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Oral argument in *Kahler v. Kansas* took place October 7, 2019 at 10 A.M. before the United States Supreme Court in Washington, D.C.[1] Sarah O'Rouke Schrup argued for the Petitioner, James Kraig Kahler.[2] Kansas Solicitor General Toby Cruise argued for the Respondent, the State of Kansas.[3] Assistant to the Solicitor General of the United States Elizabeth B. Prelogar, as *amicus curiae*, argued in support of the Respondent.[4]

I. INTRODUCTION

This case directly addresses the issue of whether, under the Fourteenth and Eighth Amendments to the United States Constitution, Kansas can restrict a defendant's use of the insanity defense to only allow evidence that he could not form the requisite *mens rea*, or criminal intent, element of the charged crime. This case has significant implications because a ruling in favor of Petitioner would likely invalidate the current mental disease or defect defense[5] in Kansas, Montana, Idaho, and Utah.

II. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner was convicted of first-degree murder and sentenced to death for killing four members of his family in 2009.[6] At trial, Petitioner did not contest that he had killed his estranged wife, her mother, and his two daughters.[7] Rather, Petitioner maintained that he was suffering from such "overwhelming obsessive compulsions and extreme emotional disturbances" that he was dissociating from reality at the time of the killings.[8] Petitioner claimed that he became detached from reality following the deterioration of his marriage.[9]

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[1] Transcript of Oral Argument at 1, *Kahler v. Kansas*, (U.S. Oct. 7, 2019) (No. 18-6135).
[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] For purposes of clarity, "mental disease or defect" will be used interchangeably with "insanity defense" when referring to Kansas', Montana's, Idaho's, and Utah's current approach to the introduction of evidence regarding mental disability by a defendant for the purposes of defending a criminal charge.
[6] Brief for Petitioner at 11, *Kahler v. Kansas*, (U.S. May 31, 2019) (No. 18-6135); Brief for the Respondent at 12, *Kahler v. Kansas*, (U.S. Aug. 2, 2019) (No. 18-6135).
[7] Brief for Petitioner, *supra* note 6, at 11; Brief for the Respondent, *supra* note 6, at 9.
[8] Brief for Petitioner, *supra* note 6, at 6.
[9] *Id*. at 7; Brief for the Respondent, *supra* note 6, at 2–3.

Prior to trial, both parties employed forensic psychiatrists to evaluate Petitioner.[10] The forensic psychiatrists for both parties reached the same conclusion: Petitioner was suffering from "obsessive compulsive personality disorder, major depressive disorder, and borderline, paranoid and narcissistic personality tendencies."[11] But, Kansas has limited a defendant's use of evidence of mental illness as a defense to a crime to only whether the defendant could form the requisite *mens rea*.[12] By doing so Kansas has removed the issue of whether a defendant, because of mental illness, may be morally culpable for their actions, from the jury.[13] Thus, Respondent offered evidence to show Petitioner possessed the requisite mental state to find him guilty of the murders.[14] The jury agreed, and Petitioner was sentenced to death.[15] Subsequently, Petitioner lost his direct appeal to the Kansas Supreme Court, albeit under two dissenting opinions.[16]

II. ARGUMENTS OF THE PARTIES

A. Petitioner's Argument

Petitioner argues that Kansas' *mens rea* approach to the insanity defense violates both the Eighth and Fourteenth Amendments of the United States Constitution.[17] The Due Process Clause of the Fourteenth Amendment serves to protect "those 'principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[18] Citing long-standing historical practice, the Petitioner asserts that a basic tenet of the insanity defense has been to punish only those who are morally culpable for their actions.[19] Additionally, Petitioner argues the common usage of the insanity defense in American legal systems by pointing to the fact that forty-six states, the federal judiciary, and the military courts currently allow the affirmative defense of insanity.[20] In fact, up until 1979, every state had the affirmative defense of insanity until Montana became the first state to legislatively adopt a new approach.[21] History and practice also dictates that punishing those who are not morally culpable would have been cruel and unusual at

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[10] Brief for Petitioner, *supra* note 6, at 10–11.
[11] *Id.* at 11.
[12] *Id.* at 5.
[13] *Id.* at 41.
[14] Brief for the Respondent, *supra* note 6, at 11–12.
[15] *Id.* at 11.
[16] State v. Kahler, 410 P.3d 105, 133–134 (Kan. 2018).
[17] Brief for Petitioner, *supra* note 6, at 15–16.
[18] *Id.* at 16 (citing Patterson v. New York, 432 U.S. 197, 202 (1977)).
[19] *Id.* at 17–29.
[20] *Id.* at 26–27.
[21] *Id.*

the time of the founding, and thus fundamentally violates the Eighth Amendment's ban on cruel and unusual punishment.[22] Finally, Petitioner maintains that Kansas's mental disease or defect defense framework does not adequately protect severely mentally ill defendants because it stigmatizes them with a criminal conviction and potentially exposes them to incarceration where medical treatment may be inadequate.[23]

B. Respondent's Argument

The substantive portions of Kansas's argument are threefold: (1) no specific insanity defense is so deeply rooted in our nation's history and traditions as to trigger the Fourteenth Amendment's Due Process protections;[24] (2) with regard to criminal law, the States are free to adopt their own approach to the insanity defense;[25] and (3) the Eighth Amendment only prohibits cruel and unusual punishment and does not require that the States provide certain affirmative defenses.[26] In its Due Process argument Kansas concedes that the insanity defense has existed for hundreds of years.[27] But, the insanity defense has taken on multiple forms throughout its existence and jurisdictions are allowed play within the joints to determine how they want the defense used in practice.[28] Criminal law has largely been left for the states to decide, therefore, no federal constitutional standard should be invoked as long as some form the defense is available.[29] As for the cruel and unusual punishment argument, no case law supports Petitioner's position that the Eighth Amendment requires certain defenses be available to a defendant.[30]

III. *Analysis and Application to Montana*

A. Mental Disease or Defect Defense Structure in Kansas and Montana

Except for minor semantic differences, Montana's mental disease or defect defense structure is identical to that of Kansas. Montana, like Kansas, has a three-stage integration of the defense: pretrial,[31] trial,[32] and

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[22] *Id.* at 30–31.
[23] Brief for Petitioner, *supra* note 6, at 32–36.
[24] Brief for the Respondent, *supra* note 6, at 18.
[25] *Id*. at 19–40.
[26] *Id.* at 16.
[27] *Id.* at 19–21.
[28] *Id.* at 18–19, 37.
[29] *Id.* at 38.
[30] Brief for the Respondent, *supra* note 6, at 48–49.
[31] KAN. STAT. ANN. § 22-3222 (2019); MONT. CODE ANN. § 46-14-101(1)(a)(i) (2019).
[32] KAN. STAT. ANN. § 22-3219 (2019); MONT. CODE ANN. § 46-14-101(1)(a)(ii) (2019).

sentencing.[33] Before trial, the defendant must notify opposing counsel that the issue of mental capacity to form the requisite intent will be raised.[34] During trial, the defendant may only admit evidence of mental disease or defect inasmuch as it directly attacks the *mens rea* element of the crime.[35] Finally, at sentencing the traditional test for insanity plays out and the judge will accept any relevant evidence that might show that the defendant was unable to appreciate the criminality of his behavior or conform his behavior to the requirements of law.[36] The purpose of this determination at sentencing has a large impact on the defendant because a finding that the defendant neither had the cognitive capacity nor volitional control determines whether the defendant is sent to a state prison or state mental hospital.[37]

B. Potential Issues and Impact

The impact of a ruling in favor of the Petitioner will have significant consequences because it could potentially invalidate the mental disease or defect scheme in place in Montana since 1979. Depending on how broad a ruling, it could either impose a constitutional floor for the insanity defense or leave Montana's current approach in limbo until the State's 2021 legislative session.

Regardless, a favorable ruling for the Petitioner will have to reconcile with the Court's prior precedent. Since *Leland v. Oregon*,[38] the Court has been reluctant to impose any sort of constitutional standard on the states regarding how they should administer the insanity defense.[39] This becomes problematic for the Petitioner because in order to show that what Kansas, Montana, and other states have done to the traditional insanity defense is a violation of the Constitution requires a showing that the affirmative defense of insanity is "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[40] In *Clark v. Arizona*, [41] the Court notes that because such a wide and varied array of

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[33] KAN. STAT. ANN. § 21-6625(a)(6) (2019); MONT. CODE ANN. § 46-14-101(1)(a)(iii) (2019).

[34] Mont. Code Ann. § 46-14-103 (2019); Andrew King-Ries, *Arbitrary and Godlike Determinations: Insanity, Neuroscience, and Social Control in Montana*, 76 MONT. L. REV. 281, 293 (2015).

[35] MONT. CODE ANN. § 46-14-101(1)(a)(ii) (2019); King-Ries, *supra* note 34, 293–94.

[36] MONT. CODE ANN. § 46-14-311 (2019); King-Ries, *supra* note 34, 294.

[37] Stephanie C. Simpson, Note, State v. Cowan*: The Consequences of Montana's Abolition of the Insanity Defense*, 55 MONT. L. REV. 503, 522–23 (1994); King-Ries, *supra* note 34, 294–95.

[38] 343 U.S. 790 (1952).

[39] *See* Clark v. Arizona, 548 U.S. 735, 749–53 (2006); Powell v. Texas, 392 U.S. 514, 536–37 (1968)

Leland v. Oregon, 343 U.S. 790, 800–01 (1952).

[40] Patterson v. New York, 432 U.S. 197, 202 (1977)

[41] *Clark*, 548 U.S. at 752–53 ("With this varied background, it is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the

insanity defenses exist in the states it is impossible to say in any constitutional sense that the absence of any specific defense is a violation of due process. Conversely, one commonality does exist: forty-six states, the District of Columbia, the federal system, and military jurisdictions have an *affirmative* defense of insanity, unlike the four states at issue here.[42]

Recently, the Supreme Court has signaled that the constraints put on defendants in Kansas, Montana, Idaho, and Utah may be unconstitutional. Specifically, critics of the *mens rea* approach and some members of the Court are concerned about a specific type of mentally ill defendant: the defendant who acknowledges what they are doing is wrong, but who cannot control their actions.[43] Dissenting from denial of a writ of certiorari in *Delling v. Idaho*,[44] Justice Breyer, joined by Justice Ginsburg and Justice Sotomayor, posed a question which he reiterated during oral argument in this case.[45] The question states that there are two defendants, both indisputably insane.[46] Defendant one kills a man, believing that man to be a dog.[47] Defendant two kills a man, because he believes a dog was telling him to do it.[48] Thus, extending this logic to the issue here, why in forty-nine other jurisdictions should a defendant be allowed to argue that he was insane in both instances and not held criminally responsible, but in Montana, Kansas, Idaho, and Utah the defendant could only raise insanity in the first situation?

This line of questioning may indicate that if the Court holds that Kansas's statutory framework for the mental disease and defect defense is unconstitutional, not only must a cognitive "right or wrong" test must be available, but also a volitional test. This hybrid test has been advocated by scholars because it serves to better protect a wider array of mentally ill persons from the stigma of criminal convictions and incarceration.[49]

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conceptualization of criminal offenses is substantially open to state choice . . . . There being such fodder for reasonable debate about what the cognate legal and medical tests should be, due process imposes no single canonical formulation of legal insanity").

[42] *Clark*, 548 U.S. at 751–52.

[43] State v. Searcy, 798 P.2d 914, 935 (Idaho 1990) (McDevvit, J., dissenting); State v. Cowan, 861 P.2d 884, 894 (Mont. 1993) (Treiweiler, J., joined by Hunt, J., dissenting); Brief for Petitioner, *supra* note 6, at 41; Brief of American Psychiatric Association, American Psychological Association, American Academy of Psychiatry and the Law, The Judge David L. Bazelon Center for Mental Health Law, and Mental Health America as *Amici Curiae* in Support of Petitioner at 25–31, Kahler v. Kansas, (U.S. Jun. 6, 2019) (No. 18-6135); Brief of *Amicus Curiae* 290 Criminal Law and Mental Health Law Professors In Support of Petitioner's Request for Reversal and Remand at 11–17, Kahler v. Kansas, (U.S. Jun. 6, 2019) (No. 18-6135).

[44] 568 U.S. 1038 (2012) (Breyer, J., dissenting).

[45] Transcript of Oral Argument, *supra* note 1, at 38.

[46] *Delling*, 568 U.S. at 1038.

[47] *Id.*

[48] *Id.*

[49] *See* HERBERT FINGARETTE, THE MEANING OF CRIMINAL INSANITY 242–44 (1972).

IV. CONCLUSION

The Court should find in favor of Petitioner and hold that limiting a defendant's use of the insanity defense to only allow evidence which shows that they could not form the proper criminal intent is a violation of the Due Process Clause of the Fourteenth Amendment. In turn, this ruling will very likely strike down Kansas, Montana, Idaho, and Utah's iteration of the insanity defense.