No. 11-1515

In The Supreme Court of the United States

JOHN JOSEPH DELLING,

Petitioner,

v.

IDAHO,

Respondent.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Due Process Clause of the Fourteenth Amendment or the Cruel and Unusual Clause of the Eighth Amendment require the states to provide an affirmative defense based on a defendant's inability to appreciate the wrongfulness of his conduct due to mental illness?

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STATEMENT OF THE CASE

Joseph Delling petitions this Court for a writ of certiorari, claiming the Due Process Clause[1] and the Eighth Amendment[2] entitle him to assert an affirmative insanity defense based on his inability to appreciate the wrongfulness of his conduct. This Court, however, has rejected the proposition that the states must provide any particular insanity defense and has recognized that moral incapacity is only one of four different historical approaches to insanity in criminal cases, no one of which is constitutionally required. Idaho's approach to insanity, which allows a defendant to present evidence of mental illness that negates the *mens rea* element of the crime, employs one of the other three historical tests, that of cognitive incapacity. Indeed, several past approaches to insanity did not look to moral incapacity and their application would have resulted in Delling's conviction.

At bottom, Delling seeks certiorari because the State of Idaho has not adopted an insanity test that provides him a defense, out of the several different tests traditionally employed at common law and in states. That states are not required to adopt a single, uniform test necessarily means, however, that some defendants that might have a defense in some states will not have a defense in others.

1. Joseph Delling "prepared a careful list of everything that was necessary" to carry out his plan

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[1] U.S. Const. amend. XIV.

[2] U.S. Const. amend. VIII.

to murder Jacob Thompson. He purchased a gun from an ad, avoiding a mental health hold that otherwise would have prevented him from buying a gun, took a bus from California to Tucson, Arizona, brought a bike with him, and stalked Jacob for two days. He arranged a ruse to lure Jacob from his apartment and then shot him multiple times. Sentencing Tr., p.744, Ls.5-15; p.745, Ls.11-16. Delling disposed of the gun by dropping it in a dumpster. Pre-sentence Investigation Report ("PSI"), p.12. Jacob did not die, but Delling learned "that he need[ed] to refine his method for killing. . . ." Sentencing Tr., p.744, Ls.16-20.

Delling next traveled by airplane to Boise, Idaho, rented a car, and bought another gun. Sentencing Tr., p.745, Ls.4-20. He drove to Moscow, Idaho, where he called David Boss and arranged to meet David in his apartment. Once inside, Delling shot David twice in the head, killing him. PSI, p.3.

Delling returned to Boise, where he tracked down Brad Morse at Brad's place of work. "Bradley Morse is simply somebody [Delling] [came] across because he was playing some Internet games with him. . . ." Delling laid in wait for Brad, killed him by shooting him twice in the head, and then hid the body. Delling returned his rental car and stole Brad's car. He was thereafter arrested in Nevada with the car. Sentencing Tr., p.744, L.24 – p.745, L.3; p.745, L.20 – p.746, L.1; PSI, pp.2-3, 12.

After his arrest, Delling explained that several people were involved in wiping his brain when he was 20 years old, and that he had to kill them before he turned 25 in order to get his soul back. Most of

the seven people he planned to kill he met in high school, although he had no more connection to Brad Morse than having played an internet strategy game together. When he was arrested Delling had four more people on his list to kill. Sentencing Tr., p.743, Ls.12-18; PSI, pp.4-6.

2. The State of Idaho charged Delling with two counts of first-degree murder for killing David Boss and Brad Morse. Delling pled guilty to two counts of second-degree murder after being denied the ability, under Idaho law, to assert mental illness as an affirmative defense. Pet. App. 2a-3a.

Under Idaho law, "mental condition" is not a "defense to any charge of criminal conduct." Idaho Code § 18-207(1). However, evidence of mental condition is admissible "on the issue of any state of mind which is an element of the offense, subject to the rules of evidence." Idaho Code § 18-207(3). Idaho law also mandates a mental health evaluation for sentencing "[i]f there is reason to believe the mental condition of the defendant will be a significant factor at sentencing" and, if so, that six factors related to mental illness "shall" be considered at sentencing and treatment "shall" be authorized during confinement if certain criteria are met. Idaho Code §§ 19-2522(1), 19-2523(2) and (3).

Murder is the "unlawful killing of a human being . . . with malice aforethought." Idaho Code § 18-4001. "Express" malice is where the defendant manifests "a deliberate intention unlawfully to take away the

life of a fellow creature"; "implied" malice is "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." Idaho Code § 18-4002. Delling had no defense based on his mental state because he had the intention of taking human life and no argument that self-defense rendered his actions lawful. Pet. 6-7.

3. Delling is a paranoid schizophrenic. He killed in the delusional belief that the people he marked for death were "trying to steal his powers" and that their actions "would result in his death." Pet. App. 25a. The evidence at sentencing showed an escalation of violence in Delling's behavior over time. Delling had, however, successfully hidden the extent of his delusional thinking from mental health specialists prior to the murders. The trial court found that, at the time of sentencing, after "several years of treatment," Delling's "delusions [were] as unshakeable as ever." He was still "grossly psychotic, even after years of active treatment." Although it was "reasonable to hope that improvements will be made in the treatment of paranoid schizophrenia," such treatment does not "exist at this point," so it was "a possibility that [Delling's] mental state will deteriorate further" and the "prognosis for improvement or rehabilitation [was] at best speculative." Sentencing Tr., p.741, Ls.8-14; p.746, Ls.15-20; p.747, L.8 – p.748, L.16; p.749, L.4 – p.750, L.4; Pet. App. 25a.

4. The Idaho Supreme Court affirmed Delling's convictions against claims that the constitutions of the United States and the State of Idaho required that he

be afforded an affirmative defense based on the claim his mental illness rendered him incapable of appreciating the wrongfulness of his conduct. Pet. App. 3a-21a. It re-affirmed that Idaho's abolition of an affirmative defense for insanity "does not remove the element of criminal responsibility" because the prosecution must still "prove beyond a reasonable doubt that a defendant had the mental capacity to form the necessary intent" and therefore does not violate due process protections. Pet. App. 6a (quoting *State v. Card*, 825 P.2d 1081, 1086 (Idaho 1991)). The Idaho Supreme Court also distinguished *Finger v. State*, 27 P.3d 66, 75 (Nev. 2001), simply noting that the Nevada court had concluded that "a focus on intent eliminated the concept of wrongfulness," a conclusion already rejected in the Idaho Supreme Court's precedents. Pet. App. 7a.

The Idaho Supreme Court also upheld the concurrent sentences of life without possibility of parole. Pet. App. 21a-27a. The court specifically scrutinized the statutory requirements that a sentencing court consider the mental health of the defendant. Pet. App. 23a-26a. The court ultimately affirmed the trial court's factual finding of "an unreasonable risk to society unless Delling was sentenced to fixed life" in light of the brutality of the murders, the "high level of planning and organization" that had gone into the crimes, and "Delling's particular mental health issues." Pet. App. 27a.

REASONS FOR DENYING THE PETITION

Delling posits three reasons why this Court should grant review, but none of his arguments has merit. There is no conflict of significance among the lower courts: the only decision striking down a statute similar to Idaho's is an outlier opinion that appears to have a state-law predicate. The question presented has no practical significance because Idaho law entitles insane persons convicted of a crime to the same quality of treatment as insane persons who are civilly committed – and there is every reason to believe Delling has been receiving appropriate treatment. Nor, finally, was the Idaho Supreme Court's ruling incorrect. Neither the Due Process Clause nor the Eighth Amendment requires states to provide an affirmative defense based on the second prong of the *M'Naghten*[3] test, moral incapacity, rather than one of the other approaches to insanity that historically have been used. Further review is not warranted.

I. Delling Has Shown No Split Among The State Courts Meriting A Writ Of Certiorari

Delling argues that "supreme courts are squarely divided over whether the Constitution requires an insanity defense." Pet. 10-13. Delling has shown, however, merely one state supreme court (Nevada) that has held that a defendant has a due process right to assert a moral incapacity insanity defense, and cites to not even one opinion holding such a defense is

[3] 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

required by the Eighth Amendment. Moreover, review of the Nevada decision shows that its reasoning was premised on the state law ground that *mens rea* in Nevada contains an implied element of understanding the wrongfulness of the charged conduct. And even if the decision were fairly read as being based solely on federal grounds, it is an outlier that is based on a rationale that due process requires a particular *mens rea* definition, a rationale Delling does not advocate and which is incompatible with this Court's precedents.

1. The supreme courts of Idaho, *State v. Searcy*, 798 P.2d 914 (Idaho 1990), Kansas, *State v. Bethel*, 66 P.3d 840 (Kan. 2003), Montana, *State v. Korell*, 690 P.2d 992 (Mont. 1984), and Utah, *State v. Herrera*, 895 P.2d 359 (Utah 1995), have all upheld the constitutionality of statutes providing that insanity does not constitute an affirmative defense but allowing the defendant to present evidence of mental illness where relevant to the *mens rea* element of a crime (the "*mens rea* model"). Generally speaking, these courts have concluded that an affirmative insanity defense is not a fundamental principle of justice so long as the defendant may present relevant evidence on all elements of the crime. *Searcy*, 798 P.2d at 918; *Bethel*, 66 P.3d at 844-46; *Korell*, 690 P.2d at 996; *Herrera*, 895 P.2d at 364-65.

Only one court has held unconstitutional a statutory scheme similar to Idaho's.[4] The Nevada Supreme Court held:

> The *mens rea* model has the effect of eliminating the concept of wrongfulness from all crimes, in effect changing the criminal intent to be established regardless of the statutory definition of the offense. This would permit an individual to be convicted of a crime where the State failed to prove an element of the offense beyond a reasonable doubt.

Finger v. State, 27 P.3d 66, 81 (Nev. 2001). This reasoning appears to be based on a state law predicate. The Nevada Supreme Court rejected the reasoning of the courts upholding the *mens rea* model by concluding "the concept of legal insanity" is synonymous with "an inability to form the requisite *mens rea*." *Id.* at 82. The Nevada court then reasoned that "the *mens rea* of most crimes, particularly specific intent crimes, incorporates some element of wrongfulness." *Id.* at 84. The court acknowledged, however, that a legislature can eliminate an insanity affirmative defense "if it redefines the crime itself" and makes "the act, regardless of the mental state, the crime. Thus,

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[4] Delling also cites *People v. Skinner*, 704 P.2d 752 (Cal. 1985), as evidence of a split in authority. Pet. 11-12. In that case the California court noted that a statute mandating that a defendant had to prove both prongs of the *M'Naghten* test (moral incapacity and cognitive incapacity) would raise "serious questions of constitutional dimension," but concluded it "need not face these difficult constitutional questions" in that case. *Id.* at 757-58. The language cited by Delling is therefore merely *dicta*.

murder could simply be defined as the killing of a human being. But *so long as* a crime requires some additional mental intent, then legal insanity must be a complete defense to that crime." *Id.* (emphasis added).

This reasoning can only be supported on the state law ground that, in Nevada, the *mens rea* element of crimes "incorporates some element of wrongfulness." In Idaho, however, no such element exists. Pet. App. 6a-7a (rejecting Nevada analysis that focusing on intent eliminates element of wrongfulness). The intent relevant to Delling's crime under Idaho law was intent to kill another human being. Idaho Code §§ 18-4001, 18-4002. In Idaho, the crime of murder does not "require[ ] some additional mental intent," and therefore "legal insanity" need not "be a complete defense to that crime" under the Nevada Supreme Court's reasoning. *Finger*, 27 P.3d at 84. In short, the Nevada Supreme Court's reasoning appears to have been based on its predicate state-law holding that Nevada crimes impliedly include the *mens rea* requirement of wrongfulness, which a defendant is entitled to challenge at trial. Because Idaho crimes do not include that implied element, Idaho's statute abolishing the affirmative insanity defense did not eliminate any element of any crime. There is therefore no cognizable split in authority as to the application of *federal* law.

2. To the extent the Nevada court's opinion could be read as holding that the due process guarantees of the *federal* Constitution define *mens rea* as necessarily including knowledge of the wrongfulness of conduct, and that elimination of an affirmative insanity defense is therefore effectively the elimination of the

mens rea element of the crime, such a holding is inconsistent with the due process precedents of this Court. *E.g.*, *Clark v. Arizona*, 548 U.S. 735, 752 (2006) ("the conceptualization of criminal offenses[ ] is substantially open to state choice"); *Powell v. Texas*, 392 U.S. 514, 535 (1968) ("this Court has never articulated a general constitutional doctrine of mens rea" (footnote omitted)); *see also Montana v. Egelhoff*, 518 U.S. 37, 58 (1996) (Ginsberg, J., concurring) ("States enjoy wide latitude in defining the elements of criminal offenses, particularly when determining the extent to which moral culpability should be a prerequisite to conviction of a crime." (internal citations and quotations omitted)). Delling does not argue that Idaho's murder statutes must be constitutionally read to incorporate an element the Idaho Legislature has not adopted and the Idaho Courts have not found. Thus, to the extent the *Finger* holding is read as a requirement under federal Constitutional due process standards that states incorporate an element of moral capacity into *mens rea* elements of crimes, such is a split different than the one Delling requests this Court to resolve.

In the end, the Nevada Supreme Court's decision is an outlier that appears to have been based on state law. Differences between that court's approach to the question presented and the Idaho Supreme Court's approach do not merit this Court's review.

II. The Question Presented Has No Practical Importance Because Idaho Law Generally Entitles Insane Persons Convicted Of Crimes To The Same Treatment As Insane Persons Who Are Civilly Committed

Certiorari is also not warranted in this case because resolution of this issue will ultimately have little or no practical effect on Delling's circumstances. Delling is currently in a secure mental health facility. Undoubtedly he would be in a secure mental facility even had he successfully asserted an affirmative defense based on his mental illness. *See*, *e.g.*, *Jones v. United States*, 463 U.S. 354, 366 (1983) ("a finding of not guilty by reason of insanity is a sufficient foundation for commitment of an insanity acquittee for the purposes of treatment and the protection of society"). The only difference in law is that a civil commitment would be indefinite, such that Delling would be "entitled to release when he has recovered his sanity or is no longer dangerous." *Id.* at 368. If Idaho adopted the verdict of guilty but mentally ill, as have eleven other states, even this difference would disappear. *Clark v. Arizona*, 548 U.S. 735, 751 n.19 (2006) ("Usually, a defendant found 'guilty but mentally ill' will receive mental-health treatment until his mental health has rebounded, at which point he must serve the remainder of his imposed sentence."). Thus, at least 15 states (four with the *mens rea* model and eleven with the guilty but mentally ill option) allow a sentence to be served where a mentally ill defendant commits a crime and is found guilty. Delling has cited

to no court that has concluded that a mentally ill person actually convicted of a crime (as opposed to acquitted by reason of insanity) is constitutionally entitled to indeterminate commitment, such that criminal sentencing for a determinate period violates a constitutional right.

Moreover, in this case the judge specially found that Delling's only hope for improvement or rehabilitation was the development of treatments that do not currently exist. Sentencing Tr., p.749, L.18 – p.750, L.4. Delling has failed to show that he would in any way *factually* benefit from some speculative future right to be released should he be cured or rendered no longer dangerous.

To bolster his claim of a compelling reason to grant the writ, Delling asserts there are several other "stark and serious" differences between placement in a secure mental health facility by virtue of a criminal conviction as opposed to a civil commitment. Pet. 13-16.[5] However, most of the factual claims underlying this argument were not litigated in the Idaho courts and are, at best, disputed.

For example, had Delling been civilly committed he likely would have been deemed "dangerous to such

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[5] Delling's first "stark and serious" difference between conviction and civil commitment is the "stigma" of a criminal conviction. Pet. 14; *see also Brief of Amici Curiae* 52 Criminal Law and Mental Health Professionals, 7. The State submits that the "stigma" in this case is neither factually nor legally significant.

a degree that a maximum security treatment setting is required," Idaho Code § 66-1305(3), and admitted into the Idaho Security Medical Program, Idaho Code §§ 66-1301, 66-1315. In that program his mental health treatment would have been administered by the Department of Correction according to standards jointly developed with the Idaho Department of Health and Welfare. Idaho Code §§ 66-1302, 66-1312. In addition, Idaho law provides that dangerous civil commitments may be admitted into the mental health facilities maintained by the Department of Correction, Idaho Code § 66-1316, and inmates with mental health issues may be transferred to facilities run by the Department of Health and Welfare, Idaho Code § 66-1318.

Relying on a special master's report in unrelated litigation and pointing out that a staff psychologist position with the Idaho Department of Correction went unfilled for a length of time, Delling insinuates that he has been provided inadequate care. Pet. 15. The special master's report is strongly disputed by the State of Idaho and is the subject of ongoing, unrelated litigation. It was not presented to the Idaho courts in this case and no factual findings have been made on any of its contentions. Although it is true that a staff psychologist position at the Idaho Department of Correction went unfilled for a time, such does not demonstrate that Delling was not cared for during that time. To the contrary, Delling has been under the care of a psychiatrist the entire time of his incarceration. Delling's apparent assumptions that only

one psychologist works at the Idaho Department of Correction and that staffing problems never happen in civilly administered institutions are unwarranted.

Delling also cites the "irony" that he suffered a "harsher penalty" than he believes would have been inflicted on his "sane counterpart[ ]." Pet. 15-16. This is highly debatable. A sane counterpart who had completed the premeditated, execution-style murders of two people, with an attempt on a third and a list of four more intended victims, would no doubt have been eligible for the death penalty under Idaho law. Idaho Code §§ 18-4003(a) (premeditated murder is first-degree murder); 18-4004 (first-degree murder punishable by death if accompanied by aggravating factor properly balanced); 19-2515(9)(b) (multiple homicide aggravating factor), (9)(i) (propensity aggravating factor). That he would have received less than a fixed life sentence is unwarranted speculation. Indeed, the very citation Delling provides in support of his argument is a statement from the Idaho Supreme Court that the district court did not abuse its discretion by "balanc[ing]" Delling's "level of appreciation" for the wrongfulness of his conduct "against other considerations" such as the threat of harm to society. Pet. App. 25a-27a.

Finally, Delling contends he is "serving [his] time at a maximum-security penitentiary in solitary confinement." Pet. 16. This is disputed. There was a period of approximately eight months (November 11, 2011 to July 24, 2012, which would have included the filing of his petition) when he was in the acute mental

health unit in the maximum security facility. He has never been in "solitary confinement." Even in the maximum security facility he had access to recreation and educational resources, albeit limited according to security concerns: Because he was manifesting psychotic symptoms to the point he presented a risk to other inmates and staff he was kept from the general population. Other than this eight-month period Delling has been in the Behavioral Health Unit at Idaho's medium security institution where he has the same access to the available recreation and education facilities as any other medium security inmate.

Delling never asserted in the courts below that his level or quality of treatment would be different based on whether he was criminally convicted or civilly committed and the law and facts show that such a claim would have been without merit.

III. The Manner By Which Idaho Law Allows Insanity To Excuse Criminal Wrongdoing Is Consistent With The Due Process Clause And The Eighth Amendment

A. The Due Process Clause

Delling contends that certiorari should be granted because "[t]he 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." Pet. 13. Delling's claim that due process requires an affirmative

defense based on moral incapacity does not withstand analysis, however.

Because "preventing and dealing with crime is much more the business of the States than it is of the Federal Government," a state's administration of its criminal justice system is "not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 445 (1992) (citations and quotations omitted). A claim that due process prevents a state procedure "entails no light burden." *Clark v. Arizona*, 548 U.S. 735, 749 (2006).

Applying this standard, this Court has already stated that "due process imposes no single canonical formulation of legal insanity." *Clark*, 548 U.S. at 753. *See also Leland v. Oregon*, 343 U.S. 790, 800-01 (1952) (particular insanity defense not "implicit in the concept of ordered liberty" because the "whole problem has evoked wide disagreement among those who have studied it" (internal quotations omitted)).[6] The Court identified "four traditional strains" of insanity defenses "variously combined to yield a diversity of American standards." *Clark*, 548 U.S. at 750. These

[6] The *amicus* brief by the American Psychiatric Association (APA) and the American Academy of Psychiatry and the Law recognizes that no precise and widely accepted definition of legal insanity exists or has existed despite over a century of controversy, modification and refinement. APA Br. 5-6 (and authority cited).

are the "moral incapacity" test, which arises from the second prong of the *M'Naghten* test; the "cognitive incapacity" test, which arises from the first prong of the *M'Naghten* test; the "volitional incapacity" test; and the "product-of-mental-illness" test. *Id.* "[I]t is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice." *Id.* at 752.

The cognitive test asks "whether a mental defect leaves a defendant unable to understand what he is doing." *Clark*, 548 U.S. at 747. Idaho's test, which allows the presentation of mental health evidence to show lack of capacity to form the requisite mental state, is thus a form of the cognitive incapacity test.[7] The net effect of the Idaho statute is to treat mental illness the same as any other cognitive incapacity in determining guilt. Jurors are "no longer . . . treated to one definition of the mental state required for the crime, another with respect to insanity, and perhaps a third with respect to diminished capacity." Raymond L. Spring, Farewell to Insanity: A Return to Mens

[7] This is true of all four states that have adopted the *mens rea* model. Alaska has also adopted the cognitive incapacity test as its sole test of insanity. Alaska Stat. § 12.47.010. The primary difference between the *mens rea* model and Alaska's standard is that the latter imposes upon the state a duty to prove capacity once evidence of incapacity is introduced while, in Idaho, evidence of mental incapacity goes to the question of whether the state has proven the mental state required for guilt beyond a reasonable doubt.

Rea, 66-May J. Kan. B.A. 38, 45 (1997). Contrary to Delling's arguments, the *mens rea* model adopted by Idaho is entirely consistent with the idea "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) (citing W. Blackstone, 4 Commentaries on the Laws of England *24-*25 (1769)), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). The common law exoneration of "lunatics" was premised on the reasoning that "where there is a *total defect of the understanding*, there is no free act of will." Sir Matthew Hale, Knt., The History of the Pleas of the Crown, vol. I, p. 13 (1847) (emphasis added). Indeed, the *mens rea* model is more consistent with that common law standard because of its focus on cognitive capacity for both "lunatics" and "idiots."

Delling essentially contends that the State of Idaho may pick its own test so long as it picks some form of the moral incapacity test.[8] Perhaps this is

[8] Delling relies heavily on the trial court's sentencing determination that he did not appreciate the wrongfulness of his conduct, going so far as to call it "outcome-determinative in this case." Pet. 17. The district court was not, however, ruling on an insanity defense. Even if Delling were to be granted certiorari and even if this Court were to find he was entitled to present an affirmative insanity defense, he would have to present that defense to a jury at a trial on his guilt. For purposes of this brief, however, the State of Idaho will assume that Delling *could* establish an affirmative insanity defense based on a moral incapacity theory.

because it is the only legal standard under which he has a likelihood of success.[9] Delling's extensive premeditation, planning, preparation and learning from his earlier attempt negate any inference he lacked cognitive abilities or was acting on an irresistible impulse due to volitional incapacity.[10] Although the holding in *Clark* that Arizona did not violate due process by adopting a moral incapacity test alone does not preclude Delling's claim that the moral incapacity test is constitutionally required, *Clark*, 548 U.S. at 748-56, that claim is inconsistent with the Court's reasoning: "With this varied background, it is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule,

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[9] Indeed, Delling may not have prevailed under the *M'Naghten* test as originally conceived. Under that test the "defendant had to be considered to be in the same situation as if the facts to which the delusion existed were real." *R. v. McNaghten*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843). "If the rule declared by the English judges be correct, it necessarily follows that the only possible instance of excusable homicide, in cases of delusional insanity, would be where the delusion, if real, would have been such as to create, in the mind of a reasonable man, a just apprehension of immediate peril to life or limb." *Parsons v. State*, 2 So. 854, 865-66 (Ala. 1887) (finding error in jury instructions based on *M'Naghten*). Delling was under no apprehension of immediate harm, and therefore his delusions would not have justified his preemptive acts of "self-defense."

[10] "The volitional incapacity or irresistible-impulse test . . . asks whether a person was so lacking in volition due to a mental defect or illness that he could not have controlled his actions." *Clark*, 548 U.S. at 749.

like the conceptualization of criminal offenses, is substantially open to state choice." *Id*. at 752.

Idaho's *mens rea* model is compatible with historical practice and the cognitive incapacity test, a "traditional Anglo-American approach[ ] to insanity." *Clark*, 548 U.S. at 749. The only fault Delling finds is that it does not excuse *him* or others with only moral incapacity.[11] However, Delling has failed to show that moral incapacity, as opposed to the other conceptions of incapacity historically recognized as approaches to insanity, is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 748-49 (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)). Delling's argument that the "Idaho Supreme Court's ruling is incorrect" because the "historical and modern consensus require an insanity defense" that recognizes moral incapacity, Pet. 18-26 (capitalization altered), is unpersuasive and does not show a compelling reason to grant the writ.

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[11] Delling complains of the lack of a viable defense in this case. Pet. 6 (elimination of an affirmative insanity defense meant his "only viable defense" was "unavailable"). Likewise, *amici* defense lawyers associations complain that "[w]ithout an affirmative insanity defense, a person whose mental illness prevented them from appreciating the wrongfulness of their conduct, and who therefore lacked the legal capacity for criminal responsibility, cannot be acquitted." IACDL Br. 19. The State of Idaho is not required to provide all defendants a viable defense. Both these arguments beg the question of whether due process requires states to provide an affirmative insanity defense based on moral incapacity.

B. The Eighth Amendment

The relevant Eighth Amendment inquiry is whether "evolving standards of decency that mark the progress of a maturing society" demonstrate a punishment to be "disproportionate to the crime." *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011, 2021 (2010) (internal quotations omitted); *see also Roper v. Simmons*, 543 U.S. 551, 560-61 (2005). "The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense." *Graham*, 130 S.Ct. at 2021 (internal quotations and brackets omitted). This proportionality falls generally into two classifications: whether the length of a sentence of incarceration is proportional "given all the circumstances in a particular case" and "certain categorical restrictions on the death penalty." *Id.* Neither of these circumstances applies in this case; the latter because no death penalty was imposed and the former because Delling's sentence is proportional to his crimes (two murders) and Delling does not claim otherwise.

Delling instead claims that he is entitled to an acquittal because any sentence whatsoever is cruel and unusual given his mental illness. Pet. 18-27. He asserts the proscription against cruel and unusual punishment "prohibits not only punishments of certain degrees or kind but also, in certain cases, any criminal conviction at all," citing *Robinson v. California*, 370 U.S. 660, 667 (1962). Pet. 19. In that case

this Court held it was cruel and unusual to punish someone for drug addiction alone. *Robinson*, 370 U.S. at 667. *Robinson* stands for nothing more than the generic proposition that punishing a person for the "act" of being a drug addict is necessarily not proportional to the crime. Here Delling's crimes were *two homicides*, not being mentally ill. *Robinson* does not ultimately support Delling's argument for the creation of a categorical rule that persons with moral incapacity due to mental illness who commit crimes are exempt from conviction and sentence.

As set forth above in this brief in opposition, Delling does not claim that there is any split in authority on the Eighth Amendment question he would raise. He cites no case that has actually reached the result he proposes on Eighth Amendment grounds. Indeed, his argument is effectively that a person lacking moral capacity due to mental illness must be determined not guilty of the offense, and is therefore a naked request that this Court simply engraft an affirmative insanity defense into the Eighth Amendment – a result that has not been so much as hinted at by this Court's precedents.

Even if the "evolving standards of decency" standard were to be applied in this case, no court has held it indecent to lock up a mentally ill person who has murdered two people. As noted above, fifteen states allow the criminal sentencing of murderers who were mentally ill but still guilty of the crime (four with the *mens rea* model and eleven with the verdict of guilty but mentally ill). More importantly, however, a

mentally ill person who has killed can be held in a secure facility. Indeed, as acknowledged by Delling, Pet. 27, under some circumstances a mentally ill person who commits a crime may be locked up for a longer period than the maximum sentence for the actual crime committed. *Jones v. United States*, 463 U.S. 354, 368-69 (1983).

It is universally accepted that mentally ill persons who commit violent crimes may have their freedom removed and may be placed in secure facilities for the protection of the public. As set forth above, Delling's attempt to distinguish between civil commitment and incarceration under criminal sentence was not factually developed in the Idaho trial courts and is, at best, disputed by the State of Idaho.[12] The Petition, however, should be denied as to the Eighth Amendment claim because Delling's argument that a moral incapacity affirmative defense should be engrafted whole into the Cruel and Unusual Punishment Clause is unprecedented and there is no compelling reason for the Court to entertain an argument seeking such a broad expansion of the scope of the Eighth Amendment.

[12] Indeed, his claim seems more suited to an Eighth Amendment challenge to the conditions of confinement, a claim Delling has at no point raised to any Idaho court.

CONCLUSION

The State of Idaho respectfully requests this Court to deny Delling's Petition for Writ of Certiorari.

Respectfully submitted,

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