ARIZONA SUPREME COURT

STATE OF ARIZONA, Petitioner, v. KEVIN ARTICE MILES, Respondent.	))))))))))	No. CR-16-0021-PC Pima County Superior Court No. CR-40238

BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE AND PIMA COUNTY PUBLIC DEFENDER IN SUPPORT OF RESPONDENT

David J. Euchner, No. 021768
Pima County Public Defender's Office
33 N. Stone Ave., 21st Floor
Tucson, Arizona 85701
(520) 724-6800
David.Euchner@pima.gov

TABLE OF CONTENTS

Page

TABLE OF CASES AND AUTHORITIES

CASES PAGES

ARIZONA REVISED STATUTES

ARIZONA RULES OF EVIDENCE

ARIZONA CONSTITUTION

OTHER AUTHORITIES

INTRODUCTION

Criminal defendants have a constitutional right to present a complete defense. *State v. Machado*, 224 Ariz. 343, 351 ¶ 12 (App. 2010), *aff'd*, 226 Ariz. 281 (2011) (citing *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *Washington v. Texas*, 388 U.S. 14, 18-19 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3, 302 (1973); *State v. Oliver*, 158 Ariz. 22, 30 (1988)); *see also State v. Richter*, __ Ariz. __, ¶ 12, 772 Ariz. Adv. Rep. 4, 2017 WL 3687994 (Ct. App., Aug. 25, 2017). These rights are also protected by Ariz. Const. art. II, §§ 4, 24. Rules of evidence and other rules may be applied in order to ensure an orderly trial, but they "'may not be applied mechanistically to defeat the ends of justice.'" *Machado*, 224 Ariz. at 351 ¶ 13 (quoting *Chambers*, 410 U.S. at 302); *see also State v. Moody*, 208 Ariz. 424, 458 ¶ 137 (internal cites omitted) ("a trial judge may place reasonable limits upon the scope of cross-examination, without infringing upon the defendant's right of confrontation. These limits become unconstitutional only when they deny the opportunity to present 'information which bears…on the issues in the case.").

In this case, a trial court considered evidence bearing on the important issue of Kevin Miles's state of mind at the time of the offense. The State now calls upon this Court to hold, as a matter of first impression, that such evidence should be excluded from consideration, not only in the guilt phase but also in aggravation

proceedings, if the defendant's state of mind is influenced in any way by mental disorders, voluntary intoxication, or withdrawal from alcohol or drugs. It asserts, without any compelling authority, that this Court's opinion in *State v. Mott*, 187 Ariz. 536 (1997), dictates such a result. As will be explained fully in this brief, not only does *Mott* say nothing of the sort, but Arizona courts have also routinely failed to recognize that *Mott* was interpreting old case law and had no occasion to interpret statutory changes in 1993 and 1997 (after Mott's offense) that should have impacted the reasoning in later cases. Thus, *Mott*'s holding has largely been abrogated by statute, apparently unbeknownst to the courts.

This Court should fix the problems with its *Mott* jurisprudence. *See State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 605-06 ¶ 67 (2017) (Bolick, J., concurring in the result) ("Resort to the Constitution's plain meaning is especially essential where, as the Court freely acknowledges, the state of the law is disarray. In such instances, our fidelity should be to the Constitution rather than to the disarray.") (internal citations omitted). The "*Mott* rule" has not entirely been abrogated by statute, but its reach now applies only to affirmative defenses and not to defenses that deny the culpable mental state. Particularly in deciding sentencing factors, the defendant's mental state can be of paramount importance. The State wants triers of fact to speculate on the defendant's mental processes while denying them the information they need to discover the truth. This Court should reject that entreaty.

INTERESTS OF *AMICI CURIAE*

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

The Pima County Public Defender's Office is the second largest indigent defense agency in the state. Its eighty attorneys represent many thousands of clients every year on felony charges, both in Superior Court and in Juvenile Court. The office has a small appellate unit that represents clients in criminal cases before the Arizona Court of Appeals, the Arizona Supreme Court, and, on occasion, the Supreme Court of the United States. The appellate courts of this state publish opinions in several of the office's cases every year. One such case is *State v. Johnson*, 229 Ariz. 475 (App. 2012), which the State now asks this Court to overrule.

Amici offer this brief in support of Respondent Miles because the State's request to expand the reach of *Mott* has extreme and dire consequences for a great

number of criminal defendants who are constitutionally and statutorily entitled to present evidence of their mental state as relevant to disprove an essential element of the government's charge. In capital cases, the State's interpretation would make many more persons death-eligible because defendants would be stripped of the right to defend themselves. But the State's request would also reach well beyond capital cases. *Amici* represent countless clients in noncapital cases who are wrongfully charged or overcharged because of an interpretation of *Mott* that allows prosecutors to ask jurors to assume a mental state while denying defendants the opportunity to defend themselves.

Amici ask this Court to recognize statutory changes that postdate Mott's offense date—changes that so far appear to have gone unnoticed—and update its jurisprudence on diminished capacity and voluntary intoxication accordingly. Furthermore, *amici* ask this Court to breathe life into the due process clause of the Arizona Constitution and hold that the right to present a complete defense is so fundamental to an ordered sense of liberty that criminal defendants must not be prevented from challenging the *mens rea* element of any offense or any sentencing allegation. If nothing else, because heightened scrutiny must be afforded to capital sentences, this Court should rebuff the State's attempts to keep vital evidence from the eyes of the trier of fact when deciding whether a person is eligible to be put to death. Such a mechanistic application of the *Mott* rule clearly violates due process.

ARGUMENT

I. Any evidence that tends to negate *mens rea* is admissible in any phase of a criminal trial. The prohibition on presentation of diminished capacity must be restricted to affirmative defenses that attempt to excuse criminal liability for a crime.

The State's argument that cocaine-withdrawal evidence was inadmissible under *Mott*, 187 Ariz. at 540-41, has far broader reach than just seeking to reinstate Miles's death sentence. It recognizes this much when it calls upon this Court to overrule the court of appeals' opinion in *Johnson*, which was a noncapital case on direct appeal involving admissibility of evidence that negated the existence of the mental state necessary to prove that the defendant acted in a cruel, heinous or depraved manner. The State correctly points out a conflict of law that this Court must resolve, but its proposed solution is fundamentally flawed and destined to result in undeserved punishments, including imposition of the death penalty.

The State's argument fails for three reasons. First, although heretofore unaddressed, this Court must recognize that legislative amendments to A.R.S. §§ 13-502 & 13-503 in 1993 and to §§ 13-103 & 13-205 in 1997 have a dramatic effect on the *Mott* rule to the extent that this court-made rule can no longer restrict defenses negating *mens rea* in contravention of clear legislative action. Second, even if this evidence was diminished capacity or voluntary intoxication evidence that could be properly excluded in the guilt phase of the case, *Johnson* correctly stated that the bar on such evidence in the guilt phase does not extend to the aggravation and penalty

phases. Third, because the evidence was probative of the key issue—whether Miles acted cruelly and in reckless disregard for human life, and whether he should be put to death for his crime—exclusion of the evidence under a new formulation of the *Mott* rule would constitute a "mechanistic application of the rules of evidence" that must be overridden by the state constitutional right to present a complete defense.

A. The offense in *Mott* pre-dated significant legislative changes—the modification of A.R.S. § 13-502(A) in 1993 and the adoption of § 13-103(B) in 1997. These changes allow evidence of diminished capacity or voluntary intoxication to be used to negate *mens rea*, while remaining inadmissible as an affirmative defense.

"Diminished capacity," as it is used in *Mott*, refers to a mind that is weakened, such as by emotional abuse. Mott's claim was that she could not form the requisite mental state to commit the charged offenses because she suffered from battered woman syndrome (BWS) and her "history of being abused, in conjunction with her limited intelligence, prohibited her from being able to decide to take Sheena to the hospital." 187 Ariz. at 539-40. This Court held that a woman suffering from BWS could not present that defense to the jury because it constituted diminished capacity, which was specifically precluded under *State v. Schantz*, 98 Ariz. 200 (1965). When this Court wrote in *Mott* that "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime," 187 Ariz. at 541, it expressly quoted and interpreted the earlier version of § 13-502 that was in effect at the time of Mott's offense. But

the statute now states that "mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders, or impulse control disorders." Defenses such as diminished capacity and voluntary intoxication, whether allowed or disallowed by law, are properly characterized as affirmative defenses for excusing a defendant's acting with a culpable mental state, rather than a negation of the culpable mental state. This much is made explicit in § 13-502, which states that "a mental disease or defect constituting legal insanity is an affirmative defense."

Although *Mott* is couched in language of "negating *mens rea*," that is not really an accurate characterization of BWS. Mott knew her child needed medical assistance and was very aware that she was failing to perform a duty, as evidenced by the fact that a paramedic testified that he told her the baby needed to go to the hospital, and she explained in a police interview that she knew the baby needed to go to the hospital earlier. 187 Ariz. at 538-39. Thus, in the manner that it was presented in *Mott,* BWS is clearly an affirmative defense. The BWS expert proffered by Mott would have testified "that defendant was unable to form the requisite intent to have acted knowingly or intentionally." *Id*. at 539. While it is extremely unlikely that Mott acted intentionally, it is inconceivable how, under these facts, she was actually incapable of forming the culpable mental state of knowingly, which requires only that, "with respect to conduct or to a circumstance described by a statute

defining an offense, that a person is aware or believes that the person's conduct is of that nature or that the circumstance exists." A.R.S. § 13-105(10)(b). Regardless of the fact that *Mott* is replete with references to "negating *mens rea*," it should be obvious that the crux of the BWS defense is an admission that the defendant formed the culpable mental state for the offense while seeking to excuse that conduct. This Court seemed to recognize as much in *State v. Leteve*, 237 Ariz. 516, 524 ¶ 20 (2015): "The legislature has not provided for, and this Court has refused to allow, an affirmative defense of diminished capacity," although the next statement in that same paragraph refers directly to *Mott*'s holding about negating *mens rea*.

Likewise, voluntary intoxication is not an affirmative defense to possessing a requisite culpable mental state for an offense, A.R.S. § 13-503, but it could act as a barrier to the formation of the mental state if intoxication causes unconsciousness. For example, if a drunken driver passes out behind the wheel, the driver is criminally responsible for the consequences of his reckless conduct but is not guilty of intentional conduct. Prosecutors often choose to charge such conduct as second-degree murder, because the driver's recklessness arguably "manifest[ed] extreme indifference to human life." *See* A.R.S. § 13-1104(A)(3). But prosecutors never charge vehicular homicide caused by drunk driving as premeditated murder. Implicit in such charging decisions is acceptance of the fact that a defendant could produce evidence of the extreme intoxication to show that the conduct was reckless and not

intentional or knowing. But a defendant charged with premeditated murder is properly prohibited from presenting voluntary-intoxication evidence to show that the crime was in fact premeditated but that his premeditation should be excused because his decision making was impaired—because such would be an affirmative defense. In this manner, voluntary intoxication, like diminished capacity, has a proper use (for negating *mens rea*) and an improper use (affirmative defense).

Mott has been discussed for two decades as if the current versions of statutes existed at the time of Shelly Mott's offense date in 1991. This ignores two important changes, which have apparently gone entirely unnoticed. At the time *Mott* was decided, this Court was interpreting its own prohibition on use of diminished capacity or other such evidence to negate *mens rea* as stated in *Schantz*. But in the time between Mott's 1991 offense and this Court reviewing her case, the legislature repealed the existing §§ 13-502 & 13-503 and replaced them with entirely new statutes, so that § 13-502(A) then read:

> A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense. Mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders. Conditions that do not constitute legal insanity include but are not limited to momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from

> a mental disease or defect or an abnormality that is manifested only by criminal conduct.

Laws 1993, Ch. 256, §§ 2-3. This section has remained unchanged for the last twenty-four years. Thus, the statute has now excised the prohibition on negating the culpable mental state for an offense using such evidence; the prohibition explicitly extends to the affirmative defense of insanity, and no farther.

The rule from *Mott* is based almost entirely on *Schantz*. Notably, this Court did not discuss the statute at great length, and its limited citation to the statute (in both the majority opinion and the dissent) were to the old version. Yet successive cases that cite to *Mott* have failed to note the legislative changes, and instead seem to have assumed that language from *Mott* appears in the statute and that Mott's offense post-dated the 1993 change. *See Johnson*, 229 Ariz. at 480 ¶ 14 ("Subsection (A) of § 13–502 was passed in its current form in 1993, before *Mott*, and has not been amended since. Thus, we can presume the legislature has approved the supreme court's interpretation of the statute as precluding diminished capacity evidence to defend against the *mens rea* element of an offense.") (internal citations omitted).

The second change relates to what constitutes an "affirmative defense." *Mott* was decided on January 16, 1997. Later that year, the definition of "affirmative defense" was added to A.R.S. § 13-103(B) by Laws 1997, Ch.136, § 3. Now, "affirmative defense" is defined as: "a defense that is offered and that attempts to excuse the criminal actions of the accused … Affirmative defense does not include

… any defense that either denies an element of the offense charged or denies responsibility, including alibi, misidentification or lack of intent." *Id*.[1] This Court has recently explained this difference and held that the defense of lack of sexual motivation in A.R.S. § 13-1407(E) does not deny the culpable mental state of knowingly in the molestation or sexual abuse statutes, and thus it is not an "element-negating defense under § 13-103(B)." *State v. Holle*, 240 Ariz. 300, 305 ¶ 24 (2016). Although the issue in *Holle* was different—Holle argued that reading the statutory defense as negating an element of the offense was necessary under the constitutional avoidance doctrine—its rationale on this point applies equally to §§ 13-502 & 13-503, which in no way refer to negating *mens rea*.

Under our doctrine of separation of powers, *see* Ariz. Const. art. III, the legislature defines offenses and defenses. Thus, if the legislature modifies the statute, this Court's interpretations must conform to those modifications. In spite of the fact that *Mott* interpreted an earlier version of the laws, however, Arizona courts have consistently failed to acknowledge these changes and instead have adhered to *Mott*. A similar error has recently been discovered—and fixed—in the context of self-defense. In *State v. King*, 222 Ariz. 636 (App. 2009), *vacated*, 225 Ariz. 87 (2010), the court of appeals reviewed the propriety of a denial of a self-defense instruction

[1] In 2006, the Legislature modified §§ 13-103(B) and 13-205(A) to remove justification defenses from the category of "affirmative defenses" so that such defenses must now be disproved by the prosecution.

in light of longstanding Arizona case law requiring that a defendant be motivated "solely" by self-defense. Although the legislature had changed the statute and removed the "sole motivation requirement" in 1977, repeated decisions of this Court adhered to the old rule. *Id*. at 638 ¶ 9. As the court of appeals lacked authority to modify the rule, this Court accepted King's petition for review and made the change accordingly. *State v. King*, 225 Ariz. 87, 90 ¶ 12 (2010).

Jurors would naturally need to be instructed on the proper use of such evidence—that it can be used in consideration of whether the defendant actually had the requisite state of mind, but it cannot be used to excuse the defendant's actions if he or she did in fact have the requisite state of mind. As the court of appeals has recently explained, however, this is easy to accomplish. The court of appeals distinguished *Mott* in *State ex rel. Thomas v. Duncan*, 216 Ariz. 260, ¶ 11, n.4 (App. 2007), when it noted that the defendant was not presenting a justification *defense* but using justification *evidence* to negate the culpable mental state required for the State to prove the offense. And last month, the court again had opportunity to distinguish *Mott* in the context of a duress defense. In *Richter*, a husband and wife were both charged with kidnapping and child abuse, and the wife's attempt to raise the duress defense was precluded because the trial court held that she was trying to argue diminished capacity. *Richter* held, consistently with *Duncan*, that evidence that might be excluded for one purpose may be admitted nevertheless if offered for a

proper purpose. 772 Ariz. Adv. Rep. 4, ¶ 19. And because the duress defense is one of justification, it is neither an affirmative defense as defined in § 13-205(A) nor a defense that negates *mens rea*, and thus *Mott* is inapplicable. Yet both of these cases, like Johnson, failed to recognize the impact of new legislation on the *Mott* rule.

There is a very simple explanation for why *Mott* did not interpret the 1993 version of § 13-502: Mott's offense predated the 1993 changes. Had this Court dropped a footnote in *Mott* or otherwise made clear that it was interpreting the law as it existed in 1991, this succession of errors likely would not have occurred. *Mott* may have been correctly decided given the 1991 statutory framework; but now that the legislature has specifically provided that an affirmative defense does not include negating an element of the crime, this Court must recognize that *Mott* is largely abrogated by statute.

By precluding affirmative defenses of diminished capacity and voluntary intoxication from the guilt phase but allowing such evidence to challenge sentencing factors (capital and noncapital alike), the legislature and the courts have struck an appropriate balance that ensures that criminal defendants are held accountable for the culpable mental state they possessed and acquitted of the mental state they did not possess. *Cf. State v. Lua*, 237 Ariz. 301, 305 ¶ 13 (2015) (recognizing "the societal interest in avoiding the unjustified exoneration of wrongdoers and in punishing a defendant only to the extent of his crime.") (internal citations omitted).

B. *Mott* only applies in the guilt phase, not in sentencing phases.

The State errs in arguing that cocaine-withdrawal evidence is inadmissible in the aggravation phase of a capital case.[2] This Court agreed with that argument in one recent case. In *State v. Payne*, 233 Ariz. 484, 517 ¶¶ 148-149 (2013), this Court stated that § 13-503 prohibited the defendant from presenting intoxication evidence to rebut the mental state needed to prove the aggravating factor that he acted cruelly under § 13-751(F)(6). *Payne* failed to cite authority reaching the contrary result, and its thin analysis cited only one case, *State v. Boyston*, 231 Ariz. 539, 550 ¶¶ 52, 54 (2013)—a case involving intoxication evidence in the guilt phase.[3]

The precise language of A.R.S. § 13-503, which has not been modified since its enactment in 1993, is

> Temporary intoxication resulting from the voluntary ingestion, consumption, inhalation or injection of alcohol, an illegal substance under chapter 34 of this title or other psychoactive substances or the abuse of prescribed medications does not constitute insanity and is not a defense for any criminal act or requisite state of mind.

---

[2] The State argues that cocaine withdrawal syndrome should be considered voluntary intoxication under § 13-503, but none of the definitions for "intoxication" it cites actually describe withdrawal. *Amici* do not believe the State's distinction is relevant, because, as explained above, diminished capacity and voluntary intoxication are equally prohibited as affirmative defenses. If such a distinction is to be made, however, the plain language of § 13-502 encompasses "withdrawal from alcohol or drugs," and the symptoms of withdrawal fit more clearly within diminished capacity.

[3] The State does not argue such evidence is inadmissible as mitigation under § 13-751(G)(1), nor does it deny this Court's repeated reliance on such evidence to vacate death sentences. *See* Ruling, Conclusions of Law, ¶ 22 (citing cases).

As discussed in the preceding section and in *Holle*, this language uses the clear language of affirmative defense. Unlike the discussion in *Mott*, nowhere in § 13-503 is there even a hint of prohibition against negating the culpable mental state for an offense. It is apparent that, not unlike the *Mott* rule, Arizona courts have failed to account for the effect of the 1997 adoption of § 13-103(B) on this statute.

Mott involved a guilt-phase trial regarding the mental state for "the criminal act." *See Leteve*, 237 Ariz. at 524 ¶ 20 ("Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the mens rea element of a crime.") (quoting *Mott*, 187 Ariz. at 541); *Johnson*, 229 Ariz. at 480 ¶ 14 ("A.R.S. § 13-502(A) provides that insanity is a defense to a 'criminal act.' That statute does not address whether evidence of diminished capacity can be used to determine the appropriate range of sentence once a defendant's guilt has been established."). This interpretation is supported by this Court's recent holding in *Sanchez v. Ainley*, 234 Ariz. 250, 253 ¶ 8 (2014), distinguishing "offenses" from "aggravating circumstances." *Johnson* correctly held that, in the absence of any other authority controlling whether the evidence may be admitted, the court was required to apply the only existing authority: Ariz. R. Evid. 401-403. Because the evidence of Miles' state of mind was relevant to a material issue (his state of mind at the time of the killing), *see Johnson*, 229 Ariz. at 480-81 ¶¶ 16-18, the trial court was required to allow admission of this testimony.

A trial on aggravating factors or any other sentence enhancements is not a trial on guilt or innocence for "the criminal act" or "an offense." Instead, it is a proceeding to determine whether this particular defendant on trial committed the criminal act in a manner that is deserving of greater punishment than the norm. Arguably, evidence of the defendant's mental state is of the greatest importance in an *Enmund*/*Tison*[4] eligibility proceeding, which provides refuge from the death penalty only for those whose accomplices in an underlying felony kill, such as Miles, and not for those who kill or intend to kill. Furthermore, Miles cannot be said to have acted in a cruel, heinous, or depraved manner merely because his co-defendant did so. *See State v. Carlson*, 202 Ariz. 570, 583 ¶ 49 (2002) ("There is no vicarious liability for cruelty in capital cases absent a plan intended or reasonably certain to cause suffering. The plan must be such that suffering before death must be inherently and reasonably certain to occur, not just an untoward event."). One cannot know whether Miles acted with the requisite intent without considering the effect of his withdrawal from alcohol and drugs. Evidence supporting the State's belief that "Miles understood in December 1992 that guns kill people," Petition at 11, is certainly admissible to prove death eligibility; but this simplistic comment cannot be the end of the story.

The State recognized that *Johnson* forecloses its argument, and thus the State asks this Court to overrule *Johnson*. In so doing, however, the State neglected to cite

[4] *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987).

any cases where this Court found such evidence admissible—some of which are cited in *Johnson*, 229 Ariz. at 481 nn. 8 & 10. *See State v. Bocharski*, 218 Ariz. 476, 494-95 ¶¶ 83-91 & n.15 (2008); *State v. Smith*, 146 Ariz. 491, 504 (1985); *Moody*, 208 Ariz. at 472 ¶ 226. *Moody* quoted *State v. Trostle*, 191 Ariz. 4, 18 (1997) for the proposition that proof of cruelty "contains an additional requirement: that 'the defendant knew or should have known that suffering would occur.'" *Moody* then stated: "Because evidence was presented that Moody was in a 'dissociated state' due to psychosis, drug impairment, or both, we cannot conclude beyond a reasonable doubt that a reasonable jury could not find other than the trial court did on this issue." 208 Ariz. at 472 ¶ 226. This Court should uphold its own longstanding rule and overrule that small section of *Payne* in which it held to the contrary.

C. This Court should recognize a state constitutional due process right to present evidence of diminished capacity, mental disorders, or voluntary intoxication to negate *mens rea*, especially in the sentencing phases.

Even if, *arguendo*, proper application of the statutes would require precluding diminished capacity or voluntary intoxication evidence, preclusion would violate the constitutional right to present a complete defense, either to the crime or sentencing allegations. The United States Supreme Court has held that the federal due process clause is not violated by the *Mott* rule, *see Clark v. Arizona*, 548 U.S. 735 (2006), or by state prohibitions on presenting evidence of voluntary intoxication, *see Payne*, 233 Ariz. at 517-18 ¶ 150 (citing *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996)).

This Court has not yet extended our state constitution's due process clause, Ariz. Const. art. II, § 4, beyond those protections afforded by the federal constitution. One case in which this Court considered doing so was *State v. Youngblood*, 173 Ariz. 502 (1993).[5] *Youngblood* involved a remand after the United States Supreme Court reversed the holding of the Arizona Court of Appeals that destruction of potentially exculpatory evidence, when bad faith is not at issue, does not require dismissal of the indictment under the federal due process clause. This Court then held, similarly to the United States Supreme Court, that the state constitutional right to due process is not offended to the extent that dismissal is required. Given that the question presented in this case has nothing in common with *Youngblood* except for the

[5] Justice Martone criticized Chief Justice Feldman's belief that Youngblood's failure to expressly raise the state constitutional claim as understandable, because there have been a couple of law review articles by jurists calling upon litigants to raise such claims in their state courts. *Id*. at 504 n.1. But placing the blame at practitioners' feet for not raising such claims is a textbook example of putting the cart before the horse.

Presently, without any cases stating that the state constitution affords different and additional protection, claims are rejected out of hand for lack of citation to authority. Moreover, the court of appeals has expressly stated on multiple occasions that it will not touch state constitutional questions until this Court does it first. *E.g.*, *State v. Florez*, 241 Ariz. 121, 127 n.10 (quoting *State v. McPherson*, 228 Ariz. 557, 563 ¶ 16 (App. 2012)) ("decision to interpret cruel and unusual punishment under state constitutional provision more broadly than federal constitutional provision 'would be in the exclusive purview of [our supreme] court'") (alteration in original). This rationale of the court of appeals is clearly wrong, and is contrary to the oath of office taken pursuant to A.R.S. § 38-231(E). Without action from this Court clearly signaling a desire for lower courts to entertain such state constitutional claims independently of the federal counterpart, practitioners have no incentive to use up valuable real estate in a page- or word-limited brief on an academic exercise that practically amounts to tilting at windmills.

invocation of the due process clause, *Youngblood* cannot control here, except in one regard: that the state due process clause should afford different protections.

Other Arizona cases have interpreted the state due process clause not just in lockstep with the federal due process clause, but even in terms of it. *See State v. Farley*, 199 Ariz. 542, 545-46 ¶¶ 13-17 (App. 2001) (demonstrating that there is no state due process violation by citing to United States Supreme Court cases); *State v. Preston*, 197 Ariz. 461, 463 ¶ 3 (App. 2000) (acknowledging defendant's separate state constitutional argument but never addressing it independently of the federal due process right). In addition to former Chief Justice Feldman, other members of this Court have argued against this lockstep approach. *See* Ruth V. McGregor, *Recent Developments in Arizona State Constitutional Law*, 35 Ariz. St. L.J. 265, 274-80 (2003); Clint Bolick, *Vindicating the Arizona Constitution's Promise of Freedom*, 44 Ariz. St. L.J. 505, 509 (2012) (advocating primacy of the state constitution). *Amici* ask this Court to give an independent interpretation of the state due process clause that recognizes the primacy of the state constitution.

The ultimate purpose of any trial is that the truth shall be discovered. *See State v. Robinson*, 153 Ariz. 191, 198 (1987) (statute purporting to supplement hearsay rules but actually displaces them invades "an area going to the very essence of the truth-seeking process and in cases in which constitutional protections apply"). Especially in a capital case's eligibility and aggravation phases, the stakes are simply

too high to err on the side of enforcing any rule whose only purpose is to prevent the truth from emerging. But the act hoodwinking the jury to fool it into erroneously believing that a defendant acted with a culpable mental state is no less offensive in noncapital cases. For the State to mislead the jury as to a defendant's actual state of mind while then seeking to deprive that defendant of the right to present evidence of actual mental state uses *Mott* as a sword and a shield. *See State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 60 ¶ 23 (2000) (litigant cannot defend claim based on advice of counsel and then invoke attorney-client privilege because "advice received from counsel as part of its investigation and evaluation is not only relevant but, on an issue such as this, inextricably intertwined with the court's truth-seeking functions").

CONCLUSION

For these reasons, *amici* request that this Court hold that *Mott* applies only to affirmative defenses in the guilt phase of a criminal trial, because any other result would violate the due process clause of the Arizona Constitution.

RESPECTFULLY SUBMITTED this 18th day of September, 2017.

By /s/ David J. Euchner

David J. Euchner
33 N. Stone Ave. #2100
Tucson, AZ 85701
Attorney for *amici curiae*