No. 18-6135

IN THE
Supreme Court of the United States

JAMES K. KAHLER,
Petitioner,
v.

STATE OF KANSAS,
Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF OF AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, AND MENTAL HEALTH AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus American Psychiatric Association, with more than 38,500 members, is the Nation's leading organization of physicians who specialize in psychiatry. The American Psychiatric Association has participated in numerous cases in this Court. The American Psychiatric Association and its members have a strong interest in one of the core matters of forensic psychiatry: the relevance of serious mental disorders to criminal punishment. Recognizing that serious mental disorders can substantially impair an individual's capacities to reason rationally and to inhibit behavior that violates the law. The American Psychiatric Association supports recognition of an insanity defense broad enough to allow meaningful consideration of the impact of serious mental disorders on individual culpability. *See* Am. Psychiatric Ass'n, *Position Statement on the Insanity Defense* (2007) ("2007 Am. Psychiatric Ass'n Statement").

Amicus American Psychological Association, with approximately 120,000 members and affiliates, is the largest association of psychologists in the United States. The American Psychological Association is a voluntary nonprofit scientific and professional organization whose mission includes the goals of disseminating psychological knowledge and advancing "the application of research findings to the promotion of

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief.

health, education and the public welfare." Am. Psychological Ass'n Bylaws Art. 1 (Jan. 2018). To this end, the American Psychological Association has filed 175 *amicus curiae* briefs in federal and state courts, including 70 briefs with this Court, describing scientific research pertinent to matters before the Court. *See*, *e.g.*, *Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017) (citing American Psychological Association brief); *Hall v. Florida*, 572 U.S. 701, 710, 712, 713, 722, 723 (2014) (same). A number of these briefs have addressed the effect of mental illness and intellectual disability on criminal capacity. Division 41 of the American Psychological Association (the American Psychology-Law Society) includes members who engage in research, scholarship, and clinical practice relevant to the insanity defense. Along with forensic psychiatrists, forensic psychologists have the scientifically validated assessment tools and professional experience to provide reliable evaluations and testimony to courts and legal counsel on the question of a defendant's clinical characteristics and functional-legal capacities relevant to an insanity defense, including knowing wrongfulness and conforming conduct to avoid criminal wrongdoing.

Amicus American Academy of Psychiatry and the Law ("AAPL") has approximately 2,000 psychiatrist members dedicated to excellence in practice, teaching, and research in forensic psychiatry. The *AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 42 J. Am. Acad. Psychiatry & L. S3 (2014 Supp.), provides practice guidance and assistance in the performance of insanity defense evaluations by forensic psychiatrists. AAPL has participated as an *amicus curiae* in, among other cases, *McWilliams v. Dunn*, 137 S. Ct. 1790

(2017); *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 572 U.S. 701 (2014); and *Clark v. Arizona*, 548 U.S. 735 (2006).

Amicus The Judge David L. Bazelon Center for Mental Health Law ("The Center") is a national public interest organization founded in 1972 to advance the rights of individuals with mental disabilities. Through litigation, public policy advocacy, education, and training, The Center works to advance the rights and dignity of individuals with mental disabilities in all aspects of life, including community living, employment, education, health care, housing, voting, parental and family rights, and other areas. The Center's goals include fair treatment of individuals with mental disabilities by the criminal justice system.

Founded more than a century ago, *amicus* Mental Health America ("MHA") is the oldest mental health advocacy and education organization in the United States. Its board and staff are comprised of professionals with expertise in the diagnosis and treatment of mental illnesses, persons with mental illnesses, and other persons with expertise in mental health law and public policy. MHA is interested in ensuring that persons who commit criminal acts due to their mental illnesses be afforded treatment for their illnesses, rather than being punished for those acts.

STATEMENT

1. From the early days of its statehood, Kansas recognized a common-law insanity defense. *See State v. Nixon*, 4 P. 159 (Kan. 1884); App. 35a. That defense was based on the "*M'Naghten* rule" (discussed further below) and provided that a defendant could not be held criminally responsible for his actions unless, "at the time of the commission of [the] alleged crime," the person "ha[d] sufficient mental capacity to understand the nature and quality of the particular act or acts constituting the crime, and the mental capacity to know whether they are right or wrong." *Nixon*, 4 P. at 163.

Effective January 1, 1996, Section 22-3220 of the Kansas Statutes (now codified at § 21-5209) "abandons lack of ability to know right from wrong as a defense." App. 35a. Instead, the statute provides that "[i]t shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged" but that "[m]ental disease or defect is not otherwise a defense." Kan. Stat. Ann. § 21-5209.

Under this statute, evidence of mental illness or other mental disability may be offered to raise a reasonable doubt as to whether the defendant had the knowledge or intent that is an element of the crime charged. For example, if a murder defendant shot a person under the delusional belief that the victim was a robot or an alien, the defendant could not have purposely or knowingly caused the death of another human being and would not have committed the crime. *See Clark v. Arizona*, 548 U.S. 735, 767-68 (2006). By contrast, if the defendant knew that the victim was a person but believed, as a result of a psychotic delusion, that the victim was a servant of the devil and that God

had commanded that the victim be killed to protect the world from great harm, such a belief would not tend to disprove the defendant's knowledge that the victim was a human being, and the statute would bar the defendant from offering such evidence to show, in the language of *M'Naghten*, that the defendant "did not know he was doing what was wrong." *M'Naghten's Case*, 10 Cl. & F. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843); *see Delling v. Idaho*, 568 U.S. 1038, 1040 (2012) (Breyer, J., dissenting from denial of certiorari); *State v. Herrera*, 895 P.2d 359, 362 (Utah 1995) (discussing similar provision of Utah law: "Under the amended provision, it does not matter whether [the defendant] understood that the act was wrong.").

Kansas is one of only five States to preclude a criminal defendant from asserting as a defense that a mental illness or other mental disability rendered the defendant unable to know that his actions were wrong.[2]

2. James K. Kahler was charged with capital murder of several family members. At trial, Kahler introduced expert testimony to support his argument that, as a result of mental disease or defect, he lacked the mental state required as an element of the offense charged. App. 34a. Experts for the prosecution and defense agreed that Kahler exhibited major depressive disorder, as well as obsessive-compulsive, borderline, paranoid, and narcissistic personality tendencies, and the defense expert opined that Kahler "felt compelled" and "couldn't refrain from doing what he did." App. 102a-103a. The defense expert further found that Kahler might have suffered from "short-term dissociation." App. 129a. But, based on

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[2] The other States are Alaska, Idaho, Montana, and Utah. *See infra* pp. 18-21.

§ 22-3220, Kahler was not permitted to introduce evidence that he lacked the ability to tell right from wrong, and the experts for the defense and prosecution did not address that issue.

3. At trial, Kahler moved to have the court declare § 22-3220 unconstitutional because it deprived him of his ability to assert a defense based on insanity. App. 34a-35a. The trial court denied the motion and instructed the jury in accordance with the statute; Kahler was convicted and sentenced to death. App. 72a.

Kahler appealed, arguing that Kansas's abolition of the insanity defense is unconstitutional because due process prohibits punishment of a defendant who, by reason of mental disease or defect, lacks the ability to know right from wrong. App. 34a-37a. The Kansas Supreme Court, which had upheld the statute in a prior decision, affirmed. *Id.* Although the court agreed with Kahler that the statute "allows conviction of an individual who had no capacity to know that what he or she was doing was wrong," it held that Kahler presented "no new reason to reconsider the arguments" that it had previously rejected in *State v. Bethel*, 66 P.3d 840 (Kan. 2003). App. 36a-37a.

In *Bethel*, the Kansas Supreme Court rejected the argument that the abolition of the insanity defense violates due process. Citing prior decisions of the Idaho, Montana, and Utah supreme courts – and rejecting the contrary determination of the Nevada Supreme Court – the Kansas Supreme Court upheld § 22-3220 based on its conclusion "that the affirmative insanity defense is a creature of the 19th century and is not so ingrained in our legal system to constitute a fundamental principle of law." 66 P.3d at 851. Therefore, because, "[i]n Kansas, the only intent required [for murder] is the intent to kill a human being," *id.* at 850,

Bethel could be convicted for murder even if, as a result of mental disease or defect, he did not know the action was wrong, *see id.*

SUMMARY OF ARGUMENT

This case presents the question whether the Constitution's due process guarantee bars the imposition of serious criminal punishment on a defendant who, by reason of mental disease or defect, lacked the capacity, at the time of the offense, to know that his conduct was wrong. From the founding of the United States until today, virtually all American jurisdictions have recognized that, when serious mental illness prevents a defendant from grasping that his conduct was wrong, the defendant should not be held criminally responsible. In the words of one nineteenth century commentator, "[i]n all jurisdictions everywhere, and among all people, . . . a defect of reason that renders one unaccountable for his acts is viewed with commiseration, and the subject of it shielded from even the least reproach." John D. Lawson, *The Adjudged Cases on Insanity as a Defence to Crime* 200 (1884). This Court's cases support the conclusion that, when a criminal defendant, as the result of a serious mental disorder, lacks the capacity to know that his or her actions are wrong, the imposition of criminal punishment fails to serve legitimate retribution and deterrence goals.

Articulation of an appropriate test or standard to define the insanity defense has long been controversial, as has been the allocation of burdens of production and persuasion; *amici* do not here contend that any particular standard is constitutionally required. Nevertheless, the approach adopted by the Kansas legislature – under which evidence of mental illness or other mental disability is relevant only to show that

the defendant lacked the requisite mental state defining the particular crime charged – fails to give effect to the principle that criminal responsibility should not be imposed at all on an individual who, as a result of a mental disorder, lacks the ability to know that his conduct was wrong.

The clinical experience of mental health professionals, as well as the peer-reviewed research literature, support the conclusion that severe mental illness can seriously impair an individual's ability to understand that his conduct is wrong. Forensic psychiatrists and psychologists have devoted substantial effort to developing rigorous protocols for the evaluation of criminal defendants when the insanity defense is at issue, which can assist the trier of fact and reduce any risk of malingering.

ARGUMENT

"The insanity defense refers to that branch of the concept of insanity which defines the extent to which [those] accused of crime may be relieved of criminal responsibility by virtue of mental disease." Abraham S. Goldstein, *The Insanity Defense* 9 (1967). This case squarely implicates the distinction – recognized by this Court in *Clark v. Arizona*, 548 U.S. 735, 773-74 (2006); *see also id.* at 790-91 (Kennedy, J., dissenting) – between an affirmative defense of legal insanity (however denominated) and a defense based on the failure of the prosecution to establish beyond a reasonable doubt that the defendant possessed the requisite mental state for the commission of the crime defined by the legislature. When one of the elements of a crime is knowledge or purpose, the determination that the defendant had (or lacked) the requisite mental state "depends not on moral responsibility but on empirical fact." *Id.* at 791. The Kansas statute at

issue permits the introduction of evidence of mental disease or defect to cast doubt on the prosecution's showing of *mens rea* in this technical sense.

The Kansas statute does not, however, permit introducing evidence to show that, as a result of mental disorder, the defendant lacked the capacity to understand that his conduct was wrong, and therefore should not be held criminally responsible. The historical, philosophical, evidentiary, and practical consequences of such a defense have attracted the intense interest of scholars and jurists for centuries. The defense has sometimes broadened and sometimes narrowed depending on currents of thought and passions raised by notorious events. The problem of "discover[ing] a test by the application of which to a particular case[] a jury may decide whether a particular person is or is not a proper subject of punishment" is an old one. Lawson, *Insanity as a Defence* 200. But the core principle underlying the defense has been an unvarying part of the law for centuries.

This case thus presents the question, not presented or decided in *Clark* or any other case of this Court, whether the Due Process Clause imposes such a limitation on the imposition of criminal punishment on individuals who lack the capacity to understand the wrongfulness of their actions due to a serious mental disorder. As a matter of history and uniform practice, recognition of such a "moral incapacity" defense is constitutionally required, and the Kansas statute, by prohibiting a defendant from putting forward such a defense, violates due process.

Amici take no issue with the view that the question presented is "a legal and moral issue, not a medical, psychiatric, or psychological issue," and that "[t]he criteria for . . . deciding who is a fit subject for blame

and punishment[] are thoroughly normative." Stephen J. Morse, *Mental Disorder and Criminal Justice*, *in* 1 *Reforming Criminal Justice: A Report by the Academy for Justice* 251, 290 (Erik Luna ed., 2017). At the same time, a scientific understanding of mental illness and its effects lends weight to the arguments in favor of recognition of the insanity defense as constitutionally required. Furthermore, the experience of forensic mental health professionals provides assurance that the insanity defense – which is rarely invoked – has not been and will not be subject to abuse.

I. DUE PROCESS BARS CRIMINAL PUNISHMENT OF A DEFENDANT WHO, BECAUSE OF MENTAL DISORDER, DID NOT KNOW THAT HIS CONDUCT WAS WRONG

A. The Principle That an Individual May Be Absolved of Criminal Responsibility as a Result of Severe Mental Illness or Disability Has Deep Historical Roots

"[A] State's capacity to define crimes and defenses" is subject to limitations imposed by the Due Process Clause of the Fourteenth Amendment. *Clark*, 548 U.S. at 749. The Due Process Clause prohibits any imposition of criminal liability that "'offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 748 (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)) (alteration in original). "Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (plurality); *see also Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("It is precisely the historical practices that *define* what is 'due.'").

The long and consistent Anglo-American tradition precluding the imposition of serious criminal punishment on a defendant who, because of mental disorder, is unable to grasp the wrongfulness of his conduct qualifies as such a "fundamental" "principle of justice." "Whatever the specific formulation of the [insanity] defense has been throughout history, it has always been the case that the law has been loath to assign criminal responsibility to an actor who was unable, at the time he or she committed the crime, to know either what was being done or that it was wrong." *United States v. Denny-Shaffer*, 2 F.3d 999, 1012 (10th Cir. 1993).

1. The principle existed long before the common law. "The Greek moral philosophers, at least as far back as the fifth century B.C., 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.'" Am. Bar Ass'n, *Criminal Justice Mental Health Standards* 324 n.8 (1989)[3] (quoting John Walter Jones, *The Law and Legal Theory of the Greeks* 264 (1956)). Hebrew scholars distinguished between legally culpable acts and nonculpable acts, where acts committed by children or individuals with serious mental disorders fall into the latter category. *See* Jacques M. Quen, *Anglo-American Criminal Insanity: An Historical Perspective*, 2 Bull. Am. Acad. Psychiatry & L. 115, 115 (1974); *see also* Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test*

[3] The American Bar Association adopted a new version of its Criminal Justice Mental Health Standards in 2016, without commentary. The Standard on the insanity defense remains the same in the updated version.

of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey, 54 Calif. L. Rev. 1227, 1228 n.7 (1966) (citing the Babylonian Talmud).

2. By the fourteenth century, the concept of criminal insanity had appeared 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), which embraced the question whether the defendant was capable of distinguishing good from evil and was therefore morally culpable for his conduct, *see* Platt & Diamond, 54 Calif. L. Rev. at 1228, 1234-35.

Although few excuses were generally allowed in criminal law, "[i]t was well settled at common law that 'idiots,' together with 'lunatics,' were not subject to punishment for criminal acts committed under those incapacities." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). In 1618, for example, the English jurist Michael Dalton wrote: "If one that is *Non compos mentis*, or an Ideot, kill a man, this is no felonie." Michael Dalton, *The Country Justice* 215 (reprint 2013) (1618). This was because, at the time of the offense, such an individual "'hath no knowledge of good nor evil.'" Platt & Diamond, 54 Calif. L. Rev. at 1234 (quoting William Lambard's legal reference book from 1581).

In the eighteenth century, Blackstone elaborated on the defense: "if there be any doubt, whether the party be *compos* or not, this shall be tried by a jury. And if he be so found a total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such

deprivation of the senses." 4 William Blackstone, *Commentaries on the Laws of England* *25 (1769). The excuse would not be defeated merely by showing that the individual intended to commit the underlying act; "lunatics or infants, as was formerly observed, are incapable of committing any crime; unless in such cases where they show a consciousness of doing wrong." *Id.* at *195.

All of the leading scholars of the common law echoed these observations. *See*, *e.g.*, 1 Matthew Hale, *The History of the Pleas of the Crown* 30 (1st Am. ed., 1847) (1736);[4] 3 Edward Coke, *Institutes of the Laws of England* 4 (W. Clarke ed., 1809); 1 William Hawkins, *A Treatise of the Pleas of the Crown* 1-2 (7th ed. 1795) ("[T]hose who are under a natural disability of distinguishing between good and evil, as . . . ideots, and lunaticks are not punishable by any criminal prosecution whatsoever."), *quoted in Penry*, 492 U.S. at 331. As did the leading treatises. *See*, *e.g.*, John Hawles, *Remarks on the Trial of Mr. Charles Bateman* (1685), *reprinted in* XI *A Complete Collection of State Trials* 474, 477 (T. B. Howell ed., 1816) ("it is inconsistent with humanity" to punish the insane); *see also* Oliver W. Holmes, Jr., *The Common Law* 50 (1881) (noting that the criminal law "take[s] no account of incapacities, unless the weakness is so marked as to fall into well-known exceptions, such as infancy or madness").

Cases from prior to the country's founding directly confirm the entrenched recognition of the insanity defense. As summarized in a famous charge to the

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[4] The notes to Hale's treatise also confirm that the governing "rule of law" was that persons "'incapable of judging between right and wrong'" were excused from criminal liability. 1 Hale, *Pleas of the Crown* 37 n.5 (quoting Joseph Chitty, *Medical Jurisprudence* 346 (1835)).

jury in *Arnold's Case*, 16 How. St. Tr. 695, 764-65 (Eng. 1724), the question is whether the defendant "knew what he was doing, and was able to distinguish whether he was doing good or evil, and understood what he did." *Quoted in* 1 Joel P. Bishop, *Commentaries on the Criminal Law* § 378, at 218 (6th ed. 1877); *see also Ferrer's Case*, 19 How. St. Tr. 885, 948 (Eng. 1760) (noting that the key question for an insanity defense was whether the defendant could, at that time, "distinguish between good and evil"); 1 Hale, *Pleas of the Crown* 37 n.5 (collecting cases using a right-wrong standard for insanity).

3. "At the time of the Constitution, the insanity defense had become firmly established." Goldstein, *Insanity Defense* 11. The cases in American courts and English courts in the early 1800s continued to forbid the criminal conviction of mentally ill persons who could not appreciate the wrongfulness of their conduct. *See*, *e.g.*, *United States v. Clarke*, 25 F. Cas. 454 (C.C.D.D.C. 1818) (No. 14,811); *Pienovi's Case*, 3 City Hall Recorder 123, 126-27 (N.Y. 1818); *Ball's Case*, 2 City Hall Recorder 85, 86 (N.Y. 1817); *Clark's Case*, 1 City Hall Recorder 176, 177 (N.Y. 1816); 2 George Dale Collinson, *A Treatise on the Law Concerning Idiots, Lunatics, and Other Persons Non Compotes Mentis* 477 (1812) (collecting cases).

4. In 1843, the House of Lords famously articulated this requirement in its restatement of the standard for insanity in *M'Naghten's Case*, 10 Cl. & F. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843): "[E]very man is to be presumed to be sane . . . . [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the

nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

The question, as articulated under *M'Naghten*, is "whether the mental illness had deprived the defendant of the capacity to know what 'normal' people are able to know about their behavior. The idea, in sum, is that people who are unable to know the nature of their conduct or who are unable to know that their conduct is wrong are not proper subjects for criminal punishment. In common sense terms, such people should not be regarded as morally responsible for their behavior." Richard J. Bonnie et al., *A Case Study in the Insanity Defense: The Trial of John W. Hinckley, Jr.* 11 (3d ed. 2008).

The *M'Naghten* restatement soon "became the accepted standard in both [the United States and England]." 2 Am. Bar Ass'n, *Standards for Criminal Justice* 7-295 (2d ed. 1986) ("*ABA Standards*"). *See also Egelhoff*, 518 U.S. at 48 (plurality) (describing the historical due process inquiry as whether the asserted principle "was so deeply rooted at the time of the Fourteenth Amendment . . . as to be a fundamental principle which that Amendment enshrined").

B. Uniform Practice Until the Present Day Confirms That the Defense Is Required by the Due Process Clause

The ubiquity of a defense based on a *M'Naghten*-type "moral incapacity" test confirms that Kansas's abolition of the rule "offends a principle of justice that is deeply rooted in the traditions and conscience of our people." *Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996); *see also Schad*, 501 U.S. at 640 (plurality) ("we have often found it useful to refer both to history and to the current practice of other States"). In the

175 years since *M'Naghten*, the modern consensus in criminal law has continued to maintain the baseline rule that serious criminal punishment should not be imposed on individuals who, at the time of the crime, by reason of mental disease or defect, were unable to distinguish right from wrong conduct.

1. In the century following, some States adopted different – more inclusive – articulations for the insanity defense.[5] Several States precluded conviction not only where the *M'Naghten* cognitive/moral-incapacity test was met but also where a standard based on volitional impairment ("irresistible impulse") – inability to control oneself – was met. *ABA Standards* 7-296. And New Hampshire adopted a still broader standard, namely, that an individual should not be held criminally responsible "for an act which was the offspring and product of mental disease." *State v. Jones*, 50 N.H. 369, 394 (1871).[6]

From 1900 through the 1950s, the *M'Naghten* standard governed in most jurisdictions, while about one-third of the States added an irresistible-impulse test. *ABA Standards* 7-296. In 1955, the American Law Institute ("ALI") proposed a standard for non-

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[5] In the early years of the last century, three States – Louisiana, Mississippi, and Washington – enacted statutes barring all evidence of mental condition. These statutes were struck down as violations of state or federal due process. *See* Brian E. Elkins, *Idaho's Repeal of the Insanity Defense: What Are We Trying To Prove?*, 31 Idaho L. Rev. 151, 156 & n.20 (1994).

[6] New Hampshire continues to apply the product-of-mental-illness test, which is the broadest of the insanity defenses recognized in the States. *See State v. Gribble*, 66 A.3d 1194, 1217 (N.H. 2013); *State v. Plante*, 594 A.2d 1279, 1283 (N.H. 1991); Bonnie, *A Case Study* 17.

responsibility that applied when either a cognitive or a volitional deficit was present:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.

Quoted in ABA Standards 7-297 (brackets in original). By the early 1980s, the ALI formulation, or some close variant, governed in the federal courts and in "a majority of the country's jurisdictions." *Id.*

Then, in the early 1980s, the insanity defense came under intense critical attention prompted in significant part by John Hinckley's acquittal by reason of insanity in his trial for the attempted assassination of President Reagan. Some jurisdictions abandoned the volitional-impairment part of the ALI test. Crucially, however, in the vast majority of jurisdictions, the core moral-incapacity standard remained. For example, Congress in 1984 enacted a statute that codified a federal insanity defense (previously a matter of judge-made law) that tracked *M'Naghten*:

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

18 U.S.C. § 17(a).

Likewise, nearly every State continues to provide for an insanity defense that, at a minimum, excuses from criminal responsibility those individuals lacking the

mental capacity to understand the wrongfulness of their conduct. *See AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 42 J. Am. Acad. Psychiatry & L. S3, S38-S45 (2014 Supp.) ("*AAPL Guideline*") (state-by-state survey); *see also* Samuel Jan Brakel et al., *The Mentally Disabled and the Law* 769-77 (Am. Bar Found. 3d ed. 1985) (state-by-state survey, mid-1980s).

Between 1982 and 1996, Kansas and five other States – Alaska, Idaho, Montana, Nevada, and Utah – enacted legislation abolishing or significantly limiting their longstanding recognition of the insanity defense. The Nevada Supreme Court subsequently found that State's abolition of the defense unconstitutional, *see Finger v. State*, 27 P.3d 66, 84 (Nev. 2001), while the other five States' courts rejected constitutional challenges to their statutes, *see Lord v. State*, 262 P.3d 855, 861-62 (Alaska Ct. App. 2011); *State v. Searcy*, 798 P.2d 914, 917-19 (Idaho 1990); *State v. Bethel*, 66 P.3d 840, 844-52 (Kan. 2003); *State v. Korell*, 690 P.2d 992, 998-1002 (Mont. 1984); *State v. Herrera*, 895 P.2d 359, 364-66 (Utah 1995).[7]

The net result, as reflected in this Court's assessment of the various standards in *Clark v. Arizona*, 548 U.S. at 750-52, is that in 45 States and the District of Columbia, and under federal law, a defendant who, because of mental disorder, lacks the ability to know

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[7] Alaska's version of the insanity defense recognizes only that aspect of the *M'Naghten* rule involving inability to know the nature and quality of the act. *See* 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). Thus, under Alaska's current approach (as in Idaho, Kansas, Montana, and Utah), an individual who does know that his or her conduct was wrongful because of a mental disorder can still be convicted and punished.

that conduct is wrong is not subject to serious criminal punishment. By contrast, the inability to appreciate the wrongfulness of one's conduct is not available as a defense (at least under some circumstances) in only five jurisdictions, of which Kansas is one.

2. The States that have upheld the abolition of the insanity defense as constitutional have done so based on a misunderstanding of the place of the insanity defense in the history of criminal law.

In *Bethel*, the court relied on three sources to support its assertions that "the affirmative insanity defense is a creature of the 19th century" and that "[c]ommentators generally agree that it was not until the *M'Naghten* case of 1843 that the focus shifted . . . to an insanity defense and the cognitive ability of a defendant to know right from wrong." 66 P.3d at 850-51.[8] Those sources were Cynthia G. Hawkins-León, "*Literature as Law": The History of the Insanity Plea and a Fictional Application within the Law & Literature Canon*, 72 Temp. L. Rev. 381, 389-427 (1999); Raymond Spring, *Farewell to Insanity: A Return to Mens Rea*, 66 J.K.B.A. 38, 44-45 (1997); and "the Supreme Courts of Montana, Idaho, and Utah." 66 P.3d at 851.

The Hawkins-León article, far from supporting the court's conclusion, explicitly states that "the *M'Naghten* Rule is considered a restatement of the law rather than a new theory." 72 Temp. L. Rev. at 391. It likewise traces acquittals on the basis of insanity in England to 1505 and explicitly states that "the aptly

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[8] The Kansas Supreme Court likewise erred in asserting that the relevant question is whether the insanity defense was clearly established at the country's founding, rather than at the time of the adoption of the Fourteenth Amendment. *See Egelhoff*, 518 U.S. at 48 (plurality).

named 'right versus wrong'" test was utilized in the early 1700s. *Id.* at 389. The Spring article does not examine the law prior to *M'Naghten*, and, to the extent it refers to such history at all, the article states that "[f]or nearly 2,000 years there has been legal recognition that only conduct that is the product of a blameworthy state of mind is appropriately classified as criminal and that blame can only be affixed where the mind is capable of understanding the law's commands." 66 J.K.B.A. at 38.

The decisions of the Idaho, Montana, and Utah supreme courts likewise fail to provide any persuasive support for this historical proposition. In *Korell,* the Montana Supreme Court relied solely on two sources to support its determination that "[i]nsanity did not come to be generally recognized as an affirmative defense and an independent ground for acquittal until the nineteenth century," 690 P.2d at 999: Norval Morris, *The Criminal Responsibility of the Mentally Ill*, 33 Syracuse L. Rev. 477, 500 (1982); and American Medical Association, *The Insanity Defense in Criminal Trials and Limitation of Psychiatric Testimony*, Report of the Board of Trustees at 27 (1983) ("AMA Report"). The citation to the Morris article is to a topic sentence that says, "[u]ntil the nineteenth century, criminal law doctrines of *mens rea* handled the entire problem of the insanity defense." 33 Syracuse L. Rev. at 500. But this refers to general *mens rea* – the blameworthy intent required to render conduct criminal under the common law – rather than the contemporary technical definition of *mens rea* as the mental state defined to be the element of a particular crime defined by the legislature. Thus, "[i]nsanity, which robs one of the power to make intelligent choice

between good and evil, must negative criminal responsibility if criminality rests upon moral blameworthiness." Sayre, 45 Harv. L. Rev. at 1004. And the AMA Report explicitly states that, under the "test of insanity that prevailed in the English courts through the eighteenth century," "impairment of cognitive capacity so severe that the accused could not distinguish good from evil[] sufficed to relieve one of criminal responsibility." AMA Report at 6.[9]

Searcy and *Herrera* do not provide any further analysis on the history of the defense before *M'Naghten* and instead rely on the Montana Supreme Court's analysis. Alaska has not provided any analysis of the history of the defense either.

In short, the state court decisions upholding the abolition of the insanity defense rested on a demonstrably incorrect historical proposition. Although those decisions stated that the insanity defense came about in the nineteenth century, the common-law treatises and decisions discussed above (and even the sources on which the state courts relied) show that the insanity

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[9] The American Medical Association ("AMA"), in 1983, recommended the abolition of the insanity defense in favor of an approach like the one adopted in Kansas. *See Medical Association Urges Insanity Defense Be Ended*, N.Y. Times, Dec. 7, 1983, at B8. This prompted an outcry that such a change would undermine the moral basis of criminal law. *See id.* (noting opposition from the American Psychiatric Association, which called the proposal "a punitive strike against the mentally ill, inconsistent with several centuries of Anglo-American criminal law"); Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. Cal. L. Rev. 777, 791 (1985) (criticizing the AMA for "confus[ing] moral and legal concepts with medical concepts"). The AMA subsequently rescinded its policy supporting abolition of the insanity defense. *See AAPL Guideline*, 42 J. Am. Acad. Psychiatry & L. at S6 (citing AMA, *Reports of Council on Long Range Planning and Development* 202 (June 2005)).

defense has roots dating back to well before the country's founding.

C. Imposition of Criminal Punishment on Individuals Who, as a Result of Mental Disorder, Are Unable To Know That Their Conduct Is Wrongful Undermines the Moral Basis of the Criminal Law

The long tradition and uniform contemporary practice of the insanity defense reflect principles fundamental to the criminal law. The insanity defense "come[s] to us as part of a tradition which makes the notion of 'desert' or 'blame' central to criminal responsibility." Goldstein, *Insanity Defense* 9.

"Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." Roscoe Pound, Introduction to Frances B. Sayre, *Cases on Criminal Law* (1927), *quoted in Morissette v. United States*, 342 U.S. 246, 250 n.4 (1952). In *Morissette*, Justice Jackson explained that "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." 342 U.S. at 250.

The objectives of criminal punishment are not served by punishing individuals who lacked the ability to understand right from wrong at the time they committed an offense. This Court has recognized that "the two primary objectives of criminal punishment [are] retribution [and] deterrence." *Kansas v. Hendricks*, 521 U.S. 346, 361-62 (1997); *see id.* at 373 (Kennedy,

J., concurring). But retribution is dependent on having "affix[ed] culpability," *id.* at 362 (majority), and criminal culpability, and hence retribution, requires an awareness of some wrongdoing, *see id.* (concluding that absence of *scienter* supported civil character of sexual-predator-commitment statute, which is therefore not "retributive"); *see also Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) ("[A] 'reasonable person' standard is a familiar feature of civil liability in tort law, but is inconsistent with 'the conventional requirement for criminal conduct – *awareness* of some wrongdoing.'") (citation omitted). Without the required understanding, the retribution objective does not generally apply. *See Panetti v. Quarterman*, 551 U.S. 930, 958-59 (2007) (whether "retribution is served" is "called in question . . . if the prisoner's 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").

It is likewise doubtful whether punishment in these circumstances serves deterrence. "If [an individual] cannot make the calculations or muster the feelings demanded of him by the [criminal code], . . . he would be made to suffer harsh sanctions without serving the purpose of individual deterrence." Goldstein, *Insanity Defense* 13; *see also Robinson v. California*, 370 U.S. 660, 668 (1962) (Douglas, J., concurring) ("'Nothing can more strongly illustrate the popular ignorance respecting insanity than the proposition, equally objectionable in its humanity and its logic, that the insane should be punished for criminal acts, in order to deter other insane persons from doing the same thing.'") (quoting Isaac Ray, *Treatise on the Medical Jurisprudence of Insanity* 56 (5th ed. 1871)). The Court recognized in *Ford v. Wainwright*, 477 U.S. 399

(1986), that these aims are not served by executing a prisoner who is considered insane. *Id.* at 409-10. The reasoning applies to any imposition of criminal responsibility on an individual with a mental illness or impairment that deprives him or her of the ability to distinguish right from wrong conduct.

D. Kansas's Abolition of the Insanity Defense Violates Due Process

Under the Constitution, States have latitude in articulating the type of understanding that is consistent with the culpability concept in our tradition. But the key substantive point is that too narrow a view – such as bare awareness of the physical character of one's act – would fail to capture the constitutional requirement of a capacity to distinguish between right and wrong conduct. *See* 2007 Am. Psychiatric Ass'n Statement ("The [American Psychiatric Association] does not favor any particular legal standard for the insanity defense over another, so long as the standard is broad enough to allow meaningful consideration of the impact of serious mental disorders on individual culpability."); Am. Psychological Ass'n, *Council Policy Manual*, Ch. 4 (Pt. 2), "Mental Disability and the Death Penalty" (2006) (a defendant suffering from "a severe mental disorder or disability that significantly impaired their capacity . . . to appreciate the nature, consequence, or wrongfulness of their conduct" at the time of the crime should not be executed or sentenced to death), https://www.apa.org/about/policy/chapter-4b#death-penalty.

Because Kansas's statutory scheme precludes defendants from presenting any defense based on the ability to appreciate the wrongfulness of conduct, it violates due process. The Kansas Supreme Court has held that its statutory scheme allows the State to

impose serious punishment on individuals who, by reason of mental disorder, cannot tell right from wrong. *See* App. 35a ("The mens rea approach . . . abandons lack of ability to know right from wrong as a defense."). And, for all of the reasons discussed above, merely allowing a defendant to put in evidence that he lacked the mental state required by the definition of the offense charged does not adequately protect the fundamental principles of criminal justice that the insanity defense has traditionally served.

Because petitioner was required to mount his defense under a statutory regime that precluded him from pursuing a defense based on an inability to distinguish right from wrong conduct at the time of his offense, his conviction should be vacated.

II. MODERN UNDERSTANDING OF THE NATURE OF MENTAL ILLNESS PROVIDES ADDITIONAL SUPPORT FOR RECOGNITION OF A TRADITIONAL INSANITY DEFENSE

A. Mental Illness Can Render a Person Incapable of Knowing That Conduct Is Wrongful

The clinical experience of mental health professionals, as well as the peer-reviewed scientific literature, support the conclusion that severe mental illness can seriously impair an individual's ability to appreciate the wrongfulness of his or her conduct. Serious mental disorders may cause delusions and hallucinations, and such symptoms (among others) can seriously impair an individual's ability to perceive reality and the intentions of others.

Schizophrenia and other psychotic disorders may produce delusions – erroneous perceptions of the external world – held with strong conviction. *See* Am.

Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 87-90 (5th ed. 2013) ("DSM-5"). For example, persecutory delusions can lead a person with mental illness to believe, incorrectly, that another person threatens harm. *See* Donald W. Black & Nancy C. Andreasen, *Introductory Textbook of Psychiatry* 136-37 (6th ed. 2014); *see also* Bonnie, *A Case Study* 9-10 (describing M'Naghten's persecutory delusions). Grandiose delusions may result in the belief that ordinary rules and laws do not apply. And religious delusions can be manifested as an overwhelming impulse to commit certain acts (even if illegal) because they are commanded by God. *See* Jennifer L. Kunst, *Understanding the Religious Ideation of Forensically Committed Patients*, 36 Psychotherapy 287 (1999); Felice Carabellese et al., *Mental Illness, Violence and Delusional Misidentifications: The Role of Capgras' Syndrome in Matricide*, 21 J. Forensic & Leg. Med. 9, 10 (2014) (describing the case of a man who shot his mother, thinking she had been replaced by an evil being and believing that he was "Jesus Christ and was sent into this world to defeat evil"). Depressive delusions seen in post-partum psychosis may lead the mother to believe that she and her newborn are condemned to suffer unending torment in this world or damnation in the world to come. *Cf.* Phillip J. Resnick, *The 2006 Friedman & Gilbert Criminal Justice Forum – The Andrea Yates Case: Insanity on Trial*, 55 Clev. St. L. Rev. 147 (2007).

Such delusions may have a *bizarre* quality – meaning they are "clearly implausible and not understandable to same-culture peers and do not derive from ordinary life experiences," DSM-5 at 87 – such as the delusions of the petitioner in *Clark* that aliens in disguise were attempting to kill him. *See* 548 U.S.

at 745; *see also* Nicholas Bott et al., *Cotard Delusion in the Context of Schizophrenia: A Case Report and Review of the Literature*, 7 Frontiers in Psychol. art. 1351, at 1-2 (Sept. 2016) (describing the case of a 58-year-old Navy veteran with "significant depression" who believed that "he was physically dead and possessed by demons for several weeks").

Hallucinations – false sensory perceptions, including the hearing of voices or "auditory hallucination" – may be given delusional interpretations. Thus, a person experiencing psychosis may believe that the voice criticizing her behavior or preventing her from sleeping is coming from a neighbor, or that a voice commanding unlawful acts is the voice of God, which must be obeyed. *See* Trial Tr. 609, *Idaho v. Delling*, Nos. CR-FE-2007-663 & CR-FE-2007-1625 (Idaho 4th Jud. Dist. Ct., Ada Cnty. Aug. 18, 2009) ("*Delling* Tr.") (testimony of defense psychiatric expert that defendant's "explanation for" auditory and tactile hallucinations was the "crystallization of his delusion that all of this was happening because he was . . . Jesus"); Ian Brockington, *Suicide and Filicide in Postpartum Psychosis*, 20 Arch. Women's Mental Health 63, 66 (2017) (describing a new mother's "auditory hallucinations and persecutory delusions," including that "her child was controlled by the Devil," which tragically led her to kill her infant and herself). The latter are termed "command hallucinations," which approximately half of hallucinating psychiatric patients experience (and which are usually nonviolent). Charles L. Scott & Phillip J. Resnick, *Evaluating Psychotic Patients' Risk of Violence: A Practical Guide*, 12 Current Psychiatry 29, 31 (May 2013).

Only a small percentage of people with mental illness commit violent acts; most are law abiding.

See Jeffrey W. Swanson, *Mental Disorder, Substance Abuse, and Community Violence: An Epidemiological Approach*, *in Violence and Mental Disorder: Developments in Risk Assessment* 101 (John Monahan & Henry J. Steadman eds., Univ. of Chicago Press 1994); Jan Volavka, *Violence in Schizophrenia and Bipolar Disorder*, 25 Psychiatria Danubina 24 (2013). At the same time, the symptoms of mental illness can lead to violent behavior in a small number of instances. Persecutory delusions may result in violent responses[10] and have been especially associated with extreme acts of violence.[11] Persons suffering delusions may respond as if reacting to a real aspect of their situation.[12]

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[10] *See* Brent Teasdale et al., *Gender, Threat/Control-Override Delusions and Violence*, 30 L. & Hum. Behav. 649, 649 (2006) (finding that "men are significantly more likely to engage in violence during periods when they experience threat delusions, compared with periods when they do not experience threat delusions"); Jeffrey W. Swanson et al., *A National Study of Violent Behavior in Persons With Schizophrenia*, 63 Archives Gen. Psychiatry 490, 494-96 (2006) (finding that "persecutory symptoms" showed a "strong association with serious violence"); Josanne Donna Marlijn van Dongen et al., *Delusional Distress Partly Explains the Relation Between Persecutory Ideations and Inpatient Aggression on the Ward*, 200 Psychiatry Res. 779, 781 (2012) ("[h]igher levels of persecutory ideations significantly predicted higher aggression").

[11] *See* Thomas Stompe et al., *Schizophrenia, Delusional Symptoms, and Violence: The Threat/Control-Override Concept Reexamined*, 30 Schizophrenia Bull. 31 (2004); Jeremy W. Coid et al., *Paranoid Ideation and Violence: Meta-Analysis of Individual Subject Data of 7 Population Survey*, 42 Schizophrenia Bull. 907, 913 (2016) ("[S]tudies show[] that, in a range of psychotic symptoms, persecutory ideation is most strongly associated with violence.").

[12] *See* Bruce G. Link et al., *Real in Their Consequences: A Sociological Approach to Understanding the Association between Psychotic Symptoms and Violence*, 64 Am. Soc. Rev. 316 (1999).

Mothers suffering from depressive delusions may kill to protect or rescue their children "from some awful fate that was indicated by their delusional system."[13] Religious delusions may "provide[] a context in which . . . violent impulses seem[] justifiable and irresistible . . . because these pressures involve ultimate matters of life and death, salvation and damnation, and obedience or disobedience to the highest authority, God."[14] Auditory hallucinations can be associated with violence as a result of interpretative delusions that make sense of the voices.[15] Excitement and grandiosity are also linked to violent acts.[16]

Individuals experiencing delusions and hallucinations often lack the ability to perceive the wrongfulness of their actions.[17] For instance, in the *Delling* case, the trial court credited testimony that the defen-

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[13] Josephine Stanton et al., *A Qualitative Study of Filicide by Mentally Ill Mothers*, 24 Child Abuse & Neglect 1451, 1456 (2000); *see* Brockington, 20 Arch. Women's Mental Health at 65-66.

[14] Kunst, 36 Psychotherapy at 291; *see id.* at 291-92 (describing "tragic case" in which a mother killed her young son, believing that he was the Antichrist).

[15] *See* Swanson, 63 Archives Gen. Psychiatry at 495-96 ("Serious violence was also strongly associated with hallucinatory behavior . . . ; the highest score was assigned when the patient reported these false perceptions and gave the perceptions 'a rigid delusional interpretation' . . . ."); Pamela J. Taylor et al., *Mental Disorder and Violence: A Special (High Security) Hospital Study*, 172 Brit. J. Psychiatry 218, 221 (1998).

[16] *See* Swanson, 63 Archives Gen. Psychiatry at 496.

[17] What matters for these purposes is the ability to distinguish right from wrong, not the particular symptoms that a defendant exhibits. *See Madison v. Alabama*, 139 S. Ct. 718, 728 (2019) (holding that competency to be executed "focuses on whether a mental disorder has had a particular *effect*" and not on "establishing any precise *cause*").

dant's conduct was motivated by delusions produced by his paranoid schizophrenia. *See Delling* Tr. 632; App. to Cert. Pet. 25a, *Delling v. Idaho*, No. 11-1515 (U.S. June 13, 2012). According to that testimony, Mr. Delling "truly believed, delusionally and tragically, that in order to save his own life, to keep him [from] being destroyed, he had to stop the people that he thought were harming him . . . . He thought he was doing what he had to do in order to save himself." *Delling* Tr. 636. The trial court in *Delling* found that he did not have "the ability to appreciate the wrongfulness of his conduct" and committed the crimes because he "suffer[ed] from severe delusional thinking." *Id.* at 749-50; *see also* Jillian K. Peterson et al., *How Often and How Consistently do Symptoms Directly Precede Criminal Behavior Among Offenders With Mental Illness?*, 38 L. & Hum. Behav. 439, 440 (2014) ("[I]t is relatively easy to conceptualize how . . . hallucinations and delusions that alter one's sense of reality . . . can directly motivate criminal behavior.").

B. Forensic Mental Health Professionals Have Substantial Experience with Diagnosis of Mental Illness That May Deprive a Person of the Ability To Distinguish Right from Wrong Conduct

Insanity defense pleas are rarely made and even more rarely successful. *See* 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); Henry J. Steadman et al., *Before and After Hinckley: Evaluating Insanity Defense Reform* 5 (1993). "The majority of insanity defenses involve individuals who suffer from psychotic disorders or intellectual disability (formerly termed mental retardation). Insanity is pled in about one percent of all felony cases, and successful pleas are rarer

still." *AAPL Guideline*, 42 J. Am. Acad. Psychiatry & L. at S11; *see also* Jeffrey S. Janofsky et al., *Insanity Defense Pleas in Baltimore City: An Analysis of Outcome*, 153 Am. J. Psychiatry 1464, 1466-67 (1996) (finding that only 0.31 percent of defendants entered a plea of not criminally responsible by reason of insanity and that only 4.2 percent of those who so pleaded succeeded in establishing insanity at trial). At the same time, forensic mental health professionals have expertise that can assist courts and juries in cases where the insanity defense is asserted.

"Forensic psychiatrists have an ethics-based obligation to adhere to the principle of honesty and to strive for objectivity in conducting insanity defense evaluations." *AAPL Guideline*, 42 J. Am. Acad. Psychiatry & L. at S20. "In evaluating the defendant's mental state at the time of an alleged offense, the forensic psychiatrist has an obligation to conduct a thorough assessment and to formulate opinions based on all available data, no matter who initiated the request for the evaluation." *Id.* Of course, evaluation and diagnosis of mental illness is at the heart of mental health professionals' expertise. And forensic mental health professionals have developed additional protocols to assist with the assessment of mental disorders that might support an insanity defense under governing law. *See generally AAPL Guideline*.

Mental health professionals treat and manage seriously ill individuals in a variety of contexts.[18]

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[18] There is overarching agreement on the essential elements of reports documenting the evaluation of insanity; such elements include basic identifying information and description of procedures, psychiatric history, mental health records, current mental status, police report information, use of medications at time of offense, use of alcohol or drugs at time of offense, and the

Psychiatric management involves assessing myriad interactions, including serious, sometimes criminal, behavior. Professional determinations must be made about the ability of affected individuals to control their behavior, understand right and wrong, and the degree to which various interventions may be effective in altering misconduct. *See*, *e.g.*, *Youngberg v. Romeo*, 457 U.S. 307, 323 n.30 (1982). Bringing such professional expertise to bear in the evaluation of defendants who raise an insanity defense can assist the trier of fact and help to ensure against malingering.

States that recognize the insanity defense generally institute assessment and management programs, and psychiatric treatment can prove effective for many defendants, reducing the risk of violence or other criminal behavior. *See* Robert Keers et al., *Association of Violence With Emergence of Persecutory Delusions in Untreated Schizophrenia*, 171 Am. J. Psychiatry 332, 332, 335 (2014) ("[s]chizophrenia was associated with violence but only in the absence of treatment," which "can substantially reduce violent recidivism"). Unfortunately, some acquittees also continue to experience psychiatric symptoms and impairments, and require continued hospitalization. As a result, some will stay under institutional care or close management for many years, past the time of the maximum sentence limits that would have applied had they been convicted. Hence, the professional experience of mental health professionals demonstrates the benefits of the insanity defense: the individuals who improve through treatment will not threaten public safety in the future, and

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defendant's account of his or her behavior at time of the offense. *See generally* Randy Borum & Thomas Grisso, *Establishing Standards for Criminal Forensic Reports: An Empirical Analysis*, 24 Bull. Am. Acad. Psychiatry L. 297 (1996).

those who remain dangerous and for whom treatment is less effective remain confined as necessary.

CONCLUSION

The judgment of the Kansas Supreme Court should be reversed.

Respectfully submitted,

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