Supreme Court of Ohio Clerk of Court - Filed January 02, 2018 - Case No. 2017-0344

In the Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2017-0344
	:	
Appellant,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
DARIN K. IRELAND,	:	
	:	Court of Appeals
Appellee.	:	Case No. 15AP-1134

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLANT STATE OF OHIO

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INTRODUCTION

There is no dispute in this case that, on the night of October 19, 2013, Darin Ireland brutally beat Drew Coen in the parking lot of a bar. And there is also no dispute that this beating "cause[d] serious physical harm" to Coen, who required extensive surgery as a result. R.C. 2903.11(A)(1). Instead, this case concerns Ireland's defense for what would otherwise be an obvious felonious assault. Ireland, a veteran, asserted that he has post-traumatic stress disorder ("PTSD"). Although he had never been diagnosed with PTSD before his indictment, Ireland alleged that he was experiencing a dissociative episode caused by the PTSD when repeatedly hitting and kicking Coen. This dissociative episode, according to Ireland, rendered him unconscious during his attack, so he argued that the attack could not be viewed as voluntary (for purposes of the *actus reus*) or knowing (for purpose of the *mens rea*). The trial court, consistent with many Ohio cases, instructed the jury that Ireland's "blackout" argument was an affirmative defense that he bore the burden of proving. Rejecting that defense, the jury convicted Ireland of knowingly causing serious physical harm to Coen. The Tenth District reversed. It held that the State bears the burden to disprove that a defendant was in a blackout state at the time of the crime in order to establish the "voluntariness" element in R.C. 2901.21(A)(1). *State v. Ireland*, 2017-Ohio-263 ¶ 42 (10th Dist.) ("App. Op."). This Court should reverse for two reasons.

First, the Tenth District wrongly held that Ireland's PTSD defense was not an affirmative defense. Unlike the decision below, many other appellate courts have characterized this defense as an affirmative defense. That is because it falls comfortably within the statutory definition of the term. *See* R.C. 2901.05(D)(1)(b). A defendant presents this defense as an *excuse* to otherwise criminal activity. *Id.* And whether a defendant was in a blackout state at the time of the crime falls peculiarly within the defendant's own mind. *Id.* Aside from the statute, the defense is similar to other defenses that this Court has long treated as affirmative defenses, such

as insanity, intoxication, or duress. Indeed, the Tenth District's principal rationale—that this defense only rebuts the voluntariness element of the crime—could be said of these other defenses as well. After all, this Court has long recognized that the insanity defense exists for individuals who "'lack the minimal capacity to act *voluntarily*.'" *State v. Wilcox*, 70 Ohio St. 2d 182, 193 (1982) (emphasis added) (citation omitted). And, while intoxication has historically been an affirmative defense when it is legally available, it too could be claimed to disprove an element of the crime. *See State v. French*, 171 Ohio St. 501, syl. (1961) (finding that intoxication was an affirmative defense even though the defendant argued it made him physically incapable of committing rape).

Second, the Tenth District mistakenly held that "claims of involuntariness resulting from PTSD-induced blackout" may negate the voluntariness element of a crime. App. Op. ¶ 42. Over the years, this Court's cases have "definitively" rejected a diminished-capacity defense, which attempts to show that a sane defendant lacked the ability to form the mental state necessary for the crime. *State v. Fulmer*, 117 Ohio St. 3d 319, 2008-Ohio-936 ¶ 66. Not only that, Ohio courts have repeatedly refused to allow defendants to get around this ban on that diminished-capacity defense merely by relabeling that defense as a rebuttal to the *mens rea* element. *Id.* ¶¶ 69-70, 74; *State v. Napier*, 2017-Ohio-246 ¶¶ 23-24 (12th Dist.); *State v. Mobley*, 2011-Ohio-309 ¶¶ 35-60 (5th Dist.). If allowed to stand, however, the Tenth District's decision would undermine this longstanding case law. Going forward, it will permit defendants to present these unavailable diminished-capacity defenses merely by asserting that they are rebutting the *voluntariness* element (instead of the *mens rea* element). The Court should not allow that result.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is the State's chief law officer. R.C. 109.02. He has an interest in ensuring that Ohio's criminal laws are correctly and consistently interpreted and applied throughout the entire State.

STATEMENT OF THE CASE AND FACTS

A. Darin Ireland, an army veteran, beat another man in a parking-lot brawl.

Darin Ireland is an Army veteran who served as a combat mechanic in Kuwait and Iraq during the Persian Gulf War. Trial Tr. at 307-08, 348. Ireland returned to civilian life and became a mechanic for the Columbus Public Schools. *Id.* at 418. Many years after his stressful combat experiences—and after the indictment in this case—a psychologist, Dr. James Reardon, diagnosed Ireland with post-traumatic stress disorder ("PTSD"); he had not previously been diagnosed with PTSD. *Id.* at 375.

On October 19, 2013, Ireland was at Cappy's Bar in Blacklick, Ohio, with the Combat Motorcycle Veterans Association, which was having a fundraiser. *Id.* at 77; 256-57. Ireland was there with his wife, Pam, and his friend, Tyler Thrash. *Id.* at 155-56. Drew Coen (the victim) and his brother were also at Cappy's. *Id.* at 74. When Coen decided to leave the bar, he allegedly groped Pam. In the parking lot, Thrash put Coen into a headlock and said "[n]obody grabs my brother's girl, you know." *Id.* at 160. Later, after Ireland heard what Thrash had alleged, he repeatedly punched and kicked Coen while Coen was on the ground. *Id.* at 162-63. Coen was largely unconscious during Ireland's repeated blows. *Id.* at 163.

Coen sustained serious injuries during the attack, including a broken jaw, a broken nose, and a broken orbital bone. *Id.* at 82. He required surgery to wire his jaw shut, and doctors implanted metal plates and screws to help fuse the bones back together. *Id.* at 82-83. During his

recovery, the metal plates interacted with nerves in his face, and he now has permanent nerve damage that causes pain in his teeth when he bites down or chatters them together. *Id.* at 86, 88.

B. At trial, Ireland asserted that a dissociative episode caused by his (previously undiagnosed) PTSD had rendered his actions involuntary and unknowing.

In January 2014, a grand jury indicted Ireland for one count of felonious assault under R.C. 2903.11. Ireland pleaded not guilty, and the common pleas court set the case for trial.

Ireland's counsel referred him to Dr. Reardon, a psychologist with experience assessing veterans who have had traumatic experiences. *Id.* at 301. Dr. Reardon determined that Ireland has PTSD with dissociative symptoms based on his experiences during the Gulf War, *id.* at 347-48, and that Ireland also experiences alcoholic blackouts, *id.* at 356. Ireland had not previously been diagnosed with PTSD, *id.* at 375, and, in fact, had "refused to discuss the stressor events" in his background in previous examinations for PTSD, *id.* at 316.

Dr. Reardon explained that "[s]ome people who have a posttraumatic stress disorder condition also experience dissociative symptoms." *Id.* at 357. A dissociative episode "is an alteration in consciousness, memory, and the ability to make . . . rational decisions." *Id.* at 357-58. A person who dissociates does so as "an escape when there's no escape . . . when [he] can't physically remove [himself]." *Id.* at 358. But dissociation is not a choice; it is an "experience . . . almost like a knee-jerk reaction." *Id.* at 361.

Dr. Reardon further explained that when an individual like Ireland has a PTSD-related dissociative episode, "he's not able to make reasoned decisions." *Id.* at 362. "[H]is consciousness, his memory, his decision-making capability for those instances . . . is compromised." *Id.* When asked if a dissociating person was "acting consciously or unconsciously," Dr. Reardon said "[h]e's acting automatically in a dissociative episode." *Id.*

The defense completed its direct examination of Dr. Reardon shortly after he provided this opinion. Before allowing the State to cross-examine Dr. Reardon, the trial court raised a concern. It was unsure whether Dr. Reardon's description of dissociation was a matter of involuntariness under R.C. 2901.21(E)(2), or if it was an issue of one's ability to perceive the criminality of his acts, which would require the court to conduct proceedings for a not-guilty-by-reason-of-insanity defense under R.C. 2945.401. *Id.* at 362-70. Apparently satisfied with the expert's answers to his questions, the judge allowed the trial to continue.

In light of the testimony that the dissociative episodes impaired Ireland's consciousness, the defense requested that the jury instructions include what is known as the "blackout" instruction. *See* Defendant's Request for Jury Instruction, Franklin Cnty. Ct. Common Pl. Dkt., Oct. 27, 2015; Trial Tr. at 439-44. Drawn from the Ohio Jury Instructions—Criminal § 417.07, the instruction given to the jury reads as follows:

> Where a person commits an act while, as in a coma, blackout, or convulsion due to heart failure, disease, sleep, or injury, such act is not a criminal offense even though it would be a crime if such act were the product of a person's will or volition.
>
> If you have a reasonable doubt whether the defendant was conscious at the time of such act, you must find that he is not guilty. If you find that the defendant was conscious, such finding does not relieve the State of its burden of establishing by the required weight of the testimony that the act was knowingly committed.
>
> This instruction would not apply to one who recklessly or negligently became intoxicated.
>
> Reflexes, convulsions, body movements during unconsciousness or sleep and body movements that are not otherwise a product of the act's will or volition are involuntary acts.

Id. at 647-48. The State argued that the facts did not support the trial court's giving the blackout instruction. *Id.* at 439. It also argued that, if the instruction were given, it would be an affirmative defense. *Id.* Over Ireland's objection, the trial court agreed that the defense was an

affirmative defense and, therefore, warranted an instruction that Ireland had the burden to prove the alleged blackout by a preponderance of the evidence. *Id.* at 442.

The jury convicted Ireland of felonious assault. *Id.* at 656. The Tenth District reversed the conviction, however, holding that blackout is not an affirmative defense. App. Op. ¶ 42. It grounded its analysis in R.C. 2901.21(A)'s provision that a criminal offense requires "conduct that includes . . . a voluntary act." *Id.* ¶ 35. Extrapolating from that text, the court "conclude[d] that voluntariness is an essential element of a criminal offense," and that it violates due process to require a defendant to prove involuntariness by a preponderance of the evidence. *Id.* ¶¶ 37-38.

ARGUMENT

***Amicus Curiae* Ohio Attorney General's Proposition of Law:**

> *A defendant's reliance on a dissociative episode caused by PTSD to excuse the defendant's actions is an affirmative defense analogous to other affirmative defenses that this Court has recognized. If anything, that defense should be treated as the functional equivalent of a diminished-capacity defense and so unavailable under Ohio law unless and until the General Assembly says otherwise.*

The Tenth District mistakenly held that Ireland's defense—that he was under a dissociative episode caused by his PTSD when he severely beat the victim—was not an affirmative defense that he bore the burden to prove. *See* Part A. If anything, Ireland's defense is the functional equivalent of a diminished-capacity defense. Thus, the Tenth District's holding that his defense addresses the voluntariness element of the crime conflicts with this Court's longstanding law rejecting similar arguments with respect to the *mens rea* element. *See* Part B.

A. Ireland's argument that his PTSD-induced dissociative episode should relieve him of criminal responsibility qualifies as an affirmative defense sharing many similarities to other affirmative defenses that this Court has recognized.

Ohio law requires the State to prove all elements of a crime beyond a reasonable doubt, but requires criminal defendants to prove affirmative defenses like insanity or duress. Under this dichotomy, Ireland's defense that he was suffering from a PTSD-induced dissociative episode

qualifies as an excuse for the felonious assault that is within his peculiar knowledge, and so should be treated as an affirmative defense that he bears the burden of proving.

1. While the State must prove all elements of a crime, a defendant must prove all affirmative defenses, such as insanity, duress, or self-defense.

This case involves a conviction under the felonious-assault statute, which requires the State to prove that a defendant "knowingly" "[c]ause[d] serious physical harm to another." R.C. 2903.11(A)(1). But this case does not concern the specific felonious-assault elements identified in R.C. 2903.11. Instead, it concerns the interaction between two general Revised Code provisions that govern *all* types of crimes. One of these provisions, R.C. 2901.05(A), concerns the burdens of proof in criminal cases. The other, R.C. 2901.21(A), concerns the minimum requirements for liability in those cases.

a. *R.C. 2901.05(A).* The Fourteenth Amendment requires a State to prove all elements of a criminal offense beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). That amendment, by contrast, permits the State to allocate the burden of proof to a defendant for all affirmative defenses. *See Patterson v. New York*, 432 U.S. 197, 210 (1977). The General Assembly has codified this distinction in R.C. 2901.05(A). It requires the State to prove each element of an offense "beyond a reasonable doubt." *Id.* For affirmative defenses, however, it shifts to defendants the burden of proof by a preponderance of the evidence. *Id.* To distinguish an element from an affirmative defense under this burden-shifting framework, the statute defines "affirmative defense" as either "[a] defense expressly designated as affirmative" or "[a] defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence." R.C. 2901.05(D)(1)(a)-(b).

As this definition suggests, affirmative defenses come in two varieties—statutory and common law. The General Assembly has expressly designated some affirmative defenses by statute. *E.g.*, R.C. 2901.06(B) (permitting expert testimony about affirmative defense of battered woman syndrome); R.C. 2921.51(F) (establishing as an affirmative defense to the crime of impersonating a peace officer that the person acted with a "lawful purpose"). Perhaps most notably, the General Assembly has characterized insanity as an affirmative defense. That defense requires an accused to show that, "at the time of the commission of the offense, the [accused] did not know, as a result of a severe mental disease or defect, the wrongfulness of the [accused's] acts." R.C. 2901.01(A)(14). Even before this statutory definition, moreover, this Court had already held that the common-law insanity defense was "clearly within the statutory definition" of an affirmative defense because that "defense is based on an excuse, of which the defendant has special knowledge for which he can produce evidence." *State v. Humphries*, 51 Ohio St. 2d 95, 99 (1977), *superseded by statute on other grounds as stated in State v. Curry*, 45 Ohio St. 3d 109, 112 n.1 (1989).

This Court has long permitted other common-law affirmative defenses. *State v. Poole*, 33 Ohio St. 2d 18, 19 (1973). These defenses have generally "represent[ed] not a mere denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged." *Id.* "[R]ather, they represent a substantive or independent matter 'which the defendant claims exempts him from liability even if it is conceded that the facts claimed by the prosecution are true.'" *Id.* (citation omitted). Examples of affirmative defenses from Ohio's common law include self-defense and duress. *See, e.g.*, *State v. Getsy*, 84 Ohio St. 3d 180, 198-99 (1998) (duress); *State v. Williford*, 49 Ohio St. 3d 247, 249 (1990) (self-defense).

b. *R.C. 2901.21(A).* Basic hornbook law also teaches that there are two central components of every criminal offense: an *actus reus* (a voluntary act) and a *mens rea* (a guilty mind). *See* Wayne R. LaFave, *Substantive Criminal Law* § 5.1, at 332 (2d ed. 2003) ("It is commonly stated that a crime consists of both a physical part and a mental part."); *id.* § 6.1, at 424 ("Bad thoughts alone cannot constitute a crime; there must be an act, or an omission to act where there is a legal duty to act."). In other words, "[c]riminal liability is normally based upon the concurrence of two factors, 'an evil-meaning mind [and] an evil-doing hand.'" *United States v. Bailey*, 444 U.S. 394, 402 (1980) (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952)). In 1974, the General Assembly codified these two components of a crime into R.C. 2901.21(A). That provision presently provides:

> (A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:
>
> > (1) The person's liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing;
> >
> > (2) The person has the requisite degree of culpability for each element as to which a culpable mental state is specified by the language defining the offense.

Id. The voluntary-act requirement in R.C. 2901.21(A)(1) generally exists to prevent "thought" crimes. The law rightly does not "reach those who entertain criminal schemes but never let their thoughts govern their conduct." LaFave, *Substantive Criminal Law* § 6.1, at 425.

Given this narrow purpose, courts have recognized that "'[t]his voluntary act requirement is easily satisfied. The provision for involuntary acts is narrow and removes only truly uncontrollable acts from the realm of the voluntary.'" *City of Akron v. Peoples*, 2011-Ohio-579 ¶ 16 (9th Dist.) (citation omitted); 29A Ohio Jur. 3d Criminal Law § 109, at 140 (2011). Commentary accompanying the similarly worded Model Penal Code explains that the term "voluntary" merely seeks to distinguish "ordinary human activity" from "a reflex or a

convulsion." Model Penal Code and Commentaries § 2.01 cmt. 1 (Am. Law Inst. 1985). Thus, the term requires only a modicum of volition. Indeed, Ohio's statute goes on to indicate the narrow things that make an act "involuntary": "[r]eflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition." R.C. 2901.21(E)(2) (LexisNexis 2014 & Supp. 2016). (When the General Assembly most recently revised 2901.21, it omitted a subsection (D), and instead labeled the subsection containing the definition of involuntariness, which used to be subsection (D), "subsection (F)." *See* 2014 Am. S.B. No. 361. To be consistent with the Tenth District, this brief is using Lexis's numbering, which labels this definition as "subsection (E).")

Because "involuntariness" has a limited statutory meaning, an act is still considered "voluntary" under the statute, even if a person undertakes the act under the duress caused by violent threats from third parties. "'[N]either proof of an irresistible impulse nor proof of duress negates the voluntariness of defendant's conduct.'" *Peoples*, 2011-Ohio-579 ¶ 16 (citation omitted). And individuals who engage in aggressive conduct towards their victims—such as breaking into a woman's home and shooting her, forcing a woman onto the ground and hitting her repeatedly, or threatening a police officer—generally cannot claim that they were "unconscious" within the meaning of R.C. 2901.21(E)(2) when undertaking these violent activities. *State v. Mobley*, 2011-Ohio-309 ¶¶ 45-46 (5th Dist.); *State v. Hackedorn*, 2005-Ohio-1475 ¶ 43 (5th Dist.); *State v. McClaskey*, 2006-Ohio-6646 ¶ 12 (10th Dist.).

2. Ireland's claim that he was having a dissociative episode caused by his PTSD when he repeatedly hit and kicked Coen qualifies as an affirmative defense.

a. Until the Tenth District's decision below, Ohio courts of appeal had consistently characterized a "blackout" defense—like the one that Ireland raised here—as an affirmative defense. *E.g.*, *State v. Hinton*, 2014-Ohio-490 ¶ 27 (8th Dist.); *Peoples*, 2011-Ohio-579 ¶ 4;

Mobley, 2011-Ohio-309 ¶ 43; *Hackedorn*, 2005-Ohio-1475 ¶ 42; *State v. Singleton*, 2004-Ohio-1517 ¶ 47 (11th Dist.); *State v. Cloud*, 2001-Ohio-3396 ¶ 25 (7th Dist.); *State v. LaFreniere*, 85 Ohio App. 3d 840, 850 (11th Dist. 1993); *State v. Robinson*, 1986 Ohio App. LEXIS 6940, at *18 (2d Dist. May 27, 1986); *State v. Myers*, 1959 Ohio App. LEXIS 966, at *13-14 (10th Dist. 1959). As one court noted, "[h]istorically, blackout has been deemed an affirmative defense which the defendant must prove by a preponderance of the evidence." *LaFreniere*, 85 Ohio App. 3d at 849 (citing *Myers*, 1959 Ohio App. LEXIS 988, at *13-14).

These courts categorized blackout as an affirmative defense because it fits within the statutory definition of "affirmative defense" in R.C. 2901.05(D)(1). *First*, the blackout defense acts as an "*excuse*" for the defendant's otherwise criminal conduct. R.C. 2901.05(D)(1)(b) (emphasis added). An excuse has traditionally been defined as "[t]hat which is offered as a reason for being excused, or a plea offered in extenuation of a fault or irregular deportment." *Black's Law Dictionary* 567 (6th ed. 1990). Here, for example, there is no dispute that Ireland brutally beat Coen in a parking lot, and that Ireland's beating caused Coen to suffer serious physical harm within the meaning of the felonious-assault statute, R.C. 2903.11(A)(1). But Ireland asserts as his "excuse" for this obviously criminal conduct that he was under a PTSD-induced dissociative episode. *Second*, a defendant's claim of being in a blackout state is "'peculiarly within the knowledge of the defendant.'" *Hackedorn*, 2005-Ohio-1475 ¶ 42 (quoting R.C. 2901.05(D)(2)) (citations omitted). Here, for example, the fact that Ireland suffered from PTSD (and experienced a dissociative episode) was peculiarly within his own knowledge (and even he did not know that he had PTSD until *after* he was charged in this case).

The conclusion that blackout is an affirmative defense also follows from comparing this defense to others that this Court has recognized. Take insanity. *Cf. Robinson*, 1986 Ohio App.

LEXIS 6940, at *18 (noting that "the defense of blackout is very similar to the defense of insanity"). This Court has noted that an insanity defense may rebut the *mens rea* element of a criminal offense. *See Curry*, 45 Ohio St. 3d at 112 (noting that "a legally insane defendant may lack the capacity to form the specific intent to commit a particular crime"). And the Court has observed that an insanity defense may rebut the voluntariness element. *See State v. Wilcox*, 70 Ohio St. 2d 182, 193 (1982) (noting that the insanity defense exists for individuals who "'lack the minimal capacity to act voluntarily'" (citation omitted)); *State v. Swiger*, 2013-Ohio-3519 ¶ 21 (9th Dist.) (same). But these facts do not require the State to establish that the defendant was *sane* at the time of the crime in order to prove those intent and voluntariness elements. To the contrary, this Court has long recognized that an insanity defense falls within the statutory definition of an "affirmative defense" because the "defense is based on an excuse, of which the defendant has special knowledge for which he can produce evidence." *Humphries*, 51 Ohio St. 2d at 99. Similar logic applies to the blackout defense, as an out-of-state decision has recognized: "The same presumption, which casts upon the defendant, claiming insanity, the burden of proving it to the satisfaction of the jury, and thus to negative the presence of *mens rea*, applies also to the defendant who asserts a temporary mental lapse due to concussion, somnolentia, epilepsy or the like." *State v. Caddell*, 215 S.E.2d 348, 363 (N.C. 1975).

To provide another example, before the General Assembly passed R.C. 2901.05, this Court had held that a voluntary-intoxication defense to rape—in which the defendant asserted that he was too intoxicated to be physically capable of having sex—qualified as an affirmative defense for which the defendant bore the burden of proof. *State v. French*, 171 Ohio St. 501, syl. (1961). In the process, the Court rejected the defendant's argument (similar to Ireland's here) that he was merely using this intoxication defense to show that he did not commit the sexual acts

of which he had been charged. *Id.* at 503. This Court disagreed, analogizing this intoxication defense to the insanity defense. *Id.* at 504-05; *cf. State v. Kortz*, 2013-Ohio-121 ¶ 20 (2d Dist.) (noting that an involuntary-intoxication defense is an affirmative defense under Ohio law).

As a third example, this Court has long held that a defendant bears the burden of proving the sudden-passion or sudden-rage element that reduces a murder case into a voluntary-manslaughter case. *See State v. Rhodes*, 63 Ohio St. 3d 613, syl. (1992); R.C. 2903.03. Notwithstanding the dissent's assertion that this sudden-passion defense merely rebutted the *mens rea* element for murder, *id.* at 625 (Brown, J., dissenting), the Court held that the defendant had long been required to prove the defense, *id.* at 619-20.

As a final example, the Court invoked similar reasoning to rebut a similar argument with respect to the duress defense. *See State v. Sappienza*, 84 Ohio St. 63, syl. & 70-72 (1911). The defendant in *Sappienza* argued that he should not bear the burden of proving duress because the third-party threats that led to his robbery showed that he lacked the intent necessary to commit the crime. This Court disagreed, analogizing duress to the insanity defense. *Id.* at 71. When criticizing the opposite rule, moreover, it added that "'what is recognized in the books as a defense would cease to be such in any just sense, because the burden would be cast on the State of disproving its existence in order to support the indictment.'" *Id.* at 72 (citation omitted). The same logic applies here. Like in *Sappienza*, there is no dispute that the defendant engaged in the conduct for which he was convicted—brutally beating Coen. And, like in *Sappienza*, the defendant argues that he lacked the necessary intent because of an "outside force"—PTSD. *Id.* But, as in *Sappienza*, the defendant should bear the burden of proving this defense.

In sum, the many appellate decisions characterizing a blackout defense as an affirmative defense follow from the statutory definition in R.C. 2901.05(D)(1)(b) and from an analogy to many other affirmative defenses that this Court has traditionally recognized.

b. The Tenth District's contrary rationale was mistaken. The court started by noting that a voluntary act was an element of every crime under R.C. 2901.21(A)(1), so the State must bear the burden of proving this element under R.C. 2901.05(A). App. Op. ¶¶ 35-38. And because a defendant's blackout defense affects whether the defendant committed a voluntary act, the Tenth District continued, the State must bear the burden of disproving the alleged blackout to establish the required voluntariness element. *Id.* ¶ 39.

This analysis conflicts with the Court's precedent, because it would transform almost every affirmative defense into an element of the crime that the State must disprove. As noted, for example, "on more than one occasion, [this] Court has equated sanity with a person's ability to engage in a voluntary act." *Swiger*, 2013-Ohio-3519 ¶ 17. Under the Tenth District's logic, then, the State should bear the burden of proving that a defendant was sane at the time of the crime because it affects whether the defendant's actions were voluntary. *But see Humphries*, 51 Ohio St. 2d at 99 (holding that insanity was an affirmative defense). Similarly, a defendant asserting an intoxication defense could argue that the defense sought to disprove an essential element of the crime. *But see French*, 171 Ohio St. 501 at syl. (referring to intoxication as an affirmative defense). And "[d]uress, if proved, prevents" a finding of a "'voluntary act.'" *State v. Lawrence*, 1997 Ohio App. LEXIS 6078, at *12 (2d Dist. Dec. 19, 1997). But it has always been deemed an affirmative defense. *Getsy*, 84 Ohio St. 3d at 198-99. In short, the Tenth District's analysis is inconsistent with many affirmative defenses that this Court has long recognized.

B. The Tenth District's decision would wrongly permit defendants to assert diminished-capacity defenses that have long been unavailable in this State merely by invoking the "voluntariness" label rather than the "intent" label.

This Court's case law on the diminished-capacity defense confirms that the Tenth District mistakenly held that a PTSD-induced dissociative episode could be used to disprove R.C. 2901.21(A)(1)'s voluntariness element, rather than to establish an affirmative defense. For decades, Ohio courts have barred defendants from raising a diminished-capacity defense, notwithstanding R.C. 2901.21(A)(1)'s requirement of a voluntary act. Importantly, courts have also refused to permit defendants to sidestep this ban on the diminished-capacity defense merely by relabeling their argument as a rebuttal of the crime's *mens rea* element. Yet that is exactly what the Tenth District allowed Ireland to do in this case—to rebut the voluntariness element (rather than the *mens rea* element) with such a defense. This Court should not allow its longstanding rule against the diminished-capacity defense to be whittled away in such fashion.

1. This Court and the lower courts have categorically refused to recognize the diminished-capacity defense or its "functional equivalents."

This Court's "jurisprudence definitively states that the partial defense of diminished capacity is not recognized in Ohio." *State v. Fulmer*, 117 Ohio St. 3d 319, 2008-Ohio-936 ¶ 66. That has been true ever since *Wilcox*. There, the defendant stood trial for aggravated burglary and aggravated murder. 70 Ohio St. 2d at 183. He sought to introduce psychiatric testimony and requested a jury charge on whether his "diminished mental capacity precluded him from forming the specific intent to commit the offenses." *Id.* When examining the history of this diminished-capacity defense, the Court found that it arose primarily to lessen the harshness of the demanding *M'Naghten* test for insanity. *Id.* at 187-89. But because Ohio had adopted a "considerably more flexible" insanity test, that justification did not support using this diminished-capacity defense in Ohio. *Id.* at 188. This Court examined various other arguments, but also "found them wanting."

Id. at 194. It thus held "that the partial defense of diminished capacity is not recognized in Ohio," and that "a defendant may not offer expert psychiatric testimony, unrelated to the insanity defense, to show that the defendant lacked the mental capacity to form the specific mental state required for a particular crime or degree of crime." *Id.* at 199.

a. Since *Wilcox*, this Court has also rejected "functional equivalent[s]" of the diminished-capacity defense. *Fulmer*, 2008-Ohio-936 ¶ 70. In *Fulmer*, a defendant sought to avoid this Court's bar on that defense under the rubric of disproving the *mens rea* element of his crimes. The defendant, who was tried for felonious assault, argued that he was suffering from "metabolic derangement" at the time of his conduct as a result of taking aspirin. *Id.* ¶ 63. An expert had suggested that "'when one is under the stress of metabolic derangement, one's brain 'doesn't work right.'" *Id.* The trial court declined to give any type of diminished-capacity instruction, however, and it later instructed the jury that Ohio does not recognize such a defense when defense counsel sought to use the alleged metabolic derangement to disprove the required *mens rea*. *Id.* ¶¶ 58-61. The court of appeals reversed on the ground that the trial court had improperly refused to allow the jury to consider this argument, which was relevant to whether the defendant had acted knowingly. *Id.* ¶¶ 63-64. This Court held that the "court of appeals [was] patently wrong." *Id.* ¶ 65. "In cases in which a defendant asserts the functional equivalent of a diminished-capacity defense, the trial court should instruct the jury to disregard the evidence used to support that defense unless the defendant can demonstrate that the evidence is relevant and probative for purposes other than a diminished-capacity defense." *Id.* ¶ 70.

The Twelfth District applied this principle in a case that is quite similar to this one. *State v. Napier*, 2017-Ohio-246 (12th Dist.), *appeal not accepted for review*, 150 Ohio St. 3d 1452, 2017-Ohio-8136. Napier assaulted a peace officer and "entered pleas of not guilty and not guilty

by reason of insanity based upon his affliction with [PTSD]." *Id.* ¶ 2. The court's clinic verified that Napier had PTSD but found that he did not "meet the criteria" to satisfy the insanity defense. *Id.* The trial court granted the State's motion in limine to exclude evidence relating to Napier's PTSD after finding that Napier was planning to assert a diminished-capacity defense. *Id.* ¶¶ 3, 23. On appeal, Napier argued that he had not simply sought to provide a diminished-capacity defense; he had also sought to negate the intent element of his offense "because his conduct was a 'simple reaction' due to his PTSD." *Id.* ¶ 24. The Twelfth District rejected that argument, finding that it was "the exact limitation in offering such evidence as explained in *Fulmer*." *Id.* "Napier did not qualify for a not guilty by reason of insanity defense; therefore, he may not offer expert testimony to negate his capacity to form the specific mental state required for assault." *Id.*

b. All told, then, this Court and the Twelfth District have held that defendants cannot sidestep the ban on the diminished-capacity defense merely by arguing that their asserted mental conditions negated the *mens rea element*. Other lower courts have extended this logic by holding that defendants cannot avoid the ban on the diminished-capacity defense merely by arguing that their alleged mental conditions negated the *voluntary-act element*.

The Fifth District, for example, rejected a defendant's effort to use an improper diminished-capacity defense under the label of "blackout." *Mobley*, 2011-Ohio-309 ¶ 47. In *Mobley*, the defendant forced his way into his ex-wife's apartment, cornered her in her bathroom, shouted a derogatory phrase at her, and shot her. 2011-Ohio-309 ¶¶ 4-6. Unable to assert an insanity defense, the defendant's expert suggested that the defendant had a "disabling depressive disorder." *Id.* ¶ 15. The trial court granted the State's motion to exclude the expert's testimony. *Id.* On appeal, the defendant argued that the trial court should have permitted this testimony because it went to whether he was "'unconscious'" at the time of the crime. *Id.* ¶¶ 35-43. While

recognizing that other courts had treated blackouts as affirmative defenses, *id.* ¶ 43, the Fifth District held that the defendant's actions—breaking into someone's house and then shooting her—were "not ones that could be committed as a result of a blackout, coma, disease, sleep, or injury." *Id.* ¶ 45. The defendant "was not 'unconscious.' No reflexes, convulsions, or other involuntary bodily movements compelled or contributed to his actions." *Id.* ¶ 46. Instead, the court noted, the defendant's "argument suggests something more in the nature of 'a functional equivalent' of a diminished-capacity defense." *Id.* Because Ohio does not recognize that defense, he could not present expert testimony to support it. *Id.* ¶ 47-48.

The Fourth District reached a similar result in *State v. Pennington*, 2000 Ohio App. LEXIS 2145 (4th Dist. May 16, 2000). There, the defendant was convicted of aggravated assault. *Id.* at *1. "Dr. James F. Reardon" had suggested that the defendant "was suffering from a dissociative disorder during the incident and that, in the doctor's opinion, [the defendant] was unable to tell the difference between right and wrong." *Id.* at *2-3. "Dr. Reardon explained that a dissociative episode is a disruption in one or more of the following processes: (1) memory; (2) consciousness; (3) identity; or (4) awareness of surroundings." *Id.* at *7. The appellate court found that this evidence would have been inadmissible as a diminished-capacity defense. *Id.* at *13-17. "Notwithstanding [the defendant's] attempt to classify Dr. Reardon's testimony as something other than diminished capacity testimony," the court found, "Dr. Reardon's testimony essentially related his belief that [the defendant], due to his dissociative state, could not form the requisite intent to commit the offense with which he was charged." *Id.* at *17. And while the court suggested that "it is possible that the trial court could have" instructed the jury on blackout if so requested, *id.* at *22 & n.7, the court then compared the case to *State v. McDaniel*, 1998 Ohio App. LEXIS 6122 (9th Dist. Dec. 16, 1998). *See Pennington*, 2000 Ohio App. LEXIS

2145, at *22-23. In *McDaniel*, "the defendant argued that the evidence would establish that he did not commit the offense voluntarily" because "God took over his body and the defendant was unable to control his actions" as he was "unconscious." *Id.* The *McDaniel* court found that this testimony "constituted inadmissible diminished capacity testimony." *Id.* *Pennington* applied this same logic to its case, concluding that "Dr. Reardon's testimony constituted inadmissible diminished capacity testimony, despite [the defendant's] attempts to characterize the nature of the doctor's testimony by other names." *Id.* at *23.

2. The Tenth District allowed Ireland to assert an impermissible diminished-capacity defense merely by characterizing that defense as disproving the voluntariness element.

The Tenth District's decision conflicts with *Fulmer*, *Napier*, *Mobley*, and *Pennington*. Ohio has rejected the diminished-capacity defense, and Ireland's theory was remarkably similar to ones rejected by these other cases. Ireland's expert suggested that his consciousness was diminished, but gave no basis for finding that Ireland's dissociative episode was the equivalent of the unconsciousness that renders an act involuntary under R.C. 2901.21(A)(1) and R.C. 2901.21(E)(2).

Ireland does *not* dispute that his bodily movements—repeatedly beating the victim—caused the victim's injuries. In his brief to the Tenth District, he admits that he "brutally beat Mr. Drew Coen, continuing to kick him even after he was lying unconscious in the parking lot." Brief of Appellant at 1, *Ireland*, 2017-Ohio-263. Thus, he asserted below, "[t]he only issue for the jury was whether [he was] not guilty on the ground that [he] was experiencing a PTSD-induced dissociative episode and thereby not acting 'voluntarily' and 'knowingly.'" *Id.* Although Ireland framed his appeal in terms of both the *actus reus* and the *mens rea*, the Tenth District focused only on the *actus reus* aspect of his argument. But its conclusion would undermine this Court's cases.

Treating this blackout defense as a rebuttal of the voluntariness element (rather than as an affirmative defense) would violate this Court's clear prohibition on using an alleged "diminished capacity" to rebut an element of the crime. *See Wilcox*, 70 Ohio St. 2d at syl. ¶ 2 ("A defendant may not offer expert psychiatric testimony, unrelated to the insanity defense, to show that the defendant lacked the mental capacity to form the specific mental state required for a particular crime or degree of crime."). Indeed, adding the "voluntary-act" element to this argument is merely an attempt to introduce a diminished-capacity theory under the *actus reus* element (rather than the *mens rea* element). Yet all functional equivalents of the diminished-capacity defense—no matter the label under which they are made—should be equally impermissible. *Fulmer*, 2008-Ohio-936 at syl.; *Napier*, 2017-Ohio-246 ¶ 24.

* * *

In sum, just as in *Mobley*, Ireland "was not 'unconscious.'" 2011-Ohio-309 ¶ 46. And "[n]o reflexes, convulsions, or other involuntary bodily movements compelled or contributed to [his] actions. Rather, [Ireland's] argument suggests something more in the nature of 'a functional equivalent' of a diminished-capacity defense." *Id.* If Ireland's defense qualifies as a valid defense, then, it must be in the nature of an affirmative defense. A holding that treats it as a rebuttal of the essential elements of the crime would be analogous to an improper diminished-capacity defense. *Cf. Napier*, 2017-Ohio-246 ¶ 23 (explaining that a defendant who does not assert an insanity defense may not "'offer expert testimony in an effort to show that he lacked the mental capacity to form the specific mental state required for a particular crime'" (citation omitted)). No matter how the Court rules in this case, it should not undermine its longstanding rule against the diminished-capacity defense or defenses (like Ireland's) that are the functional equivalent of that defense.

CONCLUSION

For the foregoing reasons, the Court should reverse the Tenth District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellant State of Ohio was served this 2nd day of January, 2018, by U.S. mail and e-mail on the following:

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