CAPITAL CASE
No. 18-6135

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

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

I. KANSAS HAS ABOLISHED THE INSANITY DEFENSE.

Kansas insists it "has not abolished the insanity defense." Opp. 8–9. That is wrong. Kansas has undisputedly "abandon[ed] lack of ability to know right from wrong as a defense." Pet. App. 35a. Thus, an insane defendant, like any other defendant, can only attempt to rebut the prosecution's showing on the offense's elements, including *mens rea*. Pet. 13. The Kansas Supreme Court has been clear about the nature of this change: "Kansas followed Montana, Idaho, and Utah to become the fourth state *to legislatively abolish the insanity defense*." *Kansas* v. *Jorrick*, 4 P.3d 610, 617 (Kan. 2000) (emphasis added). That is, by channeling "[a]ll capacity defenses" into "the *mens rea* of the crime," Kansas "eliminate[d] the insanity defense." *Id*. at 617–18.

True, Kansas has not barred all evidence of insanity. Opp. 9. But allowing such evidence as to *mens rea* alone does not preserve the defense. "[C]riminal intent or lack thereof is not the focus of the insanity question," which "is and always has been broader." *Ohio* v. *Curry*, 543 N.E.2d 1228, 1230 (Ohio 1989); accord *Oregon* v. *Olmstead*, 800 P.2d 277, 282 (Or. 1990); Wayne R. LaFave, 1 *Substantive Criminal Law* § 7.1(b) (3d ed. 2018). Indeed, "the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements." *Mullaney* v. *Wilbur*, 421 U.S. 684, 706 (1975) (Rehnquist, J., concurring); see *United States* v. *Pohlot*, 827 F.2d 889, 898–900 (3d Cir. 1987) (noting the distinctions between the insanity and *mens rea* inquiries and describing *mens-rea*-only proposals as "abolish[ing]" the defense).

In turn, a *mens-rea*-only approach treats as criminals people who are, by any definition, insane. A "man who commits murder because he feels compelled by demons," *Pohlot*, 827 F.2d at 900; a defendant who believes that "a wolf … has ordered him to kill the victim," *Delling* v. *Idaho*, 133 S. Ct. 504, 505 (2012) (Breyer, J., dissenting from denial of certiorari); and a person whose mental illness deprives him of "the ability to control his actions," LaFave, *supra*, § 7.1(b), are all capable of forming intent, yet lack the "ability … of the normal individual to choose between good and evil," *Morissette* v. *United States*, 342 U.S. 246, 250 (1952). But in Kansas, all would be guilty. So would an insane defendant charged with a strict-liability crime. Cf. *Olmstead*, 800 P.2d at 282. The opposition does not even try to square these results with the traditional insanity defense.

Clark does not suggest that a *mens-rea*-only approach preserves the defense. Contra Opp. 8–9. In fact, the Arizona scheme in *Clark* maintained "a separate insanity defense," *id.*, under which mental-state evidence—including inability to tell right from wrong—was admissible to avoid conviction. *Clark* v. *Arizona*, 548 U.S. 735, 760–62 (2006). Such evidence simply could not be considered in the *mens rea* inquiry. See *id.* That is "precisely the opposite" of Kansas's approach. Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity And Mens Rea: Beyond* Clark *v.* Arizona, 97 J. Crim. L. & Criminology 1071, 1121 (2007). In short, in Kansas—and in four other states, Pet. 14—insanity has "disappear[ed] as a separate defense." *Jorrick*, 4 P.3d at 618 (emphasis omitted).

II. THE SPLIT IS CLEAR AND ENTRENCHED.

1. Kansas concedes that Nevada (like Kansas) "abolished the concept of legal insanity as a defense"

and "adopted a *mens rea* model." Opp. 10. Yet it says that *Finger* v. *Nevada*, 27 P.3d 66, 83 (Nev. 2001), which struck down that law, is distinguishable. Not so. Although *Finger* was "grounded, in part, on the Nevada Constitution," Opp. 10, it squarely held that the *mens rea* approach violates the Fourteenth Amendment because "the concept of legal insanity"—*i.e.*, "that a person has a complete defense" by virtue of his mental state—is "a fundamental principle" protected by due process. 27 P.3d at 80, 84–86. Kansas has repeatedly held the opposite. See Pet. App. 36a; *Kansas* v. *Bethel*, 66 P.3d 840, 851 (Kan. 2003).

Nor did *Finger* turn on the fact that murder in Nevada requires "malice aforethought." 27 P.3d at 83; see Opp. 10–11. Rather, "so long as a crime requires some additional mental intent" beyond the *actus reus*, "legal insanity must be a complete defense to that crime." *Finger*, 27 P.3d at 84. Thus, *Finger* invalidated, as to *all* crimes, the statute "abolishing the defense of legal insanity," and the Nevada court has applied *Finger*'s holding to crimes requiring only general intent. See *O'Guinn* v. *Nevada*, 59 P.3d 488, 490 (Nev. 2002) (per curiam). But even if *Finger* were limited to crimes with a higher *mens rea*, the conflict would remain: Just as murder in Nevada requires "malice aforethought," in Kansas it requires killing "[i]ntentionally, and with premeditation." Kan. Stat. Ann. § 21-5402.

Further, if Kansas were correct, *Finger* would not have needed to consider and reject "the analysis of federal law contained in the majority opinions of *Herrera*, *Searcy* and *Korell*." 27 P.3d at 83. Nor would the Kansas Supreme Court have needed to analyze those opinions and reject *Finger* to follow the others. *Bethel*, 66 P.3d at 846–47; see Pet. App. 36a ("*Bethel* … considered and rejected the reasoning of … *Fin-*

ger, and we adhere to our *Bethel* decision."). Other pro-abolition courts have done the same. See Pet. 16–17 (collecting cases). This is an acknowledged split.

Clark did not undermine *Finger*. According to Kansas, *Finger* held that "both prongs of the *M'Naghten* test" were constitutionally required, which *Clark* rejected because "cognitive incapacity is itself enough to demonstrate moral incapacity." Opp. 11 (quoting *Clark*, 548 U.S. at 753). That argument rests on the "fallacy" that cognitive incapacity (not knowing what you are doing) and moral incapacity (not knowing your action is wrong) are interchangeable. See *California* v. *Skinner*, 704 P.2d 752, 760 (Cal. 1985). That is only half right. Cognitive incapacity is sufficient to establish moral incapacity, because "if a defendant did not know what he was doing … he could not have known that he was performing [a] wrongful act." *Clark*, 548 U.S. at 753–54. But the "reverse does not necessarily follow"; a person can know what he is doing without knowing his action is wrong. *Skinner*, 704 P.2d at 760. *Clark* upheld the Arizona statute because, while it "dropped the cognitive incapacity" prong, "the requirement that the accused know his act was wrong" remained. 548 U.S. at 748, 754. *Clark* did not question—and indeed supports—*Finger*'s holding that due process requires an insanity defense that at least reflects the defendant's ability to understand the "wrongfulness of the act." 27 P.3d at 75.

2. Kansas fares no better with the other cases. *Skinner* cannot be brushed aside as correcting a "drafting error." Opp. 12. It held that construing the California statute "literally" would have "strip[ped] the insanity defense from an accused who, by reason of mental disease, is incapable of knowing that the

act he was doing was wrong." 704 P.2d at 754. *Skinner* rejected that construction to "preserve [the law's] constitutionality." *Id.* at 754, 757–58. There is little doubt that *Skinner* would have invalidated a statute like Kansas's; in the California Supreme Court's view, construing the statute in that manner would create "a fatal constitutional infirmity." *California* v. *Ortega*, No. C-044635, 2005 WL 1623911, at *3 (Cal. Ct. App. July 11, 2005). And *Skinner* held that "the insanity defense reflects a fundamental legal principle," 704 P.2d at 758—directly contrary to Kansas's holding that the defense does not "constitute a fundamental principle of law," *Bethel*, 66 P.3d at 851.

Kansas concedes that *Washington* v. *Strasburg*, 110 P. 1020 (Wash. 1910), and *Sinclair* v. *Mississippi*, 132 So. 581 (Miss. 1931) (per curiam), both "str[uck] down the legislative abolition of the insanity defense," but it says these cases "relied on state law" only. Opp. 11. Incorrect. *Strasburg* relied on principles found "in all the Constitution[s] of the Union, state and federal," 110 P. at 1023, and *Sinclair* relied on "the due process clause of both state and federal Constitutions," repeatedly invoking "the liberties … embraced in the Fourteenth Amendment," as illuminated by "declarations of the United States Supreme Court," 132 So. at 586 (Ethridge, J., concurring); see *id.* at 582 (majority adopting the concurrence's reasoning). In any event, both states' due process clauses are construed identically to the federal Clause. Pet. 12. Because Kansas also has "legislatively abolish[ed] the insanity defense," *Jorrick*, 4 P.3d at 617, the decision below conflicts with these cases.

Kansas says *Louisiana ex rel. Causey*, 363 So. 2d 472 (La. 1978), "did not involve a specific insanity test." Opp. 12. But *Causey* held that a state must provide some "effective means of distinguishing men-

tal illness from moral culpability." 363 So. 2d at 476; see *id*. at 474. That is precisely what Kansas's *mens-rea*-only approach fails to do. See *supra* § I. So too *Ingles* v. *Colorado*, which recognized a due process right "to raise and have a jury pass upon the question of whether [the defendant] was sane or insane" during the offense. 22 P.2d 1109, 1111 (Colo. 1933). By abolishing the insanity defense, Kansas has violated that right. Although *Ingles* "relied solely on the state constitution," Opp. 12, Colorado's due process clause is construed in parallel with the federal Clause. *E.g.*, *Williams* v. *Dist. Court*, 417 P.2d 496, 499 (Colo. 1966). The decision below thus conflicts with these cases too.

3. *Clark* did not resolve this split. Contra Opp. 11, 13–14. Setting aside that *Clark* reserved the question presented, 548 U.S. at 752 n.20, Kansas's claim that all of the post-*Clark* cases support its position, Opp. 13, is mistaken. Although *Colorado* v. *Grant* rejected a due-process claim, Colorado (unlike Kansas) preserves the insanity defense by protecting defendants who are "incapable of distinguishing right from wrong"; *Grant* concerned mental incapacity resulting from drug use, a separate issue. 174 P.3d 798, 810, 813 (Colo. App. 2007). And while *Wisconsin* v. *Burton* found no constitutional "right to an insanity defense," 832 N.W.2d 611, 632 (Wis. 2013), it did not even cite *Clark*, and in any event Wisconsin (unlike Kansas) protects defendants who cannot "appreciate the wrongfulness of [their] conduct," Wis. Stat. § 971.15. Other post-*Clark* cases have actually reaffirmed that there is "a due process right to present a mental illness defense." *Minnesota* v. *Schroyer*, No. A14-0855, 2015 WL 1880204, at *2 (Minn. Ct. App. Apr. 27, 2015); see also *Washington* v. *Ellison*, 194

Wash. App. 1033 (2016) (following *Finger* and *Strasburg*). The split remains.

III. THE DECISION BELOW IS WRONG.

Clark held that due process permits "an insanity test stated solely in terms of the capacity to tell whether an act charged as a crime was right or wrong." 548 U.S. at 742. The question presented here is whether a law that abolishes that right-from-wrong test remains constitutional. Although Kansas repeatedly insists that *Clark* decided this question too, Opp. 7–8, 13–14, 16–18, the opposite is true. *Clark* expressly reserved it: "We have never held that the Constitution mandates an insanity defense, nor have we held that the Constitution does not so require." 548 U.S. at 752 n.20. That unequivocal statement negates Kansas's reliance on pre-*Clark* dicta "suggest[ing] that there is no such right." Opp. 17–18; see also Pet. 24. It also nicely encapsulates the importance of the question presented here.

As Kansas recognizes, laws that offend principles of justice deeply rooted in historical practice violate the Constitution. Opp. 14–15; Pet. 18. But Kansas says "no particular formulation of the insanity rule enjoys widespread use or acceptance." Opp. 15. That is true—as far as it goes. That the insanity defense's procedures and parameters are "substantially open to state choice," *Clark*, 548 U.S. at 752, does not mean that states can do away with the defense entirely. As the petition explains, reserving criminal punishment for those who can distinguish right from wrong has been deeply ingrained in the common law for centuries. Pet. 18–23. That is true despite the variations in formulations over the years and across jurisdictions. Kansas does not dispute the historical endurance of this standard, nor do any of its authorities undermine the petition's showing. See Opp. 15–16.

In fact, one of Kansas's cases explains that Congress adopted the federal insanity-defense statute—which applies if the defendant "was unable to appreciate the nature and quality or the wrongfulness of his acts," 18 U.S.C. § 17—"because abolition 'would alter that fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment.'" *Pohlot*, 827 F.2d at 900 (quoting H.R. Rep. No. 98-577, at 7–8 (1983)). Kansas has transgressed this deeply rooted principle.

Finally, Kansas says the decision below is correct because *Bethel* already decided this issue, and Mr. Kahler's "only new argument" below was to invoke the three-Justice dissent from denial of certiorari in *Delling*. Opp. 19. But if *Bethel* is wrong—and it is, as the petition explained (at 17–26)—the decision below is equally wrong. State court decisions are not insulated from review simply because they apply state court precedents. And the fact that "[t]his Court … declined to review" *Bethel*, Opp. 19, "imports no expression of opinion upon the merits of the case," *United States* v. *Carver*, 260 U.S. 482, 490 (1923).

IV. THIS ISSUE IS IMPORTANT AND RECURRING.

The question presented is vitally important and recurring, in death penalty cases and more broadly. Pet. 26–28. Kansas does not and cannot argue otherwise. Criminally punishing people like Mr. Kahler delegitimizes our criminal justice system, which "postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." *Morissette*, 342 U.S. at 250 n.4. It is also inconsistent with criminal law's penological justifications. See Pet. 22–23. And because mental illness is unfortunately prevalent, insanity is certain to be

raised as a defense in criminal cases, even in states that have abolished the defense. *Id.* at 27–28.

V. THIS CASE IS AN IDEAL VEHICLE.

1. Mr. Kahler preserved his Eighth Amendment claim. Contra Opp. 9, 20–21. In the trial court, he filed a motion arguing that "Kansas has unconstitutionally abolished the insanity defense and in its stead enacted an unconstitutional partial mental illness defense." Reply Brief Addendum ("Add.") 13. The motion argued not only that Kansas's scheme denies "due process of law," *id.* at 14, but also that it violates the Eighth Amendment, *id.* And it invoked the insanity defense's long history, *id.* at 14–15, as described in the petition. Mr. Kahler reiterated these points on appeal, including in a post-argument submission in response to questions from the Kansas Supreme Court, explaining that his arguments regarding "the historical insanity defense" applied equally to his Eighth Amendment claims. *Id.* at 19.

Although the decision below did not separately analyze Kansas's *mens rea* approach under the Eighth Amendment, Pet. App. 42a–46a, that is not an obstacle to this Court's review. See *Adams* v. *Robertson*, 520 U.S. 83, 86–87 (1997) (per curiam); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928). Nor is it a practical reason to deny the petition. The decision below relied entirely on *Bethel*, which *did* address an Eighth Amendment challenge to the *mens rea* approach. 66 P.3d at 852. Other state courts have similarly analyzed attempts to cut back the insanity defense under "both the due process and cruel and unusual punishment provisions of the Constitution." *Skinner*, 704 P.2d at 757; see *Sinclair*, 132 So. at 583–84. Indeed, the due process and Eighth Amendment analyses overlap significantly. Pet. 18. This Court thus has the benefit of multiple lower-

court decisions considering both sets of arguments, including from the Kansas Supreme Court.

2. This case squarely raises the question presented. Kansas says the Life-Alert recording suggests that Mr. Kahler knew his actions were wrong. Opp. 22. But no such finding was made or sought below, because Kansas law barred the trial jury from conducting the right-from-wrong inquiry that due process demands. And Kansas's argument rests on a thin reed: A psychotic person's use of profanity hardly suggests he knows right from wrong and has chosen freely to do wrong. See Pet. App. 100a, 102a.

In all events, the insanity defense protects not only those who cannot tell right from wrong, but also those who lack "the ability to control [their] actions" to conform to that understanding. LaFave, *supra*, § 7.1(b); Pet. 26. Dr. Peterson testified that this evidence indicates Mr. Kahler "completely lost control" and "couldn't refrain from doing what he did." Pet. App. 102a–103a. But in Kansas, it was enough that Mr. Kahler apparently was able to "form the requisite intent" to commit murder. Opp. 5. And that is the problem: Kansas treats as criminals people who can form general intent but lack the "freedom of … will" to "choose between good and evil." *Morissette*, 342 U.S. at 250.

It is immaterial that Mr. Kahler could present mental-state evidence at the *penalty* phase. Opp. 23. Unlike the insanity defense, Kansas's penalty-phase process does not require the jury to give any particular effect to such evidence. See Kan. Stat. Ann. § 21-6617(c), (e).

3. Kansas criticizes the petition for "fail[ing] to offer constitutional guideposts." Opp. 20. This claim is puzzling. The petition explains that, for centuries,

the insanity defense has protected those who cannot choose between doing good and doing evil—either because they cannot tell the difference or because they cannot control their conduct. Pet. 18–23. This standard is so rooted in our legal tradition as to be fundamental, and thus establishes a constitutional minimum. The point is not to enshrine a "portion of the *M'Naghten* test," Opp. 20, but to preserve the core of the defense as it developed at common law. Centuries of case law applying this test belie Kansas's claims of confusion.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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