IN THE ARIZONA SUPREME COURT

CARLOS TERCERO CRUZ,

Petitioner,
v.

HON. MICHAEL BLAIR, Judge of the Maricopa County Superior Court,

Respondent Judge,

STATE OF ARIZONA,

Real Party in Interest

Arizona Supreme Court Case
No. CR-22-0123-PR

Arizona Court of Appeals
No. 1 CA-SA 22-0071

Maricopa County Superior Court
No. CR2015-123744-002

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

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INTRODUCTION

Criminal defendants have a constitutional right to present a complete defense. *See Washington v. Texas*, 388 U.S. 14, 18-19 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3, 302 (1973); *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); *State v. Oliver*, 158 Ariz. 22, 30 (1988). Rules of evidence and other rules ensure an orderly trial, but they "may not be applied mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302.

In this case, the trial court rejected several pieces of crucial evidence based on a misinterpretation of *State v. Mott*, 187 Ariz. 536 (1997).[1] As explained below, *Mott* prohibits only certain kinds of defenses; it does not prohibit admitting evidence for purposes unrelated to those defenses. Furthermore, 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

[1] For example, it is black-letter law that defendants may challenge the voluntariness of confessions before the jury, *see State v. Amaya-Ruiz*, 166 Ariz. 152, 172 (1990), and the defendant's mental condition is relevant toward that inquiry, *see Withrow v. Williams*, 507 U.S. 680, 693-94 (1993); *State v. Carrillo*, 156 Ariz. 125, 136-37 (1988); *State v. Blakley*, 204 Ariz. 429, 437 ¶31 (2003). AACJ focuses this brief on diminished-capacity evidence to support permissible defenses because of its statewide importance.

not to defenses that deny the culpable mental state. This Court should fix the problems with its *Mott* jurisprudence, because such mechanistic application of the *Mott* rule clearly violates due process. By suppressing such evidence, the State encourages jurors to speculate on a defendant's mental processes while denying them the information they need to discover the truth and reach fair verdicts.

INTEREST 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 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 offers this brief to encourage this Court to address as-of-yet judicially unrecognized statutory changes postdating the offense date in *Mott* and to update its jurisprudence on diminished capacity accordingly. This recurring issue of great statewide importance merits special-action review. *See Busso-Estopellan v. Mroz*, 238 Ariz. 553, 554 ¶4 (2015). Further, special-action review is appropriate because

this Court has an interest in avoiding a lengthy trial infested with reversible error, which would tax not only the finances of the state but also the emotions of the victims and their families who would have to suffer the ordeal of a second trial.

ARGUMENTS

In *State v. Malone*, 247 Ariz. 29, 31 ¶8 (2019), this Court began its legal analysis with a restatement of the *Mott* rule. It then proceeded to apply a statute that limits defenses in a manner that limits admissibility of evidence—thereby conflating two separate inquiries. *Id*. at 32 ¶12, 35 ¶23; *see also id*. at 39 ¶41 (Bales, C.J., dissenting in part). In *Malone*, this Court decided that the two inquiries are distinct, but "this distinction is meaningless." *Id*. at 35 ¶23. It based this conclusion upon a faulty premise: that the Legislature's refusal to adopt Model Penal Code §4.02(1) represented its final word on this subject. *Id*. at 35-36 ¶¶23-27.[2]

First, although heretofore unaddressed, this Court must recognize that legislative amendments to A.R.S. §§13-502 & 13-503[3] in 1993 and to §§13-103 & 13-205 in 1997 now prohibit use of the *Mott* rule to restrict defenses negating *mens rea*. Second, because the evidence proffered was probative of the key issue—whether Cruz's failure to act was knowing or intentional—exclusion of the evidence

[2] This Court also recognized that the defendant failed to argue otherwise. *Id*. ¶27.

[3] Although this case involves diminished capacity, which is governed by §13-502, the issue discussed applies equally to voluntary intoxication, which is governed by §13-503.

constitutes a disfavored "mechanistic application of the rules of evidence" that must yield to the defendant's constitutional right to present a complete defense. Third, *Malone*'s rationale must be clarified in the context of crimes of omission, where the State must prove that the failure to act was a voluntary act—a component of the *actus reus*.

I. 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 claimed 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 [her daughter] 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 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.

For twenty-five years, *Mott* has been erroneously discussed as interpreting the current versions of the applicable statutes. This ignores two important changes to the legal landscape. First, in the time between Mott's 1991 offense and this Court's review of her case, the legislature repealed the existing versions of §§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. *Mott* fails to incorporate this change because, as mentioned, it interpreted the earlier version of §13-502.

Unfortunately, successive cases citing *Mott* fail to note the legislative changes, apparently assuming language from *Mott* incorporates the 1993 statutory

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.") (internal citations omitted). Had *Mott* signaled it was interpreting the law as it existed in 1991, this succession of errors likely would not have occurred.[4]

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*.[5] This Court

[4] 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).

[5] 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

recently explained this difference when it held that a defense of lack of sexual motivation does not necessarily deny the requisite culpable mental state of knowingly committing molestation or sexual abuse, *see* §13-1407(E), and thus it is not an "element-negating defense under §13-103(B)." *State v. Holle*, 240 Ariz. 300, 305 ¶24 (2016). The same rationale applies when interpreting which defenses are available under §§13-502 & 13-503, which in no way prohibit evidence introduced to negate *mens rea*. Accordingly, under §13-103(B), there is now a permissible use of the evidence (negating *mens rea*) and an impermissible use (as an affirmative defense).

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 actions of a defendant who possessed the requisite state of mind. In allowing defendants to present evidence negating *mens rea* while precluding affirmative defenses such as diminished capacity and voluntary intoxication, the legislature struck an appropriate balance ensuring that criminal defendants are held accountable for the mental state they possessed and acquitted of the mental state they did not possess. *See 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

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defenses must now be disproved by the prosecution.

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 the *Mott* rule no longer applies to defenses that negate *mens rea* but only to affirmative defenses.

II. 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 requires precluding evidence of diminished capacity or mental disorders, such preclusion offends due process and violates the constitutional right to present a complete defense. The State cannot be permitted to misuse *Mott* as both sword and shield by, with one hand, misleading the jury as to a defendant's actual state of mind while also, with the other hand, depriving the defendant of the right to present evidence of his actual mental state. *See State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 60 ¶23 (2000) (litigant cannot claim advice-of-counsel defense and then invoke attorney-client privilege because advice received "is not only relevant but, on an issue such as this, inextricably intertwined with the court's truth-seeking functions").

The Supreme Court has held that the federal due process clause is not violated by *Mott*'s restriction on the insanity defense. *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). However, neither *Clark* nor *Egelhoff* involved the issue of evidence introduced to negate *mens rea*. In the context of A.R.S. §13-502, if the law allows the State to establish knowledge by proving that someone else would have understood the circumstances, while at the same time denying the defendant an opportunity to defend against that mental state, due process is clearly offended.

Arizona's restriction on presenting diminished capacity defenses in criminal trials was originally triggered by acquittals obtained through 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). But the pendulum cannot swing so far as to prevent defendants from presenting a legitimate defense for consideration by the fact-finder. *See State v. Robinson*, 153 Ariz. 191, 198 (1987) (ultimate purpose of trial is that the truth be discovered). If A.R.S. §13-502 allows the State to establish knowledge by proving only that someone else would have understood the circumstances, while at the same time denying the defendant an opportunity to defend against that mental state, 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*.

III. With crimes of omission, the State must prove that the failure to act was a voluntary act—a component of the *actus reus*.

Even if this Court declines to permit diminished capacity to be used to challenge *mens rea*, the trial court erred in preventing the defense from submitting evidence relevant to the voluntariness of the defendant's conduct. It is textbook law that criminal liability requires both a guilty mind (*mens rea*) and a voluntary act (*actus reus*). *State v. Lara*, 183 Ariz. 233, 234 (1995); *see also State v. Almaguer*, 232 Ariz. 190, 197 ¶19 (App. 2013) ("A defendant may be held criminally liable only if his conduct includes a voluntary act."). Consistent with the majority view, in Arizona the *actus reus* requirement can be satisfied in one of two ways: (1) by way of "a voluntary act" or (2) through "the omission to perform a duty imposed by law which the person is physically capable of performing." A.R.S. §13-201. "Voluntary act" means "a bodily movement performed consciously and as a result of effort and determination." §13-105(42). This voluntariness requirement precludes culpability based on "the sorts of bodily movements that would not be 'performed consciously and as a result of effort and determination.'" *Lara*, 183 Ariz. at 234.

Less well-developed are the contours of voluntariness with respect to crimes of omission. Contradistinctively to the definition of a "voluntary act," Arizona law

defines "omission" as "the failure to perform an act as to which a duty of performance is imposed by law." A.R.S. §13-105(28). Although the definition itself does not reference voluntariness, criminal culpability based on an act of omission attaches only where an omission is willful. *See, e.g., State v. Moran*, 162 Ariz. 524, 526 (App. 1989) ("The evidence supports the conclusion that the omission was deliberate; defendant voluntarily refrained from an act that he was able to perform…"); *see also State v. Gadreault*, 758 A.2d 781, 785 (Vt. 2000) (even where "intent is not an element, 'the act or omission must be "willful," i.e., deliberate and voluntary, in order to violate even a strict liability provision.'") (citing 21 Am.Jur.2d Criminal Law §146).

The difficulty of navigating these distinctions in crimes of omission is well noted in legal scholarship. As explained by one scholar cited in *Moran*, not all omissions are created equal—nor can they be said to uniformly suggest intent:

> [T]he logic of failing to act differs significantly from that of refraining …, omitting …, and even, "letting happen." Failures to act need not be voluntary. In the case of refraining, omitting, and letting happen, however, voluntariness is implicated. [One]'s failure to keep an appointment may result from an unexpected accident in which [he] has been involved. It is the lack of ability that makes it inappropriate to say that [he] refrained from keeping or omitted to keep the appointment. Likewise, if some harm occurs as a result of [his] failure to keep the appointment, it is usually inappropriate to say that [he] let it happen. To say that one had no alternative but to let [harm] happen is normally to offer a justification, not an excuse.

See, e.g., John Kleinig, *Criminal Liability For Failures To Act*, Law & Contemp.

Probs., Summer 1986, 161 (1986) ("Kleinig"). Highlighting further nuance, the following hypothetical shows the importance of assessing a defendant's physical ability and opportunity to act as it relates to culpability arising from his failure to act:

> If sleeping Richard in Sydney does not rescue drowning Fred from the New York Central Park Pond, he is not rescuing in a very different respect than unencumbered superswimmer Charles who watches Fred drown just a few yards away. Only Charles omits to rescue Fred. Only Charles lets Fred drown. But not even Charles omits to rescue Fred or lets him drown if he, like Richard, is asleep, assuming Charles is not responsible for watching over the pond. What constitutes a lack of ability or opportunity, then, may depend on what can reasonably be expected of the nondoer.

Kleinig at 169. This hypothetical demonstrates that one's ability to perform a duty is necessarily at the heart of a voluntariness determination. For instance, presume Charles—who is present on scene and responsible for Fred's safety—cannot swim. Surely the jury should be permitted to consider this fact when determining whether Charles is criminally liable for his failure to rescue Fred.

In this case, justice and common sense require—and Arizona law permits—the defendant be allowed to offer evidence of his ability to act separate and apart from his desire to do so. The defense seeks to introduce evidence of the defendant's limited ability not to negate the defendant's ability to form the requisite *mens rea*, but rather to demonstrate that he could not have acted *even if he wanted to do so*. Irrespective of the defendant's intent, the proffered evidence is undeniably relevant

and admissible for the purpose of demonstrating what can reasonably be expected of the defendant, physically, under the circumstances.

On this point, upholding the trial court's reasoning in this case leads to absurd results. A defendant's low intelligence or cognitive functioning could cause him to fail to properly read medication packaging, or operate a car, or navigate to the hospital, or even how to call for help. If the defendant is not allowed to introduce such evidence, the State can imply to the jury that the defendant is of ordinary ability, and the jury would be none the wiser. The jury would never expect that court-made evidentiary rules would obscure the truth.

As this Court forewarned in *Lara*, the trial court conflated the voluntariness requirement of the *actus reus* with an inference of intent based on a finding of voluntariness. This is evident in the trial court's failure to appreciate that the defendant's *ability* to drive his daughter to the hospital is necessarily a threshold consideration in determining whether he willfully failed to do it. *See* Petition at 8-9. But intent can only be inferred *after* voluntariness is found. *Lara*, 183 Ariz. at 234-35. This Court should accept review to clarify that crimes of omission require a willful failure to act.

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 and the judicial quest for truth. Furthermore, AACJ asks this Court to recognize that *Mott* has no application where the client's capacity goes to *actus reus* and not *mens rea*.

RESPECTFULLY SUBMITTED this 27th day of July, 2022.

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