

# Arizona's Insanity Defense, *Clark*, and the 2007 Legislature

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In the post-Hinckley era, four states (Montana, Idaho, Utah, and Kansas) abolished their traditional insanity statutes in 1979 in favor of what are in certain circumstances *mens rea* insanity statutes. These changes were controversial and attracted early attention of legal scholars and courts in the individual states and at the U.S. Supreme Court. A 2006 Supreme Court decision in *Clark v. Arizona* had distinct but related concerns that helped crystallize the Court's attention on both *mens rea* and traditional insanity defense statutes. This decision led to a dramatic precedent that may have settled these matters for generations to come. This article will discuss the changes in the Arizona statutory and case law and the interplay between these changes and the important decisions of the U.S. Supreme Court during the same time span. The result of the changes has led to a situation in Arizona where, for the most serious criminal defendants with mental illness, there is no current mechanism to acquit a defendant on the basis of insanity by a *mens rea* statute or otherwise.

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When Arizona became a state on February 14, 1912, it adopted an insanity defense described in the Penal Code of 1901 that read, “[A]ll persons are of sound mind who are neither idiots nor lunatics nor affected with insanity” (Ref. 1, p 294). According to the Arizona Supreme Court decision in *Burgunder v. State of Arizona* (1940),<sup>2</sup> the 1922 case of *West v. State*<sup>3</sup> affirmed Arizona's adoption by case law of the Supreme Court of California's test of sanity, which was “whether defendant could distinguish between right and wrong” (Ref. 2, p 264). Subsequently, courts adopted the complete M'Naughten rule at least as early as 1974, as described in the Arizona Supreme Court decision in *State v. Karstetter*.<sup>4</sup> In 1977, the legislature codified the full M'Naughten rule as the state's insanity test in A.R.S. § 13-502.<sup>5</sup> In 1993, Arizona changed its insanity defense statute by truncating the M'Naughten rule to include only those persons who at the time of the crime “did not know that the criminal act was wrong.”<sup>5</sup> In addition,

the legislature changed the name of its insanity verdict to guilty except insane (GEI) and changed its postinsanity acquittal management system by adopting a psychiatric security review board (PSRB) model, similar to the PSRB programs in Oregon and Connecticut.<sup>6</sup>

As described by Kirkorsky, Shao, and Bloom,<sup>6,7</sup> from 1993 to 2007 Arizona divided insanity acquittees into two categories based on the trial court's determination of the seriousness of the criminal charge. The group with less serious criminal charges were hospitalized at the Arizona State Hospital (ASH) for evaluation for a defined period and either released or entered into the civil commitment system. Those who were viewed as having serious charges were also hospitalized at ASH and placed under the jurisdiction of the PSRB for a period commensurate to the sentence the defendant would have received if found guilty, as determined by the trial court judge.

With statutory changes adopted in 2007, Arizona's system has dramatically changed. Currently, the same two groups are committed to ASH and distinguished on the basis of whether the individual “. . . did or did not cause the death or serious physical injury of or the threat of death or serious physical injury to another person” (Ref. 8, § B).

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Rather than being placed directly under the jurisdiction of the PSRB, individuals charged with a serious crime as defined above are now committed to the jurisdiction of the Arizona Department of Corrections and then assigned to the PSRB for a period of time determined by the trial judge on the basis of sentencing guidelines. Most of the seriously dangerous group are also subject to possible later transfer to the Department of Corrections for placement in a correctional institution if the PSRB determines at a later hearing that the person no longer needs ongoing treatment but is still dangerous with a propensity to reoffend.<sup>6</sup> While all individuals assigned to the PSRB are potentially dangerous, certain crimes may not fit the statutory criteria for possible transfer to a correctional facility.<sup>7</sup> Kirkorsky *et al.*<sup>6,7</sup> postulated that those individuals later subject to transfer to corrections no longer should be considered insanity acquittees. Instead, they are criminal offenders, as the legislature, inadvertently or intentionally, effectively classified them into a category similar to those found guilty but mentally ill (GBMI) in other states. These include offenders found GEI for first- or second-degree murder or sentenced under the dangerous offender statute that, if interpreted broadly, might place any individual assigned to the PSRB at risk of transfer from ASH to a correctional facility.<sup>9–11</sup>

Major changes to Arizona's insanity statutes were proposed in the 2020 legislative session, but the session was curtailed by the COVID-19 pandemic and these bills were not fully considered. Each was reintroduced in the 2021 legislative session. Neither the 2020 or 2021 proposals would restore the insanity defense to the model that existed prior to the changes made in 2007.

Two new bills were considered by the 2021 Arizona Legislature; one focused on improving the PSRB, while the other eliminated the PSRB. Ultimately, the legislature combined these bills into a single bill, SB 1839,<sup>12</sup> which was passed and signed by the Governor in July 2021. The bill was divided into two phases. The first phase requires that by October 1, 2021, various procedural changes be implemented by the PSRB, and that a retired superior court judge become the chair of the board. The new law abolished the commitment of PSRB individuals to the Department of Corrections but retained the powers of superior court judges to terminate commitment of certain PSRB individuals, described above, to complete their GEI sentences in a

prison. The second phase of the bill, effective in 2023, completely abolishes the PSRB and returns jurisdiction of PSRB cases to the superior courts. The apparent thinking behind this contradictory appearing bill was to give the PSRB time to improve its functioning in the eyes of the legislature while spelling out very clearly what would happen if improvements did not take place.

### Clark v. Arizona (2006)

In 2000, Eric Clark shot and killed a police officer in Flagstaff, Arizona. He was charged with first-degree murder under an Arizona statute for intentionally and knowingly killing a police officer in the line of duty.<sup>13</sup> He spent two years as incompetent to stand trial, was later found competent, and was then tried and convicted of the original murder charge at a bench trial. There was no question that, at the time of the death of the police officer, Mr. Clark was experiencing chronic paranoid schizophrenia. At trial he raised concerns related to both the use of psychiatric testimony to prove he was unable to form the requisite *mens rea* related to the criminal charge and Arizona's truncated insanity defense. The trial court judge did not allow him to raise the *mens rea* defense on the basis of an earlier Arizona State Supreme Court decision in *State of Arizona v. Mott*,<sup>14</sup> which prohibits psychiatric or psychological testimony in criminal cases involving *mens rea*. In addition, the trial court judge found that Mr. Clark did not meet Arizona's truncated M'Naughten insanity test, although the severity of his paranoid schizophrenia was never questioned at trial.

In his appeal to the U.S. Supreme Court, Mr. Clark asked whether Arizona abrogates the due process rights of defendants in criminal cases, first by eliminating the "nature and quality" component of the traditional M'Naughten rule and, second, by prohibiting the use of psychiatric and psychological testimony in *mens rea*-based cases. By answering in the negative to each question, the Court sided with Arizona's position,<sup>15</sup> although Justice Kennedy along with Justices Stevens and Ginsburg offered a spirited dissenting opinion regarding Arizona's prohibition of professional psychiatric or psychological testimony on the question of *mens rea* in this case.<sup>16</sup>

The Court determined that no insanity defense, including a full M'Naughten test, was required as fundamental to the "principle of justice" (Ref. 15, p

749). Further, the Court stated that removing the M'Naughton reference to "nature and quality" (the cognitive component of the M'Naughten rule) did not damage the insanity rule because the cognitive component was clearly subsumed into the moral component of wrongfulness.

On the *mens rea* question, the majority opinion recognized that a defendant in a criminal case has "a right as a matter of simple due process to present evidence favorable to himself on an element that must be proven to convict him." (Ref. 15, p 769). The Court's majority, however, stated that, under Arizona state law, "[t]he mental disease and capacity evidence is thus being channeled or restricted to one issue and given effect only if the defendant carries the burden to convince the factfinder of insanity: the evidence is not being excluded entirely, and the question whether reasons for requiring it to be channeled and restricted are good enough to satisfy the standard of fundamental fairness that due process requires. We think they are" (Ref. 15, p 771).

At the time of the *Clark* decision in 2006, Arizona had a true insanity defense, as changes in the state's insanity statute allowing possible transfer to the Department of Corrections did not begin until 2007. Thus, in 2006 Arizona clearly had an insanity defense that met the standards put forth in the *Clark* decision.

### **Kahler v. Kansas (2020)**

In 1996, Kansas became one of four states that abolished a traditional insanity defense, instead implementing *mens rea* defenses. James Kahler was convicted of the 2009 murder of four members of his family, received a death sentence in a Kansas court, and subsequently lost his appeal in the Kansas Supreme Court. Mr. Kahler filed a Writ of *Certiorari* to the U.S. Supreme Court, posing the question "of whether the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense." On March 23, 2020, the Supreme Court issued its opinion in the affirmative, frequently citing the *Clark* decision. The majority concluded, "[A] State's 'insanity rule [. . .] is substantially open to state choice'" (Ref. 17, p 1029). The Court made it clear that the decision applied only to Kansas but also clarified that states have wide latitude in their insanity defense rules as long as they have at least one way to an acquittal by reason of insanity. In the *Clark* decision, the Court defined the concept of channeling as

permitting states to have a single path to an insanity defense. In *Kahler*, the Court went on to summarize the cases of Mr. Clark and Mr. Kahler, writing, "Of course, Kahler would have preferred Arizona's insanity defense (just as Clark would have liked Kansas's). But it doesn't mean that Kansas (any more than Arizona) failed to offer any defense at all" (Ref. 17, p 1031).

In Kansas, it was permissible to channel all insanity cases into a possible *mens rea* defense, while in Arizona it was possible for the state to channel all insanity cases into its truncated M'Naughten rule. For Arizona defendants, however, there is no channel to a *mens rea* insanity defense, and, for certain defendants, the truncated M'Naughten rule may lead to the Arizona Department of Corrections.

### **Discussion**

*Clark* was decided in 2006. One year later, the Arizona legislature changed its insanity statute. Arizona preserved the truncated M'Naughten insanity test, maintained the GEI verdict, and continued the division of those found GEI, now divided into three categories. Individuals facing less serious charges were still hospitalized for a defined time to evaluate them for civil commitment or release, but the legislature significantly changed the possible outcome for the other two groups. In cases where the GEI verdict was for a crime resulting in the death or threat of death or serious physical harm to others, "[T]he judge shall sentence the defendant to a term of incarceration in the state department of corrections and shall order the defendant to be placed under the jurisdiction of the psychiatric security review board and committed to a state mental health facility under the department of health services . . ." (Ref. 18, § D). Because of the criminal charge for which the individual was adjudicated GEI, most individuals were then potentially subject to transfer directly to a correctional facility. Kirkorsky *et al.*<sup>6,7</sup> described these legislative changes and proposed that these individuals were judged under a GBMI statute rather than an insanity statute. Further, Arizona does not allow psychiatric or psychological testimony at trial pertaining to *mens rea*. This leads to a situation where a portion of GEI offenders lack access to a true insanity defense. If this is accurate, then Arizona stands outside of the decisions in *Clark* and *Kahler*, which require at least one pathway to possible acquittal by reason of insanity. It appears that following

both Supreme Court cases, Arizona has two possible choices.

First, the legislature could reverse its position and promulgate a *mens rea* insanity defense similar to what was done in Kansas and do away with its modified M'Naghten insanity test. Arizona could then become a *mens rea* state like the four others (i.e., Montana, Idaho, Utah, and Kansas) that are currently recognized as such. The state could then virtually leave the GEI verdict and the PSRB intact, recognizing that the current statute is equivalent to a modified GBMI verdict. For the sake of consistency in its statutes, the time may have come for this change to be considered. There was enough criticism of the negative aspects of Arizona's situation by both the majority and the dissent in *Clark*, as well as in the amicus brief<sup>19</sup> submitted jointly by major professional organizations, including the American Psychiatric Association, the American Psychological Association, and the American Academy of Psychiatry and the Law. This change could be accomplished by allowing professional testimony on observational evidence and mental disease evidence by psychiatrists and psychologists, leaving to the trier of fact the ultimate question of the defendant's capacity to form the necessary criminal intent (Ref. 15, p 757–9).

Second, the legislature could revert to the original 1993 statutes and restore the GEI verdict, reinstating an insanity defense with a functioning PSRB as it was originally intended. If the legislature were to go in this direction, it would be prudent to consider some of the criticisms of the PSRB that surfaced in the abbreviated 2020 legislative session that appeared to emanate mainly from the defense bar. These criticisms focused on the operation of the PSRB without clear administrative support or rules and with possible reluctance to use the full extent of its powers to subpoena witnesses and award conditional release similar to what has been a strong feature of the Oregon PSRB.<sup>20</sup> Alternatively, as passed in July 2021, SB 1839 appears to give the PSRB two years to improve its functioning. If the PSRB succeeds, new legislation could then continue the PSRB, otherwise the PSRB would be abolished.

In a broader view, Arizona has functioned more like a *mens rea* state, often using both the jails and the prisons for individuals with serious mental illness charged with crimes. The state does not have many individuals found GEI each year. There were an

average of 10 less seriously charged GEI insanity acquittees per year in 9 of the last 10 years and an average of 13 GEI-GBMI offenders in each of the last 10 years. This is in a state with a 2020 population estimated at close to 7.4 million people<sup>21</sup> and a prison population at the end of June 2020 of slightly more than 40,000 inmates.<sup>22</sup> Arizona is also a state that, according to the Treatment Advocacy Center in 2016, ranked 48th in state hospital beds among the 50 states, with only 4.4 beds per 100,000 people.<sup>23</sup> Additionally, most of the state's competency to stand trial evaluations and restoration programs take place in county jails or in the community.<sup>24</sup> Although it appears that there is a high number of individuals with mental illness in prison, the state does not appear to be providing effective health and mental health care for these prisoners. The Arizona Department of Corrections is currently being sued in a prisoner health and mental health care suit that began in 2012 as *Parsons v. Ryan*<sup>25</sup> (now *Parsons v. Shinn*) and at present is not proceeding toward any real settlement. Currently, the state is viewed by the Federal District Court in Arizona as being out of compliance on many dimensions of the previous settlement agreements and the case may be proceeding toward a trial.<sup>26</sup>

In addition to the four *mens rea* states, Alaska is often also mentioned as another state that has all but abolished its insanity defense. Alaska radically changed its Model Penal Code defense in 1982 following the horrific shooting deaths of four teenagers in a local park in Anchorage, committed by an insanity acquittee on pass from the state hospital.<sup>27</sup> The 1982 changes have several unusual provisions, including a truncated M'Naghten statute, a GBMI statute that allows the judge to enhance the in-custody portion of a GBMI sentence and order the Department of Corrections to provide treatment for the now convicted person while providing protection to the general public, and a full *mens rea* defense.<sup>28</sup> Review of the Alaska mental health statutes between 1982 and 2016 reveals that only one person was found NGRI under its *mens rea* defense.<sup>29</sup> Further, in addition to the four *mens rea* states, Alaska, and what we have described in relation to Arizona, there are 12 other states that submitted an amicus brief in support of Kansas in the *Kahler* case.<sup>30</sup> These include Alabama, Arkansas, Florida, Georgia, Indiana, Louisiana, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, and Texas. We hope this article will encourage others to examine their state

insanity statutes carefully to see where the available channels lead.

In summary, the term “channeling,” as used in both *Clark* and *Kahler*, is descriptive of the intended disposition of defendants who are mentally ill and charged with serious crimes. In most cases, the channels in the *mens rea* states and Alaska lead to prison. *Clark* began this process, and then *Kahler* finished it by concluding that no specific importance should be granted to the traditional insanity tests. Thus, states are free, within unspecified boundaries, to develop their own formulations of an insanity statute. *Kahler* affirmed that a *mens rea* insanity test is as acceptable as the M’Naughten rule, the Model Penal Code, the Durham tests, or possibly other future tests of insanity.

It is clear that all insanity defenses are not the same, with some designed by states to safeguard insanity acquittees from long prison sentences and place them in the mental health system, while others are designed to channel defendants with severe mental illness to prison. The latter seems to be the intent of *mens rea* states and Alaska. Arizona is slightly different, seemingly treating its group of GEI-GBMI offenders better than the other five states.<sup>6</sup> Nonetheless, there are too few individuals adjudicated GEI in a state with a population close to 7.4 million people, and the prison alternative is clouded by a lawsuit alleging inadequacy of treatment.<sup>23</sup>

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