Case No. 18-6135
Capital Case

IN THE SUPREME COURT OF THE UNITED STATES

JAMES K. KAHLER,

Petitioner,

v.

STATE OF KANSAS,

Respondent.

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

BRIEF OF THE STATE OF KANSAS IN OPPOSITION

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QUESTION PRESENTED

The Kansas Legislature refined the State's insanity defense by channeling evidence of mental disease or defect into the *mens rea* element of a crime. Specifically, 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 mental state required as an element of the offense charged," but "mental disease or defect is not otherwise a defense." Kan. Stat. Ann. § 22-3220 (2009).

There are two questions presented: (1) whether the Due Process Clause prohibits a State from evaluating evidence of a mental disease or defect solely through the *mens rea* element of a crime, and, if so (2) what does the Constitution require for a mental disease or defect defense in light of the complex and competing policy judgments about moral culpability, societal protections, and evolving medical science.

The Eighth Amendment claim that Petitioner would like this Court to reach has not been preserved.

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The opinion of the Kansas Supreme Court (Pet. App. 1a-68a) is reported at *State v. Kahler*, 410 P.3d 105 (Kan. 2018). The relevant order of the trial court is not published.

JURISDICTION

The judgment of the Kansas Supreme Court was entered on February 9, 2018. Pet. App. 1a-68a. A petition for rehearing was denied on April 26, 2018, and a corrected denial order was issued on May 1, 2018. Pet. App. 69a-70a. Following an extension of time, the petition for a writ of certiorari was filed on September 28, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

Petitioner James Kraig Kahler ("Petitioner") shot and killed his estranged wife, two of their three children, and his estranged wife's grandmother on November 28, 2009. A jury convicted Petitioner of capital murder and recommended a death sentence. Pet. App. 73a-77a.

1. In 2008, Petitioner and Karen Kahler lived in Weatherford, Texas. They had three children: two teenage daughters, Emily and Lauren, and a nine-year-old son, Sean. Both Petitioner and Karen had successful careers. Karen was a personal trainer; Petitioner was the director of public utilities. "Acquaintances described the Kahlers as a perfect family." Pet. App 8a.

That summer, Petitioner accepted a new job as the director of water and light for the city of Columbia, Missouri. Karen and the children remained in Texas, but Petitioner moved to Missouri. The plan was for the family to be reunited in the fall.

Before Petitioner left for Missouri, Karen mentioned that she was interested in having a sexual relationship with a female co-worker. Petitioner "assented to the sexual relationship." Pet. App. 9a.

Although Petitioner believed Karen's affair would end when she and the children moved to Missouri, it did not. While at a New Year's Eve party in Texas, Petitioner became embarrassed by Karen and her lover's behavior, and the evening concluded in a shoving match between the Kahlers.

By January 2009, Karen filed for divorce. Two months later she made a battery complaint against Petitioner. That complaint resulted in Petitioner's arrest, which was widely publicized. Karen took the children and moved out of the family home. Petitioner was then fired from his job in August 2009. He moved in with his parents on their ranch near Meriden, Kansas.

Meanwhile, Petitioner did not give up on trying to win Karen back. When that did not work, he tried to "humiliate her publicly to bring her back." Pet. App. 94a. He was "preoccupied with the divorce process" to the point of logging into Karen's computer, trying to destroy her public image, following her, and fearing the influence Karen was having on their daughters, Pet. App. 131a, who he believed had "aligned with Karen" in the divorce. Pet. App. 114a-115a. He even tried to "psychologically bludgeon her back into the relationship," but that "[d]idn't work" either. Pet. App. 94a.

2. Karen spent Thanksgiving 2009 in Derby, Kansas, at her sister's home. Pet. App. 9a. Petitioner and Sean spent the holiday at the Meriden ranch. Although Sean

wanted to stay at the ranch for the weekend, Karen denied permission for him to do so. Instead, on November 28, 2009, she picked up Sean from Petitioner's mother in Topeka, Kansas, Pet. App. 9a, while Petitioner was cashing his final paycheck so that Karen would not get it in the divorce, Pet. App. 121a, 128a. Consistent with a long-standing family tradition, Karen took all three of her children to the home of her grandmother, Dorothy Wight.

That evening, Petitioner pursued Karen, driving from his home in Meriden to Wight's home in Burlingame, Kansas. Petitioner entered Wight's home with a gun around 6:00 PM. Pet. App. 10a. He first encountered Karen, who was standing in the kitchen of the home with Sean. Petitioner shot Karen twice, but did not attempt to harm Sean, who escaped to a neighboring home. At that point, Wight's "Life Alert" system activated, summoning law enforcement and partially recording the events that unfolded. Pet. App. 10a; *see also* Pet. App. 115a (recounting Petitioner telling "a sobbing voice to 'stop crying'"). Petitioner subsequently shot Wight and Emily in the living room; he shot Lauren in an upstairs bedroom. Pet. App. 10a.

Law enforcement arrived shortly thereafter. Pet. App. 10a. Karen was found lying on the kitchen floor, unconscious and barely breathing from the two gunshot wounds. They next found Petitioner's daughters, who both were shot twice as well. They also located Wight, who had been shot once in the abdomen. Lauren and Wight, who were both conscious, informed the officers that Petitioner had shot them. They later died from their gunshot wounds. All told, Petitioner shot and killed four females. But Petitioner chose to save his son's life. This decision "speaks of some decision-

making" by Petitioner, and also his "deep pathological detachment" from his daughters. Pet. App. 128a; *see also* Pet. App. 97a (noting Petitioner preferred his son over his daughters); Pet. App. 120a (describing his daughters as "rotting corpses").

3. Petitioner, armed with three or four rifles and ammunition, managed to elude law enforcement that evening. Pet. App. 10a, 121a (recalling that he had the ability to "take[] out at least a handful" of the law enforcement searching for him). The next day, Petitioner was arrested without incident. Pet App. 10a. The State of Kansas charged him with one count of capital murder, or in the alternative, four counts of premeditated first-degree murder, as well as one count of aggravated burglary for the unauthorized entry into Wight's home.

At trial, Petitioner did not dispute that he shot the four victims. Pet. App. 11a. Rather, he attempted to establish that severe depression had rendered him incapable of forming the intent and premeditation necessary for capital murder under Kansas law. *See* Kan. Stat. Ann. § 21-3439(a)(6) (2009).[1]

Petitioner presented expert testimony in support of his contention. In particular, Petitioner's attorney called Dr. Stephen Peterson, a forensic psychiatrist, who testified that Petitioner was suffering from severe major depression at the time of the crime, but that he was not psychotic. Pet. App. 96a-97a, 103a. Dr. Peterson further opined that Petitioner's ability to manage his own behavior had been "severely degraded" so that he had no ability to "refrain from doing what he did." Pet. App. 11a.

[1] As part of a 2011 recodification of Kansas's criminal code, this statute was renumbered as Kan. Stat. Ann. § 21-5401(a)(6), but otherwise remains unchanged from the time of Petitioner's crime and trial.

But Petitioner's attorney did not ask Dr. Peterson whether Petitioner had the capacity to premeditate or form the requisite intent. *Id.* The State's forensic psychiatrist, in contrast, specifically addressed that point: he "opined that Kahler was capable of forming the requisite intent and premeditation." *Id.*; *see also* Pet. App. 154a-155a (explaining that Petitioner showed planning by bringing a weapon and killing those whom he blamed for his problems while sparing the son that he did not blame for his troubles, and concluding that Petitioner's behavior was "consistent with a clear motive of revenge").

This point was brought up during closing arguments too. Pet. App. 11a. Defense counsel argued that Petitioner was incapable of forming the requisite premeditation or intent. In response, the State noted that Petitioner's expert had failed to offer such testimony and highlighted the fact that its expert had directly opined that Petitioner was capable of premeditating the murder and forming the requisite intent to kill.

The jury convicted Petitioner of capital murder. And, after hearing additional evidence in the penalty phase, the same jury recommended the death sentence.

4. Petitioner appealed directly to the Kansas Supreme Court. As relevant here, he argued that a Kansas statute, Kan. Stat. Ann. § 22-3220 (2009),[2] "violates the Due Process Clause" because it deprived him of the ability to assert a defense based on insanity. Pet. App. 35a-36a. That statute provides: "It is a defense to a prosecution

[2] This is the statute that was recodified in 2011 as Kan. Stat. Ann. § 21-5209 in 2018, but it has not been substantively changed.

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."

The Kansas Supreme Court unanimously rejected Petitioner's due process argument. Pet. App. 36a-37a. In particular, the court stated that the very same due process argument that Petitioner was making had been made in and rejected by the court in *Bethel*. Pet. App. 36a. In *Bethel*, the Kansas Supreme Court, after conducting a thorough review of controlling decisions from this Court and surveying the decisions from other courts that considered similar issues arising under their jurisdictions' similar laws, held that Kan. Stat. Ann. § 22-3220 did not violate the defendant's right to due process under either the United States or Kansas Constitutions. *See* 66 P.3d at 840, *cert. denied* 540 U.S. 1006 (2003). Petitioner mentioned the dissent from the denial of certiorari in *Delling v. Idaho*, 568 U.S. 1038 (2012), but the Kansas Supreme Court concluded it had "no effect on [the] *Bethel* decision." Pet. App. 36a-37a.

* * * * *

ARGUMENT

Review is unwarranted for many reasons. *First*, Petitioner mischaracterizes Kansas law. Kansas has not abolished the insanity defense; rather, Kansas has modified the defense to use a *mens rea* approach like several other States. *Second*, there is no conflict to resolve. The only state court of last resort that has found the *mens rea* approach to be unconstitutional did so based in part on state law and in reliance on a rationale that was subsequently rejected by this Court in *Clark v. Arizona*, 548 U.S. 735 (2006). *Third*, the Kansas Supreme Court's decision correctly identified and applied this Court's precedent that has recognized the States' wide latitude in determining the extent to which mental illness may excuse criminal liability. Adopting a *mens rea* approach does not violate the Constitution. *Finally*, this case is a poor vehicle for addressing this issue. Petitioner failed to preserve the Eighth Amendment claim asserted in his Petition; the record suggests no reason to believe the outcome of this case would be any different based on any other insanity defenses; and, even if this Court were to consider the due process question, the Petition fails to offer constitutional guideposts that the States could, going forward, rely on when exercising the traditional discretion in this field. The Petition should be denied.

I. Petitioner's Question Presented is misleading.

Petitioner has framed the question as whether the "Eighth and Fourteenth Amendments permit a State to abolish the insanity defense." Pet. i. That framing is wrong because it depends on a mischaracterization of Kansas law and an argument that was not preserved.

Kansas "has not abolished the insanity defense," it has only "redefined" the defense to adopt a *mens rea* approach. *State v. Bethel*, 66 P.3d 840, 851 (Kan. 2003); *see also Delling v. Idaho*, 568 U.S. 1038, 1038 (2012) (Breyer, J., dissenting from denial of certiorari) (describing Kansas law as "modif[ying] the insanity defense"); *Clark v. Arizona*, 548 U.S. 735, 752 (2006) (describing Kansas as having "no *affirmative* insanity defense" (emphasis added)). The statute Petitioner challenges here made two modifications to the insanity defense. One concerns nomenclature: the defense is no longer called the "insanity" defense; it is called the "mental disease or defect" defense. *See* Kan. Stat. Ann. § 22-3220 (2009); *see also* Notes on Use, Pattern Instructions Kansas 52.120 (4th ed.) ("In 1996, the term 'insanity' was replaced by 'mental disease or defect.'"). The other modification moved the defense from being one in which the defendant bore the burden of production to show a likelihood of insanity, *see State v. Hedges*, 8 P.3d 1259, 1265 (Kan. 2000), to one in which the mental disease or defect is now a defense to the *mens rea* element of the State's case in chief on which the State bears the burden, *see* Kan. Stat. Ann. § 22-3220 (2009).

Petitioner claims that "an insanity defense limited to the *mens rea* approach is no insanity defense at all," Pet. 25, because a "defendant may always offer relevant evidence in an effort to negate an element of the state's case in chief," Pet. 13. But that proposition was rejected by this Court in *Clark*, which approved a rule that expert testimony about a defendant's insanity could not be considered on the element of *mens rea*. 548 U.S. at 756-57. Instead, the insanity evidence was channeled to a separate insanity defense. The Court found "there is no violation of due process . . .

and no cause to claim that channeling evidence on mental disease and capacity offends any principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 779. Abolishing the insanity defense would mean eliminating any consideration of insanity evidence. That is not what Kansas law does. It merely channels such evidence to the *mens rea* requirement.

In addition, the question presented includes a claim that has not been preserved. Although Petitioner argues (Pet. 28) that he preserved an Eighth Amendment challenge to Kansas's mental disease or defect defense, the record confirms that he made no Eighth Amendment challenge to Kan. Stat. Ann. § 22-3220 (2009) below, *see* Part IV.A, *infra*, and there is no mention of such a challenge in the Kansas Supreme Court's decision, *see* Pet. App. 35a-37a. Because Petitioner did not preserve the Eighth Amendment challenge, it should not have been referenced in the question presented. *See* Part IV.A., *infra.*

II. There is no conflict to resolve.

Petitioner's main argument is that the "States are intractably split over whether the insanity defense is constitutionally required." Pet. 9. Not so. Rather, as this Court has recognized, the Federal Government and the States have a long-standing, significantly varied approach about how to handle mental illness in the criminal context. *See Clark*, 548 U.S. at 749. Thus, any dissonance between the state courts of last resort is attributable to the unique approaches existing in those jurisdictions and not a disagreement about a constitutional rule. Indeed, no State court of last resort

since this Court decided *Clark* has held that the insanity defense is constitutionally required.

1. The principal case Petitioner identifies as indicative of the conflict that needs resolved is *Finger v. State*, 27 P.3d 66 (Nev. 2001), a decision rendered five years before *Clark* and grounded, in part, on the Nevada Constitution. There, the Nevada Legislature, among other things, abolished the concept of legal insanity as a defense to culpability and adopted a *mens rea* model in its place. *Id.* at 78. After recounting the history of the insanity defense and the backdrop against which the Nevada Legislature acted, the Nevada Supreme Court recognized that Utah, Idaho, and Montana (the only three state courts of last resort that had considered the issue at that time) had "place[d] heavy emphasis on the fact that the United States Supreme Court ha[d] never held that a defense of insanity is a fundamental principle under the Due Process Clause." *Id.* at 71-81. Nonetheless, having undertaken its own analysis of this Court's decisions, the Nevada Supreme Court "conclude[ed] that legal insanity is a well-established and fundamental principle of the law of the United States" and was "therefore protected by the Due Process Clauses of both the United States and Nevada Constitutions." *Id.* at 81-84. This Court denied Nevada's petition for writ of certiorari. *Nevada v. Finger*, 534 U.S. 1127 (2002).

Finger is inapposite because the Nevada Supreme Court tied its decision to a unique aspect of Nevada law not present in the Kansas statute. *See generally Bethel*, 66 P.3d at 848-50 (describing the differences between Kansas and Nevada law). Nevada law defined murder to include the element of "malice aforethought," which

meant that wrongful mental state was an element of the crime. *Finger*, 27 P.3d at 83. The Nevada Supreme Court held that "[a]nytime a statute requires something more than the intent to commit a particular act, then legal insanity must be a viable defense to the crime and involves both tests under the *M'Naghten* rule." *Id.* at 84. But "in Kansas, malice is not a requisite element of murder." *Bethel*, 66 P.3d at 850. For that reason alone, *Finger* is distinguishable from this case on state law grounds.

In addition, *Finger*'s rationale was rejected by this Court in *Clark*. The Nevada Supreme Court in *Finger* characterized the *mens rea* approach as essentially employing only the first part of the *M'Naghten* test and concluded that constitutional due process requires knowledge of wrongfulness as well (*i.e.* both prongs of the *M'Naghten* test). *Id.* at 79-84. In *Clark*, this Court rejected the idea that due process required recognition of both the cognitive and moral capacity parts of the *M'Naghten* test. 548 U.S. at 748-56. Indeed, "cognitive incapacity is itself enough to demonstrate moral incapacity. . . . [A] defendant can therefore make out moral incapacity by demonstrating cognitive incapacity." *Id.* at 753. Petitioner cannot succeed where respondent in *Clark* failed, as the issues are two sides of the same coin.

2. *Finger* also cited two decisions from state courts of last resort that reached a similar result. 27 P.3d at 570. Both are unhelpful to Petitioner's cause because each relied on state law, not the United States Constitution, to strike down the legislative abolition of the insanity defense. In *Sinclair v. State*, 132 So. 581 (Miss. 1931), the court held that a statute that completely abolished insanity as a defense to a charge of murder violated section 14 of the Mississippi Constitution. *Id.* at 582. So, too, in

State v. Strasburg, 110 P. 1020, 1021 (Wash. 1910), where the defendant only made a challenge based on the rights guaranteed under the state Constitution. *Id.* at 1021.

Petitioner has also cited a few other cases, but they are equally unhelpful to his position. Pet. 10-13. For example, *People v. Skinner*, 704 P.2d 752 (Cal. 1985), involved nothing more than what all parties agreed was a drafting error: a California ballot initiative phrased the two prongs of the *M'Naghten* test in the conjunctive instead of the disjunctive, which the California Supreme Court corrected as a matter of state—not federal—law. *Id.* at 758 ("We need not face these difficult constitutional questions . . . if [the initiative] does no more than return to . . . the *M'Naghten* test.").

State ex rel. Causey, 363 So.2d 472 (La. 1978), is equally afield. It only considered whether there was a justifiable reason that juveniles could not raise an insanity defense in a civil juvenile proceeding when adults could raise such a defense in an analogous criminal proceeding. *See id.* at 473-74. It did not involve a specific insanity test. The Louisiana Court observed that the right to plead insanity is "fundamental," but it did so while stating this was so "absent some other effective means of distinguishing mental illness from moral culpability." *Id.* at 476. Here, of course, Kansas law provides that "other effective means" by which a criminal defendant may advance a claim of mental illness to escape legal culpability.

The final two cases Petitioner identifies are even more attenuated. In *Ingles v. People*, 22 P.2d 1109 (Colo. 1933), the Colorado Supreme Court relied solely on the state constitution for its exposition of due process. *Id.* at 1111. And in *Minnesota v. Hoffman*, 328 N.W. 2d 709 (Minn. 1982), the court offered dicta to the effect that some

presentation of mental illness was a "right of constitutional dimension" under both the state and federal constitutions, but declined to define the scope of that right because Minnesota continued to follow the *M'Naghten* rule. *Id.* at 716 (referring to the *M'Naghten* rule as "a minority position").

3. Since *Clark*, every state appellate court to have addressed the issue has concluded that the *mens rea* approach does not violate the Due Process Clause. For example, the Idaho Supreme Court expressly rejected the opportunity to reconsider whether the *mens rea* approach was inadequate and unconstitutional in light of *Finger*. *See State v. Delling*, 267 P.3d 709 (Idaho 2011). Its decision was based on the language of *Clark* and this Court's repeated denials of petitions for writ of certiorari challenging Idaho's insanity defense, observing that the latter practice "reinforces the language found in other U.S. Supreme Court opinions that these types of decisions are left to the states." *Id.* at 714 (listing three prior cases presenting the same issue). This Court thereafter denied Delling's petition for writ of certiorari. *See Delling v. Idaho*, 568 U.S. 1038 (2012).

The same is true in Alaska, Wisconsin, and Colorado. The Alaska Court of Appeals, citing *Clark* among other cases, denied a constitutional challenge to that State's similar *mens rea* approach. *See Lord v. State*, 262 P.3d 855, 861-62 (Alaska Ct. App. 2011) ("If the State proves beyond a reasonable doubt that the defendant possessed the mens rea required by a criminal statute, the United States Constitution does not require any further inquiry into the defendant's mental state to support a

conviction."). Further, other state courts have recognized that there is no constitutional right to an insanity defense. *See State v. Burton*, 832 N.W.2d 611, 632 & n.21 (Wisc. 2013) ("[N]either the federal constitution nor the Wisconsin Constitution confers a right to an insanity defense . . ."); *cf. also People v. Grant*, 174 P.3d 798, 813 (Colo. Ct. App. 2007) (recognizing it is not unconstitutional to punish a person who cannot distinguish right from wrong).

III. The decision below was correctly decided.

This Court's cases have repeatedly recognized that the States have significant discretion in how they define crimes and permit affirmative defenses. Indeed, *Clark* rejected an attempt to convert the *M'Naghten* test into a constitutional rule because of the varying approaches and judgments that jurisdictions have made concerning a defense based on mental illness. Thus, the Kansas Supreme Court properly relied on this Court's decisions—and one of its own, prior decisions that this Court chose not to review—to reject Petitioner's due process objection to Kansas law.

A. The States have broad discretion in determining how they define crimes, admit evidence, and create affirmative defenses.

"States enjoy wide latitude in defining the elements of criminal offenses." *Montana v. Egelhoff*, 518 U.S. 37, 58 (1996) (Ginsburg, J., concurring); *accord Patterson v. New York*, 432 U.S. 197, 201-02 (1977). This is especially true when "determin[ing] the extent to which moral culpability should be a prerequisite to conviction of a crime." *Powell v. Texas*, 392 U.S. 514, 545 (1968) (Black, J., concurring). This Court has therefore recognized that a State's law violates the Due Process Clause if—but only if—"it offends some principle of justice so rooted in the traditions and conscience

of our people as to be ranked as fundamental."[3] *Patterson*, 432 U.S. at 202 (quotation marks and citations omitted); *see also Egelhoff*, 518 U.S. at 47 (opinion of Scalia, J.) ("It is not the State which bears the burden of demonstrating that its rule is 'deeply rooted,' . . . .").

Historical practice is the primary guide to determine whether a principle is fundamental. *Egelhoff*, 518 U.S. at 43 (opinion of Scalia, J.). "Even a cursory examination" of historical practice shows that no particular formulation of the insanity rule enjoys widespread use or acceptance. *Clark*, 548 U.S. at 749-53 (tracing the variations, strains, and practices among the States). The insanity rule, therefore, "is substantially open to state choice." *Id.* at 752.

Not only has there been wide variation in the tests used to establish insanity, but the insanity test has always been highly controversial and subject to repeated tinkering. *See*, *e.g.*, *Leland v. Oregon*, 343 U.S. 790, 801 (1952) (the choice of a test for legal insanity involves questions of basic policy that have "evoked wide disagreement among those who have studied it"). Reflecting this fluid situation, legal commentators have championed and legislatures have considered various approaches to formulating

[3] This Court's recognized deference to the States "respects the States' longstanding and well-established authority to determine the circumstances in which mental illness excuses liability," a question that "involves complex and competing policy considerations about moral culpability, societal protection, and medical science" that "have evolved over time and continue to evolve." *See* Brief of the United States as Amicus Curiae, *Clark v. Arizona*, 548 U.S. 735 (2006) (No. 05-5966), 2006 WL 542415, at *9-10.

an acceptable mental illness defense for well over one hundred years, including considering mental illness only in assessing *mens rea* instead of a *M'Naghten*-like insanity defense. *See generally* Brief of the United States as Amicus Curiae, *Clark v. Arizona*, 548 U.S. 735 (2006), 2006 WL 542415, at *10-14 (Mar. 6, 2006) (tracing the variations of insanity and the varying approaches in England and the United States from the 1800s to modern times); *see also* Edwin R. Keedy, *Insanity and Criminal Responsibility*, 30 Harv. L. Rev. 535, 536 (1917) (proposing a *mens rea* approach in model legislation); *United States v. Pohlot*, 827 F.2d 889, 895-90 (3d Cir. 1987) (discussing the Insanity Defense Reform Act of 1984, 18 U.S.C. § 17, the concerns leading to the legislation, and the implications of the varying approaches).

B. In *Clark*, this Court rejected an attempt to create a constitutional right to a particular insanity or mental illness defense.

1. This Court in *Clark* addressed a closely related question to the one that Petitioner presents here. Arizona law provided an insanity defense based on "the two-part insanity test announced in *M'Naghten's Case*, 8 Eng. Rep. 718 (1843)." *Clark*, 548 U.S. at 746. The first part of the *M'Naghten* test points to cognitive capacity: "whether a mental defect leaves a defendant unable to understand what he is doing." *Id.* at 747. The "second part presents an ostensibly alternative basis for recognizing a defense of insanity understood as a lack of moral capacity: whether a mental disease or defect leaves a defendant unable to understand that his action is wrong." *Id.*; *see also id.* at 753-55 (discussing the "long-accepted understanding that the cognitively incapacitated are a subset of the morally incapacitated"). Because the Arizona Legislature amended its statute on insanity by "drop[ing] the cognitive incapacity part"

and "leaving only moral incapacity as the nub of the stated definition," Clark alleged that he was denied due process because the full *M'Naghten* test was constitutionally required. *Id.* at 748.

This Court held that "[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. And it surveyed the variety of methods that the States have used to consider mental illness in the criminal context: seventeen States and the Federal Government had adopted some version of the two-part *M'Naghten* test, one had adopted only the cognitive incapacity portion of *M'Naghten*, ten had adopted only the moral incapacity portion of *M'Naghten*, fourteen applied "an amalgam of the volitional incapacity test and some variant of the moral incapacity test," three combined a full *M'Naghten* test with a volitional incapacity formula, one used a "product-of-mental-illness test," and four allowed consideration of mental illness only as it relates to the *mens rea* element of the offense at issue. *Clark*, 548 U.S. at 750-52.

2. This Court has never held that a defendant has a constitutional right to present an affirmative insanity defense. To the contrary, this Court has suggested that there is no such right. *See Medina v. California*, 505 U.S. 437, 449 (1992) (recognizing that due process might afford an incompetent defendant the right not to be tried, but stating that the Court "has never said that the Constitution requires States to recognize the insanity defense"). The reason for this suggestion is because, as recognized in *Leland v. Oregon*, the "choice of a test of legal sanity involves not only

scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility." 343 U.S. 790, 800-01 (1952) (permitting Oregon to require the criminal defendant to prove insanity by clear and convincing evidence).

Sixteen years after *Leland*, this Court again declined to "defin[e] some sort of insanity test in constitutional terms" because of the "centuries-long evolution" of "interlocking and overlapping concepts" the States have used to "assess the moral accountability of an individual for his antisocial deeds." *Powell v. Texas*, 392 U.S. 514, 536 (1968) (opinion of Marshall, J.); *see also id.* at 545 (Black, J., concurring) (suggesting that both the majority and dissenting opinion in *Leland* "stressed the indefensibility of imposing on the States any particular test of criminal responsibility"). Thus, not only has this Court has "never held that the Constitution mandates an insanity defense," *Clark*, 548 U.S. at 752 n.20, but it also has strongly and repeatedly signaled for nearly seven decades that the Constitution *does not* require an insanity defense. *See generally* Brief of the United States as Amicus Curiae, *Clark v. Arizona*, 548 U.S. 735 (2006) (No. 05-5966), 2006 WL 542415, at *8-9 (collecting decisions and statements of various Members of this Court). The Kansas Legislature has properly exercised its discretion in channeling the defense of insanity to the *mens rea* element of the charged crime.

C. The Kansas Supreme Court correctly applied this Court's decisions.

The Kansas Supreme Court properly identified the Due Process Clause, as interpreted by this Court, as the basis of Petitioner's claim. Pet. App. 35a-36a. In particular, the Kansas Supreme Court recognized that Petitioner was arguing that, as required by *Patterson v. New York*, 432 U.S. 197, 201-02 (1977), the Kansas *mens rea* statute offended a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. Pet. App. 35a-36a. It then rejected Petitioner's contentions because they were no different than those it had "considered and rejected" in *State v. Bethel*, 66 P.3d 840 (2003). Pet. App. 36a.

The Kansas Supreme Court's decision in *Bethel* was sound. There, the Kansas Supreme Court fully described the state of the law, the competing claims of the parties, the historical arguments for and against both the *M'Naghten* and *mens rea* approaches, and the decisions from this Court and other state courts of last resort. *Bethel*, 66 P.3d at 844-51. In the end, it concluded that the *mens rea* approach did not run afoul of the Due Process Clause. *See id.* at 851. This Court subsequently declined to review that conclusion. *See Bethel v. Kansas*, 540 U.S. 1006 (2003).

The only new argument that Petitioner made was to reference the written dissent from the denial of certiorari in *Delling v. Idaho*, 568 U.S. 1038 (2012) (opinion of Breyer, J.). *See* Pet. App. 36a. The Kansas Supreme Court concluded that the dissent from the denial of certiorari in *Delling* did not undermine its prior decision. Pet. App. 36a-37a. It was not error for the Kansas Supreme Court to decline reconsideration of its precedent based on *Delling*. *See Singleton v. Commissioner*, 439 U.S. 940, 944-45

(1978) (Stevens, J., opinion respecting denial of certiorari) (characterizing such writings as "totally unnecessary" and "the purest form of dicta" with "even less significance than the orders of the entire Court, which . . . have no precedential significance at all").

IV. This case is an unsuitable vehicle.

Petitioner seeks a broad constitutional rule, yet his is a poor case in which to consider that request. For one thing, Petitioner has not preserved one of the two arguments that he identifies. For another, the argument about whether *mens rea* or the *M'Naghten* test is appropriate is academic because the jury considered Petitioner's evidence of mental illness and recommended the death penalty for the crimes he committed. Finally, the Petition simply suggests that the *mens rea* test is unconstitutional because it does not incorporate a portion of the *M'Naghten* test, but fails to offer constitutional guideposts that the States can rely on when exercising the traditional discretion in this field.

A. Petitioner did not preserve the Eighth Amendment argument.

The question framed by Petitioner identifies the Eighth Amendment as one of two bases for his claim. Pet. i, 1. That argument has not been preserved.

Before the Kansas Supreme Court, Petitioner made a number of broad ranging arguments concerning the trial, conviction, and sentence and briefly raised the Due Process argument that he asserts in this Petition. Pet. App. 35a-37a. But he never argued that Kansas's adoption of the *mens rea* approach violated the Eighth Amendment. *See* Brief of Appellant, *State v. Kahler*, 410 P.3d 105 (2018) (No. 106981), 2013

WL 3790736 at *41-47 (arguing only that the mental disease or defect law violated due process); Reply Brief of Appellant, *State v. Kahler*, 410 P.3d 105 (2018) (No. 106981), 2014 WL 2674967 at *ii (failing to address the State's mental disease or defect argument). Rather, he only asserted that Kan. Stat. Ann. § 22-3220 was an unconstitutional abrogation of the insanity defense "in violation of the Due Process Clause of the Fourteenth Amendment" and the state constitution. Brief of Appellant, *State v. State v. Kahler*, 410 P.3d 105 (2018) (No. 106981), 2013 WL 3790736 at *1, 41-47. As a result, Kansas did not argue and the Kansas Supreme Court did not consider the Eighth Amendment. Pet. App. 35a-37a.

Because this Court is one of "final review and not first view," it does not address "issues not decided below," including innovative theories of constitutional rights. *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012). Thus, to the extent Petitioner's question presented could proceed at all in this Court, it can only proceed as a Fourteenth Amendment due process challenge. *See Illinois v. Gates*, 462 U.S. 213, 217-22 (1983) (reiterating that the Court does not consider a federal question that has not been raised or decided below); *see also CSX Transp., Inc. v. Alabama Dep't of Rev.*, 562 U.S. 277, 284 n.5 (2011) (declining to consider arguments made when "[n]o court in this case has previously considered these questions, and the parties' briefs in this Court have only sketchily addressed them").

Petitioner's failure to preserve an Eighth Amendment argument renders this case an unsuitable vehicle to address the constitutionality of the *mens rea* approach. To the extent this Court is inclined to address that issue, it should do so in a case

where both the Due Process Clause and Eighth Amendment theories have been preserved.

B. The jury rejected Petitioner's mental illness evidence.

Another problem is that the jury was presented with and rejected Petitioner's evidence of mental illness. Petitioner's chief concern is that the *mens rea* test used in Kansas does not, unlike its prior reliance on *M'Naghten*, provide a defense to someone who, due to his or her mental condition, is incapable of knowing that what he or she is doing is wrong. Pet. 18-23. But even if *M'Naghten* still applied, there is no reason to believe the jury would have reached a different result under another approach to insanity.

Petitioner's forensic psychologist, Dr. Stephen Peterson, testified that Petitioner "was suffering from severe major depression at the time of the crime" and that those "with major depression can become so impaired that they actually are psychotic and impaired to the point they do not have judgment." Pet. 6-7 (quoting Pet. App. 100a); *see also* Pet. App. 11a. But the record suggests that Petitioner knew at the time that what he was doing was both momentous and wrong: the Life Alert recording of the shooting that captured Petitioner exclaiming "Oh s**t! I am going to kill her . . . . God damn it!," Pet. 6 (quoting Pet. App. 115a); *see also* Pet. App. 115a ("Later he tells a sobbing voice to 'stop crying.'"). The evidence also shows that his crime was not a spur-of-the-moment reaction: the record demonstrates that Petitioner traveled to Burlingame, entered Wight's home with a weapon, chose which individuals to shoot

and which to spare, left the murder scene before law enforcement arrived, and successfully avoided capture that night. This evidence shows intentional, deliberate conduct. Pet. App. 154a-155a (describing Petitioner's pride in eluding police and getting retribution for the perceived wrongs against him).

During the penalty phase of the trial, Petitioner was able to present whatever evidence of insanity he may have had, and yet the jury concluded that he should be sentenced to death. Regardless of the hypothetical arguments against the *mens rea* approach, this is not a case that depends on the nature of the mental disease or defect defense that applies. Given the jury's imposition of the death sentence—after Petitioner had to the opportunity to present evidence of his alleged inability to distinguish right from wrong—there is no reason to believe that the jury would have reached a different result at the guilt phase if the *M'Naghten* rule applied.

C. If this Court considers the *mens rea* issue, it should also be prepared to articulate constitutional guideposts for States to exercise their discretion when defining mental illness defenses.

There is a final, practical concern with the Petition. It simply suggests that the *mens rea* test is unconstitutional, but fails to offer constitutional guideposts that the States could, going forward, rely on when exercising the traditional discretion in this field. Thus, a conclusion that the Constitution forbids the States from focusing on mental disease and defect as the *mens rea* approach begs the question of what are the constitutional guideposts that the States can, may, or must consider when adopting their varying approaches.

Historically, this Court has declined to constitutionalize the insanity defense. *See Clark*, 548 U.S. at 752. That decision has rested in large measure on the States' longstanding and well-established authority to set the parameters of criminal liability and to determine the circumstances when mental illness excuses it. *See Powell*, 392 U.S. at 536; *see also Leland*, 343 U.S. at 801. Each State, therefore, has made a variety of judgments based on complex and competing policy considerations that touch on moral culpability, societal protection, and medical science that continues to ebb and flow. *See Clark*, 548 U.S. 752.

If this Court were to consider whether the Constitution forbids the *mens rea* approach, it should also be prepared to clearly articulate what the Constitution requires (or permits) as it relates to mental illness defenses. Unfortunately, Petitioner offers no constitutional test or framework for measuring a State's compliance with the Due Process Clause except constitutionalizing the *M'Naghten* test, opting instead to note that most of the other States have a more traditional insanity defense that he would prefer. See Pet. 5, 21-23; *but see* Part IV.B., *supra* (arguing that Petitioner's evidence would not excuse his behavior even under the *M'Naghten* test). And the Petition identifies no decisions from any United States court of appeals or state courts of last resort that have suggested a particular framework within which States can safely exercise their historical discretion. Leaving the States without this guidance injects unnecessary uncertainty into any criminal matter where insanity has been or may be an issue.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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