No. 12-547

IN THE
Supreme Court of the United States

LINDA METRISH, Warden,

Petitioner,

v.

BURT LANCASTER,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, ARIZONA, DELAWARE, IDAHO, KANSAS, NEW MEXICO, UTAH AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether retroactive application of a State Supreme Court's rejection of a "diminished capacity" defense to premeditated murder represents an "unreasonable application" of this Court's due process precedents justifying habeas relief.

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INTEREST OF THE *AMICI* STATES[1]

The *amici* States have a compelling interest in ensuring that federal courts uphold criminal convictions absent state court rulings that are "contrary to or an unreasonable application of" this Court's precedents. They also have a more specific interest in defending their own courts' determinations of State law against federal court interference. Furthermore, as sovereign operators of the nation's front-line criminal justice systems, States have a compelling interest in maintaining flexibility in developing substantive criminal law standards, consistent with due process and other Constitutional protections.

The *amici* States' participation in this case arises from all three of these interests. The decision below invokes notions of "fair warning" to interfere with the Michigan judiciary's decision to apply retroactively its rejection of "diminished capacity" as an affirmative defense to a charge of premeditated murder. There is a logical disconnection, however, between a criminal defendant's asserted "diminished capacity" to form the specific intent necessary for premeditated murder, and the interests of "fair notice" that underlie the due process rule applied below. Accordingly, the *amici* States urge the Court to review how the Michigan Court of Appeals could

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[1] Pursuant to Supreme Court Rule 37.2(a), the *amici* States provided all parties' counsel of record with timely notice of their intent to file this brief. Consent of the parties is not required for the States to file an amicus brief. Sup. Ct. R. 37.4.

have committed an "unreasonable application" of *this* Court's due process precedents when interpreting *state law* affirmative defense precedents to support retroactive application of the diminished capacity defense rule.

SUMMARY OF THE ARGUMENT

The decision below invalidated the premeditated murder conviction of Burt Lancaster because he lacked "fair warning" before he killed his girlfriend that his supposed "diminished capacity" would not be a defense to prosecution. According to the Sixth Circuit, refusing to permit Lancaster to assert a diminished capacity defense that supposedly existed when he murdered Toni King burdened his right to due process, which "turns upon . . . the *appearance to the individual* of the status of state law as of that moment [when the crime was allegedly committed]." Pet. App. at 6a-7a (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (emphasis added)). The Sixth Circuit did not address whether, if such "fair warning" could possibly have impacted Lancaster's decision to kill King, he could nonetheless plausibly have suffered from the diminished mental capacity he asserted at trial.

On a basic level, that is, it makes no sense to apply the *Bouie* foreseeability test to a diminished capacity defense. Fair warning can be important in situations involving, for example, claims of self-defense, where a defendant might actually have

relied on knowledge of the law when deciding whether to use deadly force. But where, as is true here, such cognitive reliance would itself render the defense (lack of sufficient cognition) wholly inapplicable, there can be no due process concern.

Furthermore, the Sixth Circuit did not give the Michigan courts proper deference under AEDPA. Retroactivity is a matter of state law and is not subject to federal habeas review.

ARGUMENT

I. The Court Should Review Whether Retroactive Elimination of a "Diminished Capacity" Defense Can Constitute an "Unreasonable Application" of this Court's "Fair Warning" Due Process Precedents

In the decision below, the Sixth Circuit held that the Michigan courts committed an "objectively unreasonable application of clearly established United States Supreme Court precedent," namely *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and *Rogers v. Tennessee*, 532 U.S. 451 (2001). Pet. App. at 27a. *Bouie* and *Rogers* hold that, "[i]f a judicial construction of a criminal statute is *unexpected and indefensible* by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect." *Bouie*, 378 U.S. at 354 (emphasis added and quotation omitted).

The due process right vindicated by *Bouie* and *Rogers* is "[t]he basic principle that a criminal statute must give *fair warning* of the conduct that it makes a crime . . . ." *Bouie*, 378 U.S. at 350-51 (emphasis added); *Rogers*, 532 U.S. at 459 (explaining that *Bouie*'s "rationale rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning").

In the context of a diminished capacity defense, however, the *Bouie* standard makes little sense. If Burt Lancaster had truly suffered from diminished capacity at the time he killed Toni King, he would not have had the mental capacity to foresee that he could rely on the defense at trial. The diminished capacity defense "allows a defendant, even though legally sane, to offer evidence of some mental abnormality to negate the specific intent required to commit a particular crime." *Michigan v. Carpenter*, 627 N.W.2d 276, 280 (Mich. 2001). A person who does not possess the mental capacity necessary for premeditation of murder cannot have the mental capacity to forecast whether that incapacity may be a defense to prosecution. Yet the decision below premised its decision on precisely that fantastical conceit. Pet. App. at 23a ("Lancaster could not have reasonably foreseen in 1993—when his crime was committed—that the consistent line of Michigan Court of Appeals' decisions upholding the diminished-capacity defense would have been overturned before his retrial in 2005.").

The specific circumstance of a diminished capacity defense consequently eliminates the primary rationale—to require "fair warning"—for applying *Bouie*. This is in stark contrast with more traditional affirmative defenses, such as self-defense and coercion, which criminal defendants might more plausibly consider when choosing to engage in the conduct the State nonetheless charges as a crime. For example, if "Jane Doe chooses to kill John Smith when he threatens her with substantial bodily harm or death[,] Doe has a right to rely on the representation of her state legislature that her conduct is legal. If the State then were to . . . not permit her to plead self-defense, [that denial] undoubtedly would violate principles of fundamental fairness." *Gilmore v. Taylor*, 508 U.S. 333, 359 (1993) (Blackmun, J., dissenting). Similarly, a defendant who is compelled to abet a murder must be able to invoke that defense if the law at the time did not give him notice that the defense was unavailable. *United States ex rel. Reed v. Lane*, 759 F.2d 618, 623-24 (7th Cir. 1985). In both cases, the nature of the defense does not inherently negate the defendant's capacity to consider the law.

Indeed, this Court and lower courts have distinguished situations where *Bouie* is inapplicable because notice is unwarranted or unhelpful. In *Bradshaw v. Richey*, 546 U.S. 74, 74-75 (2005) (per curiam), the defendant committed arson in an attempt to kill his former girlfriend and her new

boyfriend, but only a neighbor's daughter died in the fire. This Court upheld the conviction for aggravated felony murder on a theory of transferred intent against a *Bouie* due process claim in part because the Court opined that "[i]t is doubtful whether this principle of fair notice has any application to a case of transferred intent, where the defendant's *contemplated* conduct was *exactly* what the relevant statute [*sic*] forbade[.]" *Id.* at 76-77 (citation omitted).

The Ninth Circuit has similarly demarcated, in *Gonzalez v. Wong*, 667 F.3d 965, 997 (9th Cir. 2011), a zone where "[a]pplying *Bouie* [] would not further the principle underlying that decision." There, the Ninth Circuit rejected a murder defendant's claim that he lacked "fair notice" that, notwithstanding the invalidity of the search warrant the victim-police officer was attempting to serve when he was murdered, a trial court would instruct jurors to infer that the officer was engaged in the "lawful pursuit of his duties." *Id.* at 971-73. The court dismissed as irrelevant whether the defendant had "fair notice" such an instruction would be given under those circumstances because "[a]n individual who sees an officer serving a warrant would not ordinarily know at the time that the warrant was not valid." *Id.* at 997.

It is reasonable, therefore, to declare that *Bouie* is inapposite where a defendant has sought to plead diminished capacity but was denied such an

opportunity based on retroactive application of a rule. Analogous to *Bradshaw* and *Gonzalez*, this case presents the scenario where providing "fair warning" would engender no relief. A person with mental capacity so diminished that he cannot premeditate the murder he commits could not possibly benefit from notice that his condition is not a defense. Such a person is by definition out of mental control, and due process surely does not require courts to afford a criminal defendant the benefit of a hypothetical mental state at war with the defendant's own contentions.

At the very least, it surely was not unreasonable in light of this Court's precedents—not only *Bouie* and *Rogers*, but also *Bradshaw*—for the Michigan Court of Appeals to eschew an understanding of due process that allows Lancaster to prove insufficient mental capacity to commit premeditated murder on the assumption that he was perfectly lucid when he killed his victim. But this is exactly the logic of the Sixth Circuit, whose understanding of this Court's due process precedents led it to focus on whether Lancaster could have "reasonably foreseen" when he committed his crime that there would be no diminished capacity defense available at his trial. Pet. App. at 23a.

Even setting aside the unlikely scenario where a *compos mentis* Burt Lancaster methodically appraises the legal landscape before deciding whether to kill Toni King, the supposition that an

addled Lancaster might have done so, and decided to proceed only once he read the teachings of the Michigan appellate courts on diminished capacity, is farcical. Not only that, but even indulging in this thought experiment—which is necessary for Lancaster to prevail on his due process claim—could only confirm that Lancaster acted with *exactly* the calculation and premeditation he was convicted of having.

In no event were Lancaster's due process rights violated by the retroactive application of Michigan's *Carpenter* decision. Certiorari should be granted either because the *Bouie* foreseeability test does not even apply in cases involving the rejection of a diminished capacity defense, or because, given the Court's holding in *Bradshaw* that lack of prejudice from retroactivity counts, it was not clearly established that *Bouie* should apply here. For if it was not clearly established that *Bouie* should even apply, the Michigan Court of Appeals cannot be faulted for (allegedly) applying it incorrectly.

II. In the Alternative, the Court Should Review Whether, Under AEDPA, Federal Courts May Decide that State Court Elimination of an Affirmative Defense Was "Unexpected and Indefensible" in Light of State Precedent

Even assuming that Lancaster may generally maintain a *Bouie* claim pertaining to the elimination of a diminished capacity defense, the Court should take this case to address an important AEDPA issue. The decision below holds that the determination whether the elimination of a state criminal defense was foreseeable under state law is a *federal* law question, and that holding is in tension with holdings from the Third Circuit and this Court.

Here, again, the Michigan Court of Appeals held that the Michigan Supreme Court's holding in *Carpenter* that the defense of "diminished capacity" did not exist was not a change in the law precluding retroactivity. Pet. App. at 76a-77a. Rather than defer to this seeming state law determination, however, the Sixth Circuit analyzed the state court cases and found that "the district court materially understated the 'foothold' that the diminished-capacity defense had established in Michigan law and failed to recognize the plethora of state appellate court cases recognizing the validity of the defense." Pet. App. at 8a.

In dissent, Chief Judge Batchelder stated that "[i]n concluding that *Carpenter* did not constitute a change in Michigan law, the [Michigan] court of appeals applied Michigan state law; it did not apply *Bouie*, *Rogers*, or any other Supreme Court precedent." Pet. App. at 30a (Batchelder, C.J., dissenting). Thus, said the Chief Judge, even if the Michigan court's decision were somehow "illogical," such "conclusion is not relevant to our review because it was based on state, not federal, law." Pet. App. at 30a-31a *(*citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.")). The Michigan Court of Appeals' decision, therefore, should have been given "the benefit of the doubt required under AEDPA's highly deferential standard[.]" Pet. App. at 30a.

The Third Circuit, in contrast with the panel majority below, has suggested that state law retroactivity questions leave nothing for federal courts to review in a habeas proceeding where the issue is the status of state law at the time of the crime. In such a context, that court deferred to "the Pennsylvania courts' application of their own established retroactivity doctrines. On habeas review we are in no position to second-guess the state courts' determination as to that state law issue." *Warren v. Kyler*, 422 F.3d 132, 137 (3d Cir. 2005). The court relied on the "Supreme Court's longstanding position that 'the federal constitution

has no voice upon the subject' of retroactivity." *Id.* at 136 *(*quoting *Great N. Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932)).

To be sure, in *Warren* the relevant intervening state court decision was favorable to the defendant, and the question was whether due process *required* the State to apply it to the defendant. Regardless, the court deferred to the state court's retroactivity determination even though it had consequences for the federal due process question. That decision, in turn, was based on this Court's holding in *Fiore v. White*, 531 U.S. 225, 228 (2001) (per curiam), which relied on a state court assessment of the retroactive application of an intervening decision to conclude that due process was not at issue.

Yet in both the "requires" context (*Warren* and *Fiore*) and the "permits" context (this case), the threshold retroactivity determinations rested on how to apply state law doctrine. In *Warren* and *Fiore*, the question was whether, under state law, the intervening decision actually represented a new rule, or whether it was instead simply a "clarification" of an old rule. *Warren*, 422 F.3d at 137; *Fiore*, 531 U.S. at 228. Here, similarly, the threshold question was whether the intervening decision represents a departure from precedent or merely clarifies extant principles. *See* Pet. App. at 8a. And while it may seem unexceptional in the abstract for federal due process doctrine to look more favorably upon state court *refusals* to apply intervening decisions

retroactively, AEDPA deference to state court resolutions of threshold state law questions should be the same regardless of the outcome.

With regard to the decision below, therefore, the net result is both inter-circuit tension and tension with this Court over the point at which a state law retroactivity determination becomes a federal question. This tension is all the more significant given the history of the particular intervening rule at stake, namely the elimination of the diminished capacity defense.

The Court has previously observed that the availability *vel non* of a diminished capacity defense is particularly a question of *local* law. *See Fisher v. United States*, 328 U.S. 463, 473 (1946) (affirming under District of Columbia law that "an accused in a criminal trial is not entitled to an instruction based upon evidence of mental weakness, short of legal insanity, which would reduce his crime from first to second degree murder"). Indeed, the diminished capacity defense represents such "a radical departure from common law concepts" that it could only be "a matter peculiarly of local concern." *Id.* at 476. *See also Powell v. Texas*, 392 U.S. 514, 536 (1968) (questions relating to the mental state necessary to be guilty of a crime have "always been thought to be the province of the States."); *Clark v. Arizona*, 548 U.S. 735, 779 (2006) (holding that the availability of a diminished capacity defense is a

matter of state prerogative, not federal constitutional law).

The point is that, while some defenses have roots in the common law and are therefore culturally understood to be available in the vast majority of states, the defense of diminished capacity is a state-specific defense—one rejected by many states at that. Pet. App. at 33a. It does not possess the renown and longevity essential for its denial amidst murky state law precedent to offend the due process principle of "fair warning." As a consequence, a state court determination that it was foreseeable that the State would reject a diminished capacity defense warrants all the more deference. Review should be granted here to clear up whether state law retroactivity, which depends on the foreseeability of a new state law rule, is a state or federal issue under AEDPA.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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