Supreme Court, U.S.
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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 IN OPPOSITION

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QUESTION PRESENTED

Whether the Petition for a Writ of Certiorari should be denied where the Sixth Circuit correctly applied the AEDPA standard of review and this Court's precedents to determine that the Michigan courts' retroactive application of the unforeseeable judicial abrogation of the diminished capacity defense violated Respondent's due process rights and was an objectively unreasonable application of those precedents.

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OPINION BELOW

Respondent Burt Lancaster respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case, issued on June 29, 2012, reproduced in the appendix to the petition (Pet. App.) at 1a-35a, and reported in *Lancaster v. Metrish*, 683 F.3d 740 (6th Cir. 2012). The district court's amended memorandum and order is reported in *Lancaster v. Metrish*, 735 F. Supp. 2d 750 (E.D. Mich. 2010), and reproduced at Pet. App. 37a-54a. The opinion of the Michigan Court of Appeals is not reported, but is available at *People v. Lancaster*, No. 263483, 2006 WL 3751420 (Mich. Ct. App. Dec. 21, 2006), and reproduced at Pet. App. 76a-78a.

STATEMENT OF THE CASE

Respondent Burt Lancaster respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case because it does not merit this Court's review, as it does not present any of the reasons that this Court traditionally considers as warranting the grant of a writ of certiorari. *See* Sup. Ct. R. 10. Specifically, the Sixth Circuit did not decide an important issue of federal law that has not yet been, but should be, decided by this Court; the Sixth Circuit did not decide an important federal question in a way that conflicts with relevant decisions of this Court; and the Sixth Circuit's decision does not present an important matter as to which the decisions of the Circuit Courts of Appeals conflict. This Court has already provided clear guidance to the lower courts for

assessing the due process implications of retroactively applied changes in state law, and, even if one were to accept the State's arguments as correct, this case, at most, would merely present a situation in which the Sixth Circuit misapplied a properly stated rule of law, a circumstance under which a writ of certiorari is "rarely granted." Sup. Ct. R. 10. The State's premise is, in any event, incorrect; the Sixth Circuit correctly applied the relevant statutes and this Court's precedents.

A. Respondent's First Trial and Post-Conviction Proceedings

On April 22, 1993, Respondent, a former Detroit police officer with a long history of severe mental health problems, killed his girlfriend in broad daylight. He was charged in the Oakland County, Michigan, Circuit Court with first-degree murder and possession of a firearm in the commission of a felony. After a 1994 trial at which he raised the defenses of insanity and diminished capacity,[1] he was convicted as charged and sentenced to a mandatory term of life imprisonment for the murder charge plus two years for the felony firearm offense.

Following exhaustion of his direct appellate remedies in state court, Respondent petitioned in the Eastern District of Michigan for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was granted

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[1] The trial judge instructed the jury as to diminished capacity by using the language of the then-standard jury instruction on the subject, Mich. Crim. Jury Instructions 6.3 (2d ed. 1994).

by the Hon. Avern Cohn on the ground that the trial court had violated Respondent's right pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), to a jury selected free from racial discrimination. *Lancaster v. Adams*, No. 00-CV-70691-DT (E.D. Mich. Sept. 25, 2001). The Sixth Circuit affirmed, *Lancaster v. Adams*, 324 F.3d 423 (6th Cir. 2003), and this Court denied certiorari, *Adams v. Lancaster*, 540 U.S. 1004 (2003).

B. Respondent's Second Trial

Respondent was retried in 2005. In pretrial proceedings, he sought an *in limine* ruling that the intervening Michigan Supreme Court decision in *People v. Carpenter*, 627 N.W.2d 276 (Mich. 2001), which held that the diminished capacity defense had been abrogated by the enactment of Mich. Comp. Laws § 768.21a, could not as a matter of due process be retroactively applied to preclude him from asserting a defense that had been available at the time of the offense and upon which he had relied at his first trial. The trial judge denied the motion, and Respondent's interlocutory appeals were unsuccessful. *People v. Lancaster*, No. 256914 (Mich. Ct. App. Sept. 3, 2004) (Pet. App. 81a) (denying application for leave to appeal); *People v. Lancaster*, No. 127080 (Mich. Dec. 9, 2004) (Pet. App. 79a-80a) (denying application for leave to appeal over; Cavanaugh and Kelly, JJ., dissenting).

At his retrial, Respondent was permitted to make an offer of proof on a separate record as to the evidence of diminished capacity that he would have presented to the trier of fact had he been permitted to do so. He was convicted as charged and once again sentenced to life imprisonment plus two years.

C. Post-Conviction Proceedings

Following his conviction after the second trial, Respondent appealed as of right to the Michigan Court of Appeals raising the following issues:

> I. THE RIGHT TO PRESENT COMPETENT EVIDENCE NEGATING AN ELEMENT OF THE CHARGED OFFENSE IS AN ASPECT OF MR. LANCASTER'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE GUARANTEED BY U.S. CONST, AM V, VI & XIV, AND CONST 1963, ART 1, § 17 & 20.
>
> II. ABOLISHING A DEFENSE IS A SUBSTANTIVE CHANGE IN THE LAW, AND U.S. CONST, AM V & XIV, AND CONST 1963, ART 1, § 17, PROHIBIT BOTH THE LEGISLATURE AND THE JUDICIARY FROM APPLYING SUCH A CHANGE RETROACTIVELY.

On December 21, 2006, the Michigan Court of Appeals affirmed Respondent's conviction in an unpublished per curiam opinion, *People v. Lancaster*, No. 263483, 2006 WL 3751420 (Mich. Ct. App. Dec. 21, 2006) (Pet. App. 76a-78a), and subsequently denied Respondent's motion for reconsideration, *People v. Lancaster*, No. 263483 (Mich. Ct. App. Jan. 23, 2007) (Pet. App. 75a). On May 30, 2007, the Michigan Supreme Court denied Respondent's timely application for leave to appeal in which he raised the retroactivity

issue that had been raised in the Court of Appeals.[2] *People v. Lancaster*, 731 N.W.2d 743 (Mich. 2007) (Pet. App. 74a).

On August 18, 2010, Hon. Avern Cohn, District Judge, denied Respondent's timely petition for a writ of habeas corpus; on August 19, the court entered an amended memorandum and order correcting a misstatement in the initial memorandum and order. *Lancaster v. Metrish*, 735 F. Supp. 2d 750 (E.D. Mich. 2010) (Pet. App. 37a-54a). Following Respondent's timely filing of a notice of appeal, Judge Cohn, noting that "reasonable jurists might debate the [c]ourt's conclusion that Petitioner is not entitled to habeas relief," sua sponte granted a certificate of appealability on August 27, 2010. *Lancaster v. Metrish*, No. 07-13692, 2010 WL 3397336, at *1 (E.D. Mich. Aug. 27, 2010).

In his appeal to the Sixth Circuit, Respondent raised the following issue:

> WHERE, AT THE TIME OF PETITIONER'S OFFENSE, THE RIGHT TO PRESENT EVIDENCE OF DIMINISHED CAPACITY WAS FIRMLY ESTABLISHED AS A MATTER OF MICHIGAN LAW AND THERE WAS NO FAIR WARNING THAT THE RIGHT MIGHT BE ABROGATED, AND WHERE PETITIONER PRESENTED EVIDENCE OF DIMINISHED

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[2] Issue I as raised in the Court of Appeals was not pursued because of the intervening decision of this Court in *Clark v. Arizona*, 548 U.S. 735 (2006).

CAPACITY AT HIS FIRST TRIAL AND HIS CONVICTION FOLLOWING THAT TRIAL WAS SET ASIDE AS A RESULT OF CONSTITUTIONAL ERROR, IT WAS A DENIAL OF DUE PROCESS, U.S. CONST, AM V & XIV, FOR A MICHIGAN SUPREME COURT DECISION ABROGATING THE RIGHT EIGHT YEARS AFTER PETITIONER'S OFFENSE TO BE APPLIED RETROACTIVELY TO PRECLUDE PETITIONER FROM PRESENTING EVIDENCE OF DIMINISHED CAPACITY AT HIS RETRIAL.

On June 29, 2012, the Sixth Circuit reversed the district court's denial of the writ of habeas corpus, holding that the Michigan Court of Appeals unreasonably applied this Court's decisions in *Rogers v. Tennessee*, 532 U.S. 451 (2001), and *Bouie v. City of Columbia*, 378 U.S. 347 (1964), to reach the conclusion that Respondent's due process rights were not violated by the retroactive application of *Carpenter*. *Lancaster v. Metrish*, 683 F.3d 740 (6th Cir. 2012) (Pet. App. 1a-35a). The Sixth Circuit examined the consistent line of decisions from the Michigan Court of Appeals and Michigan Supreme Court that, without exception, recognized the existence of the diminished capacity defense – both before and after the enactment in 1975 of Mich. Comp. Laws § 768.21a – and held that the defense was well-established under Michigan law prior to *Carpenter*. (Pet. App. 9a-19a). The Sixth Circuit noted that none of the factors that justified retroactive application of a change in law in *Rogers* were present in the instant case, and held that *Carpenter*'s abolition of the diminished capacity defense was unforeseeable. (Pet. App. 19a-25a). Finally, applying the standard of

review mandated by AEDPA, the Sixth Circuit held that the retroactive application of *Carpenter* to Respondent was an unreasonable application of this Court's clearly established precedent in *Bouie* and *Rogers*. (Pet. App. 26a-27a). Chief Judge Batchelder dissented, concluding that – notwithstanding the fact that "it seems illogical for the Michigan Court of Appeals to ignore the practical consequences of *Carpenter* and conclude that abolishing the diminished-capacity defense was not a change in law" – the decision was "not so lacking in justification as to entitle Lancaster to habeas relief." (Pet. App. 30a-31a (citation and internal quotation marks omitted)).

REASONS FOR DENYING THE PETITION

The issue presented in this case does not merit this Court's review, and the facts of this case would present a poor vehicle for addressing that issue. The State does not allege that the issue presented is an unresolved issue of great importance, nor, in light of the clear guidance already provided by this Court and the unique, fact-bound nature of this case, is it one. There is no allegation that the Sixth Circuit identified or applied the wrong legal principles or ignored relevant precedent, nor did it. There is no supportable allegation that the case presents a circuit split, nor does one exist. In sum, the State has wholly failed to satisfy any of this Court's traditional criteria for granting certiorari. *See* Sup. Ct. R. 10. At most, the State argues that the Sixth Circuit has misapplied a properly stated rule of law. As this Court's rules make clear, petitions for the writ of certiorari are "rarely granted" under these circumstances. *Id.* The arguments presented by the amici do not alter this conclusion.

THE SIXTH CIRCUIT DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

The issue presented in this case has long been resolved and clarified by this Court. In *Bouie*, 378 U.S. 347, and *Rogers*, 532 U.S. 451, this Court provided clear guidance to the lower courts tasked with assessing the due process implications of retroactively applied changes in state law. The State does not argue otherwise. Indeed, as the Petition for a Writ of Certiorari lays bare (*see* Pet. at 4), the State's arguments amount to nothing more than a claim that the Sixth Circuit identified the proper rules of law but misapplied them to this case. However, a "petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Importantly, this case presents an extremely unusual set of facts and a quirk of chronology unlikely to be repeated in other circumstances; even if the relevant issues were unresolved, lower courts are not in need of guidance on these issues. Michigan courts recognized and assumed without question the availability of the diminished capacity defense since at least 1973. *See People v. Lynch*, 208 N.W.2d 656 (Mich. Ct. App. 1973). Two years later, the Michigan Legislature, for the first time, codified the insanity defense. Mich. Comp. Laws § 768.21a. For the next twenty-six years, Michigan courts continued to recognize and assume, without question, the continued existence of the diminished capacity defense. Indeed, in 1978 the Michigan Court of Appeals expressly held that

the 1975 statute encompassed the diminished capacity defense and that an accused raising the defense must comply with the procedural requirements set out in that statute. *People v. Mangiapane*, 271 N.W.2d 240, 249 (Mich. Ct. App. 1978); *see also People v. Mette*, 621 N.W.2d 713, 719 (Mich. Ct. App. 2000) ("This [c]ourt has consistently held that the defense of diminished capacity comes within the codified definition of legal insanity and is subject to the same procedural requirements."). When the Michigan Supreme Court finally determined – eight years *after* Respondent committed the acts here at issue – that the defense had been abrogated, it did so in a case in which it had originally granted leave to appeal solely to consider whether the defendant properly bore the burden to establish the defense.

When Respondent was first tried in 1994, it was universally held and unquestioned in the Michigan courts that a diminished capacity defense was available to him, and he properly raised the defense at that trial. Because his first trial was tainted by a violation of his right to a jury selected free from racial discrimination, *see Batson*, 476 U.S. 79, Respondent was retried eleven years after his first trial. In the interim, the Michigan Supreme Court held that the diminished capacity defense had been abrogated by the enactment of Mich. Comp. Laws § 768.21a, after having consistently assumed the continued viability of the defense up through the issuance in 2001 of its opinion in *Carpenter*, 627 N.W.2d 276. In sum, Respondent was first tried at a time when the Michigan courts uniformly acknowledged the existence of the diminished capacity defense; he raised that defense at his first trial; his first trial was subsequently

determined to have been tainted by a violation of his right to a jury selected free of racial bias; he was retried after the Michigan Supreme Court abolished the defense; and he was not permitted to raise the defense at his retrial even though the first trial had been fatally tainted by structural, constitutional error.

Even leaving aside the plain correctness of the Sixth Circuit's holding that such a turn of events was unforeseeable and the retroactive application of *Carpenter* was a denial of due process, it is clear that this highly unusual set of facts is unlikely to be repeated and does not merit this Court's consideration. The Sixth Circuit's fact-bound application of *Rogers* and *Bouie* to the unusual circumstances of this case does not warrant this Court's review.

THE SIXTH CIRCUIT DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT

Contrary to the State's argument, the Sixth Circuit's decision in this case does not conflict with *Rogers* or *Bouie*, or with the standard of review mandated by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d)(1). The Sixth Circuit identified the correct legal principles drawn from those cases and engaged in a straightforward application of those principles and the statutory standard of review to this unique set of circumstances, an intensely fact-bound inquiry based upon a factual pattern that is unlikely to be repeated.

The State's argument that the Sixth Circuit's decision conflicts with *Rogers* essentially boils down to an argument that because the Sixth Circuit found that

Respondent's due process rights had been violated, while, on the basis of a starkly different set of facts and circumstances, *Rogers* found no due process violation, the Sixth Circuit's decision necessarily must conflict with *Rogers*. However, as the Sixth Circuit correctly noted, none of the rationales that justified retroactive application of the abolition of the "year and a day" rule in *Rogers* are present with respect to the abolition of the diminished capacity defense. There is no conflict between the Sixth Circuit's decision and *Rogers*.

In this case, the Sixth Circuit correctly ruled that the Michigan Supreme Court's abolition of the diminished capacity defense in 2001 – eight years after the offense was committed and seven years after Respondent's first trial – was unexpected and unforeseeable in 1993, and thus could not, consistent with due process, be applied retroactively to Respondent. Indeed, as noted above, in *Carpenter*, the Michigan Supreme Court "originally granted leave to consider whether the lower courts properly determined that it was defendant's burden to establish his diminished capacity defense by a preponderance of the evidence under M.C.L. § 768.21a." *Carpenter*, 627 N.W.2d at 277. Thus, the Michigan Supreme Court took it as a given that such a defense existed at the time. Under these circumstances, where even the Michigan Supreme Court treated the defense as a given in 2001, it was objectively unreasonable to suggest that abolition of the defense was foreseeable in 1993, just as it was objectively unreasonable for the Michigan Court of Appeals to determine in this case that the Michigan Supreme Court's interpretation of § 768.21a "did not involve a change in the law because it concerned an unambiguous statute that was interpreted by the

[Michigan] Supreme Court for the first time." (Pet. App. 77a).

Moreover, the notion that § 768.21a "unambiguously" reflected the legislature's intent to abrogate the diminished capacity defense is belied by the fact that two justices of the Michigan Supreme Court concluded that the statute did no such thing. *Carpenter*, 627 N.W.2d at 241-42 (Kelly, J., dissenting) ("I disagree that the Legislature has signified its intent to preclude a defendant from negating mens rea by introducing evidence of mental illness short of legal insanity."). Justice Kelly, in a dissent joined by Justice Cavanaugh, found "unpersuasive" the majority's determination that the legislature, in codifying the defenses of insanity and guilty but mentally ill, intended to abolish the diminished capacity defense, noting that concerns "that the accused who successfully show that their mental illness negated the requisite mens rea may be set free without treatment or imprisonment . . . cannot justify reading into legislation a rule of exclusion per se *where none exists*." *Id.* at 291 (emphasis added); *see also id.* at 292 (calling the majority's holding an "extreme step" that "lacks sound justification").

It cannot reasonably be said that the statute "unambiguously" abolished the diminished capacity defense where (1) the Supreme Court – twenty-six years after its enactment – granted leave to appeal to determine *not* whether the defense still existed, but rather which party bears the burden of proving or disproving this defense that the Court assumed to exist; (2) the justices of the Michigan Supreme Court all read the same language and two of them concluded

that the statute effected no such change; and (3) Michigan trial courts, as well as its Court of Appeals and Supreme Court, consistently assumed the existence of this defense in the decades following the enactment and amendment of the codification of the insanity defense.[3] Against this backdrop, it was objectively unreasonable for the Michigan Court of

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[3] As the Sixth Circuit correctly recognized, until *Carpenter* was decided, the right of an accused to present evidence of diminished capacity was acknowledged *without question* in Michigan's appellate courts both prior to, *People v. Griffin*, 444 N.W.2d 139 (Mich. 1989); *People v. Ramsey*, 375 N.W.2d 297 (Mich. 1985); *People v. Lipps*, 421 N.W.2d 586 (Mich. Ct. App. 1988); *People v. Jones*, 390 N.W.2d 189 (Mich. Ct. App. 1986); *People v. Denton*, 360 N.W.2d 245 (Mich. Ct. App. 1984); *People v. Linzey*, 315 N.W.2d 550 (Mich Ct. App. 1981); *People v. Hall*, 269 N.W.2d 476 (Mich. Ct. App. 1978); *Mangiapane*, 271 N.W.2d 240; *Lynch*, 208 N.W.2d 656, and after the date of Respondent's offense, *People v. Lloyd*, 590 N.W.2d 738 (Mich. 1999); *People v. Pickens*, 521 N.W.2d 797 (Mich. 1994); *Mette*, 621 N.W.2d 713, and cases cited therein. The existence of a Michigan accused's right to offer evidence of diminished capacity was also recognized in *Johnigan v. Elo*, 207 F. Supp. 2d 599, 610 (E.D. Mich. 2002). The right to present evidence of diminished capacity was so well established in Michigan law that it was the subject of a standard criminal jury instruction, Mich. Crim. Jury Instructions 6.3, an instruction given to the jury at Respondent's first trial in this very case. While the standard criminal jury instructions in Michigan are not promulgated by the Supreme Court and their use is not mandatory, they are and for decades have been widely relied on by trial judges, prosecutors and defense attorneys throughout the state. Moreover, when the Legislature amended the insanity statute in 1994, it still made no reference to the diminished capacity defense. If the Michigan courts had been misconstruing the Legislature's intent in the nineteen years since it first enacted the insanity statute, it is likely that the Legislature would have clarified its intent when amending the statute in 1994 if not earlier.

Appeals to hold that the insanity statute was unambiguous in reflecting legislative intent to abolish the diminished capacity defense.

Moreover, contrary to amici's argument, the Sixth Circuit did not invade the province of the states to determine state law. Whether retroactive application of the judicial abolition of a common law defense violates due process is a question properly before the federal courts. Indeed, that is precisely the issue that the federal courts considered in *Rogers*; *see also, e.g.*, *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (per curiam) (trial court's construction of the term "arrest" as including a traffic citation under state law, and application of that construction to defendant to revoke his probation, was unforeseeable and thus violated due process).[4] Respondent did not ask the district court and

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[4] The State cites *Parker v. Matthews*, 132 S. Ct. 2148 (2012), in support of its curious argument that this Court should grant certiorari in this case because it has, in other cases and on other facts, reversed Sixth Circuit grants of the writ of habeas corpus. Notably, however, *Parker* supports exactly the opposite argument that amici propose here. In *Parker*, the Sixth Circuit had determined that the defendant's due process rights were violated when a state supreme court retroactively applied a post-offense judicial determination that the defendant bears the burden proving extreme emotional disturbance (whereas, previously, the defendant bore the burden of production, after which the state bore the burden of disproving extreme emotional disturbance), where that determination was deemed to be an unexpected and indefensible judicial revision of the state law. *Id.* at 2151. This Court noted that the state supreme court's reliance on the post-offense determination and its assessment of the sufficiency of the evidence according to that determination "would be relevant if they formed the sole basis" for the state supreme court's denial of the petitioner's claim. *Id.* However, because the jury instructions had

the Sixth Circuit – and is not now asking this Court – to determine whether the Michigan courts' interpretation of the effect of the insanity statute (or its amendment) on the diminished capacity defense was correct. Such an inquiry is decidedly outside the scope of proper inquiry of the federal courts. *See, e.g.*, *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. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). Instead, what Respondent properly sought, and what the Sixth Circuit performed, is a review of whether the Michigan courts' retroactive application of that interpretation violated his federal due process rights, an inquiry that is emphatically the within the province of the federal courts. *See id.*; *see also Rogers*, 532 U.S. 451 (reviewing whether state court's retroactive application of abolition of state common law "year and a day" rule violated due process); *Bouie*, 378 U.S. 347 (reviewing whether state court's retroactive application of new construction of state law violated due process).

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allocated the burden as required under the pre-offense state of law, and because the state supreme court determined that the evidence was sufficient to support the jury's finding under that law, "it [was] irrelevant that the court also invoked a ground of questionable validity." *Id.* at 2152. Thus, *Parker* supports the proposition that the federal courts may and should inquire into a state court determination that retroactive application of a change in state law does not offend due process. The difference between the instant case and *Parker* is simply that, in *Parker*, the state court determination was also supported by an independent basis that did not rely on the "ground of questionable validity" presented here.

The amici apparently submit that, so long as a state court claims that its decision does not represent "new" law – even if, as Chief Judge Batchelder recognized in her dissenting opinion below, that characterization is "illogical" (Pet. App. 30a) and entirely unsupported by its own history and precedent – the decision is beyond federal court review. Such a crabbed interpretation of the ability to vindicate due process rights via the writ of habeas corpus cannot be correct; it cannot be the case that the state courts can avoid federal court review of federal constitutional claims by the simple expedient of claiming that an unexpected and unforeseeable change in state law actually effected no change in state law. The Supremacy Clause of the United States Constitution demands otherwise. U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . , shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."). If the Supremacy Clause is to mean anything, it must mean that a state cannot ignore federal constitutional rights by such judicial sleight of hand.

THE SIXTH CIRCUIT DECISION DOES NOT CONFLICT WITH DECISIONS FROM OTHER CIRCUITS

Despite the strained efforts of amici to manufacture a circuit split, none exists. *Warren v. Kyler*, 422 F.3d 132 (3d Cir. 2005), and the Supreme Court decision upon which it relied, *Fiore v. White*, 531 U.S. 225 (2001), address the entirely distinct issue of whether a *favorable* change in state law is *required* by the United

States Constitution to be applied retroactively. The amici's attempt to compare that entirely distinguishable situation to the situation here presented – when a state is *permitted*, under the United States Constitution, to apply an *unfavorable* decision retroactively – is without basis. Here, the question is one of fair notice as required by the due process clause. Nowhere in *Warren* or *Fiore* does that concept arise.

Instead, the amici attempt to create a circuit split by misrepresenting the issue in this case as one of how federal courts are required to treat state court determinations about the retroactivity of changes in state law. But, as discussed above, the issue here is not one of state law, but rather whether and when changes in state law may, consistent with the United States Constitution, be applied retroactively to defendants whose offense predated that change in law. When the change in state law would favor the defendant, the question that arises is not whether the change was foreseeable and reasonable by reference to the previously existing state of state law – an inquiry that, by necessity, requires the federal courts to examine the state of state law. Instead, in *Warren*, because "[n]othing in the federal Constitution compels a State to apply its criminal decisions retroactively, and we lack the authority to review the State's own application of its retroactivity principles," the federal courts were without authority to pass judgment on the state court's determination that a favorable change in law did not apply retroactively. 422 F.3d at 141. This is quite obviously distinguishable from the situation here, where the federal Constitution *does* compel a state *not*

to apply certain criminal decisions retroactively and federal due process rights are plainly implicated.

The State appears to imply – without outright stating – that the Sixth Circuit opinion creates a circuit split with the Third Circuit's opinion in *Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004). The purported conflict between these cases does not withstand analysis. First, *Ponnapula* arose not in the context of judicial changes in criminal law but rather statutory changes in civil immigration law. Second, the Third Circuit expressly rejected the notion that actual reliance must be established in order to find impermissible retroactivity under *Landgraf v. AFI Film Products*, 511 U.S. 244 (1994). Third, the State wrenches the phrase it quotes ("it would border on the absurd") from the rest of its context ("to argue that an alien would refrain from committing crimes or would contest criminal charges more vigorously if he knew that after he had been imprisoned and deported, a discretionary waiver of deportation would no longer be available to him," *Ponnapula*, 373 F.3d at 496 n.14) and instead attempts to make it stand for the far broader – and plainly incorrect – proposition that a defendant could *never* reasonably claim to have charted his course of conduct in reliance upon the state of law at the time he committed his offense. The State has presented no case that stands for that extremely broad, patently untenable proposition.

The Sixth Circuit decision does not conflict with *Warren* or *Ponnapula*; neither the State nor amici have identified any actual circuit split; and no circuit split exists.

THE STATE'S AND AMICI'S ARGUMENTS ARE INCONSISTENT WITH THIS COURT'S PRECEDENT

The State and its amici present a view of fair warning that is inconsistent with this Court's precedent and wholly out of step with the requirements and values of due process. In cases where there is no question of the defendant's mental capacity to understand the state of law, courts do not inquire whether that particular defendant actually did so understand. Instead, courts examine the state of law from an objective perspective. *See Bouie*, 378 U.S. at 355 n.5 ("We think it irrelevant that petitioners at one point testified that they had intended to be arrested. The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an ad hoc appraisal of the subjective expectations of particular defendants."). *Cf. Stogner v. California*, 539 U.S. 607, 651 (2003) (Kennedy, J., dissenting) (noting that, in the criminal law context, the notion of reliance on state of law at time of offense is "for the most part, a fictional construct" insofar as the Court does not require a defendant to show that he or she, personally, relied upon state of law in deciding how to order his or her conduct).

Here, however, amici suggest that, in the case of defenses specific to individuals with arguably diminished mental capacities, courts should instead examine whether *this particular defendant* (or at least this particular type of defendant) actually possessed the mental capacity accurately to assess the state of

law prior to acting. Amici, in essence, propose removing the due process protection of "fair notice" or "fair warning" from individuals who lack the mental capacity to understand what they are being given notice or warning of. Stated another way, amici appear to be asking the Court to adopt a rule permitting retroactive application of a change in substantive law in a criminal case in which the defendant suffers from a mental, cognitive or psychological impairment even though retroactive application would be forbidden if the defendant suffered no such impairment.

This Court's precedents are clear: "All citizens are presumptively charged with knowledge of the law." *Atkins v. Parker*, 472 U.S. 115, 130 (1985). Amici, however, would have this Court create a novel but significant limitation to this axiom. By their reading, courts are to assume to that, while all fully and consistently mentally competent citizens are presumptively charged with knowledge of the law, anyone not so situated cannot be assumed to understand the law and thus cannot be deprived of due process when the law is suddenly and unexpectedly changed to their detriment. Nothing in this Court's precedents or in the values and principles underlying due process supports such an extreme and unjustified restriction of this fundamental right; the proposition does not warrant examination by this Court.

CONCLUSION

For all of the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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