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Tobin P. Richer

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PLACING PROPER LIMITS ON BATTERED WOMAN SYNDROME IN AREAS BEYOND SELF-DEFENSE: AN ARGUMENT AGAINST ADMISSION IN CHILD ABUSE AND NEGLECT CASES

*Tobin P. Richer**

INTRODUCTION

Child Abuse and Battered Women: throughout the past several decades, these two devastating social problems have risen to the forefront of social, legal, and political debate. State statutes, endless volumes of both federal and state case law, and a literary saturation of law reviews, psychiatric trade journals, and other publications have all attempted to decipher and rationalize just where and when the defense of Battered Woman Syndrome (BWS) should apply. However, even with such an extensive line of case precedent and a virtual library of text, courts have remained in confusion and have struggled with the task of drawing succinct boundaries to BWS application. Although BWS has been well established and widely accepted in the self-defense setting, the epicenter of debate now surrounds the issue of where, when, and under what circumstances beyond self-defense, should evidence of this powerful defense be appropriately applied.

In the recent case of *State v. Mott*, the Supreme Court of Arizona was faced with the pressing issue of whether to expand the traditional admission lines and allow BWS expert testimony to negate the "specific intent" element in a prosecution of child abuse and neglect.[1] Charged with first-degree murder and child abuse leading to death or serious injury, Mott attempted to introduce BWS expert testimony to show she lacked the

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* Tobin P. Richer: Executive Articles Editor of the DEPAUL JOURNAL OF HEALTH CARE LAW; J.D. (candidate), DePaul University College of Law, 1997; B.A. University of Wisconsin-Madison, 1995.

[1] State v. Mott, 187 Ariz. 536; 931 P.2d 1046 (Ariz. 1997).

capacity to "knowingly or intentionally" kill or abuse her child.[2] This novel, yet dangerous; concept of BWS testimony was rejected by the Arizona Supreme Court, and therefore, the appellate court decision admitting the evidence was overturned.[3] Due to the Arizona Supreme Court's careful analysis, an unfit parent was prevented from escaping justice and the strength of the appropriate BWS defense was protected from widespread, debilitating abuse. By preventing unreasonable expansion of BWS, the Arizona court effectively preserved the available, justified, and often necessary BWS defense in the self-defense setting.

After a brief overview of both the applicable federal and Arizona state court precedents, this article will analyze the decision of *State v. Mott* in accordance with traditional notions of expert testimony evidence and will discuss the reach of BWS into determinations of specific intent. When the analysis is complete and the drastic effects of expanding BWS into the child abuse and neglect area are illustrated, it will become clear why the refusal to allow BWS evidence to prove lack of intent in *State v. Mott* serves as a guide to limiting BWS testimony and prevent abusive parents from escaping justice. Quite simply, BWS should not apply beyond the self-defense setting.

BACKGROUND

Federal Cases

Well before the defense of BWS was introduced into the American judicial system, the federal courts addressed the issue of whether mental deficiencies, not amounting to insanity, could be introduced as evidence to negate elements such as intent and premeditation.[4] Although not a murder case involving child abuse, in *Fisher v. U.S.*, the United States Supreme Court ruled the constitutional notion of Due Process was not

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[2] *Id.* at 538; 1048.

[3] *Id.*

[4] Fisher v. U.S., 328 U.S. 463 (1946). Insanity itself had long been recognized as a defense to criminal action as decided under the widely accepted M'Naughten Rule. The M'Naughten test for insanity states, in essence, that a defendant will be relieved of her criminal liability if, at the time of the offense committed, the defendant, due to such a disease or defect in cognitive mental processes or perception making it impossible for the defendant to recognize the nature and quality of her acts, was unable to realize that what she was doing was wrong. *Fisher* concerned mental disabilities short of insanity, not amounting to the M'Naughten insanity requirements.

violated when the trial court refused to allow the jury to weigh mental deficiency evidence in their determination of the defendant's capacity for premeditation and deliberation.[5] Because Fisher's alleged mental impairments did not qualify or rise to the level of "insanity" under the M'Naughten test, the Court stated Fisher was rightfully prohibited from introducing the evidence and was not, therefore, entitled to a jury instruction requiring the jury to include an evaluation of the mental deficiencies in their determination.[6]

The defendant Fisher, assaulted Ms. Reardon, a fellow library employee, after Reardon complained to the library superiors of Fisher's "slacking."[7] Fisher began slapping Reardon impulsively, then chased her throughout the library, striking her with a log of wood and strangling her to "stop her from hollering."[8] After Reardon stopped breathing and became limp, Fisher dragged her to a lavatory, cleaned up the blood spots throughout the building, and eventually killed Reardon by stabbing her in the throat.[9] Although Fisher stated in a written confession his main reason for killing Reardon was because she reported him for not cleaning the library floor sufficiently, Fisher claimed his low levels of emotional and mental stability precluded his ability to form the requisite premeditation and deliberation required for a first degree murder conviction.[10] Fisher sought to introduce the testimony of several psychiatrists to verify his mental defects and also insisted on a jury instruction allowing an evaluation of the alleged defects when determining intent, premeditation, and deliberation.[11] The psychiatric evidence was introduced, however the instruction was refused; after conviction for first degree murder, Fisher appealed to the United States Supreme Court.[12]

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[5]*Id.* at 472. Fisher was charged with first degree murder and thus, it was the state's obligation to prove premeditation and deliberation. Fisher wanted to present the expert testimony to rebut the state's evidence pertaining to such.

[6]*Id.* at 473

[7]*Id.* at 465, 479. Fisher also accused Reardon of referring to him as a "black nigger."

[8]*Id.* at 465, 480.

[9]Fisher v. U.S., 328 U.S. 463, 465 (1946).

[10]*Id.* at 466.

[11]*Id.*

[12]*Id.* at 467. Instructions were given on insanity, irresistible impulse, and traditional notions of premeditation and deliberation.

The Court began by stipulating the psychiatric evidence may indeed have assisted the jury in concluding Fisher was mentally "somewhat below the average" with "minor stigmata of mental subnormalcy."[13] Yet, as the Court continued, evidence of "mental weakness character traits," short of insanity, need not be admitted in criminal trials even for the purpose of negating intent, premeditation, or deliberation.[14] Deferring to the District of Columbia Rules of Evidence, the Court noted that, although there are obviously possible classifications of mentality beyond merely sane or insane, States are free to decide whether to accept a "diminished responsibility" theory based on mental defect and whether such a theory should be applied to elements of intent.[15] Although the Court refrained from expressing an opinion as to whether evidence short of insanity should be allowed, the Court clearly stated they would not "force" any state to adopt a requirement that criminal defendants be allowed to present evidence of mental deficiencies to determine or negate specific elements of the crime.[16] Such a requirement, the Court ruled, would involve a fundamental change in the common law theory of responsibility and should, therefore, be left to the better-qualified state legislature for debate.[17]

This theory of "diminished capacity" or "diminished responsibility" was next addressed in the landmark decision of *U.S. v. Pohlot*.[18] In *Pohlot*, the United States Court of Appeals for the Third Circuit ruled The Insanity Defense Reform Act clearly revealed Congressional intent to prohibit mental disease or defect evidence not amounting to insanity when attempting to create a "diminished capacity" or "diminished

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[13] *Id.*

[14] Fisher v. U.S., 328 U.S. 463, 472 (1946).

[15] *Id.* at 475. The "diminished responsibility" differs from insanity in the following way: insanity, if proven, has an end result of proclaiming the defendant "not guilty" by reason of insanity. However, when mental defect is introduced to negate intent, the end result, once intent is negated, is a lessening of the charge (*i.e.* murder to manslaughter or the like). Thus, a lesser charge leads to "diminished responsibility" because the defendant is "less responsible" due to a lack of intent. Diminished capacity and diminished responsibility are used interchangeably throughout the article, as both essentially assert the same theory of *mens rea.*

[16] *Id.* at 476.

[17] *Id.* at 477.

[18] U.S. v. Pohlot, 827 F.2d 889 (1987).

responsibility" defense.[19] Although Congress banned diminished capacity defenses in general, the court noted that psychiatric evidence of mental abnormalities might, in some cases, be relevant to a jury's determination of specific intent or other *mens rea* elements of a crime.[20] Yet, the court also called for meticulous scrutiny in these rare situations in order to protect from evidentiary abuse, and to prevent the jury from confusion and consideration of such evidence on a "diminished capacity defense" level.[21] As the court stated, psychiatric evidence not amounting to insanity may be admitted to negate specific intent, but only when the evidence contributed to a "legally acceptable theory of *mens rea*."[22]

Stephen Pohlot admittedly planned, orchestrated, and finalized a plan to have his wife, Elizabeth, murdered.[23] In his own defense, however, Pohlot offered testimony that his wife had dominated him and severely abused him throughout their "strange" relationship.[24] Pohlot claimed his wife had broken his thumb by striking it with a coffee pot, gouged his face with her nails, shot him in the stomach, threatened him with a hunting knife, and repeatedly locked him out of their bedroom.[25] In addition to the abuse, Pohlot also alleged his wife was solely responsible for the psychiatric illness and severe anorexia of their daughters.[26] In 1985, Elizabeth filed for divorce, froze Pohlot's assets, and obtained a court

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[19]*Id.* at 889. *See* Insanity Defense Reform Act, 18 U.S.C. § 17(a). The Act was passed in the wake of John Hinkley's acquittal of charges arising from his attempted shooting of President Ronald Reagan. The Act eliminated the "volitional prong" of the well-accepted MPC approach to insanity which would acquit the accused due to insanity if he lacked "substantial capacity" to conform his conduct to the requirements of law. Further, the Act eliminated all other affirmative defenses based on mental disease or defect short of insanity, transferred the burden of proof of insanity to the defendant, and limited the use of expert psychological testimony on ultimate legal issues. *See also* U.S. v. Cameron, 907 F.2d 1051, 1061 (11th Cir. 1990).

[20]*Pohlot*, 827 F.2d at 889. The court drew a distinction between a "diminished capacity" defense and a simple admission of psychiatric testimony to negate intent. As the court stated, admitting psychiatric evidence short of insanity to negate intent is merely a rule of evidence; it is not an affirmative defense of "diminished capacity" in and of itself and therefore, such an "intent" based admission is not precluded by the Insanity Defense Reform Act.

[21]*Id.*

[22]*Id.* at 906.

[23]*Id.* at 890.

[24]U.S. v. Pohlot, 827 F.2d 889, 890 (1987).

[25]*Id.* at 890.

[26]*Id.*

order barring Pohlot from the family home.[27] In response to these events, Pohlot initiated the scheme for Elizabeth's murder by discussing the idea with a friend and by contacting Michael Selkow whom Pohlot and his friend suspected as having ties to organized crime.[28] Selkow, in reality a government informer, had several conversations with Pohlot discussing Elizabeth's daily routine and how Selkow would most likely "bring a killer in from Italy."[29] After Pohlot agreed to the offer and presented Selkow with an advance of $8,000 for the killing, Pohlot was arrested and tried on five counts of using interstate commerce in the commission of murder for hire and one count of conspiring to commit murder.[30]

At trial, Pohlot relied primarily on the affirmative defense of insanity, claiming he misperceived the entire "plot to kill" experience as a "fantasy" representing an unrealistic attempt to overcome an inability to cope with his wife's continuous abuse.[31] Pohlot claimed he was incapable of responding to his wife's many instances of abuse and that he had even sought legal assistance, although to no avail, after the stomach shooting incident.[32] Psychiatrist Dr. Gary Glass diagnosed Pohlot as a "passive aggressive" and as having a "compulsive, passive dependent personality."[33] Further, Dr. Glass testified that in his expert opinion, Pohlot sincerely perceived that Pohlot and Elizabeth would have gotten "back together and be[en] happy" even if the contract to kill had actually consummated.[34] At the trial's conclusion, Pohlot requested a jury instruction that the evidence of his abnormal mental conditions be considered when deciding whether the state had met its burden of proving specific intent as required for murder.[35] The trial court declined to instruct the jury as such, stating the proposed "insanity evidence" and instruction

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[27]*Id.*

[28]*Id.*

[29]U.S. v. Pohlot, 827 F.2d 889, 892 (1987).

[30]*Id.* In order to convict Pohlot, the prosecution had to prove Pohlot willfully participated in the conspiracy with the intent to advance an object of the conspiracy, and to voluntarily, intentionally, and with specific intent do something the law forbids. *Id.* at 894.

[31]*Id.* at 893.

[32]*Id.*

[33]*Id.*

[34]U.S. v. Pohlot, 827 F.2d 889, 893 (1987).

[35]*Id.* at 894.

were merely a disguised attempt to assert a "diminished capacity" defense *short of insanity* which Congress explicitly abolished by passing the Insanity Defense Reform Act.[36]

On appeal, the Third Circuit disagreed with the prosecution's assertion that evidence of mental abnormality is *never* admissible even to negate elements of *mens rea.*[37] The appellate court stated congressional intent was only to abolish all "affirmative defenses" that "excuse" conduct resulting from a mental defect not amounting to insanity.[38] Psychiatric evidence that tends to negate specific intent, however, was distinguishable; because it did not constitute a "defense" as such, but merely negated one element of the crime itself.[39] As the court reasoned, psychiatric testimony concerning a lack of intent is not a defense at all, but simply a standard rule of evidence since it did not excuse or justify the crime committed nor provide grounds for acquittal.[40] The appellate court stated Pohlot's proffered evidence might have merely shown why Pohlot could not be held fully accountable for the specific intent crime of murder.[41]

However, despite this encompassing discussion into the differentiation between diminished capacity versus *mens rea* defenses, the *Pohlot* court remained dubious of Pohlot's true motive behind the evidence and rejected the admission, indicating a suspicious fear of broad application.[42] The court warned that permitting across-the-board use of

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[36]*Id.* [emphasis added].

[37]*Id.* at 896.

[38]*Id.* The Court noted although showing "mental disease or defect prevented the defendant from having the 'state of mind' required for the crime charged" is often termed "diminished capacity defense," it does not provide grounds for acquittal and therefore is not a defense, on its own, *id.* at 897.

[39]U.S. v. Pohlot, 827 F.2d 889, 896 (1987).

[40]*Id.*

[41]*Id.* In most cases, the psychiatric evidence is used to negate premeditation or deliberation which, under traditional notions of murder, would reduce first degree murder to second degree murder. Further, if the evidence showed a lack of intent, it may, in some cases, reduce second degree murder to manslaughter. The evidence in no case will ever excuse the crime or make the accused any less morally culpable. It may only show she lacked one of the specific legal elements required for conviction, which in turn would only subject her to a lesser charge, hence lessened or "diminished" responsibility.

[42]*Id* at 903.

psychiatric evidence to negate criminal intent may open the jury to theories of justification and "diminished responsibility" disguised in the illusory casing of a "lack of *mens rea*" defense.[43] Therefore, evidence such as Pohlot's should only be admitted when it supports a "legally acceptable theory of *mens rea*."[44] As the court pointed out, even if Pohlot's psychiatric testimony had been admitted, it still would have fallen short of a legally acceptable theory of lack of intent.[45] Pohlot acted with "considerable awareness" of what he was doing, carefully planning and scheming over a lengthy period of time to assure the murder of his wife would never be traced back to him.[46] Thus, the proffered psychiatric testimony addressed not whether Pohlot had the "intent" necessary to commit murder, but rather, whether Pohlot had a meaningful "understanding" of the consequences of his actions.[47] As the court reasoned, this evidence did not tend to negate intent, but rather, attempted to excuse or justify the murder scheme based on sympathy for Pohlot's suffered abuse and the mental abnormalities caused by his wife.[48]

Admittedly, Pohlot may not have contemplated or appreciated the consequences of the proposed murder at the time, however, the court firmly stated, "purposeful activity is all the law requires."[49] Pohlot purposely engaged in activity that would have lead to the death of his wife; and, therefore, psychiatric testimony of his mental abnormalities would only have presented a variation of the abolished "diminished capacity" or "diminished responsibility" defense.[50] As the court reasoned, "we often act intending to accomplish the immediate goal of our acts while not fully appreciating the full consequences ..." however, when a spouse intentionally kills the other, "the spouse is guilty of homicide

[43]*Id.*
[44]U.S. v. Pohlot, 827 F.2d 889, 903 (1987).
[45]*Id.* at 906.
[46]*Id.* at 906, 907.
[47]*Id.*
[48]*Id.*
[49]U.S. v. Pohlot, 827 F.2d 889, 907 (1987).
[50]*Id.*

nonetheless."[51] In closing, the court reiterated its strong position that psychiatric evidence be heavily scrutinized so that defendants, such as Pohlot, may not disguise a "diminished capacity" defense under the veil of "lack of *mens rea*" evidence, and thereby confuse the jury into "justifying" the crime rather than determining the requisite specific intent.[52]

More recently, the United States Court of Appeals for the Eleventh Circuit was pressed with clarifying the *Pohlot* distinction between psychiatric testimony tending to negate specific intent versus psychiatric testimony aimed at presenting an affirmative defense of "diminished capacity."[53] As the court observed in *U.S. v. Cameron*, most often when a defendant claims to have psychiatric evidence that she was "incapable" of forming the requisite intent for a certain crime, she is merely claiming she had an incapacity to reflect on or control the behaviors which resulted in the crime accused.[54] Such evidence, the court noted, does not support a legally acceptable theory of *mens rea* and is simply another example of an attempted "diminished capacity" defense strictly outlawed by the Insanity Defense Reform Act.[55] Therefore, as in *Pohlot*, although psychiatric evidence regarding mental abnormality was not entirely barred *per se*, evidence aimed at excusing or justifying the crime to any degree was simply not acceptable.[56]

Although Cameron was indicted upon charges of conspiring to distribute five grams of "crack cocaine," many of the *Pohlot* intent-based rationales were repeatedly cited.[57] Cameron sought to introduce "diminished capacity" psychiatric evidence of schizophrenia, not as an affirmative defense, but as an attack on the prosecution's necessary burden

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[51]*Id.* As the court stated, the purpose of Pohlot's activity was to hire someone to kill his wife, regardless of whether he actually wanted his wife to die. That purposeful activity was enough to satisfy intent, *id.* at 890.

[52]*Id.*

[53]U.S. v. Cameron, 907 F.2d 1051 (11th Cir. 1990).

[54]*Id.* at 1066. *See also* Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 834 (1997).

[55]*Cameron*, 907 F.2d at 1051.

[56]*Id.*

[57]*Id.* at 1064-67.

of showing specific intent to distribute cocaine.[58] The court immediately cited *Pohlot*, however, stating that at no point in Cameron's pleadings or arguments did Cameron explain how psychiatric evidence of this nature would support a "legally acceptable theory" that she did not intend to distribute cocaine.[59] Cameron was simply unable to show a connection between her alleged schizophrenia and the alleged inability to form intent.[60]

The *Cameron* court cited *United States v. Staggs* as illustrating when psychiatric evidence to negate specific intent would indeed contribute to a "legally acceptable theory of *mens rea*."[61] In *Staggs*, the defendant was charged with threatening to shoot a police officer, a specific intent crime.[62] However, Staggs introduced psychiatric evidence theorizing that, because he suffered from a severe mental condition, it is highly unlikely that he would make such a threat.[63] The *Staggs* court noted, and the *Cameron* court concurred, that such an offering did not imply a "legal excuse" for the conduct, nor did it suggest an unacceptable theory of "unconscious motivation" or lack of "volitional control."[64] Instead, the court ruled Staggs was essentially trying to prove he acted in conformity with his reflexive, and thereby often unintentional, personality trait.[65] Whereas Cameron claimed she lacked the *ability to form or possess* the requisite

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[58]U.S. v. Cameron, 907 F.2d 1051, 1056 (11th Cir. 1990). Conspiracy to distribute crack cocaine was a specific intent crime and therefore, like in *Pohlot*, the prosecution bore the burden of proving such specific intent. Just as in *Pohlot*, Cameron claimed her psychiatric evidence was aimed at rebutting the Prosecution's evidence, not at proffering her own independent affirmative defense of "diminished capacity." But schizophrenia did not amount to insanity and therefore, could not stand alone as the "defense" to the crime.

[59]*Id* at 1067. The Court stated the district court had not abused its discretion in "prohibiting the unarticulated, general psychiatric evidence of mental abnormality to negate specific intent," *id.* at 1054.

[60]*Id.*

[61]*Id.* (citing United States v. Staggs, 553 F.2d 1073 (7th Cir. 1997)). The distinction is between actual state of mind at the time of the offense and the ability to form such a state of mind at the time of the offense. Since *Staggs* concerned the actual state of mind at the time of the offense, the psychiatric evidence was admitted.

[62]*Id.* at 1067.

[63]U.S. v. Cameron, 907 F.2d 1051, 1067 (11th Cir. 1990) (citing United States v. Staggs, 553 F.2d 1073 (7th Cir. 1997)).

[64]*Id.*

[65]*Id.*

intent, Staggs claimed his mental condition made it unlikely he actually *did possess* the requisite state of mind at the time of the offense.[66]

Although *Cameron* agreed with *Pohlot* that Congress did not intend to prohibit all usage of psychiatric testimony short of insanity, *Cameron* reaffirmed the standard that mental deficiency evidence should be limited to assisting the jury in determining elements of the crime and should in no instance stand on its own and extend to issues of legal excuse or justification.[67] Whether or not Cameron had "volitional control" of her actions or was capable of reflecting on the nature and consequences of those actions was deemed wholly irrelevant. The *Cameron* court concluded the requested evidence would only insinuate a "lessened moral culpability" which Congress had expressly excluded in the Insanity Defense Reform Act.[68]

The *Cameron* court also relied upon *U.S. v. White*, a case where a defendant charged with conspiracy to possess cocaine and possession of cocaine with intent to distribute, attempted to present "mental state" psychiatric testimony that she lacked the capacity to form intent due to complete psychological domination by her mother.[69] Because of the alleged domination, White claimed she was psychologically "compelled" to distribute cocaine on her mother's behalf.[70] However, just as in *Cameron* and *Pohlot*, the court in *White* recognized that a "good motive" for violating the law is irrelevant if the defendant was "cognizant" that the law was being violated by her proscribed actions.[71]

Cameron knew she was violating the law when she conspired to distribute cocaine; and, thus, just as in *White*, there was sufficient specific intent "regardless of underlying motivation" or ability to reflect on long-

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[66]*Id.*

[67]*Id.* Cameron did assert an insanity defense as well, but the court stated that a mere showing that Cameron had been diagnosed with schizophrenia "did not necessarily mean she was legally insane." The schizophrenia evidence did not assist the insanity defense and thus, was excluded by the court, *id.* at 1059, 1060.

[68]U.S. v. Cameron, 907 F.2d 1051, 1067 (11th Cir. 1990).

[69]*Id.* (citing U.S. v. White, 766 F.2d 22 (1st Cir. 1985)).

[70]*Cameron*, 907 F.2d at 1063.

[71]*Id.* at 1067. "Good motive" is not necessarily "good" in the positive connotation; it merely means a motive other than a criminal one.

term consequences.[72] The acts, independent of conscious or unconscious influence, were nonetheless intentional; and, therefore, evidence regarding the influence of mental disease or abnormality on Cameron's behavior would not have assisted a jury in determining an acceptable *mens rea* defense.[73] Because Cameron only presented evidence that psychiatrists diagnosed her as schizophrenic and failed to tie that mental defect evidence to a likelihood that she did not have the intent to distribute cocaine, the evidence was precluded as an invalid attempt to present a "dangerously confusing theory," more akin to justification than a "legally acceptable theory of lack of *mens rea*."[74]

Although the federal courts provided a foundational basis for determining when psychiatric testimony short of insanity should and should not be applied, the *Fisher* decision admitted that state courts were free to decide whether or not to accept "diminished capacity" defenses, thereby, permitting a broader admission of psychiatric evidence.[75] Theoretically, if a state chose to include an affirmative defense of "diminished capacity" in their criminal code, this was the state's prerogative and the evidence under discussion would be admitted. In Arizona, however, the legislature followed federal precedent and refused to adopt "diminished capacity" defenses and evidence regarding such in any capacity. The following discussion traces this road to exclusion in Arizona.

Arizona Background

In 1965, the Arizona judiciary first addressed the relationship between mental deficiencies and criminal tendencies in the case of *State v. Schantz*.[76] In *Schantz*, the Supreme Court of Arizona rejected the theory of "diminished capacity," recognizing the state legislature was solely responsible for promulgating criminal law and "it [the legislature] had not

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[72]*Id.* at 1063-64.

[73]U.S. v. Cameron, 907 F.2d 1051, 1067 (11th Cir. 1990).

[74]*Id.* at 1067-68.

[75]*See* Fisher v. U.S., 328 U.S. 463 (1946) (demonstrating where the Court made no opinion as to whether such evidence should or should not be excluded, but merely stated it would not "force" the District of Columbia to adopt such an admission requirement).

[76]State v. Schantz, 98 Ariz. 200; 403 P.2d 521 (1965).

recognized a disease or defect of mind in which volition does not exist ... as a defense to prosecution for [a crime]."[77] The court recognized the state legislature, when drafting Arizona criminal law, had refused to accept the Model Penal Code (MPC) approach which relieved criminal responsibility due to insanity as well as mental disease or defect in the "volitional process" of the human mind.[78] Instead, the Arizona Legislature adopted the M'Naughten approach, relieving criminal responsibility only when there were defects in perception or cognitive mental processes that amounted to insanity.[79]

Schantz was charged with murder after neighbors witnessed Schantz stab his wife in the back and neck with a butcher's knife and beat her in the head and body with a ten-inch cast iron skillet.[80] A psychiatrist examining Schantz, the psychiatric witness stated that, at the time of the offense, Schantz did not know the nature and significance of his actions and did not know right from wrong.[81] Further, the psychiatrist stated Schantz suffered from total amnesia, "where the emotional state predominates without conscious awareness of the individual" and therefore, Schantz's actions were outside of deliberate, volitional, conscious awareness.[82] Schantz plead not guilty and requested a jury instruction that his mental deficiencies be evaluated when determining the requisite malice aforethought for first degree murder because Schantz allegedly lacked the "capacity to design and contrive" the murder.[83] The

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[77] *Id.* at 212.

[78] *Id.* at 207-209. The MPC approach as disputed is MODEL PENAL CODE §§ 401-402(1) and Commentaries which allow the introduction of evidence "whenever it [is] relevant to prove the defendant did or did not have a state of mind that is an element of the defense" and recognizes mental defects short of insanity which may not eliminate responsibility but rather, lessen the charge. *See also* Fisher v. U.S., 328 U.S. 463 (1946) (discussing the M'Naughten Approach, as discussed *supra* in note 4).

[79] *Schantz*, 98 Ariz. at 207-209.

[80] *Id.* at 204.

[81] State v. Schantz, 98 Ariz. 200, 204; 403 P.2d 521, 524 (1965).

[82] *Id.* It is important to note that Schantz did not plead insanity. It is conceivable that if Schantz had offered a defense of insanity, the evidence may have been admitted to illustrate such. But here, Schantz plead not guilty and sought to introduce the testimony to negate intent.

[83] *Id.* at 205.

court refused to grant the instruction; however, and thus, after his conviction, Schantz appealed.[84]

The Arizona Supreme Court held the proposed instruction requested by Schantz presented a theory of "partial responsibility" or "diminished responsibility" noting, that regardless of the proscribed label, the asserted defense amounted to mental derangement distinguishable from "cognitive insanity" as understood and excepted in Arizona under M'Naughten.[85] Although Schantz may not have been able to conform his acts to law or evaluate the consequences of his actions, the mental defect factors were irrelevant to determining legal malice aforethought, or the specific intent to kill.[86] The court ruled that since Schantz's actions *themselves* were intentional regardless of their intended *outcome*, psychiatric evidence could not be admitted to show lack of capacity for specific intent; because Schantz did not qualify for, nor even plead, M'Naughten insanity.[87]

Further, the court stated malice aforethought, may be implied by the behavior itself even where actual intent to kill does not necessarily exist. Deferring again to the legislative record, the court ruled that "malice" shall be implied where there is unlawful killing with no considerable provocation, regardless of mental disease or defect, unless such defect amounted to insanity.[88] The court concluded that "volition," or the ability to determine or to choose a course of action, may also be implied by the nature of the criminal behaviors or actions themselves.[89]

The Arizona court reiterated the standard excluding psychiatric evidence negating specific intent in the 1980 case of *State v. Laffoon*.[90] *Laffoon* posed the question of whether, when determining criminal responsibility, a jury may consider voluntary intoxication . . . not as a

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[84]*Id.*

[85]*Id.* at 210-211.

[86]State v. Schantz, 98 Ariz. 200, 210-211; 403 P.2d 521, 529 (1965).

[87]*Id.* at 210. The court gave two hypothetical examples to illustrate their point: where a defendant chokes another resulting in death, or when a defendant shoots another in the knee which eventually results in death. In both cases, although the defendants may not have intended death as an end result, the nature of their actions themselves implied malice and satisfied the requisite intent.

[88]*Id.* at 212.

[89]*Id.*

[90]State v. Laffoon, 125 Ariz. 484; 610 P.2d 1045 (1980).

defense, but as the intoxication relates to the ability of the individual to form specific intent.[91] Although the Arizona Supreme Court allowed the jury to consider the intoxication testimony, the court stated that even with such an admission, wholly voluntary acts of the defendant would never excuse subsequent criminal conduct.[92]

Defendant Laffoon was fired from his job and became severely intoxicated after spending the remainder of his workday in various bars.[93] Late in the afternoon, Laffoon went in search of his wife at the home of his sister-in-law and upon discovering his wife, Laffoon instigated a fight. Laffoon became violent and abusive, kicking both his wife and her sister several times.[94] Laffoon's wife fled the home and hid outside, returning only when Laffoon threatened to kill her niece and "held the baby above his head and, with both hands, slammed the five-week-old infant to the ground."[95] Laffoon was indicted on first-degree murder and offered a defense based on a "lack of capacity" to form specific intent due to alcohol and heroin intoxication.[96] The trial judge refused to admit the expert testimony; and Laffoon appealed, claiming the evidence was essential to show Laffoon lacked the ability to form specific intent.[97]

The Supreme Court of Arizona reiterated that the M'Naughten test for insanity was the sole standard for criminal responsibility in Arizona.[98] The court cited *Schantz* in again rejecting the theory of "diminished responsibility" and disallowing the admission of mental disease or defect evidence short of insanity for the purpose of negating criminal intent.[99] After deciding that Laffoon's testimony alleging an incapacity for intent was essentially an attempt at a diminished capacity or diminished responsibility defense, the court cited several other Arizona state court

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[91]*Id.* at 486.

[92]*Id.* This qualification was added to the instruction to assure the jury would not excuse the crime based on voluntary intoxication.

[93]*Id.* at 484.

[94]*Id.*

[95]State v. Laffoon, 125 Ariz. 484; 610 P.2d 1045 (1980). The baby's injuries included six broken ribs, a scull fracture, subarachnoid hemorrhaging, and a bruised kidney.

[96]*Id.* at 485.

[97]*Id.* at 486.

[98]*Id.*

[99]*Id.*

decisions that have declined to allow psychiatric testimony to negate specific intent in intoxication circumstances.[100]

Although the Arizona legislature did allow the effects of voluntary intoxication to be used in an evaluation of a criminal defendant's culpable mental state, the *Laffoon* court qualified this standard stating that wholly voluntary acts of a defendant will not, under any circumstances, excuse that defendant's subsequent criminal conduct.[101] This distinction between "culpable mental state" and voluntary conduct was clarified in *State v. Ramos* where the Supreme Court of Arizona stated public policy dictated that one who voluntarily seeks the influence of alcohol should not be insulated from criminal responsibility.[102] The *Ramos* court noted that the great majority of moderately to grossly drunken persons are probability "aware" of what they are doing and "aware" of the likely consequences of their behavior.[103] Further, although intoxication may release or relax inhibitions, reasoning, and judgment, the *Ramos* court stated most intoxicated defendants still have a sufficient capacity to form the conscious mental processes required by the "ordinary definitions of most specific *mens rea* crimes."[104]

In *State v. Christensen*, the Supreme Court of Arizona Court drew a fine-line distinction between psychiatric evidence concerning "character traits" and evidence regarding a "diminished mental capacity."[105] As the court contrasted, evidence of a defendant's "impulsive behavioral tendency" was admissible when utilized to show the defendant acted in conformity with that tendency, but inadmissible to show a lack of capacity to premeditate or deliberate the offense.[106] The Court ruled Christensen

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[100]State v. Laffoon, 125 Ariz. 484, 486; 610 P.2d 1045, 1047 (Ariz. 1980); *see also* State v. Steelman, 120 Ariz. 301; 585 P.2d 804 (Ariz. 1975); *see also* State v. Briggs, 112 Ariz. 379; 542 P.2d 804 (Ariz. 1975); *see also* State v. Intogna, 101 Ariz. 275; 419 P.2d 59 (Ariz. 1966); *see also* State v. Schantz, 98 Ariz. 200; 403 P.2d 521 (Ariz. 1966).

[101]*Laffoon*, 125 Ariz. at 486.

[102]State v. Ramos, 133 Ariz. 4, 6; 648 P.2d 119, 121 (Ariz. 1982).

[103]*Id.* at 7.

[104]*Id.* (citing State v. Stasio, 78 N.J. 467, 478; 396 A.2d 1129, 1134 (1979)).

[105]State v. Christensen, 129 Ariz. 32, 33; 628 P.2d 580, 582 (Ariz. 1981).

[106]*Id.* This is similar to the argument mentioned in *Staggs*. The defendant is not claiming an incapacity to form intent, he is simply asserting that because of his behavioral tendencies, it is unlikely that he actually did not commit the crime as a result of reason or planning. The Arizona Rules of Evidence do allow psychiatric testimony on character traits, but only to show that the

was not attempting to show an inability to premeditate, but actually offering admissible evidence of a "behavioral trait" relating to Christensen's alleged characteristic impulsivity or lack of premeditation.[107] Therefore, because the evidence tended to show Christensen *did not have* the requisite intent, rather than tending to show he lacked the *capacity to form* intent, the Court ruled the expert testimony was indeed admissible.[108]

Christensen admitted to killing his former wife, but when charged with murder, called a psychiatric witness to show Christensen had difficulty dealing with stressful situations and that characteristically, his actions were more "reflexive" than "reflective."[109] Although, recognizing one of the essential questions the jury was forced to answer when determining first degree murder was whether Christensen premeditated the offense, the trial court refused to allow the psychiatric testimony claiming it was an attempt to present a "diminished capacity" defense disallowed by the decisions in *Schantz* and *Laffoon*.[110]

The Supreme Court of Arizona reversed, stating that, because the establishment of a "character trait" of acting impulsively tends to establish that the defendant acted impulsively, the jury could have concluded Christensen lacked the requisite premeditation at the time of the offense.[111] The court distinguished personality traits from mental defects in that here, the psychiatric testimony would have shown a behavioral personality that often *lacked* premeditation as opposed to a mental defect that *prevented the ability* to premeditate.[112] As the court reasoned, the exclusion of such evidence prevented Christensen from disputing elements of the charges

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defendant acted in conformity therewith. *See* ARIZ. R. EVID. § 404(a)(1).

[107]*Christensen*, 129 Ariz. at 35.

[108]*Id.*

[109]*Id.* at 33.

[110]State v. Christensen, 129 Ariz. 32, 34; 628 P.2d 580, 582 (Ariz. 1981). *See also* State v. Laffoon, 125 Ariz. 484; 610 P.2d 1045 (Ariz. 1980) (demonstrating where voluntary intoxication evidence was not allowed to show an incapacity to form the requisite intent.); State v. Schantz, 98 Ariz. 200; 403 P.2d 521 (Ariz. 1965) (ruling psychiatric evidence was not allowed to negate the specific intent for murder when defendant was acting without deliberate volitional control).

[111]*Christensen*, 129 Ariz. at 35.

[112]*Id.* at 35-36. The difference here, again, is lacking *mens rea* (acceptable) and lacking the ability to form *mens rea* (unacceptable).

against him and therefore, was inconsistent with fundamental notions of justice.[113]

In *State v. Gonzales*, the Supreme Court of Arizona departed from the long line of precedent cases excluding psychiatric mental abnormality testimony in specific intent determinations ruling that when a defendant's mental condition has probative value to material issues in dispute, psychiatric testimony concerning those defects may not be excluded without denying Due Process.[114] As the court stated, when mental diseases or defects such as retardation and organic brain syndrome are relevant to intent or any other fact in issue, expert testimony may be necessary to explain the potential effect of those impairments on the disputed facts.[115]

In *Gonzales*, the defendant was charged with sexual assault and kidnaping, sought to introduce psychiatric testimony that his low intelligence and probable organic brain damage affected his ability to reason and therefore, diminished or even abolished his ability to form the specific intent to commit rape.[116] The defense asserted the theory that Gonzales was "merely present" at the crime and that his impaired ability to reason and impaired ability to exercise judgment prevented him from stopping the commission of the assault he was charged with participating in.[117] Therefore, because specific intent was an "essential element" to the defense in demonstrating the defendant was "confused and unable to realize the failure to act or help the victim was a criminal restraint on her movement," the defendant claimed the psychiatric testimony could not be

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[113]*Id.*

[114]State v. Gonzales, 140 Ariz. 349; 681 P.2d 1368 (Ariz. 1984).

[115]*Id.* at 353. *See also* Herman v. Vigil, 11 Ariz. App. 282; 464 P.2d 353 (Ariz. Ct. App. 1970) (holding where an offer of proof that a defendant's mental condition has probative value to a material issue in dispute, psychiatric testimony must be admitted to avoid a violation of due process.).

[116]*Gonzales*, 140 Ariz. at 351-352.

[117]*Id.* at 352-353. The defense also claimed the evidence would be relevant for the jury in evaluating the credibility of Gonzales himself. Because of his alleged brain abnormalities, Gonzales may have become confused on cross examination and may answer questions in an inconsistent way. Explaining away the tendency to commit such was one of the reasons the defense sought to introduce the psychiatric testimony. However, the trial court refused to allow such testimony stating it would interject sympathy into the jury and that the jury was perfectly capable of determining whether or not the defendant was telling the truth.

excluded without violating fundamental notions of justice.[118] After the trial court's refusal to allow the testimony, and the defendant was found guilty of unlawful imprisonment, a lesser included offense of kidnapping. The appellate court affirmed and Gonzales appealed to the Supreme Court of Arizona.[119]

The Supreme Court of Arizona reversed the decision, claiming the psychiatric testimony was relevant to the charged offense and essential to Gonzales' asserted "mere presence defense."[120] As the court stated, the trial court's exclusion precluded the defendant from introducing evidence essential to his case and therefore, Gonzales' constitutional right to due process was violated.[121] In order to prove unlawful imprisonment, the state had to show the defendant was aware or under the belief that a circumstance existed which "restrict[ed] another's movements without consent, without legal authority, and in a manner which interferes substantially with such a person's liberty . . . ."[122] In other words, it had to be shown that the defendant by the nature of his actions, "knowingly participated in" an activity or "knowingly failed to act" in a situation constituting a restriction on the victim's movements.[123]

As the defense argued, and the Supreme Court of Arizona agreed, the proffered psychiatric testimony may have shown that Gonzales' action, or his "failure to act by not calling the police," was not a restraint because Gonzales was confused and unable to understand that such a failure to act was, in essence, a restraint on the victim.[124] Thus, Gonzales' mental deficiency evidence was pivotal in the jury's determination and evaluation of the "mere presence" defense and, therefore, its probative value was ruled too great to be outweighed by the possible confusing and sympathetic influences it might inadvertently impose on the jury.[125] As

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Id. at 353.

[119]State v. Gonzales, 140 Ariz. 349, 353; 681 P.2d 1368, 1372 (Ariz. 1984).

[120]*Id.* The Arizona supreme court also stated the evidence had probative value in providing the jury with information essential to a fair, well-informed assessment of the defendant's credibility.

[121]*Id.*

[122]*Id.* at 352 n.5 (citing A.R.S. §§ 13-1304(A), 13-1406(A)).

[123]*Id.* at 349.

[124]State v. Gonzales, 140 Ariz. 349; 681 P.2d 1368 (Ariz. 1984).

[125]*Id.*

the court reasoned, Gonzales alleged he did not know or appreciate his failure to act was a restraint and therefore, the psychiatric evidence was probative in showing this liability-releasing misperception by way of mental abnormality.[126]

THE ARIZONA CASE OF *STATE V. MOTT*[127]

Facts

On January 1, 1991, Shelly Kay Mott left her two young children with her boyfriend, Vincent Near, and returned approximately one hour later to find Near fanning Mott's two-and-one-half-year-old daughter, Sheena, with a towel.[128] When Mott questioned Near about the incident, Near stated that Sheena had "fallen off the toilet and hit her head."[129] Later that day, a friend, and former paramedic, visited the home and noticed the child's eyes were fluttering, hands were twitching, and that Sheena was having trouble sleeping.[130] Due to these symptoms, the friend advised Mott to take Sheena to the hospital immediately.[131] Yet Mott and Near refused, declining several subsequent offers from the friend to take Sheena to the hospital himself.[132]

The next day, Mott arrived at the home of Erin Scott "crying," because Mott was unable to wake up Sheena.[133] When Scott asked why Mott had not taken her child to the hospital, Mott responded she was worried the authorities would take Sheena from her due to Sheena's bruises.[134] Mott then returned home, picked up Sheena, and returned to Scott's home where Scott dialed 911 after observing Sheena's severe bruising, continuous spasms, and the softness of Sheena's head.[135] Upon Sheena's admittance to the hospital, Dr. Richard Lemen diagnosed her as

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[126] *Id.*
[127] State v. Mott, 187 Ariz. 536; 931 P.2d 1046 (Ariz. 1997).
[128] *Id.* at 538; 1048.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] State v. Mott, 187 Ariz. 536, 538; 931 P.2d 1046, 1048 (Ariz. 1997).
[133] *Id.*
[134] *Id.*
[135] *Id.*

"in cardiopulmonary arrest with extreme trauma," and detected a large hemorrhage, which had caused the death of the right half of Sheena's brain.[136] Due to the nature of the injuries, Sheena's condition was deemed "hopeless" and she died seven days later.[137]

Dr. Lemen termed all of the injuries "non-accidental" and stated the injuries could not be the product of "falling off of a toilet."[138] In order to result in the serious injuries Sheena displayed, Dr. Lemen contended Sheena would have had to fall from an excess of twelve feet, suffer the equivalent of a major car accident, or suffer repeated blows to the head with a large object.[139] In addition to Dr. Lemen's original diagnosis, other doctors observed "branding burn marks" on the bottom of Sheena's feet, a series of whip marks on Sheena's upper thigh and buttocks, cigarette burn marks between Sheena's fingers, and bruising throughout Sheena's head and body.[140]

When interviewed by the police, Mott alleged she had previously confronted Near about suspicious bruises on Sheena "five or six times," but that she never reported the abuse because she did not want Near to "get in trouble."[141] Although Mott stated that each time she approached Near about the bruising, Near claimed Sheena had fallen, Mott also admitted she did not truly believe Near's excuses.[142] Mott further admitted to dressing Sheena in clothes that disguised the abuse and that she declined to take Sheena to the hospital the night of the fatal injuries because she did not want anyone else to see the bruises.[143] Yet, after Mott

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[136] *Id.*

[137] State v. Mott, 187 Ariz. 536, 538; 931 P.2d 1046, 1048 (Ariz. 1997). *See also* State v. Mott, 183 Ariz. 191; 193, 901 P.2d 1221, 1223 (Ariz. Ct. App. 1995). There is a more detailed summation of the case facts and the issues presented at trial listed in the appellate court decision, therefore, some of the facts used in this section are taken from there rather than the Supreme Court of Arizona opinion. All statements are footnoted appropriately.

[138] *Mott*, 187 Ariz. at 538.

[139] *Id.*

[140] *Id.*

[141] *Id.* Mott did not question Near "five or six times" on this particular occasion, but rather, Mott stated there were five or six other incidents where Sheena had developed suspicious bruises. Mott questioned Near on each of these occasions, but stated she did not believe the excuses proffered by Near.

[142] 187 Ariz. 536, 538; 931 P.2d 1046, 1048 (Ariz. 1997).

[143] *Mott*, 187 Ariz. at 538-39.

was indicted on first degree murder and two counts of "child abuse under circumstances likely to produce death or serious bodily injury," Mott claimed she "lacked the capacity to act" due to Battered Woman Syndrome.[144]

The Expert Testimony

Mott was examined by Dr. Cheryl Karp, a licensed, certified clinical psychologist specializing in child abuse, family violence, and sexual abuse.[145] Dr. Karp concluded that Mott possessed the characteristics of a "battered woman" and had developed "learned helplessness," or a passive acceptance to abuse common to BWS victims.[146] Due to the nature of the syndrome and its associated mental disabilities, Dr. Karp stated her opinion was that BWS adversely affected Mott's ability to protect her children.[147] According to Karp, battered women such as Mott, develop a "traumatic bond" with their abusers which inevitably results in feelings of hopelessness, depression, and an inability to escape the abusive environment.[148] Further, battered women tend to believe what the batterer says, lie to protect the batterer, and are often unable to perceive danger or to protect themselves or others from such danger.[149]

Thus, the essence of Dr. Karp's testimony was that Mott, due to her history of abusive victimization in conjunction with her limited intelligence, was mentally incapable of deciding to take Sheena to the hospital in defiance of Near.[150] Mott's desire to introduce the expert testimony was allegedly aimed at demonstrating how Mott lacked the capacity to form the requisite mental state of knowledge or intent, not aimed at excusing or mitigating her crime based on Near's abuse.[151]

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[144] *Id.*

[145] State v. Mott, 183 Ariz. 191, 193; 901 P.2d 1221, 1223 (Ariz. Ct. App. 1995).

[146] *Id.*

[147] *Id.* Presumably, Karp was insinuating that the "passive acceptance of abuse" which battered women develop, also transferred to her child. Therefore, Mott became passively accepting to both her own abuse and the abuse of her child. A more thorough discussion of this issue is presented in the Analysis section *infra* p.____).

[148] *Id.*

[149] *Id.*

[150] 187 Ariz. 536, 540; 931 P.2d 1046, 1050 (Ariz. 1997).

[151] *Id.*

The Trial

At trial, the prosecution moved to preclude the psychiatric evidence of BWS claiming such testimony was only relevant in self-defense cases where a woman kills her batterer.[152] After an offer of proof, the state contended the expert testimony was nothing more than Dr. Karp's opinion of Mott's mental state at the time of the crime and that this type of "state of mind" opinion testimony was rejected by *State v. Ortiz* which only allowed the admission of such testimony in furtherance of an insanity defense.[153] As the state alleged, the testimony was not relevant to any legally recognized defense, and therefore, the only motivation behind Mott's proffered introduction was an illegal attempt to confuse the jury with a "diminished capacity defense," explicitly outlawed in Arizona by *State v. Ramos*.[154]

In rebuttal to these assertions, Mott claimed the BWS evidence played an essential part in the defense by showing Mott was unable to form the requisite intent to have acted "knowingly or intentionally" as required for a conviction of first degree murder or child abuse leading to death or serious bodily injury.[155] As Mott stated, she sought not to use BWS in conjunction with the complete "self-defense" defense as BWS was traditionally used, but sought only to use the evidence to assist the jury with their evaluation of "state of mind" or the "intent" aspect of the accused crimes.[156] Because first degree murder and child abuse leading to death or serious bodily injury required the state to prove intent, Mott proffered the expert testimony to show why BWS prevented her from making decisions and protecting her children.[157]

Initially, the trial court did allow the psychiatric testimony on the assumption it may have illustrated Mott's "mental and emotional capabilities."[158] But upon later objection, the court sided with the

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[152]State v. Mott, 183 Ariz. 191, 193; 901 P.2d 1221, 1223 (Ariz. Ct. App. 1995).

[153]*Id.* at 194 (citing State v. Ortiz, 158 Ariz. 528; 764 P.2d 13 (Ariz. 1988) (stating absent an insanity defense, Arizona does not allow an expert opinion on a defendant's state of mind at the time of the offense)).

[154]*Mott*, 183 Ariz. at 194.

[155]*Id.*

[156]State v. Mott, 187 Ariz. 536, 540; 931 P.2d 1046, 1050 (Ariz. 1997).

[157]*Mott*, 183 Ariz. at 195.

[158]State v. Mott, 183 Ariz. 191, 195; 901 P.2d 1221, 1225 (Ariz. Ct. App. 1995).

prosecution by excluding the evidence as an attempt to establish a prohibited "diminished capacity" defense.[159] The jury found Mott guilty of "knowing or intentional" child abuse likely to produce death based on Mott's failure to take Sheena to the hospital.[160]

The Appeal

The Arizona Court of Appeals reversed Mott's conviction after determining the trial court's exclusion of BWS testimony violated Mott's due process rights.[161] Citing *Christensen* and *Gonzales*, the appellate court noted that the BWS evidence concerned "character traits" common to battered women and that evidence of such traits, if believed, may have negated the element of knowledge or intent.[162] As the court continued, the "traits" of a battered woman, just like the traits of mild retardation and organic brain syndrome in *Gonzales*, were probative of Mott's behavior, and may have assisted the jury in deciding that Mott did not act "knowingly or intentionally" when she neglected to bring Sheena to the hospital.[163]

The appellate court relied heavily on the testimony of Dr. Karp who concluded Mott was a battered woman and that Mott's "learned helplessness," a common trait of BWS, affected her ability to protect her children.[164] Karp's testimony stated "flat affect, unresponsiveness, and inaction" were all common aspects of learned helplessness, a BWS trait that Karp believed Mott possessed.[165] More precisely, Karp continued, Mott formed a "traumatic bond" with Near which caused Mott to feel isolated and incapable of escaping the relationship.[166] Because of these

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[159]State v. Mott, 187 Ariz. 536, 539; 931 P.2d 1046, 1049 (Ariz. 1997)

[160]*Id.* Mott was also found guilty of child abuse of a person under fifteen under circumstances other than those likely to produce death or serious bodily injury. This was a lesser offense than the class 2 felony of child abuse under circumstances likely to produce death and serious bodily injury with which Mott was originally charged. Mott was convicted on this charge due to her error in leaving her child alone with Near. Mott was also found guilty of felony murder.

[161]*Id.* at 195.

[162]*Id.* at 194-195.

[163]State v. Mott, 183 Ariz. 191, 195; 901 P.2d 1221, 1225 (Ariz. Ct. App. 1995).

[164]*Id.* at 194; 1224.

[165]*Id.*

[166]*Id.*

BWS factors, Karp explained why Mott was unable to accurately perceive danger or protect others from danger, why Mott failed to notice the severity of Sheena's injuries, and why Mott believed Near when he lied about the bruises and assured Mott everything would be "ok."[167] Therefore, according to Karp, because of Mott's history of abuse from Near and due to her arguably limited intelligence, Mott was "mentally incapable" of making the decision as to whether or not Sheena needed medical attention or required hospitalization.[168]

The appellate court cited *Christensen*, restating that the establishment of a "character trait" of acting without reflection tended to establish Christensen acted impulsively and therefore, did not premeditate the homicide.[169] Similarly, the court held the BWS and "learned helplessness" evidence was essentially the same as the character evidence admitted in *Christensen* because it may have shown why Mott did not respond to Sheena's injuries and how Mott "characteristically" lacked the ability to make sound decisions due to her "traumatic bond" with Near.[170] Referring next to the decision in *Gonzales*, the appellate court ruled the BWS and "learned helplessness" evidence in *Mott* was also character evidence similar to that admitted under *Gonzales*. In both cases, the court reasoned the proffered evidence was essential to show inaction and unresponsiveness, intent-based elements required for convictions of both murder and child abuse leading to death based on failure to act.[171] Thus, the appellate court in *Gonzales* ruled the expert testimony was not a "diminished capacity defense" since it sought not to relieve the defendant from responsibility, but simply tended to negate the criminal intent or "knowing" required for a conviction. Following suit, the appellate court in *Mott* reversed the trial court's exclusion and remanded the case for retrial.[172]

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[167]State v. Mott, 183 Ariz. 191, 194; 901 P.2d 1221, 1224 (Ariz. Ct. App. 1995).
[168]*Id.*
[169]*Id.*
[170]*Id.*
[171]*Id.*
[172]State v. Mott, 183 Ariz. 191, 195; 901 P.2d 1221, 1225 (Ariz. Ct. App. 1995).

The Supreme Court of Arizona Decision

The Supreme Court of Arizona agreed Mott's proffered testimony was aimed at demonstrating Mott was not capable of forming the requisite mental state of knowledge or intent and, therefore, was not an attempt to excuse or justify the criminal actions.[173] However, citing *Pohlot* and *Cameron*, the court noted psychiatric evidence to negate *mens rea* is still, in fact, a "diminished capacity" or "diminished responsibility" admission even though the evidence does not qualify as an affirmative "diminished capacity" defense aimed at excusing, mitigating, or lessening moral culpability due to psychological impairment.[174] Therefore, by recognizing the Arizona Criminal Code explicitly left out a provision which included "diminished capacity," the Arizona Supreme Court deferred to legislative intent, rejecting all expert psychological testimony short of insanity whether it be presented as an affirmative defense, or even, as a challenge to the *mens rea* element of a crime.[175]

The court referred to their previous decision in *Schantz* by reiterating the Arizona criminal law has refused to recognize a disease or defect of the mind in which "volition does not exist ... as a defense to a prosecution for a crime," and therefore, the sole standard for criminal responsibility in Arizona remains the M'Naughten insanity test.[176] Since BWS testimony in Mott's case would only have presented evidence of mental defects short of insanity, the court ruled the testimony of Dr. Karp was justifiably and rightfully excluded from presentation at the trial level.[177] The court next likened the Arizona Statute to the one at issue in *Fisher*, where the United States Supreme Court refused to "force" the District of Columbia to allow

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[173]State v. Mott, 187 Ariz. 536, 540; 931 P.2d 1046, 1050 (Ariz. 1997)

[174]*Id.* (citing U.S. v. Pohlot 827 F.2d 889 (3rd Cir. 1987); U.S. v. Cameron 907 F.2d 1051 (11th Cir. 1990)).

[175]*Mott*, 187 Ariz. at 541 (Ariz. 1997). Arizona has refused to adopt the MPC approach set forth in the MODEL PENAL CODE §§ 401-402(1) and Commentaries, which allows the introduction of evidence "whenever it [is] relevant to prove the defendant did or did not have a state of mind that is an element of the defense" and recognizes mental defects short of insanity which may not eliminate responsibility but rather, lessen the charge. *See also* Fisher v. U.S., 323 U.S. 463, (1946) (discussing the M'Naughten Approach).

[176]*Mott*, 187 Ariz. at 541 (Ariz. 1997). *See also* State v. Schantz 98 Ariz. 200; 403 P.2d 521 (Ariz. 1981) (discussing M'Naughten as the sole "mental defect" based entirely on insanity test for determining responsibility in Arizona).

[177]*Mott*, 187 Ariz. at 541 (Ariz. 1997).

evidence of mental deficiencies to assist the jury in determining elements of premeditation and deliberation.[178] Since the exclusion of such testimony did not violate the constitution in *Fisher*, precluding Mott from presenting similar mental disability evidence to challenge *mens rea* elements of her crime was consistent and likewise constitutional.[179] Before addressing the cases relied upon by the dissent and Mott, the court listed several federal circuits which have explicitly allowed states to exclude expert testimony alleging a defendant "lacked the capacity" to form specific intent.[180]

The defense and dissent in *Mott* argued the court's ruling was blatantly inconsistent with *Christensen* and *Gonzales* since those cases allowed psychiatric testimony to show how mentally deficient character traits may indeed affect "knowingly" or "intentional" requirements.[181] However, the court distinguished *Mott* from *Christensen* by stating the proffered testimony in *Christensen* did not claim the defendant was *incapable* of premeditating or deliberating by reason of mental defect as in *Mott*. Rather, Christensen claimed he had a *tendency* to act impulsively, and therefore, truly *did not* premeditate the homicide.[182] Unable to distinguish and justify their prior decision in *Gonzales*, however, the court overruled the portion of *Gonzales* which allowed expert testimony regarding a defendant's mental capacity to challenge the requisite mental state of a charged crime.[183] The *Mott* court stated *Gonzales* was incorrect, because the proffered testimony was essentially an expert opinion on Gonzales' cognitive ability to form the requisite

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[178]State v. Mott, 187 Ariz. 536, 541; 931 P.2d 1046, 1051 (Ariz. 1997).

[179]*Id.* at 541; 1041. *See Fisher*, 328 U.S. at 463.

[180]*Mott*, 187 Ariz. at 543. *See* Muench v. Israel, 715 F.2d 1124, 1144-45 (7th Cir. 1983); Hans v. Abrahamson, 910 F.2d 384, 398 (7th Cir. 1990); Welcome v. Blackburn, 793 F.2d 672, 674 (5th Cir. 1986); Campbell v. Wainwright, 738 F.2d 1573, 1581 (11th Cir. 1984); Wahrlick v. Arizona, 479 F.2d 1137, 1138 (9th Cir. 1973).

[181]*Mott*, 187 Ariz. at 543 (Ariz. 1997).

[182]*Id. See* State v. Chistensen, 129 Ariz. 32; 628 P.2d 580 (Ariz. 1981).

[183]State v. Mott, 187 Ariz. 536, 544; 931 P.2d 1046, 1054 (Ariz. 1997). *See* State v. Gonzales, 140 Ariz. 349; 681 P.2d 1368 (Ariz. 1980).

mental state, distinguishable from *Christensen* and previously deemed inadmissible as "diminished capacity" evidence under *Schantz*.[184]

The Court next turned to federal precedent citing *Cameron*, where psychiatric evidence that defendant was incapable of forming the necessary intent was excluded, because the alleged "incapacity" was actually a claimed inability to reflect on or control the behaviors that produced criminal conduct.[185] The *Mott* court agreed with the *Cameron* decision that such evidence did not negate specific intent because, only in extraordinary circumstances, would a defendant actually lack the capacity to form "legal" *mens rea*.[186] Even though Cameron may not have reflected on the consequences of her behaviors, her purposeful activity was all the law required to satisfy intent. Further, noting *Pohlot*, even the most psychiatrically ill have the capacity to form intentions and the existence of *intention*, as opposed to *reflection*, was all *mens rea* required.[187]

Applying these standards to Mott, the court stated although she may not have been able to reflect on the consequences or severity of her actions, Mott did indeed act purposely by not rendering assistance, or delivering Sheena to medical care.[188] Mott was deemed capable of recognizing her child needed medical care; because she admitted the only reason she delayed bringing Sheena to the hospital was to hide Sheena's bruises and prevent the Department of Social Services from taking Sheena away, not because she was unable to perceive the danger of Sheena's injuries.[189] As in *Pohlot*, the court ruled Mott's purposeful activity was all the law required and noted that no federal court would excuse Mott's conscious failure to assist her dying child simply because she was motivated by unconscious influences or products of her environment.[190] Because *Pohlot* ruled *mens rea* was satisfied by any purposeful activity regardless of psychological origins, the Arizona Supreme Court held Mott

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[184] *Mott*, 187 Ariz. at 544 (Ariz. 1997). *See* State v. Schantz 98 Ariz. 200; 403 P.2d 521 (Ariz. 1981).

[185] *Mott*, 187 Ariz. at 542-43 (Ariz. 1997).

[186] *Id. See Chistensen*, 129 Ariz. at 32.

[187] *Mott*, 187 Ariz. at 543 (Ariz. 1997); *see* U.S. v. Pohlot, 827 F.2d 889 (3rd Cir. 1987).

[188] State v. Mott, 187 Ariz. 536, 543; 931 P.2d 1046, 1053 (Ariz. 1997).

[189] *Id.*

[190] *Id. See Pohlot*, 827 F.2d at 889.

was rightfully precluded from introducing BWS testimony, because such testimony would not have supported a "legally acceptable theory of *mens rea*."[191]

ANALYSIS

The Expert Testimony Itself

Before addressing the legal issues and analysis in *Mott*, it is important to discuss some of the obvious inconsistencies with Dr. Karp's BWS testimony and how this applies in the child abuse context, as compared to how the traditional notions of BWS apply in the self-defense setting where a battered woman kills her abuser.[192] Even assuming all of the legal arguments would not disqualify Mott's BWS evidence, a closer examination of the evidence itself, and its proffered purpose, clearly reveal why BWS should not apply outside the context of self-defense. By exploring BWS more in depth, it will be clear to see why such an ill-fated application, which Dr. Karp and Mott support, is plagued with psychiatric holes of theoretical inconsistency.

Lenore E. Walker, a psychologist who has been an expert witness, is considered by many to be the developer, and nation's finest expert on BWS. In her book, *Terrifying Love*, Walker states that battered women who kill their abusers must be seen as acting normally, not abnormally.[193] Further, Walker states women who kill their abusers develop a "heightened perception of imminence" and kill in mere self-defense based on a "reasonably perceived imminent danger."[194] Because of this perceived danger, BWS testimony is used to develop the complete, affirmative defense of self-defense, and not to excuse the killing or gain "jury sympathy" due to the battered woman's violent history.[195] BWS is

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[191]*Mott*, 187 Ariz. at 543 (Ariz. 1997); *see Pohlot*, 827 F.2d at 889.

[192]As noted in the case discussion above, Dr. Cheryl Karp, Ph.D. was hired by the defense to examine Mott and to testify about the possible effects of BWS upon Mott. *See Mott*, 187 Ariz. at 539 (Ariz. 1997).

[193]LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 169 (1989).

[194]*Id.*

[195]*Id.*

used only to show the average non-battered juror why the perceptions and actions of the battered woman in killing her batterer were legally *reasonable*, not why those actions should be *justified*.

Although in its traditional self-defense usage, BWS evidence contributes to the legally acceptable theory of self defense, such is simply not the case with Mott. The BWS evidence does not contribute to a legally acceptable theory since Arizona does not allow a "diminished capacity" defense short of insanity.[196] Traditional BWS evidence used to establish self-defense is similar to the admission of BWS evidence aimed at assisting in the development of a "coercion" defense, because both are legally acceptable theories.[197] If Arizona had allowed a "diminished capacity" defense, theoretically, the BWS evidence may have been used to negate specific intent. But quite simply, as the law in Arizona stands, there is no legally acceptable theory of *mens rea* to which BWS can be applied in Mott's case.[198] Mott was not, nor did she ever claim to be, coerced or acting in self-defense when she neglected Sheena by denying her necessary medical attention.

If consistent with Walker's theory of BWS, Mott's neglect would have been normal, reasonable, or even justified, thereby diminishing her responsibility and essentially "excusing" her conduct.[199] However, BWS does not cause mental disease or defects, but rather the theory is meant to explain why the battered woman's behavior was reasonable. This theory is simply inapplicable to *Mott;* the victim is Sheena, the child, not Mott, the alleged battered woman. Unlike a battered woman who perceives imminent bodily injury when she kills her abuser, Mott did not perceive "imminent bodily injury" to herself or her child when she neglected to

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[196]*See* State v. Willoughby, 181 Ariz. 530, 538; 892 P.2d 1319, 1327 (Ariz. 1995); State v. Schantz, 98 Ariz. 200; 403 P.2d 521 (Ariz. 1981).

[197]*See* State v. Lambert, 173 W.Va. 60; 312 S.E.2d 31 (W. Va. 1984) (demonstrating where evidence of a history of domestic abuse was accepted as a factor that may negate criminal intent. The domestic abuse evidence did not stand alone however; it was used to help illustrate a legally acceptable "coercion" defense which, if believed, would have negated intent.).

[198]*See* State v. Ramos, 133 Ariz. 4; 648 P.2d 119 (Ariz. 1982) (citing A.R.S. § 13-502(A) (where the court stated the sole test for criminal responsibility in Arizona is the M'Naughten test for insanity).

[199]*See* WALKER, *supra* note 193.

take Sheena to the hospital.[200] BWS is used to show why action against the *batterer* is reasonable, not why action or inaction against an *innocent third party* is reasonable. There is simply no possible theoretical bridge to the child abuse setting.

Mott worried about Sheena, consulted friends, was well aware of the seriousness of the injuries and, in the end, did indeed allow Sheena to be taken to the hospital.[201] Yet, the central question remains: exactly why did Mott delay in hospitalizing Sheena? Her conduct was not due to a reasonably perceived fear of imminent abuse at the hands of Near. Nor was her action based on a belief that, because she had to delay assistance until Near was gone in order to protect herself and Sheena from further, "imminent," abuse. On the contrary, Mott, in her own statements, admittedly delayed for three simple reasons:

(1) she feared the doctors would see Sheena's bruises;
(2) she feared Sheena would be taken away "by the authorities;" and
(3) she wanted to protect Near and prevent him from "getting in trouble."[202]

BWS causes reasonable fear based on a heightened perception of imminent danger; it is not intended to shield liability for the "selfish fear" rationale Mott asserts. Quite simply, Mott cannot be justified based on BWS for delaying Sheena's hospitalization.[203]

Yet, even if we were to ignore Mott's self-damaging statements and evaluate the BWS evidence solely on the rationale of Dr. Karp, similar inconsistencies with traditional BWS theory would surface. Primarily, Karp asserted Mott was unable to recognize the danger or seriousness of Sheena's injuries.[204] Karp further stated that due to Near's abuse, Mott mentally and psychologically "lacked the capacity" to act and "lacked the

[200] *See* State v. Mott, 187 Ariz. 536, 538; 931 P.2d 1046, 1048 (Ariz. 1997).
[201] *Id.*
[202] *Id.*
[203] *See* WALKER, *supra* note 193 (stating BWS assists the jury by showing them why the attered woman has a more acute perception of imminence, a more justified fear under the rcumstances than a non-battered woman).
[204] *Mott*, 187 Ariz. at 539 (Ariz. 1997).

capacity" to sense danger or protect others from it.[205] This frivolous assertion goes against the very heart of the BWS theory. As Walker states, the primary use for BWS testimony in self-defense settings is to show how the battered woman has a *heightened perception* of danger and imminence, a better understanding of where and when imminent bodily injury will occur based on the cycle of abuse.[206] This heightened perception is what provides the battered woman with the ability to protect herself in the only reasonable way . . . to kill her abuser.[207]

If consistent with BWS theory, Mott would not be *unable* to perceive danger as Dr. Karp claimed, but rather she would have been *more aware* of the danger, and thus *better able* to perceive Sheena's imminent injuries than a non-battered woman. Mott did not argue that BWS prevented her from coming to the punctual aid of Sheena, because she *feared* "imminent" repercussions from Near. Nor did Mott claim she was better able to perceive the danger and, therefore, was acting in Sheena's best interest by delaying Sheena's delivery to the hospital until Near was not present. Mott delayed the hospitalization due to the fear of legal prosecution of herself and Near and because she feared losing custody of Sheena to "the authorities."[208] There was simply no indication, neither explicit nor perceived threat, that Mott claimed as the underlying reason she delayed Sheena's hospitalization. Her own testimony rebuts such an assertion and, therefore, is highly inconsistent with BWS theory. Again, there is simply no connection that can be drawn between reasonable action against a batterer and inaction or abuse of a third party as in Mott's case. The two theories are plainly distinct and wholly irreconcilable.

In BWS, the battered woman's only hope to escape injury is to kill her batterer . . . it is the last straw and final option to stop the life threatening pattern of abuse.[209] It is unreasonable to assert that abusing or failing to come to the aid of one's child can be seen as the only option, the "last resort" to an abusive situation. Mott was free to take Sheena to th

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[205] *See* State v. Mott, 187 Ariz. 536, 539; 931 P.2d 1046, 1049 (Ariz. 1997).

[206] *See* WALKER, *supra* note 193, at 169 (discussing how the battered woman can bet perceive danger and imminence than the non-battered woman).

[207] *Id.*

[208] *Mott*, 187 Ariz. at 538 (Ariz. 1997).

[209] *See* WALKER, supra note 193.

hospital as evidenced by the fact she *actually did* allow Sheena to be taken to the hospital the day following the severe abuse.[210] She did not have to delay, consult friends, or "wait to see if she comes out of it" as Mott herself, stated she had.[211] Karp's extensive, technical testimony of "learned helplessness" and the "traumatic bond" was somewhat accurate and may have shown why Mott lied to protect Near or failed to leave the relationship; however, it showed no connection to Mott's relationship and her negligent behavior toward Sheena[212]

The testimony showed nothing as to why Mott did not bring Sheena to the hospital when Mott was fully aware, and indeed quite worried, about the seriousness of Sheena's injuries.[213] Even if the "traumatic bond" caused Mott to believe Near's assurances that Sheena would be alright; there is no reason Mott would have disbelieved the assertions of her friend, the former paramedic. The paramedic was, in all likelihood, very qualified to determine the seriousness of Sheena's condition. However, after several requests and offers to take Sheena to the hospital himself, the paramedic was repeatedly refused by Mott and Near. Mott may have tended to believe Near, but there is no rational reason associated with BWS that would have caused Mott to disbelieve or not trust in the veracity of the paramedic's concern. Mott claimed no threat, no imminent fear, and no "danger" which prevented her from taking Sheena to the hospital. Her unreasonable *inaction* simply cannot be analogized to the fully reasonable *action* of a true battered woman in a self-defense case.[214]

The Mott decision never reached these inconsistencies, however, as the testimony could not match up to the precedent legal standards in both federal and Arizona state court. Assuming as the court did, however, that the BWS testimony was indeed valid psychiatric testimony consistent with

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[210]State v. Mott, 183 Ariz. 191, 193; 901 P.2d 1221, 1223 (Ariz. Ct. App. 1995) (presenting how Mott claimed it was her own idea to take Sheena to the hospital when she could not wake Sheena the next morning.).

[211]*Id.*

[212]*See* State v. Mott, 187 Ariz. 536, 539-40; 931 P.2d 1046, 1049-50 (Ariz. 1997); *Mott*, 183 Ariz. 191, 193; 901 P.2d 1221, 1223 (Ariz. Ct. App. 1995).

[213]*See* WALKER, *supra* note 193.

[214]*See id.* In self-defense, the action of killing the abuser is seen as reasonable due to the imminent threat of ongoing abuse in the BWS relationship.

the traditional notions and standards of BWS, the Arizona Court nonetheless correctly excluded Mott's testimony on two grounds:

(1) the testimony was unacceptable due to Arizona's refusal to adopt "diminished capacity" defenses in its criminal law; and
(2) Arizona's exclusion of such testimony did not violate Due Process.[215]

Arizona Refusal of Diminished Capacity

Mott's primary argument for the expert testimony admission was based on the theory that Mott's battered history and limited intellectual ability rebutted the state's evidence that Mott possessed the requisite specific intent.[216] Mott strongly, yet mistakenly, stated she did not seek to introduce the BWS evidence as an "affirmative defense" to excuse or mitigate her responsibility in neglecting or abusing Sheena.[217] This distinction between psychiatric testimony of mental defect as a defense itself and psychiatric evidence to negate an element of the crime was drawn and defined as "diminished capacity" or "diminished responsibility" in *Pohlot*.[218] It is important to note that "diminished capacity" or the use of such evidence is not necessarily prohibited and would have been allowed in *Pohlot* had such evidence contributed to a "legally acceptable theory of *mens rea*."[219] Further, *Cameron* reiterated the distinction by differentiating "diminished capacity" *mens rea* defenses from those affirmative defenses which excuse, mitigate, or lessen a defendant's moral culpability due to her psychological impairment.[220] Following the guiding standards of these precedents, it would have initially seemed Mott had a strong argument for admission by claiming the psychiatric testimony related to her lack of capacity to form *mens rea*.

However, although Mott's testimony may have indeed tended to negate *mens rea*, the Arizona legislature and courts have plainly, clearly, and repeatedly refused to accept expert testimony regarding mental defects

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[215] *Mott*, 187 Ariz. at 540-44 (Ariz. 1997).
[216] *Id.* at 540.
[217] State v. Mott, 187 Ariz. 536, 540; 931 P.2d 1046, 1050 (Ariz. 1997).
[218] U.S. v. Pohlot, 827 F.2d 889 (3rd Cir. 1987).
[219] *Id.*
[220] U.S. v. Cameron, 907 F.2d 1051; 1062-1063 (11th Cir. 1990).

short of insanity to negate such intent.[221] As the court illustrated, Arizona refused to adopt section 4.02(1) of the MPC which allowed the admission of evidence that a defendant "suffered from a mental disease or defect . . . whenever it was relevant to prove the defendant did or did not have a state of mind that is an element of the defense."[222] This section of the MPC recognized that while "mental defects" of insanity could effectively eliminate responsibility, lesser degrees of mental defect may tend to negate intent and therefore, lessen the charge.[223]

Although the MPC theory is plausible, the Arizona legislature was not bound to the MPC "guidelines" and was free to reject this troublesome and inherently "jury confusing" section.[224] As the *Mott* court correctly interpreted, the legislature's decision not to adopt this section clearly evidenced rejection of the use of psychological testimony short of insanity to challenge the *mens rea* element of a crime.[225] Quite simply, Mott's psychological testimony may have contributed to her personal theory of inaction, but it was the Arizona legislature's sole prerogative to deny such misleading evidence from entering the criminal law realm in Arizona.

This deference to the legislature and the validity of Mott's exclusion was further strengthened by the Arizona decision in *Schantz*, where the court faced an issue nearly identical to the one presented by *Mott*.[226] Schantz claimed his mental deficiencies were so severe that his actions were outside of deliberate, volitional control and therefore, he lacked the capacity to contrive and design the crime.[227] However, the *Schantz* court refused to instruct the jury to weigh evidence of Schantz's mental deficiencies when determining whether Schantz possessed the required malice aforethought for first degree murder.[228] The court stated such a "volitional prong" defense was nothing less than a "diminished capacity

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[221] *Mott*, 187 Ariz. at 540 (Ariz. 1997).

[222] State v. Mott, 187 Ariz. 536, 540; 931 P.2d 1046, 1050 (Ariz. 1997) (citing MODEL PENAL CODE AND COMMENTARIES § 4.02(1) cmt. 1 (1985)).

[223] *Id.* This is precisely the distinction. Mental defects which lessen the charge (*i.e.*, from murder to manslaughter), result in "diminished responsibility" or a less culpable offense.

[224] *Id.* at 542; 1052 (citing U.S. v. Pohlot, 827 F.2d 889, 903 (3rd. Cir. 1990)).

[225] *Mott*, 187 Ariz. at 540 (Ariz. 1997).

[226] *See* State v. Schantz, 98 Ariz. 200; 403 P.2d 521 (Ariz. 1965).

[227] *Id.* at 205.

[228] *Id.* at 212.

due to mental derangement" defense, quite distinguishable from "cognitive insanity" as understood, accepted, and allowed under M'Naughten.[229]

Similarly, Mott did not claim she lacked the *cognitive* ability to have intent. Rather, Mott essentially claimed she lacked the volitional capacity to "intend or [act] know[ingly]" and was unable to conform her volitional conduct to the requirements of law.[230] Yet, just as in *Schantz*, such a "lack of volitional control" claim is precisely what Arizona refused to recognize by not adopting the MPC approach allowing mental defect evidence to negate specific intent.[231] Because Arizona has not recognized a defect of the mind where volition does not exist, the exclusion regarding such was rightfully extended to the BWS testimony in Mott's case. Arizona will not allow psychiatric evidence short of insanity because it simply does not believe that BWS or any other mentally debilitating syndrome will result in an inability to choose a course of action as is the case with insanity.[232]

After recognizing the legislative intent to exclude "diminished capacity," the court strengthened its position by noting numerous other Arizona decisions that have excluded diminished capacity evidence to negate specific intent.[233] Situations similar to *Mott* arose in *Laffoon* and *Ramos*, where each defendant tried to raise voluntary intoxication, not as an affirmative defense, but to show how severe alcoholic effects prevented them from forming specific intent.[234] In both cases, the Arizona court ruled that, while drunkenness may loosen inhibitions and hamper judgments, even the most severely drunk will be *aware* of what they are doing and have the requisite *volitional processes* required for *mens rea*.[235] The court correctly likened this explication to *Mott* by reiterating that Arizona has refused to recognize any mental deficiencies, whether it be

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[229] *Id.*

[230] State v. Mott, 187 Ariz. 536, 543; 931 P.2d 1046, 1053 (Ariz. 1997).

[231] *Id.* at 540; 1050; *see* State v. Schantz, 98 Ariz. 200, 212; 403 P.2d 521, 529 (Ariz. 1965).

[232] *Mott*, 187 Ariz. at 543 (Ariz. 1997).

[233] *Id.* at 541 (citing State v. Ramos, 133 Ariz. 4, 6; 648 P.2d 119, 121 (Ariz. 1982); State v. Laffoon, 125 Ariz. 484, 486; 610 P.2d 1045, 1047 (Ariz. 1980); State v. Briggs, 112 Ariz. 379, 382; 542 P.2d 804, 807 (Ariz. 1975). Each of the cited cases followed the Arizona decision in *Schantz* refusing to allow psychiatric testimony to negate specific intent.

[234] *See Ramos*, 133 Ariz. at 6; *Laffoon*, 125 Ariz. at 486.

[235] *See Ramos*, 133 Ariz. at 6; *Laffoon*, 125 Ariz. at 486.

from voluntary intoxication or BWS, because Arizona simply does not believe that short of insanity, one does not possess volitional control or conscious awareness of her actions.[236]

As the *Ramos* court stated and the *Mott* court correctly concurred, the sole test for criminal responsibility in Arizona is insanity: "a person is not responsible for criminal conduct *by reason of insanity* if at the time of such conduct the person was suffering from such a mental disease or defect as not to know the nature and quality of the actor, if such person did know, that such person did not know what he was doing was wrong."[237] Mott clearly did not assert insanity, for although she may not have reflected upon the consequences of her denial of medical attention, Mott was "consciously aware" of her actions and was able to make choices as evidenced by her eventual delivery of Sheena to the hospital.[238] This volitional control, according to Arizona law, can only be absent in cases of insanity, and thus is the only situation where Arizona will allow psychiatric testimony regarding such.[239]

Truly, Mott was overly optimistic to think the court, *sua sponte*, would recognize BWS as the first mental defect/syndrome in Arizona to have such "volitional control preventing" power. The precedent cases clearly and unequivocally rejected the entire realm of "diminished capacity" defenses and evidence and thus, Mott's assertion that she desired only to negate specific intent was frivolous and irrelevant.[240] No matter the intended use or purpose, Arizona has prohibited all mental defect evidence short of that supporting the M'Naughten insanity test as set forth in *Ramos* and *Laffoon*.[241]

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[236]State v. Mott, 187 Ariz. 536, 541; 931 P.2d 1046, 1051 (Ariz. 1997) (citing State v. Schantz, 98 Ariz. 200, 212; 403 P.2d 521, 529 (Ariz. 1965)).

[237]*Mott*, 187 Ariz. at 541 (Ariz. 1997) (citing A.R.S. § 13-502-A (emphasis added)).

[238]*Mott*, 187 Ariz. at 543 (Ariz. 1997).

[239]*Id*

[240]*See* State v. Ramos, 133 Ariz. 4, 6; 648 P.2d 119, 121 (Ariz. 1982); State v. Laffoon, 125 Ariz. 484, 486; 610 P.2d 1045, 1047 (Ariz. 1980); State v. Briggs, 112 Ariz. 379, 382; 542 P.2d 804, 807 (Ariz. 1975); State v. Schantz, 98 Ariz. 200, 212; 403 P.2d 521, 529 (Ariz. 1965).

[241]*See Ramos*, 133 Ariz. at 6; *Laffoon*, 125 Ariz. at 486.

The Due Process Claim

Unable to deny that her evidence fell into the well established Arizona definition and exclusion of "diminished capacity," Mott next claimed the Arizona law preventing her from introducing expert testimony to show lack of intent denied her Due Process and was therefore, unconstitutional.[242] Yet, this misguided assertion from Mott wholly overlooks the United States Supreme Court decision in *Fisher*.[243] The *Mott* court was correct in discounting Mott's erroneous Due Process claim by stating the fundamental law, as set forth in *Fisher*, gave states the freedom to decide whether or not to admit psychiatric evidence short of insanity to disprove or rebut evidence of premeditation or intent.[244] Although the M'Naughten insanity defense is a constitutional guarantee, BWS is admittedly not an insanity-type defense and therefore, is not required under the *Fisher* doctrine.[245]

In *Fisher*, the defendant argued the District of Columbia law precluding him from introducing mental defect evidence attributing to his lack of premeditation, violated due process.[246] However, the Supreme Court explicitly stated they would not "force" the District of Columbia to require such admissions, and further held that states were free to preclude psychological evidence of mental deficiencies to negate elements of a crime, without as Mott contends, violating the constitution.[247] Whether it be to show lack of premeditation as in *Fisher*, or lack of intent as in *Mott*, the precluded admissions in both cases attempted to introduce mental defects short of insanity to disprove elements of the crimes charged.[248] There is no reason to believe the constitution would require admission in Mott's case and effectively "force" Arizona to adopt such a rule of evidence in their criminal law, while at the same time, give deference to the District of Columbia's legislature to reject an identical rule of evidence

[242]State v. Mott, 187 Ariz. 536, 541; 931 P.2d 1046, 1051 (Ariz. 1997).

[243]*See* Fisher v. U.S., 328 U.S. 463 (1946).

[244]*Mott*, 187 Ariz. at 541 (Ariz. 1997) (citing Fisher v. U.S., 328 U.S. 463 (1946)).

[245]*See Fisher*, 328 U.S. at 463 (demonstrating where mental defects short of insanity are not required to protect due process, whereas including a provision allowing for an insanity defense in the state criminal law is required for due process).

[246]*Id.* at 470.

[247]*Id.* at 476. *See Mott*, 187 Ariz. at 541 (Ariz. 1997).

[248]*See Fisher*, 328 U.S. at 470; *Mott*, 187 Ariz. at 541 (Ariz. 1997).

in *Fisher*. Although expert testimony may have shown Mott did suffer from BWS, just as expert testimony may have shown Fisher was indeed below average intelligence, these types of mental impairments which do not amount to insanity are simply not constitutionally required under *Fisher*.[249] Even if Arizona criminal law did allow "diminished capacity" evidence to negate intent elements of a crime, Mott's claim would remain without merit because the BWS evidence she sought to introduce would not, consistent with federal and state precedent, contribute to a legitimate legal theory of *mens rea*.[250] In *Pohlot*, the court stated mental deficiency evidence may indeed be used to negate specific intent, even though such evidence is not required by the *Fisher* decision.[251] Regardless, the court rejected the use of Pohlot's proffered evidence because it did not contribute to a legally acceptable theory of *mens rea*.[252] Although the Insanity Defense Reform Act was ruled only to preclude diminished capacity defenses on their own, the *Pohlot* court ruled that even if the jury believed Pohlot's mental deficiency psychiatric evidence, it would still have failed to release Pohlot from legal responsibility.[253] This same theory is easily applied to *Mott*. Even if the above arguments were all decided in Mott's favor and the BWS evidence was admitted, it would still fail to illustrate why Mott was not fully liable through lack of *mens rea*.[254] The following discussion is illustrative.

As explained in *Pohlot*, only in extraordinary cases will even the most psychiatrically ill "lack the capacity" to form specific intent as

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[249] *See* Fisher v. U.S., 328 U.S. 463, 470 (1946).

[250] *See* U.S. v. Pohlot 827 F.2d 889 (3rd Cir. 1987); U.S. v. Cameron, 907 F.2d 1051 (11th Cir. 1990). An illustrative example of where psychiatric evidence may be introduced to assist the jury in deciding on a legally acceptable theory of *mens rea* can be found in *State v. Lambert*. State v. Lambert, 173 W.Va. 60; 312 S.E.2d 31 (W. Va. 1984). There, the defendant woman was on trial for child abuse and used her history of abuse to help prove her defense of coercion. She claimed she lacked the intent to commit the abuse because she was coerced into committing it with her abuser. Therefore, the psychiatric testimony contributed to a legally acceptable theory of *mens rea* . . . the theory of coercion. The distinction in *Mott* is simply that Mott lacked the capacity to form intent; this is not a legally acceptable theory of *mens rea* except in the area of insanity.

[251] *Pohlot*, 827 F.2d at 903.

[252] *Id.*

[253] *Id.*

[254] State v. Mott, 187 Ariz. 536, 543; 931 P.2d 1046, 1053 (Ariz. 1997).

traditionally understood in criminal law.[255] The problem with psychiatric testimony of mental disease or defect is that it confuses the jury, focusing their attention on whether the defendant was *capable* of forming intent rather than the true legal question of whether there *actually was* intent.[256] The evaluation of a defendant's criminal responsibility looks to the defendant's *conscious awareness* and therefore, any showing of purposeful activity usually satisfies *mens rea.*[257] Pohlot purposely planned, and Mott purposely neglected, regardless of whether either defendant had the "capacity" to reflect upon or "intend" the criminal end result. Unless Mott was completely oblivious as to what was going on, and unless she was thoroughly unaware of Sheena's condition to the point of insanity, the BWS evidence was irrelevant.[258]

As in *Cameron,* the prosecution in *Mott* need not have shown Mott *intended* for Sheena to die or even that Mott knowingly *understood* that the delay in taking Sheena to the hospital would lead to death. The prosecution was merely required to show Mott was consciously aware of the injuries themselves, consciously aware that she was delaying Sheena's necessary admittance to the hospital.[259] It is Mott's conscious awareness of her own behaviors, not the awareness or evaluation of the potential outcome of those behaviors, which satisfies intent.[260]

Although Mott may not have noticed the severe detriment a delay in treatment caused, she nonetheless was aware that she was delaying needed treatment. Mott was aware that Sheena was injured as evidenced by Mott's continuous "checking up" on Sheena the night of the abuse and also by Mott's episodic crying and consultation with neighbors the morning following the abuse.[261] She was fully capable of realizing her daughter was injured and, in fact, pleaded with her boyfriend several times

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[255]U.S. v. Pohlot, 827 F.2d 889, 903 (3rd Cir. 1987).

[256]*Id.* at 903-904.

[257]*Id.* at 904.

[258] *See* WALKER, *supra* note 193. Traditional BWS would not support such an assertion because battered women are very alert and aware of their actions in the self-defense setting.

[259]*See* U.S. v. Cameron, 907 F.2d 1051, 1067 (11th Cir. 1990).

[260]*Id.*

[261]State v. Mott, 183 Ariz. 191, 193; 901 P.2d 1221, 1223 (Ariz. Ct. App. 1995).

the night before to allow Sheena to be taken to the hospital.[262] In addition, although Mott claimed she was confused, she was "aware" as shown by her desire to prevent anyone at the hospital from seeing Sheena's bruises.[263] All of the activities, like Pohlot's extensive planning and scheming, were purposeful and clearly evidenced Mott's delay was not done "uncontrollably" or without conscious awareness. Mott did not consciously "wake up" to the severity of the abuse only after Sheena's death; but on the contrary, Mott knew of the danger all along. Such conscious awareness and purposeful activity, whether motivated by fear, anger, or some other psychological origin, is irrelevant in determining *mens rea* because it does not contribute to a legally acceptable theory of *mens rea* such as self-defense, as BWS is traditionally used.[264]

It is also worthy to note that, if anything, the facts and mental circumstances in *Pohlot* more closely resemble the traditional notions of BWS than those contained in *Mott*. In *Pohlot*, the husband claimed he was unable to appreciate or reflect upon the consequences of hiring someone to kill his wife.[265] He claimed the history of manipulation, and psychological and physical abuse influenced his decision to hire a killer without contemplating the consequences or recognizing the effects.[266] The connection in *Pohlot* was allegedly direct: the abuse triggering the murder plot may have been seen as the only way out of Pohlot's abusive relationship, the only way to prevent imminent physical abuse at the hands of his wife.[267] Yet, there is no direct connection found in *Mott*. Mott claimed the abuse she suffered under Near prevented her from helping her daughter ... creating a much more tenuous relationship between the facts

[262] *Id.* Returning to the testimony of the paramedic "friend," even if Mott had believed Near, which she admits she did not, Mott still had no reason to disbelieve the paramedic. Certainly, it is quite reasonable to think Mott was alerted to Sheena's serious condition after the repeated warnings from the highly qualified paramedic.

[263] State v. Mott, 187 Ariz. 536, 543; 931 P.2d 1046, 1053 (Ariz. 1997).

[264] *See* U.S. v. Pohlot, 827 F.2d 889, 903 (3rd Cir. 1987).

[265] *Id.* at 893.

[266] *Id.*

[267] *Id. See* WALKER, *supra* note 193 (establishing that when a battered woman kills her abuser, it is because the battered woman sees the killing as the only way out, the last option available to prevent further imminent and severe abuse).

presented than had Mott acted out against *Near* or even neglected to help *him* in a life-threatening situation.[268]

Further, evidence against a legal acceptance of Mott's BWS theory of *mens rea* came from the court's analysis of *Cameron*.[269] Just as in *Mott*, Cameron claimed her mental defect of schizophrenia rendered her "incapable" of forming the specific intent to commit the crimes charged.[270] Mott argued that her mental defects, although not qualifying as insanity, tended to show she was incapable of "knowingly" allowing Sheena to die just as Cameron was incapable of intending to distribute drugs.[271] However, as the *Cameron* court stated, in most instances where a defendant claims she is "incapable" of forming intent, she is not referring to "intent" in the traditional sense of the word. Rather, most "incapacity to form intent" defenses are actually confused with, and rooted in, an inability to reflect on the long-term consequences or "volitionally control" the behaviors which produced criminal conduct.[272] These notions of lack of reflection or lack of volitional control are not acceptable theories of *mens rea* because, as stated in *Pohlot*, defendants often act not intending or realizing the end result of their actions, yet the purposeful actor remains guilty nonetheless.[273]

In *Mott*, the essence of Mott's assertion was that she was unable to realize the seriousness of Sheena's condition, or in other words, she was unable to see the potential effects of not taking Sheena to the hospital.[274] Even if such an assertion were believed, which is unlikely since Mott's own statements cast sincere doubts upon such, the evidence would still have been unacceptable. Mott was not psychologically prevented from acting to save Sheena, as evidenced by the fact that she did allow Sheena

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[268]This does not suggest that the *Pohlot* decision was incorrect by any sense. It merely demonstrates that the connection in *Pohlot* (i.e., battered vs. batterer) was more similar to traditional BWS evidence in self-defense than the connection, or lack thereof, in *Mott* (i.e., battered woman v. battered child).

[269]*See* U.S. v. Cameron, 907 F.2d 1051 (11th Cir. 1990).

[270]*Id.* at 1056.

[271]*See* State v. Mott, 187 Ariz. 536, 543; 931 P.2d 1046, 1053 (Ariz. 1997); *Cameron*, 907 F.2d at 1067.

[272]*Cameron*, 907 F.2d at 1066.

[273]U.S. v. Pohlot, 827 F.2d 889, 907 (3rd Cir. 1987).

[274]*Mott*, 187 Ariz. at 540 (Ariz. 1990).

to be taken to the hospital the following day.[275] She may not have perceived the danger in delaying Sheena's admittance; she may not have reflected on the fact that Sheena may die due to her boyfriend's abuse. However, Mott did not lack the capacity to purposefully act, which is all the law required.[276]

Mott is likewise distinguishable from *Staggs* where expert testimony was admitted because it did, indeed contribute to a legally acceptable theory of *mens rea.*[277] In *Staggs*, the court admitted psychiatric evidence that may have shown it was improbable that the defendant had made the threat charged.[278] Unlike Mott, however, Staggs did not claim that he lacked the volitional control or was influenced by some unconscious motivation when threatening to kill a police officer.[279] Staggs claimed he *characteristically* acted without reflection and therefore, most likely did the same in the charged circumstance.[280]. Conversely, Mott did not claim that she was a characteristically irresponsible person and therefore it was unlikely she caused Sheena's death by abuse. Mott claimed precisely what *Staggs* prohibited: that Mott did not have the capacity to form "knowing or intention" because she lacked volitional control and was unconsciously prevented by BWS from making the decision to take Sheena to the hospital.[281] Staggs did not argue he was incapable of the requisite mental state because of severe mental deficiencies, he argued it was unlikely he actually did have the requisite mental state because of characteristic deficiencies.[282] The former is a pure example of "diminished responsibility."

This same rationale was used to preclude testimony similar to Mott's in *White.*[283] There, defendant White attempted to introduce testimony that

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[275]*See id.*

[276]*See* State v. Mott, 187 Ariz. 536, 543; 931 P.2d 1046, 1053 (Ariz. 1997); *See also Pohlot*, 827 F.2d at 907 (stating *mens rea* is generally satisfied by any showing of purposeful activity, regardless of its psychological origins).

[277]*See* U.S. v. Staggs, 553 F.2d 1073 (7th Cir. 1987).

[278]*Id.*

[279]*Id.*

[280]*Id.*

[281]State v. Mott, 187 Ariz. 536, 540; 931 P.2d 1046, 1050 (Ariz. 1997).

[282]*See* U.S. v. Staggs, 553 F.2d 1073 (7th Cir. 1987).

[283]*See* U.S. v. White, 766 F.2d 22 (1st Cir. 1985).

she lacked the ability to form the requisite intent to distribute cocaine due to the domination by White's mother.[284] Just as White alleged her mother psychologically compelled her to act, Mott claimed Near's abuse psychologically prevented her from acting on Sheena's behalf.[285] In both cases, unconscious motivations and a lack of volitional control were proffered as defenses, yet both are distinguishable from the true lack of intent found in *Staggs*.[286] Further, the *White* court stated the "good motive" of being psychologically compelled to distribute cocaine to "help her mother" was irrelevant since White was cognizant that the law was being violated by her proscribed actions.[287] Similarly, in *Mott*, even if Mott's long-term motivation was to protect the child, evidence illustrating such would be irrelevant since Mott was cognizant the law was being broken. Mott was well aware of the abuse, well aware her daughter needed medical attention and was thus, cognizantly aware of her actions just as the defendant in *White* was. Mott was obviously aware the law was being broken or she would not have stated she "feared the authorities" would take Sheena away upon discovery of Sheena's bruises. In fact, there is ample evidence in Mott's own statements to show Mott actually had "bad" or "selfish" motivations in delaying Sheena's treatment, such as protecting Near or preventing social services from taking Sheena away from an abusive home.[288]

It is conceivable that Mott did not intend for her daughter to die or intend to make the abuse worse, yet the law in *mens rea* does not require such a mental computation or analysis. Quite simply, the law will not excuse Mott's conscious failure to act, no matter how little such a decision was evaluated or contemplated in her mind, even if Mott was motivated by unconscious influences that were a product of her genes or of her environment.[289] Mott purposely wanted to hide the bruises, purposely wanted to protect Near from getting in trouble, and purposely delayed one

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[284] *Id.* at 24.

[285] *Id.*; *Mott*, 187 Ariz. at 540 (Ariz. 1997).

[286] *See* State v. Mott, 187 Ariz. 536, 540; 931 P.2d 1046, 1050 (Ariz. 1997).

[287] *White*, 766 F.2d at 24.

[288] *See Mott*, 187 Ariz. at 538 (Ariz. 1997); State v. Mott, 183 Ariz. 191, 193; 901 P.2d 1221, 1223 (Ariz. Ct. App. 1995).

[289] *See* U.S. v. Pohlot, 827 F.2d 889, 907 (3rd Cir. 1987).

night "to see if [Sheena] would come out of it."[290] This undeniably purposeful action is all the law requires and thus, her proffered BWS testimony was rightfully excluded.[291]

The Distinction, Comparison, and Overruling of Arizona Precedents

With her Due Process claim effectively and powerfully rebutted by the court, Mott futilely tried to liken her case to the only existing Arizona precedents. Primarily, Mott relied on the Arizona court's recent decision in *Gonzales*, where expert testimony to negate specific intent was allowed into evidence.[292] Yet, when pressed with Mott's citation and comparison to *Gonzales*, the court corrected its erroneous prior decision, overruling *Gonzales* in as much as it allowed for an admission contrary to Arizona law.[293] In *Gonzales*, the court allowed evidence of the defendant's low intelligence, probable organic brain damage, and mental state because it was deemed relevant to the defendant's "mere presence" defense.[294] The *Gonzales* court ruled the evidence was probative in that it tended to show Gonzales did not, and could not; have the specific intent to commit rape.[295]

However, as the *Mott* court criticized, this "defense" was nothing more than an attempt to admit expert testimony regarding the defendant's ability to form the requisite mental state and thus, was evidence of "diminished capacity" excluded under *Schantz*.[296] Both Mott and Gonzales tried to show they lacked the requisite mental state at the time of the offense by offering testimony that they lacked the *ability* to form culpable intent.[297] Whether there be a diminished capacity to stop others from raping as in *Gonzales*, or a diminished capacity to recognize and care

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[290]*Id.*

[291]*See id.*; U.S. v. Cameron, 907 F.2d 1051, 1066 (11th Cir. 1990).

[292]*See* State v. Gonzales, 140 Ariz. 349; 681 P.2d 1368 (Ariz. 1980).

[293]State v. Mott, 187 Ariz. 536, 544; 931 P.2d 1046, 1054 (Ariz. 1997).

[294]*Gonzales*, 140 Ariz. at 351.

[295]*Id.*

[296]*Mott*, 187 Ariz. at 544 (Ariz. 1997) (citing State v. Schantz, 98 Ariz. 200; 403 P.2d 521 (1965)).

[297]*Mott*, 187 Ariz. at 544 (Ariz. 1997); State v. Gonzales, 140 Ariz. 349, 351; 681 P.2d 1368, 1370 (Ariz. 1980).

for an abused child as in *Mott*, both "defects" were justifiably inadmissible and irrelevant in the court's eyes.[298]

Mott also cited *Christensen* where psychiatric testimony was, in fact, allowed to assist the defendant in disputing an element of the charge against him.[299] Although Mott may claim that BWS prevented her from knowingly or intentionally abusing Sheena and causing Sheena's death, the court clearly illustrated the stinging distinction from *Christensen*. As noted above, the *Christensen* court allowed the psychological testimony because it was, essentially, "character evidence" and spoke nothing of the defendant's mental capacity as such.[300] Christensen did not argue that he was mentally unable to premeditate or deliberate murder. Rather, Christensen asserted that because of his tendency to act impulsively and reflexively in times of stress he truly did not premeditate the homicide.[301] Christensen was indeed *capable* of premeditating, yet his testimony regarded the acceptable theory that because of his characteristic behavioral tendencies, he actually *did not* premeditate.[302] Unlike Christensen, Mott did not assert that at the time of the abuse she did not "intend or knowingly" stand by as Sheena died, rather, Mott claimed she lacked the ability to intend or knowingly stand by.[303]

The distinction is quite simple. Mott was not *characteristically* imperceptive as Christensen was *characteristically* impulsive and reflexive.[304] BWS is not a trait, it is a syndrome by its very title and, although the syndrome may instill many traits in the sufferer such as "passive acceptance" of abuse or the "traumatic bond" which Dr. Karp mentioned, these traits are simply effects of the syndrome, and not character traits.[305] In Arizona, the only "syndrome effects" which may be

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[298]State v. Mott, 187 Ariz. 536, 544; 931 P.2d 1046, 1054 (Ariz. 1997); *Gonzales*, 140 Ariz. at 351.

[299]*Mott*, 187 Ariz. at 543-44 (Ariz. 1997); *See* State v. Christensen, 129 Ariz. 32; 628 P.2d 580 (Ariz. 1981).

[300]*See Christensen*, 129 Ariz. at 35.

[301]*Id.*

[302]*Id.*

[303]*Id.*

[304]*See* State v. Mott, 187 Ariz. 536, 543-44; 931 P.2d 1046, 1053-54 (Ariz. 1997); State v. Christensen, 129 Ariz. 32, 35; 628 P.2d 580, 583 (Ariz. 1981).

[305]*See Mott*, 187 Ariz. at 543-44 (Ariz. 1997).

introduced or weighed by a jury in their determination of intent are the effects or "traits" of insanity.[306] Even if Mott's suspicious and unconvincing claims of fear and "lack of danger perception" were believed, the Arizona legislature, as well as the court in *Schantz*, have made it crystal clear the only mental disease effects allowed will be those due to insanity, not some other diminished capacity defense.[307]

As the court plainly and rightfully concluded, Dr. Karp's testimony did not meet the standards set forth in the M'Naughten test, the sole test for criminal responsibility in Arizona, and therefore, the evidence was justifiably excluded at the trial level.[308] This illuminating and powerful analysis was elementary and prevented the appellate court from injecting its own notions of criminal law into the Arizona legal system. By honoring the standards set forth in their own previous decisions and by nobly deferring the evidentiary BWS decision to the legislature, the Arizona Supreme Court rejected Mott's unfounded claims and prevented future juries from releasing "many dangerous criminals who obviously should be under confinement."[309] If true, it is indeed unfortunate that Mott was a battered woman and this article does not suggest that such a claim should be taken lightly. What this article does argue, however, is that BWS, as reasoned and offered by Mott, simply does not match up with judicial precedent and should not be admitted outside of the self-defense realm. Quite possibly, the best illustration of why Mott's BWS testimony is inappropriate to negate *mens rea* is painted by an examination of Mott's own statements to police, investigators, and witnesses.

Mott's Damaging Statements

The most damaging evidence to Mott's claim of lack of *mens rea* does not come from federal or state case law, it comes, quite simply, from Mott's very own statements to neighbors, doctors, and the police. Mott was far

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[306] *See* State v. Ramos, 133 Ariz. 4, 6; 648 P.2d 119, 121 (Ariz. 1982); State v. Laffoon, 125 Ariz. 484, 486; 610 P.2d 1045, 1047 (Ariz. 1980); State v. Schantz, 98 Ariz. 200; 403 P.2d 521 (Ariz. 1965).

[307] *See Mott*, 187 Ariz. at 540 (Ariz. 1997); *Schantz*, 98 Ariz. at 200.

[308] *Mott*, 187 Ariz. at 541 (Ariz. 1997).

[309] *See* State v. Mott, 187 Ariz. 536, 545; 931 P.2d 1046, 1055 (Ariz. 1997) (citing *Schantz*, 98 Ariz. at 200).

from incapable of comprehending the situation at the time of the abuse. In fact, she was well aware of the serious condition of her child on both the night of and the day following the abuse.[310] Mott stated that on the night of the beatings, she was concerned about Sheena and "stayed up all night" to check on her condition.[311] It is ludicrous to suggest that an unconcerned parent, allegedly incapable of realizing or perceiving her child was in danger, would worry and continuously check on that child's condition throughout the night.

Further, although Near stated he and Mott should "wait to see if [Sheena] would come out of it," Mott admitted the reason she did not take the child to the hospital at that time was because she was worried about the bruises on Sheena's body, not because she actually thought Sheena would in fact, "come out of it."[312] This is not the motivation of a battered woman living in fear of her abuser, this is the motivation of a neglecting mother living in fear of legal prosecution and liability for her own criminal actions. This pure self-interest on the part of Mott is precisely why the argument of BWS does not apply, and should not apply, in child abuse and neglect settings.

Mott recognized that a hospital visit would subject Sheena to an examination that would undoubtedly reveal the bruises and scars of abuse and therefore, Mott selfishly delayed the delivery of Sheena, hoping that such an incriminating and criminally suspecting hospital visit would not be necessary.[313] Mott did not want the doctors to question or report the abuse because Mott feared Sheena would be taken away from her by the authorities and that Mott herself would be subject to criminal charges.[314] The fear of future violence, or imminent violence as BWS illustrates in the self-defense setting, simply played no part in Mott's ill-motivated actions. There is simply no connection between Mott's alleged BWS and the subsequent neglect of Sheena. Mott's very own statements rebut any assertion to that effect.

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[310]*Mott*, 187 Ariz. at 543 (Ariz. 1997).
[311]State v. Mott, 183 Ariz. 191, 193; 901 P.2d 1221, 1223 (Ariz. Ct. App. 1995).
[312]*Id.*
[313]*See Mott*, 187 Ariz. at 538 (Ariz. 1997).
[314]*Mott*, 183 Ariz. at 193.

Even if Mott was "caught up in the moment" and unable to perceive Sheena's danger the previous night due to Near's presence and alleged "psychological control," she was certainly well aware, even *acutely* aware, of Sheena's injuries the next morning.[315] Evidence of this awareness is plainly illustrated by Mott's visit to her friend Eric Scott's home the morning following the abuse when Mott arrived flustered and "crying" because Sheena "would not wake up."[316] Tears and verbal concern over Sheena's condition are damaging evidence that Mott was worried and therefore *very* aware about Sheena's decreasing chance of survival. Again, a parent unable to recognize the seriousness of her child's injuries would hardly be capable of worry, and rarely become emotional to the point of tears, about the very injuries she claimed "unable to perceive." Quite simply, Mott was well aware of the seriousness of Sheena's condition both the night of the beatings and the morning after and thus, her delay in Sheena's hospitalization, her purposeful act of delaying Sheena's necessary medical treatment, was plainly enough to show "knowing or intention."[317]

By recognizing these blatant inconsistencies in Mott's testimony and defense, it is plain to see why the court was justified in excluding her testimony. Psychiatric testimony regarding BWS in a situation where the facts are overwhelmingly against the defendant, can realistically serve one purpose and one purpose only ... to invoke jury sympathy. Whether under the guise of diminished capacity, due process, or lack of intent, Mott was simply trying to transfer her own responsibility and liability to someone else. By presenting herself as a battered woman and portraying *herself* as the victim rather than Sheena, Mott attempted to admit BWS testimony to confuse the jury into placing Near and his alleged abuse, rather than Mott's own culpable neglect, on trial. These selfish motivations simply cannot excuse or even mitigate a defendant's liability where a child has been abused and neglected to the point of death.

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[315] *See* State v. Mott, 187 Ariz. 536, 538; 931 P.2d 1046, 1048 (Ariz. 1997).
[316] *Id.*
[317] *Id.* at 543; 1053.

IMPACT

The legal impact of this case is clearly visible when noted that an Indiana case nearly identical to *Mott*, rested its decision heavily upon the erroneous and overruled appellate court decision in *Mott*.[318] Just days before the Arizona Supreme Court decision in *Mott* was rendered, the Indiana Court of Appeals ruled testimony regarding BWS was admissible to show lack of requisite intent for child abuse in *State v. Barrett*.[319] Barrett was charged with neglect of a dependent after her four-year-old son died at the hands of Barrett's severely abusive live-in boyfriend.[320] The *Barrett* court ruled the proffered BWS testimony was relevant and necessary to determine Barrett's mental state and therefore, necessary to determine whether she acted knowingly or intentionally in neglecting her dependent.[321]

After citing several other circumstances where BWS testimony in Indiana has been admitted (i.e. to bolster credibility in the face of inconsistent testimony or as a mitigating factor during sentencing), the *Barrett* court relied heavily on the *Mott* appellate court decision, "the only other jurisdiction which has considered this issue."[322] Because both *Mott* and *Barrett* involved a showing of knowing or intention, the respective courts deemed BWS testimony essential to the defense, and thus an admission mandated by the Constitution.[323] Due to this heavy reliance on the *Mott* appellate decision, it is reasonable to assume that future courts will also look to these preliminary foundation precedents as guiding lights to rules of admissibility. This places an enormous responsibility on the courts because, as shown by *Barrett*, when pressed with their own first impression scenarios of BWS and child abuse, courts will often refer to the landmark decision of *State v. Mott* in Arizona.[324]

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[318] State v. Barrett, 675 N.E.2d 1112 (Ind. Ct. App. 1996).
[319] *Id.* at 1115.
[320] *Id.* at 1116.
[321] *Id.*
[322] *Id.* at 1117.
[323] *See* State v. Barrett, 675 N.E.2d 1112, 1117 (Ind. Ct. App. 1996); State v. Mott, 183 Ariz. 191, 193; 901 P.2d 1221, 1223 (Ariz. Ct. App. 1995).
[324] *See* State v. Mott, 187 Ariz. 536; 931 P.2d 1046 (Ariz. 1997).

As evidenced by the lack of case law directly on point, these primary decisions will provide the foundation upon which BWS admissions in child abuse neglect situations are decided. Therefore, the decisions must be carefully scrutinized to prevent abuse just as the Supreme Court of Arizona did in *Mott*. Conceivably, and indeed hopefully, the *Barrett* court decision will be appealed due to its reliance on the vacated appellate opinion of *Mott*, and Barrett's BWS testimony will be excluded in full accordance with the impeccably reasoned holding in the Supreme Court of Arizona opinion.[325] Yet, with the potential power of these decisions illustrated, the negative effects must also be explained to show the rationale behind exclusion. Some may ask, what is the danger in allowing the admittance of BWS testimony in this area? Just how would such potential abuse, even if it were to surface, harm the battered woman, the BWS defense, or society as a whole? The answers are quite simple.

Primarily, as Lenore Walker details and documents in *Terrifying Love*, the road to BWS acceptance, even in the self-defense setting, has been long and difficult.[326] Many courts and juries remain very skeptical when reviewing or admitting BWS testimony because they simply do not consider the syndrome and its effects plausible. Yet, there seems to be some consensus, psychologically, socially, and legally, that battered women may indeed be more capable of perceiving when abuse is imminent and thus, have a greater notion of when "killing in self-defense" is necessary to prevent serious bodily injury. Yet, if the BWS theory were

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[325]Note also that similar litigation is currently underway in West Virginia in the case of *State v. Wyatt*. State v. Wyatt, 198 W.Va 530; 482 S.E.2d 147 (W. Va. 1996). The issues in Wyatt were essentially the same as *Mott*: child abuse and neglect are challenged by BWS testimony on a lack of *mens rea* grounds. However, the West Virginia legislature actually adopted the same MPC section purposely omitted by Arizona in the *Mott* case. The Wyatt court noted that in another West Virginia case, *State v. Lambert*, the court recognized a history of domestic violence can indeed be a factor that may negate criminal intent. However, the proffered testimony of Wyatt was excluded because it failed to meet the standards for expert testimony set forth in the West Virginia case of *Wilt v. Brubaker*. The *Wyatt* court did state, however, that if the validity of such testimony conformed to the standards set forth in *Wilt*, BWS could be introduced to negate the necessary intent element of the crime. Hopefully, on remand, the lawyers will raise, and the court will notice, the strong and persuasive decision in *Mott*. If future West Virginia decisions are in accordance with Mott, they will serve to nullify the potentially dangerous dicta the *Wyatt* court left behind.

[326]*See generally* WALKER, *supra* note 193, at 264-328.

expanded beyond showing a "heightened perception of imminence" and applied to show an inability to stop child abuse or an inability to perceive the seriousness of abuse, it is quite likely that judges and juries, will be more critical and hesitant to accept the BWS theory as a whole.

When BWS testimony is introduced to support an implausible theory, as it was in *Mott*, the credibility of the defense as a whole will decrease substantially.[327] Just as Congress enacted the Insanity Defense Reform Act in response to social outcry and criticism of unreasonable "insanity" based defenses, it is quite possible that if applied to unreasonable cases of child abuse, the BWS defense will lose its muster and be abolished from the entire criminal law realm.[328] Society is not likely to accept the notion of relieving child abuse or neglect responsibility due to third party abuse. Therefore, if defendants are consistently relieved from even a fraction of liability, it is likely our justifiably cynical society will once again call for tighter restrictions to protect the safety of its children. In the long run, this skepticism and disbelief of battered women will transfer into a decrease of utilization and acceptance of BWS even in the self-defense setting where the syndrome is necessary.

If the defense is abused and blindly expanded to encompass child abuse, the true battered woman who justifiably kills her abuser to escape imminent injury will be stripped of her only viable and only applicable defense. In order to preserve BWS testimony and protect the battered woman in self-defense situations, courts cannot erroneously apply BWS to situations such as child abuse where there is likely little public support. It is much easier and morally settling to find reasonableness in a battered woman who kills her long-time abuser than it is to find reasonableness when an innocent child has been abused and left to die. This child abuse unreasonableness is simply inexcusable. Therefore, the only way to protect and preserve this already heavily criticized syndrome is to limit its application to only the most relevant and legally acceptable cases of self-defense.

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[327]*See Mott*, 187 Ariz. at 538 (Ariz. 1997).

[328]The Insanity Defense Reform Act was passed in the wake of John Hinkley's acquittal of charges arising from his attempt to assassinate President Ronald Reagan and Press Secretary James Brady. Insanity Defense Reform Act, 18 U.S.C. § 17.

How likely is this predicted abuse of BWS? Very. In his book, *The Abuse Excuse*, acclaimed lawyer and legal scholar, Alan Dershowitz, stated that even in the self-defense setting, "Any time a defense works, it is quickly abused by some who killed in cold blood."[329] Therefore, it is fair to assume that even if BWS evidence in child abuse situations was legitimate, abusive and neglecting mothers would be quick to "jump on the bandwagon" and attempt to excuse their conduct by showing an abusive history of their own.[330] If society was hesitant to accept that a woman's only option in an abusive relationship is to kill her abuser in self-defense, "society's heart-strings" will be significantly less compassionate when faced with the death of a child due to a woman's negligence. The BWS theory already stands on thin ice support . . . inject a murdered child into the situation, and the entire defense is doomed to fall through.

As Dershowitz continues, although we may be sympathetic to the battered woman, she still has options beyond killing, or in Mott's case, options beyond leaving Sheena to die. As "unpalatable as the options may be," Mott still had options which the law required her to act upon.[331] Quite simply, Mott was merely trying to "deflect responsibility from the person who committed the criminal act onto someone else who may have abused him or her or otherwise caused him or her to do."[332] Court's are already less than anxious to accept such theories which Dershowitz claims, "places the victim on trial."[333] Thus, if the victim becomes a helpless child who has been neglected and abused to death, there will be even less acceptance and the possibility of transferring skepticism to the BWS self-defense realm will become more and more a reality.

This leads into the most important and redeeming consequence of Arizona's refusal to expand BWS, the protection of the child. In the self-

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[329] ALAN M. DERSHOWITZ, THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY 14 (1994).

[330] *See* U.S. v. Lewis, 92 F.3d 1371, 1382 (5th Cir. 1996) (quoting the mother-abuser who stated she wished the kid were dead and had to stop beating the child because she was "not going to go to jail for kill[ing] [that child].").

[331] *See* DERSHOWITZ, *supra* note 329, at 14.

[332] *Id.*

[333] *Id.*

defense setting, the victim can be seen as the battered woman or the killed abuser. However, there is no mistaking the child is the sole victim in child abuse and neglect situations. Whether Mott was battered or not, the safety, the welfare, and indeed, the survival of Sheena, was the only real issue to be considered. Sheena and the thousands of other abused and neglected children throughout the country are the true beneficiaries of the decision in *Mott*. Because of this BWS regulation and restriction, negligent and abusive parents, regardless of the reasons motivating the abuse or neglect, will not be sent home, free to neglect and abuse further until the child ends up like Sheena. If we accept the "third-party control excuse" as Shelly Kay Mott suggests, it would be difficult, if not impossible to draw the line on this slippery slope. Would we excuse child abusers who are severely intoxicated? Would we excuse child abusers who abuse due to depression from losing their job? Clearly this would turn legal theory down a dangerous road. Yet, by strictly prosecuting the parents and those responsible for the care of children, the children themselves will be better protected and spared from further abuse.

As can be assumed from *Mott*, had Sheena's abuse been detected earlier, she would have been taken from Mott's detrimental custody and placed in a safer, less life threatening and less abusive environment. Indeed, this is precisely what Mott feared. However, if BWS can negate intent in child abuse settings, the neglecting parent will be sent back to further neglect her child, unable to protect the child until it is simply too late. Only by prosecuting abusive and neglecting parents and not allowing a reduction in sentencing or charges due to alleged third party domestic abuse, will the child neglect cease and the innocent abused child be transferred to a more protective, beneficial, and nurturing environment.

CONCLUSION

It is essential and elementary to remember that the victim in *State v. Mott* was Sheena, not Shelly Kay Mott. Child abuse is a continuing and pressing social problem in America and we cannot allow this societal scar to be excused or desensitized by transferring liability and diminishing responsibility due to questionable and inapplicable mental impairments. Battered Woman Syndrome, while an acceptable and often necessary

theory of self-defense, simply cannot be justified in the child abuse setting. The case law, legislative intent, and indeed American social mandate does not support such a tenuous expansion. In *State v. Mott*, the Supreme Court of Arizona, by refusing to allow BWS testimony to negate specific intent, prevented a dangerous child abuser/neglecter from escaping justice and thereby protected future abused children from suffering a shameful and appalling fate similar to that of Sheena Mott.[334] If children are to remain a priority in society, no motivation short of pure insanity, whether conscious or unconscious, may act to mitigate or excuse child neglect. The Supreme Court of Arizona believed this assertion and rightfully upheld the conviction of Shelly Kay Mott.[335] Hopefully, for the sake of the thousands of abused children throughout the country, future courts will follow this precedented path.

[334] *See* State v. Mott, 187 Ariz. 536; 931 P.2d 1046, (Ariz. 1997).
[335] *Id.*