

No. _____

In the Supreme Court of the United States

Brian Graco, *Petitioner*

v.

United States of America, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CLAUDE J. KELLY
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF LOUISIANA
CELIA C. RHOADS
COUNSEL OF RECORD

500 POYDRAS STREET, SUITE 318
HALE BOGGS FEDERAL BUILDING
NEW ORLEANS, LOUISIANA 70130
(504) 589-7930
CELIA_RHOADS@FD.ORG

QUESTION PRESENTED

Brian Graco suffers from severe and debilitating Post-traumatic Stress Disorder (PTSD) as a result of his 10 years of military service. After being charged with one count of receipt of child pornography, Mr. Graco gave notice of his intent to raise an insanity defense at trial based on his mental illness. An expert in PTSD among military veterans examined Mr. Graco extensively and reported to the court that it was “highly unlikely that an individual with Mr. Graco’s severe PTSD, combined with his trauma related alcohol abuse disorder, would possess the capacity to refrain from engaging in a behavior that would decrease his emotional pain” like drinking alcohol and viewing child pornography. The Government moved to exclude this evidence, arguing that it failed to support an insanity defense under federal law. The district court expressed concerns that federal law was out of step with modern understandings of mental illness. Ultimately, however, the court was forced to exclude and disregard this critical evidence of diminished culpability, hemmed in by the federal law’s antiquated and unduly narrow definition of insanity—a standard that has been criticized by courts and experts for decades.

The question presented is whether a criminal defendant is denied due process when he is prevented from raising an insanity defense based on an outdated federal insanity standard that fails to account for the realities of mental illness and its impact on criminal culpability.

TABLE OF CONTENTS

Question Presented	ii
Table of Authorities.....	iv
Judgment at Issue	1
Jurisdiction	1
Constitutional Provisions Involved	3
Statutory Provisions and Rules Involved.....	3
Statement of the Case	4
I. Mr. Graco is charged with receipt of child pornography and is diagnosed with severe PTSD caused by repetitive trauma experienced during his military service.	4
II. The district court grants the Government’s motion to exclude evidence related to Mr. Graco’s PTSD, and Mr. Graco pleads guilty.....	5
III. The Fifth Circuit affirms.	7
Reasons for Granting the Petition.....	8
I. The Victorian-era definition of insanity used in the federal system is inadequate and antiquated in light of modern understandings of mental illness and criminality.	8
II. Excluding reliable and relevant evidence of severe mental illness based on the federal system’s narrow and flawed definition of insanity violated Mr. Graco’s rights to both procedural and substantive due process.	10
A. <i>Procedural Due Process.</i>	10
III. This Court should revisit the federal insanity standard, because its continued use undermines the integrity of the criminal justice system and harms the most vulnerable criminal defendants.	13
Conclusion	15

TABLE OF AUTHORITIES

Cases

<i>California v. Trombetta</i> , 467 U.S. 479 (1984).....	10
<i>Clark v. Arizona</i> , 548 U.S. 735 (2006).....	12
<i>Crane v. Kentucky</i> , 476 U.S. 683 (1986).....	10, 11
<i>Durham v. United States</i> , 214 F.2d 862 (D.C. Cir. 1954).....	8, 12
<i>Holmes v. South Carolina</i> , 547 U.S. 319 (2006)	10
<i>Montana v. Egelhoff</i> , 518 U.S. 37 (1996)	11
<i>Patterson v. New York</i> , 432 U.S. 197 (1977)	11, 13
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958)	13
<i>United States v. Currens</i> , 290 F.2d 751 (3d Cir. 1961).....	8
<i>United States v. Eff</i> , 524 F.3d 712 (5th Cir. 2008)	6
<i>United States v. Freeman</i> , 357 F.2d 606 (2d Cir. 1966)	8
<i>United States v. Graco</i> , 699 F. App'x. 403 (5th Cir. 2017)	1, 7
<i>Washington v. Texas</i> , 388 U.S. 14 (1967).....	11
<i>Webb v. Texas</i> , 409 U.S. 95 (1972).....	11

Statutes

18 U.S.C. § 17.....	3, 6, 7, 8
18 U.S.C. § 2252.....	4
28 U.S.C. § 1254.....	2

Other Authorities

Am. Psychiatric Ass’n, Position Statement on the Insanity Defense (2014).....	9
Edward de Grazia, <i>The Distinction of Being Mad</i> , 22 U. Chi. L. Rev. 339 (1955)	14
Ira Mickenberg, <i>A Pleasant Surprise: The Guilty but Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense</i> , 55 U. Cin. L. Rev. 943 (1987)	12
Mental Health America, Position Statement 57: In Support of the Insanity Defense (2010).....	9

IN THE
SUPREME COURT OF THE UNITED STATES

BRIAN GRACO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Brian Graco respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

JUDGMENT AT ISSUE

On October 26, 2017, a panel of the Fifth Circuit Court of Appeals entered an unpublished opinion affirming the judgment of the United States District Court for the Eastern District of Louisiana. *United States v. Graco*, 699 F. App'x. 403 (5th Cir. 2017). A copy is attached to this petition as an appendix. App., *infra*, 1a.

JURISDICTION

The opinion and judgment of the Fifth Circuit Court of Appeals were entered on October 26, 2017. No petition for rehearing was filed. This petition is filed within

90 days after entry of judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

No person shall be . . . deprived of life, liberty or property, without due process of law

STATUTORY PROVISIONS AND RULES INVOLVED

18 U.S.C. § 17 provides as follows:

(a) Affirmative defense.—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of proof.—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

STATEMENT OF THE CASE

I. Mr. Graco is charged with receipt of child pornography and is diagnosed with severe PTSD caused by repetitive trauma experienced during his military service.

In 2014, Mr. Graco was charged with one count of receipt of child pornography, in violation of 18 U.S.C. §§ 2252(a)(2) and 2252(b)(1). Mr. Graco provided timely notice that he intended to raise an insanity defense at trial and that his defense would be supported by expert testimony from Dr. Frederic J. Sautter. Dr. Sautter examined Mr. Graco on four occasions and produced a report that was filed with the district court. In turn, the Government sought, and received, permission to have Mr. Graco evaluated by its own expert, who also produced a report.

Dr. Sautter's extensive analysis outlined his clinical impression that Mr. Graco suffered from severe PTSD and depression stemming from his personal history and traumatic events during his service with the United States Coast Guard. The report recounted that, during his service, Mr. Graco was exposed to high levels of stress and trauma, as he routinely watched others experience great harm and was frequently in extreme danger himself. Dr. Sautter observed that the high levels of traumatic stress Mr. Graco experienced "had a dramatic pervasively damaging psychological impact on" him. He explained that the events met the American Psychiatric Association's definition of "traumatic stress," which has been shown to cause "enduring behavioral and biological changes in people who have been exposed to traumatic events." Specifically, Dr. Sautter noted that multiple and repetitive trauma, like that experienced by Mr. Graco, can cause "severe PTSD and dramatic changes in

emotional and behavioral functioning.” Moreover, due to Mr. Graco’s family history and events he experienced during childhood, Dr. Sautter concluded that he “entered adulthood with a pronounced vulnerability to traumatic stress and that there was a very high probability that he would develop PTSD if he was exposed to traumatic events.”

Dr. Sautter’s report also specifically outlined how Mr. Graco’s severe PTSD contributed to his criminal conduct—explaining that during episodes of high PTSD anxiety, Mr. Graco’s ability to control his self-destructive addictions to alcohol and pornography were greatly diminished. Dr. Sautter described Mr. Graco’s interest in pornography as an “addiction” that he developed sometime after his tenure with the Coast Guard began and after he began suffering from PTSD. The report concluded: “It is highly unlikely that an individual with Mr. Graco’s severe PTSD, combined with his trauma related alcohol abuse disorder, would possess the capacity to refrain from engaging in a behavior that would decrease his emotional pain [like drinking alcohol and viewing child pornography.]”

The Government’s expert disagreed with the PTSD assessment. In his opinion, some of Mr. Graco’s statements were inconsistent with that diagnosis, and he believed Mr. Graco was not truthful with him about past trauma.

II. The district court grants the Government’s motion to exclude evidence related to Mr. Graco’s PTSD, and Mr. Graco pleads guilty.

The Government promptly moved *in limine* to bar evidence related to Mr. Graco’s PTSD, challenging both the medical conclusions reached by Dr. Sautter and the relevance of those conclusions because the diagnosis did not reach the federal

insanity threshold. The Government argued that, even assuming that all of Dr. Sautter's finding were correct, they were insufficient to support an insanity defense under 18 U.S.C. § 17. Mr. Graco filed a written response arguing that, if used in this manner to exclude evidence of his PTSD, the definition of insanity in § 17 violated due process and the Eighth Amendment.

In a written order, the district court granted the Government's motion and excluded any evidence of Mr. Graco's PTSD. The court "recognized and appreciated that [Mr. Graco's urged] approach to legal insanity (rather than the Federal/McNaughten approach) is likely more consistent with, and perhaps has developed as a result of, innovations in our nation's understanding of psychiatry and its relationship with criminality." However, the court determined that its hands were tied by federal law and Fifth Circuit precedent interpreting it. Without resolving any factual or medical disputes, the district court concurred with the Government's assessment that the Fifth Circuit's decision in *United States v. Eff*, 524 F.3d 712 (5th Cir. 2008), controlled and precluded admission of Dr. Sautter's findings. The court noted that, under *Eff*, evidence related to a defendant's mental disease or defect should only go before a jury if it is sufficient to warrant a jury instruction on insanity. The court concluded:

Dr. Sautter's conclusion that Graco suffers from diminished capacity is inadequate to support an insanity defense. At best, Dr. Sautter's report shows that Graco's PTSD made it difficult for him to control his impulses, not that it rendered him completely unable to appreciate the wrongfulness of his actions and such "lack of volitional control" cannot be the foundation for insanity defense.

Accordingly, the district court ordered the PTSD evidence excluded.

In the wake of this ruling, Mr. Graco pleaded guilty. He signed a written plea agreement in which he specifically reserved his right to appeal the district court's *in limine* ruling, even while generally waiving his appellate rights. The district court sentenced him to 97 months' imprisonment—the bottom of his Sentencing Guidelines range.

III. The Fifth Circuit affirms.

Mr. Graco timely appealed. In his brief, Mr. Graco acknowledged that the district court was hemmed in by federal law—as well as Fifth Circuit precedent interpreting it—but he urged that the definition of legal insanity employed in the federal system is overly narrow and arcane and that the district court's order excluding his mental health evidence violated both procedural and substantive due process. Procedurally, Mr. Graco argued, the order unduly burdened his ability to defend against the charges brought against him. Substantively, he urged, the functioning of the federal insanity definition in his case effectively criminalized conduct in a manner that violated Mr. Graco's fundamental rights. The Government filed a Letter of Non-Participation indicating that it would not file a brief in response.

In an unpublished opinion, the Fifth Circuit affirmed the district court's judgment, acknowledging that the district court was bound by § 17's existing definition of insanity and caselaw interpreting that definition. *United States v. Graco*, 699 F. App'x. 403, 404 (5th Cir. 2017).

REASONS FOR GRANTING THE PETITION

I. The Victorian-era definition of insanity used in the federal system is inadequate and antiquated in light of modern understandings of mental illness and criminality.

Under federal law, a defendant is not criminally responsible when, “as a result of a severe mental disease or defect, [the defendant] was unable to appreciate the nature and quality or the wrongfulness of [the defendant’s] acts.” 18 U.S.C. § 17. This standard codifies a modified (and narrowed) version of the Victorian-era M’Naghten Rule for assessing the criminal defense of insanity—a standard that has been criticized by experts for decades and is widely recognized as wholly out of step with the realities of mental illness. *See, e.g., United States v. Freeman*, 357 F.2d 606, 615–25 (2d Cir. 1966) (engaging in a critique of the rule’s failure to account for the realities of mental illness and a lengthy account of the peculiar history of the M’Naughten rule—a retrograde result of direct pressure from Queen Victoria after a man considered insane under the prevailing psychology of the day, Daniel M’Naghten, was acquitted by reason of insanity for the assassination of the Prime Minister’s secretary); *United States v. Currens*, 290 F.2d 751, 763–69 (3d Cir. 1961) (describing the M’Naghten Rule as “unworkable,” “a sham,” and “absurd[]”); *Durham v. United States*, 214 F.2d 862, 874 (D.C. Cir. 1954), *abrogated by United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (“We find that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient amount of physic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances.”).

Mental health experts have long urged common sense changes to the insanity standard that would actually measure culpability and bring federal law in line with basic understandings of human psychology. For example, Mental Health America, the oldest mental health advocacy and education organization in the United States, advocates for an insanity defense that would “exculpate both those who are unable to understand that their act is wrong, *as well as those who are unable, due to mental disability, to control their actions.*” Mental Health America, Position Statement 57: In Support of the Insanity Defense (2010) (emphasis added). This position is in line with Section 4.01 of the Model Penal Code, promulgated by the American Law Institute, which provides an insanity defense that is more inclusive than the federal standard. The American Psychiatric Association has similarly urged that the insanity standard must be “broad enough to allow meaningful consideration of the impact of serious mental disorders on individual culpability.” Am. Psychiatric Ass’n, Position Statement on the Insanity Defense (2014).

Despite the sustained criticism—and mammoth revolutions in society’s understanding of psychology, neurobiology, and their relationship to legal culpability—the federal law’s Victorian-era standard for assessing a defendant’s mental state persists. The court below recognized the antiquated nature of the rule, but nevertheless was constrained to apply it—and, as a result, was forced to exclude critical evidence of Mr. Graco’s mental illness that directly spoke to his culpability.

II. Excluding reliable and relevant evidence of severe mental illness based on the federal system’s narrow and flawed definition of insanity violated Mr. Graco’s rights to both procedural and substantive due process.

A. Procedural Due Process.

Fundamental to our system of justice is the right of a criminal defendant to defend himself. The due process clause requires that “criminal prosecutions must comport with prevailing notions of fundamental fairness,” meaning criminal defendants must “be afforded a meaningful opportunity to present a complete defense.” *California v. Trombetta*, 467 U.S. 479, 485 (1984); *see also Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986))). In other words, meaningful adversarial testing of the Government’s case requires that the defendant, within limits, be permitted to fight back against accusers.

Faced with deprivation of liberty—and contending with the full weight of the government as adversary—courts have jealously guarded these fundamental rights to self-defense. For example, this Court has held that the “right is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.” *Homes*, 547 U.S. at 324 (internal citations and quotation marks omitted). Moreover, the “wholesale”

exclusion of certain categories of defense evidence without justification is unconstitutional. *See, e.g., Crane*, 476 U.S. at 691.

Here, Mr. Graco’s scientific and clinical evidence demonstrating the impact that his mental illness had on his criminal impulses was excluded. Thus, Federal law was applied to preclude Mr. Graco from defending himself—through the introduction of powerful and reliable evidence relevant to his culpability. Doing so based on an artificially narrow and outdated definition of insanity denied Mr. Graco “the right to present a defense, the right to present [his] version of the facts . . . to the jury so it may decide where the truth lies[, which] is a fundamental element of due process of law.” *Webb v. Texas*, 409 U.S. 95, 98 (1972) (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)).

B. Substantive Due Process.

Beyond his procedural due process right to present evidence of his mental illness, the district court’s ruling also abridged Mr. Graco’s entitlement to substantive due process. Substantive due process analysis governs how the government may define the substantive bases for criminal punishment. Courts must consider whether a criminal statute or its interpretation “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (quoting *Patterson v. New York*, 432 U.S. 197, 201–02 (1977)). The “primary guide in determining whether the principle in question is fundamental is, of course, historical practice.” *Id.*

This Court previously has reserved the question of whether the “Constitution mandates an insanity defense.” *Clark v. Arizona*, 548 U.S. 735, 752 n.20 (2006). However, centuries of jurisprudence reveal that the defense is deeply rooted in our nation’s legal history and fundamental to our notions of fairness. No doubt, there is a long and uninterrupted tradition in our criminal justice system of precluding serious criminal punishment of defendants who, due to mental disorder or defect, lack the necessary culpability for their conduct. *See, e.g.*, 4 William Blackstone Commentaries 20–21 (noting that among those not “capable of committing crimes . . . or, which is all one, who are exempted from the censures of the law” are those who have a certain “want or defect of will,” which is “the only thing that renders human actions either praiseworthy or culpable”); *Durham*, 214 F.2d at 876 (“The legal and moral traditions of the western world . . . require that where [criminal] acts stem from and are the product of a mental disease or defect . . . moral blame shall not attach, and hence there will not be criminal responsibility.”); Ira Mickenberg, *A Pleasant Surprise: The Guilty but Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. Cin. L. Rev. 943, 957 (1987) (“[S]cholars uniformly agree that predicating criminal responsibility on the defendant's exercise of free will and choice to do evil is deeply ingrained in the legal tradition.”). Indeed, “the principle of holding the insane criminally blameless can actually be traced to ancient Judaic, Christian, and Roman law, and appears in various forms throughout more than a millennium of English jurisprudence.” Mickenberg, 55 U. Cin. L. Rev. at 954.

This deeply-entrenched legal tradition makes clear that mental health is a fundamental component of legal culpability. An insanity standard that fails to reflect the realities of mental illness fails to shield from unjust punishment those who are insufficiently culpable, and thus “offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Patterson*, 432 U.S. at 202 (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)). Recent jurisprudence, however, turns this message on its head. Instead of heeding the lesson of our legal tradition dictating that mental health evidence is critical to culpability determinations—and integrating the evolving understanding of mental health into that calculus—it uses obsolete formulations to ossify the status quo against modern developments.

This bizarre and antiquated approach does a disservice to the tradition that birthed it and fails to achieve the insanity defense’s constitutionally-mandated purposes. An insanity standard so out of step with the realities of mental illness fails to offer meaningful protection and thus deprives defendants like Mr. Graco of fundamental rights guaranteed by substantive due process.

III. This Court should revisit the federal insanity standard, because its continued use undermines the integrity of the criminal justice system and harms the most vulnerable criminal defendants.

“The criminal law, it has been said, is an expression of the moral sense of the community[,]” and “[t]he fact that the law has, for centuries, regarded certain wrongdoers as improper subjects for punishment is a testament to the extent to which that moral sense has developed.” *Freeman*, 357 F.2d at 615. “Thus, society has recognized

over the years that none of the three asserted purposes of the criminal law—rehabilitation, deterrence and retribution—is satisfied when the truly irresponsible, those who lack substantial capacity to control their actions, are punished.” *Id.* Indeed, at the heart of the insanity defense is a recognition of the injustice of punishing those whose mental functions were substantially impaired at the time of their actions. Accordingly, as one legal commentator observed decades ago: “Th[is] issue is a moral one. If the perpetrator of a crime was insane, his punishment would be unjust.” Edward de Grazia, *The Distinction of Being Mad*, 22 U. Chi. L. Rev. 339, 348 (1955).

A federal definition of insanity that fails to capture modern understandings of mental illness undermines the legitimacy of this nation’s justice system—it imposes unjust and illegitimate punishment on our most vulnerable defendants. And excluding testimony of mental health experts based on federal law’s unduly narrow and inaccurate construction of insanity prevents mentally ill defendants from providing fact-finders with reliable information about their true culpability.

Mr. Graco’s case illustrates this point. An expert in PTSD among military veterans determined that that—due to Mr. Graco’s severe mental illness—it was “highly unlikely” that he “possess[ed] the capacity to refrain from engaging in a behavior that would decrease his emotional pain,” including the criminal actions for which he was charged. This critical information casts grave doubts on Mr. Graco’s culpability for his conduct. However, this evidence was never made available to a fact-finder. The district court was forced instead to excluded and disregard it.

A reconsideration of the federal insanity standard is long overdue, and Mr. Graco's case presents an ideal vehicle.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted January 23, 2018,

/s/ Celia Rhoads

CLAUDE J. KELLY

CELIA C. RHOADS

Counsel of Record

Federal Public Defender

Eastern District of Louisiana