No. 18-6135

In the
Supreme Court of the United States

JAMES K. KAHLER,
Petitioner,

v.

STATE OF KANSAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF OF THE IDAHO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE UTAH ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE SALT LAKE LEGAL DEFENDER ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Established in 1989, the Idaho Association of Criminal Defense Lawyers ("IACDL") is a non-profit, voluntary organization of attorneys. Currently, IACDL has over 400 lawyer members, all of whom practice criminal defense. IACDL's membership includes both public defenders and private counsel, attorneys who work in both state and federal court, and attorneys who focus on trials, appeals, postconviction, and federal habeas proceedings.

The Montana Association of Criminal Defense Lawyers ("MTACDL") is an affiliate of the National Association of Criminal Defense Lawyers, a nationwide organization of 10,000 dedicated criminal defense attorneys. MTACDL was formed in 1997 to ensure justice and due process for persons accused of crimes; to foster the integrity, independence and expertise of those who represent persons accused of crimes; and to promote the proper and fair administration of justice.

The Utah Association of Criminal Defense Lawyers ("UACDL") is a professional non-profit organization that represents over 400 public defenders and private attorneys throughout the State who actively advocate for those who have been accused of a crime. UACDL works to ensure fairness

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[1] No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief; and no person other than *amici*, their members, and their counsel made such a contribution. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

in our criminal justice system by providing training and resources to attorneys as well as representation in policymaking and lawmaking.

The Salt Lake Legal Defenders Association ("SLLDA") was established in December 1964 as a non-profit law firm responsible for providing legal representation to eligible persons charged as adults with criminal offenses in Salt Lake City and Salt Lake County, Utah. Court-appointed lawyers from SLLDA represent a large number of clients who suffer from severe mental illnesses, many of whom would qualify for an insanity defense if one were available in the state. Lawyers from SLLDA represented Tomas Herrera in litigation challenging the constitutionality of Utah's legislative elimination of the insanity defense. *See State v. Herrera*, 993 P.2d 854 (Utah 1999); *State v. Herrera*, 815 P.2d 359 (Utah 1995).

IACDL, MTACDL, UACDL and SLLDA have substantial expertise in the practical circumstances on the ground in Idaho, Montana, and Utah regarding how defense attorneys, their clients, and courts operate. They consequently have insight into how the abolition of the insanity defense has affected the functioning of the criminal justice system in three of the few states in the country that have taken that approach.

SUMMARY OF ARGUMENT

Only four states have no insanity defense on their books. *See Clark v. Arizona*, 548 U.S. 735, 752 n.20 (2006). In the merits briefing, the Court will hear how such a regime works in one of the states, namely, Kansas. This amicus brief provides a report from the other three states: Idaho, Montana, and Utah. In

overview, the consequences of the abolition in those jurisdictions have been overwhelmingly negative.

As illustrated below, in both Idaho and Montana, the overall effect of the change has been to cause large and unnecessary expenditures of taxpayer money, less effective mental-health treatment for people in dire need of it, and tremendous administrative burdens and complications. Thus, a holding that it is unconstitutional to eliminate the insanity defense in the instant case will not do any harm to the few states that have done so. Quite to the contrary, such a ruling would impel these states to adopt more sensible, efficient approaches for dealing with insane defendants.

This brief will first discuss the impact the removal of the insanity defense has had in Idaho by examining one representative capital case. Then, the brief will address how the same removal has influenced the criminal justice system in Montana, with a focus on its impact in lower-level criminal matters.

Together, the two sections will show that in cases both major and minor, the abrogation of the insanity defense has been bad for taxpayers, bad for the criminal justice system, and bad for the mentally ill. Declaring such an abrogation unconstitutional would only benefit the people of the few outlier states that have abandoned the insanity defense.

ARGUMENT

I. IDAHO

David Leslie Card's case powerfully captures how the elimination of the insanity defense leads to lengthy, expensive, and unnecessary litigation.

The murders for which Mr. Card was convicted took place almost exactly thirty-one years ago, in 1988. *See State v. Card*, 825 P.2d 1081, 1083 (Idaho 1991). Mr. Card was initially deemed incompetent to stand trial because he was "found to be suffering from a type of paranoid schizophrenia," but his prosecution was allowed to move forward after he received medication. *Id.* at 1083–84. At trial, Mr. Card argued "that he did not have the mental capacity to form the specific intent necessary to commit first degree murder." *Id.* at 1084. "Notwithstanding this testimony, the jury found Card guilty of two counts of first-degree murder" and he was sentenced to death. *Id.* On appeal, Mr. Card challenged Idaho's repeal of the insanity defense, but lost. *See id.* at 1084–86. For the next eighteen years, Mr. Card's case was in nearly continuous litigation in state and federal court.

That litigation consumed an enormous amount of taxpayer-funded resources. For example, thirteen different judges were involved in the case, in the sense that they wrote one or more substantive orders. And that number does not even include the numerous appellate judges who participated in the case but did not author an opinion of their own, such as the Justices on this Court who took part in Mr. Card's two certiorari proceedings, one of which led to a remand for further proceedings. *See Card v. Idaho*, 552 U.S. 1227 (2008); *Card v. Idaho*, 506 U.S. 915 (1992).

The many judges who worked on the case collectively reviewed thousands of pages of briefing put together by the fourteen different attorneys who handled the matter for either the State or Mr. Card at one time or another. Aside from the thousands of hours these lawyers invested in the case, they also incurred substantial additional expenses. For

instance, the publicly available portion of Mr. Card's federal habeas docket reflects that the parties hired at least six separate experts, who they employed intermittently over a period of roughly nine years. *See Card v. Ramirez*, D. Idaho, No. 1:93-cv-030 (hereinafter "Card Dist. Ct."), Dkts. 94, 100, 166, 203, 283, 284, 285, 296, 303, 304, 321-1.

Setting aside Mr. Card's multiple state post-conviction actions, his federal habeas case alone was almost constantly active for a period of roughly thirteen years. *See id.*, Dkts. 1, 324. By the time the case was closed, the docket comprised 364 entries, many of which consisted of lengthy and complex pleadings. In 2005 and 2006, the district court issued orders allowing some discovery and granting an evidentiary hearing. *See Card v. Arave*, No. 1:93-cv-030, 2005 WL 3359725 (D. Idaho Dec. 9, 2005); *Card v. Arave*, No. 1:93-cv-030, 2006 WL 1806193 (D. Idaho June 29, 2006). These orders occasioned yet more litigation, of an increasingly demanding variety. Among other things, there was extensive discovery, including multiple depositions, *see* Card Dist. Ct., Dkts. 267–69, 273, 278, expert examinations of Mr. Card, *see id.*, Dkts. 290, 300, 305, 306, issues regarding the scope of document production, *see id.*, Dkts. 258, 260, 261, 163, and interrogatories, *see id.*, Dkts. 295, 310.

After years of protracted litigation, and on the eve of the scheduled evidentiary hearing, Mr. Card's habeas case was stayed due to his incompetence to proceed. *See id.*, Dkt. 324. It is apparent from the habeas docket that Mr. Card's attorneys continued their expansive investigation all the way up until the moment the hearing was canceled. *See id.*, Dkt. 321-1 at 5–6. And it is important to note that the stay

was only a matter of happenstance. Under the more recent precedent of this Court, a federal habeas case might well continue despite the incompetence of the petitioner. *See Ryan v. Gonzales*, 568 U.S. 57, 77 (2013) ("Where there is no reasonable hope of competence, a stay is inappropriate and merely frustrates the State's attempts to defend its presumptively valid judgment."). Thus, it is easy to imagine a world in which Mr. Card's case proceeded through an even longer period of steady litigation. *See, e.g.*, *Williams v. Filson*, 908 F.3d 546, 553 (9th Cir. 2018) (remanding for an evidentiary hearing on a sentencing issue where the petitioner was a Nevada death-row inmate whose crime was committed thirty-six years earlier); *Kirkpatrick v. Chappell*, 872 F.3d 1047, 1050 (9th Cir. 2017) (remanding for further proceedings in a capital case where the petitioner's crime was committed thirty-four years earlier); *Hardwick v. Sec'y, Fla. Dep't of Corrs.*, 803 F.3d 541, 545–46 (11th Cir. 2015) (granting sentencing relief to a Florida death-row inmate whose crime was committed thirty-one years earlier).

Despite the stay for incompetence, the litigation burden keeps growing in Mr. Card's own case. Although he has been given a new sentence of life without the possibility of parole, Card Dist. Ct., Dkt. 364-1, Mr. Card is now challenging that punishment in a direct appeal, *see id.*, Dkt. 364 at 2. Consequently, a set of attorneys and judges will have to devote yet more time and energy to the case. And in federal habeas, Mr. Card's guilt-phase claims are only stayed, not adjudicated, and they will be reopened if he regains competency. *See id.*, Dkt. 362. In other words, after thirty-one years of litigation, there is still no resolution. *Cf.* Alison Gene-Smith, *In*

Idaho, Those Declared Incompetent to Stand Trial End up in Limbo, Jan. 27, 2013, MagicValley.com, available at https://magicvalley.com/news/local/in-idaho-those-declared-incompetent-to-stand-trial-end-up/article_dff9facc-9844-5f92-b448-02e6501eef49.html (examining the uncertainty created by the absence of an insanity defense in Idaho and paraphrasing a judicial as considering it problematic because of "the difference of being judged to be not guilty, and a case being left open-ended").

To summarize, the Card case illustrates the massive amount of time, effort, and money that can be spent when an individual with severe mental illness is barred from pleading insanity as a defense to his crime. Significantly, that considerable quantity of time, effort, and money comes directly from taxpayer-funded pools. All of the judges, attorneys, and experts on Mr. Card's case have been paid out of the public fisc. And the judges and attorneys were as a result distracted from the many other pressing tasks on their plates. *See* Comment, *Idaho's Abolition of the Insanity Defense—an Ineffective, Costly, and Unconstitutional Eradication*, 51 Idaho L. Rev. 575, 601–03 (2015) (discussing how the insanity defense would spare Idaho taxpayers millions of dollars spent in litigating capital cases involving defendants suffering from severe mental illness).

If Idaho had permitted Mr. Card to enter a plea of insanity, this tremendously wasteful exercise could have been avoided. In that event, he likely would have been adjudged not guilty by reason of insanity and civilly committed. Then, mental-health experts would have been able to provide him the treatment he needed and to ensure that he remained confined until he posed no threat to the public. *See Jones v. United*

States, 463 U.S. 354, 370 (1983) (permitting the government to "confine" a defendant who is not guilty by reason of insanity "to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society," as the vast majority of states do).

It is also worth observing that Mr. Card's habeas docket indicates that he did not take medication to treat his mental illness for many years. *See* Card Dist. Ct. Dkt. 359 at 6. The prospect of medicating an individual who is actively challenging the charges against him, at either trial or in collateral proceedings, raises a host of ethical concerns. While drugs might alleviate the sickness, and are consequently in the accused's best interest in that regard, they also could restore his competence and therefore subject him to a criminal sentence and a more punitive environment. That places everyone involved in a difficult position, from the defendant himself to his attorneys to counsel for the State to correctional personnel. And the difficulty is greatly increased in capital cases, where successful treatment may allow an execution to go forward. *See generally* Note, *The Ethical Dilemma of Involuntary Medication in Death Penalty Cases*, 15 Geo. J. Legal Ethics 795 (2001–02).[2] By contrast, when a defendant is found not guilty by reason of insanity and civilly committed,

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[2] The four states that have abolished the insanity defense, *see Clark*, 548 U.S. at 752 n.20, all have the death penalty and none of them have declared moratoria against executions, *see* Death Penalty Information Center, States With and Without the Death Penalty, available at https://deathpenaltyinfo.org/states-and-without-death-penalty.

he can receive the treatment he needs without anyone having to confront any such vexing moral questions.

Instead of recognizing the necessity of that tool and taking the manageable and commonsense approach adopted by nearly every one of its sister states, Idaho decided to repeal its insanity defense and the tab of thirty-one straight years of litigation in Mr. Card's case stays open, along with the uncertainty surrounding a criminal case that has to this day never been disposed of.

II. MONTANA

The Montana legislature has made a "conscious decision to hold individuals who act with a proven criminal state of mind accountable for their acts, regardless of motivation or mental condition." *State v. Cowan*, 861 P.2d 884, 889 (Mont. 1993) (quoting *State v. Korell*, 690 P.2d 992, 1002 (Mont. 1984)). As a result, insanity is not a defense. Mont. Code Ann. §§ 46-14-102 & 46-14-311 (2019); *Clark*, 548 U.S. at 751 & n.20. Montana punishes the mentally ill as criminals so long as their conduct satisfies the bare elements of a criminal offense. Convictions stand even if the operative *mens rea* is the product of delusional beliefs. *See, e.g.*, *State v. Meckler*, 190 P.3d 1104, 1107 (Mont. 2008).

Because insanity is not a defense, criminal cases often involve persons whose misconduct evidences illness rather than criminality. The monetary cost of this reality for society is incredible, but it pales in comparison to the emotional costs borne by the mentally ill who are warehoused rather than treated. In the end, abolition of the insanity defense acts as a disincentive to openly address serious mental illness

that frequently manifests itself in Montana's criminal justice system.

A. The History Of Montana's Insanity Defense.

Throughout much of its history, Montana recognized that persons suffering from serious mental illness or insanity were not criminally responsible for their conduct. "Insane persons" were considered incapable of committing crimes from the earliest territorial days until 1967, when a specific insanity standard was adopted. *See* Secs. 2, 3, Chap. 1, Criminal Practice Acts, Resolutions and Memorials of the Territory of Montana, Passed by the First Legislative Assembly (1866); Penal Code, Part I, § 30 (1895); Sec. 94-201 (R.C.M. 1947). Comments to the 1895 code explained that the word "insanity" "in modern times, has been used to designate all mental impairments and deficiencies[.]" The new standard, enacted as § 95-501(a), R.C.M. (1947), provided that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he is unable either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Another new statute provided that evidence of mental disease or defect was admissible to prove that the defendant did nor did not have a state of mind required by the offense. Sec. 95-502, R.C.M. 1947.

The Montana legislature abolished the insanity defense in 1979. As a result, two concepts embraced by the repealed insanity defense—the inability to appreciate the criminality of one's conduct or to conform conduct to the requirements of law—were relegated to sentencing considerations. *State v.*

Watson, 686 P.2d 879, 883 (Mont. 1984). In *Korell*, the Montana Supreme Court concluded that neither the Due Process Clause nor the Eighth Amendment was violated by the 1979 statutory amendments. 690 P.2d at 1000 & 1002. For the past forty years the mentally ill have been criminally punished in Montana even when they lack any recognized moral culpability.

B. Montana Has Explicitly Condoned The Abolition Of The Insanity Defense.

The Montana Supreme Court reads *Leland v. Oregon*, 343 U.S. 790 (1952), to permit the complete abolition of the insanity defense under the Due Process Clause and the Eighth Amendment. *See, e.g.*, *Cowan*, 861 P.2d at 888–89. *Cowan* was not unanimous. *Id.* at 889 (Trieweiler, J. dissenting) ("While that Court did hold in that case that the defendant was not constitutionally entitled to a specific form of the insanity defense, it is implicit from that decision that some form of insanity defense is required by the due process clause.").

To justify the decision to abolish the defense, Montana relies on the claim that abolition furthers "goals of protection of society and education." *Id.* at 889 (quoting *Korell*, 690 P.2d at 1002). No known Montana case offers a thorough comparative analysis of the increased protections offered by conviction as opposed to the protections offered by civil commitment. It would be difficult to imagine a realistic difference, given that mentally ill convicts are ultimately housed in the same facilities used to treat mentally ill persons subject to civil commitment. See §§ 46-14-312(2), MCA.

C. Montana Views Delusionality As Insufficient To Trump *Mens Rea*.

Montana has also watered down the standard for cognitive incapacity as it bears on *mens rea*. Montana allows conviction even for persons whose actions are the product of delusion. *See, e.g.*, *Meckler*, 190 P.3d at 1108. Montana's approach cannot be squared with *Clark*, which recognized that "evidence accepted as showing insanity trump[s] *mens rea*[.]" 548 U.S. at 768 n.38.

Clark explained that "[i]n practical terms, if a defendant did not know what he was doing when he acted, he could not have known that he was performing the wrongful act charged as a crime." *Id.* at 753–54. This standard for cognitive incapacity exculpates a person who "thought delusively he was doing something just as wrongful as the act charged against him" because that person could not "have understood that he was committing the act charged and that it was wrongful." *Id.* at 754 n.23. The Arizona statute at issue in *Clark* was upheld largely because it preserved the defendant's ability to argue a defense based on delusionality even if the technical *mens rea* of the offense had been met. *Id.* at 754–56. Even though Arizona had limited admissibility of mental illness on the issue of *mens rea*, it had adequately accounted for cognitive incapacity by preserving a true defense.

By comparison, Montana does not adhere to the view that delusionality trumps *mens rea*. Conviction is appropriate even if delusions result in a cognitive incapacity to appreciate the nature of the actions at issue. In explaining this rule, *Korell* reasoned that

> planning, deliberation and a studied intent are often found in cases where the defendant lacks the capacity to understand the wrongfulness of his acts. . . . Illustrations include the assassin acting under instructions of God, the mother drowning her demonically-possessed child, and the man charging up Montana Avenue on a shooting spree believing he is Teddy Roosevelt on San Juan Hill.

690 P.2d at 1000 (internal citation omitted). Although *Korell* rhetorically pondered whether such delusions make the State's burden of proof on *mens rea* more difficult, it nonetheless accepted that a conviction could stand even if such delusions were taken as true. *Id.* The Montana Supreme Court has doubled down on this view. In *Meckler*, the court again dismissed the notion that delusions will trump *mens rea*:

> Furthermore, all of Meckler's various explanations as to why he struck Penrod involved a conscious intent to cause another person serious bodily injury, regardless of whether the victim Meckler saw before him was Penrod or someone else. Indeed, whether Meckler struck Penrod because he thought she hit him first, or because he thought she was a 6'10" apparition of his ex-wife, or because he heard voices compelling him to do so, the definitions of "purposely" and "knowingly" simply require that Meckler intended to strike at the victim in front of him and/or should have expected serious bodily injury if he did so.

190 P.3d 1108. These precedents establish that, in Montana, even an uncontroverted showing of insanity may not be sufficient to "trump *mens rea*."

D. Abolition Of The Insanity Defense Creates A Disincentive To Openly Account For Mental Health In Litigation.

"Far too many people with mental illnesses are in jails and prisons due to inadequate public mental health systems." Judge David L. Bazelon Center for Mental Health Law: Criminal Justice, http://www.bazelon.org/our-work/criminal-justice-2/.

Montana exacerbated this problem by abolishing the insanity defense. Now, the mentally ill are routinely hauled into Montana's criminal justice system. *See* T.B. Conley and D.L. Schantz, University of Montana School of Social Work, Predicting and reducing recidivism: Factors contributing to recidivism in the State of Montana Prerelease Center population & the issue of measurement: A report with recommendations for policy change, 11 (2006) (reporting that 69% of females and 41% of males at prerelease centers suffer from mental illness). Law enforcement officials no longer need to consider the viability of an insanity defense prior to filing charges, and thereby lack incentive to fully contemplate the civil commitment process as an alternative to criminal prosecution. The resulting influx of mentally ill defendants into criminal courts imposes overwhelming administrative costs on courts, jails, and public defender offices.

Once in custody, those suffering from mental illness are more likely to stay there. Decompensation of the mentally ill while in pretrial custody is not merely theoretical, particularly when appointment of

counsel is delayed. *See, e.g.*, *State v. Norvell*, 440 P.3d 634, ¶10 (Mont. 2019). Such decompensation often makes the mentally ill person a less attractive candidate for release, despite the fact that release may be the very thing that provides a chance for improvement. Experience also shows that "[p]eople with mental illnesses in the jail and prison systems often go without proper mental health treatment," resulting in higher risk for prolonged sentences because of heightened risk factors. Kenneth J. Gill and Ann A. Murphy, Jail Diversion for Persons with Serious Mental Illness Coordinated by a Prosecutor's Office (Dec. 3, 2017), https://www.researchgate.net/publication/321496960_Jail_Diversion_for_Persons_with_Serious_Mental_Illness_Coordinated_by_a_Prosecutor's_Office. These realties are inconsistent with the overarching aims of the criminal justice system.

Warehousing the mentally ill in the criminal justice system also results in significant backlogs in processing evaluation requests. In Montana, delays approaching half of a year are common for a simple competency evaluation under § 46-14-102, MCA. And the same facility used by the state to obtain competency evaluations—the Montana State Hospital—is routinely used by the state to conduct its own evaluations bearing on *mens rea* under § 46-14-204, MCA. *See, e.g.*, *State v. Scarborough*, 14 P.3d 1202, 1215 (Mont. 2000). If mental illness is raised as a sentencing consideration, the Montana State Hospital will again be the likely destination. See § 46-14-311(2), MCA. Therefore, those defendants who raise mental illness can expect substantial delays in the processing of their case.

Given the lack of a true mental health defense and the delays associated with raising mental illness in court, defendants with serious mental illness often believe that raising it as a mere mitigating factor is more trouble than it is worth. This is tragic. By elevating serious mental illness above the realm of mitigation, the insanity defense encourages the mentally ill to place all relevant information before the court so educated decisions regarding liability and treatment can be made. The existence of the insanity defense promotes a healthier dynamic, as state trial courts "are in the best position to convene the relevant interested parties and design a comprehensive, collaborative approach to provide treatment instead of incarceration for persons with mental illness." Milton L. Mack, Jr., Conference of State Court Administrators, *Decriminalization of Mental Illness: Fixing a Broken System*, 20 (2016–17), https://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/2016-2017-Decriminalization-of-Mental-Illness-Fixing-a-Broken-System.ashx.

Our laws should encourage those who lack moral responsibility for their actions to openly request assistance in correcting behaviors. Instead, by abolishing the insanity defense, Montana has created a disincentive to place these sensitive issues into the spotlight.

CONCLUSION

The judgment of the Supreme Court of Kansas should be reversed.

Respectfully submitted,

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