No. 11-___

IN THE

Supreme Court of the United States

JOHN JOSEPH DELLING,

Petitioner,

v.

IDAHO,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the question this Court reserved in *Clark v. Arizona*, 548 U.S. 735, 752 n.20 (2006): whether the Fourteenth or Eighth Amendment mandates the availability of an insanity defense in criminal cases.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Joseph Delling respectfully petitions for a writ of certiorari to review the judgment of the Idaho Supreme Court.

OPINIONS BELOW

The opinion of the Idaho Supreme Court (Pet. App. 1a) is published at 267 P.3d 709. The relevant order of the trial court is unpublished.

JURISDICTION

The judgment of the Idaho Supreme Court was entered on December 1, 2011. Pet. App. 1a. That court denied a timely-filed petition for rehearing on January 27, 2012. Pet. App. 29a. On March 30, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 29, 2012, and on May 22, 2012, he further extended that time to and including June 13, 2012. *See* No. 11A905. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(A).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Idaho Code § 18-207 states in relevant part: "(1) Mental condition shall not be a defense to any charge of criminal conduct. . . . (3) Nothing herein is intended to prevent the admission of expert evidence on the issue of any state of mind which is an element of the offense, subject to the rules of evidence."

The Eighth Amendment states in relevant part that "Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted."

The Fourteenth Amendment states in relevant part that "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner John Delling, a person suffering from acute paranoid schizophrenia, was convicted of shooting and killing two of his friends while in the grip of severe delusions. The trial court found he was unable to appreciate the wrongfulness of his actions, which satisfies the traditional test for legal insanity. Delling, however, could not present an insanity defense because Idaho is one of five states that have enacted legislation abolishing the insanity defense. The Idaho Supreme Court held that such legislation violates neither the Due Process Clause nor the Eighth Amendment, expressly disagreeing with a decision from the Nevada Supreme Court declaring Nevada's legislation unconstitutional.

1. The criminal law and courts implementing it have recognized an insanity defense since ancient times. This rule was perhaps most famously articulated in 1843 in *M'Naghten's Case*, in which the Queen's Bench explained that someone cannot be convicted of a crime if, "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 . . . that he did not know he was doing what was wrong." *M'Naghten's Case*, (1843) 8 Eng. Rep. 718 (Q.B.) 722.

For almost all of its history, Idaho, like other U.S. states, adhered to this time-honored tenet. Idaho varied its formulation of the insanity defense over the years, but it consistently prohibited the conviction of someone who was unable to appreciate

the wrongfulness of his conduct at the time of the offense. *See* Brian E. Elkins, *Idaho's Repeal of the Insanity Defense: What Are We Trying to Prove?*, 31 Idaho L. Rev. 151, 153-54 (1994).

Yet around the time John W. Hinckley, Jr. was acquitted by reason of insanity for his assassination attempt on President Ronald Reagan, Idaho and four other states – Montana, Utah, Nevada, and Kansas – enacted legislation "abolish[ing]" their longstanding recognition of the insanity defense. *State v. Rhoades*, 809 P.2d 455, 457 (Idaho 1991).[1] As amended, Idaho law provides that "[m]ental condition shall not be a defense to any charge of criminal conduct." Idaho Code § 18-207(1). The upshot is that Idaho now "allow[s] the conviction of persons who may be insane by some former insanity test or medical standard, but who nevertheless have the ability to form intent and to control their actions." *State v. Card*, 825 P.2d 1081, 1086 (Idaho 1991).

2. Delling suffers from severe paranoid schizophrenia. He first showed symptoms of the disease in high school and became increasingly ill as adolescence progressed. He eventually became "grossly psychotic." PSI Add., Woods Ltr. at 4.

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[1] The federal government and many other states responded to the Hinckley verdict by shifting the burden of proof to prove insanity to the defense. But these amendments maintained the rule that defendants unable to appreciate the wrongfulness of their acts could not be held criminally liable. *See, e.g.*, Federal Insanity Defense Reform Act, Pub. L. No. 98–473, § 402, 98 Stat 1837 (1984) (codified as renumbered at 18 U.S.C. § 17 (1986)); Richard J. Bonnie et al., A Case Study in the Insanity Defense: The Trial of John W. Hinckley, Jr. 127 (3d ed. 2008).

As his condition worsened, Delling came to believe that he was "a type of Jesus," and that certain friends of his were "tak[ing] his energy." Tr. 609. He believed that "tak[ing] that energy would kill him." *Id.* Indeed, Delling believed his friends were already grievously wounding him, saying that if one "were to take, like, an MRI of my brain, I probably have a relatively significant amount of cerebral atrophy already." FBI Interview Tr. 210 (Apr. 15, 2007). "I had to defend myself," he explained. *Id.*

A psychologist who later evaluated Delling confirmed that "he 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." Tr. 636. "He believed he had to kill those that were killing him. They were not killing him with guns or knives, but, in his delusional thinking, his death was no less sure." PSI Add., Woods Ltr. at 5.

In 2007, Delling struck back against those who were "killing him." He traveled first to Tucson, Arizona where he shot and wounded Jake Thompson, a high school classmate. About one week later, Delling shot and killed his childhood friend David Boss in Moscow, Idaho. He then traveled to Boise, Idaho, where he shot and killed Brad Morse, whom Delling had met playing online video games. When apprehended shortly thereafter, Delling admitted to the killings and stated that he shot these men in self-defense. FBI Interview Tr. 210.

The trial court later found that "at the time he committed the offenses," Delling did not have "the ability to appreciate the wrongfulness of his conduct." Tr. 750. "The reason for [Delling's] crimes," the court

explained, is that "[h]e is profoundly ill" and "suffers from severe delusional thinking." Tr. 743, 749.

3. The State charged Delling with two counts of first-degree non-capital murder for the killings of Boss and Morse. The charges were combined into a single proceeding.

The trial court initially found Delling incompetent to stand trial because he was "not able to make rational decisions" and was "too psychologically impaired" even to participate in an interview without "delusional thoughts intrud[ing] into the interview." Decision and Order Re: Competency to Stand Trial 3 (Feb. 19, 2009). The court thus delayed proceedings for over a year while the State gave Delling both oral and intramuscular antipsychotic medication. Eventually, the court found that Delling was able to assist in his own defense, despite "remain[ing] mentally ill" and continuing to "h[o]ld to some delusional beliefs about others 'using his energy.'" *Id.* at 6. Pretrial proceedings then commenced.

Under Idaho law, "[m]urder is the unlawful killing of a human being . . . with malice aforethought . . . ." Idaho Code § 18-4001. Malice aforethought can be satisfied merely by showing a "deliberate intention" to kill a human being. Idaho Code § 18-4002; *see also State v. Aragon*, 690 P.2d 293, 298 (Idaho 1984).[2] A person is not liable for homicide

[2] With respect to second-degree murder, the State can also prove malice by showing that the defendant acted with an "abandoned or malignant heart." *State v. Porter*, 128 P.3d 908,

when acting in self-defense, but "[t]he Idaho rule of self-defense is not premised upon a subjective test. It is grounded in the objective concept of the actions of a 'reasonable person.'" *State v. Camarillo*, 678 P.2d 102, 105 (Idaho Ct. App. 1984) (internal citation omitted); *see* Idaho Code § 18-4009 (1). Thus, if a person intentionally kills another because he irrationally thinks that his life is in grave danger, he cannot claim self-defense.

By his own admission, Delling's actions met Idaho's statutory definition of murder because he killed people intentionally. Tr. 325. And since Delling's delusional beliefs were objectively unreasonable, any claim of self-defense would have been unavailing. Delling's only viable defense would have been his inability to appreciate the wrongfulness of his acts; however, given Idaho's abolition of the insanity defense, that argument was unavailable.

Delling therefore moved the trial court to declare unconstitutional Idaho's abolition of the insanity defense. Pet. App. 2a-3a. The trial court denied that motion, *id.* at 3a, noting that the Idaho Supreme Court had already held that the state statute abolishing the insanity defense was constitutional. *Id.* at 7a; *see also, e.g.*, *State v. Searcy*, 798 P.2d 914 (Idaho 1990).

Left with no defense to the State's charges, Delling entered a conditional guilty plea to two

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911-12 (Idaho 2005). That alternative method of proof is not at issue here.

counts of second-degree murder, reserving the right to appeal all of the trial court's pre-trial rulings, including the denial of his constitutional challenge to Idaho Code § 18-207. Pet. App. 3a.

Second-degree murder in Idaho carries a sentence range of ten-years-to-life, and a judge has the discretion to choose any sentence in that range and to decide whether the sentence should be indeterminate or fixed. Idaho Code § 18-4004. Thus, at sentencing, Delling asked the court to consider his mental illness and his responses to treatment as mitigating factors and to sentence him on the lower end of that range. Tr. 731-35. The court, however, found that his illness "[was] at such an extraordinary level" that it functioned as an aggravating factor. Tr. 751; *see also* Pet. App. 27a. The trial court reasoned that in light of Delling's inability to appreciate the wrongfulness of his conduct, "it is an unreasonable risk to society, based on just speculation, to impose a sentence of less than fixed-life on these second-degree murder convictions." Tr. 752; *see also* Pet. App. 23a-27a. The court thus sentenced him to life without parole. He was sent to Idaho State Correctional Institution and later moved to Idaho's Maximum Security Institution, where he is now being held in solitary confinement.

4. The Idaho Supreme Court affirmed Delling's conviction and sentence. The court accepted the trial court's determination that Delling did not "ha[ve] the ability to appreciate the wrongfulness of his conduct." Pet. App. 25a. But relying on its earlier precedents upholding Idaho Code § 18-207, Pet. App. 7a-9a, the court reaffirmed, for two reasons, its belief that states need not provide an insanity defense. First,

even though it has long been "settled" in Idaho (like other states) that a defendant's ability "to understand that [his act] was wrong" is irrelevant to whether he had the requisite intent to commit murder, *State v. Hoagland*, 228 P. 314 (Idaho 1924), the Idaho Supreme Court stated that abolishing the insanity defense does not preclude a defendant from introducing "evidence of mental illness" respecting other issues, including to "rebut the element of intent." Pet. App. 12a. Second, while acknowledging that this Court recently reserved the issue whether "the Constitution mandates an insanity defense," the Idaho Supreme Court asserted that "language" in prior opinions from this Court suggests that this Court "would conclude" that states may indeed dispense with the insanity defense. *Id.* at 10a (quoting *Clark v. Arizona*, 548 U.S. 735, 752 n.20 (2006)), 13a (quoting *Searcy*, 798 P.2d at 918).

The Idaho Supreme Court recognized that the Nevada Supreme Court had invalidated that state's post-Hinckley law abolishing the insanity defense. Pet. App. 7a (citing *Finger v. State*, 27 P.3d 66, 79-84 (Nev. 2001), *cert. denied*, 534 U.S. 1127 (2002)). But the Idaho Supreme Court dismissed Nevada's ruling by simply noting it "differs from th[e] [Idaho Supreme] Court's previous holdings on the subject." Pet. App. 7a.

Delling filed a timely petition for rehearing, which that court denied on January 27, 2012 without comment. Pet. App. at 29a.

REASONS FOR GRANTING THE WRIT

Recently, this Court considered whether a state could define its insanity defense narrowly, to exclude defendants who did not "know the nature and quality of the act[s]" they committed. *Clark v. Arizona*, 548 U.S. 735, 747-48 (2006) (quotation marks and citation omitted). The Court held that precluding such a defense did not violate due process because the Arizona law at issue still allowed for a defendant to prove his insanity by showing that, "at the time of the commission of the criminal act [he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong." *Id.* at 748 (quoting Ariz. Rev. Stat. Ann. § 13-502(A)). In light of that resolution, the Court expressly left open the question whether the "Constitution mandates an insanity defense." *Id.* at 752 n.20.

The Court should resolve that issue now. Between 1979 and 1995, five states passed legislation abolishing the insanity defense: Montana, Idaho, Utah, Nevada, and Kansas. Four of these states' supreme courts have upheld these laws against constitutional challenges, while one (the Nevada Supreme Court) has held that its law violates the Constitution. Similarly, the California Supreme Court has read this Court's precedent to "accept[] the proposition that the insanity defense, in some formulation, *is* required by due process." *People v. Skinner*, 704 P.2d 752, 757-58 (Cal. 1985) (emphasis in original).

This disagreement over whether the Constitution mandates an insanity defense strikes at the heart of the integrity of the criminal justice system. And this case presents an ideal vehicle for resolving the issue.

The trial court expressly found that petitioner suffers from a severe mental defect such that he satisfied the classic test for insanity – namely, that he could not "appreciate the wrongfulness of his conduct." Tr. 750. The Idaho Supreme Court's holding, moreover, is incorrect. The pervasive and deep-rooted historical recognition of the insanity defense, still overwhelmingly honored today, dictates that the Fourteenth and Eighth Amendments require such a defense in criminal cases such as this one.

I. State Supreme Courts Are Intractably Divided Over Whether The Constitution Requires An Insanity Defense.

1. State supreme courts are squarely divided over whether the Constitution requires an insanity defense.

a. Four state supreme courts – those of Idaho, Montana, Utah, and Kansas – have held that neither the Due Process Clause nor the Eighth Amendment requires an insanity defense. Pet. App. 11a-12a, 26a-27a (reaffirming holding in *State v. Searcy*, 798 P.2d 914 (Idaho 1990)); *State v. Korell*, 690 P.2d 992 (Mont. 1984); *State v. Herrera*, 895 P.2d 359 (Utah 1995); *State v. Bethel* 66 P.3d 840 (Kan. 2003), *cert. denied*, 540 U.S. 1006 (2003); *State v. Cowan*, 861 P.2d 884 (Mont. 1993), *cert. denied*, 511 U.S. 1005 (1994); *State v. Lafferty*, 20 P.3d 342, 363-66 (Utah 2001).

Three of these decisions generated vigorous dissents, two of which fell just one vote short of a majority. *Korell*, 690 P.2d at 1005, 1009 (five-to-two); *Searcy*, 798 P.2d at 921-22 (three-to-two); *Herrera*, 895 P.2d at 371 (three-to-two). The dissent in the

Utah Supreme Court, for example, asserted that abolishing the insanity defense violates the Due Process Clause and Eighth Amendment because it is "a monumental departure from, and rejection of, one of the most fundamental principles of Anglo-American criminal law that has existed for centuries," and imposes punishment while "advanc[ing] none of the objectives of the criminal law." *Herrera,* 895 P.2d at 371, 386 (Stewart, Assoc. C.J., dissenting). The state supreme court majorities, however, have rejected these arguments.

b. In 2001, the Nevada Supreme Court explicitly broke with its counterparts and held that abolishing the insanity defense violates the Due Process Clause. *Finger v. State*, 27 P.3d 66 (Nev. 2001), *cert. denied*, 534 U.S. 1063 (2002). While a legislature is "free to decide what method to use in presenting the issue of legal insanity to a trier of fact," the court reasoned, "it cannot abolish legal insanity" altogether. *Id.* at 84. The Nevada Supreme Court rested this judgment on an extensive review of the historical record. That record, the court maintained, establishes a "fundamental principle" that people cannot be convicted of crimes when mental illness prevents them from knowing their conduct is wrong. *Id.* at 80-81.

The California Supreme Court has adopted this same view, determining "[i]t is fundamental to our system of jurisprudence that a person cannot be convicted for acts performed while insane." *Skinner*, 704 P.2d at 755 (citations omitted). The court therefore held that "the suggestion that a defendant whose mental illness results in inability to appreciate that his act is wrongful could be punished by death or

imprisonment raises serious questions of constitutional dimension under both the due process and cruel and unusual punishment provisions of the Constitution." *Id.* at 757. Given its view of the seriousness of these constitutional issues, the court refused to construe a statute redefining the state's insanity defense in accordance with its "literal" meaning. *Id.* at 754. Instead, the court rewrote the statute – changing an "and" to an "or" – to ensure that defendants who prove that they were unable to appreciate the wrongfulness of their conduct need not prove anything else in order to be acquitted. *Id.* at 758-59.

2. State supreme courts have now thoroughly ventilated this issue and have resolved, in the wake of the Nevada Supreme Court's opinion in *Finger*, to remain divided. Not only has the Idaho Supreme Court held fast to its previous view that states may abolish the insanity defense, *see* Pet. App. 7a, but so have the other three state supreme courts on its side of the split. *See State v. Meckler*, 190 P.3d 1104 (Mont. 2008); *State v. Meeks*, 58 P.3d 167 (Mont. 2002), *overruled on other grounds by State v. Herman*, 188 P.3d 978, 981 n.9 (Mont. 2008); *State v. Drej*, 233 P.3d 476 (Utah 2010); *State v. Pennington*, 132 P.3d 902, 911 (Kan. 2006); *State v. White*, 109 P.3d 1199, 1209 (Kan. 2005); *State v. Davis*, 85 P.3d 1164 (Kan. 2004). Furthermore, the Idaho Supreme Court noted in this case that it now interprets this Court's silence on the issue as tacit acceptance of its position. Pet. App. 10a.

On the other hand, the Nevada Supreme Court continues to follow its holding that federal due process requires the availability of an insanity

defense. *See O'Guinn v. State*, 59 P.3d 488 (Nev. 2002). California courts likewise continue to proceed under that understanding of federal law. *See, e.g., People v. Ortega*, 2005 WL 1623911, at *3 (Cal. Ct. App. 2005). The only way to resolve this conflict is for this Court to intervene.

II. The Question Presented Is Profoundly Important.

The question whether states may inflict criminal punishment upon persons who could not appreciate the wrongfulness of their acts is profoundly important both legally and practically.

1. For centuries, the moral integrity of the criminal law has depended, in part, on the insanity defense. As Justice Jackson, a former United States Attorney General, explained for this Court: Criminal punishment has traditionally been justified based on a breach of the "duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250 (1952). Laws such as Idaho's abandon that basic tenet. As the American Bar Association has put it, such laws constitute a "jarring reversal of hundreds of years of moral and legal history," which "forces judges and juries confronted with defendants who are uncontrovertibly psychotic either to return morally obtuse convictions or to acquit in outright defiance of the law." Am. Bar Assoc., ABA Criminal Justice Mental Health Standards 337-78 (1989) (commentary to § 7-6.1). Such a reversal should not take place without this Court's review.

2. The question presented arises regularly and will not go away until this Court resolves the issue.

A 1991 study, for instance, found that the insanity defense is raised in roughly one percent of felony cases, and juries find about one-fourth of these defendants insane. 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). Moreover, most cases involving assertions of insanity arise from homicides or other serious felony charges where defendants face lengthy potential sentences. *Id.* at 336-37. It thus comes as no surprise that defendants in the four states lacking an insanity defense continue to bring constitutional challenges against statutes that abolished the defense. *See e.g.*, *State v. Winn*, 828 P.2d 879 (Idaho 1992); *State v. Card*, 825 P.2d 1081 (Idaho 1991); *State v. Meckler*, 190 P.3d 1104 (Mont. 2008); *State v. Cowan*, 861 P.2d 884 (Mont. 1993); *State v. White*, 109 P.3d 1199 (Kan. 2005); *State v. Davis*, 85 P.3d 1164 (Kan. 2004); *State v. Lafferty*, 20 P.3d 342 (Utah 2001); *State v. Mace*, 921 P.2d 1372 (Utah 1996).

3. Further, the differences between an insane person being convicted of a crime and being acquitted (and civilly committed) are stark and serious. A person who is convicted of a crime, in contrast to someone who is civilly committed, suffers "the stigma of a finding that he violated a criminal law." *In re Winship*, 397 U.S. 358, 367 (1970). Furthermore, a criminal conviction extinguishes various civil rights and privileges, whereas a person who is civilly committed retains all his civil rights. *See* Idaho Code § 66-346.

Equally important, insane defendants in Idaho, Montana, Utah, and Kansas – in contrast to

equivalent individuals in other states and the federal system – are subject to punishment in state prisons. People who are in such facilities have no guarantee of treatment for their mental illness. *See, e.g.*, Idaho Code § 19-2523(2) (court can only "authorize" mental health treatment in prison); *State v. Reese*, 563 P.2d 405, 406 (Idaho 1977). And even when prisons in Idaho, Montana, and Utah are interested in treating mentally ill inmates, the prisons are often ill-equipped to do so.[3] For instance, the Idaho Maximum Security Institution, where Delling is currently incarcerated, recently went without a staff psychologist for at least eight months. Rebecca Boone, *Idaho Fines Prison Health Care Company $382K*, Associated Press, June 6, 2011, *available at* http://m.spokesman.com/blogs/boise/2011/jun/06/idaho-prison-health-contractor-fined-382k-big-contract-violations/.

Finally, in the absence of an insanity defense, the mentally ill not only are placed in prisons instead of mental hospitals, but they often are also subject to even *harsher* penalties than their sane counterparts. Delling is a prototypical example of this irony. The trial court expressly found that Delling was suffering delusions such that he could not appreciate the wrongfulness of his conduct. Pet. App. 25a. Yet

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[3] *See* Marc F. Stern, Special Master's Report, 3, 29 (Feb. 2, 2012) (document 822 prepared for *Balla v. Idaho State Bd. of Corr.*, 1:81-cv-01165-BLW, D. Idaho), *available at* http://mediad.publicbroadcasting.net/p/idaho/files/Report%20on%20ISCI%20medical%20and%20mental%20health%20care.pdf; Human Rights Watch, Ill-equipped: U.S. Prisons and Offenders with Mental Illness 1-5 (2003).

rather than reducing Delling's sentence on that basis, the court characterized his mental illness as an aggravating factor – imposing a sentence at the top end of the ten-years-to-life sentencing range for the very reason that Delling might not ever be able to understand right from wrong in the future, either. *Id.* 23a-27a. Furthermore, Delling is now serving that time at a maximum-security penitentiary in solitary confinement.

III. This Case Is An Ideal Vehicle To Resolve The Issue.

In *Clark*, this Court held that states may restrict the insanity defense to those who did not appreciate the wrongfulness of their conduct. This is the first case since that decision to present the question whether the Fourteenth and Eighth Amendments permit states to dispense with the defense entirely. And for three reasons, this case is an ideal vehicle for resolving that issue.

1. The constitutional question is cleanly presented. Delling argued in the trial court that Idaho Code § 18-207 violated the Fourteenth and Eighth Amendments, and the trial court denied that motion. Pet. App. 2a-3a. Delling's subsequent guilty plea reserved the right to appeal the court's rejection of his constitutional claims. Pet. App. 3a. Delling pressed both of those claims on direct appeal to the Idaho Supreme Court, and that court rejected them in a written opinion. Pet. App. 3a-20a. This case arrives on direct review from that court.

2. The facts of this case place the need for an insanity defense in vivid relief. Delling stipulated to the *actus reus* of second-degree murder and to

possessing the specific intent to kill ("malice aforethought") that satisfies Idaho's murder statute. He had no viable self-defense claim under Idaho law because his actions were objectively unreasonable. *See supra* at xx. At the same time, the trial court explicitly found (and the Idaho Supreme Court expressly accepted) that Delling did not "ha[ve] the ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law" at the time of his offenses. Tr. 750; *see also* Pet. App. 25a. Therefore, the question whether Delling is constitutionally entitled to press an insanity defense is outcome-determinative in this case.

3. The foregoing two aspects of this case not only make this case a perfect vehicle to resolve the question left open in *Clark*, but also distinguish this case from the three cases in which this Court denied certiorari on this issue between the Nevada Supreme Court's solidifying the conflict over the constitutionality of repealing the insanity defense and this Court's deciding *Clark*.

First, the State of Nevada sought certiorari from the Nevada Supreme Court's decision in *Finger* that the Constitution requires states to provide an insanity defense. *See Nevada v. Finger*, No. 01-673, *cert. denied*, 534 U.S. 1127 (2002). But although the Nevada Supreme Court's analysis rested exclusively on federal law, the court concluded by holding that Nevada's law abolishing the insanity defense "violate[d] the due process clauses of the United States *and Nevada Constitutions*." 27 P.3d at 68 (emphasis added). Granting certiorari in that case thus would have required this Court to decide whether it had jurisdiction over the case under the

"adequate and independent state ground" doctrine of *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

Second, in *Bethel v. Kansas*, No. 03-5459, *cert. denied* 540 U.S. 1006 (2003), the defendant did not raise the Eighth Amendment in his petition for certiorari. Furthermore, his mental state was hotly contested. While he contended that he had been unable to appreciate the wrongfulness of his conduct, the prosecution's expert witness "found no manifestations of active psychosis in the record" or even any "diagnosis of paranoid schizophrenia." *Bethel*, 66 P.3d at 844.

Third, in *Stoddard v. Idaho*, No. 04-9139, *cert. denied*, 546 U.S. 828 (2005), the defendant had not preserved the question presented here in state court. Instead of arguing below that adopting the "*mens rea* model" itself violated the Constitution, the defendant had argued merely that Idaho law was unconstitutional because it did not properly follow that model. *Stoddard v. State*, 123 P.3d 211 (Idaho App. 2004) (table) (unpublished opinion at 10-11).

IV. The Idaho Supreme Court's Ruling Is Incorrect.

A. A Historical And Modern Consensus Require An Insanity Defense Under The Due Process Clause And The Eighth Amendment.

Laws that permit criminal punishment contrary to overwhelming historical and modern norms implicate both the Due Process Clause and the Eighth Amendment. Specifically, 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." *Clark v. Arizona*, 548 U.S. 735, 748 (2006) (quoting *Patterson v. New York,* 432 U.S. 197, 202 (1977)). The Cruel and Unusual Punishment Clause of the Eighth Amendment forbids criminal punishment that violates broadly and deeply held Anglo-American legal practices. *See, e.g.*, *Ford v. Wainwright*, 477 U.S. 399, 406 (1986). This Clause prohibits not only punishments of certain degrees or kind but also, in certain cases, any criminal conviction at all. *Robinson v. California*, 370 U.S. 660, 667 (1962).

Both of these constitutional standards turn on a combination of historical and modern traditions. In due process cases, this Court has explained that "[o]ur 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); *see also Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring) ("It is precisely the historical practices that *define* what is 'due.'" (emphasis in original)). Similarly, "the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford*, 477 U.S. at 405; *see also Solem v. Helm*, 463 U.S. 277, 298 (1983) (Eighth Amendment provides "at least the same protection" as English common law at time of Founding).

Modern consensus is also probative of whether the Fourteenth and Eighth Amendments require a practice. In due process terms, "[t]he near-uniform application" of a given rule can show that abolishing

the rule would "offend[] 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) (internal quotation marks and citation omitted); *see also Schad*, 501 U.S. at 640 ("[W]e have often found it useful to refer both to history and to the current practice of other States."). In the Eighth Amendment context, evidence of modern consensus – evinced by "legislative enactments and state practice" and reinforced by this Court's own independent judgment – can be sufficient to compel the conclusion that a practice constitutes cruel and unusual punishment. *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (internal quotation marks and citation omitted); *accord Ford*, 477 U.S. at 406.

The widespread recognition, deeply rooted in history and overwhelmingly followed in modern practice, that the insane cannot be held criminally liable establishes that the Due Process Clause and the Eighth Amendment require an insanity defense.

1. The insanity defense has as ancient and robust a pedigree as any principle of criminal law. Indeed, "[w]hatever 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).

a. Hebraic, Roman, and early Muslim law recognized the insanity defense, prohibiting punishment of "insane persons" on the same grounds as they forbade the punishment of very young

children – namely, that such persons were not "in full possession of their facilities." Michael S. Moore, Law and Psychiatry, 65-66 (1984) (internal quotation marks and citation omitted). Similarly, "[t]he Greek moral philosophers, at least as far back as 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 Assoc., ABA Criminal Justice Mental Health Standards, 324 n.8 (1989) (quoting B. Jones, The Law and Legal Theory of the Greeks 264 (1956)). So well ingrained was this concept even in ancient times that at one point in *The Iliad*, Agamemnon defends himself on the basis of insanity. Homer, The Iliad 490-92 (Robert Fagles trans., 1998) (bk. XIX, ll. 86-134). The Talmud also provides that "idiots, lunatics, and children below a certain age ought not to be held criminally responsible because they could not distinguish good from evil, right from wrong and were thus blameless in the eyes of God and man." Rita J. Simon & Heather Ahn-Redding, The Insanity Defense, The World Over 4 (2006) (internal citation omitted).

b. This ancient prohibition was firmly embedded in the common law. This Court, in fact, has repeatedly noted that it 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); *see also Davis v. United States*, 160 U.S. 469, 484-85 (1895) (It is a "humane principle, existing at common law" that one cannot commit murder without "sufficient

mind to comprehend the criminality or the right and wrong of such an act" and therefore offenders suffering from "the overwhelming violence of mental disease . . . [are] not punishable for criminal acts."); *United States v. Baldi*, 344 U.S. 561, 570 (1953) (Frankfurter, J., dissenting) ("Ever since our ancestral common law emerged out of the darkness of its early barbaric days, it has been a postulate of Western civilization that the taking of life by the hand of an insane person is not murder.").

A brief examination of common-law sources bears out this Court's observations. Blackstone observed that "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." William Blackstone, 4 Commentaries on the Laws of England *25 (1769). Thus, Blackstone explained that murder, for example, "must be committed by a *person of sound memory and discretion*; for 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 (emphasis in original).

Similarly, William Hawkins began his 1739 treatise with the basic principle that "[t]he Guilt of offending against any Law whatsoever . . . can never justly be imputed to those, who are either uncapable of understanding it, or of conforming themselves to it." 1 William Hawkins, A Treatise of the Pleas of the Crown 1 (1739). Consequently, he explained, "[t]hose who are under a natural Disability of distinguishing

between Good and Evil, as Infants under the Age of Discretion, Ideots and Lunaticks, are not punishable by criminal Prosecution whatsoever." *Id.* at 2.

The other great expositors of the common law described the same prohibition. Sir Matthew Hale explained that "a total alienation of the mind, or perfect madness; this excuseth from the guilt of felony and treason." 1 Matthew Hale, History of the Pleas of the Crown 30 (George Wilson & Thomas Dogherty eds., 1800) (1736). This was so "because the liberty or choice of the will presupposeth an act of the understanding to know the thing or action chosen by the will." *Id.* at 14. Sir Edward Coke likewise wrote that "[a] man that is non compos mentis" – that is, not of sound mind – could not be punished for high treason because "punishment can be no example to mad-men." 3 Edward Coke, Institutes of the Laws of England 4 (W. Clarke ed., 1809). Treatise after treatise echoed these sentiments. *See, e.g.*, Michael Dalton, The Country Justice 476 (William Nelson ed., 1727) (1630) ("If one that is *Non compos mentis*, or an Ideot, kill a Man, this is no Felony; for they have not Knowledge of Good and Evil nor can have a felonious Intent, nor a Will or Mind to do Harm."); John Hawles, *Remarks on the Trial of Mr. Charles Bateman* (1685), *reprinted in* A Complete Collection of State Trials 474, 477 (T. B. Howell ed., 1811) ("[I]t is inconsistent with humanity" to punish the insane.)

M'Naghten's Case is perhaps the most famous articulation of this long-standing tradition. In that case, the Queen's Bench reaffirmed the necessity of the insanity defense and explained that "to establish [the] defense . . . , 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." *M'Naghten's Case*, (1843) 8 Eng. Rep. 718 (Q.B.) 722.

c. The insanity defense has always been part of American common law. *See, e.g.*, Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 Cal. L. Rev. 1227, 1250-51 (1966). After *M'Naghten's Case*, many jurisdictions adopted that formulation of the test. Wayne R. LaFave, 1 Substantive Criminal Law § 7.2 (2d ed. 2011); Simon & Ahn-Redding, *supra*, at 7. And a state-by-state survey at the time of Reconstruction confirmed that every existing state or territory recognized some form of the insanity defense. George L. Harrison, Legislation on Insanity, 19-858 (1884).[4]

When the prohibition of criminal punishment under certain circumstances bears such "impressive historical credentials," *Ford*, 477 U.S. at 406, there can be little doubt that the Constitution forbids it.

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[4] This compilation provides laws on the insanity defense in almost all then-extant states and territories. The source did not discuss seven states: Arizona; California; Colorado; Kansas; Nebraska; Nevada; New Hampshire. Other sources, however, confirm that those states recognized the insanity defense as well. *See* 1887 Ariz. Sess. Laws 682 § 21; 1850 Cal. Stat. 321 § 615; 1860 Colo. Sess. Laws 50 § 326; 1855 Kan. Sess. Laws 430 §§ 33-34; 1855 Neb. Laws 286 § 480; 1861 Nev. Stat. 56 § 3; 1822 N.H. Laws 51 § 1.

2. Apart from the rich and unequivocal evidence of history, modern practice and policy also demonstrate that the Constitution requires the insanity defense.

a. Near-uniformity of state law is persuasive evidence that society deems a practice to be fundamental. In *Cooper v. Oklahoma*, 517 U.S. 348 (1996), a unanimous Court held that the fact that forty-six states followed a certain rule of criminal law represented a "near-uniform" consensus indicating that Oklahoma's departure from that practice "offend[ed] a principle of justice that is deeply rooted in the traditions and conscience of our people." *Id.* at 362 (quotation marks and citation omitted). Similarly, in *Kennedy v. Louisiana*, the Court held that it was "significan[t]" for Eighth Amendment purposes that forty-five states prohibited a certain kind of criminal punishment. 554 U.S. 407, 426 (2008).

The evidence of a national consensus is equally compelling here. Forty-six states and the District of Columbia recognize an insanity defense. Scott O. Lilienfeld & Hal Arkowitz, *The Insanity Verdict on Trial*, Scientific American, Jan. 2011, *available at* http://www.scientificamerican.com/article.cfm?id=the-insanity-verdict-on-trial. Federal law has always provided an insanity defense, initially as a matter of common law and currently as codified at 18 U.S.C. § 17. Indeed, when considering the Insanity Defense Reform Act of 1984, the House Judiciary Committee observed that "[t]he defense expresses a fundamental moral precept of our society." H.R. Rep. No. 98-577, at 2 (1983). Describing the defense as "an integral [] part of Anglo-American criminal law," the committee

opined that "few would quarrel with the concept that truly 'crazy' people must be acquitted." *Id.*

b. When it comes to Eighth Amendment analysis, an independent assessment of "[t]he penological justifications" for the practice at issue is "also relevant." *Graham v. Florida*, 130 S. Ct. 2011, 2028 (2010). The four traditional justifications for criminal punishment are retribution, deterrence, incapacitation, and rehabilitation. Convicting the insane of crimes, rather than committing them civilly, serves none of these objectives.

First, punishing those who do not know their acts are wrong serves no retributive purpose. "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 481 U.S. 137, 149 (1987). Yet, as Justice Kennedy has explained for this Court, "[g]ross delusions stemming from a severe mental disorder" sever that "link between a crime and its punishment." *Panetti v. Quarterman*, 551 U.S. 930, 960 (2007).

Second, convicting the insane of crimes does not advance deterrence. Scholars recognized almost four hundred years ago that one "principall end of punishment is, that others by his example may feare to offend[,] . . . but such punishment can be no example to mad-men." 3 Coke, *supra*, at 4; *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)). In fact, the trial court in this case recognized that "deterrence" is "irrelevant" here. Tr. 742. "There are very few people as mentally ill as the defendant was at the time he committed these crimes, and those people who are at that level of illness are not going to be deterred by anything the court does anywhere in adjusting their conduct." *Id.*

Third, whatever purpose can be served by incapacitating insane offenders can be served equally well through civil commitment, "without unfairly treating them as criminals." *Clark v. Arizona*, 548 U.S. 735, 798 (2006) (Kennedy, J., dissenting). In particular, in states in which persons may be acquitted by reason of insanity, those persons are typically held until they are no longer a danger to the community – even if that period of confinement exceeds the maximum prison term that would have been available upon conviction. *See Jones v. United States*, 463 U.S. 354 (1983) (describing and upholding District of Columbia law to this effect). That rule fully satisfies any interest in incapacitation.

Fourth, imprisoning the insane actually thwarts any serious efforts at rehabilitation. As described above, rehabilitation of an insane person must begin with medical treatment. Yet prisons are ill-equipped to deliver such treatment, and hours on end in solitary confinement – as occurs in Idaho – is sure to stymie any progress that might otherwise be made. *See Special Master's Report* at 25-27.

B. Neither Of The Two Arguments Advanced By The Idaho Supreme Court Demonstrates That The Constitution Does Not Require An Insanity Defense.

Notwithstanding the overwhelming historical and modern consensus requiring an insanity defense, the Idaho Supreme Court has contended, for two reasons, that Due Process and the Eighth Amendment do not require such a defense. First, it has maintained that the *"mens rea* model" provides sufficient alternative channels for considering evidence of insanity in criminal trials. Second, even though this Court in *Clark* expressly reserved the question whether the Constitution requires an insanity defense, the Idaho Supreme Court has asserted that isolated statements in older decisions of this Court show that this Court "would conclude" that the insanity defense is not required. Pet. App. 13a (quoting *Searcy*, 798 P.2d at 918). Neither contention withstands scrutiny.

1. The *mens rea* model allows consideration of a defendant's mental state at three stages: (a) when assessing whether the defendant is competent to stand trial; (b) when determining whether the specific *mens rea* element of the criminal statute is satisfied; and (c) at sentencing. But whether taken individually or together, none of these procedures is an adequate substitute for a defendant's right to assert an insanity defense.

a. Precluding trial of incompetent defendants does not provide anything like an insanity defense. A defendant is competent to stand trial if he "has sufficient *present ability* to consult with his lawyer with a reasonable degree of rational understanding"

and "has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam) (emphasis added) (internal quotation marks omitted); *accord State v. Lovelace*, 90 P.3d 278, 287 (Idaho 2003). Because individuals legally insane at the time of an offense can be medically treated to satisfy this competency standard at the time of trial, it is obvious that the competency requirement does not protect against insane people being convicted of crimes. Even before modern medicine, courts and commentators understood that insanity and competency were entirely separate inquiries – both substantively and temporally. *See* 4 Blackstone, Commentaries *24-25.

b. Allowing defendants to introduce evidence of mental illness to attempt to negate the statutory *mens rea* elements of crimes similarly fails to protect insane defendants from criminal punishment. As Justices of this Court have repeatedly observed, criminal responsibility and *mens rea* are distinct concepts. "Criminal responsibility involves an inquiry into whether the defendant knew right from wrong, not whether he had the *mens rea* elements of the offense. While there may be overlap between the two issues, 'the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime.'" *Clark*, 548 U.S. at 796 (Kennedy, J., dissenting) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 706 (1975) (Rehnquist, J., concurring)). That is, a person who is unable to appreciate the wrongfulness of his conduct can still deliberately kill a person. *See, e.g.*, *State v. Card*,

825 P.2d 1081, 1086 (Idaho 1991) (acknowledging that Idaho now "allow[s] the conviction of persons who may be insane" because they have the requisite *mens rea* despite their insanity).

The courts that have upheld the *mens rea* model have nevertheless sought refuge from this reality by characterizing the *mens rea* model as analogous to the centuries-old practice of admitting "evidence of mental illness" to show the "accused was incapable of forming criminal intent." *Korell*, 690 P.2d at 999; *see also Searcy*, 798 P.2d at 917 (asserting that Idaho law "continues to recognize the basic common law premise that only responsible defendants may be convicted"). Such assertions ignore the critical distinction between common-law criminal intent and modern-day *mens rea*. The criminal state of mind that the common law required – at least for *malum in se* crimes such as murder – included an intent to do wrong, or, as Blackstone put it, a "vicious will," Blackstone, 4 Commentaries *21. Proof of "insanity," like "infancy," necessarily defeated that *mens rea* element because it established an "[a]bsence of [that] intent." *Morissette*, 342 U.S. at 251 n.8.

But twentieth century state criminal codes no longer include an intent to do wrong or vicious will as an aspect of *mens rea*. With respect to murder, for example, "the only intent required is the intent to kill a human being." *Bethel*, 66 P.3d at 850; *see also State v. Hoagland*, 228 P. 314, 318-19 (Idaho 1924) (whether defendant was able "to understand that [his act] was wrong" was irrelevant to *mens rea* because "[t]he law is well settled that whenever homicide is shown or admitted to have been committed without lawful authority and with deliberate intent it is

sufficiently proven to have been done with malice aforethought"); *see generally* Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 998 (1932). That being so, the insanity defense no longer negates the element of *mens rea*. The only way under modern criminal codes to preserve the common law's wrongfulness requirement – and the concept of criminal responsibility – is to expressly provide an insanity defense separate from the elements of the charged offense. In other words, merely requiring the defendant to have performed a "conscious and intentional act" – without also providing an insanity defense – "strip[s] the defendant of such benefit as he derived at common law from innocence of evil purpose." *Morissette*, 342 U.S. at 276, 263.

The facts of this case illustrate the point. Under Idaho law, "[m]urder is the unlawful killing of a human being" with the *mens rea* of "malice aforethought." Idaho Code § 18-4001. A "deliberate intention" to kill a human being constitutes "malice aforethought." Idaho Code § 18-4002; *see also State v. Aragon*, 690 P.2d 293, 298 (Idaho 1984) ("Malice [i]s defined as a 'state of mind' manifested by an intentional or deliberate act."). Delling indisputably satisfied that *mens rea* requirement, since he intended to kill the people he shot. It is immaterial to that conclusion that Delling's psychotic delusions precluded him from "appreciat[ing] the wrongfulness of this conduct." Tr. 750. Indeed, under a strict application of the *mens rea* model, evidence that a defendant did not know his conduct was wrong is not only logically immaterial to whether malice aforethought is present; it is flatly "inadmissible at trial" because it does not speak to whether the

defendant's acts were intentional. *Bethel*, 66 P.3d at 843.

c. Finally, the sentencing stage is too late to take into account evidence of the defendant's insanity. "Even one day in prison" is impermissible when the Constitution prevents punishment for certain conduct. *Robinson v. California*, 370 U.S. at 667; *see also Skinner*, 704 P.2d at 758 ("Obviously an insane person would be inhumanely dealt with if his insanity were considered merely to reduce the degree of his crime or the punishment therefor.") (quotation marks and citation omitted).

2. None of this Court's cases in which the Idaho Supreme Court quoted isolated statements regarding the insanity defense undercuts this constitutional analysis. The constitutionality of abolishing the insanity defense was not briefed or otherwise implicated in any of those cases. Furthermore, the holdings in those cases are fully consistent with a constitutional requirement that states make available an insanity defense.

The Idaho Supreme Court first cited *Leland v. Oregon*, 343 U.S. 790 (1952). There, this Court held that a state may place the burden on a defendant to prove insanity beyond a reasonable doubt and that the Due Process Clause does not mandate an "irresistible impulse" test for insanity. *Id.* at 801. Neither of those holdings, however, is inconsistent with a constitutional requirement to provide at least some form of an insanity defense.

Next, the Idaho Supreme Court cited *Powell v. Texas*, 392 U.S. 514 (1968). Pet. App. 15a. There, the defendant argued that the Eighth Amendment

prohibits a state from criminalizing public drunkenness because, for alcoholics, the acts leading to such a condition are "in some sense, 'involuntary,' or 'occasioned by compulsion.'" 392 U.S. at 533. In the course of rejecting that argument, this Court stated that "[n]othing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms." *Id.* at 536. In context, that statement is nothing more than a reaffirmation of *Leland*'s holding that the Constitution does not require states to provide a defense for acts performed pursuant to an "irresistible impulse."

The *Powell* Court also stated that the "process of adjustment" between "[t]he doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress" for "assess[ing] the moral accountability of an individual for his antisocial deeds" has "always been thought to be the province of the States." 392 U.S. at 535-36. That the insanity defense is a tool in this "process of adjustment" does not mean a state can abandon it altogether, any more than it could also abandon justification, *mens rea*, or *actus reus*.

The Idaho Supreme Court also cited then-Justice Rehnquist's dissent in *Ake v. Oklahoma*, 470 U.S. 68 (1985). There, while criticizing the majority's holding that the Due Process Clause requires states to pay for a psychiatrist to examine the accused when he intends to raise an insanity defense, Justice Rehnquist wrote it was "highly doubtful that due process requires a State to make available an insanity defense to a criminal defendant." *Id.* at 91 (Rehnquist, J., dissenting). Not only was the requirement of an insanity defense not at issue in the

case, but no other Justice joined this dissenting opinion.

Finally, other state supreme courts have cited Justice O'Connor's and Justice Kennedy's separate opinions in *Foucha v. Louisiana*, 504 U.S. 71 (1992). *See, e.g.*, *Herrera*, 895 P.2d at 365. In *Foucha*, this Court held that Louisiana could not continue to confine defendants found not guilty by reason of insanity after they fully recovered from their mental illnesses. Concurring in part and concurring in the judgment, Justice O'Connor noted that "[t]he Court does not indicate that States must make the insanity defense available." 504 U.S. at 88-89. Dissenting, Justice Kennedy similarly stated that states remained "free to recognize and define the insanity defense as they see fit." *Id.* at 96. Those remarks, however, simply observed that the Court in that case did not hold that states must provide an insanity defense. They cannot fairly be read to suggest the converse – namely, that the Court held (or would in a future case hold) that states need *not* provide an insanity defense. To the contrary, Justice Kennedy expressly commended the state there for having "h[ad] adopted a traditional and well-accepted test for determining criminal insanity," namely, the *M'Naughten* test for an inability to appreciate wrongfulness. *Id.* at 102.

Lest there be any doubt concerning the limited import of *Foucha*, Justice O'Connor, writing for the Court in another case, seemed to assume that the Eighth Amendment would prohibit conviction of people "wholly lacking the capacity to appreciate the wrongfulness of their actions." *Penry*, 492 U.S. at 333. And in *Clark*, this Court's most recent case

involving the insanity defense, Justice Kennedy emphasized the states' ability to regulate in this area "has constitutional limits." *Clark*, 548 U.S. at 789 (Kennedy, J., dissenting). Petitioner respectfully suggests that Idaho has transgressed those limits here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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