No. 11-1515

IN THE
Supreme Court of the United States

JOHN JOSEPH DELLING,
Petitioner,

v.

STATE OF IDAHO,
Respondent.

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

BRIEF OF AMERICAN PSYCHIATRIC ASSOCIATION AND AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus American Psychiatric Association ("APA"), with more than 36,000 members, is the Nation's leading organization of physicians who specialize in psychiatry. APA has participated in numerous cases in this Court. APA and its members have a strong interest in one of the core matters of forensic psychiatry: the relevance of serious mental disorders to criminal punishment. Recognizing that serious mental disorders can substantially impair an individual's capacities to reason rationally and to inhibit behavior that violates the law, APA supports recognition of an insanity defense broad enough to allow meaningful consideration of the impact of serious mental disorders on individual culpability. *See* Am. Psychiatric Ass'n, *Position Statement on the Insanity Defense* (2007) ("2007 APA Statement").

Amicus American Academy of Psychiatry and the Law ("AAPL"), with approximately 2,000 psychiatrist members dedicated to excellence in practice, teaching, and research in forensic psychiatry, has participated as an *amicus curiae* in, among other cases,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* represents that all parties were provided notice of *amici's* intention to file this brief at least 10 days before its due date. Pursuant to Rule 37.2(a), counsel for *amici* also represents that all parties have consented to the filing of this brief; counsel for petitioner has filed a letter with the Clerk granting blanket consent to the filing of *amicus* briefs, and counsel for respondent has consented to the filing of this *amicus* brief in a letter that is being submitted contemporaneously with the filing of this brief.

Brown v. Plata, 131 S. Ct. 1910 (2011), *Indiana v. Edwards*, 554 U.S. 164 (2008), *Clark v. Arizona*, 548 U.S. 735 (2006), and *Penry v. Johnso*n, 532 U.S. 782 (2001).

STATEMENT

1. Until 1982, Idaho recognized an insanity defense, first as a matter of common law and then pursuant to a statute enacted in 1972. That statute – which adopted a then-recent formulation articulated by the Idaho Supreme Court – provided that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." Idaho Code § 18-207 (1972). In 1982, the Idaho legislature repealed the existing version of § 18-207 and adopted in its place the current statute, which provides that "[m]ental condition shall not be a defense to any charge of criminal conduct." Idaho Code § 18-207(1). The statute further provides that "[n]othing 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." *Id.* § 18-207(3).

2. Delling was charged with two counts of second-degree murder. He was initially found unfit to stand trial, but, after a year, the district court found that his mental state had improved and he would be capable of aiding in his defense. Pet. App. 2a. Before trial, he moved to have the court declare Idaho Code § 18-207 unconstitutional. *Id.* at 2a-3a. The court denied the motion, and Delling entered a conditional guilty plea. *Id.* at 3a.

The record before the district court indicates that, at the time of the crimes, Delling was suffering from severe paranoid schizophrenia, a mental illness that has, as one of its defining characteristics, delusions that affect an individual's beliefs and understanding of what he is doing. *See* APA, *Diagnostic and Statistical Manual of Mental Disorders* 299, 313-14 (4th ed. Text Revision 2000) ("*DSM-IV-TR*"). The district court stated at sentencing that "the defendant unquestionably suffers from a very serious mental illness. He suffers from paranoid schizophrenia. It played a direct role in his conduct in this case." Pet. App. 24a; *see id.* at 25a ("He is profoundly ill."). The court "did not believe that Delling had the ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." *Id.*

Rather than treating Delling's mental illness as a mitigating factor, however, the district court found that Delling's "ability to plan intelligently and rationally is not . . . impaired" and that the "prognosis for improvement or rehabilitation is at best speculative." *Id.* at 26a. Because of Delling's "risk to society," the court concluded that it was "obligated as part of its duty to protect society" to impose a fixed life sentence. *Id.* at 26a-27a. The court added that "it is essential that [Delling] be provided treatment." *Id.* at 27a. According to the petition for certiorari, Delling is currently being held in Idaho's Maximum Security Institution, in solitary confinement. Pet. 7.

3. The Idaho Supreme Court – which had upheld the 1982 statute in prior decisions – affirmed the conviction. Pet. App. 7a-9a, 27a-28a. It rejected the argument that the abolition of the insanity defense violates substantive due process; in particular, it rejected Delling's argument that the Supreme Court's

opinion in *Clark v. Arizona*, 548 U.S. 735 (2006), suggests that the Due Process Clause mandates the recognition of an insanity defense. The court also rejected Delling's arguments that the abolition of the insanity defense abridged his Sixth Amendment right to present evidence in his own defense; it held that "nothing in the statute prevents a witness from testifying about Delling's ability to form the requisite intent required to commit murder. . . . Delling is still able to present a defense; it just takes a different form." Pet. App. 16a-17a. And the court likewise rejected Delling's argument that inflicting punishment on one who is legally insane violates the Eighth Amendment prohibition on cruel and unusual punishment. *Id.* at 20a.

REASONS FOR GRANTING THE PETITION

This case presents the question, not before resolved by this Court, whether the Constitution permits criminal conviction and punishment of a defendant who, by reason of mental disease or defect, could not appreciate the wrongfulness of his conduct at the time of the offense. That core issue is critical to the moral basis of the criminal law and an important aspect of the question that this Court reserved in *Clark v. Arizona*, 548 U.S. 735 (2006) – whether the "Constitution mandates an insanity defense." *Id.* at 752 n.20. For centuries and in virtually all American jurisdictions, the law has recognized that, when serious mental illness prevents a defendant from grasping that his conduct was wrong, the defendant should not be held criminally responsible. Under the statutory scheme in place in Idaho, Delling could not defend against the charge of second-degree murder by showing – as the district court accepted – that he had no ability to appreciate the wrongfulness of his

conduct. This Court should grant certiorari and hold that, as applied in Delling's case, Idaho's abolition of the insanity defense violates due process.

I. SUBSTANTIVE DUE PROCESS BARS SERIOUS CRIMINAL PUNISHMENT OF A DEFENDANT WHO, BECAUSE OF MENTAL DISORDER, LACKED A RATIONAL APPRECIATION OF THE WRONGFULNESS OF HIS CONDUCT

"[A] State's capacity to define crimes and defenses," *Clark*, 548 U.S. at 749, is subject to limitations imposed by the Due Process Clause of the Fourteenth Amendment. "[T]he relevant inquiry [is] whether" the State's rule "'"offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."'" *Cooper v. Oklahoma*, 517 U.S. 348, 355 (1996) (quoting *Medina v. California*, 505 U.S. 437, 445 (1992), quoting in turn *Patterson v. New York*, 432 U.S. 197, 202 (1977)). A long and consistent Anglo-American tradition precluding the imposition of serious criminal punishment on a defendant who, because of mental disorder, is unable to grasp the wrongfulness of his conduct qualifies as such a "fundamental principle of justice." *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion); *id.* at 59 (Ginsburg, J., concurring in the judgment); *id.* at 68 (O'Connor, J., dissenting).

This is not to say that the Constitution requires any particular formulation of the insanity defense: "it is clear that no particular formulation has evolved into a baseline for due process, and . . . the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice." *Clark*, 548 U.S. at 752. The formulations of the legal tests for insanity have varied over the years, and all the

formulations have presented challenges: sometimes there are difficulties in application; sometimes debate about the meaning of terms; sometimes imperfection in precisely capturing underlying notions of culpability. *See* Samuel J. Brakel, *et al.*, *The Mentally Disabled and the Law* 707 (Am. Bar Found. 3d ed. 1985) ("*Mentally Disabled & Law*") ("A precise and widely accepted definition of legal insanity . . . continues to elude the legal system after more than a century of controversy, modification, and refinement of successive tests of criminal responsibility.").

The presence of variations and uncertain boundaries, however, should not obscure the common substantive core that underlies all of the traditional formulations. Nor should it preclude constitutional recognition of that core as a minimum constitutional predicate for serious criminal punishment. Anglo-American legal tradition has long and pervasively precluded serious criminal punishment when acts result from mental disorders that impair the understanding of one's acts relevant to culpability. At the common core of that tradition is the rule that serious criminal punishment is barred when a mental disease deprives the defendant of rational appreciation of the wrongfulness of his conduct at the time of the conduct. As a matter of history and virtually uniform contemporary practice, that common core qualifies as a constitutional requirement. Moreover, that basic principle reflects the "central thought that wrongdoing must be conscious to be criminal" and that the moral basis for criminal punishment rests on the "belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250, 252 (1952).

A. The notion that a certain level of understanding is a precondition to the culpability required for criminal punishment has ancient roots.[2] In English law, Lord Coke wrote of the "lunatic" that "hath not [his] understanding" as avoiding criminal punishment, and Sir Matthew Hale in the early 18th century wrote:

> The consent of the will is that which renders human actions either commendable or culpable; . . . where there is no will to commit an offense, there can be no transgression, or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes or offenses. And because the liberty or choice of the will presupposeth an act of the understanding to know the thing or action chosen . . . it follows that, where there is a total defect of the understanding, there is no free act of the will in the choice of things or actions.

Quoted in Quen, 2 Bull. Am. Acad. Psychiatry & L. at 116 (ellipses in original); *see also ABA Standards* 7-289.

Blackstone explained that "[a]ll the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto may be reduced to this single

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[2] Various sources trace the history of an insanity defense. *E.g.*, *Mentally Disabled & Law* 707-19; 2 Am. Bar Ass'n, *Standards for Criminal Justice* 7-287 to 7-290, 7-295 to 7-299 (2d ed. 1986) ("*ABA Standards*"); Jacques M. Quen, *Anglo-American Criminal Insanity: An Historical Perspective*, 2 Bull. Am. Acad. Psychiatry & L. 115 (1974); Deborah Giorgi-Guarnieri, *et al.*, *AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 30 J. Am. Acad. Psychiatry & L. No. 2, Suppl. (2002) ("*AAPL Practice Guideline*").

consideration, the want or defect of *will*." 4 William Blackstone, *Commentaries* *20. The required act of the will is missing "[w]here there is a defect of understanding. For where there is no discernment, there is no choice, and where there is no choice there can be no act of the will, . . . ; he therefore, that has no understanding, can have no will to guide his conduct." *Id.* at *21. Such a defect of will may arise from "a defective or vitiated understanding, viz., in an *idiot* or a *lunatic*. . . . In criminal cases, . . . lunatics are not chargeable for their own acts, if committed when under these incapacities." *Id.* at *24. As summarized in a famous charge to the jury in *Arnold's Case*,[3] the question is whether the defendant "knew what he was doing, and was able to distinguish whether he was doing good or evil, and understood what he did." *Quoted in* 1 Joel P. Bishop, *Commentaries on the Criminal Law* § 378, at 218 (6th ed. 1877). *See also Penry v. Lynaugh*, 492 U.S. 302, 331-32 (1989).

In 1843, following an acquittal on grounds of insanity, the House of Lords articulated a standard for insanity in *M'Naghten's Case*, 10 Cl. & F. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843):

> [E]very man is to be presumed to be sane . . . . [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

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[3] *Arnold's Case*, 16 How. St. Tr. 695, 764 (Eng. 1724).

See also Richard J. Bonnie, *et al.*, *A Case Study in the Insanity Defense: The Trial of John W. Hinckley, Jr.* 11 (3d ed. 2008) ("Bonnie, *A Case Study*").

The *M'Naghten* test thus "focuses on what the defendant was able to 'know'" and is "referred to as a 'cognitive' formula." *Id.* "[T]he question is . . . whether the mental illness had deprived the defendant of the capacity to know what 'normal' people are able to know about their behavior. The idea, in sum, is that people who are unable to know the nature of their conduct or who are unable to know that their conduct is wrong are not proper subjects for criminal punishment. In common sense terms, such people should not be regarded as morally responsible for their behavior." *Id.* The *M'Naghten* standard "became the accepted standard in both [the United States and Great Britain] within a short period of time." *ABA Standards* 7-295.

Formulations of the insanity defense in the United States, while not uniform, generally broadened the defense.[4] In particular, several States precluded conviction not only where the *M'Naghten* cognitive-impairment test was met but also where a standard based on volitional impairment ("irresistible impulse") – inability to control oneself – was met. *Id.* at 7-296. From 1900 though the 1950s, the *M'Naghten* standard governed in most jurisdictions, while about one-third of the States added an irresistible-impulse test. *Id.*

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

In 1955, the American Law Institute ("ALI") proposed a standard for non-responsibility that applied when either a cognitive or a volitional defect was present:

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

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

B. Prompted in significant part by John Hinckley's acquittal by reason of insanity in his trial for the attempted assassination of President Reagan, the insanity defense was the subject of intense critical attention and efforts at reform in the early 1980s. In particular, some jurisdictions abandoned the volitional-impairment part of the ALI test. Thus, Congress in 1984 enacted a statute that codified, for the first time, the basic *M'Naghten* standard:

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

18 U.S.C. § 17(a).

This Court has noted the "significant differences" among "traditional Anglo-American approaches to

insanity," *Clark*, 548 U.S. at 749, but its discussion confirms that state law overwhelmingly continues to provide for an insanity defense with at least a cognitive-defect standard. *See AAPL Practice Guideline* S31-S37 (state-by-state survey, 2000-2001); *see also Mentally Disabled & Law* 769-77 (state-by-state survey, mid-1980s). "Seventeen States and the Federal Government have adopted a recognizable version of the *M'Naghten* test." *Clark*, 548 U.S. at 750. Ten States have adopted a streamlined version, which asks whether the defendant could appreciate the wrongfulness of his actions – which this Court in *Clark* termed a "moral incapacity" test. *Id.* at 751.[5] "Fourteen jurisdictions, inspired by the Model Penal Code, have in place an amalgam of the volitional incapacity test and some variant of the moral incapacity test, satisfaction of either (generally by showing a defendant's substantial lack of capacity) being enough to excuse." *Id.* (footnote omitted). And three States apply a "full *M'Naghten* test with a volitional incapacity formula." *Id.* Finally, New Hampshire applies a test that asks simply whether the defendant's conduct was a "product" of the defendant's mental illness. *Id.*[6]

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[5] The drafters of the Model Penal Code omitted the first prong of the *M'Naghten* test on the ground that – as long as relevant evidence of mental disease is admissible to negate *mens rea* – it is superfluous. That is, inability to appreciate the "nature and quality of the act" is morally relevant only if it shows that the defendant was thereby unable to appreciate the wrongfulness of his conduct. *See Bonnie*, *A Case Study* 19 note o; *see also Clark*, 548 U.S. at 753-54.

[6] The product-of-mental-illness test is the broadest of the insanity defenses recognized in the States. "Both *M'Naghten* and 'irresistible impulse' require that the particular characteristics on which they focus must be a 'product' of the defendant's mental disease . . . . The difference is that the 'product' test asks

In all of the foregoing jurisdictions, that is, 45 States and the District of Columbia, as under federal law, a defendant who, because of mental disorder, lacks rational appreciation of wrongfulness is not subject to serious criminal punishment. By contrast, the inability to appreciate the wrongfulness of one's conduct is not available as a defense (at least under some circumstances) in at most five jurisdictions, of which Idaho is one.[7] There is thus no "significant minority" of States, *Egelhoff*, 518 U.S. at 58-59 (Ginsburg, J., concurring in the judgment), allowing serious criminal punishment of those who, because of mental disorder, lack rational appreciation of wrongfulness. Moreover, in Nevada, after the legislature eliminated the insanity defense, the State Supreme Court found the elimination invalid under the state and federal constitutions, because it allowed conviction where the *mens rea* elements of crimes were not present. *See Finger v. State*, 27 P.3d 66 (Nev. 2001). The legislature subsequently restored a statutory insanity defense. *See* Nev. Rev. Stat. §§ 174.035(4), 194.010(3); *Clark*, 548 U.S. at 750 n.12. This Court has found comparable consensus among the States to be persuasive evidence that a practice is indeed

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a more direct question, namely whether the defendant's conduct itself was the 'product' of mental illness." *Bonnie*, *A Case Study* 17.

[7] Alaska's version of the insanity defense provides that defense when the defendant "was unable, as a result of a mental disease or defect, to appreciate the nature and quality of [his] conduct." Alaska Stat. § 12.47.010(a). Depending on how it is interpreted, the "nature and quality" language can be understood to encompass cases in which a defendant's misunderstanding of reality rendered him unable to appreciate the wrongfulness of his conduct. *See* Abraham S. Goldstein, *Insanity Defense* 49-51 (1967).

a fundamental principle of justice. *See Kennedy v. Louisiana*, 554 U.S. 407, 426 (2008); *Cooper*, 517 U.S. at 360-62; Pet. 25.

C. The long tradition and uniform contemporary practice of sparing from serious criminal punishment a defendant who did not appreciate the wrongfulness of his actions reflects principles that are fundamental to the criminal law. The insanity defense "come[s] to us as part of a tradition which makes the notion of 'desert' or 'blame' central to criminal responsibility." Goldstein, *The Insanity Defense* 9. "The Anglo-American legal tradition is grounded on the premise that persons are normally capable of free and rational choice between alternative acts and that one who chooses to harm another is thus morally accountable and liable to punishment. If, however, a person for any reason lacks the capacity to make rational choices or to conform his behavior to the moral and legal demands of society, traditionally he has been relieved of criminal responsibility and liability for his actions." *Mentally Disabled & Law* 707. "Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." Roscoe Pound, Introduction to Frances B. Sayre, *Cases on Criminal Law* (1927) (*quoted in Morissette*, 342 U.S. at 250 n.4). In *Morissette*, Justice Jackson explained that "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." 342 U.S. at 250.

This Court has recognized that "the two primary objectives of criminal punishment [are] retribution [and] deterrence." *Kansas v. Hendricks*, 521 U.S. 346, 361-62 (1997); *see id.* at 373 (Kennedy, J., concurring). But retribution is dependent on having "affix[ed] culpability," and criminal culpability, and hence retribution, traditionally turn on the type of understanding required for *scienter*. *Id.* at 362 (majority) (concluding that absence of *scienter* supported civil character of sexual-predator-commitment statute, which is therefore not "retributive"). Without the required understanding, the retribution objecttive thus does not generally apply. *See Panetti v. Quarterman*, 551 U.S. 930, 958-59 (2007) (whether "retribution is served" is "called in question . . . if the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole"). Nor does the deterrence objective. "A person lacking the required intelligence, reasoning ability, and foresight capacity to understand the [criminal] code or its sanctions will not be deterred by them." *Mentally Disabled & Law* 707.

There are probably multiple ways to define the type of understanding that is at the core of the culpability concept in our tradition. The important substantive point is that too narrow a view – bare awareness of the physical character of one's act, or that society might view it as a bad or even unlawful act – would fail to capture the central requirement of a *rational* understanding. *Cf. Panetti*, 551 U.S. at 958-59 ("rational understanding" standard for competence to be executed); *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam) ("rational under-

standing" standard for competence to stand trial); *accord Godinez v. Moran*, 509 U.S. 389, 396 (1993); *see also State v. Johnson*, 399 A.2d 469, 477 (R.I. 1979) ("[A] person who, knowing an act to be criminal, committed it because of a delusion that the act was morally justified, should not be automatically foreclosed from raising the defense of lack of criminal responsibility."); 2007 APA Statement ("The APA does not favor any particular legal standard for the insanity defense over another, so long as the standard is broad enough to allow meaningful consideration of the impact of serious mental disorders on individual culpability."). For that reason, in place of *M'Naghten*'s "know," the term "appreciate" has been preferred by Congress, the ALI, and the ABA. *See ABA Standards* 7-307 to 7-308 (explaining reasons); *see also* Richard J. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 195 (1983) ("[I]t is fundamentally wrong to condemn and punish a person whose rational control over his or her behavior was impaired by the incapacitating effects of severe mental illness.").

D. Psychiatrists' clinical experience, as well as the peer-reviewed research literature, support the conclusion that severe mental illness can seriously impair a sufferer's ability rationally to appreciate the wrongfulness of conduct.

1. Serious mental disorders may be marked by symptoms including delusions, hallucinations, and agitated or irritable states; those symptoms can impair the ability to perceive reality and the intentions of others. For example, schizophrenia and other psychotic disorders may produce delusions – erroneous perceptions of the external world – held with strong conviction. *See DSM-IV-TR* 299. Thus, persecutory delusions can lead a person with mental illness to

believe, incorrectly, that another person threatens harm. *See* Nancy C. Andreasen & Donald W. Black, *Introductory Textbook of Psychiatry* 112-13 (4th ed. 2006); *see also* Bonnie, *A Case Study* 9-10 (describing M'Naghten's persecutory delusions). Such delusions may have a bizarre quality – such as the delusions of the petitioner in *Clark* that aliens in disguise were attempting to kill him. *See* 548 U.S. at 745. Grandiose delusions may result in the belief that ordinary rules and laws do not apply. And religious delusions can be manifested as a conviction that one must carry out certain acts – even if they are against the law – because they are commanded by God. *See* Jennifer L. Kunst, *Understanding the Religious Ideation of Forensically Committed Patients*, 36 Psychotherapy 287 (1999). Depressive delusions seen in post-partum psychosis may lead the mother to believe that she and her newborn are condemned to suffer unending torment in this world or damnation in the world to come. *Cf.* Phillip J. Resnick, *The 2006 Friedman & Gilbert Criminal Justice Forum: The Andrea Yates Case: Insanity on Trial*, 55 Clev. St. L. Rev. 147 (2007).

Hallucinations – false sensory perceptions, including the hearing of "voices" – may be given delusional interpretations. Thus a person suffering from psychosis may believe that the voice criticizing her behavior or preventing her from sleeping is coming from a neighbor, or that a voice commanding unlawful acts is the voice of God, which must be obeyed. *See* Trial Tr. 609 (Aug. 18, 2009) ("Tr.") (testimony of defendant's psychiatric expert that defendant's "explanation for" auditory and tactile hallucinations was the "crystallization of his delusion that all of this was happening because he was . . . Jesus"). Excited

or irritable states can lead persons with mental illnesses to misinterpret behavior – even a simple approach on the sidewalk – as hostile or threatening when they are positive or neutral in intent.

2. These symptoms of mental illness can lead to violent or other types of criminal behavior. Persecutory delusions – of the type suffered by petitioner – may result in violent responses[8] and be especially associated with extreme acts of violence.[9] Persons subject to delusions may respond as if reacting to a real aspect of their situation.[10] Mothers suffering from depressive delusions may kill to protect or rescue their children "from some awful fate that was indicated by their delusional system."[11] Religious delusions may "provide[] a context in which . . . violent impulses seem[] justifiable and irresistible . . . because these pressures involve ultimate matters of life and death, salvation and damnation, and

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[8] *See* Brent Teasdale, *et al.*, *Gender, Threat/Control-Override Delusions and Violence*, 30 Law & Hum. Behav. 649, 649 (2006) (finding that "men are significantly more likely to engage in violence during periods when they experience threat delusions, compared with periods when they do not experience threat delusions"); Jeffrey W. Swanson, *et al.*, *A National Study of Violent Behavior in Persons With Schizophrenia*, 63 Archives Gen. Psychiatry 490, 494-96 (2006) (finding that "persecutory symptoms" showed a "strong association with serious violence").

[9] *See* Thomas Stompe, *et al.*, *Schizophrenia, Delusional Symptoms, and Violence: The Threat/Control-Override Concept Reexamined*, 30 Schizophrenia Bull. 31 (2004).

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

[11] Josephine Stanton, *et al.*, *A Qualitative Study of Filicide by Mentally Ill Mothers*, 24 Child Abuse & Neglect 1451, 1456 (2000).

obedience or disobedience to the highest authority, God."[12] Auditory hallucinations can be associated with violence as a result of interpretative delusions that make sense of the voices.[13] Excitement and grandiosity are also linked to violent acts.[14]

The trial court credited the testimony that Delling's conduct was motivated by delusions produced by his paranoid schizophrenia. Tr. 632; Pet. App. 25a. According to that testimony, the defendant "truly believed, delusionally and tragically, that in order to save his own life, to keep him [from] being destroyed, he had to stop the people that he thought were harming him . . . . He thought he was doing what he had to do in order to save himself." Tr. 636.

3. Only a small percentage of people with mental illness commit violent acts; most are law abiding. *See* Jeffrey W. Swanson, *Mental Disorder, Substance Abuse, and Community Violence: An Epidemiological Approach*, *in Violence and Mental Disorder: Developments in Risk Assessment* 101 (John Monahan & Henry J. Steadman eds., Univ. of Chicago Press 1994).[15]

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

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

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

[15] The insanity defense is rare and even more rarely successful: one study found that the insanity defense was raised in less than one percent of felony cases and was successful about 25 percent of the time. *See* Lisa A. Callahan, *et al.*, *The Volume*

Nevertheless, the foregoing discussion illustrates some of the ways in which severe mental illness can drive violent and other criminal behavior, in circumstances where the individual has no ability to appreciate the wrongfulness of the conduct to which the illness gives rise.

II. BECAUSE THE IDAHO STATUTORY SCHEME PRECLUDED DELLING FROM PRESENTING ANY DEFENSE BASED ON HIS INABILITY TO APPRECIATE THE WRONGFULNESS OF HIS CONDUCT, IT VIOLATES DUE PROCESS

As we understand the Idaho statutory scheme and its operation in this case, it violates due process because it precluded petitioner from defending himself on the ground that he lacked a rational capacity to appreciate the wrongfulness of his conduct.

Idaho law defines murder as "the unlawful killing of a human being . . . with malice aforethought." Idaho Code § 18-4001. In turn, "malice aforethought" – the *mens rea* element of the offense – is defined by statute as the "deliberate intention unlawfully to take away the life of a fellow creature." *Id.* § 18-4002. To be sure, the Idaho statute permits the introduction of evidence of a defendant's mental disorder to show that the defendant could not have formed the *mens rea* of the crime in question. *Id.* § 18-207(3). But the Idaho court erred when it suggested that "Delling is still able to present a defense; it just takes

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and Characteristics of Insanity Defense Pleas: An Eight-State Study, 19 Bull. Am. Acad. Psychiatry L. 331, 334 (1991). "The majority of insanity defenses involve individuals who suffer from psychotic disorders or mental retardation. Successful insanity defenses make up well under one percent of all felony cases." *AAPL Practice Guideline* S11.

a different form." Pet. App. 16a-17a. A defendant's inability rationally to appreciate that such a killing is wrongful would not negate *mens rea* so long as one knew one was killing another human being. Because it appears that Delling knew that he was in fact killing human beings – albeit under a tragic delusion regarding those individuals' intentions towards him – he would appear to have no basis for contesting that he acted with the requisite *mens rea*. *Cf. State v. Patterson*, 740 P.2d 944, 946 n.8 (Alaska 1987) (suggesting that, under Alaska's scheme, the defense of insanity "'would *not* apply to a defendant who contends that he was instructed to kill by a hallucination, since the defendant would still realize the nature and quality of his act'") (quoting legislative report explaining limiting of insanity defense to first prong of *M'Naghten* test).

Likewise, Delling could not, under Idaho law, claim that he acted in self-defense: as petitioner explains, an accused can show he acted in self-defense only if he can satisfy a test "grounded in the objective concept of the actions of a 'reasonable person.'" *State v. Camarillo*, 678 P.2d 102, 105 (Idaho Ct. App. 1984). In Delling's case, his belief that his victims were threatening his life was based on paranoid delusions that were a symptom of his mental illness.

Although Delling had no way to defend himself, an individual with a similar illness and comparable symptoms might well be able to avoid criminal liability under Idaho's scheme. For example, the defendant in *Clark* based his defense on the claim that he "thought Flagstaff was populated with 'aliens' (some impersonating government agents), the 'aliens' were trying to kill him, and bullets were the only way to stop them." 548 U.S. at 745. If a defendant were

to raise a reasonable doubt in the jury's mind that he had intentionally killed a *human being* – rather than, say, an alien or a robot – the jury would presumably acquit the defendant of murder.[16] There is, however, no constitutionally adequate reason for treating a defendant as criminally responsible in Delling's case but not in a case involving delusions that are indistinguishable in any way that is relevant to the principles underlying the criminal law.

"'A central significance of the insanity defense . . . is the separation of nonblameworthy from blameworthy offenders.'" *Id.* at 768-69 (quoting Donald H. J. Hermann, *The Insanity Defense: Philosophical, Historical and Legal Perspectives* 4 (1983)) (ellipsis in original). The need to effect such a separation by excusing from criminal responsibility those who cannot rationally appreciate that their conduct was wrong is deeply engrained in Anglo-American tradition and contemporary law. To deprive a defendant of a defense to criminal punishment in such circumstances violates due process. This Court should grant certiorari, and it should so hold.

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[16] *See Clark*, 548 U.S. at 767-68 ("If it is shown that a defendant with mental disease thinks all blond people are robots, he could not have intended to kill a person when he shot a man with blond hair, even though he seemed to act like a man shooting another man. In jurisdictions that allow mental-disease and capacity evidence to be considered on par with any other relevant evidence when deciding whether the prosecution has proven *mens rea* beyond a reasonable doubt, the evidence of mental disease or incapacity need only support what the fact-finder regards as a reasonable doubt about the capacity to form (or the actual formation of) the *mens rea*, in order to require acquittal of the charge.") (footnote omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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