No. 18-6135

IN THE
Supreme Court of the United States

JAMES K. KAHLER,

Petitioner,

v.

KANSAS,

Respondent.

On Writ of Certiorari to the Kansas Supreme Court

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files numerous amicus briefs each year, in this Court and others, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a

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[1] Both parties consented to the filing of this *amicus curiae* brief in support of Petitioner. No counsel to a party in this case authored this brief in whole or in part. No party or party's counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief. No person or entity other than the *amicus* and its counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief.

fundamental interest in ensuring that no person is subject to criminal punishment based on an act for which that person is not morally culpable.

NACDL has a particular interest in this case because Kansas's abolition of the insanity defense removes a critical protection for criminal defendants that has existed throughout the history of our constitutional republic, and even well before. By exposing individuals who are not morally responsible for their actions to criminal conviction and punishment—up to and including, as in this case, the death penalty—Kansas's approach violates fundamental rights and degrades the criminal justice system.

SUMMARY OF ARGUMENT

Kansas in recent years has abolished the insanity defense, making the State an outlier both historically and by modern standards. As a result, criminal defendants in Kansas who suffer from insanity can attempt only to rebut the prosecution's showing on the elements of an offense, including *mens rea*. This approach allows for the criminal conviction and punishment of people who lack moral capacity—that is, the ability to distinguish right from wrong and to control their behavior accordingly.

This unjust approach is fundamentally at odds with American legal tradition and with the principles the criminal justice system is meant to serve. For centuries, lack of moral culpability by reason of insanity has been a defense to a criminal charge, and with good reason. Punishing individuals

who lack the ability to tell right from wrong and conform their actions to that understanding does not serve any of the purposes of punishment recognized in American criminal law.

Kansas's abolition of the insanity defense has major consequences, including life-or-death consequences as in this case. To be sure, it is relatively rare for criminal defendants to raise—let alone obtain relief based on—the insanity defense. Still, numerous courts in other states have reversed convictions on grounds of moral incapacity, even in instances where defendants might have had cognitive capacity (an understanding of the nature and quality of the acts committed) and thus the requisite *mens rea* for the crime charged. But under Kansas's approach, such defendants face criminal conviction and sentencing, and may even face the death penalty, rather than commitment to a mental health institution. That unjust result violates due process and is profoundly out of line with the principles of criminal responsibility and rationales for punishment that this Court and others have long recognized.

ARGUMENT

I. PRINCIPLED RATIONALES FOR PUNISHMENT DO NOT JUSTIFY CRIMINAL RESPONSIBILITY FOR INDIVIDUALS WHO LACK MORAL CULPABILITY

A. None of the Purposes of Punishment Embraced by American Criminal Law Justifies Punishing People Who Lack Moral Capacity

This Court has recognized four rationales for criminal punishment: retribution, deterrence, rehabilitation and incapacitation. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903 (2018); *see also* 18 U.S.C. § 3553(a)(2). A state meets none of these purposes when it punishes the "truly irresponsible"—those who cannot distinguish between right and wrong and conform their actions to that understanding. *United States v. Freeman*, 357 F.2d 606, 615 (2d Cir. 1966).

When a state punishes a defendant who is not morally culpable, it does not achieve retribution. The need to provide just and proportionate punishment for an offense cannot support the criminal punishment of a person who is not morally culpable for that offense. *See, e.g.*, *Tison v. Arizona*, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."); *cf. Ford v. Wainwright*, 477

U.S. 399, 409 (1986) ("For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today." (citation omitted)). Indeed, the whole concept of "just deserts" does not fit crimes whose perpetrators lack moral culpability.

Punishing such individuals also does not deter crime, since those who lack moral culpability cannot be deterred from engaging in acts that they cannot recognize as wrongful and thereby refrain from committing. As this Court has observed in another line of cases, the same impairments that make intellectually disabled defendants "less morally culpable . . . also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Atkins v. Virginia*, 536 U.S. 304, 320 (2002). Punishing the insane, like executing the incompetent, also "provides no example to others and thus contributes nothing to . . . deterrence." *Ford*, 477 U.S. at 407.

Society's interest in rehabilitation also surely is not advanced by subjecting the insane to criminal punishment rather than requiring them to receive appropriate mental health services, up to and including institutionalization that continues until they are able to distinguish right from wrong and control their actions. As this Court has recognized

in another context, denying a person access to the "rehabilitative services" he needs "makes the disproportionality of the sentence all the more evident"—even more so where the sentence, such as death, "forswears altogether the rehabilitative ideal." *Graham v. Florida*, 560 U.S. 48, 74 (2010).

Finally, the goal of incapacitation likewise is not served when insane persons are sentenced, not to receive the mental health treatment they need, but to a prison where they likely will not receive it. Insane persons sent to prison also are held there, not until they are deemed well enough to reenter the community, but until expiration of a fixed term regardless of their level of sanity or dangerousness. *See Jones v. United States*, 463 U.S. 354, 368 (1983) (by contrast, a state may continue to hold an insanity acquittee until "he has recovered his sanity or is no longer dangerous"). Because none of the four rationales for criminal punishment applies to persons who lack the ability to distinguish right from wrong and to control their behavior accordingly, society is not justified in, nor does it benefit from, punishing them. Criminal punishment of such individuals violates principles of fundamental fairness and due process.

B. The Insanity Defense Historically Has Protected from Criminal Punishment Individuals Who Lack Moral Culpability

The traditional insanity defense has long prevented society from visiting unjust punishment on people who are not morally culpable for their

actions. Indeed, the historical roots of this protection are exceptionally lengthy and extensive.

The insanity defense, which has deep roots in ancient Hebrew, Greek, and Roman legal doctrines, was further developed in early English common law as a "tool for pardon" to "protect those who lacked 'full reasoning powers and were deprived of moral responsibility.'" R. Michael Shoptaw, *M'Naghten Is a Fundamental Right: Why Abolishing the Traditional Insanity Defense Violates Due Process*, 84 MISS. L. J. 1101, 1106 (2015) (quoting Rudolph Joseph Gerber, The Insanity Defense 9 (1984)).

By the fourteenth century, insanity was recognized as a complete defense to a criminal charge under English law. *See* Brian E. Elkins, *Idaho's Repeal of the Insanity Defense: What Are We Trying to Prove?*, 31 Idaho L. Rev. 151, 161 (1994). By the sixteenth century, English courts were employing tests to determine whether criminal defendants were able to distinguish between "good and evil." Shoptaw, *supra*, at 1107 (quoting Gerber, The Insanity Defense, *supra*, at 10). At the time of America's independence, the notion of moral culpability as a prerequisite for criminal punishment was an ingrained principle in English law. *See* 1 W. Hawkins, 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."); 4 W. Blackstone, Commentaries on the Laws of England 25 (1769) ("[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 . . . .").

In 1843, *M'Naghten's Case* held that a defendant is not guilty by reason of insanity if,

> at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

8 Eng. Rep. 718 (H.L. 1843).

Today, nearly every state uses an insanity test that incorporates a moral capacity component. *See Clark v. Arizona*, 548 U.S. 735, 750–52 (2006). Most states use a test based on one of three models, each of which expressly or in practice includes such a component: (1) the *M'Naghten* test; (2) the American Law Institute's Model Penal Code test, which looks to defendants' "substantial capacity" to "appreciate the criminality of [their] conduct or to conform [their] conduct to the requirements of law"; or (3) the "product" test, which provides that a defendant cannot be liable for criminal acts that were the product of a mental disease or defect. *See* Shoptaw, *supra*, at 1110 (alterations in original) (quoting Model Penal Code § 4.01). The availability of an insanity defense for defendants who lacked moral capacity at the time of their offense thus not only has deep historical roots, but also remains a nearly unanimous practice among the states today.

II. ABOLISHING THE INSANITY DEFENSE, AS KANSAS HAS DONE, ALLOWS PEOPLE WHO LACK MORAL CULPABILITY TO BE IMPRISONED AND EXECUTED

Before 1996, defendants in Kansas, consistent with the practice in most other states, could raise an insanity defense under the *M'Naghten* rule. *See State v. Baker*, 819 P.2d 1173, 1187 (Kan. 1991). But Kansas law now provides that "[m]ental disease or defect" is "a defense to a prosecution under any statute" only to the extent that it shows "that the defendant . . . lacked the mental state required as an element of the offense charged." Kan. Stat. Ann. § 22-3220 (2009). [2] Consequently, Kansas law permits imprisoning and even executing people based on actions for which they are not morally culpable, even though historically—and in nearly every state today—the same lack of moral culpability has been a defense to criminal responsibility.

Kansas's purported "*mens rea* approach" "eliminate[s] the insanity defense," as the State's highest court has recognized. *State v. Jorrick*, 4 P.3d 610, 618 (Kan. 2000). As a practical matter, the critical shortcoming of this approach is that "[t]he *mens rea* element of a crime generally assesses only whether persons intended to complete the act performed." Elizabeth Bennion, *Death Is Different No Longer: Abolishing the Insanity Defense Is Cruel*

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[2] The Kansas legislature tweaked the language of § 22-3220 in a 2011 recodification, but the language of § 21-5209 is substantially identical.

and Unusual under Graham v. Florida, 61 DePaul L. Rev. 1, 54 (2011). It does not address "whether [a] person was so delusional that they did not understand the act was wrong." *Id.* For that reason, "[o]nly in the rare case . . . will even a legally insane defendant actually lack the requisite mens rea purely because of mental defect." *United States v. Pohlot*, 827 F.2d 889, 900 (3d Cir. 1987). After all, even "a man who commits murder because he feels compelled by demons still possesses the mens rea required for murder." *Id.* The criminal conviction of such defendants is inconsistent with the requirements of due process.

To be sure, where the insanity defense is available it has been invoked only rarely, and has succeeded even more rarely. Indeed, studies show that less than one percent of defendants charged with a felony ever raise the insanity defense—and that, where it is raised, the insanity defense is more likely to fail than not. *See, e.g.*, Carmen Cirincione et al., *Rates of Insanity Acquittals and the Factors Associated with Successful Insanity Pleas*, 23 Bull. Am. Acad. Psychiatry L. 399, 402 (1995); 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); Richard A. Pasewark, *Insanity Pleas: A Review of the Research Literature*, 9 J. Psychiatry & L. 357, 361–66 (1981). But the fact that the insanity defense is rare and its success even more so provides no justification for precluding it in the exceptional circumstances where it is implicated.

Indeed, in numerous cases, courts across the nation have granted relief based on the longstanding recognition that the Constitution does not permit imposing criminal sanctions on individuals who lack moral capacity and are therefore insane. These cases, including those discussed below, illustrate the practical consequences of Kansas's approach. In each case, while the defendant had *cognitive* capacity and thus could form the *mens rea* to perform the acts at issue, the defendant's mental disorder deprived him or her of the capacity to understand that the acts were wrong or to conform his or her conduct to that understanding. Defendants like these need appropriate treatment—typically including a lengthy period of institutionalization—rather than imprisonment. But in Kansas today, these same defendants cannot raise an insanity defense and can be found guilty and sentenced to prison—or, as here, death—despite their lack of moral culpability.

"Satanic delusion" cases: One recurring pattern in insanity cases involves defendants suffering from a "Satanic delusion"—a belief that they literally were killing Satan or a similar demonic being. In *State v. Hudson*, for example, the Tennessee Court of Criminal Appeals reversed Laura Ann Hudson's convictions for arson and first-degree murder because the court found that, under Tennessee's insanity test, the State had failed to prove Hudson "was capable of appreciating the wrongfulness of her conduct and conforming her conduct to the requirements of the law." No. 01C01-9508-CC-00270, 1999 WL 77844, at *8 (Tenn. Crim. Ct. App. Feb. 19, 1999). Hudson had told police that

the victim was the "son of Satan," and that God had instructed her to kill him and "battle the Devil." *Id.* at *1. All three mental health experts who testified at trial agreed that Hudson was legally insane, and lay witnesses described numerous instances of her bizarre behavior. *Id.* at *7. Months before the killing, for example, Hudson expressed the belief that she was "God's favorite angel" and claimed she could see the future. *Id.* at *2. Hudson told another witness on two separate occasions that she was "being tormented by the Devil." *Id.* at *4. Another witness "recalled an incident where [Hudson] brought china, jewelry, and other items to [the witness's] home and broke them over a garbage can." *Id.* at *3. Even the testimony of the State's lay witnesses "[was] supportive of [Hudson's] bizarre behavior"; for example, "laying a crucifix on her pregnant sister's stomach," "staying up all night to color," and claiming to have a "conversation with the Devil at a bar." *Id.* at *8. The court remanded for entry of a judgment of "not guilty by reason of insanity" and the initiation of judicial commitment proceedings under state law. *Id.*

In another Satanic delusion case, *State v. Armstrong*, the Louisiana Supreme Court reversed Freddie Armstrong's murder conviction because the court found that the evidence of his insanity was so great that "a rational juror could not have reached a contrary decision." 671 So. 2d 307, 313 (La. 1996). At trial, four out of the five psychological experts who testified concluded that Armstrong's mental illness rendered him incapable of distinguishing right from wrong at the time of the offense. *See id.*

at 308. The court noted that the evidence showed a "twenty-five year history of mental illness" involving "delusions, auditory hallucinations, religious obsessions and occasional psychotic episodes." *Id.* at 308, 312. The court found that, at the time of the crime, Armstrong was under the delusion that the victim was the anti-Christ. *Id.* at 311. Moreover, the circumstances of the killing strongly contradicted any conclusion that he "knew he was doing wrong at the time." *Id.* at 313; *see also, e.g.*, *State v. Peters*, 643 So. 2d 1222, 1226 (La. 1994) (defendant "show[ed] he was unable to distinguish between right and wrong" where, among other things, he assumed officers were confronting him "to serve a commitment order, and not because he had just shot his estranged wife," and made no attempt to conceal the gun).

Cases involving delusions of a command from God: A related (and sometimes overlapping) set of cases involves individuals who acted on a delusional belief that they were following a direct command from God. As the Supreme Court of Colorado has observed, "the 'deific-decree' delusion" is important to consider in "assessing a person's cognitive ability to distinguish right from wrong" since, "[i]f a person insanely believes that 'he has a command from the Almighty to kill, it is difficult to understand how such a man can know that it is wrong for him to do it.'" *People v. Serravo*, 823 P.2d 128, 139–40 (Colo. 1992) (first quoting *State v. Crenshaw*, 659 P.2d 488, 494 (Wash. 1983); and then quoting *People v. Schmidt*, 110 N.E. 945, 948 (N.Y. 1915)).

The *Serravo* case provides a vivid illustration of the "deific-decree delusion." After Robert Pasqual Serravo's wife suffered a non-fatal stabbing in her sleep, she found letters that Serravo had written, stating that "[o]ur marriage was severed on Mother's Day when I put the knife in your back," that "I have gone to be with Jehovah in heaven for three and one-half days," and that "I must return for there is still a great deal of work to be done." *Id.* at 130–31 (alteration in original). Confronted about the letters, Serravo told his wife that "God had told him to stab her in order to sever the marriage bond." *Id.* at 131. At trial, several experts opined that Serravo suffered from mental illness that prevented him from distinguishing between right and wrong. *Id.* at 131–32. The jury returned a verdict of not guilty by reason of insanity. *Id.* at 132. On appeal,[3] the Supreme Court of Colorado held that "a defendant may be judged legally insane where, as here, the defendant's cognitive ability to distinguish right from wrong with respect to an act charged as a crime has been destroyed as a result of a psychotic delusion that God has ordered him to commit the act." *Id.* at 130.

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[3] The State appealed pursuant to a Colorado statute that authorizes the prosecution to "appeal any decision of a court in a criminal case upon any question of law." *Id.* at 130 n.1; Colo. Rev. Stat. Ann. § 16-12-102. The Supreme Court of Colorado held, *inter alia*, that federal and state double jeopardy principles prohibited the defendant's retrial on the issue of insanity. *See Serravo*, 823 P.2d at 130.

In *People v. Skinner*, another case involving such a delusion, the Supreme Court of California reversed Jesse Skinner's second-degree murder conviction where the trial court found, "on clearly sufficient evidence," that he "could not distinguish right and wrong." 704 P.2d 752, 764 (Cal. 1985). As a result of Skinner's mental illness, the trial court found, he held a delusional belief that he had "a God-given right to kill" his wife, and believed his doing so was "with complete moral and criminal impunity" and "not wrongful because it is sanctified by the will and desire of God." *Id.* at 754–55.

The California Supreme Court held that under the State's insanity test, a defendant could establish insanity based on a showing that he "was incapable" *either* "of knowing or understanding the nature and quality of his or her act" *or* "of distinguishing right from wrong" at the time of the offense. *Id.* at 753 (quoting Cal. Pen. Code § 25(b)). Based on the record, the high court found that although Skinner "knew he was committing an act . . . that would, and was intended to, kill a human being," he "was not able to comprehend that the act was wrong because his mental illness caused him to believe that the act was not only morally justified but was expected of him." *Id.* at 760.

So too in *State v. Cameron*, the Supreme Court of Washington reversed Gary Cameron's conviction for first-degree murder, holding that the jury had been erroneously prevented from considering Cameron's insanity defense based on his delusional belief that he was following a command from God. 674 P.2d 650 (Wash. 1983). The court

found that while Cameron appeared to understand his actions in killing his stepmother, and intended their natural consequences, he could not distinguish between right and wrong at the time of his act due to delusions that the act was ordained by God. The court noted that after the crime, Cameron made no attempt to conceal the victim's body, and was seen downtown "wearing only a pair of women's stretch pants, a woman's housecoat, a shirt and no shoes." *Id.* at 651. The following day, police apprehended him "wander[ing] along the shoulder of" the interstate "wearing only the stretch pants and one shoe," such that he was actually "thought to be an escapee from a nearby mental hospital." *Id.* Cameron promptly confessed, stating among other things that his stepmother had practiced "sorcery" and "witchcraft" and that while he knew his act was against the law, "as far as right and wrong in the eye of God," he felt he had done "no particular wrong." *Id.* at 651–52.

All four testifying psychological experts agreed that Cameron "believed he was an agent of God, required to carry out God's directions," and that Cameron "believed God commanded him to kill his stepmother and that he was therefore obligated to kill the 'evil spirit.'" *Id.* at 652. The experts also agreed that "while [Cameron] technically . . . understood the mechanical nature of the act, he did not have the capacity to discern between right and wrong with reference to the act." *Id.* at 653.

In overturning Cameron's conviction, the Supreme Court of Washington observed that the jury had been instructed that the ability to tell right from

wrong referred only to knowledge that an act was contrary to law. *See id.* Noting that "one who believes that he is acting under the direct command of God is no less insane because he nevertheless knows murder is prohibited by the laws of man," the court held that the jury instruction as given impermissibly deprived Cameron of an opportunity to present an insanity defense based on the delusion that he was acting under just such a command. *Id.* at 654.

Cases involving other delusions and psychotic episodes: Still other defendants have obtained relief based on the insanity defense due to various delusions and psychotic episodes that deprived them of moral capacity. In *State v. Wilson*, for example, the Supreme Court of Connecticut reversed Andrew Wilson's conviction for murder where the trial court had failed to give an appropriate jury instruction regarding whether Wilson had the capacity to understand the wrongfulness of his conduct. 700 A.2d 633, 635 (Conn. 1997). Wilson had, for months, harbored delusions that the eventual victim and his son were conspiring to destroy his life in all manner of ways. Among other things, Wilson believed they "had poisoned him with methamphetamine and had hypnotized him in order to obtain control of his thoughts." *Id.* at 636. Wilson also believed that the victim was "the mastermind of a large organization bent on controlling the minds of others" and that he and his son were responsible for the deaths of Wilson's mother and several family dogs, as well as for a variety of personal problems Wilson had. *Id.*

Wilson repeatedly called the police over a period of months to ask them to stop the victim and his son, but they informed him that it was impossible to investigate his allegations. Finally, one day, Wilson quarreled with the victim and ultimately shot and killed him. Later that day, he entered the local police headquarters, repeated his numerous allegations against the victim, and said he had shot the victim because he "had to do it." *Id.*

The Connecticut high court, analogizing Wilson's case to the cases involving defendants who believed they were operating under commands from God, held that Wilson was entitled to a jury instruction that he was insane at the time of his act if he could establish that he acted under a delusional belief that society "would not have morally condemned his actions." *Id.* at 640.

Similarly, in *State v. Gerone*, a Louisiana appellate court reversed the conviction for armed robbery of John Gerone, a deeply disturbed individual suffering from numerous delusions. 435 So. 2d 1132, 1137 (La. Ct. App. 1983). Gerone's mother testified that he had told his parents that he had been approached by federal agents who "hypnotized" him and "wanted him to work for the CIA in an occult." *Id.* at 1135. She recalled that, one night, she found him sitting fully dressed with a suitcase packed, waiting for the imagined agents to pick him up. *Id.* at 1135–36. On other occasions, he told his mother that he had become "psychic" and "was not of this world," and said "he was getting messages from flying saucers; that airplanes dipped their wings when they passed by to acknowledge him;

and that one day a helicopter was going to pick him up in the back yard." *Id.* at 1136. Gerone "spent long periods of time in his room, could not hold a job, and would not eat." *Id.* During the criminal act of which he was convicted—a bank robbery—Gerone also demonstrated peculiar behavior, including telling the bank manager that he had a criminal record, claiming that he was taking money "for his sick and dying mother," and returning some of the money before leaving "because he thought he was taking too much." *Id.* at 1132.

At trial, two psychiatrists testified that Gerone was unable to appreciate the wrongfulness of his armed robbery at the time of the act, due to the culmination of a severe psychosis. *See id.* at 1135–36. Finding that "the state ha[d] presented no controverting evidence of merit that defendant was, in fact, sane and able to know right from wrong at the time of the commission of the crime," the court reversed Gerone's conviction and remanded for criminal commitment proceedings under Louisiana law. *Id.* at 1137.

In *United States v. Bobbitt*, the Court of Military Review found that the evidence was insufficient to establish beyond a reasonable doubt that Sergeant Thomas E. Bobbitt, accused of aggravated assault, burglary, and other offenses, was morally responsible for his actions. 48 C.M.R. 302 (1974). Both military and civilian mental health experts testified at trial that Bobbitt had schizophrenia that disrupted his moral capacity. *See id.* at 303–04. One psychiatrist "possessing impeccable professional credentials" testified that he

believed "a '90 per cent probability' existed that the accused, at the time of the offenses, was unable to distinguish right from wrong and adhere to the right." *Id.* at 303.

In *State v. Rawland*, the Supreme Court of Minnesota reversed Frank Rawland's conviction for third-degree murder because Rawland was unable to distinguish between right and wrong at the time of the offense. 199 N.W.2d 774, 790 (Minn. 1972).[4] Rawland had a long history of delusions. Among other things, on multiple occasions he had announced his candidacy for President of the United States by speaking into his AM radio—believing he could "transmit messages to the world" by this means—and had then been "disappointed when he rode his bicycle into downtown St. Cloud expecting to be greeted by crowds of well-wishers." *Id.* at 776. Rawland became convinced that his parents were equipped to spy on him with electronic devices and that they were part of a conspiracy to assassinate him. *Id.* at 777. The evidence showed that on the day Rawland killed his father, he discovered that his father had taken his gun, which Rawland understood as "a deliberate attempt on his father's part to render him defenseless against those who were plotting to take his life." *Id.* When he went to

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[4] The court held that Rawland had met the State's *M'Naghten* test without specifying which prong. *See id.* As explained below, however, it is clear from the opinion that Rawland knowingly and intentionally killed his father, and that the only relevant question contested was whether Rawland understood that his act was wrong.

confront his father, Rawland overheard him say over the phone—in a conversation unrelated to Rawland—"[h]e will have to be stopped," at which point Rawland stabbed his father, causing injuries that resulted in death the following day. *Id.*

The Minnesota court found that given the nature of Rawland's mental illness and his behavior over a number of years, it was clear that at times "he must have acted without knowing whether the act was right or wrong." *Id.* at 787. Evaluating Rawland's condition at the time he killed his father, the court found it particularly significant that "[a]ll experts," including the expert who had "the most contact with defendant over the years," "inferred that in application of the right-and-wrong test he was not at the time able to distinguish between right and wrong on an ethical basis." *Id.* at 788. The court emphatically rejected arguments that it should not consider this evidence, emphasizing that "a basic postulate of our criminal law is a free agent confronted with the choice between doing right and doing wrong and choosing freely to do the wrong." *Id.*

A final example is *People v. Horn*. In that case, a California appellate court reversed defendant Betty Horn's conviction for vehicular manslaughter because the court found that she was incapable of distinguishing between right and wrong at the time of the incident. 158 Cal. App. 3d 1014, 1034 (1984). Horn had fueled her car at a gas station but lacked the means to pay the attendant, and told the attendant that someone was bringing money to her. *Id.* at 1017–18. When the attendant suggested Horn move her car so as not to block others, Horn pulled

out of the gas station, nearly striking another vehicle, before driving through a parking lot, across a cement border, into a field, into another parking lot, and finally onto the open road. *Id.* at 1018. Pursued by another attendant on a motorcycle as she approached a red light, Horn pumped the brakes but nonetheless entered the intersection, where she struck and killed another motorcyclist. *Id.*

At trial, it was "established beyond any doubt that [Horn] suffer[ed] from mental illness," characterized by one expert as a "manic-depressive disorder" which could manifest in, among other things, "impulsiveness, irrational thinking, grandiosity and irritability." *Id.* at 1018–19. Two experts testified that, based on her condition and the relevant circumstances, at the time of her acts Horn, in a manic state, would have been incapable of distinguishing right from wrong or acting in a morally responsible way. *See id.* The appeals court observed that "[t]here was no real evidence that [Horn] could not understand the nature and quality of her act," as "it [was] clear that she was aware that she was driving her car, was being followed by the gas station attendant on his motorcycle, and that she was entering an intersection on a red light," but noted that the trial court "expressly found that [Horn] . . . was incapable of distinguishing between right and wrong at the time of the incident." *Id.* at 1033–34. Because Horn's mental illness critically impeded her moral capacity, the court found her not guilty by reason of insanity. *Id.* at 1034.

* * *

As these examples illustrate, the difference between Kansas's approach and an insanity defense that accounts for a defendant's moral culpability is that Kansas permits imprisoning and even executing individuals who lack the capacity to understand the difference between right and wrong and conform their actions to that understanding. In these cases, while the defendants otherwise may have met the *mens rea* and *actus reus* required for the crimes with which they were charged (and thus are subject to conviction in Kansas regardless whether the defendants lacked moral capacity), courts rightly concluded that their lack of moral capacity precluded criminal responsibility. Consequently, these defendants were subject to treatment—which typically included, of necessity, an extensive institutionalization period—rather than punishment.

Petitioner's case illustrates the injustice of Kansas's approach. Like the other defendants discussed above, petitioner argues that he lacked the moral capacity—the freedom of will to choose between good and evil—at the time of his crime. *See* Pet. at 5. But under Kansas law, the jury could consider his mental illness only with respect to the question of whether that illness rendered him "incapable of possessing the required criminal intent." Pet. App. at 73a. Consequently, petitioner was deprived even of the opportunity to proffer evidence to support an insanity defense involving moral capacity. As any defense attorney knows, this required funneling of an insanity defense through the narrower channel of *mens rea* necessarily colors the entire presentation of evidence at trial. Kansas's

approach dictates, for example, that psychological evaluations be focused solely on "*mens rea*" issues involving whether the defendant took deliberate steps, regardless of any mental illness or disorder that may have deprived him of the ability to distinguish good from evil and conform his steps accordingly.

In sum, by precluding petitioner from contesting guilt on the ground that he could not understand the difference between right and wrong and conform his actions to that understanding, Kansas has run afoul of the deep-rooted principle in the American criminal justice system that criminal punishment should be visited only on the morally culpable.

CONCLUSION

For the foregoing reasons, the judgment of the Kansas Supreme Court should be reversed.

Respectfully submitted,

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