DIAGNOSING *AMARAL*: MENTAL HEALTH CONDITIONS AS NEWLY DISCOVERED EVIDENCE

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The criminal justice system regularly relies on psychiatric evidence to guide policy decisions related to issues of a defendant's competency to stand trial, culpability, and sentencing. Using psychiatric and psychological evidence is meant to ensure fair outcomes for defendants who may not be morally blameworthy for their actions. Defendants with recognized behavioral, psychological, or biological dysfunctions that limit their capacity to distinguish right from wrong are arguably less responsible for their crimes, and their sentences should reflect this diminished culpability. However, as the psychiatric community continues to study known disorders, the implications of a particular diagnosis related to an individual's underlying behavioral characteristics similarly evolves. In State v. Amaral*, the Arizona Supreme Court considered whether advances in juvenile psychology and neurology over a twenty-year period constituted a colorable claim of newly discovered evidence in a post-conviction relief proceeding. This Note identifies a potential misinterpretation of the holding and examines why this interpretation is flawed, particularly under the contemporary DSM-5. It then identifies the proper inquiry of whether new research or evidence of a mental disorder constitutes newly discovered evidence, thereby showing how* Amaral *aligns with policy goals.*

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INTRODUCTION

As early as 1862, an American Civil War surgeon noticed soldiers suffering wartime casualties beyond physical injury, referring to their symptoms as "irritable and exhausted soldier's hearts."[1] Despite such early diagnoses, it took more than 100 years, two world wars, and lingering traumas from the Vietnam War for the medical community to officially recognize post-traumatic stress disorder ("PTSD") as a medical disorder.[2] Before the psychiatric community officially recognized PTSD as a medical condition, its symptoms were colloquially referred to as "battle fatigue," "shell shock," "combat neurosis," and "Post-Vietnam Syndrome."[3] When the psychiatrist who coined the term Post-Vietnam Syndrome learned that the drafters of the Third Edition of the *Diagnostic and Statistical Manual of Mental Disorders*[4] ("DSM-III") planned to omit any kind of diagnoses for trauma, he lobbied for its official recognition in the psychiatric community.[5] With the support of other psychiatrists studying stress-induced neuropsychiatric disorders, he convinced the American Psychiatric Association ("APA")[6] to officially include PTSD in the DSM-III.[7]

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1. Jeffrey A. Lieberman, *From 'Soldier's Heart' to 'Vietnam Syndrome': Psychiatry's 100-Year Quest to Understand PTSD*, TORONTO STAR (Mar. 7, 2015), https://www.thestar.com/news/insight/2015/03/07/solving-the-riddle-of-soldiers-heart-post-traumatic-stress-disorder-ptsd.html (chronicling the long road to PTSD's official recognition).

2. *Id.*

3. *Id.* On May 6, 1972, Chaim F. Shatan, psychiatrist and advocate for Vietnam veterans, published an article in which he described his research regarding post-war trauma for the first time, using the term "Post-Vietnam Syndrome." Chaim F. Shatan, *Post-Vietnam Syndrome*, N.Y. TIMES, May 6, 1972, at 35.

4. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980).

5. *Id.*

6. For the purposes of this Note, "APA" refers to the American Psychiatric Association, although the abbreviation typically refers to the American Psychological Association. Though psychiatrists and psychologists are both trained to help individuals cope with mental health issues, psychiatrists must complete medical school, sit for a written examination for a state license to practice medicine, and then complete four years of residency. *What Is Psychiatry?,* AM. PSYCHIATRIC ASS'N,

The evolution of the term PTSD and its struggle for official recognition within the medical community illustrate the fluid nature inherent in classifying behavioral and neurological disorders. The APA continually updates the DSM by adding new disorders, removing previously recognized disorders, and consolidating separate disorders into one. At the same time, the legal system frequently relies on psychiatric and psychological evidence to assess criminal responsibility.[8] In light of the intersection of psychiatry and the law, these frequent fluctuations in diagnostic terms require the legal system to look beyond the specific diagnostic label the medical community currently attaches to a particular cluster of symptoms. Instead, those in the legal system must scrutinize the behavioral implications of particular conditions when assessing a defendant's culpability.[9] A defendant found guilty of a particular crime may secure a lesser sentence by presenting evidence that he or she suffers from a recognized mental disorder.[10] This is not because of the diagnosis itself, but because that particular diagnosis carries behavioral implications that limit the defendant's "capacity to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law . . . ."[11] Similarly, in the wake of a

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https://www.psychiatry.org/patients-families/what-is-psychiatry (last visited Nov. 22, 2016). Accordingly, psychiatrists are able to prescribe medications, and spend the majority of their time providing patients with medication management as part of treatment. *Id.* By contrast, psychologists are trained in a behavioral approach to treating mental health disorders and offer behavioral counseling and therapy to treat the underlying disorders. Christian Nordqvist, *What is Psychology? What are the Branches of Psychology?*, MED. NEWS TODAY (Aug. 14, 2015), http://www.medicalnewstoday.com/articles/154874.php. Further, the American Psychiatric Association publishes the DSM. *About DSM-5*, AM. PSYCHIATRIC ASS'N, http://www.dsm5.org/about/Pages/Default.aspx (last visited July 24, 2016).

7. Matthew J. Friedman, *PTSD History and Overview*, U.S. DEP'T VETERAN AFFS., http://www.ptsd.va.gov/professional/PTSD-overview/ptsd-overview.asp (last visited July 24, 2016).

8. *See* Jane Tyler Ward, *What is Forensic Psychology?*, AM. PSYCHOL. ASS'N (Sept. 2013), http://www.apa.org/ed/precollege/psn/2013/09/forensic-psychology.aspx. According to the American Psychological Association, "forensic psychology" is defined as "the application of clinical specialties to the legal arena." *Id.* Additionally, "the most frequent duty of forensic psychologists" involves "psychological assessment" of individuals who are involved in the legal system. *Id.*

9. "Mens rea," or "guilty mind," is an essential element in many crimes. It has been described as "shorthand for a broad network of concepts encompassing much of the relationship between the individual and the criminal law." Additionally, "[w]estern nations have long looked to the wrongdoer's mind to determine both the propriety and the grading of punishment." United States v. Cordoba-Hincapie, 825 F. Supp. 485, 489 (E.D.N.Y. 1993).

10. This Note uses "mental disorder" in accordance with the APA's current usage, but may, when quoting older decisions, include outdated terminology. *See Diagnostic and Statistical Manual of Mental Disorder (DSM)*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/psychiatrists/practice/dsm (last visited Sept. 6, 2016) (defining "mental disorder").

11. ARIZ. REV. STAT. ANN. § 13-701(E)(2) (Supp. 2015) ("For the purpose of determining the sentence pursuant to subsection C of this section, the court shall

newly recognized mental health disorder in the psychiatric community, a defendant who had exhibited symptoms of an unknown or misunderstood disorder may have the proportionality of his or her sentence re-examined by filing a petition for post-conviction relief based on newly discovered evidence.[12]

In 1989, in *State v. Bilke*, the Arizona Supreme Court ruled that a defendant's latent PTSD diagnosis constituted "newly discovered evidence"[13] in his petition for post-conviction relief, in large part because PTSD was not an officially recognized mental disorder at the time of his sentencing.[14] Because the APA subsequently recognized a specific diagnostic label and the defendant had exhibited PTSD symptoms during the relevant time, the diagnosis "easily [met]" the newly discovered evidence requirement in post-conviction relief petitions.[15] Further, the court ruled that this diagnosis constituted a colorable claim because it "would likely have altered the verdict, finding, or sentence if known at the time of trial."[16]

Nearly 30 years later, in the only other Arizona Supreme Court case to reconsider advancement in behavioral health research as newly discovered evidence, the Court ruled that two decades of evolving research in juvenile psychology and neurology did not constitute newly discovered evidence.[17] The defendant in *State v. Amaral* premised his petition for post-conviction relief on modern scientific findings in juvenile psychology and neurology, which the U.S. Supreme Court had considered in decisions abolishing both the death penalty and mandatory life imprisonment without parole for juvenile offenders.[18] However, in Amaral's petition for post-conviction relief, the Arizona Supreme Court found that the advancements in research merely supplemented what was already known regarding the behavioral implications of the defendant's then-status as a juvenile.[19]

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consider . . . [t]he defendant's capacity to appreciate the wrongfulness of the defendant's conduct . . . .").

12. *See* ARIZ. R. CRIM. P. 32.1(e).

13. State v. Bilke, 781 P.2d 28, 30 (Ariz. 1989); ARIZ. R. CRIM. P. 32.1(e)(1). For a defendant to obtain post-conviction relief, he or she must present newly discovered evidence, which means that the evidence must "appear on its face to have existed at the time of trial." *Bilke*, 781 P.2d at 29–30 (citing State v. Fisher, 686 P.2d 750, 773–74 (Ariz. 1984)). If the defendant can present a colorable claim of newly discovered evidence, then this evidence can subsequently lead to a new trial or impact the defendant's sentencing. *Id.* at 30.

14. *Bilke,* 781 P.2d at 28.

15. *Id.* at 30.

16. *Id.* at 28.

17. State v. Amaral, 368 P.3d 925 (Ariz. 2016).

18. *See id.* at 929 (first citing Miller v. Alabama, 132 S. Ct. 2455 (2012) (holding unconstitutional mandatory life imprisonment without parole for juvenile offenders); then citing Graham v. Florida, 560 U.S. 48 (2010) (ruling that mandatory life in prison without parole for juvenile offenders who did not commit a capital offense violated the Eight Amendment's prohibition on cruel and unusual punishment); and then citing Roper v. Simmons, 543 U.S. 551 (2005) (holding that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on offenders who were under the age of 18 when they committed their crimes)).

19. *Id.*

This Note explores both the policy and practical implications of the *Bilke* and *Amaral* decisions in light of evolving behavioral and mental health research. Part I summarizes the newly discovered evidence doctrine as provided by the Arizona Supreme Court, which governs petitions for post-conviction relief based on newly discovered, non-physical evidence.[20] Part II addresses the potential for misinterpretation of *Amaral* and uses the DSM-5 to illustrate the inherent danger of a narrow reading of *Amaral*, which would erroneously focus on whether a particular diagnostic label existed at the time of trial or sentencing. Finally, Part III directs practitioners to accurately use *Amaral* by focusing the post-conviction relief inquiry on the behavioral implications of evolving mental health research, which also aligns with the doctrine of finality.

I. MENTAL HEALTH CONDITIONS AS NEWLY DISCOVERED EVIDENCE IN ARIZONA

Rule 32.1(e) of the Arizona Rules of Criminal Procedure allows a person who has been convicted of, or pled guilty or no contest to, a criminal offense to challenge the finality of his or her sentence. Of the available grounds for relief, the petitioner may assert that "newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence."[21] To succeed, a defendant must prove: (1) the newly discovered material facts were discovered after the trial; (2) the defendant exercised due diligence in securing the newly discovered material facts; and (3) the newly discovered material facts are not merely cumulative or used for the purpose of impeachment.[22]

A defendant is entitled to an evidentiary hearing regarding a claim of newly discovered evidence if he or she presents a "colorable claim."[23] A defendant presents a colorable claim by meeting five requirements:

> (1) the evidence must appear on its face to have existed at the time of trial but was discovered thereafter; (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering and bringing the facts to the court's attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; and (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.[24]

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20. Unlike petitions for post-conviction relief based on newly discovered physical evidence, such as DNA evidence that may exonerate a defendant, the newly discovered evidence in *Bilke* and *Amaral* involved behavioral or pathopsychological research. Non-physical evidence may shed light on why a defendant committed certain acts and whether the defendant could appreciate the consequences of his or her actions, whereas physical evidence may prove the defendant did not commit the crime. *See, e.g.*, State v. Gutierrez, 278 P.3d 1276, 1283 (Ariz. 2012) (contemplating DNA evidence on a hat found at the crime scene as newly discovered material facts).

21. ARIZ. R. CRIM. P. 32.1(e).

22. *Id.*

23. *Amaral*, 368 P.3d at 927.

24. *Id.* (citing State v. Bilke, 781 P.2d 28, 29–30 (Ariz. 1989)).

Courts may apply this framework equally in evaluating newly discovered physical and non-physical evidence, but their analysis in doing so is markedly different.[25]

Unlike newly discovered DNA evidence, new behavioral or psychiatric research may not implicate someone other than the defendant at the scene of a crime.[26] Instead, the research may offer a new understanding of why a defendant behaved in a particular way, or whether the defendant was able to appreciate the consequences of his or her actions. The complexity of this analysis is illustrated in the only two Arizona Supreme Court cases directly on the issue, decided nearly 30 years apart.

A. State v. Bilke

In *State v. Bilke*, decided in 1989, the defendant was convicted of three counts of armed robbery, three counts of armed rape, one count of armed kidnapping, and six counts of lewd and lascivious acts.[27] At trial, he attempted to defend his case based on a claim of mistaken identity.[28] Thirteen years after his conviction, the defendant asserted a post-conviction relief claim, citing newly discovered evidence that he suffered from PTSD as a result of his combat service in Vietnam.[29] In support of his petition, the defendant submitted a psychological report, which described in "graphic and chilling" detail how his time in Vietnam led to his development of PTSD.[30] In evaluating the defendant's petition, the Arizona Supreme Court looked to its decision in a workers' compensation case involving PTSD following its official recognition in the medical community.[31] The Court concluded that the PTSD diagnosis "easily me[t]" the newly discovered material facts requirement because the medical community had not officially recognized PTSD as a mental disorder at the time of his trial.[32] The Court noted that, while the defendant might have been aware that his mental condition was not stable at the time of his trial, he was not aware that he suffered from a condition that the medical community had not yet recognized, but would later be known as PTSD.[33]

The Arizona Supreme Court considered the importance of the official recognition of PTSD because "[t]he mental condition and impaired capacity of a

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25. *See e.g.*, State v. Tankersley, 121 P.3d 829, 829 (Ariz. 2005) (holding that subsequent DNA testing implicating someone other than the defendant as the source of the hair found at the scene of the crime constituted "newly discovered material facts").

26. *See supra* text accompanying note 25.

27. State v. Bilke, 781 P.2d 28, 28 (Ariz. 1989).

28. *Id.*

29. *Id.* at 29.

30. *Id.*

31. *Id.* at 30. Because the Court had declined to review the trial court's grant of a new trial in the one case involving PTSD in the context of ARIZ. R. CRIM. P. 32.1(e), there was no clear precedential authority, and the Court considered a worker's compensation benefits case. *Id.* In that case, the Court held that the plaintiff's claim was timely—despite being filed more than 20 years after the life-threatening incident—because PTSD was not diagnosable at the time the plaintiff originally sought treatment. *Id.*

32. *Id.*

33. *Id.*

defendant are commonly considered in arriving at sentencing decisions."[34] Thus, understanding a defendant's mental condition "can shed considerable light on why a defendant committed certain acts and what an appropriate sentence should be."[35] The defendant's PTSD impaired his cognitive abilities, and "his criminal activities were the result of the PTSD . . . and prior inappropriate mental health treatment."[36] Had the defendant known that his reported symptoms indicated a medical condition called PTSD, he may well have introduced this evidence at trial or sentencing.[37] As the Court explained, "Had the sentencing judge been aware that a mental disease known as post-traumatic stress disorder existed . . . and that the disorder was a causative factor leading to the commission of crimes, he might well have sentenced [the] defendant differently."[38] Until 2016, *Bilke* was the only clear authority dictating the extent a defendant in Arizona could base a petition for post-conviction relief on evolving psychiatric or behavioral research.

B. State v. Amaral

Although the *Bilke* court seemed to appreciate the official recognition of PTSD, it did so because of the behavioral implications of the new pathopsychological research.[39] In *State v. Amaral*, decided nearly 30 years later, the court clarified *Bilke* by distinguishing research that merely supplements known conditions from research identifying new behavioral implications for a condition not considered at the time of conviction.[40]

In *Amaral*, Travis Wade Amaral, the defendant, filed a petition for post-conviction relief for his 1993 conviction of two counts of first degree murder and one count of attempted armed robbery, crimes which he committed at the age of 16.[41] At his mitigation hearing, Amaral claimed that "a counselor at a placement center for violent juveniles . . . suggested the robbery, provided him with the loaded revolver, and told him to leave 'no witnesses.'"[42] Amaral was staying with the counselor at the time he committed the crimes.[43] A clinical psychologist who had interviewed Amaral prior to his sentencing testified that the counselor was a pedophile and was sexually abusing Amaral.[44]

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34. *Id.*
35. *Id.*
36. *Id.* at 29.
37. *Id.* In the course of his treatment before PTSD's official recognition, the defendant exhibited symptoms of "headaches, memory lapses, nervousness, sleep interruption, recurring thoughts of . . . combat, nightmares, guilt, and perceptual distortion (seeing combat or threatening situations during drill practice, i.e., flashbacks)." *Id.* Although the defendant reported these symptoms, he did not know they indicated that he suffered from a mental health condition that was the direct result of his time in combat. *Id.*
38. *Id.* at 30.
39. *Id*.
40. State v. Amaral, 368 P.3d 925 (Ariz. 2016).
41. *Id.* at 926.
42. *Id.*
43. *Id.*
44. *Id.*

At his mitigation hearing, Amaral also presented evidence regarding his mental health and maturity at the time of the crimes and sentencing. This included his diagnosis of attention deficit disorder and expert testimony that he displayed characteristics consistent with intermittent explosive disorder, bipolar disorder, and conduct disorder.[45] This evidence suggested that he was predisposed to impulsivity because of the interaction between attention deficit disorder and conduct disorder, which also made it difficult for him to control his behavior in certain situations.[46] The evidence also showed that, despite being 17 years old at the time of sentencing, Amaral's maturity level was "more like that of a thirteen or fourteen year old . . . ."[47] After considering this evidence, the trial judge sentenced Amaral to life imprisonment with the possibility of parole, but only after serving 57.5 years of his sentence.[48]

In 2012, Amaral filed a petition for post-conviction relief, citing "recent scientific findings in juvenile psychology and neurology," which showed that compared to adults, juveniles "(1) act more impulsively, (2) overemphasize rewards and underemphasize consequences, (3) are more susceptible to negative influences, (4) have less fixed personalities, and (5) are more likely to grow out of their risk taking behavior."[49] Amaral argued that these findings were analogous to the psychological evidence relied upon in *Bilke*, because both involved a new understanding of conditions that existed at trial.[50] The Court disagreed, and held that Amaral "failed to identify newly discovered material facts that probably would have altered his sentence."[51] The Court explained that "the . . . [new] research cannot constitute newly discovered material facts because juvenile behavioral tendencies and characteristics were generally known [at the time of sentencing], and the trial judge contemplated Amaral's youth and attendant characteristics when he considered Amaral's age, immaturity, and personal idiosyncrasies at the sentencing hearing."[52]

Thus, the Court distinguished Amaral's case from *Bilke*, explaining that the defendant in *Bilke* suffered from a condition that existed at the time of trial, but was undiagnosed because it was not yet recognized by the medical community.[53] In contrast, Amaral offered evidence that only improved the understanding of a condition already recognized—and considered—at Amaral's sentencing.[54] The Court stated:

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45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* The same evidence was considered by the U.S. Supreme Court in ruling that imposing against juveniles capital punishment or life in prison without parole constituted "cruel and unusual punishment" within the meaning of the Eighth Amendment. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012).
50. *Amaral*, 368 P.3d at 928.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*

> [I]t is the condition, not the scientific understanding of the condition, that needs to exist at the time of sentencing. . . . Like Bilke's PTSD, Amaral's juvenile status existed at the time of sentencing. But the behavioral implications of Amaral's condition, in contrast to Bilke's, were recognized at the time of his sentencing; that our understanding of juvenile mental development has since increased does not mean that the behavioral implications of Amaral's juvenile status are newly discovered.[55]

Therefore, because Amaral did not present a colorable claim, the Court dismissed his petition for post-conviction relief.[56]

II. POTENTIAL FOR MISINTERPRETATION OF *AMARAL*

A. Clarifying and Distinguishing the Holdings of **Amaral** *and* **Bilke**

Amaral and *Bilke* should not be interpreted to stand for the proposition that the application of Rule 32.1(e) turns on whether a particular diagnostic label existed at the time of sentencing. Rather, the proper inquiry is whether the condition existed at the time of trial but was not properly considered, such that new information about the condition "would likely have altered the verdict, finding, or sentence if known at the time of trial." In *Amaral*, the trial court had explicitly considered the defendant's juvenile status at sentencing by weighing his age and lack of maturity, as well as his upbringing and familial circumstances. By contrast, the *Bilke* trial court had not considered the defendant's symptoms of PTSD and their implications. Therefore, properly interpreted, these decisions compel defendants seeking post-conviction relief on the basis of evolving mental health research to look beyond diagnostic labels and consider whether the offered advancement is truly new, or only supplements the understanding of a condition that existed and was considered at the time of sentencing.

B. The Tension Between Skepticism and Justice

Though the *Amaral* decision directly addressed juvenile defendants seeking post-conviction relief, its reasoning has broader implications for defendants seeking to premise a petition for post-conviction relief on evolving mental health research. A mental disorder is a "manifestation of a behavioral, psychological, or biological dysfunction in the individual."[57] The law has a long history of skepticism about psychiatry.[58] The U.S. Supreme Court has repeatedly held that the law is not bound by psychiatry's official nosology[59] because the usual

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55. *Id.* at 930.

56. *Id.*

57. Stephen Morse, *Symposium: Preventative Detention: Mental Disorder and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885, 888 (2011).

58. Eric R. Maisel, *The New Definition of a Mental Disorder*, PSYCHOL. TODAY (July 23, 2013), https://www.psychologytoday.com/blog/rethinking-psychology/201307/the-new-definition-mental-disorder.

59. Nosology is a branch of medical science that addresses disease classification. Edward Shorter, *The History of Nosology and the Rise of the Diagnostic and Statistical*

diagnoses of mental disorders are often disputed and potentially inexact.[60] Even so, courts are interested in assessing the psychological characteristics of individuals in order to dispense fair and just outcomes pursuant to applicable law.[61] Fair and just outcomes are the goals of the sentencing portion of the criminal justice system, with sentences imposed to hold individuals morally responsible for their actions. For an actor to be held morally blameworthy, however, he must be capable of rational thought.[62]

Broad categorizations do not accurately account for psychological conditions and symptoms, at least in the legal field. "The mental disorder criterion for mental health laws achieves [the goal of justice] only imperfectly at best, but its presence in these laws confirms that the fundamental legal goal is to respond properly to rational incapacity."[63] The law then has not adapted to specific and minute advancements in psychology and instead continues to paint with a broad brush of general psychological conditions. Advancements in psychiatry provide guidance in dispensing sentences to individuals with mental and behavioral conditions, and "as people with criminal justice experience know, for many offenders the length of time that they will spend in prison is more important than whether they are convicted."[64]

C. The Limitations of the DSM-5 and Other Psychiatric Definitions

In May 2013, the APA released its revised fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-5").[65] This serves as "the authoritative guide to diagnosing medical conditions," and includes 15 new diagnoses to guide U.S. healthcare professionals.[66] Entries for conditions in the DSM-5 give healthcare providers descriptions, symptoms, and other criteria to help in diagnosing mental disorders.[67] Revising the manual took nearly a decade, as the process involved a series of work groups, which compiled the state of science relevant to the field, and 13 scientific conferences supported by the

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Manual of Mental Disorders, 17 DIALOGUES CLIN. NEUROSCIENCE 59, 59–67 (2015), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4421901/.

60. Carl E. Fisher et al., *Toward a Jurisprudence of Psychiatric Evidence: Examining the Challenges of Reasoning from Group Data in Psychiatry to Individual Decisions in the Law*, 69 U. MIAMI L. REV. 685, 689 (2015).

61. *Id.*; *see also* Morse, *supra* note 61, at 903, 924 (discussing "fairness" as it applies to imposing criminal liability on a defendant who has a mental abnormality).

62. Anders Kaye, *Resurrecting the Causal Theory of the Excuses*, 83 NEB. L. REV. 1116, 1160 (2005); *see also* MODEL PENAL CODE § 4.01 (AM. LAW INST. 1962) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.").

63. Morse, *supra* note 61 at 896.

64. *Id.* at 941–42.

65. *DSM-5 Development: Frequently Asked Questions*, AM. PSYCHIATRIC ASS'N, http://www.dsm5.org/about/pages/faq.aspx (last visited June 1, 2016) [hereinafter DSM-5 FAQ]; Jen Wieczner, *15 New Mental Illnesses in the DSM-5*, MKT. WATCH (May 25, 2013), http://www.marketwatch.com/story/15-new-mental-illnesses-in-the-dsm-5-2013-05-22.

66. *Id.*

67. *See* DSM-5 FAQ, *supra* note 69.

National Institutes of Health.[68] The task force responsible for developing the new DSM-5[69] was comprised of more than 160 of the top researchers and clinicians from around the world—experts in neuroscience, biology, genetics, and social and behavioral sciences.[70] As the APA explains, "[a]dvances in the science of mental disorders have been dramatic in the past decades."[71] This has created a need to more accurately classify mental disorders and their symptoms. The APA recognized that by more accurately defining disorders and characterizing the symptoms of behaviors not well defined in DSM-IV, those seeking clinical help are more likely to have access to treatment.[72]

"DSM diagnoses are based on a consensus about clusters of clinical symptoms, not any objective laboratory measure."[73] Thus, while prevailing medical practice should inform legal determinations involving mental disorders, there is potential for diagnostic criteria and reports of the defendants' behaviors to be misused in legal settings.[74] Nonetheless, both psychiatric and psychological research inform legal decisions. Over the past 25 years, the field of psychology has witnessed unprecedented growth and advancement, including new areas of research, new sub-disciplines, and new methodologies.[75] In 2001, the American Psychological Association voted to officially recognize the growing field of forensic psychology—the engagement of psychologists as experts in the judicial system—as a specialty.[76] Ira K. Packer, professor of clinical psychiatry at the University of Massachusetts Medical School, observes that there has been a "proliferation of the need" for psychologists to provide diagnostic expertise in the courtroom.[77] Indeed, the American Psychological Association encourages students to consider the field as a postgraduate growth area, as the demand for diagnostic

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68. *DSM History*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/psychiatrists/practice/dsm/history-of-the-dsm (last visited Nov. 22, 2016).

69. Though the APA used roman numeral designations to refer to previous editions of the DSM, in updating to the fifth edition, the APA gave the manual an Arabic numeral designation. *See* DSM-5 FAQ, *supra* note 69.

70. *Id.*

71. *Id.*

72. *Id.*

73. Nancy Haydt, *The DSM-5 and Criminal Defense: When Does a Diagnosis Make a Difference?*, 2015 UTAH L. REV. 847, 848 (quoting Thomas Insel, *Director's Blog: Transforming Diagnosis*, NAT'L INST. MENTAL HEALTH (Apr. 29, 2013), https://www.nimh.nih.gov/about/director/2013/transforming-diagnosis.shtml).

74. *Id.*

75. *What We Know Now: How Psychological Science Has Changed Over a Quarter Century*, ASS'N FOR PSYCHOL. SCI. (Oct. 31, 2013), https://www.psychologicalscience.org/observer/what-we-know-now-how-psychological-science-has-changed-over-a-quarter-century.

76. *Forensic Psychology*, AM. PSYCHOL. ASS'N, http://www.apa.org/ed/graduate/specialize/forensic.aspx (last visited May 28, 2016); IRVING B. WEINER & ALLEN K. HESS, THE HANDBOOK OF FORENSIC PSYCHOLOGY 23 (John Wiley & Sons eds. 2006).

77. Rebecca A. Clay, *Postgrad Growth Area: Forensic Psychology*, AM. PSYCHOL. ASS'N, http://www.apa.org/gradpsych/2009/11/postgrad.aspx (last visited May 28, 2016).

expertise in a courtroom continues to outstrip the supply of those specializing in the area.[78]

Meanwhile, in the DSM-5, the APA warns that its diagnostic criteria are "primarily designed to assist clinicians in conducting clinical assessment, case formulation, and treatment planning."[79] Further, "the definition of mental disorder included in the DSM-5 was developed to meet the needs of clinicians, public health professionals, and research investigators rather than all of the technical needs of the courts and legal professionals."[80] The DSM-IV likewise cautioned users of the risk that its information could be misunderstood, because the information contained in a clinical diagnosis and questions of ultimate concern in the law are not exact.[81] Nevertheless, the legal community has heavily relied on the DSM-5 and its predecessors.[82] Meanwhile, the newest edition of the Manual has met considerable criticism in the psychiatric and academic communities.[83] Nearly 70% of DSM-5 task force members reported financial relationships with pharmaceutical companies—raising concerns of financial conflicts of interest, especially in expert field panels where drugs represent the first line of treatment.[84] Those within the psychiatric community also criticized the newest edition of the Manual for expanding certain diagnoses when practitioners are increasingly concerned with over-diagnosing and over-medicating patients.[85]

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78. *Id.*

79. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [hereinafter DSM-5].

80. *Id.*

81. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000) [hereinafter DSM-IV].

82. *See, e.g.*, ARIZ. REV. STAT. ANN. § 20-826.04(E)(1) (2010) (providing that, in Arizona, "autism spectrum disorder" in the context of insurance coverage is statutorily defined as "one of the three following disorders as defined in the most recent edition of the DSM of the American Psychiatric Association"); Ralph Slovenko, Editorial, *The DSM in Litigation and Legislation*, 39 J. AM. ACAD. PSYCHIATRY & L. 6, 6 (2011) ("In the intersection of law and psychiatry, the Manual enters the picture. It is cited in court opinions over 5,500 times, but deference is the exception; and in legislation, it is cited more than 320 times.").

83. *See, e.g.*, Allen Frances, *DSM-5 Writing Mistakes Will Cause Great Confusion*, HUFFINGTON POST (June 11, 2013), http://www.huffingtonpost.com/allen-frances/dsm5-writing-mistakes-wil_b_3419747.html (criticizing the DSM-5's new diagnoses and reduced thresholds for existing ones); *Shrinks, Critics Face Off Over New Psychiatric Manual*, NY DAILY NEWS (May 15, 2013), http://www.nydailynews.com/life-style/health/shrinks-critics-face-new-psychiatric-manual-article-1.1344935 ("[E]ven the head of the U.S. National Institute of Mental Health complained that the book lacks scientific validity.")

84. Katie Moisse, *DSM Under Fire for Financial Conflicts*, ABC NEWS (Mar. 13, 2012), http://abcnews.go.com/Health/MindMoodNews/dsm-fire-financial-conflicts/story?id=15909673.

85. David Dobbs, *The New Temper Tantrum Disorder*, SLATE (Dec. 7, 2012), http://www.slate.com/articles/double_x/doublex/2012/12/disruptive_mood_dysregulation_disorder_in_dsm_5_criticism_of_a_new_diagnosis.html (reporting on the frustration of the newly added "Disruptive Mood Dysregulation Disorder" for children between the ages of 6

D. **Amaral** ***Properly Addresses the DSM-5's Shortcomings***

The changes in the diagnostic criteria that accompanied the DSM-5's shift in terminology illustrate the danger of misinterpreting *Amaral* as a status-based approach to evaluating behavioral and mental health evidence. For example, a significant update in the DSM-5 is the use of the term "intellectual disability" to replace the term "mental retardation," as intellectual disability is more commonly used in modern medical and educational fields.[86] The DSM-5 defines intellectual disability as "a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains."[87] By contrast, the DSM-IV defined mental retardation with an emphasis on a person's intelligence quotient ("IQ") level.[88] Specifically, someone was diagnosed as "mentally retarded" if he or she exhibited significantly sub-average intellectual functioning; namely, an IQ around 70 or below.[89] Without this specific IQ requirement, the DSM-5 possibly expands the spectrum of defendants eligible for a diagnosis of intellectual disability.[90]

The APA explicitly recognized that such change would impact forensic settings.[91] In fact, the APA commented that by removing IQ test scores as the diagnostic criteria of intellectual disability, but retaining them in the text description, it sought to ensure that IQ scores were not overemphasized as the defining factor of a person's overall ability.[92] The DSM-5 also changed the adaptive functioning requirement, the second criteria used in diagnosing an intellectual disability. This category measures how well a person "meets

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and 18 who experience "temper outbursts that are grossly out of proportion in intensity or duration to the situation").

86. AM. PSYCHIATRIC ASS'N, HIGHLIGHTS OF CHANGES FROM DSM-IV TO DSM-5, at 1 (2013), http://www.dsm5.org/documents/changes%20from%20dsm-iv-tr%20to%20dsm-5.pdf.

87. DSM-5, *supra* note 83.

88. DSM-IV, *supra* note 85.

89. *Id.*

90. Shelly Yeatts, *Significant changes from the DSM-IV to the DSM-5*, TEX. DIST. & CTY. ATTORNEYS ASS'N (2013). The APA comments that the DSM-5 still requires "deficits in intellectual functions, such as reasoning, problem solving, planning, and abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intellectual intelligence testing" as the first of three criteria for intellectual disability. Previously, the DSM-IV required "an IQ of approximately 70 or below on an individually administered IQ test." *Id.*

91. "Although the DSM-5 diagnostic criteria and text are primarily designed to assist clinicians in conducting clinical assessment, case formulation, and treatment planning, DSM-5 is also used as a reference for the courts and attorneys in assessing the forensic consequences of mental disorders. As a result, it is important to note that the definition of mental disorder included in DSM-5 was developed to meet the needs of clinicians, public health professionals, and research investigators rather than all of the technical needs of the courts and legal professionals." *Cautionary Statement for Forensic Use of DSM-5*, DSM LIBR., http://dsm.psychiatryonline.org/doi/abs/10.1176/appi.books.9780890425596.CautionaryStatement (last visited Nov. 16, 2016).

92. AM. PSYCHIATRIC ASS'N, INTELLECTUAL DISABILITY 1–2 (2013), http://www.dsm5.org/documents/intellectual%20disability%20fact%20sheet.pdf.

community standards of personal independence and social responsibility" when compared to those similarly situated in the community.[93] Prior diagnostic criteria in the DSM-IV required the person to exhibit a deficiency in at least two of eleven skills, including communication, self-care, home living, and use of community resources.[94] Conversely, the DSM-5 requires showing a deficit in just one of three broadly designated categories—communication, social participation, and independent living.[95] The APA also replaced the requirement that "mental retardation" manifest before the age of 18, with intellectual disability manifesting during the broader "developmental period."[96] Again, these shifts in the diagnostic criteria could create a situation in which someone who did not meet the rigid IQ or age requirements in the DSM-IV now meets the modern diagnostic criteria for intellectual disability under the DSM-5.[97]

In 2013, the Arizona Court of Appeals confronted the DSM-5's diagnostic criteria changes for intellectual disability.[98] Arizona is one of 33 states that still permit the use of capital punishment; it defines intellectual disability by statute for application in the context of capital punishment.[99] In particular, Arizona prohibits capital punishment for defendants found to have an intellectual disability, which is statutorily defined as an IQ no higher than 75.[100] In *Cahill*, the majority acknowledged the current discrepancy between clinical standards and Arizona's statutory definition.[101] But, in rejecting the dissent's argument that Arizona's current definition of intellectual disability was unconstitutional in light of the clinical changes, the court explained, "as a policy matter, requiring strict adherence to clinical standards could create some instability in this area of law."[102] While acknowledging that clinical standards change over time, the court found it "unlikely the Supreme Court would have delegated the interpretation of the Eighth Amendment to clinicians."[103] In his dissent, Judge Eckerstrom found the discrepancy in Arizona's statutory definition and the accepted clinical definition as "neither semantic nor trivial."[104] Indeed, the dissent argued that the trial court

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93. Yeatts, *supra* note 94.

94. *Id.*

95. *Id.*

96. *Id.* The APA does not define the "developmental period" in the DSM-5, but does specifically state that there is no specific age requirement. *Id.* Nonetheless, the Manual does require the individual's symptoms to begin during this developmental period in order to support a diagnosis of intellectual disability. *Id.*

97. *See, e.g.*, Symposium, *Advantages of DSM-5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in Atkins (Death Penalty) Cases*, 82 UMKC L. REV. 359, 382 (2014) (opining that "[t]he adoption of a bright-line IQ cutoff has allowed many defendants, who for clinical purposes would likely be diagnosed with Intellectual Disability, to fall through the cracks of the constitutional protection that Atkins presumptively affords to all defendants with Intellectual Disability.").

98. Williams v. Cahill, 303 P.3d 532 (Ariz. Ct. App. 2013).

99. *Id.* at 543; ARIZ. REV. STAT. ANN. § 13-753(K)(3) (Supp. 2015).

100. ARIZ. REV. STAT. ANN. § 13-753(C).

101. *Cahill*, 303 P.3d at 543.

102. *Id.*

103. *Id.*

104. *Id.* at 547.

employed an improper standard when evaluating the defendant's intellectual disability claim because "Arizona's statutory requirements substantially narrow the class of persons who are defined as mentally retarded when compared with the class of those who would be clinically defined as such."[105]

Though the impact of Arizona's current discrepancy in the statutory definition of intellectual disability and the clinical definition is limited to capital punishment cases, the debate carries broader implications for criminal defendants in other phases of the criminal justice system, including non-capital sentencing. As the judicial system grapples with how to weigh clinical changes within the psychiatric community, it would be misguided to oversimplify *Amaral*'s holding as a status-based approach to assessing clinical evidence. For example, one possible misinterpretation of *Amaral* is that a defendant cannot state a cognizable claim of newly discovered evidence where he or she suffers from intellectual disability but had a known diagnosis of "mental retardation" at the time of sentencing. *Amaral* does not bar a defendant from basing a petition for post-conviction relief on newly discovered evidence of intellectual disability merely because a particular diagnostic label existed at the time of sentencing. Instead, *Amaral* compels a court to view the clinical changes and assess whether the diagnostic changes in the DSM-5 merely supplement what was already generally known about intellectual disability at the time of sentencing, such that it was adequately considered.

Amaral might not resolve the debate as to how closely state statutes should conform to modern clinical standards when defining intellectual disability in the context of capital punishment. But, in post-conviction relief petitions, *Amaral* accounts for these kinds of diagnostic changes because it compels courts to look beyond the existence or lack thereof of a particular diagnostic label. Intellectual disability may be a new diagnostic term in the DSM-5, but that does not mean that it automatically rises to the level of newly discovered evidence as contemplated in Rule 32.1. Nor does it render a defendant unable to state a cognizable claim of newly discovered evidence of intellectual disability simply because the diagnostic label "mental retardation" existed at the time of sentencing. Conceivably, someone who did not meet this previously required IQ threshold could now present evidence of a latent diagnosis of intellectual disability. But, *Amaral* makes it clear that this new diagnostic label is alone insufficient to sustain a petition for post-conviction relief. Rather, the court would need to contemplate the changes underlying this diagnostic shift to determine whether they merely supplement the understanding of the archaic "mental retardation" label, or carry entirely new behavioral implications. In light of Rule 32.1(e), the court would have to determine whether the newly discovered evidence would *probably* have changed the outcome of the verdict or sentence.[106]

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105. *Id.*
106. ARIZ. R. CRIM. P. 32.1(e).

III. FOCUSING ON THE IMPLICATIONS OF STATUS ALIGNS WITH THE GOALS OF POST-CONVICTION RELIEF

A. The Correct Inquiry

The medical community's decision to officially recognize and classify a mental disorder should certainly influence post-conviction relief proceedings. But, as *Amaral* illustrates, it is the implication of that modern diagnosis that should guide courts, not merely the presence of the diagnosis itself. At both trial and in sentencing, courts look to modern psychiatric and behavioral research to assess a defendant's culpability, as they provide insight into someone's state of mind at the time. A behavioral, psychological, or developmental disorder could help explain the defendant's judgment or intention in committing a particular crime, thereby affecting his or her culpability. For example, in *Graham v. Florida*, the U.S. Supreme Court held that under the Eighth Amendment, life without parole for juvenile defendants constituted cruel and unusual punishment in non-homicide cases because developments in science and psychology revealed fundamental differences between juvenile and adult minds.[107] This decision did not hinge merely on the defendant's juvenile status, but rather on the implications of that juvenile status based in part on modern research that the American Psychological Association submitted in amicus briefs regarding juvenile development.[108]

Amaral properly accounts for these changes in the psychiatric community; even though the particular terms that the APA uses to label certain behavioral characteristics change, the analysis of those behavioral implications remains the same. In light of *Amaral*, the correct inquiry as to whether a newly recognized diagnostic label constitutes newly discovered evidence in petitions for post-conviction relief properly focuses on the meaning behind that label. It is only when advancements in research and understanding reveal a condition that existed, but the related behavioral implications were not recognized, that such a diagnosis of a condition would constitute newly discovered evidence that existed at the time of trial, sufficient to support a "colorable claim." Diagnostic shifts alone do not "probably change the outcome" where the behavioral implications were previously considered.

107. 560 U.S. 48, 68 (2010) (citing the American Psychological Association's amicus brief showing that juveniles were more capable of changing their behavior when compared to adults and that their actions were less likely to indicate "irretrievably depraved character")

108. *See id.*

B. Consistent with Finality

Not only does the *Amaral* decision help clarify how to use evolving mental health research under Rule 32.1(e), but it also reinforces the idea that courts favor finality of judgment.[109] Though the doctrine is not explicitly defined, finality refers to the idea that judgment of conviction or sentencing should not be revisited.[110] This serves a number of purposes, including the deterrence value of criminal statutes, rehabilitation, and conservation of government resources.[111] Finality also provides victims of crime with closure, as they need not fear being called on to once again relive the perpetrated crimes.[112] Additionally, reopening cases costs lawyers and the judicial system a significant amount of money and time. *Amaral*, while not stating any consideration of this factor, could potentially have opened the courts to a flood of post-conviction relief claims by defendants who were juveniles when they committed their crimes. Analogously, with the advancement of physical, scientific evidence leading to highly publicized wrongful conviction cases, the policy underlying finality has met considerable criticism.[113]

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109. Addressing the principle of finality in the context of capital cases, the U.S. Supreme Court has stated:

> [B]ecause of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such assumed right would necessarily be extraordinarily high.

Herrera v. Collins, 506 U.S. 390, 393 (1993). *See generally* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 HARV. L. REV. 441, 441 (1963) (examining when federal constitutional questions could be reexamined on habeas corpus, even when the state courts have fully and fairly litigated the merits of the case); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970) (arguing that aside from a few limited exceptions, convictions should only be revisited if the petitioner can support his or her constitutional plea with a "colorable claim of innocence").

110. Meghan J. Ryan, *Finality and Rehabilitation*, 4 WAKE FOREST J.L. & POL'Y 121 (2014).

111. *Id.*

112. *Id.*

113. *E.g.*, Margaret A. Berger, *Lessons from DNA: Restriking the Balance Between Finality and Justice*, *in* THE CRIMINAL JUSTICE SYSTEM: THE TECHNOLOGY OF JUSTICE 109 (David Lazer ed., 2004) (arguing that vacated convictions call on the criminal justice system to reevaluate "the value of finality in criminal proceedings"); Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1636 (2008) ("DNA technology has eroded the twin pillars supporting the Court's ruling in *Herrera*: reliability and finality."); Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1266 (2005) ("While the government's interest in finality of judgments is strong enough to block some post-conviction petitions for review, that interest should be significantly weaker when asserted in the context of petitions for post-conviction DNA testing."); *see also* NAT'L REG'Y EXONERATIONS, http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf (last visited July 17, 2016) (explaining that in 2015, the United States set a record for number of exonerations, with 149 prisoners exonerated

Modern commentators have expressed concern that sentences imposed earlier would now be considered disproportionate to the actual crimes committed.[114] The American Law Institute has suggested several changes to the Model Penal Code that would undermine the finality of sentencing. For example, drafters have proposed empowering judges to decrease sentences by up to 30%, provided an offender earned "good time" credits.[115] The drafters have also proposed "second look" sentencing, or sentence modification based upon subsequent social change.[116] In support of this new proposal, the drafters explained that "societal assessments of offense gravity and offender blameworthiness sometimes shift over the course of a generation of comparable periods . . . and [i]t would be an error of arrogance and ahistoricism to believe that the criminal codes and sentencing laws of our era have been perfected to reflect only timeless values."[117] This notion that earlier sentences should be re-examined in light of evolved societal goals undercuts relying on finality to guide all sentencing decisions.

Nonetheless, *Amaral*'s holding serves several important goals of finality, including rehabilitation and conservation of government resources. In light of rapid growth and changes in the psychiatric community, *Amaral* helps ensure that psychiatric evidence will only be revisited if it is truly new. This distinction is especially important in light of the kinds of changes in the DSM-5 and the APA's explicit warning to the forensic community that the information underlying clinical diagnoses and questions of ultimate concern in the law are inexact. Although, if scientific understandings of diagnoses and behavioral characteristics markedly change the understanding of a condition, then the proposal by the drafters of the Model Penal Code could account for it by empowering judges to proportionally decrease sentences.[118]

CONCLUSION

The Arizona Supreme Court has interpreted the constraints of Rule 32.1(e) in the context of new psychiatric research in two cases decided nearly 30 years apart. Though in *Bilke*, the psychiatric community's new recognition of PTSD as a medical disorder certainly strengthened the defendant's petition for post-conviction relief, it was not the mere presence of a new diagnostic label that led to the outcome. Instead, the Court centered its focus on what that new diagnostic label indicated about the defendant's culpability and whether this knowledge would have likely changed the original sentencing. In 2016, the Court

after subsequent evidence showed false confessions, misconduct of government officials, or lack of a crime occurring in the first place).

114. Ryan, *supra* note 114, at 136.

115. MODEL PENAL CODE: SENTENCING § 305.6 (Tentative Draft No. 2) (AM. L. INST. 2012).

116. *Id.* at § 305.6 ("Sentence modification under this provision should be viewed as analogous to a resentencing in light of present circumstances. The inquiry should be whether the purposes of sentencing . . . would better be served by a modified sentence than the prisoner's completion of the original sentence.").

117. *Id.*

118. *See* MODEL PENAL CODE, *supra* note 119.

clarified this distinction, not in a case involving the new recognition of a mental health disorder, but in a case involving a new understanding of juvenile status. In *Amaral*, the Court understood that the juvenile condition existed and was contemplated at the time of sentencing. Yet, the Court considered whether the 22 years of evidence concerning juvenile development truly offered a new understanding of that status. The analysis used in reaching this decision should not be limited to situations involving juvenile development. It provides an appropriate framework for looking at advances in psychiatric evidence in an era where the psychiatric community periodically changes the diagnostic criteria or label attached to particular mental health conditions.