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ANNOUNCEMENTS

On March 12th, the Supreme Court approved administrative plans that it previously ordered to be amended.

CRIMINAL

Doll v. State, 2020 Ark. App. 153 [**juror qualifications**] The trial court did not abuse its discretion when it excused a potential juror who did not know how to write in English and could speak and read English “just a little bit.” The potential juror explained that he spoke some English but did not understand all the words. He further explained that Spanish was his primary language and that his limited knowledge of English would impact his ability to understand the evidence in the case. The trial court’s decision was further supported by concerns that numerous documents would be introduced at trial and the juror’s difficulty with English would disqualify him because of his inability to understand the evidence. (Green, R.; CR-19-431; 3-4-2020; Gladwin, R.)

Johnson v. State, 2020 Ark. App. 157 [**severance**] When determining whether there was a single scheme or plan for purposes of Ark. R. Crim. P. 22.2(a), the court must consider several factors: (1) would the same body of evidence be offered to prove each offense that is alleged to make up

the single scheme or plan; (2) did the offenses arise from the same conduct or a series of acts connected together; and (3) are there considerations of closeness in proximity and time between the offenses. The following facts were present in appellant's case: (1) both incidents occurred on the same day and less than ten miles apart, (2) bullet casings collected revealed that both victims were shot with the same weapon, (3) both crimes were committed in the same manner, (4) appellant was the last person known to have seen one of the victims alive, and (5) appellant was identified by the other victim as the person who had shot him. The foregoing evidence demonstrates that the two offenses were factually intertwined, and the trial court did not abuse its discretion in denying appellant's motion to sever. **[witness fee]** Rule 45 of the Arkansas Rules of Civil Procedure permits a party to tender the witness fee to a witness, who was served a subpoena telephonically, when the witness appears at the trial. **[Ark. R. Evid. 804(b)(1)]** In appellant's case, the State argued that one of the victims was "unavailable" and that pursuant to Rule 804(b)(1) of the Arkansas Rules of Evidence, the victim's prior testimony should be admitted. The trial court admitted the prior testimony. On appeal, the Court of Appeals reviewed the circumstances surrounding the admission of the testimony. Specifically, the State had subpoenaed the witness well before trial. The prosecutor's office had been in contact with the witness a few weeks before trial, and the witness was cooperating at that time. The State was not aware until the afternoon before trial that the witness had left the jurisdiction or that he did not intend to comply with the subpoena. Once it was determined that the witness was missing, the State actively tried to locate him to secure his attendance at trial. Based upon the foregoing facts, the trial court did not abuse its discretion in finding the victim unavailable as a witness or in admitting his prior sworn testimony into evidence at trial under Rule 804(b)(1) of the Arkansas Rules of Evidence. (Piazza, C.; CR-19-253; 3-4-2020; Whiteaker, P.)

Kitchell v. State, 2020 Ark. 102 **[Ark. R. Evid. 403]** The circuit court in appellant's resentencing trial erred by allowing the jury to be informed of appellant's prior sentence. The evidence had no probative value and was inherently prejudicial. The danger of unfair prejudice was not only that the jury could have a diminished sense of responsibility but also that it might improperly consider the procedural history of the case in determining the appropriate punishment. (Phillips, G.; CR-19-500; 3-5-2020; Hudson, C.)

Halliburton v. State, 2020 Ark. 101 **[mistrial]** The trial court did not abuse its discretion when it denied appellant's request for a mistrial, which was based upon a statement made by a witness as he left the witness stand. Although a negative comment was made by the witness, it was not clear whether the jury heard it. Additionally, even if the comment was heard by the jury, the trial court admonished the jury to disregard any statements that were not elicited as responses to questioning. **[Zinger evidence]** A defendant may introduce evidence tending to show that someone other than the defendant committed the crime charged, but such evidence is inadmissible unless it points directly to the guilt of the third party. Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible. This rule does not

require that any evidence, however remote, must be admitted to show a third party's possible culpability; evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt. There must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime. At trial, appellant sought to introduce testimony that a third-party was responsible for the crime. The trial court excluded the evidence. On appeal, the Supreme Court noted that appellant's proffered evidence did not offer any evidence to connect the third party to the crime. The evidence did not show that the third party was present at the murder, had threatened the victim or had any involvement with the perpetration of the crime, or was connected to the crime in any way. The Court further noted that the evidence did not point to the third party's guilt or link him to the victim's murder. Thus, the circuit court did not abuse its discretion when it excluded the evidence. (Jones, C.; CR-19-396; 3-5-2020; Baker, K.)

Shock v. State, 2020 Ark. App. 165 [**double jeopardy**] Prosecutorial misconduct, even intentional and reversible misconduct, does not preclude retrial of the case. To invoke the double-jeopardy bar, a defendant must show that the misconduct was motivated not by a desire to obtain a conviction but by a desire to provoke the defendant into moving for a mistrial. In appellant's case, appellant moved multiple times for mistrial before it was ultimately granted by the court. The State responded to each motion, refuting appellant's arguments and denying that a mistrial was warranted, suggesting that the State specifically did not want the case to end in a mistrial. It was not until the prosecutor was questioning a witness that the State discovered that it had failed to provide certain items to appellant during discovery. Based upon the discovery violation, appellant renewed his motion for mistrial, the prosecutor agreed that it should be granted although it made her "physically ill." The appellate court concluded that the prosecutor did not intentionally goad appellant into moving for a mistrial. Thus, the trial court did not err when it denied appellant's motion to dismiss based upon double jeopardy. (Weaver, T.; CR-19-532; 3-11-2020; Gruber, R.)

Hewitt v. State, 2020 Ark. App. 172 [**sentencing**] Appellant, who was convicted as a habitual offender pursuant to Ark. Code Ann. § 5-4-501(a), could not be sentenced to probation. (Cottrell, G.; CR-19-736; 3-11-2020; Whiteaker, P.)

Rowton v. State, 2020 Ark. App. 174 [**DWI**] The circuit court incorrectly concluded that the appellant's nonalcohol-related DWI offense was a strict liability crime that did not require a culpable mental state. (Elmore, B.; CR-19-374; 3-11-2020; Hixson, K.)

Clements v. State, 2020 Ark. App. 175 [**sufficiency of the evidence; theft by receiving**] Arkansas Code Annotated § 5-36-102 provides that amounts involved in theft committed pursuant to one scheme or course of conduct may be aggregated in determining the grade of the offense. Theft by receiving is a continuing offense. In appellant's case, it was not erroneous to

aggregate the amount of money that appellant stole from her employer on an almost daily basis for a period of five years and classify the crime as a Class B felony. (Johnson, L.; CR-19-507; 3-11-2020; Murphy, M.)

Vaughn v. State, 2020 Ark. App. 185 [**Brady violation**] Although the State withheld evidence that was favorable to the appellant in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), appellant failed to establish that there was a reasonable probability that had the evidence been disclosed to him the result of the proceeding would have been different. (Edwards, R.; CR-19-591; 3-18-2020; Harrison, B.)

Brown v. State, 2020 Ark. App. 198 [**motion for new trial**] Appellant requested a new trial based upon allegations that two witnesses perjured themselves during appellant's trial. The alleged perjury involved copying and viewing a surveillance video of the crime. To prevail on a motion for new trial based on newly discovered evidence, the movant must show that the new evidence would have affected the outcome of his case and that he used due diligence in trying to discover the evidence. Newly discovered evidence is one of the least favored grounds to justify granting a new trial. A new trial will not be granted because of perjury on an immaterial or a collateral issue or generally where the false testimony may be eliminated without depriving the verdict of sufficient evidentiary support. Because the challenged testimony involved an issue that was not material, and because the jury was able to view the surveillance video and hear eyewitness testimony about the crime, the trial court did not abuse its discretion when it denied appellant's request for a new trial. (Richardson, M.; CR-19-743; 3-18-2020; Murphy, M.)

CIVIL

Shonting v. Connor, 2020 Ark. App. 154 [**res judicata**] Res judicata bars Shonting from asserting "abandonment" in this case because Connor's right to access Shonting's property was previously adjudicated. The circuit court's dismissal in this case is affirmed, and the dismissal is with prejudice as a matter of law. [**costs**] Although the circuit court had the authority to potentially award certain costs to Connor as the prevailing party, it was limited to the categories identified in Rule 54. (Weaver, S.; CV-19-348; 3-4-20; Harrison, B.)

S.A.M Group, LLC v. CR Crawford, LLC, 2020 Ark. App. 173 [**sanctions**] The sanction imposed is explicitly allowed under Rule 37, which authorizes the circuit court to prohibit the offending party from supporting or opposing specific claims and designating certain facts to be established for the purposes of the action in accordance with the claim of the party obtaining the order. Ark. R. Civ. P.37(b)(2)(A). Here, the court established as fact the amount appellant owed under the contract as a sanction for appellant's failure to respond to an interrogatory that asked for the amount of money appellant contended it owed. Rather than responding, even after having been

ordered by the court to do so, appellant simply stated that it would supplement the response after it had determined out-of-pocket expenses. Therefore, the court was expressly authorized pursuant to Rule 37 to make findings of fact directly related to this interrogatory appellant failed to answer. (Martin, D.; CV-18-724; 3-11-20; Vaught, L.)

Town of Springtown v. Evans, 2020 Ark. App. 176 [**summary judgment**] The passage of the Ordinance was in direct violation of Arkansas Code Annotated section 14-55-202, and as a result, it is void. The circuit court erred by denying Springtown's motion for summary judgment. (Scott, J.; CV-19-398; 3-11-20; Brown, W.)

John v. Faitak, 2020 Ark. 105 [**quasi-immunity**] The complaint alleged claims of medical negligence, breach of fiduciary duty, breach of contract, breach of confidentiality, outrage, deceit, defamation, invasion of privacy, and civil conspiracy against psychologist, who the court appointed to exam the plaintiff in connection with a child custody proceeding. The circuit court entered an order appointing Faitak to perform psychological examinations. After the examinations took place, Faitak testified at a hearing that the "major problem" is "their lack of trust with each other." The circuit court entered another order providing that the parents would submit to "mediation sessions" with Faitak. The complaint alleges a conspiracy involving Faitak, the mother and her counsel. The gist of the lawsuit is that Faitak was biased and improperly favored the mother by giving John a "bogus" individual diagnosis and communicating that diagnosis to the mother. The question is whether any potential liability for these allegations would be barred by quasi-judicial immunity. Faitak filed a motion for summary judgment on each of the claims, arguing that he was entitled to quasi-judicial immunity. The circuit court granted Faitak's motion for summary judgment. The claims go well beyond simply alleging that Faitak was "not a good therapist." The conspiracy alleges would certainly exceed the scope of the appointment order. The claims against Faitak concern alleged acts that were outside the scope of the appointment order, so liability for those acts is outside the bounds of quasi-judicial immunity. (Threet, J.; CV-17-862; 3-12-20; Hart, J.)

Equity Bank v. Southside Baptist Church, 2020 Ark. App. 199 [**cross-collateralization**] Equity Bank argued that the sales proceeds should be applied to a different note. It argued that the language "all obligations" "now existing" are "clear terms" sufficient to identify Note 1. A debt created after the mortgage, being not yet in existence, may not in all cases be clearly indicated; whereas antecedent debts may always be definitely stated. For example, a phrase like "other indebtedness" in such a clause is usually treated as referring not to an antecedent debt but to one subsequently incurred because a preexisting obligation can be referred to with specificity. The reason is that mortgages, by the use of general terms, should not be extended to secure debts that the debtor did not specifically contemplate. If Equity Bank had intended for the collateral securing the indebtedness on Note 2 to serve as additional security for Note 1, it had the opportunity to unambiguously identify Note 1 at that time. (Putman, J.; CV19-584; 3-18-20; Murphy, M.)

Camden-Progressive Elder Care, Inc. v. Cooper, 2020 Ark. App. 187 [**arbitration**] The circuit court correctly looked at the entire context of the agreement to ascertain the true intent of the parties and found that the checklist was part of the contract. Camden itself included the checklist as part of the arbitration agreement and the checklist required the signature of the resident or legal guardian just as other sections of the contract required Cooper’s signature. The circuit court correctly found that the contract was ambiguous and construed that ambiguity against the drafter, which was Camden. (Guthrie, D.; CV-19-357; 3-18-20; Harrison, B.)

Progressive Elder Care, Inc. v. Lang, 2020 Ark. App. 186 [**charitable immunity**] Under *Davis Nursing v. Neal*, 2019 Ark. 91, if the question of charitable immunity rests on disputed factual issues, a jury may determine those on “carefully drafted interrogatories.” Unless and until the circuit court identifies which facts are disputed, neither the parties nor the court can craft and submit interrogatories to the jury so that it may resolve the disputes. After the jury answers the interrogatories, the circuit court will apply the answers to charitable-immunity law and decide whether PES-Chicot is immune. (Porch, S.; CV-18-846; 3-18-20; Harrison, B.)

Ozark Mountain Reginal Water Authority v. Arkansas Attorney General, 2020 Ark. App. 180 [**statutory construction**] The State Board of Health did not err in finding that Act 197 applies to Ozark because Ozark meets the definition of water system. Act 197 defines water system as “a facility including without limitation a parent system, consecutive system, or other system.” Thus, the statute includes all facilities—regardless of whether they are parent, consecutive, or wholesale systems—that hold, treat, and supply water directly or through a consecutive system or consecutive systems to 5,000 persons or more. Act 197 applies to Ozark. In an appeal originating from an agency decision involving a constitutional challenge, the constitutional challenge must be raised before the agency in order to preserve it for the circuit court’s consideration. (Bailey, A.; CV-19-454; 3-18-20; Abramson, R.)

Summers Drilling, Inc. v. Goodwin and Goodwin, Inc., 2020 Ark. App. 194 [**contract**] The cause of action sounded in contract and a breach of contract was established. The record does not support the damage award. The figure awarded was cited by counsel in its posttrial brief—a fact referenced by the circuit court in its award of damages—but neither the posttrial brief nor the court’s order refers to any specific evidence introduced at trial to explain how such a figure was calculated. The record contains conflicting evidence as to amounts incurred in completion of the project. Because it is not entirely clear that the amount the circuit court used in calculating damages was based on the evidence presented and not simply on the arguments of counsel, the cases is remanded for a recalculation of the damages. (Fitzhugh, M.; CV-19-489; 3-18-20; Whiteaker, P.)

DOMESTIC RELATIONS

Hayden v. Hayden, 2020 Ark. App. 152 [**must cite factors for unequal distribution because retirement was not equally divided**] Because Appellee's military retirement was marital property, the circuit court was required to state its reason for not equally dividing the same. (Williams, L.; CV-19-488; 3-4-20; Abramson, R.)

Deason v. Deason, 2020 Ark. App. 155 [**refusal to set aside decree; no constructive fraud; no undue influence presumption by dominating party; dog was considered gift and not marital property**] The appellate found no error in the circuit court refusing to set aside a deed that transferred Appellant's premarital property to the parties jointly. Appellant argued that there was constructive fraud, alleging that Appellee intended to deprive him of his property by simulating affection, misrepresenting that their divorce was dismissed, and leaving him only one week after the deed was filed. However, the circuit court found that the deed was recorded while both parties intended to remain in the marriage and to build a house together. Furthermore, there was no testimony that Appellee encouraged Appellant to execute the deed, that she "took" him to the courthouse to file the deed, or that the deed was part of a promise to save the marriage. Appellant also argued that the deed should be set aside because Appellee was the dominant party in the relationship who procured the deed through undue influence. However, the appellate court found that there was no presumption of undue influence applied because the evidence did not show that Appellee occupied such a superior position of dominance or advantage as would imply a dominating influence. Lastly, the appellate court found no error in the circuit court refusing to split the value of the dog that was sold, because it was suggested that it was a gift and Appellant did not claim a marital interest. (Bryan, B.; CV-19-123; 3-4-20; Klappenbach, N.)

Lee (Whiting) v. Childs, 2020 Ark. App. 156 [**material change and best interest findings to modify custody**] The appellate court found no error in the circuit court's finding that a material change in circumstance had occurred. The minor child was suffering undue anxiety with the previous custody arrangement, attributed primarily to Appellant and the child's need for additional, predictable time with Appellee. The noncustodial parent's positive changes did not trigger that change in custody; instead, it was the negative mental and emotional effects on the child. For these same reasons along with the Appellee's changes, the appellate court found no error in the finding that it was also in the child's best interest to modify to a joint custody arrangement. (Parker, A.; CV-19-288; 3-4-20; Klappenbach, N.)

Medlen v. Medlen, 2020 Ark. App. 159 [**alimony considerations**] The appellate court found no error in the award of permanent alimony. The evidence showed that Appellant earned much more than Appellee, Appellant had a much higher earning potential than Appellee, Appellant holds a master's degree while Appellee does not have a college degree, and Appellee was primarily a stay-at-home mother during the marriage. The circuit court's comments from the

bench and its findings in the divorce decree indicate that it properly exercised its discretion and considered the relevant factors in reaching its alimony decision. (Wilson, R.; CV-19-458; 3-4-20; Hixson, K.)

Friedly v. Friedly, 2020 Ark. App. 167 [**property and debt division; attorney's fees cannot be ordered in divorce case relating to a petition for order of protection filed in another case; privileged medical records in custody case**] In light of the circuit court's broad discretionary power to allocate debt, and because the circuit court also determined that all marital personal property should be sold, the appellate court found no error in the ruling regarding debt and property. The appellate court found that the attorney's fees relating to the petition for order of protection could not be ordered within the divorce proceeding, because although they are closely related, they are separate proceedings with different case numbers. The appellate court found no error in the circuit court's finding that Appellee's medical records were privileged and did not have to be produced. The appellate court declined to adopt a blanket exception to patient-physician privilege when custody and visitation are at issue, and the circuit court has wide discretion in determining discovery matters. (Parker, J.; CV-18-1026; 3-11-20; Virden, B.)

Pace v. Pace, 2020 Ark. 108 [**parental discord in joint custody arrangement; attorney's fees in custody case**] The appellate court found no error in the circuit court's decision to maintain the joint custody arrangement. Although there is conflict, the appellate court found nothing in the record that demonstrates that parental discord has affected the child's health and welfare or that it was in the child's best interest for one parent to be awarded sole custody. The appellate court also found no error in the circuit court denying the request for attorney's fees, as the circuit court considered the disparity of the parties' income and the facts and circumstances of the case. (Halton, B.; CV-18-787; 3-12-20; Hart, J.)

Symanietz v. Symanietz, 2020 Ark. App. 189 [**imputing income to determine self-employed parent's child support; alimony; mediated agreement disregarded; contempt on child support**] When determining a self-employed parent's income, the circuit court should first consider the tax returns, shall also consider the amount the payor is capable of earning, and may attribute income to a payor up to his or her earning capacity. The circuit court looked at the tax returns, heard testimony from both parties on the state of their finances and the reasons behind them, and properly determined to impute income based on the payor's earning capacity in accordance with Administrative Order 10. Second, the appellate court found no error in the award of alimony, as the court properly considered the state of the parties' finances. Appellant did not contest the circuit court's finding that his earning potential is higher than Appellee's. Third, the circuit court did not err in disregarding a mediated agreement that was not entered into evidence and that had unclear terms based on the evidence presented at the hearing. Lastly, the appellate court found no error in the finding of contempt regarding the child support arrearage, as the imputed-income amount was affirmed, and the circuit court considered the amounts that

Appellant had paid in determining the arrearage amount. (Schrantz, D.; CV-19-625; 3-18-20; Harrison, B.)

PROBATE

ITMO the Adoption of H.G.W., a Minor (Utley v. Westbrook), 2020 Ark. App. 168

[authenticating expert witness's report] The appellate court found that the court-ordered expert's report should not have been admitted into evidence. Even if the report was admissible under the business-records exception to the hearsay rule, it was inadmissible because neither the expert nor another qualified witness or custodian testified to the report's authenticity. Because the circuit court relied heavily on the expert's report, the appellate court found that the report is inextricable from the circuit court's decision; thus, the error in admitting it without proper authentication was not harmless. (Reif, M.; CV-19-574; 3-11-20; Virden, B.)

ITMO the Adoption of P.H., R.H., and Z.H, three minors (Hrdlicka v. Hrdlicka), 2020 Ark. App.

178 **[justifiable cause for failure to communicate; consent was necessary thus best interest finding was not necessary]** The appellate court found no error in the circuit court's finding that there was justifiable cause for any failure by the mother to communicate with the children. The circuit court found that the mother requested visitation many times, that the mother attempted to send correspondence to the children, and that the father unjustifiably blocked communication and visitation between the mother and the minor children. Thus, the mother had a justifiable cause and her consent to the adoption was required. Once the circuit court found that the mother's consent was necessary, a finding on best interest was not necessary because the mother had not consented. (Williams, L.; CV-19-259; 3-18-20; Gruber, R.)

Edwards et al v. Hart et al, 2020 Ark. App. 182 **[statutorily time-barred from administering the estate]** The circuit court has no authority to administer an estate past the five-year limit. (Vardaman, G.; CV-19-336; 3-18-20; Virden, B.)

JUVENILE

Guerrero v. Ark. Dep't of Human Servs., 2020 Ark. App. 160 **[TPR—sufficiency of the**

evidence] There was sufficient evidence in support of termination on the grounds of subsequent factors that arose after the filing of the dependency-neglect petition. The father's claim that he had ended his relationship with the mother was not credible where the two birthed a subsequent child during the pendency of dependency-neglect case. Clear and convincing evidence supported termination. (Zimmerman, S.; JV-18-346; March 4, 2020; Murphy, M.)

Phillips v. Ark. Dep't of Human Servs., 2020 Ark. App. 169 [**TPR—sufficiency of the evidence**] There was sufficient evidence that termination was in the best interest of the children after they were removed from the mother upon execution of a search warrant revealing illegal drugs, firearms, and explosives in the home. Upon removal, the department noted that the children's teeth were black, and they ultimately required extensive dental work. During the case, the mother married her boyfriend despite the child's allegations of sexual abuse against him and had failed to obtain housing and employment by the time of the permanency planning hearing. Finding no clear error, the trial court's termination order was affirmed. (Zimmerman, S.; JV-18-50; March 11, 2020; Virden, B.)

Martin v. Ark. Dep't of Human Servs., 2020 Ark. App. 192 [**TPR—best interest; sibling relationships**] The parents argued on appeal that termination should be reversed because it was not in the best interest of the four children to disrupt sibling relationships. The court of appeals explained that while keeping siblings together is an important factor, it is not outcome determinative. Evidence of a genuine sibling bond is required. In this case, three of the children were younger and were all placed together. The fourth child, a tenth grader, was placed separately and was happy in that placement. Termination was in the best interest of each child and was therefore affirmed. (Cooper, T.; JV-17-20; March 18, 2020; Switzer, M.)

DISTRICT COURT

Petry v. State of Arkansas, 2020 Ark. App. 162, [**District Court**] [**Lack of Jurisdiction**] [**Criminal Procedure**] Petry was convicted in district court of violating Ark. Code Ann. 5-73-120(a) which forbids a person from "carrying a weapon." He appealed to circuit court and was convicted. On appeal, the State argued Petry had not properly followed Ark. R. Crim. P. 36 and the State's motion to dismiss on jurisdictional grounds was granted. Petry then filed a petition for rehearing and argued the "plain language of Rule 36(c) vests the circuit court with jurisdiction 'upon the filing of the certified record in the office of the circuit clerk.'" Having reconsidered the issue, this court agreed with Petry and held that the requirements contained in Rule 36(c) are administrative in nature, not jurisdictional. Consequently, this decision expressly overruled cases that applied an interpretation of Rule 36 in conflict with this decision. Regarding the appeal's merit, the court agreed with Petry that the State did not sufficiently prove its case against him in circuit court. (Lindsay, M.; CR-18-1021; 3-4-2020; Harrison, B.)

U. S. SUPREME COURT

Kahler v. Kansas [**insanity defense**] In *Clark v. Arizona*, the Supreme Court catalogued the diverse strains of the insanity defense that States have adopted to absolve mentally ill defendants

of criminal culpability. Two—the cognitive and moral incapacity tests—appear as alternative pathways to acquittal in the landmark English ruling *M’Naghten’s Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718. The moral incapacity test asks whether a defendant’s illness left him unable to distinguish right from wrong with respect to his criminal conduct. Respondent Kansas has adopted the cognitive incapacity test, which examines whether a defendant was able to understand what he was doing when he committed a crime. Specifically, under Kansas law a defendant may raise mental illness to show that he “lacked the culpable mental state required as an element of the offense charged.” Kansas does not recognize any additional way that mental illness can produce an acquittal, although a defendant may use evidence of mental illness to argue for a lessened punishment at sentencing. In particular, Kansas does not recognize a moral-incapacity defense. Kansas charged petitioner Kahler with capital murder after he shot and killed four family members. Prior to trial, he argued that Kansas’s insanity defense violates due process because it permits the State to convict a defendant whose mental illness prevented him from distinguishing right from wrong. The court disagreed and the jury returned a conviction. During the penalty phase, Kahler was free to raise any argument he wished that mental illness should mitigate his sentence, but the jury still imposed the death penalty. The Kansas Supreme Court rejected Kahler’s due process argument on appeal.

Held: Due process does not require Kansas to adopt an insanity test that turns on a defendant’s ability to recognize that his crime was morally wrong.

(a) The Supreme Court has thus twice declined to constitutionalize a particular version of the insanity defense, holding instead that a State’s “insanity rule is substantially open to state choice.”

(b) Under Kansas law, mental illness is a defense to culpability if it prevented a defendant from forming the requisite criminal intent; a defendant is permitted to offer whatever evidence of mental health he deems relevant at sentencing; and a judge has discretion to replace a defendant’s prison term with commitment to a mental health facility.

So Kahler can prevail only by showing that due process requires States to adopt a specific test of insanity—namely, the moral-incapacity test. He cannot do so. Taken as a whole, the early common law cases and commentaries reveal no settled consensus favoring Kahler’s preferred right-from-wrong rule. Even after *M’Naghten* gained popularity in the 19th century, States continued to experiment with new approaches. *Clark* therefore declared: “History shows no deference to *M’Naghten* that could elevate its formula to the level of fundamental principle.” The tapestry of approaches States have adopted shows that no single version of the insanity defense has become so ingrained in American law as to rank as “fundamental.” It is not for the courts to insist on any single criterion moving forward. Defining the precise relationship between criminal culpability and mental illness requires balancing complex considerations, among them the workings of the brain, the purposes of criminal law, and the ideas of free will and responsibility.

This balance should remain open to revision as new medical knowledge emerges and societal norms evolve. Thus—as the Court recognized previously in *Leland*, *Powell*, and *Clark*—the defense is a project for state governance, not constitutional law. (No. 18-6135; 3-23-20)