No. 11-1515

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

REPLY BRIEF FOR PETITIONER

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In *Clark v. Arizona*, this Court carefully catalogued each state's stance respecting the insanity defense and identified four states, including Idaho, that provide none. 548 U.S. 735, 750-52 & n.20 (2006). The Court then expressly reserved the question whether "the Constitution mandates an insanity defense." *Id.* at 752 n.20.

In the proceedings below, the State acknowledged that Idaho has "abolish[ed] the insanity defense," Resp. Br. 18, *State v. Delling*, 2011 WL 597811. It also conceded that "the Nevada Supreme Court has found that the abolition of the affirmative defense of insanity violates due process," *id.* 25, but urged that "[t]he better line of reasoning is that followed by the courts of Montana, Utah, Kansas, and Idaho," *id.* 26. The Idaho Supreme Court accepted the State's argument, holding that "Idaho's abolition of the insanity defense" does not violate the Due Process Clause or the Eighth Amendment. Pet. App. 3a. The Idaho Supreme Court also recognized that its holding conflicted with the Nevada Supreme Court's, explaining that the Nevada Supreme Court's view "differs from [its] previous holdings on the subject." *Id.* 7a.

Now, facing the proposition of defending the Idaho Supreme Court's decision in this Court, the State argues for the first time that Idaho law really affords "a form of" the insanity defense, BIO 17, and that there is no genuine split over whether a state may abolish the defense, *id.* 6-7. In addition, the State attempts to minimize the practical consequences of its law. None of these arguments has merit.

1. The Idaho Supreme Court's decision conflicts with decisions from the Nevada and California Supreme Courts.

a. When the Nevada Supreme Court decided *Finger v. State*, 27 P.3d 66 (Nev. 2001), *cert. denied*, 534 U.S. 1127 (2002), it concluded that "we cannot agree with the analysis of federal law contained in the majority opinions of *Herrera*, *Searcy* and *Korell*." *Finger*, 27 P.3d at 83 (citing *State v. Herrera*, 895 P.2d 359 (Utah 1995); *State v. Searcy*, 798 P.2d 914 (Idaho 1990); *State v. Korell*, 690 P.2d 992 (Mont. 1984)). Since then, numerous other courts, including the Idaho Supreme Court, have acknowledged this conflict. *See* Pet. App. 7a; *State v. Bethel*, 66 P.3d 840, 848 (Kan.), *cert. denied*, 540 U.S. 1006 (2003); *State v. Francis*, 701 N.W.2d 632, 637 & n.3 (Wis. Ct. App. 2005).

The State now denies that this conflict exists. It advances two arguments, but neither is persuasive.

First, the State contends that the Nevada Supreme Court's decision in *Finger* holds not that the federal Constitution requires states to provide an insanity defense, but rather it requires states to "incorporate an element of moral capacity into *mens rea* elements of crimes." BIO 10. This is incorrect. The Nevada Supreme Court described its holding this way: "We conclude that *legal insanity* is a well-established and fundamental principle of the law of the United States. It is therefore protected by the Due Process Clause[]." *Finger*, 27 P.3d at 84 (emphasis added).

Lest there be any doubt, the Nevada Supreme Court explained that the Constitution does *not* mandate any particular *mens rea*; a legislature, it

emphasized, "is free to decide what method to use in presenting the issue of legal insanity to a trier of fact," including providing "an affirmative defense." *Id.* "But [a legislature] cannot abolish legal insanity or define it in such a way that it undermines a fundamental principle of our system of justice." *Id.*

That holding – just like the multi-Justice dissents in *Searcy*, *Herrera*, and *Korell* – runs squarely counter to the Idaho Supreme Court's holding here that "[t]he abolition of the insanity defense does not violate Delling's due process rights" or the Eighth Amendment. Pet. App. 5a, 17a. This conflict is over the precise issue this Court reserved in *Clark*. *See* 548 U.S. at 752 n.20. This Court's intervention is necessary.

Second, the State argues that *Finger* "appears to be based on a state law predicate" that is lacking in Idaho – namely that "in Nevada, the *mens rea* element of crimes 'incorporates some element of wrongfulness.'" BIO 8-9 (quoting *Finger*, 27 P.3d at 84). Again, the State misses the mark. Nevada's murder statute, exactly like Idaho's, requires nothing more than malice aforethought – that is, the "intent" to unlawfully kill another person. *Finger*, 27 P.3d at 84; *see also id.* at 83 (citing Nev. Rev. Stat. § 200.010); *compare* BIO 9 (acknowledging that Idaho law requires proof of "*intent* to kill another human being" unlawfully); *see also* Pet. 5-6 (citing Idaho law). The Nevada Supreme Court's reference to a requirement of "wrongfulness" was just another way of stating its constitutional holding – namely, that a state cannot entirely "eliminate this concept of wrongfulness" – that is, erase it from the elements *and* "affirmative defense[s]" – with respect to a crime

that requires some mental showing beyond strict liability. 27 P.3d at 84.

b. The California Supreme Court also has determined that "the insanity defense, in some formulation, is required by due process." *People v. Skinner*, 704 P.2d 752, 758 (Cal. 1985). The State characterizes this finding as "*dicta*." BIO 8 n.4. The definition of "*obiter dictum*," however, is a "judicial comment . . . that is *unnecessary* to the decision in the case and therefore not precedential." Black's Law Dictionary 1177 (9th ed. 2009) (emphasis added). The California Supreme Court's conclusion that the Constitution requires an insanity defense was necessary to its decision in *Skinner* because that perceived constitutional requirement provided the court with the imperative to rewrite California's statute to save it from invalidity. *Skinner*, 704 P.2d at 758.

2. The State does not dispute the gravity of the issue before this Court. Nor could it. The question whether mentally ill individuals may defend themselves in court on grounds of their insanity is fundamental to the integrity of the criminal justice system. *See* Amicus Br. of 52 Law Profs. 2-7. And that reality is reason enough to grant certiorari here.

The State nevertheless endeavors to portray the decision whether to civilly commit or criminally convict insane defendants as one of "no practical importance." BIO 11. In particular, the State asserts that "Idaho law generally entitles insane persons convicted of crimes to the same treatment as insane persons who are civilly committed." *Id.* This assertion is incorrect on its own terms; it also ignores

two other ways in which the insanity defense is consequential.

a. Even a cursory examination of Idaho's laws reveals significant differences between criminal conviction and civil commitment. When a mentally ill person is criminally convicted in Idaho, even successful treatment does not alter his punishment; he is still "liable for the remainder of [his] sentence" of incarceration. Idaho Code § 18-207. Under Idaho's civil commitment laws, by contrast, individuals who are involuntarily committed are housed in a manner "consistent with the[ir] needs," *id.* § 66-329, and successful treatment is generally grounds for release, *see id.* § 66-337.

The State attempts to blur the distinction between imprisonment and civil commitment law by pointing to a single program – the Idaho Security Medical Program (ISMP), BIO 13 – that houses not only convicted felons but also a small subset of involuntarily committed persons. *See* Idaho Code §§ 66-1305, 66-1307. But even for the few civilly committed persons who are housed in the ISMP, state law requires that they – unlike those convicted of crimes – be transferred back into a less restrictive medical treatment program (*id.* § 1307) as soon as they cease evincing "homicidal or other violent behavior." *Id.* § 1305.[1]

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[1] The State also quibbles with various statements in the Petition concerning the availability of mental health care in its prisons. BIO 12-15. The special master's report speaks for itself.

The State also suggests that if Delling were tried in a state that allows "guilty but mentally ill" verdicts, he would have to serve a prison sentence instead of being civilly committed. BIO 11-12. Not so. States that allow "guilty but mentally ill" verdicts *also* provide an insanity defense. *See, e.g.,* 11 Del. Code § 401. Thus, persons in those states who are insane are acquitted and civilly committed, whereas those whose mental illness does not rise to the level of insanity are convicted of crimes. *See* Henry J. Steadman et al., Before and After Hinckley: Evaluating Insanity Defense Reform 102-03 (1993). Delling falls into the former category.

b. The State also ignores that civilly committed individuals retain many rights and privileges denied those who have been convicted and incarcerated. In Idaho, involuntarily committed individuals may still "exercise all civil rights," Idaho Code § 66-346, whereas criminal incarceration "suspends all the civil rights of the person so sentenced," *id.* § 18-310. Convicting and incarcerating a mentally ill person also has profound implications under federal law. Those consequences include the potential loss of public housing, *see* 42 U.S.C. § 1437d, and, in the case of lawful permanent residents, possible deportation, *see* 8 U.S.C. § 1255a. Acquittal by reason of insanity subjects an individual to no such consequences.

c. Finally, the State "submits" (without offering any supporting reasoning) that the stigma flowing from a criminal conviction – as opposed to an acquittal on insanity grounds – "is neither factually nor legally significant." BIO 12 n.5. But this Court has long since concluded otherwise, explaining that

"stigmatization" always results from criminal convictions and that branding someone a criminal is a matter of "immense importance." *In re Winship*, 397 U.S. 358, 363 (1970).

3. Faced with the depth of the historical imperative for providing an insanity defense, the State no longer defends the holding it sought and received from the Idaho Supreme Court that states need not provide such a defense.[2] Instead, the State asserts that its law that the Idaho Supreme Court explains "abolished the insanity defense," Pet. App. 3a, in actuality adopted a variant of the defense. Specifically, the State now argues (a) that the "*mens rea* model" is nothing more than a version of the "cognitive incapacity test," and (b) that the cognitive incapacity test, standing alone, is a form of the insanity defense. BIO 16-17. Neither of these contentions withstands scrutiny.

a. This Court's decision in *Clark*, as well as the history of the insanity defense, demonstrates that the *mens rea* model differs from the cognitive incapacity test. In *Clark*, this Court categorized each state's law

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[2] While the State does not dispute that the Due Process Clause requires an insanity defense, it contests that the Eighth Amendment requires one as well. BIO 21-23. But the State's contention rests on a misunderstanding of this Court's decision in *Robinson v. California*, 370 U.S. 660 (1962). That case does not merely hold that the Eighth Amendment forecloses punishing someone for his status. *See* BIO 22. Rather, *Robinson* (as well as other cases) dictates that insofar as history, tradition, and modern consensus forbid criminal punishment for certain conduct, the Eighth Amendment prohibits "[e]ven one day in prison." *Robinson*, 370 U.S. at 667; *see also* Pet. 19, 32.

with respect to the insanity defense. It explained that a cognitive incapacity test asks whether the defendant's mental illness precluded him from "know[ing] the nature and quality of the act he was doing," 548 U.S. at 747 (citation omitted), and that Alaska is the sole state (ever) to employ that test standing alone, *id.* at 750-51 & n.13. On the other hand, this Court included Idaho among the four states that employ no insanity test at all. *Id.* at 752 & n.20. *Clark*, therefore, necessarily concluded that the cognitive incapacity test is distinct from the *mens rea* model.

Clark was not mistaken. The *mens rea* model requires a conviction whenever the defendant intended to commit the act at issue, regardless of whether he was capable of appreciating the wrongfulness of the act. *See* Pet. 28-32. By contrast, the cognitive incapacity test has traditionally included some requirement that the defendant appreciate the wrongfulness of his conduct. *See, e.g.*, *Regina v. Oxford*, 173 Eng. Rep. 941, 950-52 (1840) (explaining that the question whether the defendant knew "the nature, character, and consequences of the act" included a consideration of whether he was "incapable of distinguishing right from wrong"); *Commonwealth v. Rogers*, 48 Mass. 500, 502 (1844) (inquiry into "the nature and character of [the defendant's] act" turned in part on whether he knew it was "wrong and criminal"); Abraham S. Goldstein, The Insanity Defense 50-51 (1967) (arguing that the phrase "nature and quality" must have a moral dimension). Because Idaho's *mens rea* model excludes all consideration of moral blameworthiness, it cannot be a form of the cognitive incapacity test.

b. Even if the State were correct that a test lacking in any moral component could fairly be labeled a cognitive incapacity test (and that Alaska law also could fairly be described this way), such a test would still fall short of what the Constitution requires for an insanity defense. Quoting a single treatise (Hale's), the State contends that the common law prohibition against convicting the insane "was premised on the reasoning that 'where there is a total defect of the understanding, there is no act of free will.'" BIO 18 (emphasis omitted) (quoting 1 Matthew Hale, The History of the Pleas of the Crown 13 (1st Am. ed. 1847) (1736)). Contrary to the State's insinuation, however, the notes to Hale's treatise make clear that the governing "rule of law" was that persons "incapable of judging between right and wrong" were excused from criminal liability. 1 Hale, *supra*, at 37 n.5 (quoting Joseph Chitty, Medical Jurisprudence 346 (1835)).

Indeed, the overwhelming weight of common law jurisprudence demonstrates that the insanity defense, by definition, encompasses more than simply a lack of intent. In English cases prior to the Founding, mentally ill persons who acted intentionally but did not know that their conduct was wrong were excused from criminal responsibility. *See Rex v. Ferrers*, 19 How. St. Tr. 885, 948 (Eng. 1760) (noting that the key question for an insanity defense was whether the defendant could, "at that time, distinguish between good and evil"); *see also Rex v. Arnold*, 16 How. St. Tr. 695, 765 (Eng. 1724); 1 Hale, *supra*, at 37 n.5 (collecting cases using a right-wrong standard for assessing insanity). English treatises were similarly united in their view that persons who could not distinguish between right and

wrong could not be convicted of serious crimes. Pet. 22-23 (citing and quoting various treatises); *see also, e.g.*, 1 George Dale Collinson, Idiots, Lunatics, and Other Persons Non Compotes Mentis 474 (1812); Leonard Shelford, Lunatics, Idiots, and Persons of Unsound Mind 458-59 (1833); John Charles Bucknill, Unsoundness of Mind in Relation to Criminal Acts 5 (1856).

Likewise, American courts traditionally understood the insanity defense to include a moral component that Idaho law disavows. Even before the decision in *M'Naghten's Case*, 8 Eng. Rep. 718 (1843), American courts consistently forbade the criminal conviction of mentally ill persons who could not appreciate the wrongfulness of their conduct. *See, e.g.*, *United States v. Clarke*, 25 F. Cas. 454 (C.C.D.D.C. 1818); *Pienovi's Case*, 3 City Hall Recorder 123, 126-27 (N.Y. 1818); *Ball's Case*, 2 City Hall Recorder 85, 86 (N.Y. 1817); *Clark's Case*, 1 City Hall Recorder 176, 177 (N.Y. 1816). That requirement of moral capacity has carried through to the present day. A survey in 1966 noted that "the 'right and wrong' test continues to be the traditionally accepted test of responsibility." 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 Calif. L. Rev. 1227, 1257-58 (1966). And the vast majority of states continue to follow some variant of that test today.

To be sure, this Court made clear in *Clark* that "due process imposes no single canonical formulation of legal insanity." *Clark*, 548 U.S. at 753. But

contrary to the State's suggestion (BIO 16-17), *Clark* did not hold that a state could satisfy the Constitution so long as it adopts what the State describes as the cognitive incapacity test. The Arizona law at issue in *Clark* – consistent with historical tradition – provided a defense based on an inability to "know the criminal act was wrong." 548 U.S. at 748 (quotation marks and citation omitted). So this Court had no occasion to consider whether a state could dispense entirely with this time-honored precept.

To the extent this Court spoke at all about *that* issue, it strongly suggested that a state may not do so. "An insanity rule," this Court explained, excuses a defendant's conduct on the grounds that "he did not have the mental capacity for . . . *criminal responsibility*." *Id.* at 773 (emphasis added). And however the concept of "criminal responsibility" is precisely defined, it has always "involve[d] an inquiry into whether the defendant knew right from wrong, not whether he had the *mens rea* elements of the offense." *Id.* at 796 (Kennedy, J., dissenting); *see also* Amicus Br. of Am. Psychiatric Ass'n 13-14. Accordingly, a *mens rea* or cognitive incapacity test that excluded all consideration of moral blameworthiness must be unconstitutional on its own.

* * *

The State's attempt to reverse course after thirty years and to paint Idaho's *mens rea* model as an insanity defense is unavailing. For hundreds of years, Anglo-American courts have refused to punish mentally ill persons, like Delling, who are incapable of appreciating the wrongfulness of their conduct.

Almost every state, the District of Columbia, and the federal government continue to agree that punishing the insane offends the fundamental principle of justice that only those who are morally responsible for their actions may be convicted of serious crimes. Idaho's model, whatever the State now calls it, flouts this principle and is at odds with both the weight of history and the modern consensus among the states. This Court should intercede to remedy this affront to our criminal justice system.

CONCLUSION

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

Respectfully submitted,

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