CAPITAL CASE
No. 18-

IN THE

Supreme Court of the United States

JAMES K. KAHLER,

Petitioner,

v.

KANSAS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

PETITION FOR A WRIT OF CERTIORARI

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September 28, 2018

QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is James Kraig Kahler. Respondent is the State of Kansas. No party is a corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner James Kraig Kahler respectfully petitions for a writ of certiorari to review the judgment of the Kansas Supreme Court.

OPINIONS BELOW

The opinion of the Kansas Supreme Court is published at 410 P.3d 105. Petition Appendix at 1a–68a ("Pet. App."). The relevant order of the trial court is unpublished.

JURISDICTION

The Kansas Supreme Court issued its opinion on February 9, 2018. Pet. App. 1a–68a. It denied a motion for rehearing on April 26, 2018 and issued a corrected denial order on May 1, 2018. *Id.* at 69a–70a. On July 2, 2018, Justice Sotomayor extended the time within which to file this petition to and including September 28, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment states in relevant part: "Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment states in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend, XIV, § 1.

Kan. Stat. Ann. § 22–3220 (2009) states in relevant part: "It is a defense to a prosecution under any statute that the defendant, as a result of mental disease

or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense."

STATEMENT OF THE CASE

In Kansas, along with four other states, it is not a defense to criminal liability that mental illness prevented the defendant from knowing his actions were wrong. Even a capital murder defendant need not be of sound mind. So long as he knowingly killed a human being—even if he did it because he believed the devil told him to, or because a delusion convinced him that his victim was trying to kill him, or because he lacked the ability to control his actions—he is guilty.

This rule defies a fundamental, centuries-old precept of our legal system: People cannot be punished for crimes for which they are not morally culpable. Kansas's rule therefore violates the Eighth Amendment's prohibition of cruel and unusual punishments and the Fourteenth Amendment's due process guarantee. The Court should grant review to answer the question reserved in *Clark* v. *Arizona*: whether "the Constitution mandates an insanity defense." 548 U.S. 735, 752 n.20 (2006); see *Delling* v. *Idaho*, 133 S. Ct. 504, 506 (2012) (Breyer, J., joined by Ginsburg & Sotomayor, JJ., dissenting from denial of certiorari) (urging review of this question). The answer to that question is yes.

A. Kansas Law.

Kansas previously recognized the *M'Naghten* rule, under which a defendant is not criminally responsible "(1) where he does not know the nature and quality of his act, or, in the alternative, (2) where he does not know right from wrong with respect to that act." *Kansas* v. *Baker*, 819 P.2d 1173, 1187 (Kan. 1991). In

1996, however, Kansas adopted a new standard: "Mental disease or defect" "is a defense to a prosecution under any statute" only insofar as it shows "that the defendant . . . lacked the mental state required as an element of the offense charged." Kan. Stat. Ann. § 22–3220 (2009). It is "not otherwise a defense." *Id.*[1]

Under this rule, "insanity . . . disappears as a separate defense." *Kansas* v. *Jorrick*, 4 P.3d 610, 618 (Kan. 2000). By "abandon[ing] lack of ability to know right from wrong as a defense," Pet. App. 35a, Kansas has narrowed the mental-capacity inquiry solely to whether the defendant was capable of forming the intent required to commit the offense—regardless of why he thought he was doing it or whether he knew it was wrong. The difference is significant: "Only in the rare case . . . will even a legally insane defendant actually lack the requisite mens rea purely because of mental defect." *United States* v. *Pohlot*, 827 F.2d 889, 900 (3d Cir. 1987). Even "a man who commits murder because he feels compelled by demons still possesses the mens rea required for murder." *Id.*; see *Delling*, 133 S. Ct. at 506. Thus, in Kansas—and Alaska, Idaho, Montana, and Utah, which share the same rule—"[i]t no longer matters whether the defendant is insane; *i.e.*, whether the defendant is unable to know the nature and quality of his actions or know the difference between right and wrong with respect to his actions." Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 Kan. J.L. & Pub. Pol'y 253, 261 (1998).

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[1] The phrasing of this provision was tweaked during a 2011 recodification, but the substance remains identical. Kan. Stat. Ann. § 21–5209 (2013); *see also Kansas* v. *McLinn*, 409 P.3d 1, 11 (Kan. 2018) (discussing the change). The 2009 version applies here.

This is unconstitutional. The Due Process Clause prohibits criminal liability that "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 (alteration in original). The Eighth Amendment similarly bars criminal punishment that either was "condemned by the common law in 1789" or violates "fundamental human dignity" as reflected in "objective evidence of contemporary values." *Ford* v. *Wainwright*, 477 U.S. 399, 405–06 (1986). Kansas's rule flunks both tests. The insanity defense—and the requirement that the defendant be able to "choose between good and evil," see *Morissette* v. *United States*, 342 U.S. 246, 250 (1952)—is deeply rooted in the Anglo-American legal tradition. See 4 William Blackstone, *Commentaries*, *24–25. And the overwhelming majority of states have always permitted an insanity defense that includes this inquiry. *Clark*, 548 U.S. at 750–52.

For these reasons, at least seven states hold that due process or Eighth Amendment principles (or both) require a state to provide an insanity defense. See *infra* § I.A. Five states, however, hold that the Constitution imposes no such requirement. See *infra* § I.B. There is thus a clear and acknowledged split on this question. *Clark* held that states have substantial leeway to determine the insanity defense's precise parameters and procedures, 548 U.S. at 748–55, but did not decide whether some minimum form of the defense is constitutionally required, *id.* at 752 n.20. This case squarely presents that question.

B. Factual Background And Trial Court Proceedings.

Kraig Kahler was convicted of capital murder and sentenced to death for killing four members of his family while suffering from depression so severe that

he experienced extreme emotional disturbance, dissociating him from reality. Although he knew that he was shooting human beings, his mental state was so disturbed at the time that he was unable to control his actions. If these events had taken place in any of the 46 states (or the District of Columbia) that recognize an insanity defense, Mr. Kahler would have been able to adduce evidence to show that his mental state prevented him from conforming his actions to the law. Instead, he was convicted of capital murder—and sentenced to death.

Mr. Kahler enjoyed a happy marriage, loving family, and successful career for many years. Pet. App. 8a, 139a–40a. Indeed, his identity depended on these pillars, *id.* at 129a, 133a–34a, and he was fixated on the need to control his family and present a "perfect" image to the world, *id.* at 92a–94a. In late 2008, his marriage started to show signs of trouble, and his wife Karen began an extramarital affair. *Id.* at 114a, 140a–41a. By early 2009, the Kahlers were on the path to divorce. *Id.* at 117a. Mr. Kahler was bewildered, completely unable to understand how his seemingly perfect life had fallen apart so quickly. *Id.* He was arrested in March 2009 for assaulting Karen and began to unravel. *Id.* at 9a, 143a.

In spring and summer 2009, Mr. Kahler became obsessed with his wife and the demise of their marriage. He became estranged from his teenaged daughters, whom he felt took their mother's side in the divorce. *Id.* 119a–20a. He slept three or four hours per night (as opposed to his usual eight or nine), was unable to focus, lost interest in his normal activities, and became suicidal. *Id.* at 117a, 123–24a.

Although Mr. Kahler saw several psychologists and psychiatrists during this time period, and was prescribed antidepressants, anti-anxiety medications,

and sleep aids, he refused to take most of the medications as directed. Pet. App. 117a-18a, 129a. His depression and obsessive-compulsive disorder became more and more severe, and in fall 2009 he lost his job, as he was unable to perform his duties. *Id.* at 9a, 98a–99a. As a consequence of his severe depression, he "lost a great deal of his judgment," *id.* at 100a, and his IQ tested lower than it should have, *id.* at 84a.

Around Thanksgiving 2009, Mr. Kahler drove to Karen's grandmother's house, where he knew Karen and the children were spending time over the holiday weekend, and killed Karen, his daughters Lauren and Emily, and Karen's grandmother. Pet. App. 10a. A LifeAlert recording of the shootings captured Mr. Kahler exclaiming, "Oh s**t! I am going to kill her . . . God damn it!," *id.* at 115a, in a tone indicating disbelief and dissociation from what was happening, see *id.* at 101a–02a.

After he was arrested and charged, two forensic psychiatrists evaluated Mr. Kahler over several months, one serving as expert for the prosecution and one as expert for the defense. Both experts agreed that he exhibited major depressive disorder, as well as obsessive-compulsive, borderline, paranoid, and narcissistic personality tendencies. *Id.* 128a, 152a–55a. The doctors disagreed only in their assessment of the severity of his symptoms and his capacity for organized thought as a result. *Id.* at 133a–36a, 154a–55a. Dr. Peterson, the defense expert, found that Mr. Kahler may have suffered from "stress induced short-term dissociation," which would explain his ongoing inability to recall his actions, despite normally excellent recall. *Id.* 129a, 133a, 135a. He further explained that people "with major depression can become so impaired that they actually are psy-

chotic and impaired to the point they do not have judgment." *Id*. at 100a.[2]

In his interviews with Dr. Peterson, Mr. Kahler seemed not to comprehend what he had done, and "could not let himself feel any emotions about their deaths." Pet. App. 121a. He was unable to empathize with his daughters, calling them "rotting corpses," and continued to obsess over Karen's behavior and decision to leave the marriage. *Id*. at 120a. Nearly one year after the shootings, Mr. Kahler remained unable to remember anything that had happened in the time between him leaving his parents' house to drive to Karen's grandmother's house and surrendering to law enforcement the morning after the shootings. *Id*. at 121a, 129a. The severity of his mental illness, in Dr. Peterson's opinion, meant that Mr. Kahler did not make a rational choice to kill his family members, but "felt compelled and . . . basically for . . . at least that short period of time completely lost control." *Id*. at 102a.

Under Kansas law, however, the jury was not able to consider any of this evidence to determine whether Mr. Kahler was criminally insane at the time of the shootings. Further, although Mr. Kahler sought diminished-capacity and affirmative-defense jury instructions at the guilt phase of the trial, the court rejected his request. Pet. App. 34a–36a. Rather, the jury was only able to consider Mr. Kahler's mental illnesses to determine whether he had the requisite

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[2] Consistent with the narrow inquiry now permitted by Kansas law, Dr. Logan, the prosecution expert, concluded that "Mr. Kahler retained the ability to form intent," but did not address Mr. Kahler's ability to discern right from wrong or conform his actions to that understanding. Pet. App. 155a.

intent to commit murder. *Id.* at 35a–36a. Mr. Kahler was convicted in August 2011. *Id.* at 73a–78a.

The same jury returned a death verdict, and in October 2011, the trial court formally sentenced Mr. Kahler to death. Pet. App. 71a–72a. Only at this point, in the sentencing phase, was the jury allowed to consider Mr. Kahler's mental state for mitigation purposes. *Id.* at 71a–78a.

C. Kansas Supreme Court Proceedings.

The Kansas Supreme Court affirmed Mr. Kahler's conviction and sentence. After a brief discussion of Kansas's transition from the *M'Naghten* rule to the *mens rea* approach, the court rebuffed Mr. Kahler's due process arguments, declaring that "[t]he same arguments . . . were considered and rejected by this court in [*Kansas* v. *Bethel*, 66 P.3d 840 (Kan. 2003)]." Pet. App. 36a. The court noted that *Bethel* "considered and rejected the reasoning of the Nevada Supreme Court in [*Finger* v. *Nevada*, 27 P.3d 66 (Nev. 2001) (en banc)]," which struck down a materially indistinguishable statute on due process grounds, "and we adhere to our *Bethel* decision." *Id.* The court saw "no new reason to reconsider the arguments previously and thoughtfully rejected by this court." *Id.* at 37a. Nor was the court moved by the views of the three Justices of this Court who dissented from the denial of certiorari in *Delling*. *Id.* at 36a.

Justice Johnson dissented, distinguishing *Bethel* on the grounds that it was not a death penalty case: "At the very least, this court has the obligation to independently analyze whether the procedure of replacing the insanity defense with the mens rea approach undermines the reliability of the jury's determination to impose the death penalty." Pet. App. 60a.

REASONS FOR GRANTING THE PETITION

I. THE STATES ARE INTRACTABLY SPLIT OVER WHETHER THE INSANITY DEFENSE IS CONSTITUTIONALLY REQUIRED.

A. Seven States Recognize A Constitutional Right To The Insanity Defense.

The Kansas Supreme Court's decision in this case conflicts with the decisions of seven state high courts, which have recognized that the Constitution requires an insanity defense and invalidated several state attempts to restrict or abolish it.

1. The decision below expressly rejected the Nevada Supreme Court's reasoning in *Finger*, 27 P.3d 66. See Pet. App. 36a. *Finger* considered the constitutionality of a Nevada statute providing, like the Kansas law here, that the "fact of [a defendant's] insanity . . . may be taken into consideration in determining" the existence of "any particular purpose, motive or intent" that is an element of the crime, but not otherwise. 27 P.3d at 71. Nevada had previously applied the *M'Naghten* rule, *id.* at 76, but under the new regime, as in Kansas, "an accused cannot argue that he or she should be acquitted on the basis of legal insanity. He or she can only argue that the State has not proven intent beyond a reasonable doubt." *Id.* at 79.

The Nevada court invalidated the statute. After tracing in detail the development of the insanity defense, *id.* at 71–75, and explaining the importance of *mens rea* to the historical conception of crime, *id.* at 80, the court held that "legal insanity is a well-established and fundamental principle of the law of the United States. It is therefore protected by the Due Process Clauses of both the United States and

Nevada Constitutions. The Legislature may not abolish insanity as a complete defense to a criminal offense." *Id.* at 84. The fact that the Nevada law "specifically permit[ted] evidence of insanity to be considered in determining intent," *id.* at 81, did not save it; that scheme failed to account for the "element of wrongfulness" that is inherent in most crimes, including murder. *Id.* at 84. *Finger* also squarely rejected the reasoning of Utah, Montana, and Idaho cases upholding similar statutes (discussed below). *Id.* at 81, 84. As a result, Nevada has reverted to the *M'Naghten* rule. Nev. Rev. Stat. § 194.010.

Like Nevada, California had previously applied the *M'Naghten* test. *California* v. *Skinner*, 704 P.2d 752, 753 (Cal. 1985). After the court replaced that test with a different standard, the state passed a referendum "designed . . . to reinstate the prongs of the *M'Naghten* test." *Id.* at 754. The new law, however, "use[d] the conjunctive 'and' instead of the disjunctive 'or' to connect the two prongs"; thus, "[r]ead literally," the statute "would strip the insanity defense from an accused who, by reason of mental disease, is incapable of knowing that the act he was doing was wrong." *Id.* That construction, the court said, "raises serious questions of constitutional dimension under both the due process and cruel and unusual punishment provisions of the Constitution" because "the insanity defense reflects a fundamental legal principle common to the jurisprudence of this country and to the common law of England." *Id.* at 757, 758–59. Thus, as a matter of constitutional avoidance, *Skinner* construed the statute to restore the traditional *M'Naghten* test, *id.* at 758, which treats as insane not only a defendant who does "not know what he is doing," *id.* at 759, but also a defend-

ant who "did not know he was doing what was wrong," *id.* at 753.

The Louisiana Supreme Court has similarly recognized that the "insanity defense, and the underlying notion that an accused must understand the nature of his acts in order to be criminally responsible (the Mens rea concept), are deeply rooted in our legal tradition and philosophy." *Louisiana ex rel. Causey*, 363 So. 2d 472, 474–75 (La. 1978). The court thus held that "the due process-fundamental fairness concepts of our state and federal constitutions would be violated . . . in adult prosecutions for crimes requiring intent, if an accused were denied the right to plead the insanity defense," and that the same principles required the availability of the insanity defense for juveniles "charged with a serious crime." *Id.* That was true even though there was "no statutory right to plead not guilty by reason of insanity in a Louisiana juvenile proceeding." *Id.* at 473.

These opinions align with (and in the case of Nevada and Louisiana, rely on) a pair of decisions invalidating state attempts to abolish the insanity defense outright. In *Washington* v. *Strasburg*, the Washington high court struck down a statute providing that it was "no defense" that a defendant was "unable, by reason of his insanity . . . to comprehend the nature and quality of the act committed, or to understand that it was wrong." 110 P. 1020, 1021 (Wash. 1910). "From the earliest period of the common law, no criminal responsibility could attach where the accused was so utterly deprived of reason as to be incapable of forming a guilty or criminal intent." *Id.* at 1022. The court thus found it "too plain for argument" that "prior to and at the time of the adoption of our Constitution" a defendant was entitled to an insanity defense. *Id.* Abolishing that defense therefore violated Wash-

ington's Due Process Clause, *id.* at 1025, which is construed identically to the federal Clause, *id.* at 1023 (relying on principles found "in all the Constitution[s] of the Union, state and federal"); see also *Hardee* v. *Washington*, 256 P.3d 339, 344 n.7 (Wash. 2011).

The Mississippi Supreme Court similarly struck down a state statute providing that "the insanity of the defendant . . . shall not be a defense." *Sinclair* v. *Mississippi,* 132 So. 581, 581–82 (Miss. 1931) (en banc) (per curiam). This prohibition violated the state Due Process Clause, *id.* at 582, which is "the same" as the federal guarantee, see *Walters* v. *Blackledge*, 71 So. 2d 433, 444 (Miss. 1954). The majority adopted the reasoning of the concurring opinions, *Sinclair*, 132 So. at 582–91, which explained that "it has been the long-settled conviction of the people through every age" that it is "shocking and inhuman to punish a person for an act when he does not have the capacity to know the act or to judge of its consequences." *Id.* at 584 (Ethridge, J., concurring). "So closely has the idea of insanity as a defense to crime been woven into the criminal jurisprudence of English speaking countries that it has become a part of the fundamental laws thereof . . . ." *Id.* Mississippi has since used the *M'Naghten* test. *Stevens* v. *Mississippi,* 806 So. 2d 1031, 1050–51 (Miss. 2001) (en banc).

Finally, the high courts of two other states, while not confronting direct attempts to abolish the insanity defense, have recognized that it is constitutionally required. The Colorado Supreme Court held that "[a] statute providing that insanity shall be no defense to a criminal charge would be unconstitutional" because "[o]ne accused of crime is entitled to raise and have a jury pass upon the question of whether he

was sane or insane when he committed the act with which he is charged." *Ingles* v. *Colorado,* 22 P.2d 1109, 1111 (Colo. 1933), *superseded by statute on other grounds*, *People* v. *Hill*, 934 P.2d 821, 825 (Colo. 1997). The court upheld a statute that "changed the method of raising the question of insanity" only because the "substance of the defendant's right to a jury trial on the question of insanity has been preserved." *Id.* Similarly, the Minnesota high court noted that "the presentation of evidence of mental illness is a right of constitutional dimension," but did not address the precise boundaries of that right because the court was "satisfied that the *M'Naughten* rule provides a fair and just means of evaluating the actions of a defendant who claims the defense of mental illness." *Minnesota* v. *Hoffman*, 328 N.W.2d 709, 716 (Minn. 1982), *superseded by statute on other grounds*, *State* v. *Bouwman*, 354 N.W.2d 1, 5 n.2 (Minn. 1984).

2. The decision below conflicts with all of these cases. To be sure, only Nevada attempted precisely what Kansas has done here. But as the court below conceded, Kansas's statute "abandons lack of ability to know right from wrong as a defense," Pet. App. 35a, and that is the crux of the insanity defense as it developed in the common law centuries ago. With that aspect eliminated, what remains—allowing evidence of mental impairment only to undermine the state's showing of intent, *id.*—adds nothing to the state's general burden to prove all of the elements of the crime beyond a reasonable doubt. A defendant may always offer relevant evidence in an effort to negate an element of the state's case in chief. Thus, Kansas's law does what the high courts of California, Louisiana, Washington, Mississippi, Colorado, and Minnesota have condemned: It permits a criminal conviction—here, of a death-penalty defendant—so

long as the defendant "know[s] what he is doing," even if he "is incapable of knowing that the act he was doing was wrong" and shaping his conduct accordingly. *Skinner*, 704 P.2d at 754, 759; see also *Finger*, 27 P.3d at 80; *Strasburg*, 110 P. at 1022. In at least seven other states, that result would violate due process, the prohibition against cruel and unusual punishments, or both.

B. Five States Have Held That Due Process Does Not Mandate Any Form of Insanity Defense.

Five states have active statutes abolishing the longstanding *M'Naghten* rule or one of its variants: Alaska, Idaho, Kansas, Montana, and Utah.[3] In Kansas, Utah, Idaho, and Montana, this prohibition includes death penalty cases. These states' courts have upheld these statutes—typically by a narrow vote over a vigorous dissent—against constitutional challenges. See *Kansas* v. *Bethel*, 66 P.3d 840, 844–52 (Kan. 2003); *Utah* v. *Herrera*, 895 P.2d 359, 364–66 (Utah 1995); *Idaho* v. *Searcy*, 798 P.2d 914, 917–19 (Idaho 1990); *Montana* v. *Korell*, 690 P.2d 992, 998–1002 (Mont. 1984); *Lord* v. *Alaska*, 262 P.3d 855, 861–62 (Alaska Ct. App. 2011).[4]

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[3] Alaska Stat. §§ 12.47.010-020; Idaho Code § 18-207; Kan. Stat. Ann. § 22-3220 (2009); Mont. Code Ann. §§ 46-14-102, 46-14-311; Utah Code Ann. § 76-2-305.

[4] "Alaska[] uses only the *M'Naghten* rule's cognitive incapacity prong," Stephen M. LeBlanc, *Cruelty to the Mentally Ill: An Eighth Amendment Challenge to the Abolition of the Insanity Defense*, 56 Am. U. L. Rev. 1281, 1312 n.190 (2007), with the "practical result" that "Alaska is functioning under the same standard as Montana, Idaho, Utah, and Kansas," Andrew P. March, *Insanity in Alaska*, 98 Geo. L.J. 1481, 1509 (2010).

In Idaho, for example, a three-Justice majority concluded that "due process as expressed in the Constitutions of the United States and of Idaho does not constitutionally mandate an insanity defense." *Searcy*, 798 P.2d at 919. This is so, the majority said, because there is "a wide disparity in the positions taken on this issue both by legislatures and courts in the various states"; language from this Court's majority opinions and dissents "suggests" that an insanity defense is not constitutionally required; and "the only court which has expressly ruled upon this issue," the Montana Supreme Court in *Korell*, "has upheld the constitutionality of a state statute abolishing the insanity defense."[5] *Id.* at 917–19. Two Justices dissented, explaining that the majority misread this Court's precedents and that "the insanity defense has an independent existence of sufficient duration and significance to entitle it to a place in our American concept of 'ordered liberty.'" *Id.* at 923–27 (McDevitt, J., dissenting).

The other states' decisions are similar—and have provoked similar dissents. See *Herrera*, 895 P.2d at 364–66 ("we conclude that the current Utah insanity defense does not violate federal due process" because "it allows defendants to present evidence of mental illness to specifically negate the required state of mind"); *id.* at 371 (Stewart, J., dissenting) (insanity defense is "one of the most fundamental principles of Anglo–American criminal law"); *id.* at 390 (Durham, J., dissenting) ("the constitution does not permit the imposition of criminal punishment on persons who

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[5] In truth, the overwhelming majority of states retain the defense, including the right-or-wrong component; this Court has expressly reserved this question, *Clark*, 548 U.S. at 752 n.20; and the Idaho court simply overlooked the contrary state-court decisions discussed above.

are not morally responsible, and therefore not legitimately blameworthy, for their actions"); *Korell*, 690 P.2d at 996–1002 (upholding Montana's statute); *id.* at 1006 (Sheehy, J., dissenting) ("Montana's treatment of the insanity defense . . . deprives the insane defendant of due process"). And the issues debated in these cases are only heightened where the defendant is charged with a crime that carries the death penalty. As the dissent below observed, "[o]ne might question whether a juror would be as likely to vote to kill a defendant who did not know that his or her murderous act was wrong." Pet. App. 60a.

C. Both Sides' Positions Are Fully Elucidated And Stable.

Neither side of this developed split is likely to reconsider. Rather, courts on both sides have reaffirmed their existing positions, even after considering the reasoning of the other side.

The states rejecting any due-process requirement have repeatedly reaffirmed their holdings, typically citing their previous rulings and taking this Court's silence on the issue as acceptance (notwithstanding *Clark*'s reservation of the question). In so doing, they have generally rejected the reasoning of the contrary cases. *E.g.*, Pet. App. 36a ("*Bethel* . . . considered and rejected the reasoning of the Nevada Supreme Court in *Finger*, and we adhere to our *Bethel* decision."); *Idaho* v. *Delling*, 267 P.3d 709, 713 (Idaho 2011) (rejecting *Finger* because it "differs from this Court's previous holdings on the subject"); *Montana* v. *Cowan*, 861 P.2d 884, 889 (Mont. 1993) ("We decline to adopt the reasoning of the California Supreme Court in *Skinner*.").

Similarly, the states on the other side of the split continue to hold that the Constitution requires an in-

sanity defense. *E.g.*, *Washington* v. *Ellison*, 194 Wash. App. 1033 (2016) (following *Strasburg*); *Minnesota* v. *Schroyer*, No. A14-0855, 2015 WL 1880204, at *2 (Minn. Ct. App. Apr. 27, 2015) ("Criminal defendants have a due process right to present a mental illness defense"); *California* v. *Ortega*, No. C-044635, 2005 WL 1623911, at *3 (Cal. Ct. App. July 11, 2005) (noting that *Skinner*'s holding was necessary "to avoid a fatal constitutional infirmity"); *O'Guinn* v. *Nevada*, 59 P.3d 488, 490 (Nev. 2002) (en banc) (per curiam) (reaffirming *Finger*). Again, these courts have confronted the reasoning of the contrary cases. *E.g.*, *Finger*, 27 P.3d at 81–83 (disagreeing with "*Herrera, Searcy* and *Korell*").

II. THE DECISION BELOW IS INCORRECT.

The Kansas Supreme Court rejected Mr. Kahler's constitutional challenge because "the same arguments . . . were considered and rejected" in *Bethel* and "a review of those arguments or of *Bethel* is not warranted." Pet. App. 36a–37a.

Bethel rejected a due process challenge to the *mens rea* approach, reasoning that the "affirmative insanity defense" is "a creature of the 19th century" and not sufficiently "ingrained in our legal system" to warrant due process protection. 66 P.3d at 851. The court based its decision on the "historical practice" of the insanity defense, as well as snippets of dicta or separate opinions from mid-twentieth century decisions of this Court. *Id.* at 844–51. *Bethel* distinguished the Nevada Supreme Court's contrary ruling in *Finger* on the grounds that "malice is not a requisite element of murder" in Kansas. *Id.* at 849–50. Finally, *Bethel* also rejected an Eighth Amendment challenge to the *mens rea* approach, holding that Kansas's statute does not violate the Eight Amendment because it "does not expressly or effectively

make mental disease a criminal offense." *Id.* at 852. None of those rationales withstands scrutiny.

A. The Centuries-Old Principle That Criminal Punishment Is Reserved For People Who Can Distinguish Right From Wrong Is Deeply Ingrained In Our Legal System.

The Due Process Clause protects those principles of justice that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson* v. *New York*, 432 U.S. 197, 201–02 (1977); see also *Montana* v. *Egelhoff*, 518 U.S. 37, 43 (1996) (explaining that the "primary guide in determining whether the principle in question is fundamental is . . . historical practice"). Likewise, "the Eighth Amendment's ban on cruel and unusual punishment embraces . . . those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted," as well as "evolving standards of decency that mark the progress of a maturing society." *Ford*, 477 U.S. at 405–06.

The Kansas Supreme Court was wrong to conclude that the insanity defense is not among these fundamental tenets of our law. On the contrary, the insanity defense generally, and the specific principle that an individual who cannot distinguish right from wrong is protected from criminal liability, have endured in the common law for centuries. This Court has recognized the "humane" common-law principle that a person "cannot be said . . . to have deliberately intended to take life," and is therefore not liable for murder, "unless at the time he had sufficient mind to comprehend the criminality *or the right and wrong* of such an act." *Davis* v. *United States*, 160 U.S. 469, 484–85 (1895) (emphasis added); see also *Finger*, 27

P.3d at 71 ("For hundreds of years, societies recognized that insane individuals are incapable of understanding when their conduct violates a legal or moral standard, and they were therefore relieved of criminal liability for their actions."). In Justice Frankfurter's words, "[e]ver since our ancestral common law emerged out of the darkness of its early barbaric days, it has been a postulate of Western civilization that the taking of life by the hand of an insane person is not murder." *United States* v. *Baldi*, 344 U.S. 561, 570 (1953) (Frankfurter, J., dissenting).

The practice of distinguishing insane people from those capable of understanding the moral implications of their actions dates back to ancient times. As far back as the sixth century B.C., Hebrew scholars "distinguished between harmful acts traceable to fault and those that occur without fault," describing the latter as acts committed by people—such as the insane—who are "incapable of weighing the moral implications of personal behavior, even when willful." Am. Bar. Ass'n, Criminal Justice Mental Health Standards pt. 6, intro. n.8 (1989) (citing Anthony Platt & Bernard L. Diamond, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 J. Hist. Behav. Sci. 355, 366 (1965)). The Greek philosophers of the fifth century B.C. similarly "considered the distinction between a culpable and nonculpable act to be among the 'unwritten laws of nature supported by the universal moral sense of mankind.'" *Id.* (citing B. Jones, *The Law and Legal Theory of the Greeks* 264 (1956)).

By the twelfth century, a general legal defense based on criminal insanity had taken root within the English common-law tradition, and by the sixteenth century, insanity was a "well recognized defense."

Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 1004–05 (1932); see also *Searcy*, 798 P.2d at 928 (McDevitt, J., dissenting). Around the sixteenth century, the insanity defense evolved to embrace the question whether the defendant was capable of distinguishing good from evil and therefore morally culpable. 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, 1228, 1234–35 (1966). Thus, in 1618, the English jurist Michael Dalton wrote: "If one that is 'non compos mentis' [mad], or an ideot, kill a man, this is no felony; for they have not knowledge of good and evill, nor can have a felonius intent, nor a will or minde to doe harm . . . ." *Id*. at 1235 (citing Michael Dalton, *The Countrey Justice* 244 (1630)).

By the eighteenth century, the "knowledge of good and evil" test was "regularly used" in insanity cases. Platt & Diamond, *The Origins of the "Right and Wrong" Test*, *supra*, at 1235–36; Sayre, *supra*, at 1006 (explaining that "[t]he eighteenth century harks back strongly to the old ethical basis of criminal responsibility," which asks: "Could the defendant at the time of the offense 'distinguish good from evil'"?). Juries in the eighteenth century were instructed to consider, for example, whether a defendant pleading insanity "was able to distinguish whether he was doing good or evil," could "discern the difference between good and evil," or "had enough intelligence to distinguish between right and wrong." Homer D. Crotty, *History of Insanity as a Defence to Crime in English Criminal Law*, 12 Calif. L. Rev. 105, 114–15 (1924). Blackstone wrote that "lunatics . . . are incapable of committing any crime, unless in such cases where they show a consciousness of doing wrong." 4 William Blackstone,

Commentaries, *25, *195–96. Likewise, English scholar Williams Hawkins wrote that "it is to be observed that those who are under a natural disability of distinguishing between good and evil, as infants under the age of discretion, ideots and lunaticks, are not punishable by any criminal prosecution whatsoever." Crotty, *supra*, at 113 (citing William Hawkins, *Pleas of the Crown*, I, p.1 (1716)).

In the nineteenth century, the "knowledge of good and evil" test developed into the modern "right and wrong" approach adopted in *M'Naughten's Case*. See Sayre, *supra*, at 1006 ("[T]he eighteenth century good-and-evil test passe[d] into the nineteenth century right-and-wrong test . . . ."). Indeed, "the phrases 'good and evil' and 'right and wrong' were used interchangeably and synonomously" during the early nineteenth century, both in England and in the United States. Platt & Diamond, *The Origins of the "Right and Wrong" Test*, *supra*, at 1237 & n.59 (describing a California jury instruction from 1871: "A person sometimes insane, who has lucid intervals, or is so far sane as to distinguish good from evil, right from wrong, may commit a crime and be legally held responsible."). Both tests address the essential question whether the defendant is morally blameworthy and therefore criminally responsible. Thus, far from being a "creature of the 19th century," *Bethel,* 66 P.3d at 844–51, the "right and wrong" insanity defense was ingrained centuries before.

These principles remain a bedrock part of our legal system to this day. Today, "forty-six states, the federal government, and the District of Columbia employ some form of an affirmative insanity defense for criminal defendants, signifying these jurisdictions' view that criminal responsibility should not attach to the acts of insane persons." Stephen M. LeBlanc, *Cruelty*

to the Mentally Ill: An Eighth Amendment Challenge to the Abolition of the Insanity Defense, *supra*, at 1312–13. This overwhelming consensus reflects not only historical practice but also good policy: None of the four traditional penological justifications for punishing criminal conduct—retribution, deterrence, incapacitation, or rehabilitation, see *Graham* v. *Florida*, 560 U.S. 48, 71 (2010)—justify convicting people who cannot distinguish right from wrong.

First, retribution is not served by punishing a person whose "mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole." *Panetti* v. *Quarterman*, 551 U.S. 930, 959–60 (2007); see also *Ford*, 477 U.S. at 409 ("For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.").

Second, there is no deterrence value in punishing the insane because such punishment "provides no example to others." *Ford*, 477 U.S. at 407; see *Jones* v. *United States*, 463 U.S. 354, 373 n.4 (1983) (Brennan, J., dissenting) ("The insanity defense has traditionally been viewed as premised on the notion that society has no interest in punishing insanity acquittees, because they are neither blameworthy nor the appropriate objects of deterrence.").

Third, although incarceration incapacitates a mentally ill person for the duration of his sentence, it does not necessarily incapacitate him until he is no longer a danger to society. He may remain unwell, and potentially dangerous, after his sentence ends. In contrast, the Constitution permits states to continue defendants acquitted on the basis of insanity to

mental institutions "until such time as he has regained his sanity or is no longer a danger to himself or society." *Jones*, 463 U.S. at 370.

Fourth, ordinary prison facilities are not equipped to rehabilitate people suffering from severe mental disorders. "[A]cross the nation, many prison mental health services are woefully deficient, crippled by understaffing, insufficient facilities, and limited programs. All too often seriously ill prisoners receive little or no meaningful treatment. They are neglected, accused of malingering, treated as disciplinary problems." Human Rights Watch, *Ill-equipped: U.S. Prisons and Offenders with Mental Illness* 1–5 (2003), https://goo.gl/wDAsmW. These problems often result in a cycle of punishment that in turn exacerbates the inmate's mental illness, particularly where solitary confinement is imposed—as it is for all capital defendants in Kansas. Kan. Dep't of Corr., *Purpose of Administrative Segregation & Appropriate Placements*, § 20-104(I)(B)(16); see, *e.g.*, *Wallace* v. *Baldwin*, 895 F.3d 481, 484–85 (7th Cir. 2018) (recognizing the significant harm to an inmate who "has spent eleven years in solitary confinement, suffers from serious mental illness, and has a history of attempting to harm himself" and noting that this "is unfortunately common in American prisons").

In short, under both the Eighth and Fourteenth Amendments, and as a matter of both ancient historical practice and modern consensus, the affirmative insanity defense—and especially the requirement that the defendant know right from wrong—is fundamental to our law.

B. The Dicta And Separate Opinions On Which *Bethel* Relied Do Not Resolve The Question Expressly Reserved in *Clark*.

Bethel, like the Montana, Utah, and Idaho cases discussed above, also relied heavily on *dicta* and separate opinions from mid-twentieth century decisions of this Court discussing the insanity defense. See 66 P.3d at 844–51. The short answer is that *Clark* made clear that none of those decisions resolved the question presented here: "We have never held that the Constitution mandates an insanity defense, nor have we held that the Constitution does not so require." *Clark*, 548 U.S. at 752 n.20.

The longer answer is that none of the decisions *Bethel* cited even purported to resolve the question presented here. *Powell* v. *Texas* held that it is not cruel and unusual punishment to convict a chronic alcoholic of public drunkenness even if the alcoholic's conduct is "in some sense, involuntary." 392 U.S. 514, 535–36 (1968). The fact that *Powell* declined to "defin[e]" a specific "insanity test in constitutional terms," *id*. at 536, does not mean states are free to do away with the defense entirely. The fact that states may constitutionally shift the burden of proving insanity to the defendant, *Leland* v. *Oregon*, 343 U.S. 790 (1952), is similarly immaterial. The defense remains fully available in that situation. Nor do the concurrences or dissents in *Foucha* v. *Louisiana*, 504 U.S. 71 (1992), or *Ake* v. *Oklahoma*, 470 U.S. 68 (1985), shed any meaningful light on this question. The Kansas court erred by resolving a fundamental question of criminal liability based on the tea leaves of these decisions addressing different issues.

C. The Right To An Insanity Defense Is Distinct From The Statutory *Mens Rea* Element Of The Offense.

Finally, *Bethel* suggested that "the Kansas Legislature has not abolished the insanity defense but rather redefined it." 66 P.3d at 851. But an insanity defense limited to the *mens rea* approach is no insanity defense at all. As the Kansas high court conceded in a different case, Kansas's approach means that "insanity . . . disappears as a separate defense." *Jorrick*, 4 P.3d at 618.

As already explained, the historical defense has always incorporated the requirement that the defendant be able to tell right from wrong in regard to his conduct. But under Kansas's approach—as illustrated in *Bethel* itself—"evidence that a schizophrenic defendant's 'mental state precluded him from understanding the difference between right and wrong or from understanding the consequences of his actions . . . does not constitute a defense to the charged crimes.'" *Delling*, 133 S. Ct. at 506 (Breyer, J., joined by Ginsburg & Sotomayor, JJ., dissenting from denial of certiorari) (alteration in original) (describing *Bethel*). Kansas's *mens rea* approach thus allows "conviction of an individual who knew *what* he was doing, but had no capacity to understand that it was wrong." *Id.* That approach is unconstitutional because it fails to account for the "fundamental principle" of justice "rooted in the traditions and conscience of our people" that people who cannot tell good from evil, or right from wrong, are not morally blameworthy and thus not criminally responsible. *Supra* § II.A.

The fact that "in Kansas, malice is not a requisite element of murder," so "the only intent required is the intent to kill a human being," *Bethel*, 66 P.3d at 850, is irrelevant. As Justice Kennedy explained in

Clark, "[c]riminal responsibility involves an inquiry into whether the defendant knew right from wrong, not whether he had the mens rea elements of the offense." 548 U.S. at 796 (Kennedy, J., dissenting). "While there may be overlap between the two issues, the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." *Id.* (citation omitted). And, as already explained, even a great many insane defendants can form the *mens rea* required to commit an intentional crime. See *Pohlot*, 827 F.2d at 900. Kansas's approach therefore fails to preserve the core of the historic defense.

III. THIS IS A VITALLY IMPORTANT AND RECURRING ISSUE.

Whether the Constitution permits states to criminally punish (and potentially execute) individuals who could not control their actions or understand they were wrong has profound legal, moral, and practical implications for our criminal justice system.

The legitimacy of the criminal law rests in large part on the sense that it reflects the moral judgment of the community. In particular, the "heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison* v. *Arizona*, 481 U.S. 137, 149 (1987). In the case of severely mentally ill defendants, however, that crucial link is broken. These defendants do not control or comprehend the nature of their actions and therefore lack the "ability . . . of the normal individual to choose between good and evil" that is a "universal and persistent" predicate for criminal punishment "in mature systems of law." *Morissette*, 342 U.S. at 250. To punish them nevertheless, in the same manner as any other defendant,

is "savage and inhuman." 4 Blackstone, *supra*, at *25. It also risks undermining the legitimacy of the criminal justice system by entirely unmooring punishment from culpability.

What is more, a guilty verdict instead of an insanity verdict prevents the defendant from receiving necessary medical treatment: Whereas an insanity verdict results in confinement in a medical facility, prisons are notoriously ill-suited to provide adequate mental-health treatment. Imprisonment of a severely mentally ill defendant thus fails to serve a rehabilitative purpose. Conversely, because a prison sentence is keyed to the offense rather than the offender's mental condition, a guilty verdict might fail to incapacitate someone even while he remains a danger to others because of his untreated illness. See *supra* § II.A.

One study has found that the insanity defense is raised in roughly one percent of all felony cases, and that juries find about one quarter of those defendants not responsible. Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 Bull. Am. Acad. Psychiatry & L. 331, 334 (1991). The abolition of the insanity defense in five states that are collectively home to roughly 10 million people therefore impacts a large number of defendants. Indeed, defendants in those states have continued to challenge the constitutionality of their convictions on this basis. *E.g.*, *Idaho* v. *Winn*, 828 P.2d 879 (Idaho 1992); *Idaho* v. *Card*, 825 P.2d 1081 (Idaho 1991); *Montana* v. *Meckler*, 190 P.3d 1104 (Mont. 2008); *Cowan*, 861 P.2d 884; *Kansas* v. *White*, 109 P.3d 1199 (Kan. 2005), *superseded by statute on other grounds, Kansas* v. *McLinn*, 409 P.3d 1 (Kan. 2018); *Kansas* v. *Davis*, 85 P.3d 1164 (Kan.

2004); *Utah* v. *Lafferty*, 20 P.3d 342 (Utah 2001); *Utah* v. *Mace*, 921 P.2d 1372 (Utah 1996).

IV. THIS CASE IS AN IDEAL VEHICLE.

This case is an ideal vehicle to decide the issue reserved in *Clark*. Mr. Kahler preserved his due process and Eighth Amendment arguments throughout the case, and the Kansas Supreme Court squarely addressed the question, Pet. App. 35a–36a, in addition to having already considered it thoroughly in *Bethel*, 66 P.3d at 844–52. Further, the issue has been fully ventilated in over a dozen state high court opinions. Waiting will neither resolve the split nor clarify the issues for this Court's review. See *supra* § I.

Moreover, the facts of this case cleanly present the issue for resolution. But for Kansas's rule, the jury, at the guilt phase, would have been able to act on the facts—on which both experts largely agreed—that Mr. Kahler suffered from a "[m]ajor [d]epressive [d]isorder," complicated by obsessive-compulsive and narcissistic tendencies, that have impaired his ability to reason or think. See Pet. App. 122a, 128a, 133a, 154a.

In particular, Dr. Peterson found a "personality fragmentation called mixed personality disorder," *Id.* at 85a, and concluded that Mr. Kahler may have suffered from "stress induced short-term dissociation," which would explain his uncharacteristic inability to recall his actions. *Id.* at 129a, 133a, 135a. "Persons with major depression can become so impaired that they actually are psychotic and impaired to the point they do not have judgment," like Mr. Kahler. *Id.* at 100a, 102a. And there was no evidence that Mr. Kahler was faking these symptoms to avoid liability. *Id.* at 81a–82a. Indeed, Dr. Peterson concluded from

his examination and the recorded LifeAlert call that Mr. Kahler, "for at least that short period of time[,] completely lost control." *Id.* at 102a. That is, "his capacity to manage his own behavior had been severely degraded so that he couldn't refrain from doing what he did." *Id.* at 103a.

Neither doctor indicated that Mr. Kahler did not realize that he was killing human beings, *i.e.*, that he could not form the *mens rea* required to commit homicide. See Pet. App. 155a. That would not be dispositive under the traditional insanity defense, however: The largely undisputed expert testimony still would have supported a strong argument that Mr. Kahler lacked the ability, in that moment, to conform his conduct to the law. Thus, in forty-six other states, Mr. Kahler could have been found not responsible as a result of his mental state. Not in Kansas.

CONCLUSION

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

Respectfully submitted,

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