No. 05-5966

In The
Supreme Court of the United States

ERIC MICHAEL CLARK,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals

PETITIONER'S REPLY BRIEF

DAVID GOLDBERG
Attorney at Law
P.O. Box 746
Flagstaff, AZ 86001
Phone (928) 606-1618
Fax (928) 525-9352

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

MISCELLANEOUS CASE AUTHORITY

STATUTES

TABLE OF AUTHORITIES – Continued

PETITIONER'S REPLY BRIEF

Most of the points made in Arizona's brief and its *amici*'s were addressed in Eric's opening brief. This reply takes up only matters that were not.

I. ERIC'S DUE PROCESS CLAIMS WERE UNMISTAKABLY PRESENTED TO THE COURTS BELOW, DECIDED ON THE MERITS, AND RAISED IN ERIC'S *CERTIORARI* PETITION.

A. The Question Whether the Trial Court Denied Eric Due Process by Refusing to Consider Evidence of his Mental Illness for the Purpose of Rebutting the Factual Inferences on Which the Prosecution Relied to Prove the *Mens Rea* Elements of the Crime Charged Was Raised and Decided on the Merits at Every Stage of this Case.

Point I in Eric's opening brief ("PB") argues that because the trial court in a bench trial refused to consider his evidence of mental illness for the purpose of rebutting the prosecution's factual proof of the *mens rea* elements of first-degree murder, Eric was denied federal due process. Arizona says this claim is not properly before the Court because it was resolved by the court below "on the state-law procedural ground of waiver." (Respondent's Brief ("RB") 12-13; *see id*. at 27-29.) It adds, with regard to one of Eric's subsidiary arguments in support of the claim (the argument at PB 13-21), that – "[t]o the extent that this is a separate argument" – "the argument was not 'pressed or passed upon' in the state appellate court or raised at the certiorari stage. . . . " (RB 26, n. 2.) The United States, as *amicus curiae*, does not share Arizona's doubts about whether the specific argument made by Eric at PB 13-21 *is* "a separate argument"; the United States declares it to be

such[1] and urges that it was not raised or decided below. (Brief for the United States. ("USB") 27-29.) The United States does not suggest that any other line of argument in Eric's Point I (PB 13-32) was not raised below, or that any part of the decision below rests on state procedural grounds.

None of the objections to this Court's consideration of Eric's Point I – or subpoint I(A) – has any substance. Eric's Point I is and always has been an attack on the rule of *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997), which both courts below held applicable and binding. *Mott* announced a categorical "rejection of the use of psychological testimony to challenge the *mens rea* element of a crime," 187 Ariz. at 540, 930 P.2d at 1050, and upheld this rule against federal due process challenge, *id*. at 541-44, 931 P.2d 1051-54. Deeming himself bound by *Mott*, Eric's trial judge therefore refused to consider any of Eric's mental-illness evidence as bearing on the question of whether Eric did or did not have the mental states that are the *mens rea* elements of first-degree murder. (JA 8-9.) Deeming itself bound by *Mott*, the Arizona Court of Appeals held that this refusal did not violate federal due process. (JA 351-353.) Eric's subpoint I.A at PB 13-21 is *not* a "separate argument" from the federal Due Process contention which he pressed upon both courts below and which both courts rejected. It is simply a specific explication of the most obvious way in which the *Mott* rule

[1] It does this by the rhetorical device of inserting the word *independently* in the sentence "Petitioner contends that the trial court independently violated his due process rights because it refused to consider psychiatric evidence offered to rebut factual inferences drawn by the prosecution about his intent." (U.S. Br. 27-28.) It neither explains nor justifies the insertion.

violated his Due Process right to present a defense. Parties before this Court "are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed." *Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899). They may refine the arguments they made below so long as the essence of their federal claim remains unchanged. *Illinois v. Gates*, 462 U.S. 213, 219-20 (1983). "Our traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 378 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). *See also, Stanley v. Illinois*, 405 U.S. 645, 658 n. 10 (1972) (this Court may "dispose of the case on the constitutional premise raised below, reaching the result by a method of analysis readily available to the state court," whether or not that exact analysis was argued below.)

In the present case, both courts and both parties below understood completely that (1) Eric was asserting a federal due process right to have his mental-illness evidence considered for the purpose of rebutting the prosecution's proof of the *mens rea* elements of first-degree murder; (2) the State, invoking *Mott*, insisted that the trial judge could not consider the evidence for that purpose; (3) the trial judge agreed with the State and declined to give any consideration to the mental-illness evidence in making his factual findings as to whether Eric did or did not act with the state of mind required for a first-degree murder conviction; and (4) Eric's federal constitutional challenge to this procedure was being rejected at trial and on appeal, upon the binding authority of *Mott*. We will document this briefly in the following pages. First, though, it is useful to

dispel a misconception that constitutes a mainstay of the efforts by Arizona and the United States to avoid this Court's decision of Eric's Due Process challenge to the *Mott* rule.

This is the notion that the failure of Eric's defense counsel to utilize an opportunity which the trial court gave them to make an "offer of proof" at the conclusion of the testimony – if they had additional evidence of mental illness relevant to *mens rea* which they had not adduced in connection with Eric's defense of Guilty Except Insane ("GEI") – has something to do with Eric's right to complain on appeal that the mental-illness evidence which they *did* adduce as going to both *mens rea* and GEI was wrongly limited by the trial court to use for the latter purpose only. (*See* RB 27-29; USB 27-29.)[2] An *offer of proof* would have

[2] Arizona's version of this misconception is to say that the Court of Appeals below "noted that the trial court had not prevented Eric from presenting psychological evidence, despite *Mott*'s holding to the contrary, and had invited him to make an offer of proof regarding the evidence's relevance to his mental state." (RB 27-28.) "Consequently, Clark had the duty – and the trial court gave him the opportunity – to show the relevance of his mental disease or defect evidence to whether he knew he was killing a police officer" (RB 28); and, "[b]y failing to draw any connection between his evidence and the fact he wanted to prove, Clark waived this claim on appeal." (RB 28-29.) These passages seriously misrepresent what happened in the trial court by subtly misstating what the Court of Appeals said about it. What actually happened in the trial court is described at PB 8-9 and documented in footnote 19 thereto. Succinctly: (1) the trial judge ruled that *Mott* precluded his consideration of any mental-illness evidence for the purpose of determining whether Eric had the *mens* rea requisite for first-degree murder; (2) the trial court observed that most or all of the evidence that it could not consider for this purpose was nevertheless admissible as relevant to the issue of GEI; (3) the trial court noted that because the case was being tried without a jury, there was no risk that evidence properly admitted on the GEI issue would be used improperly as going to the *mens* rea issues; so (4) the trial court held that (a) it

(Continued on following page)

been necessary – and counsel's failure to make one would be relevant – if Eric's claim in the Court of Appeals below and in this Court were that the trial court erred in *excluding evidence.* But that is not his claim. His claim is that the trial court erred in refusing to *consider*, as bearing on the factual issues of *mens rea*, the evidence of Eric's mental illness *which is in the record* but which the trial

---

would admit any and all mental-illness evidence that Eric presented which was relevant to GEI; (b) the trial court itself would consider that evidence only on the issue of GEI; (c) the admitted evidence would also serve as the record basis for any challenge to *Mott* that Eric might make on appeal; and (d) if Eric wished to make a record of any additional evidence – evidence which Eric contended was relevant to *mens rea* but not to GEI – Eric could do so by an offer of proof at the conclusion of the trial. This was the "offer of proof" to which the Court of Appeals was referring when it said that "the trial court did not prevent Clark from presenting . . . evidence [of mental illness], despite our supreme court's decision to the contrary in *Mott*, even going so far as to permit him to make an offer of proof on the issue at the close of the evidence." (JA 351-352.) It was not an "offer of proof" regarding the evidence which the trial court had *admitted*, still less "an offer of proof *regarding the evidence's relevance to his mental state.*" (RB 28) (emphasis added).

The United States similarly misdescribes the trial court's invitation to make "an offer of proof" of additional evidence as though it were a demand that Eric present "argument to the trial court" about the specific ways in which *admitted* evidence rebutted the prosecution's proof of *mens rea*. To talk about an "offer of proof" in connection with evidence which has been admitted and is in the record is an oxymoron. And to demand that Eric's counsel argue to the trial court exactly how Eric's mental illness refuted the prosecution's proof of *mens rea* after the trial court had explicitly ruled that "I'm bound by the supreme court decision in *Mott* and we will be focusing, as far as I'm concerned, strictly on the insanity defense" (JA 9), is to ask them to play the part of moron *simpliciter*.

court had ruled it would consider solely on the issue of GEI.[3]

Eric's counsel did everything necessary and proper to preserve *that* claim. Beginning before trial and continuing through their petition for *certiorari*, they consistently argued that the *Mott* rule violated Eric's right to federal due process because it precluded *consideration* of evidence of his mental illness to *rebut* the State's evidence that he intentionally and knowingly killed a police officer. In a pretrial memorandum regarding the issues likely to arise at trial, they took the position that "even if this court as the fact finder decides to reject Eric's affirmative defense and finds he was legally sane at the time of the offense, he is free to argue and the court is free to find that Eric is guilty of a less serious form of homicide because the State has failed to prove the requisite mental state." (ROA-362 at 5.) Again in opening argument, they asserted that if Eric "did not know that Officer Moritz was, in fact, a police officer but was acting under delusional or otherwise nonintentional thinking at that time, then he is not guilty of first degree murder." (RT 8/5/03 at 18.) Yet again, after

[3] The sole passage in the Court of Appeals' opinion to which Arizona points as purportedly showing that that court's decision rested on a state-law ground is: "aside from the evidence to prove his insanity generally, Clark specified no evidence in his offer of proof that demonstrated he was not capable of knowing he was killing a police officer." (JA 352; *see* RB 28.) This passage does not *decline* to reach the merits of Eric's federal claim; to the contrary, it *defines* the federal claim which the Court of Appeals decided on the merits. It says that the only evidence Eric contended on appeal was refused consideration under *Mott* in violation of the federal Constitution was the evidence that defense counsel was permitted to introduce and did introduce at trial, both as proof of GEI and as a record basis for his attack on *Mott*. (*See* the preceding footnote, para. 1). And that is the same evidence on which Eric's Point I – and subpoint I(A) – relies in this Court.

moving for a directed verdict of not guilty of first degree murder, counsel "reserve[d] the right to reurge this motion at the completion of the defense case based on the evidence you hear on whether there is sufficient evidence that Eric Clark in his state of mind at that moment knew that this was a police officer and intended to kill a police officer." (JA 5.) The motion was, indeed, renewed at the completion of all the evidence, based on the defense arguments "made previously but now in consideration of all of the evidence that's been presented" (RT 8/27/03 at 4) – evidence directed exclusively to showing that Eric suffered from chronic paranoid schizophrenia and was actively psychotic and delusional at the time of the killing (*see* RT 8/12/03 at 4 through RT 8/27/03 at 4) – and the motion was again denied (RT 8/27/03 at 5). With full awareness that this was Eric's position, the trial court held that it was bound by *Mott* to limit its consideration of the mental-illness evidence to the issue of GEI and not consider it for the purpose of rebutting the State's factual evidence of *mens rea.* (JA 9.)[4]

In Eric's post-trial Motion to Vacate Judgment and Sentence, he argued that "[t]he court's failure to consider whether as a result of Eric's mental illness he was unable to form the *mens rea* necessary to commit an intentional or

[4] The State was also fully aware that Eric was offering his evidence of mental illness to *rebut* its proof of *mens rea* and was claiming a federal constitutional right to have the evidence considered for this purpose. In its pretrial memorandum regarding the psychiatric issues in the case, the State explicitly asserted that "defendant is attempting to present evidence of his purported delusions *to negate the mental state of intending or knowing . . .* " (ROA-376 at 3) (emphasis added); it consequently cited *Mott* as holding both that this "is not permissible under Arizona law" and that "the federal Constitution was not [thereby] violated." *Id*.

knowing murder *deprived him of his fundamental right to contest the state's case*" in violation of the federal Due Process Clause. (ROA-406 at 1) (emphasis added). Similarly, in his Opening Brief in the Arizona Court of Appeals, he argued that the trial court's refusal to consider his factual evidence on the issue of whether the State had proved he intentionally or knowingly killed a police officer violated his due process right to "present a defense" to the State's case.[5] (ROA-Opening Brief at 47-48.) In his Reply Brief, Eric again argued that the trial court's refusal to consider this evidence prevented him from exercising his right "*to defend himself against the State's criminal charges*" and to contend that "*the State ha[d] failed to prove the requisite mens rea.*" (ROA-Reply Brief at 13-15) (emphasis added). The Arizona Court of Appeals understood that the issues thus raised were whether "the trial court erred in refusing to consider evidence of . . . [Eric's] mental disease or defect in determining whether he had the requisite *mens rea* to commit first-degree murder" (JA 351), and whether that refusal violated his "fundamental right to present a defense" to the State's case (JA 348). The court rejected his federal claim on the merits on the ground that *Mott* was binding. (JA 347-53.)

Finally, Eric's *certiorari* petition in this Court asserted repeatedly that his due process rights were violated because the trial court had refused to *consider* his evidence of mental illness "as *rebuttal evidence*" to the State's case. Eric urged this Court to grant review because no

[5] Eric specifically pointed out that "the majority view recognizes that prohibiting evidence of mental illness short of legal insanity to *rebut the State's evidence of mens rea* violates . . . due process." (ROA-Opening Br. at 51) (citing case law) (emphasis added).

precedent addressed whether precluding consideration of "factual evidence regarding an *involuntary* mental illness *to rebut the government's evidence* or negate *mens rea* violates due process." (Pet. for Cert. 25, 27; *see also id*. at 30) (emphasis added).

B. In any Event, the Objections to this Court's Consideration of Eric's Claims are Legally Inconsequential.

The preceding section demonstrates that each of the objections raised by Arizona and the United States to this Court's consideration of Eric's Point I and subpoint I.A are factually far wide of the mark. They are also baseless for two purely legal reasons:

1. Both courts below indisputably decided Eric's federal due process challenges to the *Mott* rule on the merits. This is plain because they both held *Mott* controlling, not only with regard to the Arizona rule governing Eric's mental-illness evidence but also with regard to the federal constitutionality of that rule. And *Mott* is strictly a merits decision.[6] For that reason alone, Eric's federal due process contentions are properly before this Court, pursuant to "the elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a court

[6] *Mott's* holding expressly rests upon the Arizona's Supreme Court's interpretation of federal due process. *See, e.g.,* 187 Ariz. at 541; 931 P.2d at 1051 ("Thus, *Fisher* [*v. United States*, 328 U.S. 463 (1946)] stands for the proposition that state legislatures, without violating the constitution, may preclude defendants from offering evidence of mental and psychological deficiencies to challenge the elements of a crime.") (*see also, id.* at 541-45, 931 P.2d at 1051-55 (citing and discussing, *Montana v. Egelhoff,* 518 U.S. 37 (1996); *Paterson v. New York,* 432 U.S. 197 (1977); and *Fisher*).

below when it appears that such question was actually considered and decided." *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914). *See also, e.g.*, *State ex rel. Anderson v. Brand*, 303 U.S. 95, 98-99 (1938); *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185-86 (1945); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979), and cases cited; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 313 n. 8 (1987); *Quinn v. Millsap*, 491 U.S. 55, 101-02 (1989); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991).

2. Question Presented number (2) in Eric's petition for *certiorari* in this Court reads: "Whether Arizona's blanket exclusion of evidence and refusal to consider mental disease or defect to rebut the state's evidence on the element of *mens rea* violated Petitioner's right to due process under the United States Constitution, Fourteenth Amendment." Every argument advanced in Point I of Eric's opening brief is "fairly included" within this Question Presented under Rule 10 ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein"). Q.E.D.

II. NEITHER PRECEDENT NOR REASON SUPPORTS *MOTT*'S RULE PRECLUDING CONSIDERATION OF EVIDENCE OF MENTAL ILLNESS TO REBUT *MENS REA* ELEMENTS OF A CRIME.

Arizona and the United States argue that this Court upheld procedures which precluded the consideration of mental-illness evidence offered to show that a criminal defendant lacked *mens rea* in *Fisher v. United States*, 328 U.S. 463 (1946), *Troche v. California*, 280 U.S. 254 (1929), and *Coleman v. California*, 317 U.S. 596 (1942). (RB 31-34;

USB 18-21.) As Eric's opening brief points out, no such procedure was upheld – or involved – in *Fisher*: Fisher's jury was in fact permitted to consider his evidence of mental illness as negating the *mens rea* of first-degree murder – exactly as Eric contends that his trial judge should have done. (*See* PB 25-26 & n. 31.) Nor do the summary rulings in *Troche* and *Coleman* control Eric's due process claim. This is so for several reasons.

First, these 1929 and 1942 cases long predate this Court's doctrinal development of the due process right to present a defense, in *Washington v. Texas*, 388 U.S. 14 (1967); *Chambers v. Mississippi*, 410 U.S. 284 (1973), and their progeny. According to *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), summary dismissals for want of a substantial federal question should be deemed controlling "'except when doctrinal developments indicate otherwise'" and "'until such time as the Court informs . . . [the lower courts] that (they) are not.'" *Second*, summary dispositions "do not 'have the same precedential value . . . as does an opinion of this Court after briefing and oral argument on the merits.'" *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 306-07 (1998) (quoting *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 477 n. 20 (1979)). *See also*, *e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *Connecticut v. Doehr*, 501 U.S. 1, 12 n. 4 (1991).[7] *Third*, the California procedure at issue in

[7] If, as the United States argues, "*Fisher* was virtually foreordained by the summary disposition almost twenty years earlier in *Troche*" (USB 20), it is puzzling that the *Fisher* opinion nowhere cites that disposition (although the California state-court decision in *Troche* is among the numerous state cases that the *Fisher* opinion describes as "collected" in the Government's brief on both sides of the question whether juries should be instructed that mental illness not amounting

(Continued on following page)

Troche and *Coleman* did not, as Arizona's current *Mott* rule and GEI definition do, *both* preclude consideration of evidence of mental illness to rebut the prosecution's proof of mental states that are elements of a criminal charge *and* restrict the insanity defense to a sterile right/wrong inquiry that is narrower than the traditional Anglo-American standard reflected in *M'Naghten*.[8] (*See* PB 47-49.)[9]

Arizona and its amici also strain futilely to bring the *Mott* rule within the shelter of *Montana v. Egelhoff*, 518 U.S. 37 (1996), by characterizing *Mott* as a substantive decision that "define[s] the element of mens rea in such a way that evidence of a defendant's mental disease or defect does not negate it." (RB 30; *see id*. at 35-40; *and see*

---

to insanity should be considered as bearing on the degree of murder, 328 U.S. at 473 n. 12).

[8] *M'Naghten's Case*, The House of Lords, 10 Clark & Fin. 200, 8 Eng. Rep. 718 (1843). Under California law at the time of *Troche*, a criminal defendant was to be found sane "[i]f he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, knowledge and consciousness that what he is doing is wrong and criminal and will subject him to punishment," and "if he understands the nature and character of his action and its consequences, – if he has knowledge that it is wrong and criminal, and that if he does the act he will do wrong." *People v. Troche*, 206 Cal. 35, 46, 273 P. 767, 772 (1928). That standard remained unchanged at the time of *Coleman*. *See People v. Skinner*, 39 Cal.3d 765, 768, 704 P.2d 752, 753 (1985).

[9] "A summary disposition affirms only the judgment of the court below, and no more may be read into . . . [the Court's] action than was essential to sustain that judgment." *Anderson v. Celebrezze,* 460 U.S. 780, 786 n. 5 (1983); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979). Such decisions "cannot be taken as adopting the reasoning of the lower courts." *Wisconsin Department of Revenue v. William Wrigley, Jr. Co*., 505 U.S. 214, 224 n. 2 (1992). Summary dispositions are a " 'rather slender reed' on which to rest future decisions." *Morse v. Republican Party of Virginia*, 517 U.S. 186, 203, n. 21 (1996) (quoting *Anderson, supra.*).

Brief of the States of Massachusetts, *et al*. ("MB") 21-22; USB 17 (*Mott*'s construction of Arizona GEI law produces the result that "in a prosecution for first-degree murder, the State does not have to prove that the defendant 'intend[ed] or kn[ew] that his conduct w[ould] cause death to a law enforcement officer' in a purely subjective sense")). With utmost respect, this is utter nonsense. If the State did not have to prove that Eric intended to cause the death of a police officer when he shot Officer Moritz, why did the prosecutor argue vigorously that Eric had this intent (*see*, *e.g.*, RT 8/5/03 at 15; RT 8/8 at 77-78) and rely on elaborate inferential reasoning – based on an "ambush" theory (*see* PB 14 & n. 21) and on statements purportedly made by Eric prior to the crime showing anti-police *animus* (*see* PB 14-15 & n. 22) – to prove that intent? Why did the State argue on appeal that there was sufficient "PROBATIVE EVIDENCE TO ESTABLISH THAT APPELLANT INTENTIONALLY OR KNOWINGLY KILLED A POLICE OFFICER"?[10] Why did the Court of Appeals, in rejecting Eric's contention that there was insufficient evidence to support his conviction of first-degree murder, find it necessary to make the explicit finding that there was "sufficient evidence to support the inference that

[10] (ROA – Appellee's Answering Brief at 7. *See*, *e.g.*, *id*. at 8) ("The evidence at trial established that Appellant intentionally lured a police officer into an ambush with the purpose of killing that officer. This included evidence that: (1) Appellant had antipathy toward the police prior to the killing; (2) Appellant told others that he would like to kill police officers shortly before he shot officer Moritz; (3) Appellant disturbed the residents of his neighborhood in a manner that would attract the police . . . [etc.]"); (*id*. at 12) ("There was overwhelming evidence that Appellant, not only knowingly killed a police officer, but that he intentionally did so. Accordingly, Appellant's sufficiency argument is meritless"); and *passim*.

Clark intentionally or knowingly shot Moritz"?[11] And what does it mean to say that a "defendant 'intend[ed] or kn[ew] that his conduct w[ould] cause death to a law enforcement officer'[12] in a . . . [*non*-]subjective sense" (USB 17)? Not a single concept in the history of epistemology, ontology, or metaphysics explains how there could be such a thing as non-subjective "intending" and "knowing."[13]

---

[11] (JA 343. *See* PB 15-16 & n. 24. *See also*, *e.g.*, JA 343) ("The trial court was entitled to infer from Clark's use of the weapon that *he* intended or knew that *he* would kill Moritz"); (*id*. at 344) ("Furthermore, there is sufficient evidence to support the inference that *Clark* knew that Moritz was a police officer when he shot him.") (emphasis added).

[12] ARS § 13-1105(A)(3), under which Eric was charged, defines first-degree murder as killing an on-duty law enforcement officer, "[i]ntending or knowing that the . . . conduct will cause death to a law enforcement officer." (*See* PB 1.)

[13] That serious criminal liability in Arizona is in fact reserved for persons who act with subjective intention or awareness of the criminal dimension of their conduct is all the more obvious from Arizona's adoption of the Model Penal Code definitions of culpable mental states which require proof that "a person's objective is to cause . . . [a] result or to engage in . . . [specific] conduct" or that "a person is aware that his or her conduct is" as prescribed by law. ARS §§ 13-105(9)(a), (b). The cases cited at RB 39-40, upholding criminal liability when a defendant had "reason to know" but no actual knowledge involved statutes specifically including reason to know as a punishable *mens rea*. *E.g., United States v. Wurliger,* 981 F.2d 1497, 1504 (6th Cir. 1992) (statute punished a person who intercepted information "knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation"); *State v. LeFevre*, 193 Ariz. 385, 972 P.2d 1021, 1026 (Ariz. App. 1998) (statute punished a person who acquired funds "knowing or having reason to know that they are the proceeds of an offense"). They did not, of course, involve a charge of intentional murder that requires proof of a specific intent which renders this evidence highly relevant. As stated in the leading modern case on this issue, *United States v. Brawner*, 471 F.2d 969, 998-99 (D.C. Cir. 1972): "[When an offense] requires specific intent that cannot be satisfied merely by showing that defendant failed to

(Continued on following page)

Finally, Arizona and its *amici* argue that there are good policy reasons for Arizona to preclude consideration of evidence of mental illness as bearing on the issues of intent and knowledge that constitute the *mens rea* elements of serious crimes like first degree murder. These reasons boil down to skepticism that mental-health professionals can ascertain much about the workings of the mind or that juries can understand much of what mental-health professionals report on the subject. (*See* RB 40-43; USB 24-27; MB 24-28.)[14] Again, the arguments strain credulity as a justification for Arizona's procedure of reducing all mental-illness inquiries to the single question whether a defendant "was afflicted with a mental disease or defect of such severity that . . . [s/he] did not know the criminal act was wrong." ARS § 13-502(A). Can any serious supposition possibly be entertained that psychiatrists or juries are less able to determine (A) whether a defendant was so mentally ill that s/he could not form an intent to kill an individual knowing that the individual was a police officer

---

conform to an objective standard [ ] the stated condition of defendant's mind [ ] is [ ] a proper subject for consideration, inquiry, and determination by the jury.' ") (quoting *Bishop v. United States*, 107 F.2d 297, 301 (D.C. Cir. 1939)).

[14] The United States also suggests that the prohibition is justified since permitting consideration of this evidence presents too high of a risk of erroneous acquittals. (USB at 24.) Eric was not urging, however, that the factfinder find that he was not guilty of any crime as a result of his mental illness but merely that the State had not proven him guilty of the greater crime of first degree murder and he was guilty of a lesser form of homicide. *Cf. Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975) ("criminal law is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. . . . "). Moreover, Arizona, like most states provides for civil commitments following acquittals of mentally ill offenders who are a danger to themselves or others. *See* Title 36, ARS. *See also Foucha v. Louisiana*, 504 U.S. 71 (1992); *Jones v. United States*, 463 U.S. 354 (1983).

than (B) whether s/he was so mentally ill that s/he did not know the criminal act was wrong?[15]

[15] Several additional points should be noted, although the one made in text is sufficient to demonstrate the incoherence of the purported psychiatric-skepticism justification for the *Mott* rule. *First*, by statute and case law, Arizona treats psychiatric and psychological evidence as relevant and reliable not only on the issue of sanity, *see State v. McMurtrey*, 136 Ariz. 93, 664 P.2d 637 (Ariz. 1983), but on numerous other issues. *E.g., State v. Lindsey*, 149 Ariz. 472, 720 P.2d 73 (Ariz. 1986) (psychological characteristics of molestation victims); *State v. Hamilton*, 177 Ariz. 403, 868 P.2d 986 (Ariz. App. 1993) (psychological evidence of child abuse accommodation syndrome); *Horan v. Industrial Comm'n*, 167 Ariz. 322, 806 P.2d 911 (Ariz. App. 1991) (psychiatric testimony regarding neurological deficits). *See also* Rule 11.3, *Arizona Rules of Criminal Procedure* (competency); ARS § 36-3703 (sexually violent persons); ARS, Title 36 (civil commitment); ARS § 13-502 (insanity). *See also, State v. Christensen*, 129 Ariz. 32, 35-36, 628 P.2d 580 (Ariz. 1981) (psychiatric testimony regarding defendant's character trait for impulsivity is admissible in a trial for first degree murder to rebut the state evidence of premeditation). *Second*, Arizona trial judges, like their peers elsewhere, have ample power to shield juries from evidence that is genuinely likely to be unduly confusing or more prejudicial than probative, by conducting the individualized inquiry authorized by Rules 403 and 702 of the *Arizona Rules of Evidence* (which are like the same-numbered Federal Rules). But a *categorical* exclusion of mental-illness evidence on the ground of its supposed unreliability would fare no better constitutionally than the similarly-explained categorical exclusions in *Chambers v. Mississippi, supra*, and in *Rock v. Arkansas*, 483 U.S. 44 (1987). And, *third*, the arbitrariness and overbreadth of such an exclusion would be particularly indefensible in a case like Eric's, involving a mental disorder so florid and obvious even to commonplace observation that it was proved – to the satisfaction of the prosecution and its expert as well as to the satisfaction of the trial judge – as much by lay observations of Eric's bizarre behavior as by expert psychiatric and psychological testimony.

III. ARIZONA'S DEFINITION OF INSANITY, PUNISHING MENTALLY ILL PEOPLE WHO DO NOT KNOW WHAT THEY ARE DOING, CANNOT BE SAVED FROM CONSTITUTIONAL INVALIDATION ON THE THEORY THAT ITS NARROW RIGHT-WRONG STANDARD SUBSUMES AN INQUIRY WHETHER THE DEFENDANT APPRECIATED THE NATURE AND CHARACTER OF HIS OR HER ACT.

Arizona's definition of insanity punishes people if they do an act they know is wrong, even though their mental illness prevents them from being aware that they are doing that act. *See* ARS § 13-502(A) (PB 2). Eric contends that this procedure violates due process because it disregards a nexus between personal moral culpability and criminal stigmatization that was recognized as essential long before the Constitution – a nexus classically expressed in the *M'Naghten* rule. Arizona and the United States seek to deflect this due process challenge by asserting that the right-wrong standard prescribed by ARS § 13-502(A) subsumes an inquiry as to whether the defendant knew the nature and character of the act s/he did. They support this diversion by pointing to the observation of the Court of Appeals below that "[i]t is difficult to imagine that a defendant who did not appreciate the 'nature and quality' of the act he committed would reasonably be able to perceive that the act was 'wrong.'" (JA 350; *see* RB 24-25; USB 14-16.)

It is important to note that in this passage the Court of Appeals does not purport to *construe* ARS § 13-502(A) as requiring knowledge of the nature of one's act as a component part of knowledge that the act is wrong. It could easily have done this but did not. Instead, it made the

logical point that as a matter of *fact* it failed to see how a defendant could know that his or her act was wrong without knowing what it was that s/he was doing.

On this record, that failure is singularly shortsighted. A major feature of Eric's schizophrenic delusional structure was the belief that the Earth had been invaded by aliens, that the population of Flagstaff was aliens, and that these aliens were trying to capture Eric and kill him. (*See* PB 4-6 and particularly the references in note 13.) Consistent with these delusions, Eric might well have understood that killing a human police officer was wrong but believed that Officer Moritz was an alien who had assumed the form of an officer in order to do Eric harm with impunity. (*See* ROA-Reply Brief at 17, making precisely this point.) In such a scenario – which the trial court could have found fully supported by the record if it had believed that the finding would render Eric GEI under ARS § 13-502(A), Eric's knowledge of the wrongness of killing a human police office would *not* have subsumed an awareness that that was what he was doing.

In any event, if this Court were to read the Court of Appeals' opinion as suggesting the possibility that ARS § 13-502(A) could be construed as Arizona and the United States now argue that it should be construed, the proper course of action regarding this aspect of the case would be a remand to the Court of Appeals to determine in the first instance whether the statute *is* to be so construed; and, if so, for a further remand to the trial court for factfinding under that construction of the statute. The trial judge's factual rejection of Eric's GEI defense could not fairly be salvaged by interpreting the statute *post hoc* to avoid Eric's constitutional challenge to it by giving it a meaning that did not guide the trial judge when he made the

factual findings which produced that rejection. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153-55 (1969); *cf. Cole v. Arkansas*, 333 U.S. 196 (1948).

CONCLUSION

Eric Clark's conviction should be reversed.

RESPECTFULLY SUBMITTED this 10th day of April, 2006

DAVID GOLDBERG
Attorney at Law
P.O. Box 746
Flagstaff, AZ 86001
Phone (928) 606-1618
Fax (928) 525-9352

Counsel for Petitioner