General of Michigan has
22 described it, that -- that there's a clear tradition.
23 If -- if the statute addresses the area, the courts will
24 not -- will not supplement it by -- by common law
25 additions. Did he not know that?

1 MR. MOGILL: With all due respect to
2 opposing counsel, I -- the view -- our view of the law
3 is -- is entirely different. Michigan recognizes the
4 common law in its Constitution. Michigan law has -- was
5 firmly established that the diminished capacity defense
6 existed. By 1973 --

7 JUSTICE SCALIA: Why do you say it was
8 firmly -- do you -- do you contest the -- the assertion
9 by the solicitor general that there is no case which --
10 which acknowledged and held the defense of diminished
11 capacity?

12 MR. MOGILL: I disagree.

13 JUSTICE SCALIA: Is that wrong?

14 MR. MOGILL: Yes.

15 JUSTICE SCALIA: What -- what case --

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

18 JUSTICE SCALIA: -- lets the defendant off
19 on the basis of diminished capacity?

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

22 JUSTICE SCALIA: What case has a holding, a
23 holding that diminished capacity excuses the crime or
24 mitigates the crime.

25 MR. MOGILL: Mitigates. Justice Scalia, in

1 Lynch itself in 1973, Ms. Lynch was charged with
2 first-degree murder for the starvation -- in relation to
3 the starvation death of her infant. The trial judge
4 declined to permit -- declined to permit her to offer
5 psychiatric testimony to mitigate to second degree. The
6 court of appeals reversed, indicating that evidence,
7 mental health evidence of the kind she wanted to offer,
8 was admissible to establish diminished capacity, that
9 is, to negate the element of premeditation and
10 deliberation.

11 Once that case was decided, there is one
12 direction only in Michigan law from 1973 until Carpenter
13 by surprise in 2001. Yes, the statute was passed in
14 1975, and just 3 years later in 1978, Mangiapane decided
15 that diminished capacity comes within the definition of
16 legal insanity. The phrasing in the -- in the court's
17 opinion is very significant and it's much more than
18 opposing counsel suggests. The court stated explicitly:
19 "We find that the -- the defense known as diminished
20 capacity is codified within the definition of legal
21 insanity."

22 Once that happened, then that required an
23 accused who wanted to raise a diminished capacity
24 partial defense to comply with the procedural
25 requirements of the new statute. From that point

1 forward, it was clear that diminished capacity -- and --
2 and these are published court of appeals decisions, so
3 they are binding precedent statewide in Michigan unless
4 or until reversed or modified by the State supreme
5 court, the legislature, or a constitutional amendment.

6 Once that happened, there is not a case,
7 including in Carpenter itself, where the prosecution
8 objected to the admissibility of diminished capacity
9 evidence. It was so well-established, it was beyond
10 question. It was so well --

11 JUSTICE GINSBURG: I think the question that
12 was asked was, as a bottom line at the end of the day --

13 MR. MOGILL: Yes.

14 JUSTICE GINSBURG: -- did anybody get
15 sentenced less? Did it affect the outcome? You gave a
16 case where a defendant was allowed to raise diminished
17 capacity, but was -- are there cases where the defense
18 was successful on the merits?

19 MR. MOGILL: Justice Ginsburg, I think
20 that's a very important question. The -- the closest I
21 can come, the first part of my answer is in the Griffin
22 case in 1989, in an order which was a dispositive order
23 and therefore was precedent, the Michigan Supreme Court
24 disposed of an application for leave to appeal by
25 vacating and remanding a case for an ineffective

1 assistance hearing because of defense counsel's failure,
2 inter alia, to consider a diminished capacity defense.

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

6 JUSTICE SCALIA: Or -- is that correct?
7 Wouldn't -- wouldn't the supreme court have done that if
8 it -- if it thought that at least -- at least it was
9 arguable?

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

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

25 MR. MOGILL: Well, Justice Kennedy, I

1 believe that the basis for a remand in a case like this,
2 and this is not an unusual kind of a situation in
3 practice, is where the law is clear, then the remand is
4 to determine the factual basis for the defendant's
5 claim, were the facts such that a reasonably competent
6 attorney should have been expected to investigate and --
7 and raise it.

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

10 MR. MOGILL: Yes.

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

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

14 CHIEF JUSTICE ROBERTS: You have to be --
15 you have to be -- you have to be that right to prevail,
16 right?

17 MR. MOGILL: What I have to establish is
18 that the decision of the Michigan Court of Appeals here
19 was objectively unreasonable. And whether it's beyond
20 question, I think we certainly have objectively
21 unreasonable ruling for the reasons that it was
22 without -- not only was it well-established -- and I
23 want to weave into this the second part of what I'd like
24 to answer of Justice Ginsburg's question. I think it's
25 very important in understanding the question of

1 reversals or not what the lay of the land was, because
2 where you have a framework that allows a defense to be
3 raised and prosecutors aren't objecting, the -- the
4 application's going to be a factual matter for a jury to
5 decide.

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

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

19 MR. MOGILL: Yes.

20 JUSTICE ALITO: "And insanity." So it
21 wasn't specifically -- wasn't limited to diminished
22 capacity.

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

24 JUSTICE ALITO: It was insanity in general.

25 MR. MOGILL: No, it was both. The -- the

1 insanity defense is separate from diminished capacity,
2 which is a partial defense; in fact, in Respondent's
3 first trial, prior counsel had raised both. At retrial
4 I only wished to raise the diminished capacity defense.

5 The law recognizes the difference between
6 the two in Michigan. Had diminished capacity not been a
7 recognized defense, the court's order, I respectfully
8 submit, would have been worded just with respect to
9 insanity. There would have been no legal basis for
10 arguing -- or, excuse me, for including the -- the
11 reference to diminished capacity.

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

16 MR. MOGILL: Yes.

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

18 MR. MOGILL: Yes.

19 JUSTICE SCALIA: And it -- there was an
20 evulsive change by the supreme court.

21 MR. MOGILL: I agree with that,
22 Justice Scalia. And I think that's what we have. We
23 have, from --

24 JUSTICE SCALIA: It's -- it's hard to
25 believe that, given -- given the clear text of the

1 statute.

2 MR. MOGILL: The problem, I -- I
3 respectfully submit, is that nobody in Michigan until
4 Carpenter -- and -- and I -- it -- that sounds like an
5 extreme statement, but again the record is clear.
6 Prosecutor's weren't objecting. There is a State bar
7 committee on criminal jury instructions whose
8 responsibility it is to come up with standard jury
9 instructions on areas of law that are agreed upon and --
10 and routinely enough raised in court to warrant a
11 standard instruction. That committee is comprised of
12 judges, prosecutors, and defense attorneys. In 1989,
13 that committee promulgated a diminished capacity
14 instruction. That's how well established it is.

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

20 MR. MOGILL: Yes.

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

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

25 JUSTICE SCALIA: Because he's -- he's

1 convicted and the -- I'm sorry -- he's -- he's --

2 MR. MOGILL: Convicted, convicted of second
3 instead of first; could he be tried on first?

4 JUSTICE SCALIA: That's right.

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

6 JUSTICE SCALIA: Could he be retried?

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

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

10 MR. MOGILL: No. What I -- but I --
11 Justice Scalia, the answer to your question is -- is
12 encompassed by the statutory scheme which requires
13 advanced notice. The -- a defendant can't offer
14 diminished capacity evidence in the middle of trial. A
15 defendant has to give 30 days or whatever other time set
16 by the judge notice, or it had to at the time. If the
17 prosecutor, in any case, believed that such evidence
18 wasn't admissible, the prosecutor had plenty of time
19 prior to trial to seek an in limine ruling from the
20 trial court, to seek an interlocutory appeal from the
21 Michigan Court of Appeals.

22 JUSTICE SCALIA: He could get an -- an
23 interlocutory appeal on that?

24 MR. MOGILL: Absolutely.

25 JUSTICE SCALIA: Okay.

1 MR. MOGILL: And -- and I will tell you the
2 prosecutors in Michigan are aggressive in -- in seeking
3 interlocutory appeals.

4 We have -- again, it is so well established,
5 there is not a contrary decision, there is not a
6 question raised in any opinion or any decision.

7 JUSTICE BREYER: How many holdings are
8 there?

9 MR. MOGILL: There are many mentions with
10 the -- the holdings --

11 JUSTICE BREYER: I take it the answer is
12 zero, right? I mean, I --

13 MR. MOGILL: No.

14 JUSTICE BREYER: -- I looked at your brief
15 and then I looked at their brief and they say the answer
16 is zero.

17 MR. MOGILL: Lynch is a holding.

18 JUSTICE BREYER: And the -- the holding is
19 that -- the pure holding would be if the trial court
20 judge says no, you cannot raise it. Okay? The
21 defendant is convicted and appeals.

22 MR. MOGILL: Yes.

23 JUSTICE BREYER: And then he says to the
24 appellate court: They wouldn't let me raise it.

25 And the appellate court says: You have a

1 right to raise it.

2 MR. MOGILL: And that's exactly Lynch,
3 Justice Breyer.

4 JUSTICE BREYER: That is Lynch. And Lynch
5 is what year?

6 MR. MOGILL: 1973.

7 JUSTICE BREYER: In 1973. Okay. So we have
8 one.

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

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

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

15 JUSTICE BREYER: No, but we -- we have Lynch
16 on one side. Is there any case -- this is an
17 intermediate appeals court -- is there any case in which
18 the defendant says, I would like to raise it, the
19 judge says no, convicted, appeal, and the intermediate
20 court of appeals says: Defendant, you are wrong?

21 MR. MOGILL: The answer to your question,
22 Justice Breyer, is there is no such case. And the
23 reason --

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

1 MR. MOGILL: '93 was the offense.

2 JUSTICE BREYER: Carpenter.

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

4 JUSTICE BREYER: 2001. All right.

5 MR. MOGILL: The offense was '93.

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

9 MR. MOGILL: If you talk holding only and if
10 you discount Mangiapane.

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

14 MR. MOGILL: The holding was he didn't --
15 but there was no reason for the court --

16 JUSTICE BREYER: Okay.

17 MR. MOGILL: -- to reach that
18 question unless diminished capacity exists.

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

22 MR. MOGILL: Thank you.

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

25 MR. MOGILL: If I can supplement that,

1 Justice Breyer.

2 JUSTICE BREYER: Yes.

3 MR. MOGILL: One of the things -- one of the
4 points this Court looked to in Rogers was how many times
5 the year-and-a-day rule had been "mentioned," and
6 that -- this is -- that's this Court's word -- in
7 Tennessee decisions. And so one of the things we did,
8 and that's the addendum in our red brief, is look at how
9 many times there are mentions -- all of which are
10 favorable, not one of which raises even a question, of
11 diminished capacity in Michigan. And that --

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

14 MR. MOGILL: We have 4 mentions in the
15 Michigan Supreme Court and 33 in the Michigan Court of
16 Appeals between 1975 and 1993, and we have over 100 --
17 about 100 --

18 JUSTICE SCALIA: Four mentions in the
19 supreme court that say what?

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

22 JUSTICE SCALIA: Yes.

23 MR. MOGILL: Yes.

24 JUSTICE SCALIA: Have we ever held that a
25 State law has been determined to be X simply because

1 intermediate State courts have uniformly held it to be
2 X? Never mind assumed it to be X; have held it to be X?

3 MR. MOGILL: I don't know of a particular
4 case.

5 But to answer your question, Justice Scalia,
6 the law in Michigan is clear, as stated by the Michigan
7 Supreme Court, that a published court of appeals
8 decision is precedentially binding statewide unless and
9 until reversed by the Supreme Court. So the fact
10 that --

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

12 MR. MOGILL: No. But in terms of it --

13 JUSTICE SCALIA: You have to show it's
14 right.

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

17 JUSTICE SCALIA: That it's the law.

18 MR. MOGILL: I have to show that it is the
19 law of the State. And it was the law of the State from
20 1973 forward.

21 And I would like to supplement that, if I
22 might.

23 CHIEF JUSTICE ROBERTS: Could you -- I'm
24 sorry. Go ahead.

25 MR. MOGILL: When -- when Lynch was decided,

1 it wasn't acting on something new. The court of appeals
2 opinion indicates that what we're doing is nothing novel
3 because the diminished -- the right to present
4 diminished capacity evidence to rebut an -- the elements
5 of premeditation and deliberation, grows out of a
6 100-year history in Michigan.

7 CHIEF JUSTICE ROBERTS: Well, but the
8 Lynch -- the Lynch case was 2 years before the Michigan
9 legislature adopted --

10 MR. MOGILL: Yes.

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

13 MR. MOGILL: Yes.

14 CHIEF JUSTICE ROBERTS: And that's where you
15 are putting, if not all of your eggs, most of your eggs,
16 right?

17 MR. MOGILL: No, I'm -- that -- that is --
18 that's an egg, and I think I've got a pretty full
19 basket.

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

25 MR. MOGILL: I disagree with that statement

1 by brother counsel. The -- and that's why I quoted
2 Article 3, Section 7.

3 CHIEF JUSTICE ROBERTS: Well, but you'll at
4 least -- well, maybe not. I mean, would -- would you
5 acknowledge that the force of Lynch was arguably
6 diminished by the fact that Michigan passed a statute
7 that did not mention the diminished capacity defense 2
8 years after it?

9 MR. MOGILL: I would if the facts of the
10 subsequent litigation supported that interpretation of
11 the statute. To the contrary, every case -- Mangiapane
12 wasn't --

13 CHIEF JUSTICE ROBERTS: I'm talking about
14 Lynch.

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

20 MR. MOGILL: No other holdings. But we have
21 many, many mentions, we have on-the-ground consistent
22 reliance by prosecutors, defense attorneys, and judges.

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

25 MR. MOGILL: Yes.

1 JUSTICE SOTOMAYOR: You can't prove a
2 negative, because if everybody accepts after Mangiapane
3 that the defense exists then trial courts are not going
4 to be excluding it on the basis that the statute
5 excludes it.

6 MR. MOGILL: Absolutely.

7 JUSTICE SOTOMAYOR: That's the whole point
8 you are making.

9 MR. MOGILL: And which gets me to -- to
10 Rogers, and -- and we turn to the questions of
11 fundamental fairness.

12 JUSTICE SOTOMAYOR: Do you have any -- is
13 there any evidence of a trial court holding an
14 exclusion?

15 MR. MOGILL: There is nothing.

16 JUSTICE SOTOMAYOR: Or even suggesting one?

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

21 JUSTICE BREYER: But that's because --
22 everybody agrees with you, I think -- I agree with you
23 on this anyway. I agree the bar puts it in the
24 instructions, and if the bar puts it in the
25 instructions, people tend to follow it. That's true.

1 So it's not surprising that a lot of people tend to
2 follow it.

3 But as far as court decisions are concerned,
4 we have no -- what I'm trying to think of is a
5 pre-statute. I give you a little credit on that.
6 That's Lynch. Pre-statute, and we have what I might
7 sort of exaggeratedly refer to as the great mentioner.
8 We've noticed the great mentioner is often wrong, and --
9 and here, even though there are judicial mentioners,
10 they get something. I don't know how much in the scale
11 to -- to give them.

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

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

25 MR. MOGILL: No, the Michigan Supreme Court

1 did mention it favorably as well.

2 JUSTICE BREYER: Okay. So -- so we've got
3 that. Now, actually, that Kentucky case, was it?
4 Tennessee?

5 MR. MOGILL: Rogers?

6 JUSTICE BREYER: Yeah, Rogers. That went
7 against you.

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

10 JUSTICE BREYER: All right. But can you
11 think of any Federal precedent on this issue that's come
12 even close to that being sufficient? What's your best?

13 MR. MOGILL: I think the closest point, and
14 it's important, and it goes, Justice Scalia, to respond
15 to your point about lower court -- reliance on lower
16 court opinions, is in Lanier, when the question
17 concerned what's the scope of the statute that's at
18 issue here. And this Court very explicitly stated that
19 its permissible for the world outside of court to look
20 at lower court decisions, court of appeals decisions, in
21 terms of what had been reasonably expressed. That's
22 consistent --

23 JUSTICE KENNEDY: If you -- if you prevail
24 here, it may well change the dynamic for State supreme
25 courts. State supreme courts, much like us, they wait

1 until courts of appeals have issued their opinions.
2 They wait to see how the practical application of those
3 works insofar as of the fairness of the trial. They
4 wait to see about scholarly commentaries, and then
5 they -- and then they take the case.

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

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

2 An -- an interesting contrast, and I think a
3 useful contrast --

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

6 MR. MOGILL: I'm sorry?

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

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

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

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

24 JUSTICE GINSBURG: But this -- the case
25 is -- is very different from Bouie which you -- which

1 you rely on. In -- in Bouie, it was the question of a
2 rule that is governing conduct. People come on to
3 premises; they have no reason to think that they are
4 committing an offense if they don't leave when somebody
5 asks them to if they came onto the premise lawfully. So
6 what the Court said in Bouie was that this is a
7 regulation of primary conduct, and at the time these
8 people acted, they had no reason to believe that what
9 they did was unlawful. That's quite a 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: The Court said that the
19 State supreme court interpretation of the statute was
20 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 very sparse
3 Tennessee authority on the year and a day rule.

4 That same analysis here will -- must lead to
5 a conclusion that all of the law in Michigan -- and
6 again, there are minimal holdings for the reasons
7 Justice Sotomayor indicated -- the minimal holdings, but
8 all the mentions and the holding go in the direction of
9 this existed. It was relied on, it wasn't contested --

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

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

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

1 made it very clear that you can't let a State court
2 relabel something in a way that avoids Federal
3 constitutional review. Chief Justice Rehnquist spoke to
4 that point in Collins v. Youngblood. Justice Kennedy,
5 you spoke to that in your dissent in Clark.
6 Justice Scalia, in your dissent in Rogers, you spoke to
7 the point, I think, in an apt phrasing, that this Court
8 will rely on a State court's reasonable determination of
9 State law. I --

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

12 MR. MOGILL: I'm sorry? No. The majority
13 -- the opinion of the Court in Collins, but it's also a
14 well-established principle, and I also wanted to note
15 that the two other mentions, but it's not a principle
16 that's been in dispute. The -- the Court's analysis in
17 both Bouie and Rogers also supports what I'm saying,
18 because the Court independently looked at South Carolina
19 law in Bouie. The Court independently looked at
20 Tennessee law in Rogers and --

21 JUSTICE ALITO: Well, I think you're -- what
22 you're arguing is that under certain -- in evaluating
23 certain constitutional claims, the -- the question of
24 what State law is is not dispositive. I don't think
25 you're arguing that a Federal court has a right to tell

1 a State court what State law is.

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

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

12 MR. MOGILL: No. But this is not -- that's
13 not this case. This case involves reliance --

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

18 MR. MOGILL: We're trying -- we're applying
19 a constitutional principle --

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

22 MR. MOGILL: Yes, exactly.

23 JUSTICE ALITO: What is the -- the
24 constitutional principle that doesn't depend on what
25 State law was?

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

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

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

23 It also furthers --

24 JUSTICE ALITO: This is -- this is the due
25 process issue, right?

1 MR. MOGILL: It's -- that's exactly --

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

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

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

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

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 MR. MOGILL: Thank you very much.

10 CHIEF JUSTICE ROBERTS: Mr. Bursch, you have
11 13 minutes remaining.

12 REBUTTAL ARGUMENT OF JOHN J. BURSCH

13 ON BEHALF OF THE PETITIONER

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

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

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

22 So under well-established Michigan law,
23 again, you know, In re Lamphier, Reese, which was their
24 2012 decision reapplying In re Lamphier, that code
25 occupies the field, and at that point, the common law

1 decision no longer existed.

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

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

11 CHIEF JUSTICE ROBERTS: I hate just to
12 interrupt you.

13 MR. BURSCH: Sure.

14 CHIEF JUSTICE ROBERTS: He did challenge my
15 premise when I presented that to him.

16 MR. BURSCH: Okay.

17 CHIEF JUSTICE ROBERTS: So I do think he
18 disagrees with it.

19 MR. BURSCH: Well, then I disagree with
20 that. If you look at In re Lamphier and Reese, it's
21 well-settled in Michigan that when the Michigan
22 legislature speaks to a particular subject matter in
23 criminal law that the code controls and the common law
24 cannot supplement it.

25 The words of the Michigan Supreme Court in

1 Reese itself were: "The courts have no power to add an
2 affirmative defense that the legislature did not
3 create."

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

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

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

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

24 JUSTICE KAGAN: But was there anyone prior
25 to 2001 who couldn't raise a defense like this, who was

1 precluded from doing so because a court thought, oh, you
2 know, the -- the statute really clears the field, and --
3 and this defense is not available?

4 Was it -- can you point to anything?

5 MR. BURSCH: We can't point to anything,
6 just like they can't point to anything.

7 You've got a -- you know, in 1975 --

8 JUSTICE KAGAN: I guess they can point to
9 just a lot of people who were raising this defense.

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

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

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

22 JUSTICE GINSBURG: -- why was it the right
23 case? The parties didn't even raise it, did they?

24 MR. BURSCH: Well, you know, it could be
25 because the Michigan Supreme Court thought, you know,

1 there's enough confusion, because of the mentions in the
2 lower court, that it's time that -- that we address
3 this.

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

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

16 You know, going back to -- to what the
17 Michigan law said, I -- I also heard my friend mention
18 the Griffin case. This is the three-paragraph order
19 where they -- they remand for ineffective assistance.

20 Well, Griffin is one of the cases that the
21 Michigan Supreme Court discusses in Carpenter, and in
22 the very next sentence, the Supreme Court says:
23 "However, we have never specifically authorized the
24 defense's use in Michigan courts."

25 You know, it just wasn't there.

1 What you have are these mentions, and then,
2 as Justice Breyer mentioned, he's got jury instructions
3 which are promulgated by the State bar, not the State
4 supreme court, or by any court for that matter. And
5 what you have to ask yourself, is it objectively
6 unreasonable, is it beyond any possibility of
7 fair-minded disagreement that a Michigan Court of
8 Appeals panel could conclude that Carpenter was both
9 indefensible and unexpected.

10 And --

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

14 MR. BURSCH: Well, all we have are the
15 mentions in the appellate courts.

16 JUSTICE BREYER: You do know about how many?
17 About --

18 MR. BURSCH: About 37, I believe. It was
19 four Michigan Supreme Court opinions and 33 Court of
20 Appeals. So it was 37.

21 Now, of those the Michigan Supreme Court
22 itself said their four decisions didn't say one way or
23 the other. Of the other 33, 32 of them weren't even
24 binding in other Michigan Court of Appeals panels. As
25 we explained in our brief, the Michigan Court of Appeals

1 wasn't bound to follow any panel decision prior to
2 November 1st, 1990. So those weren't even binding on
3 the court of appeals itself.

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

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

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

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

24 JUSTICE KAGAN: Do you have something like
25 in the middle?

1 (Laughter.)

2 MR. BURSCH: There are many cases in the
3 middle. There is at least a 1990 case, although I can't
4 recall the name. If you just key cite or shepherdize In
5 re Lamphier, you -- you will find scores of cases that
6 rely on this proposition.

7 It's -- it's not in dispute.

8 JUSTICE SOTOMAYOR: I'm sorry. Then you
9 were arguing that Lynch was wrong to begin with, because
10 what you are arguing is that it created a common law
11 defense that the courts say you can't under Michigan
12 law.

13 MR. BURSCH: Right. Exactly. You've got
14 Lynch, which was the common law.

15 JUSTICE SOTOMAYOR: No, no, but you're
16 saying to me it was wrongly decided under this general
17 Michigan --

18 MR. BURSCH: Oh, no, no, no.

19 To be perfectly clear, what In re Lamphier
20 and Reese and everything else say is that when the
21 legislature has spoken to a particular area, then the
22 courts cannot supplement. They had never spoken about
23 mental capacity defenses prior to 1975, and so the slate
24 was free for the courts to do what they wanted.

25 So there's nothing wrong with Lynch in '73.

1 The problem is continuing to assume that there was a
2 defense that wasn't in the '75 statute.

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

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

11 JUSTICE KAGAN: And if you were a
12 prosecutor, you would not have objected to that defense,
13 would you have?

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

17 JUSTICE KAGAN: Do you have any --

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

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

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

23 So ultimately, what we are talking about
24 here --

25 JUSTICE SCALIA: I assume you'd need a case

1 in which the prosecutor was pretty, pretty clear that a
2 diminished capacity defense would prevail. Otherwise,
3 it wouldn't -- the game wouldn't be worth the camel,
4 right?

5 MR. BURSCH: That's exactly right.

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

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

18 JUSTICE BREYER: Yeah.

19 MR. BURSCH: But the question was, did they
20 give notice? If the defense exists, is it part of the
21 statute? And -- and all the Michigan courts agree that
22 that has to be the case. But it's not till Carpenter
23 where the court finally says, is it part of the statute
24 and says no.

25 JUSTICE KAGAN: Just to go back to

1 Justice Breyer's question. I mean, there may be no way
2 you can answer this, but are we talking about, you know,
3 do five people a year -- did five people a year raise
4 this or -- or 20 or 100? I mean, what kind of numbers?

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

7 JUSTICE KAGAN: Right.

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

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

11 MR. BURSCH: Correct.

12 JUSTICE KAGAN: -- right?

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

17 You know, there was nothing here that would
18 make the Supreme Court's application of the plain
19 language so indefensible, so unexpected that no
20 reasonable jurist could possibly have reached the same
21 conclusion as now two unanimous Michigan Court of
22 Appeals panels have.

23 I wanted to touch briefly on the unfairness
24 point. And Justice Ginsburg, I -- I believe brought up
25 Bouie. And Bouie is really the perfect analogy,

1 because, again, under the AEDPA standard, it's
2 Lancaster's burden to show that the court of appeals
3 decision here was contrary to our misapplication. And,
4 to the contrary, it was the exact application of Bouie.

5 In Bouie, you had a clear statute that was
6 very narrow, and the State court expanded it in a very
7 unexpected way. And this Court found that was
8 indefensible and unexpected.

9 The exact opposite happened here. You had
10 the Michigan Supreme Court applying very narrow
11 statutory language exactly the way it was written in
12 accord with 200 years of interpretive principles.

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

19 It's not our burden to -- to demonstrate
20 what the law was or wasn't. All we have to show is that
21 a reasonable jurist could have reached the conclusion
22 the Michigan Court of Appeals did here, and there
23 doesn't appear to be any question that's the case.

24 JUSTICE SCALIA: You want us to say "yet
25 again" when we write our opinion?

1 MR. BURSCH: Yes, Justice Scalia.

2 If there are no further questions, thank you
3 very much.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 The case is submitted.

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

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