

ARIZONA SUPREME COURT

STATE OF ARIZONA,)	No. CR-17-0452-PR
)	
Appellee,)	Court of Appeals No.
)	2 CA-CR 2016-0141
v.)	
)	Pima County Superior Court
SOPHIA LEEANN RICHTER,)	No. CR-20135144-002
)	
Appellant.)	
)	

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF APPELLANT

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INTRODUCTION

Criminal defendants have a federal constitutional right to present a complete defense. *State v. Machado*, 224 Ariz. 343, 351 ¶12 (App. 2010), *aff'd*, 226 Ariz. 281 (2011) (citations omitted). 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 (citations omitted); *see also State v. Moody*, 208 Ariz. 424 (2004), 458 ¶ 137 (2004) (citations omitted) (limits on cross-examination are unconstitutional “when they deny the opportunity to present ‘information which bears...on the issues in the case.’”).

In this case, Division Two of the Court of Appeals correctly held that Sophia Richter should have been permitted to present a duress defense to the jury, and that the rule in *State v. Mott*, 187 Ariz. 536 (1997) did not preclude her from presenting expert testimony about her PTSD in support of that defense. Recently, Division One reached a different conclusion as to the admissibility of PTSD evidence. *State v. Jacobson*, ___ Ariz. ___, 2017 WL 6523707 (App. 2017). The cause of the split, essentially, was the *Jacobson* court’s assessment of the quality of Susan Jacobson’s evidence, thus failing to heed the admonishment that “judges must be careful not to ‘bootstrap [themselves] into the jury box via evidentiary rules.’” *Machado*, 224 Ariz. at 359 ¶ 43 (quoting *State v. LaGrand*, 153 Ariz. 21, 28 (1987) (alteration in

original)). *Richter*, on the other hand, correctly applied the rules set forth in *Clark v. Arizona*, 548 U.S. 735 (2006).

This case also presents an opportunity for this Court to fix the problems with its *Mott* jurisprudence. Arizona courts have consistently failed to recognize that this Court's opinion in *State v. Mott*, 187 Ariz. 536 (1997) was interpreting old case law and the 1991 statutory scheme, and thus it had no occasion to interpret statutory changes in 1993 and 1997 (after Mott's offense) that should have impacted the reasoning in later cases. The "*Mott* rule" has not entirely been abrogated by statute, but it now applies only to affirmative defenses and not to justification defenses or defenses that deny the culpable mental state. The rule proposed in this brief will affirm both the statutes' plain language and the defendant's constitutional right to present a defense.

INTERESTS OF AMICUS 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.

Amicus offers this brief in support of Appellant because the issue presented here affects countless defendants 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. *Amicus* asks this Court to recognize statutory changes that postdate Mott's offense date—changes that appear to have gone unnoticed—and update its jurisprudence on diminished capacity and voluntary intoxication accordingly. *Amicus* has presented this argument in two other cases. *State v. Miles*, CR-16-0021-PC, __ Ariz. __, 2018 WL 1721980 (Ariz., Apr. 10, 2018); *State v. Jacobson*, CR-18-0047-PR. The constitutional right to present a defense demands affirmation of *Richter*'s reasoning and result, and rejection of *Jacobson*'s.

ARGUMENTS

I. Under *Clark*, the evidence of the defendant's PTSD is admissible observation evidence that shows the reasonableness of the defendant's beliefs and relevant character traits.

In *Clark*, the United States Supreme Court decided the following question: does Arizona law, which restricts evidence supporting a defense of lack of

responsibility to the insanity defense and simultaneously restricts the availability of the insanity defense, violate the Due Process Clause of the Fourteenth Amendment? In answering in the negative, the Court first accepted Clark's concession that Arizona could properly elevate the burden of proof for insanity defenses to clear and convincing evidence. *Clark*, 548 U.S. at 771. Second, the Court made clear that Arizona courts had not yet worked out the contours of the different kinds of psychological testimony, and thus its opinion could "only address core issues, leaving for other cases any due process claims that may be raised about the treatment of evidence whose categorization is subject to debate." *Id.* at 759. Third, it understood that "*Mott* was careful to distinguish this kind of opinion evidence from observation evidence generally and even observation evidence that an expert witness might offer..." *Id.* at 760 (citing *Mott*, 187 Ariz. at 544). "Thus, only opinion evidence going to mental defect or disease, ***and its effect on the cognitive or moral capacities on which sanity depends*** under the Arizona rule, is restricted." *Id.* (emphasis added).

Here, the Court endorsed the carve-out that *Mott* created for evidence such as that presented in *State v. Christensen*, 129 Ariz. 28 (1981), which bears on the *mens rea* for the offense that the State must prove. Although the term "observation evidence" implies a person observed the defendant's behavior at the time of the offense, this cannot be what the Court meant since the Court recognized that

observation evidence includes the evaluation of an expert who had never met the defendant until after arrest. The Court believed the trial court “may have restricted observation evidence admissible on mens rea to the insanity defense alone, but we cannot be sure.” *Id.* at 764-65. As the issue was not squarely raised below, the Court did not consider it. *Id.* This Court has since applied *Clark* as affirming *Christensen* in *State v. Leteve*, 237 Ariz. 516, ¶¶ 19-24 (2015), holding that observation evidence may come from experts as well as lay witnesses.

Clark affirmed the presumption of innocence and the requirement that the government prove every element—including *mens rea*—beyond a reasonable doubt, but it also recognized that “[t]he presumption of sanity is equally universal.” *Clark*, 548 U.S. at 766. Based on all of these premises,¹ *Clark* reasoned that

if a State is to have this authority in practice as well as in theory, it must be able to deny a defendant the opportunity to displace the presumption of sanity more easily when addressing a different issue in the course of the criminal trial. Yet, as we have explained, just such an opportunity would be available if expert testimony of mental disease and incapacity could be considered for whatever a factfinder might think it was worth on the issue of *mens rea*. As we mentioned, the presumption of sanity would then be only as strong as the evidence a factfinder would accept as enough to raise a reasonable doubt about *mens rea* for the crime charged; once reasonable doubt was found, acquittal would be required, and the standards established for the defense of insanity would go by the boards.

Now, a State is of course free to accept such a possibility in its law. After all, it is free to define the insanity defense by treating the

¹ *Clark* also assumed that *Mott* was interpreting the most current versions of Arizona statutes, a premise which will be disproven in Argument II, *infra*.

presumption of sanity as a bursting bubble, whose disappearance shifts the burden to the prosecution to prove sanity whenever a defendant presents any credible evidence of mental disease or incapacity...

Id. at 771-72. Thus, the rationale for the *Mott* rule's exclusion of such diminished capacity evidence is the high burden of clear and convincing evidence to establish the defense, and that its opinion would come out the other way if the State were to accept the burden of disproving insanity.

When it comes to duress and other justification defenses, this is exactly what the Arizona Legislature has done. In 2006, it modified A.R.S. §§ 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. As this Court stated recently in the context of self-defense, "once sufficient self-defense evidence is admitted, the absence of self-defense becomes an additional element the state must prove to convict." *State v. Carson*, 243 Ariz. 263, 266 ¶ 11 (2018). Moreover, *Richter* was not the first Arizona case to recognize that evidence that is inadmissible for one purpose may be admissible for another. In *State ex rel. Thomas v. Duncan*, 216 Ariz. 260, 264 ¶ 11 (App. 2007), the court agreed with the State that a defendant charged with reckless manslaughter could not raise a justification defense, but nonetheless it concluded that the defendant could admit evidence of the reasonableness of his conduct (trying to avoid a road-rage incident) that looked like justification but actually negated the *mens rea* of recklessness. In *Duncan*, the court

noted *Mott*'s inapplicability to justification defenses, which do not seek to deny *mens rea* but rather admit it. *Id.* at 264 n.4.

Richter correctly distinguished *Mott* in holding that the defendant must be allowed to present evidence of PTSD to support a duress defense. Richter's proffered expert "would testify about her PTSD, 'virtual captivity,' and 'constant state of fear, for herself and her children.'" 243 Ariz. at 138 ¶ 21. "Such testimony would explain what was on Sophia's mind as she committed the alleged offenses." *Id.* The evidence was not proffered to support a claim of diminished capacity. In fact, the defendant "acknowledged that she had to admit she acted intentionally or knowingly as part of her duress defense." *Id.* at 137 ¶ 18. Rather, the evidence supported the defendant's claim that her actions were taken under duress.

Courts in other jurisdictions have also recognized and applied this distinction. Florida, like Arizona, does not recognize a defense of diminished capacity. *Chestnut v. State*, 538 So.2d 820, 825 (Fla. 1989). Nevertheless, in *State v. Mizell*, 773 So.2d 618 (Fla. App. 2000), the court allowed testimony about the defendant's PTSD in support of his self-defense claim. The court held that PTSD evidence was not diminished capacity evidence, but rather state-of-mind evidence, which was relevant "to aid the jury in interpreting the surrounding circumstances as they affected the reasonableness of [the defendant's] belief." *Id.* at 621 (citations omitted).

Ohio also forbids diminished capacity defenses. *State v. Wilcox*, 436 N.E.2d 523, 533 (Ohio 1982). But in *State v. Daws*, 662 N.E.2d 805, 817 (Ohio App. 1994), the court allowed expert testimony on Battered Woman Syndrome (BWS), because the testimony was not offered “to show that the accused lacked the *mens rea* to commit the crime,” but rather “to establish that the accused’s actions were justified despite the fact that she possessed the requisite mental state.”

Arizona law “adopts a purely objective standard,” evaluating the defendant’s conduct in light of a “reasonable person” standard, with no regard for the defendant’s subjective beliefs. *State v. King*, 225 Ariz. 87, 90 ¶ 11 (2010). However, an objective standard still requires a consideration of the “defendant’s circumstances” in determining the reasonableness of his conduct. *Carson*, 243 Ariz. at 465 ¶ 9. For example, in a self-defense homicide case, prior acts of violence by the deceased are admissible if the defendant either observed the acts or was aware of them. *State v. Taylor*, 169 Ariz. 121, 124 (1991). The purpose of this rule “is to show that the defendant was justifiably apprehensive of the decedent and knew that the decedent has a violent disposition.” *Id.*

Likewise, the physical characteristics of the parties is relevant in determining reasonableness. An individual who is small, weak, or disabled might be justified in using force, even deadly force, against a larger, stronger aggressor, although such force might not be justified if the characteristics of the parties were reversed. *See*,

e.g., *Mosby v. State*, 482 S.W.2d 256, 258 (Tex. Crim. App. 1972) (“On the issue of self-defense, it is relevant to give testimony as to the relative size, strength, and other physical characteristics showing the disparity between the accused and the deceased, as ground for apprehension, and also upon the question as to which party was the aggressor.”); *People v. Young*, 825 N.Y.S.2d 147, 150 (App. 2006) (jury must be allowed to consider “the physical characteristics of all persons involved and the behavior of third-party aggressors acting in concert with the victim.”).

The same logic applies to a duress defense.² A threat from a small, weak, unarmed individual to a large, strong, and armed individual might be insufficient to compel a reasonable person in the latter’s situation to break the law out of fear for his own safety, although it would be sufficient were the characteristics of the parties reversed. A threat that, in isolation, may be insufficiently compelling to a reasonable person, may prove quite compelling to an individual who has been threatened in the same manner before, by the same person, and who has seen the threats carried out. Actions or behavior that may not even be perceived as threats without the proper context may be properly understood as such when the full background is provided.

² The State suggests that previous acts of domestic violence may only be admitted for purposes of self-defense and not to support other justification defenses such as duress or necessity. Petition at 7-8; State’s Supplemental Brief at 19. The State misreads A.R.S. § 13-415, which states that if there were previous acts of domestic violence, then the jury should use a “reasonable person” test when weighing the defenses of self-defense or defense of a third person. Nothing about this statute conveys an intent to affect admissibility of evidence.

Bush v. State, 19 Ariz. 195, 200 (1917) (“No precise words are necessary to convey a threat. Conduct takes its legal color and quality more or less from the circumstances surrounding it.”); *State v. Mendoza-Tapia*, 229 Ariz. 224, 229 ¶ 13 (App. 2012) (citing *People v. Oppenheimer*, 26 Cal.Rptr. 18, 25 (1962) (“threats can be made by innuendo in light of circumstances and relations between parties”)).

It is in this context that a defendant’s PTSD serves as relevant and admissible observation evidence. A jury must evaluate a defendant’s justification claim from the perspective of a “reasonable person in the defendant’s situation.” *State v. Vogel*, 207 Ariz. 280, 285 ¶ 28 & n.4 (App. 2004). Sophia Richter’s situation is that of a battered woman with PTSD. “Although PTSD is classified as a mental disorder, it is one of the few kinds of psychiatric disorders that is considered a *normal response to an abnormal situation*.” *State v. Janes*, 850 P.2d 495, 501 (Wash. 1993) (internal quotations omitted; emphasis in original).

In order to properly evaluate how a reasonable person in the defendant’s situation would behave, a jury would have to understand that a reasonable person who suffered from years of physical and psychological abuse would likely develop PTSD, and then understand how that would affect her thoughts, reactions, and the reasonableness of her conduct going forward. As one court found in regards to BWS, a form of PTSD, expert evidence was “not at odds with a reasonableness requirement,” but rather served to “bolster an argument that a defendant's actions

were in fact reasonable.” *Dando v. Yukins*, 461 F.3d 791, 801 (6th Cir. 2006). The court reasoned:

Although those of us who are not so unfortunate to have to live with constant, imminent threats of violence might look at the actions of a defendant in Dando's situation from the relative comfort of a judge's chambers or a jury box and wonder what reasonable person would have facilitated Doyle's shocking crime spree, evidence of Battered Woman's Syndrome can explain why a reasonable person might resort to such actions given a history of violent abuse and the imminent violent threats.

Id.

Without expert testimony as to the defendant's history with her abuser and how that has affected her thought processes, the picture a jury sees is necessarily incomplete. “If the jury sees the defendant's circumstances immediately prior to commission of the crime and there is no gun held to her head or other markedly extreme duress, the jury may conclude that any fear of imminent death or violence was unreasonable.” *United States v. Marenghi*, 893 F. Supp. 85, 94 (D. Me. 1995). However, expert testimony about the defendant's years of suffering abuse and resultant PTSD allows her “to pull the camera back to provide the broader picture, so to speak, of her circumstances.” *Id.* The jury could understand “how a reasonable person reacts to repeated beatings and emotional abuse,” and how “such treatment can, over time, establish a dynamic where the threat of abuse hovers over every interaction between the individuals, even if such threat is not always articulated....In effect, this expert testimony may be characterized as explaining how a reasonable

person can nonetheless be trapped and controlled by another at all times even if there is no overt threat of violence at any given moment.” *Id.* at 94-95.

The admission of a PTSD diagnosis does not impermissibly substitute a subjective standard for an objective one. The jury must still decide whether a reasonable person in the defendant’s circumstances would have acted as the defendant did. The expert testimony simply assists the jury in understanding the defendant’s situation so that they can properly assess the reasonableness of her actions by understanding her state of mind.

II. Even if PTSD evidence serves to negate *mens rea*, the rule in *Mott* has been overturned by statute. The offense in *Mott* pre-dated significant legislative changes which allow evidence of diminished capacity to be used to negate *mens rea*.

“Diminished capacity,” as it is used in *Mott*, refers to a mind that is weakened, such as by emotional abuse. Shelly Mott claimed that she could not form the requisite mental state to commit the charged offenses because she suffered from 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 such evidence 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 A.R.S. § 13-502 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. A paramedic 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 incapable of acting 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*,” 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 *Leteve*, 237 Ariz. at 524 ¶ 20: “The legislature has not provided for, and this Court has refused to allow, an affirmative defense of diminished capacity.” Last week this Court clearly stated that *Mott* applies only to affirmative defenses. *Miles*, 2018 WL 1721980, ¶¶ 16-17.

Mott has been discussed for two decades as if the current versions of statutes existed at the time of Mott’s offense in 1991. This ignores two important changes. 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. Laws 1993, Ch. 256, §§ 2-3. The statute no longer prohibits evidence negating a culpable mental state; the prohibition explicitly extends to the affirmative defense of insanity, and no farther.

Mott is based almost entirely on *Schantz*; its limited citation to the statute was to the old version. Yet successive cases that cite to *Mott* have failed to note the legislative changes, and instead assume that *Mott*'s language appears in the statute and that *Mott*'s offense postdated the 1993 change. *See State v. Johnson*, 229 Ariz. 475, 480 ¶ 14 (App. 2012) (“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.”) (citations omitted). In *Miles*, 2018 WL 1721980, ¶23, this Court stressed that it is the version of the statute in place at the time of the offense that controls.

The second change relates to what constitutes an “affirmative defense.” After *Mott* was decided, 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.* As stated above, justification defenses were also removed from the definition of affirmative defense in 2006. *Carson* explained the interplay between affirmative defenses and justification defenses; contrasting its recent

opinion in *State v. Holle*, 240 Ariz. 300, 307 ¶ 36 (2016), this Court reasoned, “[p]recluding a defendant who claims misidentification from also asserting self-defense when even the slightest evidence supports his assertion would change the state’s burden, thereby contravening the legislature’s intent about what conduct is criminal.” 243 Ariz. at 466 ¶ 11.

If the legislature modifies a statute, this Court’s interpretations must conform to those modifications. *Id.* Arizona courts have consistently misapplied *Mott* by failing to acknowledge that *Mott* interpreted an earlier version of the laws. A similar error has recently been discovered—and fixed. *State v. King*, 222 Ariz. 636 (App. 2009), *vacated*, 225 Ariz. 87 (2010) (recognizing legislature removed “sole motivation requirement” for self-defense in 1977).

By precluding the affirmative defense of diminished capacity³ from the guilt phase, the legislature and the courts have struck an appropriate balance that ensures that criminal defendants are held accountable for the appropriate culpable mental state. *State v. Lua*, 237 Ariz. 301, 305 ¶13 (2015) (recognizing “the societal interest

³ *Amicus* sees no substantial distinction between the manner in which the Legislature has precluded diminished capacity defenses under § 13-502 and voluntary intoxication defenses under § 13-503. Although § 13-503 includes language that voluntary intoxication “is not a defense for any criminal act or requisite state of mind,” the usage of “defense” in this context is descriptive of affirmative defenses, as explained in *Holle*, 240 Ariz. at 305 ¶ 25. This Court did not need to resolve this question in *Miles*, 2018 WL 1721980, ¶¶ 22-24, and neither this case nor *Jacobson* involve intoxication evidence, so *amicus* leaves this question for another day.

in avoiding the unjustified exoneration of wrongdoers and in punishing a defendant only to the extent of his crime.”) (citations omitted).

III. Constant threats of harm, even over an extended period, can constitute the “threat or use of immediate physical force” sufficient to present a duress defense to the jury.

Because a duress defense operates as a justification defense, similar to self-defense, a defendant is entitled to present the defense to the jury if there is the “slightest evidence” that she acted in duress. *King*, 225 Ariz. at 90 ¶ 14. The “slightest evidence” is a “low standard.” *Id.* ¶ 15 (finding defendant met standard when record “contained some evidence” that he had beaten the victim to death in response to the victim throwing a water bottle at him).

Nothing in the law or logic indicates that a defendant cannot argue duress just because the alleged duress occurred over an extended period of time. Although the law requires the threat of harm to be “immediate,” an ongoing threat can leave an individual in fear of imminent harm for months, even when the threat is not articulated at any given moment.

For example, in *People v. Richter*, 221 N.W.2d 429, 432-33 (Mich. App. 1974), the court held that the defendant should have been allowed to present a duress defense to a charge of perjury, even though the threat to her life had been made three weeks earlier: “We do not think a threat occurring three weeks earlier makes it impossible, as a matter of law, for the Compulsion to be present, imminent or

impending, and fostering a well-grounded apprehension of death or serious bodily injury.” See also *United States v. Contento-Pachon*, 723 F.2d 691 (9th Cir. 1984) (defendant entitled to duress defense for drug smuggling, which occurred over period of weeks); *Esquibel v. State*, 576 P.2d 1129 (N.M. 1978), *overruled on other grounds by State v. Wilson*, 867 P.2d 1175 (N.M. 1994) (defendant entitled to duress defense even though last act of physical violence toward him occurred two to three days before crime).

The “ongoing threat” is especially appropriate in BWS cases, where implied threats underlie every interaction between the abuser and the abused, leaving the abused in constant, reasonable fear throughout the duration of the relationship, even when there have been no recent threats or acts of violence. See *Marengi*, 893 F. Supp. 85; *Dando*, 461 F.3d 791.

This case stands in stark contrast to the defendants in *State v. Medina*, ___ Ariz. ___, 2018 WL 1403818 (Ariz. Ct. App. Mar. 20, 2018) and *State v. Pina-Barajas*, ___ Ariz. ___, 2018 WL 1569673 (Ariz. Ct. App. Mar. 30, 2018). *Amicus* asserts both of these cases were wrongly decided because a threat of violence does not necessarily dissipate with time, and whether the threat dissipated ultimately must be a jury question; but *amicus* points out the factual distinction to show the strength of Sophia’s claim. In both of those cases, the defendants sought to present a necessity defense to charges of possessing a gun while being a prohibited possessor. In both

cases, the proffered evidence was a vague threat made to the defendant well before the charged offense. *Pina-Barajas*, 2018 WL 1569673, ¶ 3 (two weeks prior); *Medina*, 2018 WL 1403818, ¶ 9 (one month prior). Unlike in this case, in neither *Pina-Barajas* nor *Medina* was the person making the threat physically present, much less continuously present, from the time of the threat to the time the defendant was found in possession of the gun. In fact, the defendants' ability to obtain a weapon after the threats were made suggests they were not under constant surveillance. Nor was there any evidence that the defendant in either case had been threatened or victimized previously, much less continuously. *Pina-Barajas* specifically distinguished *Richter* on these facts. *Pina-Barajas*, 2018 WL 1569673, ¶ 9

The facts described in this case are particularly egregious—Sophia Richter was physically and mentally abused by her husband, frequently tied up, frequently forbidden to leave the house, and on the rare occasions in which she was permitted to leave, she was either accompanied by her husband's mother or required to leave her phone on so that her husband could still monitor her even outside of his presence. *Richter*, 243 Ariz. at 138-39 ¶¶ 25-26. However, this does not mean that defendants with less evidence should be denied the right to present justification defenses. The “slightest evidence” suffices to allow the jury to decide the issue. *King*, 225 Ariz. at 90 ¶ 14. When judges decide the defendant's evidence is not strong enough, they are bootstrapping themselves into the jury box, as did Division One in *Jacobson* and

Division Two in *Medina* and *Pina-Barajas*. Only when there is a complete lack of evidence supporting a defense may the court deny the opportunity to present it.

CONCLUSION

For these reasons, *amicus* requests that this Court hold that the kind of evidence presented in this case constitutes observation evidence, that rules of statutory interpretation and due process require that *Mott* applies only to affirmative defenses, and that duress can exist over an extended period of time.

RESPECTFULLY SUBMITTED this 18th day of April, 2018.

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