No. 18-6135

In the Supreme Court of the United States

JAMES KRAIG KAHLER,
Petitioner,

v.

STATE OF KANSAS,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Kansas

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether Kansas's *mens rea* approach to insanity violates the Eighth or Fourteenth Amendments.

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The Kansas Supreme Court's opinion is reported at 410 P.3d 105. J.A. 205-80. The district court's decision is in the Joint Appendix at J.A. 16.

JURISDICTION

The Kansas Supreme Court issued its opinion on February 9, 2018. It denied a motion for rehearing or modification on April 26, 2018, with a corrected order issued on May 1, 2018.

This Court has jurisdiction over Kahler's Due Process claim under 28 U.S.C. § 1257(a). But this Court lacks jurisdiction over Kahler's Eighth Amendment claim, which was not raised before or addressed by the Kansas Supreme Court. *See infra* Part II.A.

STATEMENT OF THE CASE

Kraig Kahler intentionally, and with premeditation, murdered his estranged wife, his two teenage daughters, and his wife's grandmother. The jury convicted Kahler of capital murder and, having heard all of the evidence that he wished to offer, returned a sentence of death.

Kahler asks this Court to overturn the jury's judgment. He contends that Kansas's approach to insanity, under which mental disease or defect is a defense only to the extent that it shows a lack of *mens rea* for the offense, is unconstitutional. In his view, Kansas was required to allow him to assert a defense that because of mental disease or defect, he did not know his actions were wrong. But Kahler's position is

supported by neither the text of the Constitution nor any principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental. This Court should therefore affirm the judgment of the Kansas Supreme Court.

A. Factual Background

1. Kraig Kahler met his wife, Karen, in college at Kansas State University, where he studied electrical engineering and graduated with a 3.6 GPA. J.A. 138, 140. Kahler not only excelled in school, he also had an active social life, playing intramural sports and joining a fraternity. J.A. 140.

After graduation, Kahler and Karen married and moved to Colorado for his first job at a nuclear power plant. J.A. 140. While in Colorado, Kahler obtained an MBA from the University of Colorado, and their first child, Emily, was born. *Id.* The family continued to move as Kahler's career advanced, and they were blessed with two more children, Lauren and Sean. J.A. *Id.*

Eventually the family found themselves in Weatherford, Texas, where Kahler became the director of utilities. J.A. 140, 213. Karen worked as a personal trainer. J.A. 213. By all outward appearances, the family had a "perfect" life, a fact in which Kahler took great pride. J.A. 41-42, 213.

2. While in Weatherford, Karen sought Kahler's permission to engage in a sexual relationship with a female personal trainer with whom she worked. J.A. 213. Kahler agreed to the relationship, possibly in hopes of watching the pair engage in sexual relations

or of participating in a threesome. J.A. 64, 85, 213; ROA Vol. 31, 767. He figured the relationship was not a threat to their marriage because the family would soon be moving to Columbia, Missouri, where, in May 2008, he had accepted a new job (with a substantial pay raise) as the director of water and light. J.A. 111, 128, 213.

But the relationship did not end after the move. Karen and her girlfriend continued to see each other. J.A. 129. The three even socialized together, attending a New Year's Eve party with friends in Weatherford. J.A. 128-29. At that party, Karen and her girlfriend engaged in public displays of affection, upsetting Kahler. J.A. 129. The night ended with Kahler pushing Karen and telling her that she was making a fool of herself. J.A. 129, 214.

Karen filed for divorce in January 2009. J.A. 34. In her divorce filings, she described Kahler as "controlling" and "capable of using force." J.A. 34. Kahler demonstrated these traits a few months later when he assaulted Karen while they were discussing the divorce. He refused to let her leave the room, cornered her, and physically harmed her, leaving scrapes and bruises. J.A. 33. Police arrested Kahler for the assault after a Columbia City Council meeting that night. J.A. 34. His arrest made the news because of his job as a public official. J.A. 214. He later pleaded guilty to the charge. J.A. 132.

Kahler was obsessed with Karen and stalked her throughout the nearly year-long divorce proceedings. He key-logged her computer so that he could monitor her emails; he also monitored her phone calls, credit

charges, and bank accounts. J.A. 69, 114, 131. He collected more than 3,000 documents in an effort to establish that Karen was to blame for the divorce. J.A. 114. And, after intercepting one email, he drove more than 150 miles to catch Karen with her girlfriend. J.A. 62. He tried to "sort of psychologically bludgeon [Karen] back into the relationship" to prevent her from going forward with the divorce. J.A. 43.

Kahler, meanwhile, considered himself without fault for the divorce. He maintained that he was blameless despite Karen revealing during therapy that she had been unhappy for many years because he did not listen to her or honor her needs. J.A. 60-62. He continued to cling to the idea that their marriage had been perfect until Karen went "off the deep end" with her extramarital relationship. J.A. 62. He also came to believe that his daughters were unfairly siding with Karen in the divorce. J.A. 113, 132.

While preoccupied with the divorce, Kahler lost focus on his job and was fired in August 2009. J.A. 214. After being fired, he moved to his parents' farm in Meriden, Kansas. *Id.* While there, he engaged in a variety of chores, such as building a chicken coop, putting in hedge posts, building an entryway, and collecting firewood. J.A. 115, 135. He chose to remain unemployed to prevent Karen from getting more money in the divorce. J.A. 133. He also continued to surveil Karen through Facebook. J.A. 115. Then, instead of letting the divorce become final, Kahler turned to murder.

3. Kahler spent Thanksgiving 2009 with his son, Sean, at the farm in Meriden. J.A. 214. They canoed,

fished, hunted, and worked together on various chores. J.A. 135, 214.

Arrangements had been made for Karen to pick up Sean in Topeka on Saturday, November 28, and take him to the home of her grandmother, Dorothy Wight, in Burlingame, Kansas. J.A. 214. That morning, Sean, who had been enjoying his time with his father, called his mother to ask if he could stay longer. *Id.* Karen declined Sean's request because of their plans with her grandmother. *Id.* While Kahler was out running errands, Kahler's mother took Sean to Topeka, where Karen picked him up. *Id.*

Later that day, Kahler made the roughly hour-long drive from his parents' farm to Dorothy's house in Burlingame. J.A. 215. After arriving, he approached the house and peered through the windows to watch his wife and children inside. J.A. 105-06, 109. Armed with a high-powered rifle, Kahler broke into the home, finding Karen and Sean in the kitchen. J.A. 215, 228. He shot Karen twice, but did not attempt to harm Sean. *Id*. Sean ran out of the house. *Id.* Kahler remained in the home, hunting down and shooting Emily, Lauren, and Dorothy. J.A. 215, 261.

While Kahler was still in the house, Dorothy's Life Alert system was activated. This generated a recording to the Life Alert monitoring service that also called 911. J.A. 215. That recording provides "clear evidence" that "Kahler methodically went through the house shooting each of the women in turn." J.A. 261. It also captures 16-year-old Lauren screaming for help and for her life. J.A. 261-62; State's Exs. 264, 265; ROA Vol 31,

768-69. At one point, a transcript notes Kahler telling a sobbing voice to "stop crying." J.A. 62.

By the time first responders arrived, Kahler was gone. J.A. 215. Karen was in the kitchen, barely breathing and unconscious. *Id*. She had been shot once in her leg and once in her upper back. ROA Vol. 33, 1188-89. Dorothy, age 89, was still conscious in a reclining chair in the living room, with a gunshot wound to her left arm and torso. J.A. 215; ROA Vol. 33, 1204-05. Emily, age 18, was already dead in the same room, having been shot in the chest and in the back. J.A. 124, 215; ROA Vol. 33, 1196-97. Lauren, age 16, was lying on the floor upstairs, conscious but with gunshot wounds to her back and buttock. J.A. 124, 215; ROA Vol. 33, 1177-78. She had been pursued up the stairs by Kahler as she tried to escape her father's gunshots. ROA Vol. 33-1161-61. All four victims ultimately died, but before doing so, both Dorothy and Lauren identified Kahler as the shooter. J.A. 215.

Kahler fired only seven shots to kill the four victims. J.A. 107-08; ROA Vol. 33, 1052. Each shot hit its intended target, and six of the seven shots would have proven lethal. J.A. 107-08; ROA Vol. 33, 1213.

After the shooting, Kahler returned to his vehicle, which he had parked next door to Dorothy's home. There, he encountered—but did not shoot—her neighbors, who were shining flashlights at him and yelling for him to stop. ROA Vol. 29, 81-82. He fled from the scene. Law enforcement tried to stop Kahler's vehicle, but he evaded capture by turning off his headlights and pulling into a driveway. ROA Vol. 30,

373-75. By the time law enforcement approached the vehicle, Kahler had fled on foot. *Id*. at 381-82.

The next day, law enforcement located Kahler walking along a county road. J.A. 215. He told them that he was the one they were seeking and was arrested without incident despite being armed with both a knife and a handgun. J.A. 52. He later bragged that the officers were lucky he chose not to harm them. J.A. 116-17. The murder weapon was never found. J.A. 108, 228.

B. Kansas's *Mens Rea* Approach to Insanity

After several years of debate about the insanity defense, the Kansas Legislature in 1995 adopted the *mens rea* approach to insanity. J.A. 283-339. Under this approach, it is "a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged. Mental disease or defect is not otherwise a defense." Kan. Stat. Ann. § 22-3220 (2009).[1]

Kansas law generally requires a person to act with one of three culpable mental states to be criminally liable: intentionally, knowingly, or recklessly. *See* Kan. Stat. Ann. § 21-5202(a). Aside from the misdemeanor crime of vehicular homicide, negligence is insufficient for a homicide conviction in Kansas. *See* Kan. Stat. Ann. § 21-5401 *et seq*. In addition, under Kansas law, a person commits a crime only if the person voluntarily

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[1] In 2010, this statute was recodified as Kan. Stat. Ann. § 21-5209, but its provisions have not materially changed.

engages in the conduct. *See* Kan. Stat. Ann. § 21-5201. Kansas also has an imperfect self-defense rule that reduces more severe charges of murder to manslaughter when a person possesses "an unreasonable but honest belief" that the use of deadly force was justified in defense of self or others. Kan. Stat. Ann. § 21-5404.

An offender's mental condition also continues to be relevant at sentencing. Mitigating circumstances under Kansas's sentencing guidelines include that "offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed." Kan. Stat. Ann. § 21-6815(c)(1)(C). And for more serious, non-guidelines crimes, including the capital murder in this case, mitigating factors include that "[t]he capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired." Kan. Stat. Ann. § 21-6625(a)(6). Kansas law also authorizes a judge to commit a defendant convicted of a felony to a mental health facility instead of prison when "the defendant is in need of psychiatric care and treatment," when "such treatment may materially aid in the defendant's rehabilitation," and when "the defendant and society are not likely to be endangered by permitting the defendant to receive such psychiatric care and treatment, in lieu of confinement or imprisonment." Kan. Stat. Ann. § 22-3430.

As the Kansas Supreme Court has explained, the "Kansas Legislature has not abolished the insanity defense but rather redefined it." *State v. Bethel*, 66 P.3d

840, 851 (Kan. 2003). While Kansas no longer has an *affirmative* defense called insanity, evidence of mental disease or defect is still admissible to show a lack of *mens rea*, thus exempting certain mentally ill individuals from criminal liability. In fact, Kansas statutes continue to refer to a "[d]efense of lack of mental state," Kan. Stat. Ann. § 22-3220 (2009), and Kan. Stat. Ann. § 22-3219 requires a defendant to provide timely notice in order to raise this defense. Importantly, Kansas has not forbidden evidence of insanity altogether, as several States sought to do at the beginning of the Twentieth Century. *See, e.g.*, *State v. Strasburg*, 110 P. 1020, 1021-24 (Wash. 1910) (striking down a law that would have "exclude[d] all consideration" of insanity, even to show a lack of criminal intent).

C. Proceedings Below

Following his apprehension, the State of Kansas charged Kahler with capital murder for the four murders and with aggravated burglary. J.A. 211. He did not dispute that he murdered his family. J.A. 216. Instead, he asserted "that severe depression had rendered [him] incapable of forming the intent and premeditation required to establish the crime of capital murder." *Id*. The jury rejected that argument and recommended a sentence of death.

1. Prior to trial, Kahler filed a motion arguing that Kansas's death penalty is unconstitutional because, among other reasons, Kansas abolished the insanity defense. J.A. 10-14. Kahler claimed this violates due process because Kansas's *mens rea* approach to insanity permits an individual "who cannot tell the

difference between right and wrong or cannot conduct himself or herself accordingly, to still be found guilty of criminal conduct including capital murder and be put to death." J.A. 12.

Kahler's pretrial motion did not specifically argue that Kansas's mental disease or defect statute violates the Eighth Amendment. The sole mention of the Eighth Amendment occurred in a block quote from *Ford v. Wainwright*, 477 U.S. 399, 404 (1986), which Kahler cited to support his argument that "the State of Kansas denies the defendant and others similarly situated *due process of law* both procedurally and substantively." J.A. 10-14 (emphasis added). He asserted that it would be unconstitutional to execute him because he "simply cracked under extreme pressure of a contested and contentious divorce and acted impulsively and violently." J.A. 14.

The district court rejected Kahler's challenges. J.A. 16. Kahler never proffered testimony that he was insane under whatever test he believed was constitutionally required. *But see* Kan. Stat. Ann. § 60-405 (requiring one seeking to offer evidence to proffer that evidence on the record). The report of his expert, Dr. Peterson, makes no mention of Kahler's inability to understand that his conduct was wrong. J.A. 51-100.

2. At trial, Kahler asserted that the divorce-induced depression prevented him from premediating or forming an intent to kill his victims. He called Dr. Peterson to testify that a major depressive disorder limited his capacity to manage his own behavior "so that he couldn't refrain from doing what he did."

J.A. 49. But Dr. Peterson did not specifically testify that Kahler was incapable of premeditation or of forming the requisite intent. J.A. 216.

Kansas rebutted Dr. Peterson's testimony with the testimony of Dr. Logan. Dr. Logan explained that Kahler's actions showed planning and intent. J.A. 105-09. Driving an hour to Dorothy's home signaled that Kahler's actions were purposeful, not random or impulsive. J.A. 105. Kahler did not park at the house or knock on the door, preserving the element of surprise for his attack. J.A. 109. The items found in his vehicle, such as camping equipment, clothing, and food suggested that he was preparing for a trip. J.A. 106. The location of Kahler's jacket and business card outside the home established that Kahler had been outside watching the family for some time before he decided to enter. J.A. 106.

As for the shooting itself, the fact that the victims were shot in different rooms showed Kahler pursued some of his victims. J.A. 107. Nor were there any random shots. J.A. 108. Each bullet hit its intended target. *Id*. And he purposely spared his son, Sean, with whom he had a better relationship. J.A. 109.

Kahler's actions after the shooting also showed that he acted intentionally. Kahler fled; he did not linger or render aid to his victims. J.A. 109. When confronted by neighbors who thought he was a thief, Kahler did not shoot at them. J.A. 108. These actions indicated Kahler was not in a deranged state and shooting indiscriminately. *Id*. The same was true of his choice to peacefully surrender to police rather than attempting to shoot or kill them. J.A. 116-17. And Kahler's

statement to the police when he surrendered established an awareness that the police were looking for him and some knowledge of the reason why. J.A. 108.

Dr. Logan further opined that Kahler's chores at the family farm undermined Dr. Peterson's conclusion that Kahler was severely depressed because such people typically have very little energy or interest in activities. J.A. 115-16. Kahler was also sleeping well and had no appetite or weight loss. J.A. 119. Dr. Logan concluded that Kahler was depressed but did not lack the capacity to form intent or premeditate the murders. J.A. 115-16, 119.

After deliberating, the jury returned a verdict finding Kahler guilty of capital murder and aggravated burglary. J.A. 181, 190.

3. At the penalty phase, no limitation was placed on the mitigating circumstances and evidence that Kahler could present to the jury. Each mitigating circumstance he believed existed was placed in the jury instructions. J.A. 150-52, 194-96. Included as one of his mitigating circumstances was that his capacity "to appreciate the criminality of" his conduct "was substantially impaired." J.A. 195. Still, Dr. Peterson did not opine that Kahler could not distinguish right from wrong, only that Kahler temporarily lost control of his actions. ROA Vol. 38, 42-62. Having heard all of the mitigating evidence that Kahler saw fit to present, the jury determined that Kahler should be sentenced to death. J.A. 203.

4. Kahler appealed to the Kansas Supreme Court, raising ten issues. J.A. 211. As relevant here, he argued that Kansas's *mens rea* approach to the insanity defense violates the "Due Process Clause of the Fourteenth Amendment" and the Kansas Constitution. Brief of Appellant, *State v. Kahler*, 410 P.3d 105 (No. 106981), 2013 WL 3790736, at *41-47. He did not assert that the *meas rea* approach violates the Eighth Amendment. *Id*. at *41-47.

The Kansas Supreme Court recognized that Kahler's challenge to Kan. Stat. Ann. § 22-3220 (2009) was limited. It noted that the only claim Kahler presented in that regard was that "the statute violates the Due Process Clause because it offends a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." J.A. 243. Because it was not pressed, the Kansas Supreme Court did not consider whether Kansas's *mens rea* approach violates the Eighth Amendment.

In rejecting Kahler's due process claim, the Kansas Supreme Court first briefly discussed the history of Kansas's mental disease and defect defense and then noted that it had rejected the same due process argument in *State v. Bethel*, 66 P.3d 840 (Kan. 2003), *cert. denied* 540 U.S. 1006 (2003). J.A. 242-43. In *Bethel*, the Kansas Supreme Court, after reviewing decisions from this Court and other courts considering similar issues, held that Kan. Stat. Ann § 22-3220 did not violate a defendant's right to due process under either the United States or Kansas Constitutions. 66 P.3d at 844-51. Kahler added no new argument to that rejected in *Bethel* except to cite the dissent from denial

of certiorari in *Delling v. Idaho*, 568 U.S. 1038 (2012), which the Kansas Supreme Court held had "no effect on [the] *Bethel* decision." J.A. 244.

The Kansas Supreme Court upheld Kahler's convictions and his death sentence.

SUMMARY OF ARGUMENT

Kansas's *mens rea* approach to insanity does not violate either the Due Process Clause or the Eighth Amendment.

I. Kahler incorrectly argues that the Due Process Clause requires an insanity test that applies when a defendant, due to mental disease or defect, did not understand that his actions were wrong. That test is not so deeply rooted in our history and tradition as to be compelled by due process.

A. Historically, insanity was often tied to a lack of *mens rea*. Many of the English legal writers most familiar to early Americans—Bracton, Coke, Hale, and Blackstone—all made this connection. Even when references to knowledge of good and evil began to creep into discussions of insanity, the cases still often referred to insanity as involving a lack of criminal intent. The right-and-wrong insanity test did not fully develop as an independent test until the Nineteenth Century, and even then it continued—and has continued—to be the subject of much debate. Over the years, many legal scholars, medical professionals, and policymakers have advocated for the *mens rea* approach to insanity, and Kansas followed the lead of several other States in adopting that approach. The various insanity tests that have been used over the

years demonstrate that the right-and-wrong insanity test is not deeply rooted in our history and tradition.

B. As this Court has previously recognized, the Due Process Clause does not mandate that States adopt any one particular approach to insanity. *See, e.g.*, *Clark v. Arizona*, 548 U.S. 735 (2006). Instead, given the complex legal, religious, moral, philosophical, and medical questions involved, States have the "freedom to determine whether, and to what extent, mental illness should excuse criminal behavior." *Foucha v. Louisiana*, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring).

C. Kahler argues that those who are morally blameless should be exempted from criminal liability, but that begs the question of who is morally blameless. Kansas has reasonably determined that individuals who voluntarily and intentionally kill another human being are culpable, even if they do not recognize their actions are morally wrong. After all, terrorists who kill in the name of religion may sincerely believe that their actions are morally justified or even morally required, but they are still culpable. Even when it comes to mentally ill offenders, knowledge of wrongfulness is not recognized as necessary for moral blame. Otherwise psychopaths, who are often excluded from the insanity defense, would be considered morally blameless and escape conviction.

Just as knowledge that one's conduct is morally wrong is not required for culpability, neither is knowledge of its criminality. It is a longstanding principle that knowledge of the law is not required for criminal culpability. Kansas has reasonably determined that there is no basis for creating an exception to this general principle for a certain subset of the mentally ill.

In any event, the concern about moral blamelessness is certainly not present here. The jury, having heard all of the mitigating evidence Kahler wished to offer, determined that Kahler should be sentenced to death. They would not have rendered that verdict if they believed him to be morally blameless.

II. Kansas's *mens rea* approach to insanity also does not violate the Eighth Amendment.

A. Kahler never argued to the Kansas Supreme Court that Kansas's *mens rea* approach to insanity violates the Eighth Amendment. As a result, the Kansas Supreme Court did not address the question. This Court therefore lacks jurisdiction to consider the claim.

B. Kahler's Eighth Amendment claim also fails on the merits. The Cruel and Unusual Punishment Clause, as demonstrated by its text and historical background, only applies to prohibit certain *punishments*. It does not mandate that States adopt certain affirmative defenses to criminal convictions in the first place.

In any event, Kansas's *mens rea* approach to insanity is not cruel and unusual. This approach would not have been considered cruel and unusual at the Founding, when insanity was still often tied to a lack of *mens rea* and the right-and-wrong test had not yet fully developed. Nor is it cruel and unusual today. The *mens rea* approach is entirely consistent with the purposes of retribution, deterrence, incapacitation, and rehabilitation. In fact, the *mens rea* approach is arguably more "evolved" than an affirmative insanity defense, which can stigmatize the mentally ill.

III. Even if the Constitution required some version of the right-and-wrong insanity test, the failure to allow that defense here was harmless as Kahler is not insane under that test. Kahler's own expert was unable to conclude that Kahler is insane. And, despite the fact that there was no limitation on Kahler's ability to present mitigating evidence during the penalty phase, he neither offered nor proffered any evidence that he could not distinguish right from wrong. Instead, his expert only opined that Kahler could not control his actions, which at most relates to a volitional test of insanity that Kahler concedes is not required by the Constitution. Thus, even if this Court were to adopt some version of the test that Kahler proposes, Kahler himself cannot satisfy it.

ARGUMENT

I. Kansas's *Mens Rea* Approach to Insanity Does Not Violate the Due Process Clause.

The task of defining criminal liability is largely left to the States, and this Court has recognized that it "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson v. New York*, 432 U.S. 197, 201 (1977) (internal citation omitted). A State's choice in this regard is "not subject to prescription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 201-02 (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)); *accord Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (opinion of Scalia, J.).

Kahler asserts that there is a longstanding recognition that the "insane" should not be punished, but this raises the question of what it means to be "insane." After all, "insanity" is a legal conclusion, not a medical diagnosis. While Kahler equates insanity with the inability to appreciate the wrongfulness of one's conduct, this test of insanity is not so deeply rooted in our history and tradition as to render Kansas's *mens rea* approach to insanity unconstitutional.

As this Court recognized in *Clark v. Arizona*, 548 U.S. 735 (2006), "[e]ven a cursory examination of the traditional Anglo-American approaches to insanity reveals significant differences among them." *Id.* at 749. After detailing various approaches to insanity, *Clark*

held that "it is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice." *Id.* at 752. Kansas's *mens rea* approach to insanity therefore does not violate the Due Process Clause.

A. The right-and-wrong insanity test is not deeply rooted in our history and traditions.

Contrary to Kahler's argument, an insanity defense based on the ability to distinguish right from wrong "is a creature of the 19th century and is not so ingrained in our legal system to constitute a fundamental principle of law." *State v. Bethel*, 66 P.3d 840, 851 (Kan. 2003). As a result, the right-and-wrong test that Kahler champions is not required by the substantive concepts of due process.

1. Many ancient references to insanity are at best ambiguous and consistent with the *mens rea* approach. "[I]f mental disease (or insanity) relieved from responsibility for crime in those early days, it is doubtful if any attempt was made to reduce the vague generalities, 'madness,' or 'insanity,' to more concrete, medical, psychological, or legal concepts." S. Sheldon Glueck, *Mental Disorder and the Criminal Law: A Study in Medico-Sociological Jurisprudence*, 124 (1927). For instance, Kahler cites a statement made by the Athenian stranger in Plato's *Laws* suggesting that insanity should excuse a crime or at least mitigate punishment. Pet. Br. at 19. This philosophical proposition is not reflective of actual historical practice. *See* Daniel N. Robinson, *The Insanity Defense as a*

History of Mental Disorder, 20, in *The Oxford Handbook of Philosophy and Psychiatry* (2013) ("There is no evidence in the ancient sources, however, that such philosophical reflections . . . yielded exculpatory consequences in the arena of adjudication. Ancient courts regarded the criminal act itself as evidence of mental capacity . . . ."). But even so, there is no definition of what it meant to be "insane," and certainly no indication that it required the inability to distinguish right from wrong.

It is just as likely that these early sources understood insanity as a severe lack of cognition that precluded the ability to form criminal intent. This view is supported by the Sixth-Century Code of Justinian, which provided: "There are those who are not to be held accountable, such as a madman and a child, *who are not capable of wrongful intention*." Pet. Br. at 19 (emphasis added); *see also* Raymond L. Spring, *Farewell to Insanity: A Return to Mens Rea*, 66 J. Kan. Bar. Ass'n 38, 39 (1997) (citing the Code of Justinian in support of the *mens rea* approach).

2. In England, the concepts of *mens rea* and insanity developed contemporaneously, with insanity being tied to lack of *mens rea*. As Professor Norval Morris, a former Dean of the University of Chicago Law School, explained: "Until the nineteenth century, criminal-law doctrines of *mens rea* (criminal intent) handled the entire problem" of insanity. Norval Morris, *Madness and the Criminal Law*, 54 (1982). After all, "*mens rea*" means "guilty mind" and was taken to reflect a person's culpability.

A "who's who" of early legal thinkers confirm that *mens rea* and insanity were intractably tied together. Bracton, who was influential in incorporating the principle of *mens rea* into English law, believed that "madmen" should not be punished because they lacked *mens rea*. *See* Nigel Walker, *Crime and Insanity in England, Volume One: The Historical Perspective*, 27 (1968) ("[F]or Bracton madmen as well as children were examples of offenders who lacked the intention necessary for guilt."). "Bracton's conception of a madman was one who does not know what he is doing, who is lacking in mind and reason, and who is not far removed from the brutes." Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 1005 (1932). Individuals in such a desperate state were considered incapable of forming *mens rea*.

Sir Edward Coke echoed this same understanding in *Beverley's Case*, 4 Co. Rep. 123b (1603), writing that "[n]o felony or murder can be committed without . . . a felonious intent and purpose," and therefore a "*non compos mentis*" cannot be guilty of a felony because "he cannot have a felonious intent." *Id.* at 124b. And in his Institutes, Coke explained that in criminal cases, "the act and wrong of a madman shall not [be] imputed to him, for that in those causes, *actus non facit reum, nisi mens sit rea*" (the act does not make a person guilty unless the mind is guilty)—an explicit reference to *mens rea*. 2 Sir Edward Coke, *The First Part of the Institutes of the Laws of England*, 247b (1628). Thus, "Coke wisely relied upon the general requirement of criminal intent and upon the rule that mental disease and defect negative such intent." Glueck, *Mental Disorder and the Criminal Law* at 131. Because Coke's

teachings "were read in the American Colonies by virtually every student of the law," *Klopfer v. North Carolina*, 386 U.S. 213, 225 (1967), these concepts would have been familiar to the framers of the Constitution.

Likewise, Sir Matthew Hale believed "that the defense of insanity is intimately related with the whole topic of criminal intent." Glueck, *Mental Disorder and the Criminal Law* at 131. Hale therefore sought "to assimilate the defense of insanity to that of infancy on the basis of lack of *mens rea*," postulating that a mentally ill individual who has as much understanding as a 14-year-old child may be found guilty. Sayre, 45 Harv. L. Rev. at 1006. Hale's chapter on insanity in his *History of the Pleas of the Crown* says nothing about right and wrong or good and evil. Instead, Hale explained that insanity requires "a total alienation of the mind or perfect madness." 1 Sir Matthew Hale, *The History of the Pleas of the Crown*, 30 (1736).

So too with Blackstone. Blackstone wrote that "to make a complete crime, cognizable by human laws, there must be both a will and an act"—in other words, *mens rea* and *actus reus*. 4 Blackstone, *Commentaries on the Laws of England*, 21 (1769). Blackstone then laid out several pleas and excuses, including insanity, "which protect the committer of a forbidden act from the punishment," and tied them all to a lack of *mens rea*. *Id.* at 20 ("An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has it's [sic] choice either to do or to avoid the fact in question, being the

only thing that renders human actions either praiseworthy or culpable.").

Thus, many of the English legal writers most familiar to early Americans—Blackstone, Hale, Coke, and Bracton—all linked insanity to a lack of *mens rea*. As the American Civil Liberties Union recognized in 1983 congressional hearings on the subject, early English history "treated insanity as the equivalent of a complete lack of reason, thus merging concepts of *mens rea* and insanity . . . . Therefore, the framers of the Constitution would not have been likely to recognize or appreciate an issue based on a distinction between *mens rea* and insanity." Statement of Professor Susan N. Herman on Behalf of the American Civil Liberties Union, *Reform of the Federal Insanity Defense: Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 98th Cong., 1st Sess. 527 (1983) ("*1983 House Hearings*"). If anything, the *mens rea* approach was actually more deeply rooted in history and tradition at the time of the Founding than the right-and-wrong test.

3. Even when references to the knowledge of good and evil began to creep into the discussion of insanity, these concepts were still often tied to *mens rea*. For instance, in *Rex v. Arnold*, 16 How. St. Tr. 695 (1724), Justice Tracy referenced the ability to distinguish good and evil, but also described an insane person as one "deprived of his reason, and consequently of his intention." *Id.* at 764. To be exempted from criminal responsibility, he told the jury, a man must be "totally deprived of his understanding and memory, and doth

not know what he is doing, no more than an infant, than a brute, or a wild beast." *Id.* at 764-65.[2] Justice "Tracy does not make it clear whether inability *either* to know what he was doing *or* to know that it was wrong would have excused Arnold; he speaks as if the two went together. It was not until the nineteenth century that they became clearly separate alternative tests." Walker, *Crime and Insanity in England* at 57.

Likewise, in the 1760 trial of Earl Ferrers before the House of Lords, the Solicitor General referenced the ability to distinguish good and evil but relied primarily on Hale's insanity test, describing it as "founded not only in law and practice, but in the most unerring rules of reason and justice." *Earl Ferrers's Case*, 19 How. St. Tr. 886, 946-48 (1760). This test, the Solicitor General explained, required a total lack of reason. *Id.* at 947. The Solicitor General argued that Earl Ferrers failed to meet this test because he acted with premeditation and knowledge of the consequences of his actions, and the Lords apparently agreed, condemning Earl Ferrers to death. *Id.* at 948-51, 959.

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[2] Kahler cites *Hadfield's Case*, 27 How. St. Tr. 1281 (1800), to argue that *Arnold* is an outlier. But in reality, *Hadfield* was the outlier. Justice Tracy's instructions in *Arnold* were consistent with the existing tests of insanity. *See* Walker, *Crime and Insanity in England* at 38. But in *Hadfield*, Lord Erskine successfully argued for a much broader test, one that "was without judicial authority in its day." Glueck, *Mental Disorder and the Criminal Law* at 147-48 (emphasis omitted). According to Lord Erskine, "the true character of insanity" is delusion in connection with the act. 27 How. St. Tr. at 1314. This resembles the later "product test" of insanity. *See State v. Pike*, 49 N.H. 399 (1869); *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

By the time of *Bellingham's Case* in 1812, the terms "right" and "wrong" had begun to be used, but insanity was still described as a total loss of reason, with a corresponding inability to form intent. As Lord Mansfield, the Chief Justice of Common Pleas, informed the jury:

> If a man were deprived of all power of reasoning, so as not to be able to distinguish whether it was right or wrong to commit the most wicked transaction, he could not certainly do an act against the law. *Such a man, so destitute of all power of judgment, could have no intention at all.*

Bellingham's Case, 1 Collinson on Lunacy 636, 671 (1812) (emphasis added).

The same is true of the two Old Bailey cases cited in the amicus brief of four legal historians and sociologists. *See* Amicus Br. of Legal Historians and Sociologists at 13-14. The usefulness of these cases is questionable, as there is no indication that these unpublished reports were widely known even in legal circles. *See* Walker, *Crime and Insanity in England* at 12 ("There is a sense, of course, in which only the reported cases can make legal history; for it is only the case in the law reports of which judges can be expected to take notice in deciding what the law must be."). Even so, these cases hardly demonstrate that the right-and-wrong test was established as a separate exculpatory defense independent of *mens rea*. In the 1787 trial of Francis Parr, after the judge mentions the ability to distinguish between right and wrong, he goes on to say that an insane person "is not answerable

personally, because his actions want that *which is the essence of any crime, which is the felonious and criminal intention.*"[3] (Emphasis added.) And in the 1786 trial of Samuel Burt, which dealt with forgery, the judge immediately after mentioning the ability to distinguish between right and wrong ties this to the concept of *mens rea*, noting that "the essence of forgery is the intent to defraud, and if therefore the party is incapable of knowing what he does, he can have no such intention."[4]

Far from supporting Kahler's argument, these cases demonstrate that an independent right-and-wrong test was not firmly established by the time of the Founding. In fact, other Old Bailey insanity cases do not even reference right and wrong at all. For instance, in the 1784 trial of William Walker, the judge's "summing-up made no mention of 'wild beasts' or the ability to tell right from wrong; indeed, at times he sounded like a twentieth-century judge describing a case of 'irresistible impulse.'" Walker, *Crime and Insanity in England* at 64.

4. During the Nineteenth Century, earlier references to knowledge of good and evil morphed into the right-and-wrong test recognized in *M'Naghten's Case*, 8 Eng. Rep. 718 (1843), but this test continued to be the subject of much debate and did not become so deeply entrenched as to become a fundamental

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[3] https://www.oldbaileyonline.org/browse.jsp?id=t17870115-1-defend2&div=t17870115-1.

[4] https://www.oldbaileyonline.org/browse.jsp?id=t17860719-31-defend363&div=t17860719-31.

principle of law. A 1909 treatise on the criminal responsibility of the insane, for example, described this ongoing debate:

> The feud between medical men and lawyers in all questions concerning the criminal liability of lunatics is of old standing. More than one authority on either side has tried to bring about a reconciliation between the contending parties. But their endeavours have been crowned with very little success. For though it cannot be denied that the strife and warfare has of late lost much of its former bitterness, a *modus vivendi* satisfactory to both parties has not been found.

Edwin R. Keedy, *Insanity and Criminal Responsibility*, 30 Harv. L. Rev. 535, 535 (1917) (quoting Heinrich Oppenheimer, *The Criminal Responsibility of Lunatics*).

A year after this observation was made, Professor John Henry Wigmore, then-president of the American Institute of Criminal Law and Criminology, appointed a committee of law professors, judges, and physicians to try to reach some agreement so "that the difficult problem of determining the relation of insanity to criminal responsibility might be thereby to some extent solved." *Id.* In 1916, the committee reached unanimous agreement and recommended a *mens rea* approach to insanity. Specifically, their proposed bill stated:

> No person shall hereafter be convicted of any criminal charge when at the time of the act or omission alleged against him he was suffering

> from mental disease or defect and by reason of such mental disease he did not have the particular state of mind that must accompany such act or omission in order to constitute the crime charged.

Id. at 536. This recommendation was approved by the American Institute of Criminal Law and Criminology. *Id.*

The *mens rea* approach, or some variation, has been advocated by many scholars since then. *See* Norval Morris, *Psychiatry and the Dangerous Criminal*, 41 S. Cal. L. Rev. 514, 544-47 & n.13 (1968) (discussing advocates of the approach); Joseph Goldstein and Jay Katz, *Abolish the Insanity Defense—Why Not?*, 72 Yale L. J. 853 (1963). As Professor Morris argued in his book on the subject, "[t]he English and American judges went wrong in the nineteenth century; it is time we returned to older and truer principles." Morris, *Madness and the Criminal Law* at 56. Even then-Judge Warren Burger proposed that "perhaps we should consider abolishing what is called the 'insanity defense.'" Warren E. Burger, *Psychiatrists, Lawyers, and the Courts*, 28 Fed. Probation 3, 9 (June 1964).

This debate attracted the attention of policymakers. In 1974, the U.S. Department of Justice recommended that Congress adopt a *mens rea* approach to the insanity defense. At the time, the U.S. Senate was considering comprehensive reforms to the federal criminal code. The Department of Justice supported S. 1400, which—in language nearly identical to Kansas's current law—provided: "It is a defense to a prosecution under any federal statute that the

defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense." Department of Justice Memorandum on Section 502 of the Criminal Code Reform Act (the Insanity Defense), *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary*, 93d Cong., 2d Sess. 6813 (1974) ("*1974 Senate Hearings*"); *see also* William French Smith, *Limiting the Insanity Defense: A Rational Approach to Irrational Crimes*, 47 Mo. L. Rev. 605, 612, 615 (1982) (summarizing the Department's "years of thoughtful consideration" and recommendation to adopt the *mens rea* approach).

The Department of Justice was not alone. Its proposal to adopt the *mens rea* approach was "supported by bar associations[,] . . . the heads of the majority of the state psychiatric institutions who had been queried," and "62.5 percent of the queried psychiatrists." Testimony of Ronald L. Gainer for DOJ, *1974 Senate Hearings* at 6812. In fact, "the *mens rea* approach to the issue of insanity . . . attained support from a wide spectrum of psychiatrists, legal scholars, and professional groups. It . . . also had impressive bipartisan support in the Congress, by members representing a broad range of political and social views." Prepared Statement of David Robinson, Jr., *The Insanity Defense: Hearings Before the Senate Committee on the Judiciary*, 97th Cong., 2d Sess. 76 (1982) ("*1982 Senate Hearings*").

In 1982, the Department of Justice reiterated its support for the *mens rea* approach before ultimately acceding to a legislative compromise. *See* Testimony of Hon. William French Smith, Attorney General of the United States, *1982 Senate Hearings* at 26-29; Testimony of D. Lowell Jensen, Assistant Attorney General, Criminal Division, U.S. Department of Justice, *1983 House Hearings* at 239-40.

At the time of the 1982 hearings, psychiatrists were so divided about the role of the insanity defense (and psychiatrists' role in proving and disproving it), the American Psychiatric Association was unwilling to take a position. *See* Statement by the American Psychiatric Association on the Issues Arising From the Hinckley Trial, *Insanity Defense in Federal Courts: Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 97th Cong., 2d. Sess. 58, 77 (1982). But Dr. Abraham L. Halpern, then president-elect of the American Academy of Psychiatry in the Law, testified in favor of the "total elimination of the exculpatory insanity rule" and its replacement with the *mens rea* approach. *1982 Senate Hearings* at 283; *see* Abraham L. Halpern, *The Insanity Defense: A Juridical Anachronism*, 7 Psychiatric Annals 398 (1977), *available at 1982 Senate Hearings* at 290.

And in 1983, the American Medical Association adopted a policy calling for the replacement of the affirmative defense of insanity with the *mens rea* approach. Committee Report, *Insanity Defense in Criminal Trials and Limitation of Psychiatric Testimony*, 251 J. Am. Med. Ass'n 2967, 2967 (1984). The AMA's Committee on Medicolegal Problems

produced a report on the issue which surveyed the history of the insanity defense and the ongoing debate. The report explained that "[t]he essential goal of an exculpatory test for insanity is to identify the point at which a defendant's mental condition has become so impaired that society may confidently conclude that he has lost his free will." *Id.* at 2978. But the report concluded that "[p]sychiatric concepts of mental illness are ill-suited to this task, even assuming the reliability of the highly subjective diagnostic criteria of mental illness." *Id.* Accordingly, the AMA believed that the *mens rea* test would be more appropriate based on the state of medical knowledge.

Although the *mens rea* approach was not adopted at the federal level, three other States—Montana, Idaho, and Utah—preceded Kansas in adopting it. Mont. Code Ann. § 46-14-102; Idaho Code § 18-207; Utah Code Ann. § 76-2-305(1)(a).[5] The supreme courts of all three States have upheld the constitutionality of this approach. *See State v. Herrera*, 895 P.2d 359 (Utah 1995); *State v. Searcy*, 798 P.2d 914 (Idaho 1990); *State v. Korell*, 690 P.2d 992 (Mont. 1984). In addition, Alaska has adopted a very similar approach. While insanity remains an affirmative defense in Alaska, only the cognitive prong of *M'Naghten* remains; a requirement that the defendant know his actions were wrong—which Kahler argues is at the core of the insanity defense—has been abolished. Alaska Stat. § 12.47.010(a).

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[5] In addition, Nevada adopted the *mens rea* approach the same year as Kansas, although its supreme court later held the approach unconstitutional. *See Finger v. State*, 27 P.3d 66 (Nev. 2001).

In Kansas, support for the *mens rea* approach dates to at least the late 1970s. Raymond Spring, a law professor and former Dean of the Washburn University School of Law, was the leading advocate for the *mens rea* approach in Kansas and ultimately played a key role in convincing the Kansas Legislature to adopt it. *See* Raymond L. Spring, *The End of Insanity: Common Sense and the Insanity Defense* (1983); J.A. 290, 327-30, 338-39. Kahler's suggestion that the Kansas Legislature's adoption of the *mens rea* approach was a knee-jerk, "misinformed reaction to a pair of headline-grabbing cases" is wrong. Pet. Br. at 12. Professor Spring's support for and advocacy of the *mens rea* approach predates the cases Kahler mentions. *See* Raymond L. Spring, *The End of Insanity*, 19 Washburn L.J. 23 (1979). And, as demonstrated above, the *mens rea* approach has an even longer historical pedigree.

5. Historically, a variety of tests and combinations thereof have been used to define insanity. In addition to the *mens rea* approach, these include:

- Requiring a total lack of understanding or reason. This was often tied to a lack of *mens rea* on the theory that a person completely deprived of understanding could not form criminal intent. Later, this test was also used in conjunction with early references to good and evil or right and wrong, as in *Earl Ferrers's Case. See supra* Part I.A.3.

- Hale's understanding-of-a-14-year-old test, which was based on the concept of *mens rea.*

- Fitzherbert's test, defining an insane person as one "who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc., so as it may appear he hath no understanding of reason what shall be for his profit, or what for his loss," but excluding a person who has "such understanding that he know and understand his letters, and do read by teaching of another man." Quoted in Glueck, *Mental Disorder and the Criminal Law* at 129

- The "wild beast" test. *See Rex v. Arnold*, 16 How. St. Tr. 695 (1724).

- The irresistible impulse test. While this is often combined with a version of the right-and-wrong test, as in the ALI formulation, this is not always the case. For instance, in *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961), the Third Circuit adopted a control test asking whether the defendant "possessed substantial capacity to conform his conduct to the requirements of the law" that specifically excluded the question of whether the defendant knew the difference between right and wrong. *Id.* at 772, 775.

- The "product" test, which excuses a defendant if the crime was a product of mental disease or defect. *See State v. Pike*, 49 N.H. 399 (1869); *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). Although Kahler argues that the right-and-wrong test

> is subsumed in the product test, the vagueness of the product test leaves this less than clear. Certainly, the jury is not specifically instructed that the defendant must have been unable to distinguish right from wrong to be excused.

The variety of other insanity tests that have been used over time demonstrate that the right-and-wrong test is not so deeply rooted in our history and tradition as to become a fundamental right.

Even when it comes to the right-and-wrong test, there are profound disagreements about the meaning and implementation of that test. In particular, courts and legislatures have divided on whether "wrong" refers to moral wrong or criminal wrong. *See, e.g.*, Model Penal Code § 4.01(1) (referring to "criminality" while suggesting "wrongfulness" as a potential alternative). While Kahler tries to gloss over this distinction, these are very different concepts. A person may know that an action is against the law and yet believe that it is morally justified. Given the frequent use of a "criminality" standard, it cannot be said that the Due Process Clause requires knowledge of moral wrongfulness for criminal culpability. Likewise, the fact that knowledge of moral wrongfulness alone is sufficient in other jurisdictions demonstrates that a knowledge-of-criminality requirement is not deeply rooted in our history and tradition. These are essentially two different right-and-wrong tests, and the significant differences between the two demonstrate that neither is required by due process.

There is also no agreement whether knowledge of right and wrong refers to those concepts in the abstract or whether it means that defendants must have known that their specific conduct was wrong. *See* Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 Va. L. Rev. 1199, 1207 (2000) (distinguishing "general" ignorance of the law from "specific" ignorance of the law). Many of the earlier references to distinguishing between good and evil or between right and wrong meant the concepts generally. *See* Walker, *Crime and Insanity in England* at 111; Glueck, *Mental Disorder and the Criminal Law* at 216; *People v. Schmidt*, 216 N.Y. 324, 331 (1915) (Cardozo, J.). For instance, in *Bellingham's Case*, Lord Mansfield stated that allowing a person to be excused just because he believed his actions were right would be a "pernicious" doctrine. 1 Collinson on Lunacy at 670-71. Instead, "[i]f such a person were capable, *in other respects*, of distinguishing right from wrong, there was no excuse for any act of atrocity which he might commit under this description of derangement." *Id*. at 672 (emphasis added). Under this test, a person who understands that murder is wrong generally would not be excused just because he believed a specific murder was morally justified.

M'Naghten shifted away from this approach, allowing a defendant to escape criminal liability when he can demonstrate "that he did not know he was doing what was wrong." 8 Eng. Rep. at 722. The judges acknowledged that the question had often been presented as knowledge of right and wrong "generally and in the abstract," but they suggested that it would be more accurately framed "with reference to the

party's knowledge of right and wrong in respect to the very act with which he is charged." *Id.* at 722-23. This was a significant change. In fact, then-Judge Warren Burger once described *M'Naghten* as abolishing the right-and-wrong test for this reason. 28 Fed. Probation at 4. To the extent Kahler is arguing that a defendant must have knowledge that his specific conduct was wrong, this test is not as historically grounded as Kahler would have the Court believe.

In addition, many States have narrowed the scope of the insanity defense by excluding defendants with certain mental diseases or defects. The Model Penal Code provides that "the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." Model Penal Code § 4.01(2). The federal government and some States require that the mental disease or defect be "severe." *See, e.g.*, 18 U.S.C. § 17(a); Ala. Code § 13A-3-1(a); Ind. Code Ann. § 35-41-3-6(b); Ohio Rev. Code Ann. § 2901.01(A)(14); Tenn. Code Ann. § 39-11-501(a). Other States have excluded specific conditions, such as personality disorders. *See* Or. Rev. Stat. § 161.295(1). The fact that States have restricted the right-and-wrong insanity test to only a certain subset of mentally ill offenders again demonstrates that this test is not recognized as fundamental.

As this Court recognized in *Clark*, "[h]istory shows no deference to *M'Naghten* that could elevate its formula to the level of fundamental principle, so as to limit the traditional recognition of a State's capacity to define crimes and defenses." 548 U.S. at 749. This is equally true of the second prong of *M'Naghten* as it is

of the entire test. And so, just as Arizona could eliminate the cognitive incapacity prong of *M'Naghten*, States are free to eliminate the knowledge of wrongness prong and to allow culpability to be established by proof of *mens rea*.

B. As this Court has previously recognized, the Due Process Clause does not mandate a particular insanity test.

This Court has repeatedly held that the Due Process Clause leaves States with substantial flexibility to determine the substance of their criminal law, and this flexibility is at its zenith with it comes to the question of insanity. As explained in *Leland v. Oregon*, 343 U.S. 790 (1952), the "choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility. This whole problem has evoked wide disagreement among those who have studied it." *Id.* at 801. The dissenters in *Leland* agreed on this point:

> At this stage of scientific knowledge it would be indefensible to impose upon the States, through the due process of law which they must accord before depriving a person of life or liberty, one test rather than another for determining criminal culpability, and thereby to displace a State's own choice of such a test . . . .

Id. at 803 (Frankfurter, J., dissenting).

The Court reiterated this point in *Powell v. Texas*, 392 U.S. 514 (1968):

> 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.

Id. at 535-36 (opinion of Marshall, J.); *see also id.* at 545-46 (Black, J., concurring) (explaining that "to impose constitutional and doctrinal rigidity" with regard to insanity "seems absurd in an area where our understanding is even today so incomplete").

And in *Clark*, after explaining that history shows no deference to the *M'Naghten test*, the Court held "that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice," particularly given the complex medical questions involved. 548 U.S. at 752-53 ("For medical definitions devised to justify treatment, like legal ones devised to excuse from conventional criminal responsibility, are subject to flux and disagreement.").

Thus, States have the "freedom to determine whether, and to what extent, mental illness should excuse criminal behavior." *Foucha v. Louisiana*, 504 U.S. 71, 88-89 (1992) (O'Connor, J., concurring) ("The Court does not indicate that States must make the insanity defense available."). Nothing in our history or tradition undermines this view.

In light of these cases, a leading treatise on criminal law declares that "state legislatures are seemingly not barred by the federal constitution from abolishing the insanity defense, as long as the defendant is entitled to a *mens rea* 'defense.'" Joshua Dressler, *Understanding Criminal Law*, 340 (2018) (8th ed.). This conclusion is buttressed by the fact that this Court has never held that the Constitution prohibits States from adopting strict liability crimes. *See, e.g.*, *United States v. Freed*, 401 U.S. 601, 607 (1971). Thus, "it would seem to follow that a state may take the less drastic approach of retaining the element of *mens rea*, while repealing the defense of insanity, as long as the prosecution is required to prove beyond a reasonable doubt that the defendant had the requisite mental state." Dressler, *Understanding Criminal Law* at 340.

The criminal responsibility of the mentally ill is subject to continuing debate by policymakers and scholars. "There being such fodder for reasonable debate about what the cognate legal and medical tests should be, due process imposes no single canonical formulation of legal insanity." *Clark*, 548 U.S. at 753.

Attempting to constitutionalize these matters would be a radical shift in this Court's jurisprudence. And it would draw this Court into a quagmire of difficult

questions, such as the meaning of "wrong," whether general awareness of right and wrong is sufficient (as opposed to knowledge of the wrongfulness of the specific conduct in question), and what specific mental diseases or defects trigger a right to the defense. This Court has wisely left such matters to the States.

C. Kansas has reasonably determined that individuals who voluntarily and intentionally commit a crime are blameworthy, even if they do not believe their actions are wrong.

Kahler argues that those who are morally blameless should be exempted from criminal liability, but that begs the question of who is morally blameless. That is a question the States should have freedom to address. *See Powell*, 392 U.S. at 545 (Black, J., concurring) ("The legislatures have always been allowed wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime.").

1. Kansas has reasonably determined that individuals who voluntarily and intentionally kill another human being are culpable, even if they do not recognize their actions are wrong. Of course, the extent of their culpability may still be relevant in determining the appropriate punishment. *See* Kan. Stat. Ann. § 21-6815(c)(1)(C); Kan. Stat. Ann. § 21-6625(a)(6).

The fact that someone does not understand that what they are doing is morally wrong does not render them blameless. After all, terrorists who kill in the name of religion may sincerely believe that their

conduct is morally justified or even morally required. But few Americans would consider someone like Osama bin Laden to be morally blameless. The same is true of individuals who murder abortion doctors, believing that their actions are morally justified because they are saving the lives of the unborn. *See, e.g.*, *State v. Roeder*, 336 P.3d 831, 838-39, 844-46 (Kan. 2014) (murder of Dr. George Tiller). There are many other scenarios—involving everyone from white supremacists to euthanasia doctors—where people commit crimes believing that their actions are morally justified. But they are still culpable.

Kahler will no doubt respond that his proposed rule only applies to those who do not know their actions are wrong *because of* mental illness, but this response is wholly unsatisfactory. First, it is not inconceivable that many individuals whose religious, philosophical, or racist beliefs are so strong that they believe murder is morally justified suffer from some degree of mental illness.

More fundamentally, it is not clear why mental illness should be treated differently than other factors that influence human behavior. The common argument seems to be that severe mental illness can deprive a person of free choice, but there are at least two problems with this argument. "First, it makes the assumption that whether or not someone is responsible for his acts is a yes/no question, when obviously it is on a continuum and poses a difficult question of linedrawing." Norval Morris, *Should the Insanity Defense Be Abolished: An Introduction to the Debate*, 1 J.L. & Health 113, 121 (1986); *see also* Morris, *Madness*

and the Criminal Law at 61 ("[I]n states of consciousness neither polar condition exists."). Kansas law requires a voluntary act as well as *mens rea*, so some degree of choice is required for criminal liability.

Second, this argument assumes "that defects in a person's ability to choose are to be given a larger exculpatory effect than all other pressures on human behavior. It assumes that the psychotic is more morally innocent than the person gravely sociologically deprived and pressed towards criminality. The validity of that assumption is questionable." Morris, 1 J.L. & Health at 121; *see also* Morris, *Madness and the Criminal Law* at 63 ("Social adversity is grossly more potent in its pressure toward criminality . . . than is any psychotic condition."). "[W]hile some people do seem to have more difficulty choosing the right behavior than others, determining who has the most difficulty is probably impossible," and even if it could be done "it is unlikely that serious mental illness or irrationality would provide the right dividing line." Slobogin, 86 Va. L. Rev. at 1238.

Even when it comes to mentally ill offenders, knowledge of wrongfulness is not recognized as necessary for moral blame. Otherwise psychopaths, who are often excluded from the insanity defense, would be considered morally blameless. *See* Christopher Slobogin, *A Defense of the Integrationist Test as a Replacement for the Special Defense of Insanity*, 42 Tex. Tech. L. Rev. 523, 525-26 (2009) ("[T]he paradigmatic example of an offender who cannot emotionally appreciate the wrongfulness of his act is the psychopath, who is incapable of empathy and

remorse."). Yet, "[o]utside of philosophy departments, virtually no one is willing to excuse these individuals, who occupy between 20-30% of the prison cells in this country and are often viewed as evil incarnate." *Id.*

The same is true even with respect to people suffering from psychosis. These people, "like people who are not mentally ill, often commit crimes out of anger, frustration, jealousy, and hate. They should not be excused simply because they have a particular diagnosis, a confused thought process, or 'uncorrectable' perceptions about the world." *Id.* at 536 ("John Hinckley, Ted Kaczynski, and Charles Manson all had schizophrenia and all were highly delusional at times, with fixed false beliefs about their situation. Yet none of these people should have been excused.").

Finally, Kahler and his amici cite several religious sources to argue that knowledge of good and evil is required for moral culpability. Pet. Br. at 12, 18-20. Of course, it is not the role of this Court to determine what is true in matters of religion. But to the extent those religious-based arguments are relevant, there is a well-founded theological basis to believe that those who do evil are morally blameworthy even when they do not personally recognize that their actions are evil. *See, e.g.*, Isaiah 5:20 ("Woe to those who call evil good and good evil . . . ."); Augustine, *On Free Will*, in *Augustine: Earlier Writings*, 202-03 (J.H.S. Burleigh ed., 2006) ("All that a man does wrongfully in ignorance, and all that he cannot do rightly though he wishes, are called sins because they have their origin in the first sin of the will when it was free."). While the theological debate is beyond the scope of this brief—and the role of

this Court—to resolve, suffice it to say that theological views on the moral culpability of those who do not recognize their actions are wrong are not as one-sided as Kahler suggests.

2. Just as knowledge that one's conduct is morally wrong is not required for culpability, neither is knowledge of its criminality. After all, it is a longstanding principle that knowledge of the law is not required for criminal culpability. *See*, *e.g.*, *McFadden v. United States*, 135 S. Ct. 2298, 2304 (2015). Society frequently punishes people who may not have known that their actions were criminal. Kansas has reasonably determined that there is no basis for creating an exception to this general principle for a certain subset of the mentally ill.

Indeed, the judges in *M'Naghten* contradicted themselves on this issue. They explained that a delusional person is nevertheless punishable "if he knew at the time of committing such crime he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land." 8 Eng. Rep. at 722. But in addressing how the jury was to be instructed, the judges insisted on the ambiguous term "wrong" because a term like "criminal" "might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that everyone must be taken conclusively to know it." *Id.* at 723.

Neither knowledge that conduct is morally wrong nor knowledge that it is criminal is necessary for criminal culpability.

3. In any event, the concern about moral blamelessness is certainly not present here. Twelve members of the jury, who were free to consider any mental health evidence or arguments that Kahler wished to present, concluded that Kahler should be sentenced to death for the four callous murders. They would not have reached that conclusion if Kahler were morally blameless.

II. Kansas's *Mens Rea* Approach to Insanity Does Not Violate the Eighth Amendment.

In his briefs before the Kansas Supreme Court, Kahler did not argue that Kansas's *mens rea* approach to insanity violates the Eighth Amendment. As a result, the Kansas Supreme Court did not address this issue. Thus, Kahler's Eighth Amendment claim is not properly before this Court. Br. in Opp. at 20-21. The argument lacks merit in any event.

A. Kahler's Eighth Amendment claim is not properly before this Court.

This Court has routinely refused to consider issues not raised or addressed below. In cases arising from state courts, this Court has expressed inconsistent views on whether this rule is jurisdictional or merely prudential. *See Yee v. City of Escondido, California*, 503 U.S. 519, 533 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-19 (1983). The better view is that this rule is jurisdictional. As Justice Story explained in *Crowell v. Randell*, 35 U.S. 368, 392 (1836), the rule is properly

characterized as jurisdictional based on the language of the 1789 Judiciary Act provision that is now codified, as amended, at 28 U.S.C. § 1257(a). As relevant here, this statute only gives this Court jurisdiction over state court judgments where a state law "is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States" or where a right is "specially set up or claimed" under federal law. If a federal issue is not "drawn into question" or "specially set up or claimed" before a state court of last resort, this Court has no jurisdiction to review a decision of that court under 28 U.S.C. § 1257(a).

Kahler's arguments that he preserved his Eighth Amendment claim are unpersuasive. Kahler's brief before the Kansas Supreme Court challenged Kansas's *mens rea* approach solely on due process grounds. *See* Brief of Appellant, *State v. Kahler*, 410 P.3d 105 (2018) (No. 106981), 2013 WL 3790736 at *41-47 (Issue IV). He did make a separate argument that the Eighth Amendment prohibits the death penalty for individuals who were severely mentally ill at the time of their crime, but that is different than the Eighth Amendment claim he is raising now. After oral argument, Kahler also filed a "Motion to Supplement Oral Argument" to clarify his Eighth Amendment claim, but even then his argument was limited to the constitutionality of the death penalty, not Kan. Stat. Ann. § 22-3220. Cert. Reply Add. 18-19. Kahler never argued that Kansas's *mens rea* approach to insanity violates the Eighth Amendment, nor did the Kansas Supreme Court understand him to be making such a

claim, as demonstrated by the fact that its opinion addressed only due process. J.A. 208, 242-45.

Because this Court is "a court of review, not of first view," *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018), it should refuse to consider this issue, regardless of whether the rule is jurisdictional or prudential.

B. Convicting those who voluntarily and intentionally kill others, even if they do not recognize their actions are wrong, is not cruel and unusual.

Kahler's Eighth Amendment claim also fails on the merits.

1. As an initial matter, the Eighth Amendment only applies to bar certain punishments; it does not constrain the substance of state criminal liability, including what affirmative defenses States must make available. The text of the Amendment itself demonstrates that it is concerned with "cruel and unusual *punishments*." (Emphasis added). This is consistent with the history of the provision. *See Harmelin v. Michigan*, 501 U.S. 957, 966-84 (1991) (opinion of Scalia, J.). Likewise, this Court's Eighth Amendment jurisprudence forbids "*modes or acts of punishment* that had been considered cruel and unusual at the time that the Bill of Rights was adopted," *Ford v. Wainwright*, 477 U.S. 399, 405 (1986) (emphasis added), or that are excessive in light of "evolving standards of decency," *Miller v. Alabama*, 567 U.S. 460, 470 (2012). Here, Kahler is not complaining that his particular punishment is unconstitutional; he

is arguing that the Eighth Amendment prevents his conviction in the first place.

Expanding the Eighth Amendment to address matters such as affirmative defenses to criminal liability would also draw this Court into a much more active supervision of States' ability to define crimes and defenses, which this Court has traditionally left to the States. *See Clark*, 548 U.S. at 749. For instance, a majority of States have enacted "stand-your-ground" laws that authorize the use of self-defense with no duty to retreat. This consensus is more robust than many of those this Court has relied on to restrict the application of the death penalty. So under Kahler's theory about "evolving standards of decency," the Eighth Amendment would mandate a stand-your-ground defense. But the Eighth Amendment no more mandates that result than it mandates a form of the right-and-wrong insanity defense.

Kahler relies on *Robinson v. California*, 370 U.S. 660 (1962), to argue that the Eighth Amendment extends beyond punishment. Pet. Br. at 29. *Robinson* is something of an anomaly in this Court's Eighth Amendment jurisprudence, but it has nothing to do with the issue here. All *Robinson* held is that it is unconstitutional to convict someone of a crime solely based on their condition, circumstance, or status, as opposed to their actions. 370 U.S. at 666. As the plurality explained in *Powell*, in refusing to extend *Robinson* to laws that prohibit public intoxication: "The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has

committed some act, has engaged in some behavior, . . . or perhaps in historical common law terms, has committed some *actus reus*." 392 U.S. at 533 (opinion of Marshall, J.). Here, Kahler's convictions were based on his conduct, not his status.

2. Even if the Eighth Amendment did apply here, the *mens rea* approach to insanity would not have been considered cruel and unusual at the time of the Founding. As discussed earlier, insanity was historically equated with a lack of *mens rea*. Indeed, the right-and-wrong test did not fully develop until the Nineteenth Century, and even then, it has continued to be the subject of much debate.

3. Nor is the *mens rea* approach inconsistent with any of the criminal law purposes that Kahler identifies: retribution, deterrence, incapacitation, and rehabilitation. These are not the only purposes of the criminal law. *See* Paul J. Larkin, Jr. & GianCarlo Canaparo, *Are Criminals Bad or Mad?—Premeditated Murder, Mental Illness, and* Kahler v. Kansas, 43 Harv. J. L & Pub. Pol'y (forthcoming 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3426522. But they suffice to show the constitutionality of Kansas's approach to insanity.

a. Kansas has reasonably determined that individuals who voluntarily and intentionally kill another human being are not entirely blameless, even if they do not recognize that their actions are wrong. *See supra* Part I.C. Criminal punishment therefore serves the purpose of retribution. Of course, an offender's mental illness may impact the *extent* of their culpability and is a valid consideration in sentencing.

But here, a jury considered Kahler's culpability and determined that he should be sentenced to death. That sentence has the potential to make Kahler "recognize at last the gravity of his crime and to allow the community as a whole, including the surviving family and friends of the victim[s], to affirm its own judgment" as to his culpability. *See Panetti v. Quarterman*, 551 U.S. 930, 958 (2007).

The cases Kahler cites on this score are simply not on point. They address individuals who are severely mentally ill *at the time of execution* and therefore may not understand why they are being put to death. Pet. Br. at 33 (citing *Panetti* and *Ford*, 477 U.S. at 409). But Kahler has made no argument that he is currently insane.

Kahler's intentional and premeditated murder of four human beings renders him worthy of punishment, whether or not he subjectively believed the killings were morally justified.

b. There is no proof that mentally ill individuals who voluntarily and intentionally commit crimes—particularly those who, like Kahler, kill with *premeditation*—are categorically incapable of being deterred. Just because a person believes that a crime would be morally justified does not mean that the threat of criminal punishment would never deter that person from committing it. Even when individuals believe a crime is morally *required*, the fact that they will be punished may still discourage them from acting.

For mentally ill individuals who have committed a crime and will someday reenter society, criminal

punishment may also deter them from committing additional crimes in the future. Even if they did not recognize that their previous crime was wrong at the time, punishment can help them come to understand in retrospect that what they did was wrong and enable them to avoid repeating the crime. Exonerating them would send the opposite message and undermine their ability to distinguish right from wrong in the future.

Criminal punishment may also deter other mentally ill individuals. The existence of an affirmative insanity defense may cause those with mental illness to believe that they can commit crimes without suffering punishment. *See* H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 43 (1968) ("It may very well be that, if the law contained no explicit exemptions from responsibility on the score of . . . insanity, many people who now take a chance in the hope that they will bring themselves, if discovered, within these exempting provisions would in fact be deterred."). This is a particular concern given the inaccurate but widely held view that insanity is a commonly successful defense.

Individuals who act knowingly and voluntarily have the potential to be deterred, and Kansas's *mens rea* approach serves this purpose.

c. While civil commitment may serve the purpose of incapacitation, criminal punishment is equally if not more capable of achieving this goal. Trying to predict someone's future dangerousness, especially someone who has been held in a secure environment and is now being considered for release into the community, can be exceedingly difficult. This is particularly true when it

comes to individuals who have been receiving treatment and medication while confined but may not continue when released. A fixed sentence guarantees that someone will not commit additional crimes in the community while incarcerated. This, after all, is the norm when it comes to criminal punishment: imprisonment is justified on incapacitation grounds based on the past crime without a continued assessment of ongoing dangerousness.

Kahler's suggestion that criminal punishment is too limited to serve the purpose of incapacitation is puzzling. If a mentally ill person being released from prison remains a danger, that person may be civilly committed at the time, just as under Kahler's preferred scheme. But when it comes to protecting the community, criminal punishment, combined with treatment during the sentence of imprisonment and the potential of post-release civil confinement when necessary, is more effective than pure civil commitment.

d. Nor is criminal punishment any less likely to serve the purpose of rehabilitation. Severely mentally ill individuals who are convicted can receive appropriate mental health treatment while incarcerated. In fact, Kansas statutes specifically provide that a trial court may commit a defendant convicted of a felony to a mental institution in lieu of imprisonment. Kan. Stat. Ann. § 22-3430. And individuals who are sent to prison but require mental health treatment may be transferred to the state mental hospital. *See* Kan. Stat. Ann. §§ 75-5209; 76-1305.

Thus, a criminal conviction does not preclude rehabilitation for those who (unlike Kahler) will one day be released. In fact, it may actually assist rehabilitation. Mental health professionals sometimes report that individuals found not guilty by reason of insanity "refuse to admit they have done anything wrongful; this refusal is said to inhibit treatment, which is usually premised on an acceptance of responsibility." Slobogin, 86 Va. L. Rev. at 1245. The criminal process may help some mentally ill individuals come to understand that their actions were wrong, even if they did not realize it at the time.

4. Nor do "evolving standards of decency" undermine the *mens rea* approach. The "Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." *Harris v. Alabama*, 513 U.S. 504, 510 (1995) (quoting *Spaziano v. Florida*, 468 U.S. 447, 464 (1984)). In fact, constitutionalizing a particular criminal law standard based on the majority approach would impede future evolution of the law. This should be of particular concern in the complex and ever developing area of insanity. As Justice Thurgood Marshall explained, "formulating a constitutional rule [for insanity] would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold." *Powell*, 392 U.S. at 536-37 (opinion of Marshall, J.).

There is reason to believe that the *mens rea* approach, despite its long history, is actually more "evolved" than the special, affirmative defense of

insanity. An affirmative insanity defense can create a stigma that mentally ill individuals are dangerous. "Some have plausibly argued that the insanity defense, by drawing a direct connection between mental illness on the one hand and crime and nonresponsibility on the other, bears much of the blame for these discriminatory attitudes." *See* Slobogin, 86 Va. L. Rev. at 1244. Perhaps for this reason, the Convention on the Rights of Persons with Disabilities calls for elimination of the special defense of insanity and for its replacement with "disability-neutral doctrines on the subjective element of the crime. . . , which take into consideration the situation of the individual defendant." U.N. Secretary-General & High Commissioner for Human Rights, Human Rights Council, *Thematic Study by the Office of United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities*, ¶ 47, U.N. Doc. A/HRC/10/48 (Jan. 26, 2009).

The *mens rea* approach treats mentally ill individuals as equal to other human beings—excusing them when they involuntarily commit a crime but punishing them when they act knowingly or intentionally. Like everyone else, their individual culpability is still relevant in sentencing, and they can receive treatment and rehabilitation while serving their sentence. This approach is not cruel and unusual.

III. Even if Some Version of the Right-and-Wrong Test Were Required, the Failure to Allow that Defense Here Was Harmless.

Even under the right-and-wrong test he claims is constitutionally required, Kahler is not insane, and so the failure to allow an insanity defense based on that test was harmless. *See* Br. in Opp. at 22-23 (arguing that certiorari should be denied for this reason). There is no possibility that different instructions to the jury would have led to a different outcome. *See Neder v. United States*, 527 U.S. 1, 9 (1999) ("We have often applied harmless-error analysis to cases involving improper instructions . . . .").

Kahler's own expert, Dr. Peterson, was unable to conclude that Kahler was insane at the time of the crime. His report states: "Diminished Capacity (extreme emotional disturbance), not NGRI [Not Guilty by Reason of Insanity], describes his actions." J.A. 94. Dr. Peterson *never* testified that Kahler could not appreciate the wrongfulness of his conduct. ROA Vol. 38, 42-78. Instead, his opinion only related to lack of control. J.A. 48-49 ("[H]e wasn't psychotic that I could tell, he wasn't hearing voices, but his capacity to manage his own behavior had been severely degraded so that he couldn't refrain from doing what he did."). At most, this evidence is relevant only to a volitional test of insanity, which Kahler acknowledges is not constitutionally required. *See* Pet. Br. at 37. *Nothing* in the record indicates that Kahler was unable to distinguish right from wrong.

There was absolutely no limitation on Kahler's ability to present mitigating evidence, including

evidence of insanity, at the penalty phase. The jury was even instructed that Kahler's capacity "to appreciate the criminality of [his] conduct or to conform [his] conduct to the requirements of law was substantially impaired" was a potential mitigating factor. J.A. 195. Yet the jury chose to sentence Kahler to death. This establishes the jury found Kahler morally culpable for his actions. There is no reason to believe that the jury would have reached a different verdict if Kahler had presented the insanity defense he now seeks.

If Kahler had any evidence to suggest that he lacked an appreciation of right and wrong, Kansas law required him to proffer that evidence to preserve his argument. Kan. Stat. Ann. § 60-405. He did not do so. This is a strong indication that Kahler has no evidence to support such a defense.

To the contrary, Kahler's conduct indicates that he was not insane. He drove an hour to the crime scene and parked his car near a neighbor's house so he could approach by foot, giving him the ability to observe and surprise his intended targets. After bursting into the house with a high-powered rifle, he chose to spare his son, with whom he had a close relationship. He chose to methodically hunt and kill his estranged wife, his daughters (who he believed had taken their mother's side in the divorce), and his estranged wife's grandmother. Every shot he took hit his intended target. He then fled the scene, evaded police, and hid the murder weapon.

Kahler's calculated decisions were not the acts of an insane man. He is a cold-blooded, callous murderer of

four innocent victims who a Kansas jury rightfully condemned.

CONCLUSION

The judgment of the Kansas Supreme Court should be affirmed.

Respectfully submitted,

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