No. 05-5966

In the Supreme Court of the United States

ERIC MICHAEL CLARK, PETITIONER

v.

STATE OF ARIZONA

ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment requires the States to adopt the insanity defense formulated in *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843).

2. Whether the Due Process Clause permits a State to preclude consideration of mental illness in assessing *mens rea* and instead to channel consideration of that evidence into the insanity determination.

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INTEREST OF THE UNITED STATES

This case presents two questions: (1) whether due process requires the States to define insanity using the two-part *M'Naghten* test; and (2) whether a State may constitutionally confine consideration of mental illness to resolution of the insanity defense and preclude its consideration in assessing *mens rea*. Although Congress has enacted *M'Naghten* as the test of insanity in the federal courts, 18 U.S.C. 17(a), the federal insanity standard has varied over the years, and the United States has an interest in ensuring that Congress retains authority to revise the standard. In addition, several federal courts of appeals have interpreted Section 17(a) to prohibit a defendant from using evidence of mental illness to establish that he lacked the capacity to form the mental state required for the offense. The decision in this case may determine the constitutionality of that prohibition. The United States therefore has a substantial interest in this case.

STATEMENT

1. During the early morning hours of June 21, 2000, petitioner, armed with a .22 caliber handgun, repeatedly circled his neighborhood in a pickup truck while blaring loud music. Neighbors called the police, and Flagstaff Police Officer Jeffrey Moritz drove to the scene. Petitioner pulled over in response to the police siren and lights. Moments later, several shots were fired. Petitioner abandoned his truck and fled. Officer Moritz's body was found lying behind his police car. Petitioner was arrested that evening. J.A. 338-339.

Petitioner was charged with violating Arizona Revised Statutes Annotated § 13-1105(A)(3) (West 2001), which states that a "person commits first degree murder if * * * intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty." Petitioner waived his right to a jury trial and gave notice that he would

assert a defense of "guilty except insane" under Arizona Revised Statutes Annotated § 13-502 (West 2001). J.A. 340. That provision states that "[a] person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong." Ariz. Rev. Stat. Ann. § 13-502(A) (West 2001).

At trial, the State introduced evidence that petitioner knew that Moritz was a police officer and intended to kill him. That evidence included testimony that, on two occasions before the shooting, petitioner had stated that he was angry with the police, that he "wanted to show them," and that he would "shoot[] them in the head" after he lured them from their cars. J.A. 337-338. The State also argued that petitioner, consistent with his earlier threats, intentionally goaded the police into a confrontation by driving repeatedly around the neighborhood playing loud music. J.A. 315.

Petitioner sought to present a diminished capacity defense: he claimed that the court could find him guilty of a less serious form of homicide if it rejected his insanity defense but concluded that his mental illness prevented him from forming the specific intent required for first-degree murder. 8/5/03 Tr. 18; Br. in Opp. App. B. The trial court concluded that, under *State* v. *Mott*, 931 P.2d 1046 (Ariz.), cert. denied, 520 U.S. 1234 (1997), it could not consider evidence of petitioner's mental illness on the issue of "form and [sic] intent and [petitioner's] capacity for the intent." J.A. 9. The court noted, however, that the same evidence was relevant to petitioner's insanity defense, so the court permitted petitioner to present it. *Ibid.* The court told petitioner that he could "make an offer of proof as to the intent" at the conclusion of the case to preserve the issue for appeal. *Ibid.* Petitioner did not make an offer of proof, and the court issued no further rulings on the admissibility of mental illness evidence.

After the presentation of evidence on petitioner's insanity defense, the trial court entered a two-part special verdict. The court found that (1) petitioner shot and caused the death of Moritz; and (2) petitioner's perceptions of reality were not so severely distorted that "he did not know his actions were wrong." J.A. 332-334. Petitioner moved to vacate the judgment and sentence, arguing that Arizona's definition of insanity and its rule prohibiting consideration of mental illness to determine whether he "was unable to form the *mens rea* necessary to commit an intentional or knowing murder" both violate due process. Br. in Opp. App. G at 1. The court denied petitioner's motion. 11/21/03 Order.

2. The Arizona Court of Appeals affirmed petitioner's conviction. J.A. 336-354. As relevant here, the court rejected petitioner's argument that Arizona's insanity defense violates due process because it does not include the first component of the *M'Naghten* test, which provides that a defendant is insane if he did not know "the nature and quality of the act" he committed. J.A. 349. The court reasoned that there is no constitutional right to an insanity defense, much less to a specific test of insanity. The court also concluded that the first part of the *M'Naghten* test does not add anything meaningful to Arizona's test, under which a defendant is insane if he did not know that his act was wrong. J.A. 349-350.

The appeals court also rejected petitioner's claim that he was denied the due process right to present a defense by the trial court's "failure to consider whether, due to his illness, he was unable to form the necessary *mens rea* to commit the offense." J.A. 348. The appeals court noted that the trial court "did not prevent [petitioner] from presenting" mental health evidence and allowed him to make an offer of proof on the issue. J.A. 351-352. The court also observed that, "[a]side from the evidence offered to prove his insanity generally," petitioner specified no evidence demonstrating "that he was

not capable of knowing he was killing a police officer." J.A. 352. In any event, the court concluded, the trial court was bound by *Mott*, which 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." *Ibid.* (quoting *Mott*, 931 P.2d at 1051).

3. The Arizona Supreme Court denied petitioner's petition for review. Pet. App. B at 1.

SUMMARY OF ARGUMENT

Arizona has chosen to channel consideration of a defendant's mental illness into an insanity determination that turns on whether the defendant knew that his conduct was wrong. Due process does not prohibit the State from making that policy choice.

I. No fundamental principle of justice requires the States to adhere strictly to the two-part test for insanity in *M'Naghten's Case,* 8 Eng. Rep. 718 (H.L. 1843). States have broad leeway in defining crimes and affirmative defenses. Therefore, as this Court's cases make clear, the Constitution does not require the adoption of any particular insanity test. *Leland* v. *Oregon*, 343 U.S. 790, 800-801 (1952); *Powell* v. *Texas*, 392 U.S. 514, 535-536 (1968).

Imposing one particular form of the insanity defense on the States would disregard their traditional role in balancing the complex and competing considerations that bear on the role of mental illness in excusing criminal liability. Moreover, the proposition that the *M'Naghten* test is fundamental cannot be squared with the wide variation in the insanity tests used both throughout history and today. In any event, Arizona's test incorporates the essence of the *M'Naghten* test—the inquiry into whether the defendant knew his conduct was wrong. Arizona's test is therefore constitutional even if due process requires the States to adopt some form of the *M'Naghten* test.

II. The Constitution also permits the States to confine consideration of mental illness to the insanity determination and to preclude its consideration in assessing whether the defendant had the *mens rea* required for the offense. Just as a State would be free to dispense with an insanity defense and consider mental illness only in determining whether the defendant committed the underlying offense, a State is also free to channel mental illness evidence into a particular form of the insanity defense. This Court has upheld laws precluding consideration of mental illness evidence in assessing *mens rea* in three separate cases. And both historically and today, a substantial number of States have imposed significant restrictions on the use of mental illness evidence to assess *mens rea*. The federal courts of appeals and state courts have repeatedly upheld those restrictions against due process challenges.

There are several valid reasons for a State to preclude consideration of mental illness in assessing *mens rea*. A State could reasonably conclude that psychiatric evidence sheds insufficient light on a defendant's state of mind at the time of the offense and presents too high a risk of erroneous acquittals. A State could also decide that allowing mental illness to negate *mens rea* would undermine the State's policy judgments in fashioning the insanity defense because defendants could escape liability without meeting the requirements of the defense. And a State could determine that limiting consideration of mental illness to the insanity defense better protects society because it ensures that mentally ill individuals who commit crimes are confined for treatment rather than released. Those considerations amply support Arizona's decision to channel psychiatric evidence into the insanity defense.

ARGUMENT

Arizona provides a defense of "guilty except insane" when a person commits an offense while "afflicted with a mental disease or defect of such severity that the person did not

know the criminal act was wrong." Ariz. Rev. Stat. Ann. § 13-502(A) (West 2001). The defendant bears the burden of proving the defense by clear and convincing evidence. *Id.* § 13-502(C). A defendant who is found "guilty except insane" is committed to a mental health facility instead of prison. *Id.* § 13-502(D).

Arizona does not, however, excuse criminal liability based on diminished mental capacity that does not meet the standard for legal insanity. It therefore "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." *Mott*, 931 P.2d at 1051. Permitting use of the evidence for either purpose, the Arizona Supreme Court has held, would undermine the legislature's decision to reject a diminished capacity defense. *Ibid.* Thus, Arizona restricts evidence of mental illness to the insanity determination and precludes its consideration in determining whether the defendant is guilty of the underlying offense.

Arizona's approach to mental illness is well within the broad leeway that the Constitution affords the States in administering criminal justice. Due process permits the States to determine when mental illness will excuse criminal responsibility and how mental illness will be considered—whether as an affirmative defense, in assessing *mens rea*, or both.

I. DUE PROCESS DOES NOT REQUIRE THE STATES TO ADOPT THE *M'NAGHTEN* INSANITY DEFENSE

A. The States Have Broad Discretion In Defining Crimes And Affirmative Defenses

This Court has repeatedly recognized that "[p]reventing and dealing with crime is much more the business of the States than it is of the Federal Government, and . . . [the Court] should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual

States." *Montana* v. *Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion) (quoting *Patterson* v. *New York*, 432 U.S. 197, 201 (1977)). States therefore enjoy wide latitude in defining crimes and affirmative defenses, as well as in establishing the procedures by which those crimes and defenses are proved. *Id.* at 58 (Ginsburg, J., concurring in the judgment). States have especially broad discretion when "determining 'the extent to which moral culpability should be a prerequisite to conviction of a crime.'" *Ibid.* (quoting *Powell*, 392 U.S. at 545 (Black, J., concurring)).

The Court has applied those principles in various contexts. For example, in *Patterson*, the Court held that due process permitted New York to exclude "malice aforethought" as an element of murder and to require defendants to prove the defense of "extreme emotional disturbance." 432 U.S. at 201. In *Martin* v. *Ohio*, 480 U.S. 228 (1987), the Court upheld a law that made "self-defense" an affirmative defense rather than an element of the prosecution's case.

The principles reflected in those cases establish that Arizona's insanity defense does not violate due process unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202 (citations omitted); *Egelhoff*, 518 U.S. at 43 (plurality opinion). Petitioner argues that the Arizona defense offends a "fundamental" principle because it does not track the two components of the insanity test enunciated in *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843).[1] But that contention cannot be reconciled with this Court's cases, the States' traditional responsibility for deciding when mental

[1] The *M'Naghten* test provides that "to establish a defence on the ground of insanity, it must be clearly proved 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." 8 Eng. Rep. at 722.

illness excuses criminal liability, or history and contemporary experience.

B. Precedent Establishes That The Constitution Does Not Require Any Particular Form Of Insanity Defense

The Court has never held that a defendant has a constitutional right to present an affirmative insanity defense. In fact, the Court has suggested that there is no such right. See *Medina* v. *California*, 505 U.S. 437, 449 (1992). Individual Justices have echoed that suggestion. See *Foucha* v. *Louisiana*, 504 U.S. 71, 88-89 (1992) (O'Connor, J., concurring) (The Court's holding "does not indicate that States must make the insanity defense available."); *id.* at 96 (Kennedy, J., dissenting) ("[T]he States are free to recognize and define the insanity defense as they see fit."); *Ake* v. *Oklahoma*, 470 U.S. 68, 91 (1985) (Rehnquist, J., dissenting) ("It is highly doubtful that due process requires a State to make available an insanity defense.").

The Court has also repeatedly rejected claims that the Constitution requires the States to adopt a particular form of the insanity defense. In *Leland* v. *Oregon*, 343 U.S. 790, 800-801 (1952), the Court held that due process did not require Oregon to adopt the "irresistible impulse" test of insanity in lieu of the *M'Naghten* test. The Court explained that "choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility." *Id.* at 801. Justice Frankfurter, dissenting on another issue, noted that "it would be indefensible to impose upon the States * * * one test rather than another for determining criminal culpability, and thereby to displace a State's own choice of such a test." *Id.* at 803.

The Court reiterated that view in *Powell*, which rejected a constitutional challenge to a law criminalizing public drunkenness. The plurality opinion stated that "[n]othing could be

less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms." 392 U.S. at 536. It explained that it has always been "the province of the States" to set the standards for "assess[ing] the moral accountability of an individual for his antisocial deeds," and those standards have evolved over time. *Id.* at 535-536. Justices Black and Harlan noted that *Leland* had already established "the indefensibility of imposing on the States any particular test of criminal responsibility." *Id.* at 545 (concurring opinion).[2]

C. Imposing The *M'Naghten* Test On The States Would Disregard Their Traditional Responsibility For Deciding When Mental Illness Excuses Criminal Liability

The Court's refusal to constitutionalize any particular form of the insanity defense respects the States' longstanding and well-established authority to determine the circumstances in which mental illness excuses criminal liability. That determination involves complex and competing policy considerations about moral culpability, societal protection, and medical science. Society's judgments on those issues have evolved over time and continue to evolve. As the plurality explained in *Powell*, "[t]he doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the na-

[2] Petitioner incorrectly contends (Br. 40 n.43) that this Court "embraced" *M'Naghten* in *Hotema* v. *United States*, 186 U.S. 413 (1902), and *Davis* v. *United States*, 165 U.S. 373 (1897). In *Hotema*, the Court approved the jury charge on insanity, which included tests based on both *M'Naghten* and the irresistible impulse theory. See 186 U.S. at 416-417, 420. In *Davis*, the Court rejected a claim that the jury charge did not adequately convey the *M'Naghten* test. 165 U.S. at 378. Neither case suggests that *M'Naghten* is constitutionally mandated. See *United States* v. *Freeman*, 357 F.2d 606, 613 (2d Cir. 1966); *Campbell* v. *United States*, 307 F.2d 597, 601 n.4 (D.C. Cir. 1962)).

ture of man." 392 U.S. at 536. Allowing the several States to make that adjustment permits "fruitful experimentation" and continued evolution. *Id.* at 536-537. The Due Process Clause provides little in the way of tools to superintend that experimentation and evolution. And it certainly provides no basis to adopt *M'Naghten* as a uniform standard and thereby freeze "into a rigid constitutional mold" the balance struck by the House of Lords more than 150 years ago. *Id.* at 537.

That would be particularly inadvisable because psychiatric knowledge continues to evolve. See *Leland*, 343 U.S. at 800; *id.* at 803 (Frankfurter, J., dissenting). "The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment." *Jones* v. *United States*, 463 U.S. 354, 365 n.13 (1983). Even if this Court had the authority to strike the balance for the States among competing theories of moral accountability, medical understanding of the relationship between mental disease and criminal conduct is not sufficiently developed to justify a fixed constitutional definition of insanity.

D. History And Contemporary Experience Confirm That The *M'Naghten* Test Is Not Constitutionally Required

Constitutionalizing *M'Naghten* is also unwarranted because it has not had "the uniform and continuing acceptance we would expect for a rule that enjoys 'fundamental principle' status." *Egelhoff*, 518 U.S. at 48 (plurality opinion).

Until the early nineteenth century, the English courts used various formulations of the insanity defense, including the "right and wrong" test eventually articulated in *M'Naghten*, the "wild beast" test requiring a total deprivation of understanding and memory, and the "irresistible impulse" test under which a defendant is excused if his mental impairment made him unable to control his conduct. See Henry Weihofen, *Insanity as a Defense in Criminal Law* 20-24 (1933); *e.g.*,

Regina v. *Oxford*, 173 Eng. Rep. 941, 950 (1840) (using both the right and wrong test and the irresistible impulse test); *Rex* v. *Arnold*, 16 How. St. Tr. 695, 764-765 (Ct. Common Pleas 1724) (using the wild beast test). There was thus clearly no consensus on any particular form of the insanity defense at the time of the framing.

The first case in the United States that cited the *M'Naghten* test also referenced the irresistible impulse test. *Commonwealth* v. *Rogers*, 48 Mass. 500, 502 (1844). The irresistible impulse test gained increasing popularity during the nineteenth century. See Donald H.J. Hermann, *The Insanity Defense: Philosophical, Historical and Legal Perspectives* 38 (1983). Meanwhile, in 1870, New Hampshire rejected *M'Naghten* and adopted the "product" test under which a defendant is excused if his crime "was the offspring or product of mental disease." *State* v. *Pike*, 49 N.H. 399, 442 (1870).[3]

By the time Congress codified *M'Naghten* in 1984, 18 U.S.C. 17(a), all the federal courts of appeals (and many

[3] Petitioner argues (Br. 37-39, 41) that the other definitions of insanity incorporate *M'Naghten*, so it is consistent with historical practice to adopt *M'Naghten* as the constitutional minimum. That is incorrect. The different insanity tests embody *competing* visions of when mental illness excuses criminal liability. Moreover, the other tests do not all subsume *M'Naghten*. For example, four States have abolished the affirmative defense of insanity and take mental illness into account only in assessing *mens rea*. See p. 13, *infra*. In those States, if a defendant had the mental state required for the crime, it is no excuse that he did not know that his conduct was wrong. In addition, at certain times, some jurisdictions have followed only the irresistible impulse test, without coupling it with *M'Naghten*. See Abraham S. Goldstein, *The Insanity Defense* 67 (1967); cf. *United States* v. *Currens*, 290 F.2d 751, 774 (3d Cir. 1961) (adopting only the volitional component of the American Law Institute test discussed at pp. 12-13, *infra*). Plainly, someone may be capable of controlling his conduct and thus be criminally liable under the irresistible impulse test, yet not know that his conduct is wrong and therefore be excused from liability under *M'Naghten*. Conversely, someone can know his conduct is wrong and thus be liable under *M'Naghten*, yet be unable to control his conduct and therefore be excused under the irresistible impulse test.

States) had abandoned that test in its traditional form. See *United States* v. *Brawner*, 471 F.2d 969, 979-981 (D.C. Cir. 1972) (en banc); Lisa Callahan et al., *Insanity Defense Reform in the United States—Post-Hinckley*, 11 Mental and Physical Disability L. Rep. 54 (1987); see also *Carter* v. *United States*, 325 F.2d 697, 707 (5th Cir. 1963) (Bell, J., dissenting) ("It is absurd to keep talking about McNaghten. McNaghten is dead."), cert. denied, 377 U.S. 946 (1964).

There is still significant variation in the insanity tests in use today. Most States and the federal government follow some form of *M'Naghten*. See Wayne R. LaFave, *Substantive Criminal Law* § 7.2, at 527 (2d ed. 2003). But at least eleven States omit the first component of the test—whether the defendant "knew the nature and quality of the act." *M'Naghten*, 8 Eng. Rep. at 722. See LaFave § 7.2(a), at 527-528 n.7.[4] A substantial number of jurisdictions use some form of the American Law Institute (ALI) test, under which a defendant is excused from liability if "as a result of mental disease or defect he lack[ed] substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." ALI, Model Penal Code § 4.01(1), at 163 (1985). See LaFave § 7.5(b), at 560. A few

[4] See Ariz. Rev. Stat. Ann. § 13-502(A) (West 2001); Colo. Rev. Stat. Ann. § 16-8-101.5(1) (2004); Del. Code Ann. tit. 11, § 401(a) (2001); 720 Ill. Comp. Stat. Ann. 5/6-2(a) (West 2002); Ind. Code Ann. § 35-41-3-6(a) (Michie 2004); La. Rev. Stat. Ann. § 14:14 (West 1997); Me. Rev. Stat. Ann. tit. 17-A, § 39.1 (West 1983); Ohio Rev. Code Ann. § 2901.01(A)(14) (Anderson 2003); S.C. Code Ann. § 17-24-10(A) (Law Co-op. 2003); S.D. Codified Laws § 22-1-2(20) (West 2004); Tex. Penal Code Ann. § 8.01(a) (West 2003). Oklahoma's statutory insanity test does not include "nature and quality" language, Okla. Stat. Ann. tit. 21, § 152(4) (West 2002), but Oklahoma courts have interpreted the statute to include both components of *M'Naghten*. See *Cheney* v. *State*, 909 P.2d 74, 90 (Okla. Crim. App. 1995). Some of these States could be categorized as adopting only the wrongfulness component of the American Law Institute test rather than the wrongfulness component of *M'Naghten*. See Pet. Br. 38. But the critical point is that none of them utilizes "nature and quality" language.

States follow *M'Naghten* as supplemented by the irresistible impulse test or the second part of the ALI test. See LaFave § 7.3(a), at 545 n.1; Mich. Comp. Laws Ann. § 768.21a (West 2000). One of those States does not include the "nature and quality" language of *M'Naghten*. Ga. Code Ann. § 16-3-2 (2003). New Hampshire continues to use the "product" approach. See *State* v. *Cegelis*, 638 A.2d 783 (N.H. 1994). And four States have abolished the insanity defense altogether and instead consider mental illness in assessing *mens rea*. See *State* v. *Bethel*, 66 P.3d 840 (Kan.), cert. denied, 540 U.S. 1006 (2003); *State* v. *Herrera*, 895 P.2d 359 (Utah 1995); *State* v. *Searcy*, 798 P.2d 914 (Idaho 1990); *State* v. *Korell*, 690 P.2d 992 (Mont. 1984).[5]

Not only has there been wide variation in the tests used to establish insanity, but the insanity defense has always been highly controversial. See *Leland*, 343 U.S. at 801; American Ass'n on Mental Retardation Amicus Br. 4 & nn.6-7. The idea of eliminating insanity as an affirmative defense and considering mental illness only in assessing *mens rea* has been advanced by commentators and considered by legislatures for at least a century.[6] And the *M'Naghten* test has been widely criticized from its inception. See LaFave § 7.2(b), at 540; Abraham S. Goldstein, *The Insanity Defense* 80 (1967).

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[5] Nevada also attempted to abolish the insanity defense, but its Supreme Court held the abolition unconstitutional. See *Finger* v. *State*, 27 P.3d 66 (Nev. 2001), cert. denied, 534 U.S. 1127 (2002).

[6] See Edwin R. Keedy, *Insanity and Criminal Responsibility*, 30 Harv. L. Rev. 535, 536 (1917); Norval Morris, *The Criminal Responsibility of the Mentally Ill*, 33 Syracuse L. Rev. 477, 499, 510 (1982). Members of Congress and the Department of Justice advocated the *mens rea* approach during the efforts to reform the insanity defense following the acquittal of John Hinckley for the attempted assassination of President Reagan. See *United States* v. *Pohlot*, 827 F.2d 889, 899 (3d Cir. 1987), cert. denied, 484 U.S. 1011 (1988).

Thus, there is no "settled tradition" restricting how States define the insanity defense. *Medina*, 505 U.S. at 446. On the contrary, the wide variation in insanity tests currently and over time, as well the controversy surrounding the defense, establish that no one approach to insanity can be viewed as "fundamental." See *Egelhoff*, 518 U.S. at 48 (plurality opinion) (rule is not "fundamental" when "one-fifth of the States either never adopted [it] or have recently abandoned it").

E. Arizona's Insanity Defense Would Be Constitutional Even If The Constitution Required The *M'Naghten* Test

Even if the *M'Naghten* test were constitutionally mandated, petitioner's claim that the Arizona test violates due process because it modifies the traditional test would lack merit. The wording used to articulate the *M'Naghten* test has not been uniform. See Weihofen 32. As noted above, a dozen or more States omit the "nature and quality of the act" language in phrasing their *M'Naghten*-based tests. See pp. 12-13, *supra*. Moreover, the wrongfulness component of the ALI test, used by a substantial number of States, also does not contain language requiring that the defendant have understood the "nature and quality" of his acts. See ALI § 4.01(1), at 163. And both the American Bar Association (ABA) and the American Psychiatric Association (APA) have endorsed standards that use only wrongfulness language. See APA Amicus Br. 28; ABA, Criminal Justice Mental Health Standards § 7-6.1, at 330 (1989).

Many States and model standards omit the "nature and quality" language because it adds nothing to the inquiry into whether the defendant knew that his criminal act was wrong. See Weihofen 37. The "nature and quality of the act" means the physical characteristics of the act and its harmfulness. That part of the *M'Naghten* test thus asks whether the defendant was aware of his actions and their consequences. See Goldstein 50 & n.16; *State* v. *Brosie*, 553 P.2d 1203, 1205 (Ariz.

1976). But that inquiry is subsumed by the "right and wrong" inquiry. As explained in *M'Naghten* itself, the defendant's "knowledge of right and wrong" is evaluated not "in the abstract" but "in respect to the very act with which he is charged." 8 Eng. Rep. at 723. It is therefore impossible for a defendant to have known that his actions were wrong unless he understood their nature and quality. See *People* v. *Skinner*, 704 P.2d 752, 760 (Cal. 1985); Goldstein 50.

Courts also have treated the right and wrong inquiry as subsuming the "nature and quality" inquiry. See Goldstein 50. Opinions from this Court have repeatedly described the *M'Naghten* test using only the "right and wrong" language. See, *e.g.*, *Powell*, 392 U.S. at 536 (plurality opinion) ("the right-wrong test of *M'Naghten's Case*"); *Leland*, 343 U.S. at 800 ("Knowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions."); *Fisher* v. *United States*, 328 U.S. 463, 466 (1946) (defendant was "sane in the usual legal sense" because "[h]e knew right from wrong"); see also *Foucha*, 504 U.S. at 97 (Kennedy, J., dissenting) (stating that Louisiana provided a "traditional statement" of the *M'Naghten* test in a statute containing only the "right and wrong" test). State courts also frequently treat "knowledge of 'the nature and quality of the act'" as "the mere equivalent of the ability to know that the act was wrong." LaFave § 7.2(b), at 536; see Weihofen 37. "The phrase 'nature and quality of the act' is sometimes omitted completely from the charge to the jury. More often, it is either stated to the jury without explanation or treated as adding nothing to the requirement that the accused know his act was wrong." Goldstein 50.

The Arizona Court of Appeals in this very case recognized that the wrongfulness inquiry subsumes the nature and quality inquiry. J.A. 350 ("It is difficult to imagine that a defendant who did not appreciate the 'nature and quality' of the act

he committed would reasonably be able to perceive that the act was 'wrong.'"). The trial court also understood the wrongfulness inquiry to encompass whether petitioner understood the nature and quality of his acts. See J.A. 333-334 (relying on a finding that petitioner "was aware that Officer Moritz was a police officer" in concluding that petitioner's mental illness did not "distort his perception of reality so severely that he did not know his actions were wrong").[7]

There is thus no practical, let alone constitutional, difference between the traditional two-part *M'Naghten* test and Arizona's insanity test. Under those circumstances, even if there were authority and cause for this Court to unsettle practices in the States by imposing a single test for insanity modeled on *M'Naghten*, petitioner could not show that his due process rights were violated.

II. DUE PROCESS PERMITS A STATE TO CHANNEL EVIDENCE OF MENTAL ILLNESS INTO THE INSANITY DETERMINATION

A. A State's Decision To Consider Mental Illness Only In Determining Insanity Is Valid Whether Expressed As A Redefinition Of The Offense Or As An Evidentiary Rule

If a State recognizes a particular form of the insanity defense, the Constitution permits the State to limit consideration of mental illness to the resolution of that defense and to preclude its consideration in determining whether the State has proved the elements of the offense. A State can accomplish that goal in two ways. It can effectively redefine the elements of its offenses by declaring mental illness evidence irrelevant to the *mens rea* determination, or it can establish

[7] Petitioner's contention (Br. 47) that an "unawareness of the nature of his acts could coexist in [his] mind" with knowledge of the "wrongness of killing" is beside the point. The *M'Naghten* inquiry is not whether petitioner knew that "killing" is wrong "in the abstract" but whether petitioner understood the wrongfulness of "the very act" he committed. *M'Naghten*, 8 Eng. Rep. at 723.

an evidentiary rule treating that evidence as inadmissible. Cf. *Egelhoff*, 518 U.S. at 50 n.4 (plurality opinion) (law prohibiting use of voluntary intoxication to negate *mens rea* may be justified either as a redefinition of the offense or as an evidentiary rule); *id.* at 58 (Ginsburg, J., concurring in the judgment) (upholding law as a redefinition of the offense that renders evidence of voluntary intoxication irrelevant to the *mens rea* element).

Arizona appears to have chosen the redefinition approach. See *Mott*, 931 P.2d at 1050-1051 (explaining that the rule on mental health evidence is a necessary component of the legislature's rejection of the diminished capacity defense). Thus, in a prosecution for first-degree murder, the State does not have to prove that the defendant "intend[ed] or kn[ew] that [his] conduct w[ould] cause death to a law enforcement officer" in a purely subjective sense. Ariz. Rev. Stat. Ann. § 13-1105(A)(3) (West 2001). Instead, the State has to prove only that (1) he caused the death with actual knowledge or intent, or (2) he killed under circumstances that would otherwise establish knowledge or intent but for his mental illness. Cf. *Egelhoff*, 518 U.S. at 58 (Ginsburg, J., concurring in the judgment). This definition leaves to the insanity-defense stage the consideration of the mitigating effect (if any) of mental illness. In so doing, the definition prevents mental illness evidence from being used to dispute *mens rea* in a manner that resurrects the diminished capacity defense that the Arizona legislature has rejected. See *Mott*, 931 P.2d at 1051. Alternatively, if Arizona's rule is conceived as a mere evidentiary rule rendering mental illness evidence inadmissible in assessing *mens rea*, while channeling that evidence into the insanity-defense determination, that approach is equally permissible.[8]

[8] The principal difference between conceptualizing the rule as a redefinition of the offense (*i.e.*, a rule declaring what evidence is *relevant* to the *mens rea* element) rather than a mere rule of evidence (*i.e.*, a rule declaring what

The States possess the same wide latitude to establish evidentiary rules that they have to define the elements of crimes and affirmative defenses. See pp. 6-7, *supra*; *Egelhoff*, 518 U.S. at 43 (plurality opinion); *id.* at 58 (Ginsburg, J., concurring in the judgment); *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules."); *Powell*, 392 U.S. at 535 (plurality opinion) ("[T]his Court has never articulated a general constitutional doctrine of *mens rea*.").

Thus, Arizona's decision to preclude use of mental health evidence in determining *mens rea* and instead to channel that evidence into the insanity determination is constitutional unless it violates a "fundamental principle of justice." *Egelhoff*, 518 U.S. at 43 (plurality opinion); *id.* at 59 (Ginsburg, J., concurring in the judgment). This Court's decisions, history and contemporary practice, and sound policy considerations all indicate that it does not.

B. This Court's Cases Establish That States May Preclude Consideration Of Mental Illness In Assessing *Mens Rea*

This Court has upheld state laws precluding consideration of mental illness evidence in assessing *mens rea* on three separate occasions. In *Fisher*, the Court upheld the District of Columbia (D.C.) law precluding consideration of the evidence. In two other cases, the Court summarily rejected claims that excluding the evidence violated due process. *Troche* v. *California*, 280 U.S. 524 (1929) (per curiam); *Coleman* v. *California*, 317 U.S. 596 (1942) (per curiam).

The defendant in *Fisher* was convicted of first degree murder, an offense for which "[d]eliberation and premeditation [were] necessary elements." 328 U.S. at 464-465. At trial, Fisher was permitted to introduce evidence of his mental

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evidence is *admissible* to prove the element) is that the former analysis makes clear that petitioner's challenge sounds in substantive due process.

infirmities to support his insanity defense, which proved unsuccessful. But he was denied "an instruction from the trial court which would [have] permit[ted] the jury to weigh the evidence of his mental deficiencies, which were short of insanity in the legal sense, in determining the fact of and [his] capacity for premeditation and deliberation." *Id.* at 470. This Court upheld the refusal to give the instruction because it was inconsistent with D.C. law, which did not recognize an excuse of diminished mental capacity short of insanity. See *id.* at 471 (citing *United States* v. *Lee*, 15 D.C. (4 Mackey) 489, 495 (1886)). The Court also refused Fisher's request that it exercise its supervisory power over the D.C. courts to require the requested instruction. See *Fisher*, 328 U.S. at 476-477.

The Court's refusal to exercise its supervisory power demonstrates that it did not view the D.C. law as offending any fundamental principle of justice. Indeed, the Court expressly stated that the preclusion of mental health evidence posed no due process problem. The Court observed that "[t]here was sufficient evidence to support a verdict of murder in the first degree, if petitioner was a normal man in his mental and emotional characteristics. But the defense takes the position that the petitioner is fairly entitled to be judged as to deliberation and premeditation, not by a theoretical normality but by his own personal traits. In view of the status of the defense of partial responsibility in the District and the nation no contention is or could be made of the denial of due process." 328 U.S. at 466 (citation omitted); see also *id.* at 476 ("The administration of criminal law in matters not affected by constitutional limitations or a general federal law is a matter peculiarly of local concern.").

Petitioner attempts (Br. 25) to distinguish *Fisher* on the grounds that it involved only the denial of an instruction affirmatively requiring consideration of mental health evidence and the jury was not told that it could not consider that evi-

dence. It is clear, however, that *Fisher* did not rest on a conclusion that the requested instruction was superfluous. Rather, the decision rested on the fact that instruction was inconsistent with the applicable substantive law, which prohibited reliance on mental health evidence to negate *mens rea*. See *Fisher*, 328 U.S. at 471-477. Indeed, the Court expressly noted that "[t]he jury might not have reached the result it did" if the requested instruction had been given, because the jury "could have determined from the evidence [of mental deficiency] that the homicide was not the result of premeditation and deliberation," *id.* at 467, 470.[9]

Fisher was virtually foreordained by the summary decision almost twenty years earlier in *Troche.* The defendant in *Troche* was convicted under California statutes providing for a bifurcated trial when the defendant in a murder case asserted an insanity defense. A trial was first held on guilt, at which the defendant was presumed sane and all evidence tending to establish insanity was inadmissible. The sanity issue was determined in a separate proceeding after the jury found the defendant guilty. See *People* v. *Troche*, 273 P. 767, 769-770 (Cal. 1928). The California Supreme Court ruled that the trial court's exclusion from the guilt trial of "all evidence tending to show the mental condition of the defendant at the time of the commission of the offense" was mandated by the statutory scheme, *id.* at 772, and that the statutes were consistent with due process, *id.* at 770. Troche appealed to this Court, challenging the presumption of sanity and the exclusion of insanity evidence from the guilt proceeding. He argued that those rules "conclusively presum[ed] one of the

[9] Justice Murphy's description of the question presented in his dissent confirms that *Fisher* turned on the validity of D.C.'s rule barring consideration of mental health evidence: "May mental deficiency not amounting to complete insanity properly be considered by the jury in determining whether a homicide has been committed with the deliberation and premeditation necessary to constitute first degree murder?" 328 U.S. at 491 (Murphy, J., dissenting).

main elements of a crime against the defendant, said element being that of intent." *Muench* v. *Israel,* 715 F.2d 1124, 1138 (7th Cir. 1983) (quoting from appellant's brief in this Court), cert. denied, 467 U.S. 1228 (1984). This Court dismissed for want of a substantial federal question. 280 U.S. at 524.[10]

The Court reached the same result in *Coleman*, which involved a challenge to the same California statutes. Coleman challenged his conviction on the ground that, at the guilt trial, the jury must be allowed to consider "all of the evidence bearing on the mental condition of the defendant at the time of the commission of the crime," including evidence of "mental abnormalities not amounting to a complete defense of legal insanity, but which still may show the lack of capacity to form the specific intent to commit first degree murder." *People* v. *Coleman*, 126 P.2d 349, 353 (Cal. 1942). The California Supreme Court rejected that claim, noting that arguments against excluding the evidence were fundamentally addressed to "the desirability of the legislative policy rather than to the question of deprivation of constitutional rights." *Id.* at 353. Coleman appealed, and this Court summarily dismissed, citing *Troche*. 317 U.S. at 596.

C. History and Contemporary Practice Confirm That The Constitution Does Not Require Consideration Of Mental Illness Evidence In Assessing *Mens Rea*

The question whether evidence of mental illness can be used to establish that the defendant lacked the necessary *mens rea* did not arise with any frequency until the late nineteenth century. See Henry Weihofen & Winfred Overholser, *Mental Disorder Affecting the Degree of a Crime*, 56 Yale L.J.

[10] That dismissal is a ruling on the merits binding on the lower courts. See *Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975). It is also precedent in this Court, although it does not receive "the same deference given a ruling after briefing, argument, and a written opinion." *Caban* v. *Mohammed*, 441 U.S. 380, 390 n.9 (1979).

959, 963-965 (1947).[11] When the issue did gain prominence, States divided almost evenly on the question. See *Fisher*, 328 U.S. at 473 & n.12; Weihofen & Overholser, 56 Yale L.J. at 959. Thus, in the late 1800s and early 1900s, courts in a substantial number of jurisdictions concluded that evidence of diminished mental capacity could not be used to disprove *mens rea*.[12]

The States continue to be divided on the question today. According to the ABA, in 1989, at least 16 States did not permit the use of mental health evidence to negate *mens rea*. See ABA § 7-6.2, at 349 n.2. At present, at least 14 jurisdictions and the federal government impose significant restrictions on the use of mental health evidence in assessing *mens rea*.[13]

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[11] Petitioner contends that, "[u]ntil the nineteenth century, criminal law doctrines of *mens rea* handled the entire problem of the insanity defense." Pet. Br. 28 (quoting Morris, 33 Syracuse L. Rev. at 500). That is incorrect. At common law, insanity was an excuse on which the defendant bore the burden of proof. See *Patterson*, 432 U.S. at 202. Moreover, a defendant established the excuse by meeting an independent insanity test, not by disproving the intent element of the crime. See, *e.g.*, *Arnold*, 16 How. St. Tr. at 764-765 (jury charge that the defendant had "shot" and done so "wilfully" and that he could be "exempted from punishment" only if "totally deprived of his understanding and memory"); *Rex* v. *Ferrers*, 19 How. St. Tr. 886, 948 (H.L. 1760) (argument of Solicitor General that test of insanity was whether defendant could, at the time he committed the crime, "distinguish between good and evil").

[12] See *Sindram* v. *People*, 88 N.Y. 196, 197-198, 201 (1882); *United States* v. *Lee*, 15 D.C. (4 Mackey) 489 (1886); *Jacobs* v. *Commonwealth*, 15 A. 465, 466 (Pa. 1888); *Spencer* v. *State*, 13 A. 809, 814-815 (Md. 1888); *Dean* v. *State*, 17 So. 28, 29 (Ala. 1895); *State* v. *Holloway*, 56 S.W. 734, 735, 737 (Mo. 1900); *State* v. *James*, 114 A. 553, 561 (N.J. Ct. App. 1921); *People* v. *Troche*, 273 P. 767, 772 (Cal. 1928), appeal dismissed and cert. denied, 280 U.S. 524 (1929); *Foster* v. *State*, 294 P. 268, 271 (Ariz. 1930); *State* v. *Van Vlack*, 65 P.2d 736, 756-759 (Idaho 1937).

[13] See 18 U.S.C. 17(a); Cal. Penal Code § 28(a) (West 1999); La. Code Crim. Proc. Ann. art. 651 (West 2003); *State* v. *Taylor*, 781 N.E.2d 72, 84 (Ohio 2002); *Paul* v. *State*, 555 S.E.2d 716, 718 (Ga. 2001); *Marley* v. *State*, 747 N.E.2d 1123, 1128 (Ind. 2001); *People* v. *Carpenter*, 627 N.W.2d 276, 277 (Mich. 2001); *State*

Some jurisdictions prohibit the use of mental health evidence to negate the *capacity to form* the necessary mental state but admit the evidence on the issue whether the defendant *in fact formed* the required mental state. See *Haas* v. *Abrahamson*, 910 F.2d 384, 397-398 (7th Cir. 1990); *e.g.*, Cal. Penal Code § 28(a) (West 1999). Several federal courts of appeals have drawn a similar distinction in interpreting the Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057.[14]

Not only do many jurisdictions restrict use of mental health evidence to disprove *mens rea*, but many federal and state courts have rejected due process challenges to those restrictions.[15] In light of the historical and contemporary landscape, petitioner cannot establish that use of mental health evidence to disprove *mens rea* is a "fundamental principle" that has experienced "uniform and continuing acceptance." *Egelhoff*, 518 U.S. at 48 (plurality opinion).

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v. *Nazario*, 726 So.2d 349, 350 (Fla. Dist. Ct. App. 1999); *Jones* v. *Harkness*, 709 A.2d 722, 724 (D.C. 1998); *Mott*, 931 P.2d at 1051; *State* v. *Schreiber*, 558 N.W.2d 474, 478 (Minn.), cert. denied, 522 U.S. 890 (1997); *Williams* v. *State*, 710 So.2d 1276, 1309 (Ala. Crim. App. 1996), aff'd, 710 So.2d 1350 (Ala. 1997), cert. denied, 524 U.S. 929 (1998); *Smith* v. *Commonwealth*, 389 S.E.2d 871, 879-880 (Va. 1990); *State* v. *Flattum*, 361 N.W.2d 705, 716 (Wis. 1985); *Taylor* v. *State*, 452 So.2d 441, 448-450 (Miss. 1984).

[14] See, *e.g.*, *Pohlot*, 827 F.2d at 897-904; *United States* v. *Cameron*, 907 F.2d 1051, 1066 (11th Cir. 1990); *United States* v. *Brown*, 326 F.3d 1143, 1147 (10th Cir. 2003); *United States* v. *Worrell*, 313 F.3d 867, 873-874 (4th Cir. 2002), cert. denied, 538 U.S. 1021 (2003); *United States* v. *Hillsberg*, 812 F.2d 328, 332 (7th Cir.), cert. denied, 481 U.S. 1041 (1987).

[15] See, *e.g.*, *Wong* v. *Money*, 142 F.3d 313, 323-325 (6th Cir. 1998); *Welcome* v. *Blackburn*, 793 F.2d 672, 674 (5th Cir. 1986), cert. denied, 481 U.S. 1042 (1987); *Muench*, 715 F.2d at 1137-1145; *Campbell* v. *Wainwright*, 738 F.2d 1573, 1580-1582 (11th Cir. 1984), cert. denied, 475 U.S. 1126 (1986); *Wahrlich* v. *Arizona*, 479 F.2d 1137, 1137-1138 (9th Cir.), cert. denied, 414 U.S. 1011 (1973); *Carpenter*, 627 N.W.2d at 285; *Mott*, 931 P.2d at 1051; *Schreiber*, 558 N.W.2d at 478; *Williams*, 710 So.2d at 1309.

D. There Are Sound Policy Reasons To Channel Evidence Of Mental Illness Into The Insanity Determination

There are several good reasons for a State to preclude consideration of evidence of mental illness in assessing *mens rea* and instead to channel that evidence into the insanity determination.

First, a State could conclude that psychiatric evidence does not sufficiently illuminate *mens rea* and presents too high a risk of erroneous acquittals. Courts and commentators alike have recognized that the reliability of psychiatric evidence is open to challenge.[16] Cf. *United States* v. *Scheffer*, 523 U.S. 303, 309-312 (1998) (concerns about the reliability of polygraph evidence justified a rule excluding it from courts-martial). Moreover, the uncertainty of psychiatric diagnosis allows expert witnesses to slant their testimony on their clients' behalf. See *Steele* v. *State*, 294 N.W. 2d 2, 13 (Wis. 1980). And, because "[t]he esoterics of psychiatry are not within the ordinary ken," *Wahrlich* v. *Arizona*, 479 F.2d 1137, 1138 (9th Cir.), cert. denied, 414 U.S. 1011 (1973), "judges and juries usually defer to psychiatric judgments" even though they may

[16] See, *e.g.*, *Ake*, 470 U.S. at 81 ("[P]sychiatrists disagree widely and frequently on what constitutes mental illness" and "on the appropriate diagnosis to be attached to given behavior and symptoms."); *Jones*, 463 U.S. at 365 n.13 ("We have recognized repeatedly the uncertainty of diagnosis in this field and the tentativeness of professional judgment" (internal quotation marks omitted).); *Bethea* v. *United States*, 365 A.2d 64, 89 (D.C. 1976) (questioning the "validity and reliability" of psychiatric evidence); Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal. L. Rev. 693, 737 (1974) (noting that "psychiatrists and behavioral scientists who have studied the reliability and validity of psychiatric judgments almost unanimously agree that such judgments are of low reliability and validity"). Of course, psychiatric testimony is deemed reliable enough to support judgments in certain contexts, *e.g.*, civil commitment. See *Foucha*, 504 U.S. at 76 n.3. But a State can legitimately rely on psychiatric evidence for some purposes without losing the ability to take into account special concerns about the impact of that evidence on a criminal trial. Cf. *United States* v. *Scheffer*, 523 U.S. 303, 312 n.8 (1998).

be unreliable or biased. *Bethea* v. *United States*, 365 A.2d 64, 89 (D.C. 1976) (quoting Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal. L. Rev. 693, 737 (1974)).

Those problems are especially severe "where the issue is the subtle distinction between mental states such as those reflecting specific and general intent, as opposed to the question whether there existed a mental abnormality of sufficient magnitude to be labeled insanity." *Bethea*, 365 A.2d at 90. Indeed, some courts have concluded that "psychiatric testimony directed to a retrospective analysis of the subtle gradations of specific intent" does not have "enough probative value to compel its admission." *Wahrlich*, 479 F.2d at 1138. A State could therefore conclude that psychiatric testimony is reliable when used to assess insanity but not when used to make the fine-tuned distinctions involved in the *mens rea* determination. See *Steele*, 294 N.W.2d at 13. Accordingly, the State could reasonably decide to confine use of psychiatric testimony to the insanity determination.

A State could also choose to confine psychiatric evidence to the insanity determination in order to ensure that the mental illness excuse is structured as an affirmative defense. Because the defendant bears the burden of proof on an affirmative insanity defense, there is less risk that he will erroneously be excused from liability. Cf. *Patterson*, 432 U.S. at 207 (concern that "too many persons deserving treatment as murderers would escape that punishment" justifies decision to place burden of proving extreme emotional disturbance on defendant). Moreover, the insanity defense reflects the State's judgment about the circumstances in which an individual's mental illness is sufficiently severe to excuse liability for criminal conduct. Allowing a defendant to escape liability based on an additional, alternative test—lack of *mens rea* based on mental condition—reflects a significantly different

judgment. See *State* v. *Wilcox*, 436 N.E. 2d 523, 527 (Ohio 1982) (allowing defendants to assert diminished responsibility "could swallow up the insanity defense").

Indeed, Arizona's Supreme Court invoked preservation of the integrity of the insanity defense in explaining why the State precludes the use of mental health evidence to negate *mens rea*. See *State* v. *Schantz*, 403 P.2d 521, 525-529 (Ariz. 1965), cert. denied, 382 U.S. 1015 (1966). Other States have reached a different judgment about the appropriate circumstances in which to excuse criminal conduct and have eliminated the affirmative insanity defense. Instead, those States allow evidence of mental illness to be considered only in assessing the *mens rea* element of the offense. See p. 13, *supra*. The Due Process Clause, however, does not require a State to make one judgment rather than the other.

Finally, a State could conclude that precluding use of mental illness to negate *mens rea* is justified to protect the public from mentally-ill individuals who commit crimes. See *Bethea*, 365 A.2d at 91. As the Arizona Supreme Court has explained, if a defendant uses mental illness to disprove *mens rea*, he is acquitted and released into the general population. *Schantz*, 403 P.2d at 529. In contrast, a defendant found "guilty except insane" is confined in a state mental hospital until he proves that he is neither mentally ill nor dangerous. Ariz. Rev. Stat. Ann. § 13-502(D) (West 2001); *id.* § 13-3994. Thus, channeling mental illness evidence into the insanity determination prevents the "releas[e] upon society [of] many dangerous criminals who obviously should be placed under confinement." *Schantz*, 403 P.2d at 529.[17] Arizona's use of the terminology

[17] Although a State could establish procedures to commit a defendant found not guilty because mental disease prevented him from forming the necessary *mens rea*, it is uncertain whether the State could make a commitment based solely on the criminal verdict. If the State could not commit the defendant based on the verdict alone, the State might be required to bear a heavy burden to obtain the commitment. Compare *Jones*, 463 U.S. at 363-366 (concluding

"guilty except insane" to describe its insanity defense underscores the State's policy judgment that insanity does not negate a defendant's responsibility for the substantive offense (including its *mens rea* elements). Rather, the defense excuses from punishment someone whom the State views as "guilty" of the offense.

Ignoring these valid policy concerns, petitioner argues (Br. 23, 27-28) that a State cannot treat as equally culpable someone who kills intentionally or knowingly and someone who kills but, because of mental illness, is incapable of forming intent or knowledge. That argument misses the mark because Arizona does not treat those individuals the same. If a defendant proves that he was so incapable of forming intent or knowledge that he did not know the wrongfulness of his act, then he receives a different verdict and different treatment from a defendant without mental illness. As discussed above, a defendant who is determined to be "guilty but insane" receives psychiatric treatment rather than a prison term. See Ariz. Rev. Stat. Ann. § 13-502 (West 2001). To the extent Arizona treats as equally culpable all individuals who *are* aware of the wrongfulness of their criminal acts, the State is entitled to make that policy judgment. And the State is entitled to protect that judgment by channeling psychiatric evidence into the insanity defense.

E. Petitioner's Argument That He Was Prevented From Rebutting The Prosecution's Factual Inferences Is Not Properly Presented And Lacks Merit

Petitioner contends (Br. 13-21) that the trial court independently violated his due process rights because it refused

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that an insanity acquitee may be committed without further procedures in part because he "committed an act that constitutes a criminal offense") with *Addington* v. *Texas*, 441 U.S. 418, 426-427 (1979) (holding that civil commitment requires the State to prove by clear and convincing evidence that the individual is mentally ill and dangerous).

to consider psychiatric evidence offered to rebut factual inferences drawn by the prosecution about his intent. This Court should not address that argument because petitioner did not raise it in the state courts, and those courts did not address it. See *Illinois* v. *Gates*, 462 U.S. 213, 218-220 (1983).

In the trial court, petitioner objected to the court's refusal to consider evidence of mental illness to show that he *lacked the ability or capacity* to form the intent required for first-degree murder. See, *e.g.*, Br. in Opp. App. G at 1, 9, 10. He never argued, however, that the court improperly failed to consider whether psychiatric evidence rebutted specific factual inferences drawn by the State. Because petitioner never presented that argument to the trial court, even though he had the opportunity to make an offer of proof, see J.A. 9, the court never ruled on the issue. Moreover, petitioner was permitted to introduce all of his mental illness evidence, see *ibid.*, so it is possible that the trial court in fact considered petitioner's rebuttal evidence in determining his guilt.[18]

Petitioner's argument in the court of appeals likewise focused on the trial court's refusal to consider mental illness evidence in evaluating petitioner's ability or capacity to form the requisite *mens rea*. See Pet. C.A. Br. 3, 46, 47, 48, 50, 52; Pet. C.A. Reply Br. 20. Petitioner did not argue that the trial court denied him the ability to rebut the factual inferences drawn by the prosecution. The court of appeals therefore did not address whether Arizona law precludes the use of psychiatric evidence to rebut the prosecution's factual inferences or whether such a preclusion would be constitutional. Addressing those issues likely would have required the court of ap-

[18] Petitioner incorrectly states (Br. 15) that the trial court relied on the State's "lines of factual inference" to find him guilty of murder. The court relied on "the entire record" in concluding that petitioner was guilty. J.A. 332. The court expressly relied on the factual inferences drawn by the prosecution only in rejecting petitioner's insanity defense. J.A. 333-334.

peals to analyze other Arizona decisions besides *Mott*. This Court should not address those issues in the first instance.[19]

In any event, petitioner is not correct that due process requires that he be allowed to use evidence of his mental illness to rebut factual inferences about his intent. A criminal defendant has the right "to present a complete defense" and to put the prosecution's case to "meaningful adversarial testing." *Crane* v. *Kentucky*, 476 U.S. 683, 690-691 (1985) (citations omitted). But that does not include the right to present evidence that is not relevant. See *id.* at 689; Ariz. R. Evid. 402. Evidence of petitioner's mental illness was "logically irrelevant" in determining whether he had the intent necessary to commit first-degree murder under Arizona law, because Arizona has "extract[ed] the entire subject of [mental illness] from the mens rea inquiry." *Egelhoff*, 518 U.S. at 58 (Ginsburg, J., concurring in the judgment) (citation omitted). As described above, to establish the required *mens rea* the State need prove only that the "defendant killed under circumstances that would otherwise establish knowledge or [in-

[19] It is not clear that Arizona law precludes use of psychiatric evidence to rebut the prosecution's factual inferences. Psychiatric testimony about "behavioral tendencies," such as a defendant's impulsive reaction to stress, may be admitted to rebut the element of premeditation, provided the testimony is not that the defendant was "*incapable*, by reason of a mental defect, of premeditation or deliberating." *Mott*, 931 P.2d at 1053-1054 (citing *State* v. *Christensen*, 628 P.2d 580 (Ariz. 1981)). The Arizona Supreme Court went to great lengths in *Mott* to distinguish *Christensen* from another of its previous decisions, *State* v. *Gonzales*, 681 P.2d 1368 (1984), in which psychiatric evidence was offered to establish the defendant's cognitive inability to form the requisite mental state. See *Mott*, 931 P.2d at 1054. In light of the *Mott* Court's distinction between *Christensen* (which it preserved) and *Gonzales* (which it overruled in part), the Arizona Court of Appeals could not have resolved petitioner's claim without carefully parsing Arizona precedents. And, if the court of appeals had done that, the Arizona Supreme Court might have granted plenary review. Under those circumstances, this Court should not address petitioner's forfeited claim.

tent] but for [the defendant's mental illness.]" *Ibid.* (citation omitted). Because Arizona defines intent based on the objective circumstances, assuming the defendant's "theoretical normality," *Fisher*, 328 U.S. at 466, petitioner's mental illness and its effect on his subjective intent had no bearing on whether the State proved its case.

Even if petitioner's mental health evidence were somehow relevant to his intent, due process would not give petitioner the right to insist on admission of the evidence. "[T]he introduction of relevant evidence can be limited by the State for a 'valid' reason." *Egelhoff*, 518 U.S. at 53 (plurality opinion) (citing *Crane*, 476 U.S. at 690). As discussed above, there are several valid reasons for Arizona to refuse to consider mental illness in assessing *mens rea* and to channel consideration of psychiatric testimony into the insanity determination. Those reasons apply both when that testimony is offered on the ultimate issue of intent and when the testimony is presented to rebut factual inferences used to establish that intent.

CONCLUSION

For the foregoing reasons, the judgment of the Arizona Court of Appeals should be affirmed.

Respectfully submitted.

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MARCH 2006