

# **CLARK V. ARIZONA: AFFIRMING ARIZONA'S NARROW APPROACH TO MENTAL DISEASE EVIDENCE**

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*“To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal. A man who cannot reason cannot be subject to blame. Our collective conscience does not allow punishment where it cannot impose blame.”<sup>1</sup>*

## **INTRODUCTION**

Arizona, through its narrow insanity test and rule prohibiting the use of evidence of mental disease or defect to negate mens rea, risks punishing the blameless. In *Clark v. Arizona*, the U.S. Supreme Court addressed whether those rules infringe on constitutional principles.<sup>2</sup> In a 5–4 decision, the Court held that neither Arizona’s insanity test, nor its exclusion of evidence to negate mens rea, violates due process.<sup>3</sup>

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

On June 21, 2000, 17-year-old Eric Clark shot and killed Flagstaff Police Officer Jeffrey Moritz.<sup>4</sup> At the time of the incident, Moritz was responding to a complaint that a vehicle was circling a block in a residential neighborhood and playing loud music.<sup>5</sup> Moritz located the vehicle, turned on his lights and sirens, and pulled over the truck, which was driven by Clark.<sup>6</sup> When Moritz got out of the police car, Clark shot him.<sup>7</sup> Clark fled the scene, but was found and arrested the

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1. *Holloway v. United States*, 148 F.2d 665, 666–67 (D.C. Cir. 1945).

2. 126 S. Ct. 2709, 2718 (2006).

3. *Id.* at 2716.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

same day.<sup>8</sup> The gun used to commit the crime was recovered nearby stuffed into a knit cap.<sup>9</sup> Moritz died as a result of his injuries.<sup>10</sup>

Following the incident, Clark was charged with first degree murder under Arizona Revised Statutes § 13-1105(A)(3) for intentionally or knowingly causing the death of a law enforcement officer in the line of duty.<sup>11</sup> Initially, in 2001, a trial court found Clark incompetent to stand trial, and Clark was committed to a state hospital.<sup>12</sup> In 2003, the same trial court found that Clark's competence had been restored.<sup>13</sup>

At trial, Clark did not dispute that he shot and killed Moritz.<sup>14</sup> Further, neither side disputed that, at the time of the incident, Clark suffered from chronic paranoid schizophrenia and was actively psychotic.<sup>15</sup> Clark raised the affirmative defense of insanity,<sup>16</sup> claiming that "at the time of the commission of the criminal act [he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong."<sup>17</sup> In addition, he argued that his mental illness prohibited him from forming the requisite mens rea under the statute.<sup>18</sup> Relying on *State v. Mott*,<sup>19</sup> the trial court ruled that Clark could not use evidence of his mental illness to rebut the prosecution's evidence of mens rea.<sup>20</sup>

With respect to the affirmative defense of insanity, Clark presented both lay and expert testimony of his delusions and increasingly bizarre behavior leading up to the shooting.<sup>21</sup> According to a psychiatrist who testified for the defense, Clark was insane and incapable of distinguishing right from wrong at the time of the crime because he suffered from paranoid schizophrenia.<sup>22</sup> The state's psychiatrist testified that Clark's actions before and after the shooting provided

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8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*; see also ARIZ. REV. STAT. ANN. § 13-1105(A)(3) (2004).

12. *Clark*, 126 S. Ct. at 2716.

13. *Id.*

14. *Id.*

15. *Id.* at 2746 (Kennedy, J., dissenting); Petition for Writ of Certiorari at 4-5, *Clark*, 126 S. Ct. 2709 (No. 05-5966), 2005 WL 3295166.

16. *Clark*, 126 S. Ct. at 2717.

17. ARIZ. REV. STAT. ANN. § 13-502(A) (2004).

18. *Clark*, 126 S. Ct. at 2717. Under Arizona Revised Statutes section 13-1105(A)(3), the state is required to prove that at the time of the crime charged, the defendant, knowing that the victim was a police officer, intentionally killed him while he was in the line of duty. ARIZ. REV. STAT. ANN. § 13-1105(A)(3).

19. 931 P.2d 1046 (Ariz. 1997), *cert. denied*, 520 U.S. 1234 (1997). In *Mott*, the Arizona Supreme Court held 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." *Id.* at 1051.

20. *Clark*, 126 S. Ct. at 2717.

21. *Id.* Witnesses testified that Clark thought Flagstaff was populated by aliens, some of which were disguised as government agents, that the aliens were trying to kill him, and that the only way to kill the aliens was with bullets. *Id.*

22. *Id.* at 2717-18.

evidence that his paranoid schizophrenia did not bar him from appreciating that his conduct was wrong.<sup>23</sup>

The trial judge issued a special verdict finding that Clark was not insane at the time of the incident, that he caused the death of Moritz, and that he was guilty of first degree murder.<sup>24</sup> The trial judge then sentenced Clark to life imprisonment without possibility of release for 25 years.<sup>25</sup> The court denied Clark's subsequent motion to vacate the judgment and sentence on the grounds that Arizona's insanity test and the court's application of the *Mott* rule violated his due process rights.<sup>26</sup>

Affirming Clark's conviction, the Arizona Court of Appeals concluded there was sufficient evidence to survive review for abuse of discretion, and held that Arizona's insanity test did not violate Clark's due process rights.<sup>27</sup> Arriving at its decision, the court of appeals noted that there is no constitutional right to an insanity defense and that *Mott* barred consideration of evidence of mental illness on the element of mens rea.<sup>28</sup> The Arizona Supreme Court denied further review.<sup>29</sup>

Clark petitioned the U.S. Supreme Court for certiorari arguing that, by precluding evidence of mental defect to rebut the mens rea of the crime charged, Arizona violated his due process rights and his fundamental right to present a complete defense.<sup>30</sup> Further, Clark argued that Arizona's elimination of the cognitive incapacity aspect of the insanity defense violated his fundamental due process rights.<sup>31</sup> That defense, historically recognized at common law, allowed a defendant, who did not understand the "nature and quality" of his acts to escape culpability.<sup>32</sup>

In 2005, the U.S. Supreme Court granted certiorari to decide two questions. First, the Court considered whether due process prohibits Arizona's use of an insanity test based solely on the defendant's capacity to tell whether the act charged was right or wrong. Second, the Court addressed whether Arizona violates due process by restricting consideration of evidence of mental illness and incapacity to claims of insanity, thereby excluding such evidence to negate the mens rea element of the crime charged.<sup>33</sup>

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23. *Id.* at 2718. The psychiatrist pointed to Clark's luring the police officer by blaring loud music, evading the police after the shooting, and hiding the murder weapon. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Petition for Writ of Certiorari at 6–10, *Clark*, 126 S. Ct. 2709 (No. 05-5966), 2005 WL 3295166.

31. *Id.*

32. *Id.*

33. *Clark*, 126 S. Ct. at 2718.

## II. BACKGROUND OF ARIZONA REVISED STATUTES § 13-502

Arizona's first insanity defense predates its statehood and originated in the Penal Code of 1901, which distinguished "idiots," "lunatics," and those "affected with insanity" from persons of sound mind, and thus excluded such individuals from the category of persons "capable of committing crimes."<sup>34</sup> The criminal codes of Arizona adopted in 1913, 1928, and 1939 incorporated the insanity defense as presented in the Penal Code of 1901.<sup>35</sup>

During the period prior to enactment of an insanity defense statute, Arizona case law adopted the common law test originating from *M'Naghten*,<sup>36</sup> a nineteenth century House of Lords decision.<sup>37</sup> In 1977, Arizona enacted its first insanity statute, which essentially codified Arizona's existing case law and mirrored the long-standing *M'Naghten* test:

A person is not responsible for criminal conduct if at the time of such conduct the person was suffering from such a mental disease or defect as not to know the nature and quality of the act or, if such person did know, that such person did not know that what he was doing was wrong.<sup>38</sup>

In 1983, the Arizona legislature amended Arizona Revised Statutes § 13-502(C) to shift the burden to the defendant to prove his insanity by clear and convincing evidence.<sup>39</sup> Today, Arizona is one of only a few states to require defendants to prove insanity by clear and convincing evidence.<sup>40</sup>

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34. See Renee Melancon, Note, *Arizona's Insane Response to Insanity*, 40 ARIZ. L. REV. 287, 294 (1998).

35. See *id.*

36. See *M'Naghten's Case*, (1843) 8 Eng. Rep. 718 (H.L.). In *M'Naghten* the House of Lords held that to

establish a defence on the ground of insanity, it must be clearly proven that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

*Id.* at 722. The *M'Naghten* test became the standard for assessing criminal responsibility in the United States until the irresistible impulse test, Durham test, and later the American Law Institute test gained favor in a number of jurisdictions. Melancon, *supra* note 34, at 291-94. Today, the cognitive incapacity test and moral incapacity test continue to provide a foundation for the many variations of insanity tests adopted under federal and state laws. See *infra* note 52.

37. See *Foster v. State*, 294 P. 268, 271 (Ariz. 1930); *Judd v. State*, 16 P.2d 720, 722-23 (Ariz. 1932).

38. Act of May, 31, 1977, ch. 142, 1977 Ariz. Sess. Laws 678, 703 (effective Oct. 1, 1978).

39. Melancon, *supra* note 34, at 294.

40. *Id.*; see also ALA. CODE § 13A-3-1(c) (2006); FLA. STAT. ANN. § 775.027(2) (West 2006); N.H. REV. STAT. ANN. § 628:2(II) (2006); S.D. CODIFIED LAWS § 22-5-10 (Michie 2006); TENN. CODE ANN. § 39-11-501(a) (West 2006).

Arizona next amended its insanity defense in 1993.<sup>41</sup> In doing so, Arizona created a new verdict of “guilty except insane.”<sup>42</sup> Under the revised statute, which remains in effect today, a person could be found guilty except insane if at the time of the crime the person was “afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong.”<sup>43</sup> In addition to eliminating the cognitive incapacity prong of the *M’Naghten* test, the revised statute also limited what could be considered “mental disease or defect” by excluding certain undefined disorders, and identifying specific conditions that were not sufficient to constitute insanity.<sup>44</sup> Consequently, the Arizona statute excludes from mental disease or defect disorders resulting from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders, or impulse control disorders.<sup>45</sup> In addition, conditions that fail to constitute insanity under the new statute include, but are not limited to, “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.”<sup>46</sup> Today, the high hurdle an Arizona defendant must overcome to prove insanity remains unchanged.<sup>47</sup>

### III. OPINIONS AND ANALYSES OF THE U.S. SUPREME COURT

The United States Supreme Court divided sharply on whether Arizona’s exclusion of mental-defect evidence on the issue of mens rea infringed on due process rights of criminal defendants. In a 5–4 decision, the Court affirmed Clark’s conviction and held that Arizona’s narrow insanity test and rule excluding evidence of mental illness to disprove mens rea do not violate due process. Justice Souter wrote the majority opinion, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. Justice Breyer concurred with the Court’s reasoning on the mens rea issue, but would have remanded the case and, therefore, dissented with the Court’s ultimate disposition. Justice Kennedy filed a dissenting opinion, in which Justices Stevens and Ginsburg joined. In his dissent, Justice

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41. Melancon, *supra* note 34, at 303.

42. *Id.*

43. ARIZ. REV. STAT. ANN. §13-502(A) (2004). Under the previous statute, a defendant found insane was acquitted by reason of insanity and was not subject to a mandatory period of commitment beyond the initial commitment period as defined in the statute; rather, the defendant was committed to a state mental health facility until he could prove “by clear and convincing evidence that he [was] either no longer suffering from mental disease or defect or no longer a danger to himself or others.” ARIZ. REV. STAT. ANN. §13-3994(C) (1993). However, under the revised statute, if a defendant is found guilty except insane, the judge must commit the defendant for a period of time equivalent to the presumptive sentence the defendant could have received if he had not been found insane. ARIZ. REV. STAT. ANN. §13-502(D) (2004).

44. Melancon, *supra* note 34, at 304.; *Clark*, 126 S. Ct. at 2719.

45. ARIZ. REV. STAT. ANN. §13-502(A).

46. *Id.*

47. *Id.* §13-502. In 1996, the Arizona legislature amended the statute to reflect the appropriate procedure for sentencing individuals found guilty except insane. *See id.* § 13-502(D). No amendments were made to the criteria for proving that a defendant was guilty except insane. *Id.* § 13-502(A).

Kennedy rejected the majority's holding that Arizona could convict a defendant without allowing the defendant the opportunity to present "critical" and "reliable" evidence that would negate the mental element of the crime. The dissent further argued that the majority incorrectly omitted analysis of whether the Arizona courts had failed to consider expert observation evidence proffered by Clark. The dissent would have reversed based on the mens rea issue; thus, it did not address Arizona's insanity defense.

#### *A. Majority Decision*

Justice Souter began his analysis by addressing whether Arizona's insanity defense, which allows only the moral incapacity component of the *M'Naghten* rule, violates due process.<sup>48</sup> Under *M'Naghten*, a person is insane if he is suffering from either cognitive incapacity or moral incapacity at the time of the alleged crime.<sup>49</sup> Clark, the petitioner, argued that Arizona's narrow insanity defense "offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>50</sup> Justice Souter rejected this contention and stated that "[h]istory shows no deference to *M'Naghten* that could elevate its formula to the level of fundamental principle, so as to limit the traditional recognition of a State's capacity to define crimes and defenses."<sup>51</sup> Justice Souter further noted that Clark's argument failed because there are four traditional approaches to insanity that today provide the foundation for the various state insanity tests.<sup>52</sup> Thus, no one particular formulation of the insanity defense forms the baseline for due process.<sup>53</sup> Accordingly, the decision as to how to define insanity is "substantially open to state choice."<sup>54</sup>

The Court's decision rested in part on its determination that cognitive incapacity forms a subset of moral incapacity, and that, therefore, a finding of the former necessarily includes a finding of the latter.<sup>55</sup> The Court reasoned that if a person did not know what he was doing when he acted, then he could not have known what he was doing was wrong. Further, the Court noted that Clark could not identify any evidence probative to the issue of insanity that the trial judge excluded.<sup>56</sup> The Court concluded that there was sufficient evidence that the trial judge considered the insanity evidence put forward by Clark in ruling that Clark's

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48. *Clark*, 126 S. Ct. at 2719.

49. *Id.*; *M'Naghten's Case*, (1843) 8 Eng. Rep. 718, 722 (H.L.).

50. *Id.* (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

51. *Id.*

52. *Id.* at 2720. The four traditional insanity tests include cognitive incapacity, moral incapacity, volitional incapacity or irresistible impulse, and product-of-mental illness. *Id.* The cognitive and moral incapacity tests as formulated in *M'Naghten* served as the primary test until irresistible impulse and product-of-mental illness tests gained acceptance in the mid to late 19th century. *Id.*; see also Melancon, *supra* note 34, at 292. Today, states employ insanity tests that combine one or more of the traditional approaches ranging from a full *M'Naghten* test to a hybrid of the volitional and moral incapacity tests. *Clark*, 126 S. Ct. at 2720–21.

53. *Id.*

54. *Id.* at 2722.

55. *Id.*

56. *Id.* at 2723.

mental illness did not impact his cognitive capacity so severely that “he did not know right from wrong.”<sup>57</sup> Accordingly, the Supreme Court held that neither in theory nor in practice did Arizona’s abbreviation of the *M’Naghten* test violate Clark’s due process rights.<sup>58</sup>

In determining whether, as Clark argued, due process requires an opportunity for a criminal defendant to present evidence of his mental illness or related incapacity to negate the mens rea element of the crime charged, the Court identified the categories of evidence that might be relevant to intent.<sup>59</sup> Justice Souter identified three categories that might be probative: observation evidence, mental-disease evidence, and capacity evidence.<sup>60</sup> Observation evidence would include lay testimony by those who observed Clark’s actions or heard his words and expert testimony concerning Clark’s “tendency to think in a certain way and his behavioral characteristics.”<sup>61</sup> Mental-disease evidence would embrace expert testimony about whether Clark suffered from mental disease or defect at the time of the crime.<sup>62</sup> Experts would also deliver capacity evidence, which would address whether Clark’s disease or defect left him incapable of appreciating the nature and quality of his conduct and knowing it was wrong.<sup>63</sup>

Although the *Mott* court did not recognize or follow the three evidentiary categories created by Justice Souter, the Court found that *Mott* restricted mental-disease evidence and capacity evidence, but not observation evidence.<sup>64</sup> The Court acknowledged that the trial judge incorrectly applied the *Mott* restriction to all evidence offered by Clark to negate mens rea.<sup>65</sup> Clark, however, had not specifically objected to the trial judge’s erroneous refusal to admit observation evidence.<sup>66</sup> Thus, Clark’s due process challenge was limited to the restrictions placed on mental-disease evidence and capacity evidence.<sup>67</sup>

According to Justice Souter, Clark’s argument that the *Mott* rule violates due process implicated three principles of criminal justice.<sup>68</sup> First, the Court addressed the presumption of innocence.<sup>69</sup> As applied to the burden of proving the mens rea element, like any other element in a criminal case, the presumption of innocence is overcome through proof beyond a reasonable doubt.<sup>70</sup> Thus, the State is required to present evidence proving beyond a reasonable doubt that Clark

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57. *Id.* at 2724.

58. *Id.*

59. *Id.*

60. *Id.* at 2724–25.

61. *Id.*

62. *Id.* at 2725.

63. *Id.*

64. *Id.* at 2726; *see also id.* at 2738 (Kennedy, J., dissenting).

65. *Id.* at 2726.

66. *Id.* at 2727–28.

67. *Id.* Justice Kennedy noted that, in limiting Clark’s due process challenge, “the Court narrow[ed] Clark’s claim so he [could not] raise the point everyone else thought was involved in the case.” *Id.* at 2738 (Kennedy, J., dissenting).

68. *Id.* at 2729.

69. *Id.*

70. *Id.*

intended to kill an officer in the line of duty or knew that Officer Moritz was an officer on duty.<sup>71</sup>

Second, the Court discussed the presumption of sanity, that is, the presumption that a defendant has the capacity to form the requisite intent, or mens rea.<sup>72</sup> Similar to the presumption of innocence, the force of the presumption of sanity is dictated by the force of evidence necessary to overcome it.<sup>73</sup> The two situations where a state may allow a defendant to challenge the presumption of sanity coincide with the due process violations claimed by Clark: presentation of mental disease evidence to negate the mens rea element of the crime and presentation of evidence to support the affirmative defense of insanity.<sup>74</sup> In jurisdictions that consider mental-disease and -defect evidence on par with other evidence relevant to criminal intent, such evidence need only support reasonable doubt in order to justify acquittal.<sup>75</sup> On the other hand, the quantum of evidence required to support the insanity defense varies by jurisdiction.<sup>76</sup> For instance, under Arizona Revised Statutes § 13-502(C), acquittal requires the defendant to present clear and convincing evidence that he lacked the capacity to form the requisite intent.<sup>77</sup>

Third, Clark's argument raised questions concerning the principle that a criminal defendant is entitled to present evidence which tends to disprove elements of the charged offense.<sup>78</sup> The Court agreed that evidence that shows "a defendant suffers from a mental disease and lacks capacity to form mens rea is relevant to rebut evidence that he did in fact form the required mens rea at the time in question."<sup>79</sup> The Court noted, however, that a judge could limit or exclude such evidence if its probative value is far outweighed by its potential to unfairly prejudice, confuse, or mislead the factfinder.<sup>80</sup> Arizona's rule seeks only to channel or restrict mental-disease evidence and capacity evidence to the issue of sanity, and not to exclude it entirely.<sup>81</sup> Thus, the question from the Court's perspective was whether sufficient reasons exist, in conformance with the fundamental fairness standard of due process, for channeling and restricting the evidence.<sup>82</sup>

The Court cited two reasons that support a state's limiting the use of mental-disease evidence: The authority of the state to define its presumption of

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71. *Id.*

72. *Id.* at 2729–30. Because of the presumption of sanity, the prosecution need not prove that a defendant has the capacity to form criminal intent. *Id.* at 2730. Rather, the burden rests on the defendant to prove that he lacks the capacity to form the requisite mens rea. *See id.*

73. *Id.*

74. *Id.*

75. *Id.* at 2730–31.

76. *Id.*

77. ARIZ. REV. STAT. ANN. §13-502(C) (2004).

78. *Clark*, 126 S. Ct. at 2731.

79. *Id.*

80. *Id.* at 2731–32.

81. *Id.* at 2732.

82. *Id.*

sanity and the controversial nature of mental-disease evidence and capacity evidence.<sup>83</sup> In Arizona, a defendant wishing to overcome the presumption of sanity must prove his insanity by clear and convincing evidence.<sup>84</sup> Thus, the Court reasoned that forcing Arizona to admit mental-disease evidence and capacity evidence bearing on mens rea would open a back door to a defense of diminished capacity, a door specifically shut by the Arizona legislature.<sup>85</sup> The Court was concerned that a defendant who could not meet the clear and convincing standard for an insanity defense would instead attempt to take advantage of the lower burden of proof required to disprove the mens rea element of a specific intent crime.<sup>86</sup> If this were to occur, then the clear and convincing standard for proving insanity would become irrelevant as a lesser standard of evidence might convince a jury to acquit, rather than find a defendant guilty but insane. The Court noted that although, a state was free to allow such a possibility, a state wishing to preserve its chosen standard had sufficient reason for confining consideration of mental-disease evidence and capacity evidence to the insanity defense.<sup>87</sup>

This rationale alone, however, is not enough to justify the rule in *Mott*.<sup>88</sup> As the dissent argues, if the same evidence that affirmatively proves a defendant is guilty except insane “also shows that it is at least doubtful that [the defendant] could form mens rea,” then it is a violation of the defendant’s due process rights to prohibit him from using such evidence to rebut mens rea.<sup>89</sup> The Court answered this argument by noting there were risks associated with such evidence that justified the restrictions imposed by *Mott*.<sup>90</sup> In arriving at this conclusion, the Court focused on the “controversial character of some categories of mental disease,” the “potential of mental-disease evidence to mislead” the factfinder, and the “danger of according greater certainty to capacity evidence than experts claim for it.”<sup>91</sup> Although the Court found that Arizona was acting within its authority in channeling the evidence, it was careful to note that states are free to decide differently.<sup>92</sup>

Thus, the Supreme Court held that Arizona’s rules function to preserve its standard for recognizing insanity as an affirmative defense and to “avoid confusion and misunderstanding on the part of the jurors,”<sup>93</sup> and therefore do not violate due process.

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83. *Id.* at 2732–35.

84. *Id.* at 2732.

85. *Id.* at 2732–33.

86. *Id.*

87. *Id.* at 2733.

88. *Id.* at 2733–34.

89. *Id.* at 2734. It is fundamental to the American justice system that a defendant be afforded the opportunity to present a complete defense. A rule which bars a defendant from presenting all relevant and credible evidence relating to a required element of the offense charged violates the spirit, if not the letter, of both the Due Process and Confrontation Clauses of the Constitution. *See id.* at 2743–44 (Kennedy, J. dissenting).

90. *Id.* at 2734.

91. *Id.*

92. *Id.* at 2736.

93. *Id.* at 2737.

### *B. Justice Breyer's Opinion*

Justice Breyer, concurring in part, yet dissenting in the ultimate disposition, agreed with Justice Souter's categorization of insanity-related evidence.<sup>94</sup> However, Justice Breyer expressed concern that the Arizona courts did not appreciate the distinction between the categories of evidence.<sup>95</sup> Accordingly, Justice Breyer would have remanded the case to allow the Arizona courts to determine whether Arizona law is consistent with the majority's approach and whether the trial court applied the law as such.<sup>96</sup>

Adopting this approach, Justice Breyer takes the middle ground. In his opinion, Arizona courts should have had the opportunity to evaluate whether the trial judge erroneously excluded observation evidence, evidence that could have provided sufficient doubt as to whether Clark possessed the capacity to form the necessary mens rea.

### *C. The Dissent*

In his dissent, Justice Kennedy, joined by Justices Stevens and Ginsburg, rejected the Court's holding that Arizona did not violate due process by denying Clark the opportunity to present "critical" and "reliable" evidence to negate mens rea.<sup>97</sup> He also admonished the Court for not considering the observation evidence erroneously excluded by the trial judge, based on an "error" by Clark's counsel.<sup>98</sup> As Justice Kennedy would have reversed the opinion of the Arizona Court of Appeals on that basis, he did not address the issue of whether Arizona's narrow insanity defense violates due process.<sup>99</sup>

Justice Kennedy began his dissent by noting that the majority invented its three-tiered categorization of evidence in the matter at hand, and that the "evidentiary universe," lacking in authority to support it, was "unworkable on its own terms."<sup>100</sup> Further, the Court's evidentiary framework was never addressed by the state trial court or appellate courts, counsel for the parties, or in briefs to the Court.<sup>101</sup> Thus, it was "unrealistic and most unfair, to hold that Clark's counsel erred in failing to anticipate so novel an approach."<sup>102</sup> Instead, a more appropriate approach would have been to remand the case to the Arizona courts to determine whether Clark truly waived his objection.<sup>103</sup>

The impact of adopting a framework that is unworkable extends beyond the matter at hand.<sup>104</sup> The Court's framework divorces the relevant factual evidence from the expert testimony needed to put the defendant's behaviors and

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94. *Id.* at 2737–38 (Breyer, J., concurring in part and dissenting in part).

95. *Id.* at 2738.

96. *Id.*

97. *Id.* (Kennedy, J., dissenting).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

symptoms into context for the jury.<sup>105</sup> Further, by excluding expert psychiatric testimony, the Court robs the defendant of the confirming evidence that makes lay testimony both credible and understandable.<sup>106</sup>

The dissent argues that, even assuming that the framework was not fundamentally flawed, the Court erred in narrowing Clark's claim.<sup>107</sup> Although Clark's counsel may not have raised his objection to the Court in the neat package they desired, the record is clear that Clark's objection to the exclusion of evidence bearing on mens rea was made at every stage of the proceedings.<sup>108</sup>

Contrary to the Court's findings, Clark's claim raised more than just an objection to *Mott*, as evidenced by Clark's attempts to distinguish *Mott* by arguing that the trial judge refused to "consider all evidence of mental illness."<sup>109</sup> Further, the holding in *Mott* was not restricted to mental-disease evidence.<sup>110</sup> In its opinion, the Arizona Supreme Court did not reference any distinction between mental-disease and observation evidence.<sup>111</sup> Rather, the Arizona Supreme Court held that "Arizona does not allow evidence of a defendant's mental disorders short of insanity . . . to negate the mens rea element of a crime."<sup>112</sup> Based on the broad nature of this opinion, the dissent argued that the Court should have reached the "so-called observation-evidence issues."<sup>113</sup>

Perhaps more important are the implications to the defendant's rights under the Constitution. In addition to the due process constraints on a state's ability to exclude evidence, the Confrontation and Compulsory Process Clauses<sup>114</sup> also impose constitutional limitations on states.<sup>115</sup> The clauses together serve to guarantee a criminal defendant "a meaningful opportunity to present a complete defense."<sup>116</sup>

The dissent criticized the majority opinion for characterizing Clark's defense as general incapacity, and for failing to recognize that the mens rea element in question rests on a "factual determination," not a moral choice.<sup>117</sup> Of course, as the dissent notes, either Clark "knew he was killing a police officer or he did not."<sup>118</sup> Under the dissent's argument, if Clark did not appreciate this factual matter, then Clark needs no excuse as he did not commit the crime.<sup>119</sup> As Clark's evidence spoke directly to the factual determination of whether he knew that he

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105. *Id.* at 2739.

106. *Id.*

107. *Id.*

108. *Id.* at 2740.

109. *Id.*

110. *Id.*

111. *Id.* at 2741.

112. *State v. Mott*, 931 P.2d 1046, 1050 (Ariz. 1997), *cert. denied*, 520 U.S. 1234 (1997).

113. *Clark*, 126 S. Ct. at 2741.

114. U.S. CONST. amend. VI.

115. *Clark*, 126 S. Ct. at 2743.

116. *Id.* (quoting *Holmes v. South Carolina*, 126 S. Ct. 1727, 1731 (2006)).

117. *Id.*

118. *Id.*

119. *Id.*

was killing a police officer, the trial judge's exclusion of all evidence is problematic under the Due Process and Compulsory Process Clauses and likely inconsistent with the Confrontation Clause.<sup>120</sup>

From the dissent's perspective, Arizona's rule is troublesome as it excludes evidence without regard to its credibility or materiality in disproving the mens rea element of the charged offense.<sup>121</sup> The dissent concedes there are instances in which *per se* exclusions are valid; however, if the rule substantially burdens the defense, the State is required to provide a valid reason for the rule.<sup>122</sup> Because Arizona has evidence rules in place to evaluate and exclude evidence which is speculative or unreliable, there is no valid reason for a *per se* exclusion of evidence related to mental illness.<sup>123</sup> Further, the difficulty or complexity of resolving a factual issue is not an adequate reason for prohibiting a jury from considering critical defense evidence.<sup>124</sup> Citing *United States v. Booker*,<sup>125</sup> the dissent reminded the Court that "[w]e have always trusted juries to sort through complex facts in various areas of law."<sup>126</sup> Thus, by spending very little time looking at the reliability of the evidence proffered by Clark and the risk of misleading the factfinder in his case in particular, the Court excluded psychiatric evidence and allowed the possibility of convicting a blameless man.<sup>127</sup>

Further, as the dissent noted, even though the psychiatric experts reached different conclusions about the effect of Clark's mental illness on his capacity to form the requisite intent, this only meant that the evidence was contested, not that the evidence was irrelevant or misleading.<sup>128</sup> This argument is clearly supported by the fact the trial judge was able to evaluate the competing evidence and draw his own conclusion on Clark's mental state.<sup>129</sup> Arguably, the potential to mislead increases under the Court's evidentiary framework as jurors will be privy to observation evidence, but will be denied the benefit of the corresponding explanations from the relevant experts.<sup>130</sup>

By denying mental-disease evidence that would negate mens rea, the Court runs the very real danger of relieving the State of its responsibility to prove all elements beyond a reasonable doubt, a requirement set down by the Court in *In re Winship*.<sup>131</sup> The right to introduce evidence on an element of the offense "is not respected by allowing evidence to come in only on an issue for which the defendant bears the burden of proof."<sup>132</sup>

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120. *Id.* at 2744.  
121. *Id.*  
122. *Id.*  
123. *Id.* at 2744–45.  
124. *Id.* at 2745.  
125. 543 U.S. 220, 289 (2005).  
126. *Clark*, 126 S. Ct. at 2745.  
127. *Id.* at 2746.  
128. *Id.*  
129. *Id.*  
130. *Id.* at 2746–47.  
131. 397 U.S. 358, 364 (1970).  
132. *Clark*, 126 S. Ct. at 2747.

Although a state has broad discretion in defining criminal offenses, “[u]nder the State’s logic, a person would be guilty of first-degree murder if he knowingly or intentionally killed a police officer or committed the killing under circumstances that would show knowledge or intent but for the defendant’s mental illness.”<sup>133</sup> There can be no rational basis for criminally punishing a person “who commits a killing without knowledge or intent only if that person has a mental illness.”<sup>134</sup> Even where future dangerousness is a concern, the civil commitment process provides a mechanism to address this concern and therefore negates any rational basis for convicting mentally ill defendants of crimes they did not commit.<sup>135</sup>

Lastly, the dissent argues that although other jurisdictions may adopt the same rule as Arizona, that fact is not dispositive in evaluating Clark’s claim.<sup>136</sup> While there may be some states that restrict mental-disease and -defect evidence, this does not provide sufficient support for Arizona’s *per se* bar.<sup>137</sup>

### CONCLUSION

In *Clark v. Arizona*, the U.S. Supreme Court held that Arizona’s narrow insanity test and exclusion of evidence of mental illness and incapacity due to mental illness to negate mens rea do not violate due process. In reaching its decision, the Court created and applied a new evidentiary framework. As pointed out by the dissent, the decision denied the defendant the opportunity to challenge the exclusion of key evidence that might have established that he lacked the requisite mens rea of the offense charged solely because his counsel did not foresee the novel approach the Court took in categorizing evidence. Looking to the future, the Arizona rule, as interpreted by the Court, will force juries to determine guilt without the benefit of expert testimony as to any medical defect or disease and its impact on the defendant’s ability to form the requisite intent, which has the potential to cause unnecessary jury confusion and a denial of justice for the mentally ill.

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133. *Id.*

134. *Id.* at 2748.

135. *Id.*

136. *Id.* at 2749.

137. *Id.*