No. 18-6135

IN THE

Supreme Court of the United States

JAMES K. KAHLER,

Petitioner,

v.

STATE OF KANSAS,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF OF *AMICUS CURIAE* 290 CRIMINAL LAW AND MENTAL HEALTH LAW PROFESSORS IN SUPPORT OF PETITIONER'S REQUEST FOR REVERSAL AND REMAND

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QUESTION PRESENTED

Do the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense?

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are a group of philosophically and politically diverse law school professors and scholars in the fields of criminal law and mental health from a variety of disciplines who have been teaching and writing about the insanity defense and related issues throughout their careers. They include the authors of leading criminal law and mental health law treatises and casebooks and numerous important scholarly books and articles.

Amici believe this case raises important questions about principles of criminal responsibility, the integral role of the insanity defense in Anglo-American law, and the inadequacy of the "*mens rea* alternative" to the traditional affirmative defense. Their teaching and research on the subject have given them a unique appreciation of the historical and doctrinal significance of the defense of legal insanity.

A complete list of *amici* who reviewed and join in this brief is included in the attached Appendix.

Amici file this brief solely as individuals and not on behalf of any institution with which they are affiliated. Affiliations are provided solely for the purpose of identification.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* made a monetary contribution to the preparation or submission of this brief. The parties were given timely notice and have consented to this filing.

BACKGROUND

SUMMARY OF ARGUMENT

The affirmative defense of legal insanity has such a strong historical, legal, moral and practical pedigree and is so widely accepted that providing such a defense is a matter of fundamental fairness in a just society. Jurisdictions have substantial leeway in deciding what test best meets their legal and moral policies, but some form of affirmative defense is a prerequisite of justice and therefore is required under the Due Process clause.

Legal insanity gives doctrinal expression to fundamental legal and moral principles that have been recognized by the common law and statute for centuries and that this Court has repeatedly acknowledged. Punishment under the penal law is not justified unless an offender can fairly be held criminally responsible for his conduct. There is no dispute that severe mental disorder can strongly affect an individual's cognitive and self-regulation capacities and that in extreme cases, the defects are sufficiently grave to negate any attribution of fault because such offenders do not know, understand or appreciate the wrongfulness of their actions. Criminal blame and punishment are fundamentally unfair because such offenders are not responsible for their criminal conduct. Aside from four states in our country, some form of the insanity defense is universal in United States law, as well as in every other jurisdiction in the common law world.

The alternative to the insanity defense at issue in this case, which permits evidence of mental abnormality to be introduced to negate the *mens rea* for the crime charged, is insufficient to achieve the goal of responding justly to severely mentally disordered

offenders. In most cases, mental disorder, including severe mental disorder, does not negate *mens rea*. Instead, the offender's disordered cognition gives the offender the reason to form the *mens rea* required by the definition of the offense. Although an offender may act for reasons entirely detached from reality through no fault of his own, the offender will almost always be exposed to conviction of the most serious crime charged. These are profoundly unjust results.

Because Kansas has abolished the defense of insanity, the defendant had no opportunity for a factual determination regarding the severity of his mental disorder and its impact on his ability to appreciate the wrongfulness of his behavior. Accordingly, this Court should reverse the conviction and remand the case to the Supreme Court of Kansas to take appropriate action to reinstate the insanity defense.

ARGUMENT

I. THE AFFIRMATIVE DEFENSE OF LEGAL INSANITY EXPRESSES FUNDAMENTAL LEGAL PRINCIPLES LONG RECOGNIZED BY THE COMMON LAW, STATE AND FEDERAL STATUTES AND THE JURISPRUDENCE OF THIS COURT

This section provides the positive argument in favor of providing an insanity defense. It then considers the leeway of jurisdictions to establish a test for legal insanity that comports with the justice goals of individual jurisdictions.

A. The Legal and Moral Necessity of the Insanity Defense

It is a fundamental principle of justice that if an offender was not responsible for his crime, blame and

punishment under the penal law are fundamentally unfair and thus a violation of Due Process. The affirmative defense of legal insanity applies this fundamental principle by excusing those mentally disordered offenders whose disorder or intellectual disability deprived them of rational understanding of their conduct or, in a minority of states, by excusing offenders whose capacity to control their conduct at the time of the crime was profoundly and severely impaired. Michael S. Moore, *Law and Psychiatry* (Cambridge Univ. Press 1984); Herbert Fingarette & Ann Hasse, *Mental Disabilities and Criminal Responsibility* (Berkeley Univ. of California Press 1979); Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 J. Crim L. & Criminology 885, 925 (2011).

This principle is simple but profound. Indeed, in recognition of this, the insanity defense has been a feature of ancient law and of English law since the 14th Century. Thomas Maeder, *Crime and Madness: The Origins and Evolution of the Insanity Defense* (Harper & Row 1985); 1 Nigel Walker, *Crime and Insanity in England* (Edinburgh Univ. Press 1968); Brian E. Elkins, *Idaho's Repeal of the Insanity Defense: What Are We Trying to Prove?*, 31 Idaho L. Rev. 151, 161 (1994). The predominant modern test for legal insanity dates to the 19th Century with *M'Naghten's Case*, 8 Eng. Rep. 718 (1843), but some form of an affirmative defense of legal insanity existed many centuries before that. A small number of states tried to abolish the insanity defense in the early part of the twentieth century, but their state supreme courts found these attempts unconstitutional. Stephen M. LeBlanc, Comment, *Cruelty to the Mentally Ill: An Eighth Amendment Challenge to the Abolition of the Insanity Defense*, 56 Am. U. L. Rev.

1281, 1289 n.45 (2007). Thus, the insanity defense was universal in the United States from the founding until the last decades of the 20th Century. Abraham S. Goldstein, *The Insanity Defense* (Yale Univ. Press, 1967); *Clark v. Arizona*, 548 U.S. 735 (2006). Despite the recent deviation from this longstanding principle by four states, a strong consensus still supports retention of the insanity defense, as was thoroughly explained by the Supreme Court of Nevada in 2001, when that court held that the legislature's effort to abolish the defense was a violation of due process under both the state and federal constitutions. *Finger v. State*, 27 P. 3d 66 (Nev. 2001). The insanity defense is firmly rooted in the legal history and traditions of the United States.

In both law and morals, the capacity for reason is the primary foundation for responsibility and competence. The precise cognitive deficit a person must exhibit can of course vary from context to context. In addition, many believe that the capacity to regulate one's own behavior properly, to be able to control one's conduct, is also a foundation for responsibility. In the criminal justice system, an offender who lacks the capacity to understand the wrongness of his actions as the result of severe mental disorder—a condition that is not the offender's fault—may not be convicted and punished.

Under a parallel body of law in many jurisdictions, a defendant who is profoundly unable to regulate his behavior is regarded as undeserving of full blame and punishment and must be excused in a sufficiently extreme case. Moreover, it is generally acknowledged that offenders in these two categories cannot be deterred because the rules of law and morality cannot adequately guide them. Failing to excuse severely

impaired mentally disordered offenders is inconsistent with both retributive and deterrent theories of just punishment.

Legally insane offenders are not excused solely because they suffered from a severe mental disorder at the time of the crime. The mental disorder must also impair their ability to know, understand or appreciate that what they are doing is wrong or to impair some other functional capacity that a jurisdiction believes is crucial to responsibility. The crimes of those found legally insane do not result from bad judgment, insufficient moral sense, bad attitudes, or bad characters, none of which is an excusing condition. Rather, the crimes of legally insane offenders arise from a lack of understanding or lack of self-regulation capacity that is produced by severe mental abnormality and thus their criminal conduct is not reflective of culpable moral failure. To convict such people offends the basic sense of justice.

This Court has recently recognized that defects in the capacity for rationality and self-regulation preclude the most severe punishments for offenders with intellectual disability and juvenile offenders. *Atkins v. Virginia*, 536 U.S. 304 (2002) (intellectual disability); *Roper v. Simmons*, 534 U.S. 551 (2005) (juveniles). These defects exist along a continuum, ranging from mild to severe. In the cases involving intellectual disability and youth, the offenders were responsible to some degree, but in cases of more severe intellectual disability or developmental immaturity, holding such offenders responsible at all offends widely shared views about responsibility. The same principles apply to people with mental disorder. Although most people with mental disorder who commit crimes may be fully or partially responsible,

in cases of severe disorder, the rationality and self-regulation defects this Court has recognized are so substantial that the offender is blameless and should not be held responsible.[2]

A similar baseline principle explains the many competence doctrines employed in the criminal justice process. This Court has long recognized that at every stage justice demands that some people with severe mental abnormalities must be treated differently from those without substantial mental impairment because some impaired defendants are incapable of reason and understanding in a specific context. Competence to stand trial, *Drope v. Missouri*, 420 U.S. 162 (1975); competence to plead guilty and to waive counsel, *Godinez v. Moran*, 509 U.S. 389 (1993); competence to represent oneself, *Indiana v. Edwards*, 534 U.S. 164 (2008); and competence to be executed, *Ford v. Wainwright*, 477 U.S. 399 (1986), *Panetti v. Quarterman*, 551 U.S. 930 (2007), *Madison v. Alabama*, 139 S. Ct. 718 (2019), are all examples in which the Constitution requires such special treatment. It is unfair and offensive to the dignity of criminal justice to treat people without understanding as if their understanding was unimpaired. Evidence of mental disorder is routinely introduced in all these contexts to determine if the defendant must be accorded special treatment.

The impact of mental disorder on an offender's responsibility and competence is recognized throughout the criminal law. Even the few jurisdictions that

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[2] Note that the affirmative defense of legal insanity is the traditional doctrine by which people with marked intellectual disability can be fully excused. If the insanity defense were eliminated, most such offenders will form the requisite *mens rea* for the crime charged and will be punished despite lacking responsibility.

have abolished the insanity defense, such as Kansas, recognize that mental disorder affects criminal responsibility because they permit the introduction of evidence of mental disorder to negate the *mens rea* for the crime charged and at sentencing. *State v. Kahler*, 410 P.3d 105, 124-25 (Kan. 2018). As Part II explains, however, this use of mental disorder evidence does not honor the principles concerning responsibility that are so deeply rooted in our legal history and tradition. As this Court has recognized, state infliction of stigmatization and punishment is a severe infringement, *In re Winship*, 377 U.S. 358, 363-64 (1970). It is unfair to prevent a defendant from proving, based on routinely admissible evidence, that he lacked rational understanding of his conduct, even if he formed the charged *mens rea*. That is precisely the issue Kahler raises.

Historical practice, the near universal acceptance of the need for an independent affirmative defense of legal insanity, and the fundamental unfairness of blaming and punishing legally insane offenders provide the strongest reasons to conclude that fundamental fairness and the Due Process clause require an insanity defense. Abolishing this narrowly defined and deeply rooted defense could plausibly be justified only if an alternative legal approach could reach the same just result or if irremediably deep flaws preclude fair and accurate administration of the defense.

The next two main sections of this brief argue that there are no such alternatives and that the defense is no more vulnerable to risks of mistake and abuse than any other disputed issue in the penal law.

B. The Test for Legal Insanity

This brief takes no position about what test for the affirmative defense of legal insanity any jurisdiction

should adopt as long as the jurisdiction's rule permits defendants to raise defects resulting from severe impairments caused by mental disorder or intellectual disability that compromise the defendant's understanding of the wrongfulness of his criminal actions despite the presence of the *mens rea* required by the definition of the offense. This is as it should be. As Justice Marshall's plurality opinion in *Powell v. Texas* said,

> We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. *This process of adjustment has always been thought to be the province of the States*.

Powell v. Texas, 392 U.S. 514, 535-36 (1968) (emphasis added).

Jurisdictions in our federal system have considerable constitutional leeway to decide what types of disorders and their consequent impairments are necessary to warrant a full legal excuse and what procedures should govern insanity defense cases. Indeed, in *Clark*, 548 U.S. 735, at 753-56, this Court approved Arizona's test for legal insanity, the nation's most limited rule.

Discussion in this brief has focused on lack of the capacity to know, appreciate or understand the wrongfulness of one's actions or to regulate one's

behavior because, in one form or another, these deficits best explain the predominant tests adopted by forty-six states (including Arizona) and the federal criminal code.[3] But how such lack of understanding or self-regulation should be defined doctrinally are matters within the province of the states and the federal government. Nevertheless, stigmatizing and punishing *all* severely disordered offenders, even those who were grossly out of touch with reality or seriously unable to regulate their conduct at the time of the crime is unjust. Such an offender is not a responsible agent, is not at fault, and only some defense of legal insanity can appropriately respond to this moral truth that has been recognized in law for centuries.

The Court should rule that the Due Process Clause prohibits criminal conviction and punishment of an offender who, as a result of mental disorder at the time

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[3] All states that recognize the insanity defense have a "test" that is grounded in *M'Naghten* – (.i.e., that the defendant is not criminally responsible if he was unable to "know" the nature and quality of his conduct or unable to "know" that it was wrong). Much of the case law relates to the meaning of "knowing" that the act was "wrong." The meaning of this phrase was a major consideration in the drafting of the Model Penal Code insanity test, which states that a person is not criminally responsible if he lacked "substantial capacity" to "appreciate" the wrongfulness of the conduct. The MPC drafters omitted the "nature and quality of the act" part of *M'Naghten* because they regarded it as superfluous. The term "appreciation" was used to embrace the "affective" dimension of psychotic illness. It is designed to avoid conviction of a delusional defendant who was so detached from reality that he was unable to recognize the moral and emotional significance of his act. See generally, Richard J. Bonnie, John C. Jeffries, Jr., and Peter W. Low, *A Case Study in the Insanity Defense: The Trial of John W. Hinckley, Jr.* 12-14, 18-20 (3rd. ed 2008).

of the offense, did not know, appreciate or understand the wrongfulness of his actions (or suffered from a comparable cognitive defect that equally undermines responsibility). Over the past century, many states and legal commentators have embraced the view that blame and punishment are also unfair in cases in which the offender's capacity to regulate his behavior at the time of the offense was profoundly severely impaired. Nevertheless, this view has never attracted an equivalent level of legislative and judicial support, and the court should, accordingly, leave the decision whether to recognize a defense in such cases to the individual states.

II. ADMITTING MENTAL DISORDER EVIDENCE TO NEGATE MENS REA OR TO MITIGATE THE SENTENCE ARE INADEQUATE SUBSTITUTES FOR THE INSANITY DEFENSE

This section first addresses then "*mens rea* alternative" and then considers sentencing.

A. The *Mens Rea* Alternative

The negation of *mens rea* and the affirmative defense of legal insanity are different claims that preclude criminal liability by different means. The former denies the *prima facie* case of the particular crime charged; the latter is an affirmative defense that precludes liability in those cases in which the *prima facie case* is established. The post-verdict consequences are also different. The former leads to outright acquittal; the latter results in some form of involuntary civil commitment. Although in some cases the same mental disorder evidence may be used to prove the two different claims, they are not equivalent.

The primary reason that permitting a defendant to introduce evidence of mental disorder to negate *mens rea* cannot justly replace the affirmative defense of legal insanity is that the *mens rea* alternative is based on a mistaken view of how severe mental disorder affects human behavior. In virtually all cases, mental disorder, even severe disorders marked by psychotic symptoms such as delusions and hallucinations, does not negate *mens rea*. Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. Crim. L. & Criminology 1, 16 (1984); Morse, *Mental, supra*, at 933. It is difficult to prove a negative, but cases, especially those involving serious crime, in which most or all *mens rea* is negated are rare to the vanishing point. Rather, mental disorder affects a person's motivations or reasons for committing the criminal acts. A mentally disordered defendant's irrationally distorted beliefs, perceptions or desires typically and paradoxically give him the motivation to form the *mens rea* required by the charged offense. Mental disorder rarely interferes with the ability to perform the necessary actions to achieve irrationally motivated aims. In cases of self-regulation problems, the defendant does form the *mens rea* but lacks substantial capacity to conform his conduct to the law.

Consider the following, typical examples, beginning with Daniel M'Naghten himself. *M'Naghten's Case*, 8 Eng. Rep. 718 (1843); M'Naghten delusionally believed that the ruling Tory party was persecuting and intended to kill him. Richard Moran, *Knowing Right From Wrong: The Insanity Defense Of Daniel McNaughtan* 10 (2000). As a result, he formed the belief that he needed to assassinate the Prime Minister, Peel, in order to end the threat. He therefore formed the intention to kill Peel. Thus, M'Naghten would have been convicted of murder if a defense of

legal insanity was not available. Indeed, his case has come to stand for one of the "rules" enunciated by the House of Lords – that a defendant should be acquitted on grounds of insanity if he "was laboring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong." 8 Eng. Rep. at 722.

For a more contemporary example, consider the case of Ms. Andrea Yates, the Texas woman who drowned her five children in a bathtub. She delusionally believed that she was corrupting her children and that unless she killed them, they would be tortured in Hell for all eternity. Deborah W. Denno, *Who is Andrea Yates? A Short Story About Insanity*, 10 Duke J. Gender L. & Pol'y 1 (2003). She therefore formed the intention to kill them. Indeed, she planned the homicides carefully. Ms. Yates was nonetheless acquitted by reason of insanity because she did not know that what she was doing was wrong. Even if she cognitively recognized that her conduct violated the law of Texas and that she would be arrested, she was deeply convinced that the homicides were necessary to assure the eternal well-being of her children under the circumstances. In her psychotic thinking, everyone else would approve of her conduct as justified if they knew what she knew.

For a final example, suppose an offender hallucinates that he is hearing God's voice or delusionally believes that God is communicating with him and that God is commanding him to kill. E.g., *People v. Serravo*, 823 P. 2d 828, 830 (Colo. 1992) (en banc). If the offender kills in response to this "command hallucination" or delusion, he surely forms the intent to kill to obey the divine decree. Nonetheless, it would be

unjust to punish this defendant because he, too, does not know right from wrong given his beliefs for which he is not responsible.

In all three cases, one could also claim that the defendant did not know what he or she was doing in a fundamental sense because the most material reason for action, what motivated them to form *mens rea*, was based on a delusion or hallucination that was the irrational product of a disordered mind. Finally, in all three cases the defendant's instrumental rationality, the ability rationally to achieve one's ends, was intact despite their severe disorders. They were able effectively to carry out their disordered plans.

There are very few contemporary data about the operation of the insanity defense and virtually none about the operation of the *mens rea* alternative. Montana is the only state for which there is a systematic study of mental disorder claims pre- and post-abolition of the insanity defense. The picture is complicated, but in brief, the number of cases, the types of defendants and the types of crimes did not change. There were two major effects, however. Under the *mens rea* alternative, more defendants were convicted and the number of defendants found incompetent to stand trial increased markedly. Lisa Callahan et al., *The Hidden Effects of Montana's "Abolition" of the Insanity Defense*, 66 Psychiatric Q. 103 (1995). Neither change is desirable. For the reasons given in Part I, *supra*, conviction is unjust in any case in which the defendant should have been acquitted by reason of insanity. The increase in convictions in Montana demonstrates that abolition of the insanity defense does, in fact, expose severely mentally ill offenders to unjust punishment. Moreover, the rise in the number of defendants found

incompetent to stand trial who would previously have been found competent and acquitted suggests that an incompetency finding is being used as a tool for diversion in cases involving less serious charges that likely would have led to stipulated insanity acquittals under the pre-abolition statute. This is also objectionable.

Although Kahler seemed to have had the *mens rea* required for the charged offense of capital murder, his expert evidence established that he suffered from a number of mental disorders, including a major mental disorder, severe depression. As a result, the expert opined, Kahler's perception and judgment were so distorted that he may have become dissociated from reality at the time of the crime. The expert also testified that Kahler could not refrain from his conduct. Because an insanity defense was not available and Kahler's conduct met the criteria for capital murder, his conviction for the most serious crime in the criminal law was improperly a foregone conclusion.

To further understand the injustice of the *mens rea* alternative, consider a case in which *mens rea* may plausibly be negated. Suppose a defendant charged with murder claims that he delusionally believed that his obviously human victim of a shooting was in reality the devil and not a human being. See Richard J. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 195-96 (1983). If his beliefs were genuine, the defendant did not intentionally kill a human being. Indeed, in a *mens rea* alternative jurisdiction, he could not be convicted of purposely, knowingly or recklessly killing a human being because his delusional beliefs negated all three mental states. After all, he fully believed that he was shooting at the

devil, not a human being. The defendant would be convicted of negligent homicide, however, because the standard for negligence is objective reasonableness and the motivating belief was patently unreasonable.

Of course, convicting the severely disordered defendant of a crime based on a negligence standard is fundamentally unjust, as even Mr. Justice Holmes recognized in his rightly famous essays on the common law. Oliver Wendell Holmes, Jr., *The Common Law* 50-51 (Little, Brown & Co. 1945) (1881). The defendant's unreasonable mistake was not an ordinary mistake caused by inattention, carelessness or the like. Defendants are responsible for the latter because we believe that they had the capacity to behave more reasonably by being more careful or attentive. In contrast, the hypothetical defendant's delusional "mistake" was the product of a disordered mind and thus he had no insight and no ability to recognize the gross distortion of reality. He was a victim of his disorder, not someone who deserves blame and punishment as a careless perpetrator of involuntary manslaughter. He does not deserve any blame and punishment, and only the defense of legal insanity could achieve this appropriate result. Paradoxically, such a defendant's potential future dangerousness if he remains deluded would be better addressed by an insanity acquittal and indefinite involuntary commitment, a practice this Court has approved, *Jones v. U.S.*, 463 U.S. 354 (1983), than by the comparatively short, determinate sentences for involuntary manslaughter.

Thus, the *mens rea* alternative is not an acceptable replacement or substitute for the insanity defense. Only in the exceedingly rare case in which mental disorder negates all *mens rea* would the equivalent

justice of a full acquittal be achieved, albeit for a different reason. But again, this is the rarest of cases. Most legally insane offenders form the *mens rea* required by the definition of the charged offense and only the defense of legal insanity can respond justly to their lack of blameworthiness.

B. Sentencing

Consideration of mental disorder for purposes of assessing both mitigation and aggravation is a staple of both capital and non-capital sentencing, but it is no substitute for the affirmative defense of legal insanity. On moral grounds, it is unfair to blame and punish a defendant who deserves no blame and punishment at all, even if the offender's sentence is reduced. Blaming and punishing in such cases is unjust, full stop. Sentencing judges might also use mental disorder as an aggravating consideration because it might suggest that the defendant is especially dangerous as a result. Thus, sentences of severely mentally ill offenders might be enhanced. Again, injustice would result, and indeterminate post-acquittal comment would better protect public safety than enhanced sentences. Third, unless a sentencing judge is required by law to consider mental disorder at sentencing, whether the judge does so will be entirely discretionary. Again, this is a potent, potential source of injustice. In short, only a required insanity defense would insure that arguably blameless mentally disordered offenders have an opportunity to establish that state blame and punishment are not justified.

III. THE OBJECTIONS TO THE INSANITY DEFENSE ARE TOO INSUBSTANTIAL TO JUSTIFY ABOLITION

A number of objections to the insanity defense have been raised by proponents of abolition, including Kansas, but they are insubstantial and provide not even a rational basis for abolishing a defense with such a profound historical, legal, and moral basis. See Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 Kan. J. L. & Pub. Pol'y 253, 255-60 (1998). They certainly cannot survive a more demanding standard of review. In general, these objections relate to supposed difficulties of administering the insanity defense fairly and accurately. Specific objections include: (A) administering the defense requires an assessment of the defendant's past mental state using controversial psychiatric and psychological evidence, a task that is too difficult; (B) acquitting insane defendants endangers public safety; (C) the indeterminacy of the defense produces arbitrary verdicts; and (D) it invites fraudulent claims by defendants trying to "beat the rap."

A. Assessing Past Mental State Using Psychological and Psychiatric Evidence

It is often difficult to reconstruct past mental states and, as this Court has acknowledged, psychological and psychiatric evidence can be problematic. *Clark*, 548 U.S. at 740-41; *Kansas v. Crane*, 534 U.S. 407, 413 (2002). Nevertheless, all jurisdictions, including *mens rea* alternative jurisdictions, concede the necessity of proving *mens rea* (for most crimes) before punishment may justly be imposed. Consequently, the argument against the insanity defense based on the difficulty of reconstructing past mental states must fail unless

assessing past intent, knowledge, and other types of *mens rea* is easier than assessing whether the defendant was acting under the influence of severely abnormal mental states. After all, both *mens rea* and legal insanity refer to past mental states that must be inferred from the defendant's actions, including utterances. The severe disorder that is practically necessary to support an insanity defense is arguably easier to prove than ordinary *mens rea*.

Despite the problems with mental health evidence, all but four jurisdictions that have abolished the insanity defense believe that assessing legal insanity at the time of the crime with mental health evidence is possible. Indeed, it is routine. Moreover, even the four abolitionist jurisdictions permit introduction of such evidence to negate *mens rea*. Unless abolitionist jurisdictions are prepared to argue—and none has—that assessing *mens rea* with mental health evidence is uniquely reliable, the argument based on the deficiencies of mental health evidence lacks credibility. Finally, mental health evidence is routinely admitted in a vast array of civil and criminal contexts, including all the criminal competencies and sentencing.

B. Public Safety

As previously argued, the insanity defense poses no danger to public safety. Successful insanity defenses are so rare that deterrence will not be undermined because few legally sane defendants will believe that they can avoid conviction by manipulatively and falsely raising the defense. More important, every jurisdiction provides for commitment to a secure mental facility after a defendant has been acquitted by reason of insanity and this Court has approved the constitutionality of indefinite confinement (with

periodic review) of such acquittees as long as they remain mentally disordered and dangerous. *Jones*, 463 U.S. 354; *Foucha v. Louisiana*, 504 U.S. 71 (1992); Morse, *Mental, supra*, at 932. Further, this Court has approved procedures for the commitments that are more likely to result in continued confinement of acquittees than standard civil commitment. *Jones*, 463 U.S. 354. It is of course true that acquittees might be released earlier than if they had been convicted and imprisoned, but there is no evidence that released acquittees pose a special danger to the community. Michael K. Spodak et al., *Criminality of Discharged Insanity Acquittees: Fifteen Year Experience in Maryland Reviewed*, 12 Bull. Am. Acad. Psychiatry L. 373, 382 (1984); Mark R. Wiederanders et al., *Forensic Conditional Release Programs and Outcomes in Three States*, 20 Int'l J.L. & Psychiatry 249, 249-257 (1997); Lisa A. Callahan et al., *Revocation of Conditional Release: A Comparison of Individual and Program Characteristics across Four States*, 21 Int'l J.L. & Psychiatry 177 (1998); George F. Parker, *Outcomes of Assertive Community Treatment in an NGRI Conditional Release Program*, 32 J. Am. Acad. Psychiatry & L. 291, 291-303 (2004); Henry J. Steadman et al., *Factors Associated With a Successful Insanity Plea*, 140 Am.J. Psychiatry 401, 402-03 (1983).

C. Indeterminacy of the Insanity Tests

Unlike many other criteria for criminal liability, the insanity defense tests do not raise strictly factual questions. Rather, the judgment made about the defendant's mental state at the time of the crime is primarily a legal, moral, and social judgment. For example, whether the defendant fired the fatal bullet and intended to kill the victim, thus satisfying the elements of murder, are factual questions with

determinate, albeit often difficult to determine, answers. By contrast, the insanity defense tests ask indeterminate questions, such as how much understanding of right and wrong a defendant must have in order to be acquitted (or, in the minority of states that also have a control test, how substantially their capacity to control their conduct was impaired). Of course, the legal judgment must be based on facts, but the legal test is normative and not factual. The insanity defense tests prescribe the relevant behavioral continuum, but drawing the line between guilt and innocence is the task of the finder of fact as the legal and moral representative of the community. Except at the extremes, there are rarely determinate answers to such questions. Although decisions about normative criteria can be difficult, decisions about legal insanity are no more challenging (and probably more determinate) than judgments about reasonableness or recklessness that finders of fact routinely make.

D. Fraudulent Claims

Few defendants who are actually legally sane in some objective sense "beat the rap" with the insanity defense. Experts using the proper diagnostic tools can reliably distinguish people who are faking major mental disorder. Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 Iowa L. Rev. 1375, 1409-16 (1997) Further, it is best estimated that the insanity defense is raised in less than one percent of federal and state trials and is rarely successful. Nat'l Mental Health Ass'n, *Myths and Realities: A Report of the Nat'l Comm'n on the Insanity Defense* 14-15 (1983); Richard A. Pasewark, *Insanity Pleas: A Review of the*

Research Literature, 9 J. Psychiatry & Law 357, 361-66 (1981).

The complaint that the availability of the defense of legal insanity allows large numbers of guilty criminals to avoid conviction and punishment is simply unfounded. Prosecutors and defense attorneys alike generally recognize that insanity is a defense of last resort that betokens an otherwise weak defense and that rarely succeeds. Insanity acquittals are far too infrequent to communicate the message that the criminal justice system is "soft" or fails to protect society. It is impossible to measure precisely the symbolic value of these acquittals, but it is also hard to believe that they have much impact on social or individual perceptions. So few insanity pleas succeed that neither aspiring criminals nor society assume that conviction and punishment will be averted by raising the defense.

And, of course, if the defendant is legally insane and succeeds with the defense, he deserves to be acquitted and has not "beaten the rap" at all.

The "tough on crime" justification that underlies this argument is based on a fundamental misconception about the meaning of an insanity acquittal. In cases of a successful insanity defense, the *prima facie* case for guilt has been established and the verdict thus announces that the defendant's conduct was wrong. Nonetheless, the defendant did not deserve blame and punishment and will be confined by commitment.

CONCLUSION

Until the latter part of the Twentieth Century, all American jurisdictions had some version of the insanity defense. Even now, only four states have abolished the defense. The historical practice and continuing consensus favoring retention of the defense reflect a longstanding legal and moral judgment that it is unfair and unjust to blame and punish criminal defendants who lacked the capacity to understand or appreciate the wrongness of their actions. This proposition is so rooted in our legal and moral traditions and culture that this Court should recognize its constitutional status. Further, there is no alternative that will achieve equal justice by other means. Finally, the policy reasons that might override the fairness concerns are insufficient. Accordingly, we urge the Court to rule that the insanity defense is so deeply rooted in our nation's legal traditions and is so fundamental to justice that it may not be abolished.

Respectfully submitted,

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APPENDIX

APPENDIX

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