No. 18-6135

In the Supreme Court of the United States

JAMES K. KAHLER, PETITIONER

v.

KANSAS
(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF KANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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CAPITAL CASE

QUESTION PRESENTED

Whether the Constitution permits States to treat mental illness as an excuse for criminal conduct only when it creates reasonable doubt as to the defendant's criminal mens rea, or instead mandates an insanity test that focuses on whether the defendant appreciated the wrongfulness of his conduct.

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INTEREST OF THE UNITED STATES

This case concerns whether the Constitution prohibits States from excusing criminal conduct based on a claim of insanity only when mental illness creates reasonable doubt as to the defendant's mens rea for the crime. Although federal law currently treats insanity as an affirmative defense under which a defendant may show that "as a result of a severe mental disease or defect, [he] was unable to appreciate the nature and quality or the wrongfulness of his acts," 18 U.S.C. 17(a), the federal insanity standard has varied over time, and the United States has an interest in Congress's authority to prescribe the contours of criminal liability. The United States therefore has a substantial interest in this case.

STATEMENT

1. On November 28, 2009, petitioner murdered his two daughters, his ex-wife, and her grandmother. J.A. 214-215.

Petitioner's marriage had recently disintegrated after his wife, Karen, had become romantically involved with a female coworker. J.A. 213. Petitioner initially assented to Karen's extramarital relationship, but he eventually objected to her conduct and confronted her at a New Year's Eve party, "result[ing] in a shoving match." J.A. 214; see J.A. 213-214. Karen filed for divorce shortly thereafter. J.A. 214.

Karen later made a battery complaint against petitioner, and then moved out of the home with the couple's two teenage daughters, Emily and Lauren, and their nine-year-old son, Sean. J.A. 213-214. Within a few months, petitioner was fired from his job due to his "increasing preoccupation with his personal problems and decreasing attention to his job." J.A. 214. Petitioner moved to his parents' ranch in Kansas. *Ibid.*

During the Thanksgiving holiday in 2009, Sean joined petitioner at the ranch, while petitioner's daughters stayed with Karen. J.A. 214. On November 28, Karen declined to allow Sean to stay with petitioner rather than visit Karen's grandmother, Dorothy. *Ibid.* Karen picked Sean up and went to Dorothy's house with him, Emily, and Lauren. *Ibid.*

That evening, petitioner drove an hour to Dorothy's home and entered through the back door, where Karen and Sean were standing. J.A. 105, 215. Petitioner shot Karen twice, but did not attempt to harm Sean, who ran to a neighbor's house. J.A. 215. Petitioner then "methodically" moved through the home, pursuing his victims and shooting Dorothy, Emily, and Lauren in turn.

J.A. 215, 261. During the attack, Dorothy's Life Alert system activated and recorded petitioner telling a sobbing voice to "stop crying." J.A. 62, 215, 232. It also recorded petitioner stating, "I am going to kill her." J.A. 62, 232.

When police officers arrived, Karen was unconscious in the kitchen, Emily was dead in the living room, Dorothy was conscious but shot in the abdomen, and Lauren was upstairs, conscious but shot twice and having trouble breathing. J.A. 215. Both Dorothy and Lauren told first responders that petitioner had shot them. *Ibid.* Karen, Lauren, and Dorothy were transported to a hospital but subsequently died from their gunshot wounds. *Ibid.* Although petitioner eluded law enforcement on the evening of the murders, he surrendered without incident the next morning by approaching officers and stating that he was the man the police were looking for. J.A. 52, 108, 215.

2. Petitioner was charged with capital murder. J.A. 215-216.

a. Before trial, petitioner filed a motion challenging the constitutionality of Kansas's death penalty, in which he argued that Kansas's treatment of insanity claims violates due process. J.A. 10-14. Kansas law provides that 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," but that "[m]ental disease or defect is not otherwise a defense." Kan. Stat. Ann. § 21-5209 (Supp. 2017) (replacing without material change Kan. Stat. Ann. § 22-3220 (2007), which was in effect when petitioner's crimes occurred).

Petitioner asserted that he was less morally culpable than others who commit crimes because he "simply

cracked under extreme pressure of a contested and contentious divorce and acted impulsively and violently." J.A. 14. And he argued that the Kansas statute violated due process by permitting a defendant 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.

The trial court denied petitioner's motion, stating that it was "not willing to strike down the death penalty." J.A. 16.

b. The case proceeded to trial, during which "the defense attempted to establish that severe depression had rendered [petitioner] incapable of forming the intent and premeditation required to establish the crime of capital murder." J.A. 216. Petitioner's expert psychiatrist recognized that petitioner "wasn't psychotic" and "wasn't hearing voices," but asserted that "his capacity to manage his own behavior had been severely degraded so that he couldn't refrain from doing what he did." J.A. 49.

Kansas presented expert testimony of a different psychiatrist, who determined that petitioner "was depressed" but "still retained the ability to premeditate" and "did not lack the capacity to form intent." J.A. 118; see J.A. 146 (expert report). The State's psychiatrist identified several facts indicating that petitioner's conduct was purposeful and premeditated, including his long drive to the murder scene, his decision not to park in front or knock on the door, his prolonged lurking outside before entering, and his pursuit of his victims through different rooms. J.A. 105-107, 109. In addition, petitioner intentionally spared his son Sean, "the one with whom he had the closest relationship" and whom

he viewed as less blameworthy than his daughters, whom he faulted for "siding with" Karen after the divorce. J.A. 109, 145. The State's psychiatrist further testified that the circumstances of petitioner's self-surrender to the police indicated "an awareness that the police were looking for him and some indication of his knowing the reason why." J.A. 108.

The jury was instructed that petitioner was "not criminally responsible for his acts if, because of mental disease or defect, [he] lacked premeditation and/or the intent to kill." J.A. 177. The jury found petitioner guilty of capital murder. J.A. 181.

c. At the penalty phase, petitioner was permitted to argue for any circumstance in mitigation of the death penalty, including those based on mental illness. The jury was informed that "[m]itigating circumstances are those that in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or that justify a sentence of less than death." J.A. 194. And Kansas law expressly provides that it is a mitigating circumstance if "[t]he capacity of the defendant to appreciate the criminality of [his] conduct or to conform [his] conduct to the requirements of law was substantially impaired." Kan. Stat. Ann. § 21-6625(a)(6) (Supp. 2017). The jury was instructed that petitioner sought leniency on that basis and on the ground that he "suffered from serious mental illness impairing his ability to think and control his actions." J.A. 195.

After hearing petitioner's evidence, the jury determined that petitioner should be sentenced to death because the aggravating circumstances outweighed any mitigating circumstances. J.A. 203.

3. Petitioner appealed to the Supreme Court of Kansas, which affirmed his convictions and sentence. J.A.

205-263. As relevant here, the court rejected petitioner's argument that Kansas's approach to insanity violates due process. J.A. 242-245. The court adhered to prior precedent that had found no "fundamental principle of law" that would invalidate Kansas's approach, *State* v. *Bethel*, 66 P.3d 840, 851 (Kan.), cert. denied, 540 U.S. 1006 (2003); see J.A. 243-245.

SUMMARY OF ARGUMENT

Kansas has made the reasonable and constitutionally permissible determination to treat mental illness as an excuse for criminal conduct only when it creates reasonable doubt as to the defendant's mens rea for the crime. Neither the Due Process Clause nor the Eighth Amendment demands that a State excuse criminal conduct under an insanity test focused on whether the defendant could tell right from wrong.

This Court has long recognized that States have broad discretion to make the moral, legal, and medical judgments necessary to determine when mental illness should excuse criminal conduct. Sound policy considerations support Kansas's mens rea standard of insanity. That approach reflects a moral judgment that individuals who commit criminal acts with the requisite intent should not escape all responsibility for their crimes. It accords with the ordinary criminal-law principle that a defendant's motivation for his act is irrelevant to his guilt or innocence. It avoids juror confusion about issues extraneous to the elements of the crime. It addresses concerns that psychiatric evidence may not reliably help jurors answer difficult questions that arise from broader definitions of insanity. And instead of creating an on-off switch for liability, it permits individualized consideration at sentencing of how mental illness affects culpability.

Under this Court's jurisprudence, Kansas's approach to insanity would violate due process only if it "offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Clark* v. *Arizona*, 548 U.S. 735, 748 (2006) (brackets in original; citation omitted). That stringent standard is not satisfied. Kansas's mens rea approach has roots in early English common-law definitions of insanity, which excused criminal conduct when complete cognitive incapacity precluded a defendant from forming criminal intent. The right-and-wrong test of insanity articulated in *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843), although influential, has never risen "to the level of fundamental principle" that might have substantive due process implications, *Clark*, 548 U.S. at 749. Instead, Anglo-American jurisdictions have applied diverse insanity tests, and legislatures and commentators have long considered the mens rea approach to be valid.

This Court has repeatedly rejected arguments that the Constitution mandates a particular test of insanity, and it should do so again here. Petitioner's proposal to constitutionalize an insanity test focused on moral blameworthiness is not only doctrinally unsound, but also practically unworkable. He provides no standard rooted in text, history, or precedent that would guide courts in their attempts to identify criminal acts that should be considered constitutionally blameless in light of a defendant's mental illness. And any attempt to constitutionalize a standard based on petitioner's particular view of moral culpability would override numerous reasonable legislative judgments about the proper contours of an insanity excuse from criminal liability.

The Eighth Amendment provides no sounder basis than the Due Process Clause for disturbing Kansas's judgment that mental illness should excuse criminal conduct only if it creates reasonable doubt as to the defendant's mens rea. As a threshold matter, petitioner did not preserve, and the state courts did not address, an argument that the Eighth Amendment prohibits *convicting*, as opposed to punishing, certain mentally ill offenders. In any event, the Eighth Amendment focuses on "cruel and unusual *punishments*," not on substantive liability. U.S. Const. Amend. VIII (emphasis added). The Court's one-time application of the Eighth Amendment to invalidate a statute that criminalized the passive "status" of simply being a narcotics addict, *Robinson* v. *California*, 370 U.S. 660, 665 (1962), does not call into question petitioner's convictions for premeditated quadruple murder. And even if the Eighth Amendment were applicable here, individualized consideration of mental illness at sentencing guards against disproportionate sentences, and Kansas has permissibly determined that the mens rea test furthers penological goals.

ARGUMENT

This Court has long recognized that the States have principal responsibility for "[p]reventing and dealing with crime" and that courts "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Montana* v. *Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion) (quoting *Patterson* v. *New York*, 432 U.S. 197, 201 (1977)). States thus enjoy wide latitude in defining the elements of crimes, defenses to criminal conduct, and the procedures by which crimes and defenses are proved. *Id.* at 58 (Ginsburg, J., concurring in the judgment). Nothing

in the Constitution precludes Kansas's decision to excuse criminal conduct based on a claim of insanity only when mental illness creates reasonable doubt as to the defendant's mens rea for the crime.

I. NO SUBSTANTIVE DUE PROCESS RIGHT FORECLOSES KANSAS'S MENS REA APPROACH TO INSANITY CLAIMS

A. Kansas's Approach Reflects Its Broad Discretion To Delineate The Circumstances In Which Mental Illness Excuses Criminal Conduct

1. A State's "insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice." *Clark* v. *Arizona*, 548 U.S. 735, 752 (2006). It has always been "the province of the States" to set the standards for "assess[ing] the moral accountability of an individual for his antisocial deeds." *Powell* v. *Texas*, 392 U.S. 514, 535-536 (1968) (plurality opinion); *id.* at 545 (Black, J., concurring) (observing that it would be "indefensib[le]" to "impos[e] on the States any particular test of criminal responsibility").

As a plurality of this Court explained in *Powell*, "[t]he doctrines of *actus reus*, *mens rea*, [and] insanity," along with "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." 392 U.S. at 536. The selection of an insanity test involves complex, competing, and evolving policy considerations about moral culpability, societal protection, and medical science. Legislatures are best positioned to balance those interests in "determining the extent to which moral culpability should be a prerequisite to conviction

of a crime." *Egelhoff*, 518 U.S. at 58 (Ginsburg, J., concurring in the judgment) (citation and internal quotation marks omitted).

2. Kansas and other States have made the reasonable determination that an insanity claim should excuse criminal conduct only when mental illness creates reasonable doubt about the defendant's mens rea for the crime. Kan. Stat. Ann. § 21-5209 (Supp. 2017); see Idaho Code Ann. § 18-207 (2016); Mont. Code Ann. § 46-14-102 (2017); Utah Code Ann. § 76-2-305 (LexisNexis 2017). Although those States do not channel insanity claims into an affirmative defense, by "allow[ing] a defendant to introduce (and a factfinder to consider) evidence of mental disease or incapacity for the bearing it can have on the government's burden to show *mens rea*," those States in fact provide defendants with "the opportunity to displace the presumption of sanity more easily" than if the defendant himself bore the burden of persuasion on that issue. *Clark*, 548 U.S. at 767, 771; see *id.* at 765-779 (recognizing that either procedure for considering cognitive incapacity evidence is constitutional). States adopting the mens rea approach do not measure insanity based on whether the defendant could tell right from wrong—and so they would permit conviction of a defendant who, for example, killed an individual, intended to do so, understood it was unlawful, but believed due to mental illness that the killing was morally justified. Kansas and other jurisdictions, however, do take account of mental illness that reduces culpability but is unrelated to mens rea in determining an appropriate sentence. See Kan. Stat. Ann. §§ 21-6625(a)(6), 21-6815(c)(1)(C) (Supp. 2017); Idaho Code Ann. § 19-2523 (2017); Mont. Code Ann. § 46-14-311 (2017).

Advocates of the approach that Kansas follows have identified sound policy reasons to consider mental illness in assessing mens rea without recognizing a separate insanity defense based on other measures of diminished capacity, like the ability to distinguish right from wrong. First, in evaluating degrees of moral culpability, States can reasonably conclude that "[p]eople even with mental problems" should "be responsible for what they intentionally do." *The Insanity Defense: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 26 (1982) (*Insanity Defense Hearings*) (statement of Senator Symms); see J.A. 328 (Kansas legislative record); William French Smith, *Limiting the Insanity Defense: A Rational Approach to Irrational Crimes*, 47 Mo. L. Rev. 605, 616 (1982) (Smith) (explaining view that "the adoption of a consistent philosophy of criminal responsibility—according to which all individuals found to have committed forbidden acts with the requisite criminal intent would be held liable—would enhance the credibility and acceptance of the criminal justice system").

Second, a jurisdiction may decide that a defendant's belief based on mental illness that his action was morally justified should, "like any other motivation," be treated as irrelevant to criminal liability and instead "be taken into account only at the time of sentencing." *Insanity Defense Hearings* 28 (testimony of U.S. Attorney General William French Smith). Under ordinary criminal-law principles, for example, it "is clearly, and properly, viewed as irrelevant to his guilt or innocence" that a defendant, "genuinely believed that his act was morally justified because the victim was a bad man whose death would end injustice, be just recompense for past wrongs, or lead to a better social order." *Ibid.* A

jurisdiction could decide as a policy matter to treat all such beliefs in the same way, whether or not they stem from mental illness.

Third, a State could conclude that expanding considerations of mental illness beyond mens rea may confuse jurors and "distort[] * * * the trial process" by focusing on issues unrelated to whether the defendant committed the crime as defined by its elements. Smith 611; see, *e.g.*, J.A. 290 (Kansas legislative record); *Limiting the Insanity Defense: Hearings Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 311-313 (1982) (testimony by the Idaho Attorney General that mens rea approach lessens juror confusion and "reduce[s] the complexity of the jury question to one of intent"). "[J]uries have traditionally dealt with the existence or non-existence of *mens rea*," and the mens rea approach therefore "poses no additional burdens on them." S. Rep. No. 307, 97th Cong., 1st Sess. 105 (1981) (Senate Report). A State accordingly may view the mens rea approach as a way to "remove[] nebulous and extraneous issues from the determination of guilt." *Id.* at 104.

Fourth, a State could adopt the mens rea approach to address concerns that psychiatric evidence cannot reliably guide jurors in resolving the difficult issues inherent in a broader approach to insanity, such as making a yes-or-no factual finding about whether the defendant could distinguish right from wrong or control his behavior. See *Clark*, 548 U.S. at 755 n.24 (assessment of cognitive incapacity is an "easier enquiry" for "the fact-finder to conduct" than the "harder and broader enquiry whether the defendant knew his actions were wrong"). As this Court has observed, "psychiatrists disagree widely and frequently on what constitutes mental

illness" and "on the appropriate diagnosis to be attached to given behavior and symptoms." *Ake* v. *Oklahoma*, 470 U.S. 68, 81 (1985); see *Jones* v. *United States*, 463 U.S. 354, 365 n.13 (1983) (observing that the Court has "recognized repeatedly the uncertainty of diagnosis in this field and the tentativeness of professional judgment") (citation and internal quotation marks omitted). Because even "experts disagree about both the meaning of the terms used to discuss the defendant's mental state and the effect of particular mental states on actions," a jury might have difficulty applying such concepts. *Insanity Defense Hearings* 29 (testimony of Attorney General Smith).

Finally, States may reasonably conclude that channeling claims of mental illness unrelated to mens rea to sentencing, instead of allowing them to categorically excuse a defendant's criminal conduct, facilitates a fairer and more nuanced consideration of such claims. See Smith 609. In the sentencing context, a judge can make an individualized determination of the precise mitigating effect of mental illness and can tailor a sentence to reflect "society's recognition of the defendant's lack of moral culpability for his offense." Senate Report 102. Accounting for mental illness that does not create reasonable doubt as to mens rea at the sentencing stage can "eliminate some of the confusion and inconsistency which results from considering mental illness" as an all-or-nothing limitation on criminal liability and can ensure that "treatment [is provided] for offenders in appropriate circumstances." Idaho State Senate, *Statement of Purpose, S.B. 1396*, 46th Leg., 2d Reg. Sess. (1982) (enacting Idaho's mens-rea-based statute).

B. The Due Process Clause Neither Forecloses Kansas's Mens Rea Approach Nor Requires A Right-And-Wrong Test Of Insanity

Petitioner contends (Br. 15, 41) that the Due Process Clause requires Kansas to excuse criminal liability for a "larger category of morally incapacitated defendants" by expanding the legal excuse of insanity to encompass consideration of "the defendant's ability to rationally appreciate right and wrong with respect to his offense." Under this Court's jurisprudence, however, a State's treatment of insanity violates due process only if it "offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Clark*, 548 U.S. at 748 (citation omitted; brackets in original). Satisfying that standard "entails no light burden," *id.* at 749, and petitioner cannot carry it. When a "rule has considerable justification," as Kansas's does, that "alone casts doubt upon the proposition that the opposite rule is a 'fundamental principle.'" *Egelhoff*, 518 U.S. at 49 (plurality opinion). And as a historical matter and still today, approaches to mental illness as an excuse for criminal liability have widely varied, with "no particular formulation * * * evolv[ing] into a baseline for due process." *Clark*, 548 U.S. at 752. This Court has thus repeatedly refused to constitutionalize any specific approach to insanity claims, and it should refuse again here.

1. The mens rea approach has historical roots in the English common law

At the time of the Framing, English jurists varied widely on the circumstances in which mental illness should excuse criminal conduct, with no clear consensus on the proper legal test of insanity. Kansas's mens rea

approach is consistent with early articulations of the insanity standard, which required total cognitive impairment that prevented a defendant from forming criminal intent.

a. Historically, recognition of insanity as an excuse for criminal liability was often justified on the ground that, "as a murder or other felony requires a *mens rea*, an insane person could not commit such felony, since he did not have capacity to have a *mens rea*." Homer D. Crotty, *The History of Insanity as a Defence to Crime in English Criminal Law*, 12 Calif. L. Rev. 105, 110 (1924) (Crotty). Some early approaches to insanity accordingly required complete cognitive incapacity that prevented the defendant from knowing the nature and quality of his act. See, *e.g.*, S. Sheldon Glueck, *Mental Disorder and the Criminal Law—A Study in Medico-Sociological Jurisprudence* 126-127 (1927) (Glueck).

In what became known as the "wild beast" test, for example, Henry de Bracton defined insane individuals in the thirteenth century as those whose mental capacity was akin to that of a "brute animal." Anthony M. Platt, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 Issues in Criminology 1, 5-6 (1965) (citing translation from Latin) (citations and internal quotation marks omitted); see John Biggs, *The Guilty Mind* 82 (1955) (translating Bracton's reference in his 1256 treatise on English law to men who "are not greatly removed from beasts for they lack reasoning"). The wild beast test was employed through at least the nineteenth century, with one canonical case explaining that "it is not every kind of frantic humour or something unaccountable in a man's actions,

that points him out to be such a madman as is to be exempted from punishment: it must be a man that is 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." *Rex* v. *Arnold*, 10 George I 695, 764-765 (Ct. Common Pleas 1724). Similarly, in 1812, Lord Chief Justice Mansfield defined insanity in *Bellingham's Case* (I George Dale Collinson, *A Treatise on The Law concerning Idiots, Lunatics, and Other Persons Non Compotes Mentis* 636 (1812)) to require that "all power of entertaining any intention whatsoever * * * be lost before one can be excused from criminal responsibility on the basis of mental unsoundness." Glueck 149-150.

Early English treatises likewise linked the legal definition of insanity to the defendant's lack of mens rea. In 1628, Sir Edward Coke wrote that in criminal cases, "*Actus non facit reum, nisi mens sit rea* [the act does not make a person guilty, unless the mind be guilty]," and described a legally insane person as "without his mind or discretion." I Edw. Coke, *The First Part of the Institutes of the Lawes of England* § 405, at 248 (1628); see Glueck 131 (describing how Coke "recognized the necessity of a guilty mind as the basis of every crime, and agreed with Bracton that an insane person can have no criminal intent"). Lord Matthew Hale wrote that a defendant's insanity should excuse criminal behavior because he cannot act "*animo felonico* [with felonious intent]." I Matthew Hale, *The History of the Pleas of the Crown* 37 (1736) (written before Hale's death in 1676). And John Brydall's treatise on insanity published in 1700 stated that "No Felony, or Murder, can be committed without a Felonious Intent, or Purpose."

John Brydall, *Non Compos Mentis: Or, the Law Relating to Natural Fools, Mad-Folks, and Lunatick Persons, Inquisited, and Explained, for Common Benefit* 75 (1700).

Even early formulations that used the language of moral culpability were sometimes closely intertwined with the absence of mens rea. Initially, some jurists observed that if a defendant had complete cognitive incapacity that prevented distinguishing right and wrong, he could not form criminal intent. As Lord Mansfield stated in *Bellingham's Case*, "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." Glueck 149 (quoting Lord Mansfield). Similarly, Michael Dalton wrote that "[i]f one that is *Non compos mentis*, or an ideot, kill a man, this is no Felony; for they have not knowledge of good and evil, nor can have a Felonious intent, nor a will or mind to do harm." Michael Dalton, *The Countrey Justice* 283 (1666); see Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 Calif. L. Rev. 1227, 1235 (1966).

b. In 1843, *M'Naghten's Case* set forth an insanity test that treated a defendant's ability to distinguish right and wrong as conceptually distinct from the absence of criminal intent. 8 Eng. Rep. 718 (H.L. 1843). That test recognized a claim of insanity if the defendant was "labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did

not know he was doing what was wrong." 8 Eng. Rep. at 722. While the first component of the *M'Naghten* standard "asks about cognitive capacity," and is thus congruent to Kansas's approach, the "second part presents an ostensibly alternative basis for recognizing a defense of insanity understood as a lack of moral capacity." *Clark*, 548 U.S. at 747.

Although *M'Naghten* proved influential, "[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." *Clark*, 548 U.S. at 749. The development and evolution of other insanity standards continued, such as tests that turned on a defendant's volitional incapacity. See, *e.g.*, *Regina* v. *Oxford*, 173 Eng. Rep. 941, 950 (Cent. Crim. Ct. 1840) (using what became known as the "irresistible impulse" test, which asks "[i]f some controlling disease was, in truth, the acting power within [the defendant] which he could not resist"); but see *Regina* v. *Burton*, 176 Eng. Rep. 354, 357 (Civ. Ct. 1863) (rejecting the irresistible impulse test and characterizing it as "a most dangerous doctrine").

Even courts purporting to follow *M'Naghten* were themselves long in disagreement about whether a right-and-wrong test of insanity should focus on the defendant's capacity to understand that his conduct is legally wrong or morally wrong. As one English jurist summarized the issue:

> *A* kills *B* knowing that he is killing *B*, and knowing that it is illegal to kill *B*, but under an insane delusion that the salvation of the human race will be obtained by his execution for the murder of *B*, and that God has commanded him (*A*) to produce that result by

> those means. *A*'s act is a crime if the word "wrong" means illegal. It is not a crime if the word wrong means morally wrong.

II James Fitzjames Stephen, *A History of The Criminal Law of England* 149 (1883). English courts eventually settled on reading *M'Naghten* to "requir[e] that the defendant know that the act was legally wrong." 1 Wayne R. LaFave, *Substantive Criminal Law* § 7.2(b), at 538 (2d ed. 2003) (LaFave) (citing *Regina* v. *Windle*, 2 Q.B. 826 (Eng. 1952)).

c. English courts have also varied over time on whether insanity should foreclose criminal liability altogether or be taken into account following conviction. "Though the early law excused the insane offender from the punishment of the felon, it did not in all cases let him go free." Crotty 111. Under the "usual practice," the defendant "was imprisoned and stayed in prison until the king gave him a charter of pardon." *Ibid.* By the fourteenth century, English courts began recognizing insanity as justification for acquittal of a crime. See, *e.g.*, III W. S. Holdsworth, *A History of English Law* § 8, at 372-373 & n.9 (3d ed., *rewritten*, 1923). But the insanity defense's historical roots demonstrate that insanity initially was understood only "to be good grounds for mitigation of punishment." *Id.* §8, at 372.

2. American practices likewise permit a mens rea approach to insanity claims

In the United States, legislatures have similarly formulated different insanity standards based on evolving medical knowledge and policy judgments, and the mens rea standard has long been viewed as a reasonable option. The right-and-wrong standard of insanity—which is itself subject to considerable variation in whether it

focuses on legal or moral wrongs—has never been universally applied at any time throughout history. And the wide variation in insanity approaches over time and in current use illustrate that no single approach to insanity can be viewed as "fundamental." See *Egelhoff*, 518 U.S. at 48 (plurality opinion).

a. Since the Founding, U.S. jurisdictions have adopted a variety of insanity standards. The first case in the United States that cited the *M'Naghten* test also referenced the inability to form criminal intent and the irresistible impulse test. *Commonwealth* v. *Rogers*, 48 Mass. (1 Met.) 500, 501-502 (1844). The irresistible impulse test gained popularity during the nineteenth century, see Donald H. J. Hermann, *The Insanity Defense: Philosophical, Historical and Legal Perspectives* 38 (1983), with some jurisdictions at times defining insanity based only on volitional capacity, without reference to the right-and-wrong standard, see Abraham S. Goldstein, *The Insanity Defense* 67 (1967). In 1870, New Hampshire rejected *M'Naghten* and adopted the "product" test, under which a defendant is excused if his crime "was the offspring or product of mental disease." *State* v. *Pike*, 49 N.H. 399, 441-442 (1870). And States that used a right-and-wrong test of insanity divided on whether the defendant must lack capacity to know his conduct was legally wrong or morally wrong. Compare, *e.g.*, *Harrison* v. *State*, 69 S.W. 500 (Tex. Crim. App. 1902) (employing legal wrongfulness standard), and *Watson* v. *State*, 180 S.W. 168 (Tenn. 1915) (same), with *State* v. *Spencer*, 21 N.J.L. 196 (1846) (employing moral wrongfulness standard), and *People* v. *Schmidt*, 110 N.E. 945 (N.Y. 1915) (same).

At the same time, for at least a century, legislatures and commenters have considered arguments that the

insanity test should focus on mens rea rather than other measures of diminished capacity. See Edwin R. Keedy, *Insanity and Criminal Responsibility*, 30 Harv. L. Rev. 535, 535-536 (1917) (describing criminal responsibility bill advanced by the American Institute of Criminal Law and Criminology in 1915, which advocated the mens rea approach); Norval Morris, *The Criminal Responsibility of the Mentally Ill*, 33 Syracuse L. Rev. 477, 499, 510 (1982). Notably, Members of Congress and the Department of Justice advocated for a mens rea approach during efforts to reform the insanity defense in the 1970s and 1980s. *E.g.*, *Insanity Defense Hearings* 26-56 (testimony by Justice Department officials); *Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 6808-6822 (1974) (Justice Department testimony and memorandum advocating a mens rea standard); *United States* v. *Pohlot*, 827 F.2d 889, 899 & n.9 (3d Cir. 1987) (summarizing history of support for the mens rea approach, including bills presented by Senators Hatch, Pressler, Zorinsky, and Biden), cert. denied, 484 U.S. 1011 (1988). Although Congress ultimately enacted a different standard of insanity in 18 U.S.C. 17, Congress recognized that the mens rea approach did not "suffer[] from constitutional defects" because it permitted consideration of mental illness in determining whether "mental state requirements" were satisfied. H.R. Rep. No. 577, 98th Cong., 1st Sess. 7 (1983).

b. The result of this longstanding policy debate is wide contemporary variation in when and how a claim of insanity should excuse a defendant from criminal liability. "Even a cursory examination of the traditional

Anglo-American approaches to insanity reveals significant differences among them," with "a diversity of American standards." *Clark*, 548 U.S. at 749.

Four States, including Kansas, do not have an affirmative insanity defense, but instead "allow mental-disease and capacity evidence to be considered * * * when deciding whether the prosecution has proven *mens rea* beyond a reasonable doubt." *Clark*, 548 U.S. at 768; see p. 10, *supra* (citing statutes); see also Alaska Stat. §§ 12.47.010(a), 12.47.020 (2018) (codification of mens rea standard, along with an apparently overlapping affirmative defense if the defendant is unable "to appreciate the nature and quality of [his] conduct"). In those jurisdictions, "the evidence of mental disease or incapacity need only support what the factfinder regards as a reasonable doubt about the capacity to form (or the actual formation of) the *mens rea*, in order to require acquittal of the charge." *Clark*, 548 U.S. at 768.

Many States and the federal government follow some form of *M'Naghten*. See LaFave § 7.2(a), at 527-528. Several of those jurisdictions omit the first component of the test—whether the defendant knew the "nature and quality of the act"—and instead define insanity based solely on the defendant's inability to differentiate right from wrong. *Id.* § 7.2(a), at 527-528 n.7 (2003 & Supp. 2016-2017). The jurisdictions also divide on whether the defendant may invoke the insanity defense if he understood his conduct violated the law but believed that his actions were morally justified. Compare, *e.g.*, *People* v. *Skinner*, 704 P.2d 752, 764 (Cal. 1985) (allowing such a defense); *State* v. *Worlock*, 569 A.2d 1314, 1322 (N.J. 1990) (same); *State* v. *Ulm*, 326 N.W.2d 159, 161 (Minn. 1982) (same); *People* v. *Wood*, 187 N.E.2d 116, 121 (N.Y. 1962) (same), with *Finger* v.

State, 27 P.3d 66, 84-85 (Nev. 2001) (disallowing such a defense), cert. denied, 534 U.S. 1127 (2002); *State* v. *Crenshaw*, 659 P.2d 488, 493 (Wash. 1983) (same); *State* v. *Hamann*, 285 N.W.2d 180, 183 (Iowa 1979) (same).

Other jurisdictions use some form of the American Law Institute test, which recognizes an insanity defense if the defendant "lack[ed] substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law," I Model Penal Code and Commentaries § 4.01(1), at 163 (1985) (Model Penal Code) (brackets in original). See LaFave § 7.5(b), at 560. Those jurisdictions, like the *M'Naghten* jurisdictions, divide on whether the defendant must appreciate that his conduct was legally or instead morally wrong, as the "drafters * * * left to each jurisdiction a choice between the terms 'wrongfulness' and 'criminality.'" *State* v. *Johnson*, 399 A.2d 469, 477 (R.I. 1979). Still other States have adopted unique insanity standards. See *State* v. *Cegelis*, 638 A.2d 783 (N.H. 1994) (using the "product" approach); N.D. Cent. Code § 12.1-04.1-01(1)(a) (2012) (considering, *inter alia*, whether the defendant's conduct resulted from "a serious distortion of the [defendant's] capacity to recognize reality").

States also take different approaches to insanity by "limit[ing], in varying degrees, which sorts of mental illness or defect can give rise to a successful insanity defense." *Clark*, 548 U.S. at 750 n.11; see LaFave § 7.2(a), at 528-534; Resp. Br. 31. Under the federal standard, for example, the defendant must have a "severe" mental disease or defect. 18 U.S.C. 17(a). Other jurisdictions exclude specific types of disorders from excusing criminal conduct, such as psychosexual disor-

ders, *e.g.* Ariz. Rev. Stat. Ann. § 13-502 (2010), personality disorders, Or. Rev. Stat. § 161.295(2) (2017), or mental illnesses caused by long-term substance abuse, even if the defendant is not under the temporary influence of an intoxicating substance at the time of the offense, *Bieber* v. *People*, 856 P.2d 811, 818 (Colo. 1993), cert. denied, 510 U.S. 1054 (1994). And a number of jurisdictions follow the Model Penal Code, which provides that the insanity defense cannot be based on "abnormality manifested only by repeated criminal or otherwise antisocial conduct." Model Penal Code § 4.01(2), at 163; *e.g.*, Ind. Code Ann. § 35-41-3-6(b) (LexisNexis 2009). Those varying approaches, like the others across jurisdictions and over time, refute petitioner's claim that a right-and-wrong test of insanity is a fundamental principle of law.

3. This Court's precedents confirm that Kansas's approach to insanity is constitutional

Recognizing the wide variety of historical and contemporary approaches to insanity, this Court has repeatedly rejected claims that the Constitution requires the States to adopt a particular insanity test. *Clark*, 548 U.S. at 752-753; *Leland* v. *Oregon*, 343 U.S. 790, 800-801 (1952); see *Powell*, 392 U.S. at 536 (plurality opinion). The analysis in those cases confirms that petitioner cannot carry his burden of demonstrating that the Due Process Clause forbids the approach that Kansas and like-minded States have chosen.

In *Clark*, this Court rejected the defendant's argument that the "*M'Naghten* test represents the minimum that a government must provide in recognizing an alternative to criminal responsibility on grounds of mental illness or defect." 548 U.S. at 748. *Clark* in-

volved a state statute that recognized insanity as a defense if the defendant "did not know the criminal act was wrong," but did not separately excuse his conduct if he did not know the nature or quality of his action. *Id.* at 744 n.2 (citation omitted). The Court acknowledged that a substantial number of jurisdictions had "adopted a recognizable version of the *M'Naghten* test with both its cognitive incapacity and moral incapacity components." *Id.* at 750. But the Court found that the diverse legal landscape foreclosed any constitutional requirement to define insanity based on the *M'Naghten* standard. *Id.* at 753.

Similarly, in *Leland*, this Court held that due process did not require Oregon to adopt the irresistible-impulse approach in lieu of *M'Naghten*. 343 U.S. at 800-801. The Court explained that "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." *Id.* at 801. Because "[t]his whole problem has evoked wide disagreement among those who have studied it," with no consensus on an insanity standard, the Court found it "clear that adoption of the irresistible impulse test is not 'implicit in the concept of ordered liberty.'" *Id.* at 801 (citation omitted); see *id.* at 803 (Frankfurter, J., dissenting on other grounds) (observing that "it would be indefensible to impose upon the States, through the due process of law * * * , one test rather than another for determining criminal culpability, and thereby to displace a State's own choice of such a test").

Likewise, in *Powell*, a plurality of the Court reiterated that "[n]othing could be less fruitful than for this Court to be impelled into defining some sort of insanity

test in constitutional terms." 392 U.S. at 536. The plurality cited "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." *Id.* at 535-536. Selection of an appropriate insanity standard, the plurality explained, had always been "the province of the States." *Id.* at 536; *id.* at 545 (Black, J., concurring) (noting "the indefensibility of imposing on the States any particular test of criminal responsibility").

Petitioner has not identified any heretofore unrecognized fundamental principle that would support constitutionalizing his preferred approach to insanity claims. "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. Instead, the legal approaches for which forms of mental illness should "excuse from conventional criminal responsibility" are "subject to flux and disagreement." *Id.* at 752. No sound reason exists for this Court to sharply depart from its prior analysis by "formulating a constitutional rule" that "would reduce, if not eliminate, th[e] fruitful experimentation [among the States], and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold," *Powell*, 392 U.S. at 536-537 (plurality opinion).

C. Legislatures Are Better Situated Than Courts To Make The Moral Judgments Necessary To Decide When Mental Illness Should Excuse Criminal Liability

Judicial override of legislative policymaking in the sensitive and evolving area of insanity claims would be not only doctrinally and historically insupportable, but also practically unworkable. The Due Process Clause

provides no guidance on which manifestations of mental illness should wholly excuse criminal liability, and petitioner's amorphous proposal for a constitutional rule focused on blameworthiness would involve difficult line drawing that courts are ill-equipped to perform.

The constitutional rule that petitioner proposes—that States must adopt "some mechanism, using some standard," under which "a person whose mental state renders them blameless cannot be held criminally accountable," Pet. Br. 37—raises more questions than it answers. If "blamelessness" is intended to encompass *all* defendants who assert moral incapacity, the rule would cast doubt on the numerous state laws that restrict insanity claims based on type of mental illness or on whether the defendant knew his acts were legally wrong rather than morally wrong. If petitioner's test instead encompasses only *some* assertions of moral incapacity, courts would have to determine degrees of blameworthiness as a constitutional matter, with no clear guidance from text, history, or precedent on how to do so.

Courts have no discernable standards by which to assess, for example, whether someone whose mental illness makes him unable to control his conduct should be deemed more culpable than someone whose mental illness makes him unable to "tell right from wrong," Pet. Br. 42 (citation omitted). Nor, for that matter, is it even clear what it means to be able to "tell right from wrong." Although petitioner would apparently excuse a "defendant who believes that a wolf has ordered him to kill the victim," *id.* at 41 (citation, ellipses, and internal quotation marks omitted), he fails to explain why such a defendant should necessarily be deemed less culpable than a non-delusional but easily manipulated defendant

who commits a murder on the orders of a family member. Other slippery-slope problems abound. For example, the Constitution does not clearly distinguish between moral incapacitation that results from a defendant's own long-term substance abuse, that manifests itself only as criminal psychosis, or that is caused by other particular types of mental illness. It is one thing for legislatures to draw such distinctions, see pp. 23-24, *supra* (citing statutes); it is quite another for judges to divine them from the Due Process Clause.

Petitioner cannot avoid such difficult questions by characterizing his rule (Br. 36) as a modest constitutional floor that would leave States with "ample leeway to experiment with the formulation of the insanity defense." Not only is petitioner's test amorphous, but a court would have to draw broad constitutional lines on highly debatable issues simply to cover the circumstances of petitioner's own case. Petitioner has never contended that he could not tell right from wrong in either a legal or moral sense, and the evidence would not support such a claim. See J.A. 48 (petitioner's expert's testimony that petitioner "was in great conflict about what he was doing"); J.A. 72 (petitioner's expert's report stating that petitioner "was sorry for what happened"); J.A. 52 (petitioner's acknowledgment when he surrendered that he knew why officers were looking for him). Instead, petitioner contends (Br. 11) that he is blameless because he "did not make a genuine choice to kill his family members," in light of an asserted mental illness. Very few jurisdictions recognize an insanity defense based on that form of volitional incapacity, however, and this Court has previously recognized that due process does not require the irresistible impulse test.

See *Leland*, 343 U.S. at 801. Constitutionalizing an insanity rule that would sweep so broadly as to encompass petitioner would vastly expand the defense in many jurisdictions and override numerous legislative judgments.

Such a dramatic expansion of the Due Process Clause is legally untenable and practically unsound. Legislatures, rather than courts, are best positioned to choose among competing theories of moral blameworthiness and to make fine-tuned judgments about when mental illness or other conditions should excuse criminal responsibility. See *Fisher* v. *United States*, 328 U.S. 463, 475-476 (1946) (recognition of a doctrine excusing criminal acts based on "partial responsibility" would be "more properly a subject for the exercise of legislative power"); *Patterson*, 432 U.S. at 210 (recognizing that "more subtle balancing of society's interests against those of the accused ha[s] been left to the legislative branch"). While other legislatures can and have made different judgments, Kansas's legislature was entitled to conclude that a mental impairment that does not create reasonable doubt as to mens rea does not fully eliminate the moral blameworthiness of the criminal act or bear on the justness of a criminal conviction—particularly when mental illness can be considered in assessing culpability at sentencing. The Due Process Clause provides no basis to reject that legislative judgment and ossify petitioner's particular underspecified theory of moral culpability.

II. THE EIGHTH AMENDMENT DOES NOT PROHIBIT KANSAS FROM ADOPTING A MENS REA APPROACH TO INSANITY CLAIMS

For the first time in this Court, petitioner raises (Br. 29) an argument that the Eighth Amendment prohibits

criminalizing the conduct of an individual who cannot "rationally appreciate that his actions are wrong." That argument is not properly before the Court because petitioner did not preserve it and the Kansas courts did not address it. In any event, the argument lacks merit.

A. Petitioner Did Not Preserve The Eighth Amendment Argument He Advances In This Court

In the state-court proceedings, the only Eighth Amendment claim petitioner raised challenged the constitutionality of Kansas's death penalty. See D. Ct. Doc. 100, at 1-8 (June 2, 2011); Pet. C.A. Br. 1, 61-71 (arguing that a death sentence is categorically disproportionate for mentally ill offenders). Petitioner never contended that the Eighth Amendment, separate and apart from the Due Process Clause, prohibits *convicting* mentally ill offenders. The Supreme Court of Kansas accordingly understood petitioner to challenge his conviction only under due process, not the Eighth Amendment. See J.A. 242-245. And in rejecting the claim, the court discussed only due process, not the Eighth Amendment. *Ibid.* Because the Eighth Amendment argument petitioner now pursues was not pressed or passed on below, it is not properly before this Court.

B. Kansas's Approach To Insanity Claims Does Not Violate The Eighth Amendment

In any event, petitioner is wrong to contend (Br. 29) that the Eighth Amendment—which addresses punishment, not guilt—precludes criminalizing the conduct of mentally ill offenders.

1. By its terms, the Eighth Amendment is concerned with "cruel and unusual *punishments*"—not with substantive liability. U.S. Const. Amend. VIII (emphasis added). Thus, "[t]he primary purpose" of the Eighth

Amendment "has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes; the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed." *Powell*, 392 U.S. at 531-532 (plurality opinion).

In arguing that the Eighth Amendment nevertheless forecloses *conviction* of offenders like him, petitioner relies (Br. 29) on *Robinson* v. *California*, 370 U.S. 660 (1962), in which this Court held that a state statute that made it a crime to be addicted to narcotics violated the Eighth Amendment. *Id.* at 660, 665-666. *Robinson* has no application here. The Court in *Robinson* emphasized that the statute at issue there did not require the State to show that the defendant ever *used* narcotics, but instead made "the 'status' of narcotic addiction a criminal offense." *Id.* at 665-666. Petitioner here, in contrast, was not convicted of a "status" crime of being mentally ill; he was convicted of committing a quadruple murder.

Indeed, the plurality opinion in *Powell* squarely rejected the *Robinson*-based argument petitioner presses. The defendant in *Powell* argued that the Eighth Amendment prohibited his conviction for public intoxication because he was a chronic alcoholic. 392 U.S. at 532. But the plurality opinion rejected that argument because "[t]he 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, which society has an interest in preventing," and the defendant in *Powell* "was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion." *Id.* at 532-533. Likewise here,

petitioner was convicted, not for being mentally ill, but for committing multiple murders.

As the plurality in *Powell* recognized, extending the Eighth Amendment's scope beyond the circumstances of *Robinson* would inappropriately cast the Court as "the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country." 392 U.S. at 533. The same logic applies with even greater force here, where petitioner seeks a constitutional excuse for his brutal murders. Because *Robinson* "does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by compulsion,'" *ibid.*, petitioner's Eighth Amendment argument fails from the outset.

2. Even if the Eighth Amendment were extended to restrict substantive criminal law beyond *Robinson*'s scope, petitioner cannot establish that Kansas's mens rea definition of legal insanity constitutes cruel and unusual punishment.

To the extent that petitioner suggests (Br. 29) that history requires a right-or-wrong test of insanity, that historical argument is inaccurate, as previously described. See pp. 14-21, *supra*. And to the extent that he asserts that it would be cruel and unusual to convict and criminally punish an individual who is "wholly unable to comprehend the nature and quality of [his] act," Pet. Br. 29-30 (citation omitted), that issue is not presented here because Kansas's mens rea approach would not require such a conviction. If a defendant suffers from such cognitive incapacity that he does not understand his actions—for example, if he thinks he is shooting a robot rather than a human—he will not have the mens rea for the crime. See *Clark*, 548 U.S. at 767-768.

In this case, however, petitioner was well aware that he was killing his family members. See J.A. 62, 232 (recording of petitioner during murders saying, "I am going to kill her").

Nor can petitioner establish that a criminal conviction is categorically disproportionate when an offender does not understand the wrongfulness of his conduct. Kansas permits an individualized determination of how mental illness affects culpability at the sentencing stage, refuting petitioner's claim (Br. 32) that a criminal conviction will necessarily result in punishment that might be viewed as disproportionately severe under Eighth Amendment standards. And contrary to petitioner's suggestion (Br. 33-35), Kansas could reasonably conclude that convicting and imposing at least *some* punishment on an offender who committed a crime with the prohibited mens rea, but without appreciating the wrongfulness of his conduct, furthers traditional penalogical goals.

A State could readily determine that the need to protect the community justifies applying the criminal process to incapacitate individuals whose conduct meets all of the elements of a crime. A State could further determine that such individuals may be deterred since their convictions turn on proof that they were capable of forming the prohibited mental state. See *Powell*, 392 U.S. at 531 (plurality opinion) (declining to find that "the deterrence justification for penal sanctions" is "ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts"). Nor is retribution necessarily inappropriate when a defendant acts with criminal intent. And rehabilitative goals can be served by providing

mental health treatment during the period of incarceration. See, *e.g.*, Kan. Stat. Ann. § 22-3430 (Supp. 2017) (authorizing sentencing court to commit a mentally ill offender to a mental institution when appropriate).

Other States may reach, and have reached, different conclusions about how best to balance penological goals when dealing with mentally ill defendants. But the Eighth Amendment, like the Due Process Clause, does not displace those legislative judgments and erect categorical substantive criminal law rules in this complex area.

CONCLUSION

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

Respectfully submitted.

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AUGUST 2019