No. _____

In the Supreme Court of the United States

LINDA METRISH, WARDEN, PETITIONER

v.

BURT LANCASTER

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

Laura Moody
Appellate Division Chief

Andrea M. Christensen
Assistant Attorney General
Appellate Division

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the Michigan Supreme Court's recognition that a state statute abolished the long-maligned diminished-capacity defense was an "unexpected and indefensible" change in a common-law doctrine of criminal law under this Court's retroactivity jurisprudence. See *Rogers* v. *Tennessee*, 532 U.S. 451 (2001).

2. Whether the Michigan Court of Appeals' retroactive application of the Michigan Supreme Court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" so as to justify habeas relief. *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011).

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Linda Metrish, Warden of a Michigan correctional facility. The Respondent is Burt Lancaster, an inmate.

TABLE OF CONTENTS

PETITION APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Constitutional Provisions

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals, App. 1a–35a, is reported at 683 F.3d 740 (6th Cir. 2012). The amended opinion of the United States District Court, App. 37a–54a, is reported at 735 F. Supp. 2d 750 (E.D. Mich. 2010). The opinion of the Michigan Court of Appeals, App. 76a–78a, is not reported but is available at 2006 WL 3751420 (Mich. App. Dec. 21, 2006).

JURISDICTION

The Sixth Circuit Court of Appeals judgment was entered on June 29, 2012. App. 36a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law[.]

Section 2254 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 *et seq*.), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

This is yet another appeal of a Sixth Circuit decision granting habeas relief in derogation of this Court's decisions and in violation of the lofty standard for habeas relief that Congress established in the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA).[1]

Respondent Burt Lancaster shot and killed his girlfriend in a restaurant parking lot in 1993. A jury rejected Lancaster's insanity and diminished-capacity defenses and convicted him of first-degree murder. But the conviction was vacated due to a *Batson* violation.

---

[1] See *Howes* v. *Walker*, 132 S. Ct. 2741 (2012) (vacating and remanding *Walker* v. *McQuiggan*, 656 F.3d 311 (6th Cir. 2011)); *Parker* v. *Matthews*, 132 S. Ct. 2148 (2012) (reversing *Matthews* v. *Parker*, 651 F.3d 489, 507 (6th Cir. 2011)); *Lovell* v. *Duffey*, 132 S. Ct. 1790 (2012) (vacating and remanding *Lovell* v. *Duffey*, 629 F.3d 587, 596 (6th Cir. 2011)); *Sheets* v. *Simpson*, 132 S. Ct. 1632 (2012) (vacating and remanding *Simpson* v. *Jackson*, 615 F.3d 421 (6th Cir. 2010)); *Howes* v. *Fields*, 132 S. Ct. 1181 (2012) (reversing *Fields* v. *Howes*, 617 F.3d 813, 823 (6th Cir. 2010)); *Stovall* v. *Miller*, 132 S. Ct. 573 (2011) (vacating and remanding *Miller* v. *Stovall*, 608 F.3d 913 (6th Cir. 2010)); *Bobby* v. *Mitts*, 131 S. Ct. 1762 (2011) (reversing *Mitts* v. *Bagley*, 620 F.3d 650 (6th Cir. 2010)); *Bobby* v. *Dixon*, 132 S. Ct. 26 (2011) (reversing *Dixon* v. *Houk*, 627 F.3d 553, 560 (6th Cir. 2010)); *Renico* v. *Lett*, 130 S. Ct. 1855 (2010) (reversing *Lett* v. *Renico*, 316 F. App'x 421 (6th Cir. 2009)); *Berghuis* v. *Smith*, 130 S. Ct. 1382 (2010) (reversing in *Smith* v. *Berghuis*, 543 F.3d 326, 340 (6th Cir. 2008)); *Smith* v. *Spisak*, 130 S. Ct. 676 (2010) (reversing *Spisak* v. *Hudson*, 512 F.3d 852 (6th Cir. 2008)); and *Berghuis* v. *Thompkins*, 130 S. Ct. 2250 (2010) (reversing *Thompkins* v. *Berghuis*, 547 F.3d 572, 584 (6th Cir. 2008)). See also *McQuiggan* v. *Perkins*, ___ S. Ct. ____ (Oct. 29, 2012) (granting Michigan's petition for certiorari).

Between Lancaster's first and second trial, the Michigan Supreme Court held that diminished capacity was not a valid defense to a crime. *People* v. *Carpenter*, 627 N.W.2d 276 (Mich. 2001). Accordingly, the trial court prohibited Lancaster from asserting the defense at his second trial, and he was again convicted of murder. The Michigan Court of Appeals rejected Lancaster's due-process claim, holding that under well-settled Michigan law of retroactivity, *Carpenter* was neither unforeseeable nor even a change in state law. The District Court below denied habeas relief.

Over Chief Judge Batchelder's dissent, a Sixth Circuit panel majority reversed and granted habeas relief, ordering a retrial so Lancaster could (again) raise a diminished-capacity defense. In so holding, the panel majority erred in two ways.

First, the Sixth Circuit misapplied this Court's decisions in *Rogers* v. *Tennessee*, 532 U.S. 451 (2001), and *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). Under those precedents, retroactive application of a state-court decision altering the common law violates due process only where the decision is unexpected and indefensible. But the diminished-capacity defense was not well-established in Michigan law, and its elimination was entirely foreseeable, as both the District Court and Chief Judge Batchelder recognized.

Second, under AEDPA, the Michigan Court of Appeals' decision to apply *Carpenter* retroactively did not constitute an error so "well understood and comprehended in existing law" that it was "beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011). The petition should be granted.

STATEMENT OF THE CASE

A. Toni King's murder

In 1993, Burt Lancaster, a former Detroit police officer, spent several hours talking with his mother. Lancaster told his mother that his girlfriend, Toni King, had lied to him, hurt him, and she needed to die. Lancaster asked his mother if he could have a gun. She refused to give him one, so Lancaster broke into his mother's hallway closet, stole a gun, and fled. Lancaster also disabled his mother's phone, forcing her to run to the neighbor's home to call the police.

Soon after Lancaster left his mother's home, King drove to a restaurant with her co-worker, Julie Garner. Garner noticed that Lancaster was following them in his vehicle. After arriving at the restaurant, Garner began to walk to the restaurant leaving Lancaster (who remained in his vehicle) and King to talk. Garner heard King say something, turned around, and saw Lancaster shoot King at point-blank range. King died.

B. Lancaster's 1994 trial

At his first trial, Lancaster asserted the defenses of insanity and diminished capacity. The jury rejected both defenses and found Lancaster guilty as charged.

After failing to obtain relief on his direct appeal in state court, Lancaster filed a petition for habeas relief in federal court. The District Court granted Lancaster habeas relief, concluding that the State had committed an error during jury selection under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The Sixth Circuit affirmed. *Lancaster* v. *Adams*, 324 F.3d 423 (6th Cir. 2003).

C. Lancaster's 2005 trial

The State retried Lancaster in 2005. But before trial, the court ruled that Lancaster could not present a diminished-capacity defense because the Michigan Supreme Court's intervening decision in *Carpenter* confirmed that the defense was not available in Michigan. Following a bench trial, the state trial court again found Lancaster guilty of first-degree murder.

On direct appeal, the Michigan Court of Appeals held that the trial court did not violate Lancaster's due-process rights. That is because, under well-established Michigan law, the Michigan Supreme Court's first interpretation of an unambiguous statute (here, the 1975 enactment) is not a change in law for purposes of due-process challenges. App. 77a. (citing *People* v. *Doyle*, 545 N.W.2d 627, 636 (Mich. 1996)).

D. Federal habeas corpus proceedings

The District Court denied Lancaster relief because the *Carpenter* decision was a foreseeable application of Michigan law. The Michigan Supreme Court "never specifically authorized [the defense's] use in the Michigan courts," the defense had "never been codified by the legislature," and the theory "never enjoyed a solid foothold in Michigan's law." App. 49a–50a. Moreover, the District Court recognized that the circumstances here were strikingly similar to those in *Rogers*, in which this Court upheld a murder conviction despite the Tennessee Supreme Court's intervening decision abolishing a common-law defense that would have otherwise been available to the murderer. App. 50a.

The Sixth Circuit panel majority reversed. The majority determined that this case overcame AEDPA's stringent standard because the Michigan Court of Appeals unreasonably applied this Court's decisions in *Rogers* and *Bouie*. App. 26a–27a. The majority said that the Michigan Court of Appeals disregarded its own prior cases suggesting that a diminished-capacity defense might be available in Michigan, as well as the Michigan court rule that says published Michigan Court of Appeals opinions are binding on lower courts until reversed by the Michigan Supreme Court. App. 27a.

Sixth Circuit Chief Judge Batchelder dissented, concluding that the Michigan Court of Appeals' decision was reasonable under *Rogers* and *Bouie* because the diminished-capacity defense was not well-established in Michigan and the Michigan Supreme Court's decision in *Carpenter* was foreseeable. App. 29a–35a. Since the Michigan Court of Appeals' conclusion was "consistent with *Rogers* and *Bouie*" in Chief Judge Batchelder's view, the decision "was not 'so lacking in justification' as to entitle Lancaster to habeas relief." App. 31a (quoting *Harrington*, 131 S. Ct. at 786–87).

REASONS FOR GRANTING THE PETITION

The petition should be granted to reiterate this Court's repeated admonitions to the Sixth Circuit regarding the deference owed to state-court determinations under AEDPA.

In *Parker* v. *Matthews*, 132 S. Ct. 2148 (2012), this Court reversed a Sixth Circuit grant of habeas and described that grant as "a textbook example of what [AEDPA] proscribes: 'using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.'" *Id*. at 2149 (quoting *Renico* v. *Lett*, 130 S. Ct. 1855, 1866 (2010)). Accord *Howes* v. *Walker*, 132 S. Ct. 2741 (2012) (granting Michigan's petition and summarily vacating Sixth Circuit habeas grant for further consideration in light of *Matthews*). Regrettably, the Sixth Circuit's grant of habeas relief in this case demonstrates that the panel majority is still using the same textbook.

A. The Michigan Court of Appeals' decision is wholly consistent with this Court's rulings in *Rogers* and *Bouie*.

This Court held in *Rogers* and *Bouie* that retroactive application of a state-court decision abolishing an affirmative defense will violate federal due process *only* if the decision unexpectedly or indefensibly abrogated a consistent line of decisions recognizing the defense. The paramount questions under this standard focus on notice, foreseeability, and fair warning. *Rogers*, 532 U.S. at 462; *Bouie*, 378 U.S. at 458–59. Accordingly, a brief history of the diminished-capacity defense both nationally and in

Michigan is essential to determining if the Michigan Court of Appeals' decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U.S.C. § 2254(d)(1).

In 1949, California became the first state to acknowledge the diminished-capacity defense. *People* v. *Wells*, 202 P.2d 53 (Cal. 1949). The defense allows a legally sane defendant to argue that diminished capacity vitiated the intent element of his crime.

A panel of the Michigan Court of Appeals first suggested the defense of diminished capacity in 1973. *People* v. *Lynch*, 208 N.W.2d 656 (Mich. App. 1973). But in 1975, the Michigan Legislature enacted a comprehensive statutory framework for determining when a person's mental incapacity could relieve him of criminal responsibility for an act. And the State Legislature made no reference to any mental condition other than insanity in this comprehensive statutory framework. When the State Legislature amended its statutory framework for mental capacity defenses in 1994, it once again made no reference to diminished capacity.

The Michigan Supreme Court interpreted this comprehensive statutory framework in the context of a claimed diminished-capacity defense for the first time in its 2001 *Carpenter* decision. It determined that the Michigan Legislature "demonstrated its policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent." 208 N.W.2d at 283. Thus, while a handful of Michigan Court of Appeals and Michigan Supreme Court cases hinted

over the years that the diminished-capacity defense *might* exist, there was no certainty, and it was eminently foreseeable that the Michigan courts could extinguish the doctrine altogether at any time.

On a national level, the beginning of the end for the diminished-capacity defense can be traced to the uproar that followed a California jury's use of the defense to convict a defendant of manslaughter for the killing of two individuals in San Francisco. The defendant in that case argued that a chemical imbalance caused by consuming too much "junk food" (including most famously "Twinkies") exacerbated his pre-existing mental difficulties. *People* v. *White*, 172 Cal. Rptr. 612 (Cal. Ct. App. 1981). The public outcry that followed led the California State Legislature to abolish the diminished-capacity defense by statute. *In re Christian S.*, 872 P.2d 574, 575 (Cal. 1994).

Consequently, as Chief Judge Batchelder noted in dissent here, the defense of diminished capacity had been diminishing in state jurisprudence, long before Lancaster's trials. Some state legislatures wrote the defense out of their state laws, while in other jurisdictions, the state courts held that their case law did not support such a defense. App. 33a, n.1 (Batchelder, C.J., dissenting) (citing Cal. Penal Code § 25(a); *Mincey* v. *Head*, 206 F.3d 1106, 1139 (11th Cir. 2000); *Barnett* v. *Alabama*, 540 So. 2d 810, 812 (Ala. Crim. App. 1988); *Arizona* v. *Laffoon*, 610 P.2d 1045, 1047 (Ariz. 1980); *O'Brien* v. *United States*, 962 A.2d 282, 300–01 (D.C. 2008); *Hodges* v. *Florida*, 885 So. 2d 338, 352 n.8 (Fla. 2003); *Hawaii* v. *Klafta*, 831 P.2d 512 (Haw. 1992); *Cardine* v. *Indiana*, 475 N.E.2d 696, 698 (Ind. 1985); *Iowa* v. *Plowman*, 386 N.W.2d 546, 548

(Iowa Ct. App. 1986); *Kansas* v. *Pennington*, 132 P.3d 902, 908 (Kan. 2006); *Louisiana* v. *Thompson*, 665 So. 2d 643, 647 (La. Ct. App. 1995); *Maryland* v. *Greco*, 24 A.3d 135, 144 (Md. Ct. Spec. App. 2011); *Massachusetts* v. *Finstein*, 687 N.E.2d 638, 640 (Mass. 1997); *Cuypers* v. *Minnesota*, 711 N.W.2d 100, 105 (Minn. 2006); *Stevens* v. *Mississippi*, 806 So. 2d 1031, 1051 (Miss. 2001); *North Carolina* v. *Adams*, 354 S.E.2d 338, 343 (N.C. Ct. App. 1987); *Ohio* v. *Wilcox*, 436 N.E.2d 523, 533 (Ohio 1981); *South Carolina* v. *Santiago*, 634 S.E.2d 23, 28 (S.C. Ct. App. 2006); *Tennessee* v. *Gosse*, 982 S.W.2d 349, 353 (Tenn. Crim. App. 1997); *Davis* v. *Texas*, 313 S.W.3d 317, 328 (Tex. Crim. App. 2010); *Keats* v. *Wyoming*, 115 P.3d 1110, 1119 (Wyo. 2005)).

In light of the diminished-capacity defense's national disfavor, this Court's decision in *Rogers* is directly on point. In *Rogers*, the Tennessee Supreme Court abolished the common-law rule that the death of a victim within a year and a day after being assaulted is a prerequisite to a homicide prosecution. The state court applied that abolition when it upheld a murder conviction where the victim's death was fifteen months after the assault. On direct review, this Court upheld the conviction, holding that the Tennessee Supreme Court's retroactive abolition of the "year and a day" rule did not violate due process. The Court reasoned that abolition of the "year and a day" rule was not unexpected or indefensible because it was based on an "outdated relic of the common law." *Rogers*, 532 U.S. at 462. In fact, the doctrine was so outdated that advances in medical science undermined its usefulness and rendered it obsolete. *Rogers*, 532 U.S. at 463. And because the rule at issue was a common-law rule, the Court rejected the defendant's argument that "the

judicial abolition of the rule in other jurisdictions [was] irrelevant to whether he had fair warning that the rule in Tennessee might similarly be abolished": as the Court recognized, "the fact that a vast number of [other] jurisdictions have abolished a rule that has so clearly outlived its purpose is surely relevant to whether the abolition of the rule in a particular case can be said to be unexpected and indefensible by reference to the law as it then existed." *Rogers*, 532 U.S. at 463–64. Because the state court's abolition of the year-and-a-day rule was foreseeable, Rogers' due process rights were protected.

The present circumstances are on all fours with *Rogers*. In *Carpenter*, the Michigan Supreme Court similarly abolished a principle of common law, although it did so by recognizing the doctrine's statutory abrogation in the 1975 framework for determining when mental capacity is available as an affirmative defense to a crime. Just like the year-and-a-day rule, the diminished-capacity defense never existed in Michigan's statutory criminal codes; to the contrary, the defense was affirmatively excluded by the comprehensive redrafting of Michigan statutory law in 1975. Moreover, the diminished-capacity defense had been the subject of much debate across the country and, as a result, had been abandoned in many jurisdictions, just like the common-law rule at issue in *Rogers*. And the doctrine never once served as a ground of a decision in any Michigan murder case. App. 51a. Accord *Rogers*, 532 U.S. at 467. Given all the circumstances, the rule's demise was foreseeable.

The Sixth Circuit panel majority believed that the Michigan Court of Appeals (and the District Court and Chief Judge Batchelder) "materially understated" the degree to which the diminished-capacity defense had become established in Michigan jurisprudence. App. 8a. The majority felt that the Michigan Court of Appeals (and the District Court and Chief Judge Batchelder) "failed to recognize the plethora of state appellate court cases recognizing the validity of the defense." App. 8a. But the Michigan Court of Appeals looked at those very same precedents and came to the exact opposite conclusion, and the District Court and Chief Judge Batchelder did not view that conclusion as objectively unreasonable.

In light of the similarities with this Court's decision in *Rogers*, the Michigan Court of Appeals reached the reasonable conclusion that *Carpenter* was not a change in the law because the diminished-capacity defense was *not* well-established and its elimination was foreseeable. As Chief Judge Batchelder noted, "neither the Michigan legislature nor the Michigan courts gave diminished capacity standing as a separate defense," App. 32a, and "the fact that a vast number of jurisdictions have abolished a rule that so clearly outlived its purpose is surely relevant to whether the abolition of the rule in a particular case can be said to be unexpected and indefensible by reference to the law as it then existed," App. 34a (Batchelder, C.J., dissenting) (quoting *Rogers*, 532 U.S. at 464).

B. The Michigan Court of Appeals' decision in this case was reasonable under AEDPA.

This Court has been forced to reemphasize, repeatedly, the high level of deference owed to state court decisions on federal habeas review. "A state prisoner [seeking habeas relief] must show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 131 S. Ct. at 786–87. For three reasons, there are no such circumstances here.

To begin, the Michigan Court of Appeals ultimately rejected Lancaster's position because it concluded, correctly, that *Carpenter* did not represent a change in state law. It is well established in Michigan that the Michigan Supreme Court's first interpretation of an unambiguous statute (here, the 1975 enactment) is not a change in law for purposes of due-process challenges. App. 77a (citation omitted). When a state court says that state law has not changed, it is the rare case when it will be proper for a federal court to conclude otherwise, given that state courts understand the development of state law better than federal courts do. E.g., *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Envt'l Protection*, 130 S. Ct. 2592, 2612 (2010) (Scalia, J., plurality opinion) (noting that the "result under Florida law may seem counter-intuitive," but nonetheless deferring to Florida precedent). And it should be rarer still that a state-court ruling of this sort should be deemed objectively unreasonable.

In addition, it is difficult to find an error "beyond any possibility for fairminded disagreement" in a case where a trial court judge reached a legal conclusion, a three-judge panel of a state intermediate appeals court affirmed, seven state supreme court justices saw no error sufficient to warrant further review, a federal district judge declined to set aside the result under habeas review, and a chief judge of a federal circuit agreed with the district court. Indeed, of the 15 state and federal judges who have looked at this case, it was only the two members of the Sixth Circuit panel majority who concluded that there was a constitutional problem. And in their opinion, the other 13 judges are not only incorrect but came to a conclusion no fairminded jurist could have ever reached.

Finally, the Michigan Court of Appeals' decision was not an unreasonable application of this Court's decision in *Rogers*. Unlike *Rogers*, *Carpenter* was not a case where a state supreme court overruled one hundred years of its own precedent. Instead, the Michigan Supreme Court addressed—for the first time—whether diminished capacity was a viable defense in light of the 1975 and 1994 statutory schemes. And in answering "no," the Michigan Supreme Court followed the general trend that many other states have followed over the past several decades. Accordingly, the Michigan Court of Appeals' decision to apply *Carpenter* retroactively was not an unreasonable application of *Rogers*.

To prevail on his due-process claim, Lancaster must also demonstrate that he reasonably relied on Michigan's pre-*Carpenter* law, such that the change in law constituted an "[un]fair warning." App. 6a (quoting

Rogers, 532 U.S. at 457). But it is nonsensical to say that Lancaster relied on the diminished-capacity defense's availability when he killed Toni King. As the Third and Seventh Circuits have said, "it would border on the absurd" to argue that a person would refrain from committing crimes or conduct his trial differently if he had known that a course of action would no longer be available to him. *Pannapula* v. *Ashcroft*, 373 F.3d 480, 495–96 n.14 (3d Cir. 2004) (quoting *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998)).

And Lancaster has not suggested that he acted in reliance on diminished capacity as a potential defense when he killed Toni King. Nor could he. *Lara-Ruiz* v. *I.N.S.*, 241 F.3d 934, 945 n.8 (7th Cir. 2001); *People* v. *Doyle*, 545 N.W.2d 627, 634 (Mich. 1996) ("[I]t cannot be seriously maintained that drunk drivers, such a Mr. Doyle, were relying on the rule of [*People* v.] *Tucker*, [441 N.W.2d 59 (Mich. App. 1989)] in conducting their behavior. No person would decide to drive drunk for a third time, because . . . such conduct would be a felony that could result in a five-year prison sentence, but not a prison sentence of seven and a half years. . . . [D]efendant's reliance argument [is] absurd."). Indeed, it would seem especially difficult to assert reliance on a little-known law while at the same time claiming diminished mental capacity.

In sum, the Michigan Court of Appeals' decision—that *Carpenter*'s application did not implicate due process concerns in Lancaster's case—was not an objectively unreasonable application of this Court's precedent under AEDPA. The Sixth Circuit's contrary decision will result in a waste of valuable prosecutorial and judicial resources and amounts to nothing less

than second-guessing of the Michigan state courts. The outcome is exactly what Congress sought to prevent in adopting AEDPA. Certiorari is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Laura Moody
Appellate Division Chief

Andrea M. Christensen
Assistant Attorney General
Appellate Division

Attorneys for Petitioner

Dated: OCTOBER 2012