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IN THE SUPREME COURT OF THE UNITED STATES

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ERIC MICHAEL CLARK, :
Petitioner, :
v. : No. 05-5966
ARIZONA. :
- - - - - x

Washington, D.C.
Wednesday, April 19, 2006

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:02 a.m.

APPEARANCES:

DAVID I. GOLDBERG, ESQ., Flagstaff, Arizona; Appointed
by this Court, on behalf of the Petitioner.

RANDALL M. HOWE, ESQ., Chief Counsel, Office of the
Attorney General, Phoenix, Arizona; on behalf of
the Respondent.

PAUL D. CLEMENT, ESQ., Solicitor General, Department of
Justice, Washington, D.C.; for the United States,
as amicus curiae, supporting the Respondent.

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P R O C E E D I N G S

[11:02 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument next in Clark versus Arizona.

Mr. Goldberg.

ORAL ARGUMENT OF DAVID I. GOLDBERG
ON BEHALF OF PETITIONER

MR. GOLDBERG: Mr. Chief Justice, and may it please the Court:

Eric Michael Clark was denied his Fourteenth Amendment right to a fair trial. Arizona law defined the cognitive elements of first-degree murder as requiring proof beyond a reasonable doubt that Eric Clark intentionally and knowingly shot and killed a police officer in the line of duty. The State of Arizona was permitted to offer facts to circumstantially prove these mental and essential requisite elements of mens rea. Under the rule espoused by the Arizona Supreme Court in State versus Mott, as we have been calling it, "the Mott rule," this evidence, as offered by the defense both in lay testimony and expert testimony, was arbitrarily categorically excluded as a rule of evidence that's unsupported by any valid State purpose.

In this case --

1 CHIEF JUSTICE ROBERTS: It was excluded with
2 respect to mens rea, but, of course, all of the
3 evidence came in with respect to the insanity defense.

4 MR. GOLDBERG: It came in, yes, Mr. Chief
5 Justice, as to the insanity defense, but could only be
6 considered if Eric knew right from wrong. It cannot be
7 considered because of the peculiar adoption of an
8 amendment to 13-502, which is the Arizona insanity
9 statute, that eliminated consideration of the nature
10 and quality of his acts.

11 JUSTICE KENNEDY: Is --

12 CHIEF JUSTICE ROBERTS: Well --

13 JUSTICE KENNEDY: -- the State telling us --
14 and we'll ask the State when they argue -- but is the
15 State telling us that it has defined "intent" in a
16 particular way for this, so that "intent" is just
17 having the purpose to cause the result --

18 MR. GOLDBERG: If they were --

19 JUSTICE KENNEDY: -- and, therefore, that
20 this testimony is irrelevant? Is that the State's
21 argument, as you understand it?

22 MR. GOLDBERG: As I understand the State's
23 argument, they are adopting what Justice Ginsburg wrote
24 in Montana v. Egelhoff, that the State, by enacting
25 this rule, has made this a substantive choice to make

1 evidence of mental illness irrelevant. However,
2 Arizona did not do that, and Arizona did not argue
3 that below. Below, Arizona argued, repeatedly, that
4 Eric Clark knew this was a police officer, that Eric
5 Clark intentionally shot a police officer. On appeal,
6 they argued the same thing. In the appellate decision
7 in this case, by the Court of Appeals of the State of
8 Arizona, the State -- I raised a challenge to the
9 sufficiency of the evidence in addressing that issue.
10 And this is in the joint appendix at -- one -- if I
11 could have one moment -- begins on page 330 of the
12 joint appendix -- 336, and proceeds through the court's
13 discussion of the sufficiency of the evidence, in
14 paragraph 17. The court concluded that there was
15 sufficient evidence from which a reasonable finder of
16 fact could conclude -- and it states, "reasonable
17 inference thereupon that Clark knowingly and
18 intentionally shot Moritz, and knew that he was a
19 police officer when he did so." There's repeated
20 references that the Arizona Court of Appeals did not
21 understand that Arizona had somehow, by adoption of the
22 Mott rule, decided to redefine the crime of first-
23 degree murder, and -- as it -- we point in our opening
24 brief, they could not constitutionally do so.

25 JUSTICE GINSBURG: Well, what --

1 JUSTICE SOUTER: Well, do you take that --
2 please.

3 JUSTICE GINSBURG: What do you make of the
4 very name that the State gave, not acquitted by reason
5 -- not not-guilty by reason of insanity, but guilty,
6 except insane. Guilty of what? Guilty of the charge.
7 And the charge is first-degree murder. So, even if
8 insanity is found, apparently that's defined to be
9 "guilty of the charge, except insane," therefore not
10 subject to criminal punishment.

11 MR. GOLDBERG: That's correct, Justice
12 Ginsburg. However, guilty of the charge, based on the
13 State's evidence, without any consideration of the
14 defendant's evidence. In this case --

15 CHIEF JUSTICE ROBERTS: But --

16 MR. GOLDBERG: -- we offered 16 lay witnesses
17 and their testimony, in addition to the experts. And I
18 want to point this -- make this point clear. The State
19 wants you to believe that this issue only involves
20 psychiatric expert testimony. It does not. And it
21 involves lay fact evidence, just as in any trial. But
22 these 16 lay witnesses talked about --

23 CHIEF JUSTICE ROBERTS: But the lay -- I'm
24 sorry. That was my question. The lay --

25 MR. GOLDBERG: These lay witnesses --

1 CHIEF JUSTICE ROBERTS: -- witnesses still
2 talked about his mental state, correct?

3 MR. GOLDBERG: That's correct. But the trial
4 judge ruled, under Mott, that he was precluded from
5 considering all mental health evidence, all evidence of
6 mental disease or defect, on the issue of mens rea.
7 So, even though it was admitted, and there's no quarrel
8 here that all of the evidence that we sought to present
9 was admitted, it was not considered by the trial judge.
10 He could not. Because the Mott rule itself is
11 categorical. And I quote from the Mott decision, as
12 follows, "Arizona does not allow evidence of a
13 defendant's mental disorder, short of insanity, either
14 as an affirmative defense or to negate the mens rea
15 elements of a crime." That states "all evidence," and
16 the trial judge understood it to mean that, and that's
17 the way it is applied in --

18 JUSTICE BREYER: No --

19 MR. GOLDBERG: -- Arizona.

20 JUSTICE BREYER: -- what they have here --
21 the -- what the SG says -- which seemed right to me,
22 and I would like you to explain why it wasn't -- is
23 that as far as the insanity defense is concerned, that
24 everyone in Arizona agrees that you consider whether he
25 knows right from wrong in respect to this act. Thus,

1 if he thinks the truckdriver is an alien, or he thinks
2 he's an animal, and has a serious mental problem in
3 knowing what's going on, that comes right in, as it did
4 here, because it's relevant to whether he knew it was
5 right or wrong to shoot this person. And, therefore,
6 once I read that, I thought there is not, at least in
7 this case, a question of whether the insanity defense
8 is complete, because it is. Everything that you wanted
9 to introduce was introduced. And, indeed, it was
10 considered, properly, under the insanity defense. And
11 if you had convinced the jury, you would -- or the -- I
12 guess, the jury -- you would have won on that. Now, am
13 I -- what's wrong with what I've just said?

14 MR. GOLDBERG: There is a distinction between
15 nature and quality of one's acts and knowing whether an
16 act is right or wrong. And the State's and the United
17 States position here is not supported by the history of
18 the development of M'Naghten nor the ALI version of the
19 Model Penal Code.

20 JUSTICE BREYER: Yes, but I'm interested in
21 Arizona, remember. I'm not -- what I'm interested in
22 is whether if you say, "Judge, I am going to prove the
23 following. My client knows right from wrong, in
24 general, but he thought that the truckdriver was a wild
25 animal, and that delusion meant that he is so insane,

1 he could not have formed the necessary intent." The
2 judge replies, "You can bring that in, because if he
3 thought the driver was a mental -- was a wild animal,
4 he did not know right from wrong in respect to this
5 killing." Now, is that what happened --

6 MR. GOLDBERG: No --

7 JUSTICE BREYER: -- in effect? Or would --
8 did the judge say, "You may not introduce that
9 evidence, because it is not relevant"?

10 MR. GOLDBERG: No, Justice -- the trial judge
11 ruled that we could offer the evidence, because we were
12 not before a jury, and the judge was the trier of fact.

13 And he stated so, that he would separate out, for
14 himself, what he could consider and what he could not.

15 And his verdict in this case, on the "guilty, except
16 insane," focused only on whether Eric knew right from
17 wrong.

18 JUSTICE BREYER: In this case.

19 MR. GOLDBERG: In this case --

20 JUSTICE BREYER: Well, fine. So, then, what
21 is -- would -- if he thought it was a wild animal, then
22 he would not have known right from wrong in respect to
23 killing that individual.

24 MR. GOLDBERG: But that is not the State's
25 point, or -- nor the United States Government's point

1 in this case.

2 JUSTICE BREYER: What is it?

3 MR. GOLDBERG: Their point is that the former
4 is subsumed in the latter. In other words, it makes no
5 difference. But the Arizona Court -- the Arizona
6 Supreme Court, in a State Court decision, State versus
7 Chavez, indicated otherwise.

8 JUSTICE BREYER: No, but whether it --

9 JUSTICE KENNEDY: Well, I guess maybe the
10 question is, What is your point? And I have the same
11 question as Justice Breyer, and I'd just like to pursue
12 that.

13 If a case, a hypothetical case, is one in
14 which the second prong of M'Naghten, knowing the
15 difference in right and wrong, gets to the question of
16 his capacity to form an intent, isn't that sufficient?

17 I think that's Justice Breyer's question.

18 MR. GOLDBERG: It would, if Arizona allowed
19 consideration of that evidence. And it does not, at
20 all.

21 JUSTICE KENNEDY: But let's --

22 MR. GOLDBERG: Now --

23 JUSTICE SOUTER: Yes, but whether it does or
24 --

25 JUSTICE KENNEDY: -- let's assume that it can

1 consider the evidence as to -- on the right-and-wrong
2 prong.

3 MR. GOLDBERG: The right-and-wrong prong --

4 JUSTICE KENNEDY: Does the hypothetical state
5 --

6 MR. GOLDBERG: In a hypothetical --

7 JUSTICE KENNEDY: -- that says, "We'll let
8 this evidence" --

9 MR. GOLDBERG: In a hypothetical --

10 JUSTICE KENNEDY: -- "in under the right-and-
11 wrong aspect of M'Naghten, but not under the nature and
12 quality of the act."

13 MR. GOLDBERG: And your question is whether -
14 -

15 JUSTICE KENNEDY: Why that isn't sufficient
16 to answer your contention that his intent is not -- has
17 not been subject to question.

18 MR. GOLDBERG: Because, first of all, it is
19 not offered and is not considered to specifically
20 determine whether it rebuts an inference that the State
21 has raised on factual point key to their case.
22 Secondly, the nature and quality is not a consideration
23 in Arizona.

24 JUSTICE KENNEDY: What they said --

25 MR. GOLDBERG: And even if it was -- and I

1 would -- can point this out by an example that gets to
2 what Justice Breyer was saying -- if a person is
3 squeezing a lemon -- and this is a common example in
4 law school -- and it turns out to be his sister -- he
5 knows, in the abstract, that a person -- killing a
6 person is right or wrong. He knows it's wrong. But he
7 does not know that squeezing a lemon is wrong.

8 In this case, if Eric Clark's evidence showed
9 that he believed the police officer was an alien, and
10 there was substantial evidence in the record to that
11 effect -- and I would specifically point you to page 39
12 in the joint appendix, where the -- where the expert
13 testified that Eric had a heightened fear of police --

14 JUSTICE KENNEDY: Well, I'll look at
15 M'Naghten. I had thought it was whether or not the
16 action was right and wrong, whether -- rather than the
17 -- than the -- than the moral command was wrong.

18 MR. GOLDBERG: That is correct. That is
19 correct, Justice Kennedy.

20 JUSTICE BREYER: Then, what do you do --

21 JUSTICE SOUTER: Then what you're saying, if
22 I understand it, is that when the Arizona statute
23 refers to whether or not the criminal act was wrong,
24 the criminal act that they are referring to, on your
25 view, is the act of intentional killing, period. And

1 if that's what they mean, then it is irrelevant that he
2 thought he was killing a Martian. But if the Arizona
3 reference to the criminal act being wrong refers to the
4 act in this case -- i.e., killing somebody you believe
5 is a Martian -- then the evidence could come in. So, I
6 think your argument means -- your argument rests on
7 the assumption that the Arizona statute's reference to
8 the criminal act being wrong means the criminal act, in
9 general, in the abstract -- i.e., intentional killing -
10 - as distinct from the act of killing somebody you
11 believe to be a Martian. Is that correct?

12 MR. GOLDBERG: Absolutely. That's not --

13 JUSTICE SOUTER: Okay.

14 MR. GOLDBERG: -- that's not --

15 JUSTICE BREYER: All right, if that's --

16 MR. GOLDBERG: -- the end of it, as well.

17 And the Model Penal Code makes this point when they
18 talk about their formulation, which is a -- whether a
19 defendant appreciates the wrongfulness of his conduct.

20 And they, in their discussions, had indicated -- and
21 these are on pages 166 and 169 of the ALI comments to
22 the Model Penal Code -- that M'Naghten could, under any
23 formulation -- a person could, in the abstract, know
24 that killing is wrong, but could also, in the -- in the
25 -- their subjective mental state, due to their mental

1 disease, not know that they were killing a human being.

2 JUSTICE BREYER: But the Arizona Court, the
3 Court of Appeals, writes that it turns on the finding
4 of criminal responsibility at the time of the criminal
5 offense. It is difficult to imagine that a defendant
6 who did not appreciate the nature and quality of the
7 act he committed would reasonably be able to perceive
8 that the act was wrong. Now, those words, written by
9 the Arizona Court, suggested to me that, in the case of
10 the lemon you're talking about, or in the case of the
11 individual who thinks that the truckdriver was a
12 Martian, they would say he does not know right from
13 wrong, here, now, in this case. That, it seemed to me,
14 is what the Court of Appeals wrote.

15 MR. GOLDBERG: That --

16 JUSTICE BREYER: And if that's what they
17 wrote, then they don't adopt the test you're attacking;
18 rather, they do let the very evidence that you want to
19 come in, come in, and it is totally relevant.

20 MR. GOLDBERG: They would, if it was not
21 inconsistent with previous pronouncements of this very
22 same court. But, although it is -- it is error to not
23 instruct a jury on both prongs when Arizona had both
24 prongs, it was harm -- deemed harmless error in State
25 versus Chavez. But if --

1 JUSTICE KENNEDY: Well, but --

2 MR. GOLDBERG: But not --

3 JUSTICE KENNEDY: -- if Justice Breyer --

4 MR. GOLDBERG: -- but that it was error,
5 because they are distinct. They are distinct elements.

6 And that is to suggest that a psychiatric psychosis is
7 pervasive throughout an entire person's living.

8 JUSTICE KENNEDY: But if Justice --

9 MR. GOLDBERG: But --

10 JUSTICE KENNEDY: -- Breyer's explanation is
11 a correct statement of Arizona law, do you still have
12 an argument that your proof should have been accepted,
13 on the first prong?

14 MR. GOLDBERG: Yes.

15 JUSTICE KENNEDY: And what is that argument?

16 MR. GOLDBERG: The argument is that the State
17 proved, circumstantially, his mental state. The judge,
18 as the finder of fact, never -- and stated so in his
19 ruling on this issue -- could consider the lay
20 testimony and the expert testimony on whether it raised
21 a doubt, a single reasonable doubt as to the State's
22 position. And I can point this out on four facts.
23 First of all, the State sought to prove intent and
24 knowledge. They did so by first arguing that Eric's
25 conduct, in driving around the neighborhood with the

1 music playing loud, was to lure a police officer. This
2 is in the record at -- on August 5th, in the opening
3 statement by the State's attorney, page 15; on August
4 27th, at page 50; and that's in the joint appendix, at
5 314, in their closing argument.

6 CHIEF JUSTICE ROBERTS: And your evidence to
7 the contrary that was excluded would have showed what?

8 MR. GOLDBERG: That it was equally plausible
9 that he was driving around with his music playing loud
10 because he was drowning out the voices in his head,
11 which were --

12 CHIEF JUSTICE ROBERTS: So, it went to
13 diminished mental capacity. And as I understand
14 Arizona law, it has decided that that evidence can only
15 be presented in the context of an insanity defense.

16 MR. GOLDBERG: And that is unconstitutional,
17 Mr. Chief Justice.

18 JUSTICE SOUTER: You mean --

19 MR. GOLDBERG: First of all --

20 JUSTICE SOUTER: -- the Constitution --

21 MR. GOLDBERG: -- these are facts --

22 JUSTICE SOUTER: -- requires a diminished-
23 capacity defense?

24 MR. GOLDBERG: No, not the defense. There's
25 a very subtle, but important, distinction between the

1 diminished-capacity defense as an affirmative defense
2 and diminished-capacity evidence. And it's a shame
3 that --

4 JUSTICE SOUTER: Well, if you're going to let
5 the evidence of diminished capacity in, on mens rea,
6 you've done, by -- as it were, by the front door, what
7 you can't do by the back door -- i.e., by a diminished-
8 capacity defense -- because you're making the same
9 point. The burdens of proof are different, but you're
10 making the same point.

11 MR. GOLDBERG: Well, the burdens of proof
12 goes to whether, if we did not -- if we did not prevail
13 -- or we did prevail on the second issue, the --
14 whether M'Naghten allows consideration of this --
15 whether it makes a difference. In that situation, the
16 burden of proof is on us, by clear and convincing --

17 JUSTICE SOUTER: Do you -- do you think it is
18 unconstitutional for a State to say, "We know perfectly
19 well that it is much more difficult for both cognitive
20 and reason -- reasons -- and reasons of character and
21 training and so on, for some people to conform
22 themselves to the criminal law than others. We know
23 it's harder for some than others. But we don't care
24 how much harder it is, unless it gets to the point that
25 we define as insanity. Because unless we require

1 something as serious as insanity to excuse, everybody's
2 going to have an excuse, and there isn't going to be
3 any criminal law" -- is that unconstitutional?

4 MR. GOLDBERG: No, it's not.

5 JUSTICE SOUTER: Okay.

6 MR. GOLDBERG: But the --

7 JUSTICE SOUTER: Isn't that what the State
8 does when it denies a diminished-capacity -- says, "We
9 will not have a diminished-capacity defense"?

10 MR. GOLDBERG: If it is framed as a defense,
11 yes, but if --

12 JUSTICE SOUTER: Okay. Now --

13 MR. GOLDBERG: -- it is framed --

14 JUSTICE SOUTER: -- isn't --

15 MR. GOLDBERG: -- as simply --

16 JUSTICE SOUTER: No, but isn't --

17 MR. GOLDBERG: -- lay evidence --

18 JUSTICE SOUTER: With respect, isn't that
19 also what the State is getting at when it says, "We
20 don't allow diminished-capacity evidence in on mens
21 rea, which is the State's burden. Rather, we allow it
22 in only on the defense of insanity, so that we can keep
23 it clear, clear that unless the diminished capacity is
24 so great as to amount to insanity, it's not an excuse"?
25 And if that is what the State is doing, is there any -

1 - anything unconstitutional about that?

2 MR. GOLDBERG: The unconstitutionality of
3 that -- of that procedure is that the State's evidence
4 goes uncontested. The State's evidence -- the State's
5 evidence -- and this has been fundamental to prove mens
6 rea, along with actus, is a fundamental right of the
7 defendant to present a defense to that. And we're
8 talking about presenting facts, not having --

9 CHIEF JUSTICE ROBERTS: Well, but it only --

10 MR. GOLDBERG: -- a psychiatrist get up there
11 --

12 CHIEF JUSTICE ROBERTS: -- goes uncontested --

13 MR. GOLDBERG: -- and --

14 CHIEF JUSTICE ROBERTS: -- it only goes
15 uncontested if the only way you're going to contest it
16 is to show diminished capacity. You could have
17 contested this evidence by showing that, you know, he
18 was a in a rock band, and he wanted to play the music
19 for -- to advertise the concert, not to lure the
20 police. There are a lot of defenses you can present.
21 What they're saying is, if it goes to diminished
22 capacity, that has to be used to show insanity or not -
23 - or nothing at all.

24 MR. GOLDBERG: But their justifications for
25 this rule, Mr. Chief Justice, are that it's not

1 reliable. And it is reliable evidence. Both the lay
2 testimony and expert testimony is admitted by the State
3 for other purposes, as well as for the defense in other
4 purposes, and has been found reliable. And this is
5 cited in footnote 15 of our reply brief.

6 JUSTICE GINSBURG: Mr. Goldberg, may I ask
7 you to clarify one thing about your argument? You say
8 that you should have permitted -- been permitted to
9 introduce this evidence to show that this act was not -
10 - the "act" being, kill a police officer -- was not
11 done intentionally or knowingly. But you seem to
12 indicate that Clark could have been convicted, under
13 the Arizona code, of some degree of murder. Am I right
14 about that? And, if so, what degree?

15 MR. GOLDBERG: Absolutely, Your Honor. Our
16 position -- and I stated this, in fact, in my opening
17 statement to the court, as well as in our motion for a
18 directed verdict after the close of the State's
19 evidence -- was that if the court found that the State
20 had failed to prove, considering all the evidence,
21 including the evidence of his mental illness, that he
22 did not know he was killing a police officer, then he
23 would be found guilty of second-degree murder or
24 manslaughter. And that would be our position as to why
25 this is unconstitutional, in part, because the State

1 chose to define a specific crime as requiring that
2 cognitive element that he knew he was killing a police
3 officer and then --

4 JUSTICE GINSBURG: And what would --

5 MR. GOLDBERG: -- sought --

6 JUSTICE GINSBURG: What --

7 MR. GOLDBERG: -- to preclude any
8 consideration of evidence that indicated the contrary.

9 JUSTICE GINSBURG: What was the second -- the
10 definition of "second degree"?

11 MR. GOLDBERG: "Second-degree murder" is
12 defined as intentional murder, without premeditation.
13 That's one form of second-degree murder in Arizona.

14 Now, I want --

15 JUSTICE GINSBURG: Well, what --

16 MR. GOLDBERG: -- to get back to --

17 JUSTICE GINSBURG: May I just ask, what -- if
18 the proof you'd like to introduce is that the defendant
19 considered the police officer to be an alien, why would
20 he have any intent? Why wouldn't your argument go, as
21 well, to second degree?

22 MR. GOLDBERG: Because if he knew he was
23 killing what he believed to be a alien who had taken
24 over a human form, then he may have known that he was
25 killing somebody, but not that it was a police officer,

1 because, in his mind, he believed that the police
2 officer was an alien.

3 JUSTICE SCALIA: But it doesn't go to
4 premeditation. I think that's Justice Ginsburg's
5 point. And I don't see why that isn't correct. It
6 doesn't go to premeditation.

7 MR. GOLDBERG: No, Justice Scalia, but he was
8 not charged with a premeditated murder.

9 JUSTICE SCALIA: No, but you're saying --
10 you're saying he could have been charged with second-
11 degree murder --

12 MR. GOLDBERG: As intentional murder.

13 JUSTICE SCALIA: -- because -- what?

14 MR. GOLDBERG: Because the -- because the
15 crime of second-degree murder -- because this is a
16 unique --

17 JUSTICE SCALIA: Does not require
18 premeditation. And I --

19 MR. GOLDBERG: Right.

20 JUSTICE SCALIA: -- don't see how this goes
21 to premeditation, anyway.

22 MR. GOLDBERG: Does not go to premeditation.
23 Goes to the question of whether he knowingly killed a
24 police officer. If you take -- second-degree murder is
25 -- includes all the elements of this particular first-

1 degree-murder statute and adds one, and that one
2 element is knowledge and intent to kill a police
3 officer. And that's the additional element that makes
4 second degree a lesser included defense of first
5 degree. And the judge was precluded from considering
6 the fact evidence in this case that indicated that Eric
7 was delusional, that he was schizophrenic, that he was
8 actively delusional at the time of the crime, and he
9 believed that its -- our town had been inhabited by
10 aliens.

11 JUSTICE BREYER: All right, suppose he did,
12 he believed there -- it's an alien, which is not
13 immoral, to kill an alien, let's say, if he comes from
14 Mars. I don't know about the morality of that, but --

15 [Laughter.]

16 JUSTICE BREYER: -- I'll go with you. I'll
17 say that you're absolutely right about that. Now,
18 suppose, in addition, the judge did consider that. He
19 did consider it, because he thought the person wouldn't
20 know right from wrong if he thought this was an alien.

21 All right? A space alien. Now, suppose that's true.

22 Then what is the problem, from a due-process point of
23 view? After all, you were able to make your claim
24 there. The judge would have heard the evidence. And
25 if the judge believed that that was so, he would have

1 acquitted the individual. Does there remain a due-
2 process problem?

3 MR. GOLDBERG: Not if it could be considered
4 as to going to the element, no. But that's not this
5 case.

6 JUSTICE BREYER: Actually, I was --

7 MR. GOLDBERG: It does not go to the mental
8 state, in this case, because Arizona law, under State
9 v. Mott, precludes its consideration for that purpose -
10 -

11 JUSTICE BREYER: Well, suppose --

12 MR. GOLDBERG: -- for any purpose other than
13 --

14 JUSTICE BREYER: -- I read State v. --

15 MR. GOLDBERG: -- whether we made the --

16 JUSTICE BREYER: -- Mott --

17 MR. GOLDBERG: -- other than whether we meet
18 our burden of proving he is insane, by clear and
19 convincing evidence.

20 JUSTICE KENNEDY: Is it your argument that it
21 -- under Arizona law, it goes to excuse the conduct,
22 but not whether the conduct, in fact, occurred?

23 MR. GOLDBERG: It does.

24 JUSTICE KENNEDY: I mean, is that your
25 argument?

1 MR. GOLDBERG: That's the way the Arizona --

2 JUSTICE KENNEDY: Is that your argument?

3 MR. GOLDBERG: Yes. Yes. Well, that's the
4 way the Arizona rule is drafted. It can go to -- if we
5 can convince the trier of fact that it -- that his
6 delusions prevent him from knowing the nature and
7 quality of his acts, if that was actually included in
8 our statute. But, in our case, we were limited to
9 trying to prove his delusional behavior, his delusional
10 beliefs that the officer was an alien, to show that he
11 did not know right from wrong. And that was it. And
12 that places the burden on us, which runs counter to the
13 fundamental principles of criminal law that are set
14 down in Winship, that it's the State's burden to prove,
15 beyond a reasonable doubt, every element, including
16 this element, and not without any opportunity of the
17 defense to rebut that element.

18 JUSTICE BREYER: Well, that's a different
19 question. If, in fact, it came in via the insanity
20 defense, I guess the burden is on the defendant to
21 prove it. Is --

22 MR. GOLDBERG: Correct.

23 JUSTICE BREYER: -- that true? Well, if it
24 comes in via mens rea, then the burden is on the State
25 to disprove it.

1 MR. GOLDBERG: No, the burden's not on the
2 State to disprove it, Justice --

3 JUSTICE BREYER: Doesn't the State have to
4 prove, beyond a reasonable doubt, if it came in via
5 mens rea, that the mens rea was there?

6 MR. GOLDBERG: Absolutely. The burden never
7 --

8 JUSTICE BREYER: And so, the State --

9 MR. GOLDBERG: -- shifts from the State.

10 JUSTICE BREYER: -- would have to show that,
11 in fact, he was not so insane as to preclude intent.

12 MR. GOLDBERG: In a technical sense, yes.
13 But, as a practical matter, no, because the State would
14 be offering all of their evidence, as they did here, to
15 show that, circumstantially, he had the intent. We
16 would be offering the evidence, which is regularly
17 accepted and is found reliable for numerous purposes in
18 our State, to show that there's a doubt as to whether
19 he had that. And that's a completely different thing
20 than the State attempting -- having the burden on them
21 to disprove it, which this Court has so said in
22 affirmative-defense cases involving self-defense, for
23 example, that the State does not have to disprove that
24 a person was justified or had a reasonable belief for
25 their safety, but that they -- and in the same token,

1 you cannot prevent the jury from considering whether
2 that raises a doubt as to the State's case. And that
3 is the fundamental problem, the fundamental due-process
4 violation here.

5 If there are no further questions, I'd like
6 to reserve the rest.

7 CHIEF JUSTICE ROBERTS: Thank you, Mr.
8 Goldberg.

9 Mr. Howe, we'll hear now from you.

10 ORAL ARGUMENT OF RANDALL M. HOWE

11 ON BEHALF OF RESPONDENT

12 MR. HOWE: Mr. Chief Justice, may it please
13 the Court:

14 The answer to both questions before this
15 Court today, Do States have the -- have the discretion
16 to define it -- to define the affirmative defense of
17 insanity as the policymakers see fit? And they also
18 have the right to protect that definition by -- as
19 Justice Souter's questions indicated -- from an -- from
20 an attack on that definition by having evidence of
21 diminished capacity of a different -- a different
22 definition of "insanity" from coming in the back door.

23 JUSTICE KENNEDY: Well, to prevail, do you
24 think you have to show that, under prong two of
25 M'Naghten, the right-and-wrong prong, that the

1 defendant can prove really everything, and, in fact,
2 did have the opportunity to prove everything, that he
3 seeks to prove under prong one? If it's -- do you have
4 to convince us of that in order to win?

5 MR. HOWE: I -- no, Your Honor. There are
6 two answers to that. The first answer is that the
7 M'Naghten definition of "insanity," the heart of it,
8 has always been the right/wrong test. And this Court,
9 in Leland, and, I believe, in Powell, as well, have in
10 -- have always referred to M'Naghten as the
11 "right/wrong test." State courts across the country,
12 they go --

13 CHIEF JUSTICE ROBERTS: But it's clear,
14 Counsel, though, that the first prong of M'Naghten adds
15 something different, "You don't understand the nature
16 and quality of your acts." In other words, it would be
17 enough, if you recognized both prongs, if he thought
18 this was a Martian, regardless of whether he knew it
19 was wrong to kill a Martian or not.

20 MR. HOWE: Yes, that's correct, Your Honor.
21 But as the lower courts spoke in M'Naghten, we don't
22 look at the -- at the -- at the act in the abstract.
23 As the -- as the Solicitor General's brief points out,
24 it says in here, at page 16, that what the traditional
25 M'Naghten test looks at was his very conduct. And as

1 the Arizona Court of Appeals noted, it would be -- it
2 would be difficult to imagine a situation where someone
3 would know his conduct was wrong, but not know the
4 nature of his act. And I won't pretend that perhaps in
5 some theoretical hypothetical scenario that might --
6 you know, that might occur. But it's very difficult,
7 indeed, to imagine that. And the Arizona Legislature
8 rationally could, you know -- could have, you know,
9 decided that they will -- that they will reduce the
10 definition to the heart of M'Naghten, which is
11 right/wrong, because the -- you know, the issue of
12 nature and quality will rarely, if ever, come up.

13 JUSTICE KENNEDY: But I am correct in
14 assuming that it is -- and tell me if I'm wrong -- that
15 it is your position, the State's position, that, under
16 the right/wrong prong-two part of M'Naghten, and under
17 the evidence in this case, the court was able to
18 consider, really, all of the evidence that's necessary
19 in order to meet this defendant's defense as to -- as
20 to intent.

21 MR. HOWE: Yes, Your Honor. And so --

22 JUSTICE KENNEDY: I agree with you. I'm
23 trying to think of some theoretical case where it would
24 make a difference. I can't quite come up with a
25 hypothetical.

1 MR. HOWE: And I've -- you know, I've worked
2 with this case for several months, Your Honor, and I
3 haven't come up with one either.

4 JUSTICE SOUTER: Well, wouldn't it make a
5 difference in a case in which an individual
6 understands, number one, as a general matter, that it
7 is wrong to kill people intentionally? He also
8 believes that there are space aliens. And he believes
9 that it is wrong to kill space aliens. But he kills
10 one. Under the full M'Naghten test, under prong one,
11 he would have a defense. But under the M'Naghten test
12 of prong two alone, since he believed it was wrong to
13 kill Martians, he wouldn't have a defense. Isn't that
14 right?

15 MR. HOWE: No, Your Honor, for two reasons.
16 The first reason is that the heart of the M'Naghten
17 test is knowing right from wrong. And if a State, in
18 its -- in its discretion, wants to say that those --
19 that the State will not account for those rare cases
20 where it might make a difference, a State could do
21 that. The second answer, Your Honor, is, as M'Naghten
22 says, at page 723, what we look at when we're examining
23 whether the defendant knew right from wrong, is his --
24 is the very conduct that he committed.

25 JUSTICE STEVENS: Counsel, I'm puzzled about

1 one thing. I just -- maybe it's just my stupidity.
2 But assume he thought it was a Martian, and assume he
3 thought -- does he have to think it was wrong to kill
4 Martians? Or supposing he thinks it is not wrong to
5 kill Martians, then what do you do? Does it matter
6 whether he thinks it's right or wrong to kill Martians,
7 in other words?

8 MR. HOWE: My point, Your Honor, is, if he is
9 not actually killing a space alien, there is grave
10 doubt that he would understand his conduct, and that
11 would make rather meaningless, at some practical level,
12 asking the question, "Did you know that your conduct
13 was wrong?"

14 JUSTICE STEVENS: I'm not sure I understand
15 the answer. I -- that -- is it -- does he -- let me
16 put it this way, and maybe you can answer yes or no.

17 MR. HOWE: Sure.

18 JUSTICE STEVENS: Does he have to think it's
19 wrong to kill Martians?

20 MR. HOWE: No, Your Honor. What he -- what
21 he has to understand is what he is actually doing. And
22 if he doesn't actually understand that he is killing a
23 human being, then it's rather academic, in abstract, to
24 ask, "Did you know whether that -- did you know what
25 you thought you were doing was wrong?" But at -- you

1 know, but, again, I suppose, hypothetically, there may
2 be -- you know, there may be a case where that would
3 make a difference. But the State is clearly free to
4 recognize that that's an incredibly rare circumstance
5 and that, "As a matter of policy, we're not going to
6 clutter up the definition of 'insanity' with that." It
7 could -- you know, adding that language, a policymaker
8 could very well decide that would be distracting to a
9 jury or a factfinder.

10 JUSTICE STEVENS: The thing that troubles me,
11 just to -- and then you can comment on it -- I'm
12 assuming it's possible they thought he didn't know
13 whether it was a Martian or not, and that he thought he
14 had a mission in life to kill Martians, that they're
15 enemies, they're bad to come, and he wants to kill 'em.
16 If that was the -- what the trial court found, could
17 he be put to death for that killing?

18 MR. HOWE: That would raise serious Eighth
19 Amendment concerns, Your Honor, and --

20 JUSTICE STEVENS: Or could he just be found
21 guilty of murder, or whatever, on those facts?

22 MR. HOWE: If he truly believed that he was
23 shooting an alien when he was actually shooting a human
24 being, he would -- he would certainly have, you know, a
25 very strong case for insanity. But what the factfinder

1 found here was that -- but -- was that his -- was that
2 his evidence that that's what he thought he was doing
3 was --

4 JUSTICE STEVENS: No, but there's a --

5 MR. HOWE: -- insufficient.

6 JUSTICE STEVENS: -- difference in the burden
7 of proof. He has the burden of proof to get the
8 affirmative defense or to get the -- in that category.

9 MR. HOWE: Surely.

10 JUSTICE STEVENS: And I'm just wondering if
11 he's -- just raises a doubt as -- so there's not proof
12 beyond a reasonable doubt that he knew the person he
13 was killing was either a human being or an -- a kind of
14 individual that it would be wrong to kill.

15 MR. HOWE: Well --

16 JUSTICE STEVENS: If there's just a
17 reasonable doubt on the issue --

18 MR. HOWE: Well --

19 JUSTICE STEVENS: -- would he be guilty, or
20 not?

21 MR. HOWE: Well, Your Honor, that raises the
22 second issue that we're -- that we're discussing today,
23 that, you know, the State, as I've argued, has the
24 right to define "insanity" as it -- as it sees fit.
25 And if you -- if you -- if a -- if a State allows

1 evidence, that doesn't rise to the standard of
2 insanity, to come in, then you -- then he's able to
3 raise whatever his personal definition of "insanity" is
4 through the back door. And the State has a great
5 interest in preserving its definition of "insanity,"
6 and its ability to define "insanity" as it sees fit by,
7 as we argued --

8 JUSTICE STEVENS: But, as you say, it's -- in
9 a way, it's -- in a sense, it comes in through the back
10 door, as you say, but, even coming in through the back
11 door, if it raises a reasonable doubt as to his intent
12 to kill a -- make a wrongful killing, why shouldn't it
13 be admissible?

14 MR. HOWE: It should -- it isn't -- it isn't
15 admissible, Your -- a State can preclude it, Your
16 Honor, because the State has the definite right to
17 define the element of mens rea, and it is -- again, as
18 it sees fit. And as --

19 JUSTICE KENNEDY: Does that mean that it
20 could also exclude the testimony from the lay people or
21 the friends who talked about this person's illness?

22 MR. HOWE: It --

23 JUSTICE KENNEDY: Or are we just talking
24 about the expert testimony?

25 MR. HOWE: Evidence of mental disease or

1 defect, whether it's expert testimony or lay testimony,
2 does not come in under Mott.

3 JUSTICE GINSBURG: Mr. Howe, would you
4 explain to me how the State has proved intentional --
5 not intentional killing, but of a police officer? If
6 that's the charge, that he intended to kill a police
7 officer, how does the State meet its burden on a police
8 officer if the testimony on the other side is, "I did
9 not understand that this human that I killed was a
10 police officer"?

11 MR. HOWE: What the -- what the State proved
12 in this case, Your Honor, is that, at least, you know,
13 2 weeks prior to the murder, he indicated a desire to
14 do -- to do something extremely similar to what he --
15 you know, to what he actually did. There was testimony
16 he had -- he had an extreme dislike toward police
17 officers. On the -- at the time of the killing,
18 Officer Moritz was in -- was in a marked police car, he
19 had a uniform, he turned on his lights and siren, and
20 Clark -- you know --

21 JUSTICE GINSBURG: I see that on the --

22 MR. HOWE: -- pulled over.

23 JUSTICE GINSBURG: -- the State side, so the
24 State has introduced evidence from which a trier could
25 conclude he intended to kill a police officer. But he

1 wants to introduce, on the other side, "I didn't have
2 that intent. In fact, I had delusions. I thought I
3 killed an alien." But he's not allowed to introduce
4 that evidence --

5 MR. HOWE: Yes --

6 JUSTICE GINSBURG: -- to counter --

7 MR. HOWE: -- Your Honor.

8 JUSTICE GINSBURG: -- the State's proof, as I
9 understand what the Arizona law is.

10 MR. HOWE: Sure. What the Arizona Supreme
11 Court recognized in Mott was -- what the Arizona
12 Legislature did when it enacted its criminal code and
13 it defined its mens rea, it defined the mens rea in
14 such a way -- you know, just as you -- you know,
15 just as you explained in Egelhoff, Your Honor, that the
16 -- that the condition of mental disease or defect does
17 not negate the mens rea. So, what the State has --
18 what the State has to prove, in general, and had to
19 prove in this specific case, is, the State had to prove
20 that Clark either, one, actually had the -- had the
21 intent to kill a police officer, at least knowing he
22 was a police officer, or killed under -- or killed
23 under circumstances that would indicate that he,
24 knowing -- at least knowingly killed a police officer,
25 but for his mental illness. It's --

1 JUSTICE KENNEDY: Is this an alternative
2 argument, so that, if we accept this argument, we need
3 not ask whether the evidence comes in under prong two,
4 or is this complementary to the argument that the
5 evidence comes in under prong two?

6 MR. HOWE: I -- I'm not quite sure how to
7 answer that, Your Honor. What we -- what we've argued,
8 the -- you know, as far as the first issue, is that a
9 State is free to define "insanity" as it -- as it sees
10 fit, under most, if not all, cases -- or most, if all
11 real cases.

12 CHIEF JUSTICE ROBERTS: Why is that, Counsel?
13 Let's suppose that the -- one of the cases that come
14 up is a language difficulty. The individual -- maybe
15 he's not in uniform -- identifies himself as a police
16 officer. Could the State have a rule that, "We are not
17 going to allow evidence of language concerns," that the
18 individual didn't speak English, and the officer said,
19 "I'm a police officer," so he didn't know, when he shot
20 him? What is it about mental capacity that allows you
21 to exclude that type of evidence?

22 MR. HOWE: Surely, Your Honor. This Court
23 has always noted that evidence of mental disease or
24 defect is viewed quite skeptically, because lawyers and
25 psychiatrists and psychologists very often can't agree

1 on the meaning or the value or the validity of
2 psychiatric evidence. The State also has an -- has an
3 interest in preventing someone, who has -- you know,
4 who -- there's at least a serious question of mental
5 illness, from being able to forgo an insanity defense,
6 but raise evidence to negate mens rea, in the hopes
7 that he would walk free instead of being found "guilty,
8 except insane," and sent to the State hospital.
9 There's also -- you know, a third policy reason, that,
10 because you -- in your -- because the -- you know,
11 because the gross question of whether someone is insane
12 or sane is a difficult enough question with psychiatric
13 evidence, it raises -- it raises the question to a
14 whole other level of complexity to ask the juries,
15 "Well, if we -- if you find that he is sane, but he has
16 some degree of mental illness, just find -- you know,
17 just how did that mental illness affect his ability to
18 intend." And the State, as a matter of policy, you
19 know, may properly say, "That is -- you know, we're
20 finding on the nature to determine whether someone's
21 insane or not," but it's just too complex a question
22 to ask the -- a jury or a judge, as in this case, to
23 make fine gradations of ability and responsibility.

24 JUSTICE GINSBURG: Mr. Howe, one of the
25 things that puzzled me about your position is, you

1 said, "Under Arizona law, while this doesn't come in
2 under mens rea, it does affect sentencing." I think
3 you said that the -- his mental state is properly taken
4 into account in the sentencing. And, by that, did you
5 mean just the length of the incarceration, or the place
6 of the incarceration?

7 MR. HOWE: Your Honor, my time is up. May --

8 CHIEF JUSTICE ROBERTS: You can -- may
9 answer.

10 MR. HOWE: Surely. What -- under Arizona
11 law, if you have a mental illness, that does not rise
12 to the level of insanity if the -- if the -- if the
13 trial court or the jury finds that circumstance exists
14 by a preponderance of the evidence and it can be found
15 as a mitigating circumstance, that he -- that can, in a
16 given case, reduce the sentence imposed.

17 Thank you very much.

18 CHIEF JUSTICE ROBERTS: Thank you, Mr. Howe.

19 General Clement, we'll hear now from you.

20 ORAL ARGUMENT OF PAUL D. CLEMENT

21 FOR THE UNITED STATES, AS AMICUS CURIAE,

22 IN SUPPORT OF RESPONDENT

23 GENERAL CLEMENT: Mr. Chief Justice, and may
24 it please the Court:

25 Arizona has decided to adopt a particular

1 form of the insanity defense, and it has also decided
2 to protect that substantive decision by channeling
3 evidence about a defendant's mental capacity into an
4 affirmative defense with the burden squarely on the
5 defendant. Neither aspect of that judgment violates
6 the Federal Constitution.

7 And I think, with respect to the substantive
8 decision, there are two elements to it. First of all,
9 Arizona wanted to streamline consideration of M'Naghten
10 and focus on the heart of M'Naghten, which is the
11 right/wrong test. But, equally important, as far back
12 as 1965, in the Schantz case, where they first came up
13 with the rule applied in Mott, they also wanted to not
14 have a diminished-capacity defense in the State of
15 Arizona.

16 JUSTICE KENNEDY: Could the State say that
17 it's the defendant's burden to show that it was not a
18 police officer?

19 GENERAL CLEMENT: I don't think the State --
20 could the State do that? Is that the question?

21 JUSTICE KENNEDY: Yes.

22 GENERAL CLEMENT: I don't think the State --

23 JUSTICE KENNEDY: Because the next question
24 is, Why didn't they -- isn't that what happened here?

25 GENERAL CLEMENT: Right. I don't think they

1 could do that. And I don't think that's what happened
2 here. And I think if you look at the evidence in this
3 case -- I mean, it came in, in sort of a strange way,
4 in part, I think, because it was a bench trial, but I
5 think what the trial court did is say that, "All of the
6 evidence on insanity, all of the evidence in the second
7 phase of the case, is relevant. It's all coming in.
8 I'm going to take it into consideration, but I'm going
9 to take it into consideration only on the insanity
10 defense, not as part of the mens rea defense." And I
11 think that was consistent with Arizona law. What I
12 think would be a harder question -- and let me just
13 say, I think the way that this was postured for the
14 trial court was that the Petitioner argued that all of
15 that evidence comes in for consideration of the mens
16 rea.

17 JUSTICE KENNEDY: It seems to me that you
18 introduced the -- my concern by saying that they -- the
19 State can put the burden of proof on the defendant,
20 which we know is generally true in many States with
21 reference to the insanity defense. But when you link
22 it with mens rea, then it seems to me you have a
23 problem.

24 GENERAL CLEMENT: Well, I don't think so,
25 Justice Kennedy, but you're absolutely right to say

1 that there's this tradition with insanity, which is
2 quite different than the tradition with respect to
3 other elements of a crime. And I think that goes back
4 to the common law, and goes back to Blackstone. And if
5 you look at Blackstone, and you look at some of the
6 common law cases that this Court cited in its Davis
7 opinion, they describe murder as having several
8 elements. One of them is obviously killing a person,
9 and one is malice aforethought. And then, some of the
10 cases treat a sound mind as a separate element. But, I
11 think, if you look at the history, it's clear it wasn't
12 a true element, because the common law put the -- it
13 started with a presumption of sanity, which you
14 couldn't have with respect to any other element, and
15 said it was perfectly appropriate to put the burden on
16 the defendant.

17 And I think what the common law recognizes is
18 the question of criminal responsibility or insanity,
19 although it has some logical relationship to mens rea,
20 can be separated out and can be dealt with in an
21 affirmative defense. And I think if you don't
22 recognize the State's ability to do that, you end up
23 allowing a defendant to basically sneak in, through, as
24 Justice Souter put it, the front door, all sorts of
25 watered-down insanity defenses in the guise of

1 arguments trying to negate mens rea.

2 JUSTICE KENNEDY: It does seem as if the
3 argument, that, "Oh, this all comes in under second --
4 under the second prong," means that if there's a --
5 there's another inference. It's a -- it's a secondhand
6 argument about lack of mens rea.

7 GENERAL CLEMENT: Well, it -- I think,
8 Justice Kennedy, though --

9 JUSTICE KENNEDY: Kind of, the second-class --

10 GENERAL CLEMENT: Well --

11 JUSTICE KENNEDY: -- sort of evidence.

12 GENERAL CLEMENT: -- I don't think it's
13 second class. I think what Arizona recognized, in the
14 Schantz case and in Mott, in making this rule in the
15 context of rejecting the diminished-capacity defense,
16 is that if you allow a defendant to argue, "My evidence
17 shows that I lack the capacity to form the requisite
18 mental state; and, therefore, that comes in on the mens
19 rea case," you can make that argument in terms of any
20 insanity defense you like. I can argue that, "I lack
21 the capacity to form the requisite intent, because I
22 responded to an irresistible impulse." Well, a State
23 that's decided to have the M'Naghten insanity defense,
24 rather than the irresistible-impulse defense, has to be
25 able to make the judgment, I submit, that, "We're going

1 to have the M'Naghten defense, and we're going to keep
2 it as an affirmative defense, and we're not going to
3 allow that defense, that we've rejected, to effectively
4 come in through the front door." And, to use Justice
5 Souter's --

6 JUSTICE BREYER: That would present a serious
7 constitutional question, wouldn't it? Or what -- I
8 mean, I -- that's -- but I thought some of these
9 questions might be in this case, but I now doubt -- I'm
10 having doubts about that. But suppose the State so
11 limits the defense that an individual defendant, who,
12 by any ordinary psychiatric test, would be viewed as
13 seriously insane, and, therefore, not a person who is
14 capable of being held responsible in any moral sense
15 for the crime, is, nonetheless, going to be convicted
16 of murder? I mean -- and that might be -- come up with
17 irresistible impulse, because the person is totally
18 insane, not like any other human being. Anyone would
19 normally say he lacked the knowledge of -- he's not
20 responsible for what he does. And then, the State,
21 nonetheless, convicts him of murder.

22 GENERAL CLEMENT: But, Justice Breyer, they
23 wouldn't convict him for murder, because he would
24 qualify for an insanity defense. And somebody as
25 insane as you're --

1 JUSTICE BREYER: If he knew right from wrong,
2 if they -- so, I mean, he -- it's not his intellectual
3 capacity that's wrong, it's his ability to control his
4 impulse.

5 GENERAL CLEMENT: Well, I mean --

6 JUSTICE BREYER: But that's not in this case,
7 I agree with you.

8 GENERAL CLEMENT: But --

9 JUSTICE BREYER: But is a variation of that
10 in this case -- namely, the variation -- but we've
11 discussed that at length, and I take it you think
12 that's not in this case.

13 GENERAL CLEMENT: I don't think it's in this
14 case, but I don't want to mislead you, which is as -- I
15 think you can hypothesize a situation where somebody
16 would be exonerated by one form of the insanity
17 defense, and not exonerated by a narrow form of the
18 insanity defense. And I don't think it follows that
19 somebody that's in that margin has a constitutional
20 right to make up the difference, effectively, through a
21 mens rea argument. And, otherwise, I think you -- I
22 mean, you --

23 JUSTICE BREYER: But we don't have to reach
24 that question here, in your view.

25 GENERAL CLEMENT: Well, I think you --

1 JUSTICE BREYER: Or do we?

2 GENERAL CLEMENT: I would think that you
3 might. I mean, I think you could say -- because I
4 think what happened here is, all of this evidence came
5 in on the back door through the insanity defense.

6 JUSTICE BREYER: But if we have to reach it,
7 this -- they're arguing we do, because they're saying
8 the person is so insane he doesn't know whether this is
9 a human being or a sack of lemons. Now --

10 GENERAL CLEMENT: But then he --

11 JUSTICE BREYER: -- he said that they didn't
12 consider that in the insanity defense. And he's not
13 attacking the burden of proof, at least not in this
14 Court. And so, I -- do you think we do have to -- that
15 we have to --

16 GENERAL CLEMENT: I --

17 JUSTICE BREYER: -- assume that he's right on
18 that?

19 GENERAL CLEMENT: I don't think you have to
20 reach that question here. But you do have to reach a
21 related question, I think, which is, I think the trial
22 court here very clearly, in applying Mott, prevented
23 the Petitioner from making a diminished-capacity
24 argument. And then --

25 JUSTICE BREYER: What is "diminished

1 capacity," if it is -- what is that?

2 GENERAL CLEMENT: It's an argument that is
3 basically a variation on the insanity defense. It's
4 partial responsibility. It was basically the governing
5 law in California until it was --

6 JUSTICE BREYER: But partial responsibility
7 does not -- insanity -- they use the words "insanity"
8 and "diminished responsibility." I took the word
9 "insanity" to mean the kind of mental state that would,
10 in fact, show a lack of intent. I took the word
11 "diminished responsibility" to mean there is intent,
12 but it's excusable.

13 GENERAL CLEMENT: I think you can draw that --

14 JUSTICE BREYER: Now, am I --

15 GENERAL CLEMENT: -- distinction, but I do
16 want to make clear that there are arguments here that
17 you could make in a different State that you can't make
18 in Arizona because of the substantive decision that,
19 "We don't want to have a diminished-capacity defense,
20 and we don't want to have that policy judgment
21 frustrated by having the evidence come in through the
22 front door." And to use Justice --

23 JUSTICE STEVENS: May I ask --

24 GENERAL CLEMENT: -- Souter's example --

25 JUSTICE STEVENS: -- this question?

1 Supposing the evidence is equally divided on the
2 question of whether he thought it was a Martian who he
3 had a right to kill. Could he be convicted of murder,
4 constitutionally?

5 GENERAL CLEMENT: I think he could, Justice
6 Stevens. As I understand --

7 JUSTICE STEVENS: Because then --

8 GENERAL CLEMENT: -- the hypothetical, we're
9 --

10 JUSTICE STEVENS: -- there would be --

11 GENERAL CLEMENT: -- basically --

12 JUSTICE STEVENS: -- not proof beyond a
13 reasonable doubt that he knew he was killing a human
14 being, and it was wrong to do so.

15 GENERAL CLEMENT: Well, I think it would --
16 it might depend on exactly what the statutory
17 definition of "murder" in the State was.

18 JUSTICE STEVENS: Well, I don't -- I don't --
19 I'm just wondering, as a constitutional matter,
20 forgetting all the -- as a constitutional matter, can a
21 man be convicted of murder if the evidence is equally
22 balanced on the question of whether he knew it -- he
23 did anything wrong and -- or knew that he was killing a
24 human being?

25 GENERAL CLEMENT: Maybe not, Justice Stevens.

1 It just depends on the way that the statute deals with
2 it. Because, in my view of the statute, if somebody
3 really thought -- if they had to kill a human being,
4 and they thought, "I wasn't doing it. I was killing an
5 alien," maybe that could come in, on mens rea, but if --

6 JUSTICE SCALIA: Have we ever held that an
7 insanity defense is required, that a State cannot
8 simply abolish insanity defenses?

9 GENERAL CLEMENT: No, Justice Scalia, you
10 have not held --

11 JUSTICE SCALIA: I didn't we had.

12 GENERAL CLEMENT: -- that. And I think --
13 but, equally, I don't think a State would -- is
14 required to have a diminished-capacity defense. And --

15 JUSTICE ALITO: Well, is a State required to
16 adopt any particular mens rea for murder? Is there a
17 constitutional requirement as to the minimum mens rea
18 that can be -- can be set for the offense of murder?

19 GENERAL CLEMENT: I don't think so. I mean,
20 I think it's very difficult to find, in the Due Process
21 Clause, the tools necessary to superintend those kind --

22 JUSTICE GINSBURG: But here, there --

23 GENERAL CLEMENT: -- of decisions.

24 JUSTICE GINSBURG: -- was a charge, "intended
25 to kill a police officer." It could have been just

1 "intended to kill." And I think Mr. Goldberg conceded
2 that "intended to kill" would have been a proper
3 conviction, but not "intended to kill a police officer"
4 --

5 GENERAL CLEMENT: Well --

6 JUSTICE GINSBURG: -- unless he's allowed to
7 counter that add-on.

8 GENERAL CLEMENT: With respect, Justice
9 Ginsburg, I think that starts to confuse the
10 hypotheticals with the real case, because I don't think
11 Petitioner's argument was that they had no idea that
12 this person was a police officer, and he thought he was
13 killing an alien. I think their argument was much more
14 one for insanity, and that maybe there were other
15 explanations for the conduct. But the psychological
16 testimony here suggests that maybe he sometimes thought
17 that his mother was also an alien, but he kind of knew
18 it was his mother, as well. And so, I don't really
19 think that maps up with the argument they've made.

20 The one point I want to leave you with,
21 though, is, as Justice Souter said, everybody agrees
22 that there's no due-process requirement that Arizona
23 have a diminished-capacity defense. Well, it doesn't
24 make any sense to say that they have to have that
25 implicitly with the burden on the State at the same

1 time.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, General.

4 Mr. Goldberg, you have 4 minutes remaining.

5 REBUTTAL ARGUMENT OF DAVID I. GOLDBERG

6 ON BEHALF OF PETITIONER

7 MR. GOLDBERG: There is a due-process
8 guarantee that the defendant can present evidence in
9 his own defense. No matter how the Chambers line of
10 cases is viewed by the court, this Court made clear,
11 in *Montana v. Egelhoff*, that in the absence of any
12 valid State justification -- and I'm quoting now, from
13 the plurality decision -- "exclusion of exculpatory
14 evidence deprives the defendant -- it's very basic to
15 have the prosecutor's case encounter and survive the
16 crucible of meaningful adversarial testing." And that
17 --

18 CHIEF JUSTICE ROBERTS: But that certainly
19 doesn't include the right to present any evidence you
20 want.

21 MR. GOLDBERG: It's the difference between --

22 CHIEF JUSTICE ROBERTS: You couldn't have
23 presented evidence that this person was, in fact, a
24 Martian.

25 MR. GOLDBERG: That's correct, Mr. Chief

1 Justice. And it's not that we're asking to -- this
2 Court to affirmatively rule that all of this evidence
3 comes in, just that all of it cannot be excluded, per
4 se, and that the trial judge is, just as in any other
5 type of evidence, any other fact or opinion evidence,
6 serves as the gatekeeper under the rules of evidence to
7 decide whether it's more prejudicial or it's more
8 probative. But Arizona has decided, only for this
9 purpose, that this evidence is inherently unreliable.
10 And then they've taken it to the point where they have
11 proven somebody guilty of murder in the first degree of
12 killing a police officer without allowing him to raise
13 a reasonable doubt as to whether he knew he was killing
14 a police officer. And that specific argument was made,
15 contrary to what the Solicitor just stated, in my
16 motion for directed verdict that I made in this case.

17 JUSTICE ALITO: Was it a reasonable question
18 whether he knew it was a police officer or whether he
19 knew it was a human being?

20 MR. GOLDBERG: Whether it was a police
21 officer. I moved the court for a directed verdict at
22 the close of the State's evidence, and argued to the
23 court that if he found -- the judge, as the factfinder
24 -- that, in his delusional mind -- and again re-urged
25 this at the close of our evidence -- that he believed

1 he was killing a police officer, then the court could
2 find him guilty of second-degree murder or
3 manslaughter. And I asked the court to do that, and
4 the court refused to do that.

5 So, the --

6 JUSTICE BREYER: In the --

7 MR. GOLDBERG: -- court precluded any
8 consideration of this evidence.

9 JUSTICE BREYER: Yes, I -- the best I can
10 find in that Court of Appeals opinion, at the moment,
11 is that they do reject the idea of diminished
12 responsibility, on Mott -- on the ground of Mott.
13 That's true. They say, "Don't even consider it." But
14 I didn't think diminished responsibility went to the
15 question of whether he had the requisite intent. I
16 thought insanity went to that, as they use those words.
17 What is "diminished responsibility," if it isn't, "We
18 admit the intent -- we admit that he intended to kill
19 the individual, knew it was wrong, but he isn't as
20 responsible as an ordinary person would be"? What is -
21 -

22 MR. GOLDBERG: It's not --

23 JUSTICE BREYER: -- it, if it isn't that?

24 MR. GOLDBERG: It's a fact that -- a fact
25 that he did not know he was killing a police officer.

1 JUSTICE BREYER: He thought he was killing
2 another individual.

3 MR. GOLDBERG: Correct.

4 JUSTICE BREYER: Does that --

5 MR. GOLDBERG: Or an alien.

6 JUSTICE BREYER: Does the State have to --
7 does the Constitution have to let you off if that's the
8 situation?

9 MR. GOLDBERG: It's not "let you off," with
10 all due respect. It's "judge somebody based on" --

11 JUSTICE BREYER: Yes, you --

12 MR. GOLDBERG: -- "their personal" --

13 JUSTICE BREYER: All right, but --

14 MR. GOLDBERG: -- "culpability."

15 JUSTICE BREYER: -- but does the State have
16 to say, "We are going to convict you of a lesser
17 offense," in the Constitution?

18 MR. GOLDBERG: The State -- the State has to
19 allow the defendant to present his evidence and have it
20 considered, if it's relevant, nonprivileged, and
21 reliable, for a proper purpose. And here, it was
22 offered for a proper purpose, just as in Chambers and
23 in Rock, and in all the cases that have been before
24 this Court, where this Court has held so.

25 I wanted to add -- answer one question that

1 was raised earlier about whether a State could define
2 "murder" without a requisite mens rea, essentially,
3 which is -- or a specific intent, as the State seems to
4 suggest that Arizona has done, inferentially, under the
5 Mott decision. This Court held, in 1895, in Davis
6 versus United States, that, "No one" -- and I'm quoting
7 here -- "No one, we assume, would wish either the
8 courts or juries, when trying a case of murder, to
9 disregard the main principle existing at common law and
10 recognized in all cases tending to support the charge
11 below to make a complete crime cognizable by human
12 laws, which includes mens rea and an actus rea."

13 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

14 The case is submitted.

15 [Whereupon, at 12:04 p.m., the case in the
16 above-entitled matter was submitted.]

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