IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. STEVEN JAY MALONE, Appellant.	))))))))))	No. CR-18-0431-PR Court of Appeals No. 2 CA-CR 2016-0274 Pima County Superior Court No. CR-20132518-001

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

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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) (citations omitted); *State v. Oliver*, 158 Ariz. 22, 30 (1988). These rights are also protected by article 2, §§ 4, 24 of the Arizona Constitution. Rules of evidence and other rules 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 v. Mississippi*, 410 U.S. 284, 302 (1973)); *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 rejected crucial evidence of Stephen Malone's organic brain damage, which was relevant to show a character trait for impulsivity. *Opinion* ¶ 11. The State now calls upon this Court to hold, as a matter of first impression, that such evidence should be excluded from consideration, based on a strained interpretation of *State v. Mott*, 187 Ariz. 536 (1997). As will be explained fully in this brief, not only does *Mott* hold the exact opposite to be true, 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. 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.[1]

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 State wants jurors to speculate on a defendant's mental processes while denying them the information they need to discover the truth. This Court should reject that entreaty.

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 to give a voice to the rights of the criminally accused and to those attorneys who defend them. 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

[1] AACJ has presented this argument in two other recent cases. *See State v. Miles*, 243 Ariz. 511 (2018); *State v. Richter*, 245 Ariz. 1 (2018).

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.

AACJ asks 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 accordingly.[2] Furthermore, AACJ asks 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. Such a mechanistic application of the *Mott* rule clearly violates due process.

ARGUMENTS

I. Any evidence that tends to negate *mens rea* is admissible. 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 evidence of organic brain damage is inadmissible under *Mott*, 187 Ariz. at 540-41, 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

[2] This argument applies equally to voluntary intoxication under A.R.S. § 13-503.

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, there is a difference between defenses that are allowed and evidence that may support those permissible defenses, notwithstanding the erroneous belief of the concurring judge that Malone could "evade criminal responsibility" due to brain damage. Third, because the evidence was probative of the key issue—whether Malone premeditated the murder—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 use of evidence of diminished capacity or mental disorders 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 State v. Johnson*, 229 Ariz. 475, 480 ¶ 14 (App. 2009) ("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*.[3] This Court recently explained this difference and held that a defense of lack of sexual motivation, *see* § 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. 3, 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

[3] 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.

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 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. While not citing to *Duncan*, the majority correctly recognized

and applied this proposition in this case. *Opinion* ¶ 14.

One month after *Malone* was decided, this Court 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. 245 Ariz. at 5 ¶ 15. 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 neither of these cases recognized the impact of new legislation on the *Mott* rule.

There is a simple explanation for why *Mott* did not interpret the 1993 version of § 13-502: Mott's offense predated the 1993 changes. Had *Mott* included a footnote or otherwise signaled 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.

In allowing defendants to present evidence negating *mens rea* while precluding affirmative defenses such as diminished capacity and voluntary

intoxication, the legislature has 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). To the extent that the *Mott* rule prohibits defendants from negating *mens rea*, it is an accident of judicial precedent. This Court should acknowledge, as it did in *King*, that the legislature's modifications to A.R.S. §§ 13-103, 13-205, 13-502, and 13-503 control, and that the *Mott* rule no longer applies to defenses that negate *mens rea* but only to affirmative defenses.

B. The court of appeals concurrence conflates the permissible defense against premeditation with "evad[ing] criminal responsibility."

The majority correctly held that evidence of brain damage is admissible to show impulsivity. *Opinion* ¶¶ 6-16. It relied on this Court's repeated holdings that "while a defendant is precluded from maintaining that he *cannot* reflect upon his actions (or has a lesser capacity to do so), he may introduce evidence demonstrating an ingrained character trait that rendered it less likely he acted with reflection and deliberation." *Opinion* ¶ 10 (citing *Mott*, *Leteve*, and *State v. Christensen*, 129 Ariz. 32 (1981)). Thus, it is confusing how the concurrence could reach the result that impulsivity evidence is inadmissible under *Mott*, when this Court was so clear only

three years earlier in *Leteve* that *Christensen* is still good law. *Opinion* ¶ 38 (Brearcliffe, J., concurring in part and dissenting in part).

To be sure, Arizona's restrictions on the presentation of mental disorders as a defense in criminal trials was triggered by acquittals obtained by extremely creative lawyering. *See* Renée Melançon, *Arizona's Insane Response to Insanity*, 40 Ariz. L. Rev. 287, 289, 296 (1998) (describing cases where men were each acquitted of murdering their wives based on temporary insanity). The current version of A.R.S. § 13-502 explicitly creates an affirmative defense of insanity based on "mental disease or defect," and it excludes from those definitions "disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders" as well as "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…" This statute is clear: an impulse control disorder is not an affirmative defense that can be used to plead insanity.

The concurrence attacked the *Christensen* defense as contrary to *Mott* and *Leteve*, while citing neither to *Christensen* nor to portions of *Mott* and *Leteve* that affirm *Christensen* (a mistake the majority pointed out, *see Opinion* ¶ 13). What the concurrence failed to grasp, however, is that Malone did not plead insanity. He pled not guilty of premeditated murder, using the time-honored *Christensen* defense. This

defense serves a single purpose: to seek a conviction for the lesser-included offense of second-degree murder. *See State v. Buot*, 232 Ariz. 432, 435-36 ¶ 18 (App. 2013) (no error in precluding *Christensen* defense because it serves to show defendant did not act with premeditation, not that defendant did not act knowingly or recklessly).

Ultimately, the concurrence sees *any* successful defense against a first-degree murder charge as cheating justice:

> If the reasoning of this opinion in this regard evades supreme court review or survives it, as a practical matter, there will be little left of *Mott* and not much left of *M'Naghten*. Every defendant who could not successfully meet the *M'Naghten* standard to evade criminal responsibility will now offer evidence of any brain defect or disorder as "consistent" with or to bolster some otherwise admissible character trait evidence. Under the majority's reasoning it will be a denial of the defendant's right "to put on a complete defense" and error *not* to admit such evidence. . . . [I]f future juries can now consider brain defect evidence for the improper purpose of negating *mens rea* of premeditation for first-degree murder, what will stop them from considering it for guilt itself? After all, the defendant can't help himself, he has brain damage. Unless the reasoning of the opinion is checked, the danger identified in *Mott* will be realized: future juries will be compelled to "release[ ] upon society many dangerous criminals who obviously should be placed under confinement." *Mott*, 187 Ariz. at 545, 931 P.2d at 1055, *quoting Schantz*, 98 Ariz. at 213, 403 P.2d 521.

Opinion ¶ 41 (Brearcliffe, J., concurring). In the course of a single paragraph, the concurrence not only disregards a half-century of U.S. Supreme Court case law on the right to present a complete defense,[4] but argues that someone like Malone would

[4] *See Washington v. Texas*, 388 U.S. 14, 18-19 (1967); *Chambers*, 410 U.S. at 290 n.3, 302; *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *California v. Trombetta*, 467 U.S. 479, 485 (1984). This principle was reaffirmed by a unanimous Court in

be "released upon society" instead of convicted for second-degree murder. When prosecutors make such arguments, it is considered egregious misconduct. *Moody*, 208 Ariz. at 459-60 ¶¶ 147-150 (prosecutor certainly knew it was impermissible to suggest an NGBRI verdict would "cut [Moody] loose"); *State v. Hughes*, 193 Ariz. 72, 88 ¶ 72 (1998) (misconduct for prosecutor to make "argument suggesting that defendant would be back on the street unless the jury rejected the insanity defense"); *State v. Cornell*, 179 Ariz. 314, 327 (1994) ("A long line of our cases has held that this type of statement is improper.").

As stated in the first section of this argument, the majority recognized that if evidence goes to a permissible defense, the defendant must be allowed to introduce it. *Opinion* ¶ 14. This Court unanimously agreed that *Mott* is no barrier to otherwise permissible defenses. *Richter*, 245 Ariz. 9 n.1 (Lopez, J., dissenting in part) ("I concur in the majority's holding, *supra* ¶ 15, that '[b]ecause Sophia sought to assert a justification defense, the evidence of duress she would have introduced in support of that defense did not constitute "diminished capacity" evidence and was not prohibited by *Mott*,' contrary to the trial court's ruling."). The *Christensen* defense has existed for nearly forty years and the sky has not fallen. The concurrence's fear is unfounded. Neither the State nor the concurrence provides any good cause to revisit *Christensen*.

Holmes v. South Carolina, 547 U.S. 319, 324 (2006).

C. This Court should recognize a constitutional due process right to present evidence of diminished capacity or mental disorders to negate *mens rea*.

Even if, *arguendo*, proper application of the statutes would require precluding evidence of diminished capacity or mental disorders, preclusion would violate the constitutional right to present a complete defense. As the State points out, *see* State Supp. Brief. at 5, the U.S. 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). *See also State v. Payne*, 233 Ariz. 484, 517-18 ¶ 150 (2013) (citing *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (state prohibitions on presenting evidence of voluntary intoxication do not violate the federal due process clause). Neither *Clark* nor *Egelhoff* involved a case where the issue of negating *mens rea*.

This Court has not yet extended our state constitution's due process clause, Ariz. Const. art. 2, § 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

[5] Justice Martone criticized Chief Justice Feldman's belief that Youngblood's failure to expressly raise the state constitutional claim was understandable, because there had 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 expressed that it will not touch state constitutional questions until this Court does it first. *E.g.*, *State v. Florez*, 241 Ariz.

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 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 U.S. 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

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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). And this Court recently refused a request to revisit *Youngblood*. *State v. Hulsey*, 243 Ariz. 367, 377 ¶ 20 (2018). Without a clear signal from this Court 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.

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). AACJ asks 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"). 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 misuses *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").

If A.R.S. § 13-502 allows the State to establish premeditation by proving only an intentional killing, while at the same time denying the defendant an opportunity to defend with evidence of impulsive conduct, such must violate due process.

Mullaney v. Wilbur, 421 U.S. 684 (1975). In order to avoid constitutional problems, *see State v. Thompson*, 204 Ariz. 471, 478 ¶ 27 (2003), this Court should recognize § 13-103(B) allows defendants to challenge *mens rea*.

II. Lower courts often err in harmless-error review because they follow this Court's practice of stating the facts "most favorable to upholding the verdicts." This Court should discontinue the practice.

For many years this Court has stated at the outset of the Factual and Procedural History section, "[w]e view the facts in the light most favorable to upholding the verdicts." *E.g.*, *State v. Miller*, 234 Ariz. 31, 36 n.1 (2013). But viewing the evidence in this manner at the outset of a case is not a standard of review for considering any claims of error, except for that of insufficient evidence. *State v. West*, 226 Ariz. 559, 562 ¶¶ 15-16 (2011). Depending on the error, the standard of review might be to "view the evidence in the light most favorable to a defendant's request for a self-defense instruction," *see State v. Carson*, 243 Ariz. 463, 464 ¶ 2 (2018), or to "view the evidence in the light most favorable to upholding the trial court's ruling," *see State v. Peoples*, 240 Ariz. 245, 247 ¶ 7 (2016).

AACJ suggests the Court discontinue this practice, since this section of a case does not impact the standard of review for any claim of error, and it often confuses the lower courts. *See State v. Escalante*, 242 Ariz. 375, 382 ¶ 27 (App. 2017), *vacated*, 245 Ariz. 135 (2018) ("we view the evidence in the light most favorable to sustaining the jury's verdicts, as we are required to do on appeal") (citing *State v.*

Nelson, 214 Ariz. 196, 196 ¶ 2 (App. 2007)); *id*. at 384 ¶ 36 (errors were not prejudicial because there was sufficient remaining evidence to convict).

Harmless-error review is a purposefully challenging standard to meet. The U.S. Supreme Court explained the reason for the burden being placed upon the party causing or benefitting from the error:

> An error … which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless. Certainly error … casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment."

Chapman v. California, 386 U.S. 18, 23-24 (1967) (citing *Fahy v. Connecticut*, 375 U.S. 85 (1963)). The appellate court must start from the presumption that the error is reversible, and await argument from the State that meets its heavy burden of proof. Of course, if an error is so plainly irrelevant to the outcome of the case that the finding of harmlessness is unavoidable, appellate courts may make that finding in keeping with Ariz. Const. art. 6, § 27. But, as argued by Malone, the court of appeals' harmless-error analysis shows that a return to basic principles is warranted.

CONCLUSION

AACJ requests this Court recognize legislative amendments distinguishing affirmative defenses from defenses that negates *mens rea*, and thus *Mott* now applies only to affirmative defenses. Any other result would violate due process.

RESPECTFULLY SUBMITTED this 11th day of March, 2019.

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