No. 19-1409

IN THE

Supreme Court of the United States

OCTOBER TERM 2019

LINDA FROST,

Petitioner,

v.

COMMONWEALTH OF EAST VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF EAST VIRGINIA

BRIEF FOR THE PETITIONERS

TEAM C
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether Ms. Frost waived her *Miranda* rights knowingly and intelligently when she did not understand her *Miranda* rights or the consequences of waiving them because she was suffering from severe delusions and paranoia.

II. Whether East Virginia's abolition of the traditional insanity defense violated Ms. Frost's Eighth Amendment right to be free from cruel and unusual punishment and her Fourteenth Amendment right to Due Process when she could not differentiate between right and wrong during the commission of the offense.

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STATEMENT OF JURISDICTION

The Supreme Court of Appeals of East Virginia affirmed this judgment on December 31, 2018. R. at 9. This Court granted the petition for the writ of certiorari on July 31, 2019. R. at 12. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1254(1) (Westlaw 2012).

CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns the Fifth Amendment to the United States Constitution, which in pertinent part provides: "No person shall . . . be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V.

This case also concerns the Eighth Amendment to the United States Constitution, which in pertinent provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Because this appeal arises out of allegations of State infringement upon Constitutional rights, the Fourteenth Amendment is implicated. It provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

I. Statement of the Facts

In 2016, East Virginia abolished the traditional insanity defense. *Id.* at 4. The legislature adopted a *mens rea* approach under E. Va. Code § 21-3439. *Id.* This statute only permits evidence of a mental disease or defect to disprove competency to stand trial or to disprove the *mens rea* element of an offense. *Id.* As such, the inability to know right from wrong is no longer a defense. *Id.*

Christopher Smith was a poultry inspector in Campton Roads, East Virginia, and his girlfriend, Linda Frost, worked at a local restaurant. *Id.* at 2. The two had been observed arguing the week prior to Smith's death. *Id.* On June 16th and 17th, 2017, Linda Frost likely suffered from psychosis, severe delusions, and paranoia. R. at 4. Ms. Frost picked up a last-minute shift at the restaurant the night of June 16, 2017. *Id.* Smith was found dead on June 17, 2017. *Id.* Police officers concluded Smith was murdered and initiated an investigation. *Id.*

Upon receiving an anonymous tip, investigators brought Ms. Frost in for questioning on June 17, 2017. *Id.* While Ms. Frost was given her *Miranda* rights and signed a written waiver, she did not understand her rights or the consequences of waiving them. *Id.* at 2, 5. Officer Nathan Barbosa of the Campton Roads Police Department testified that nothing at the beginning of the interrogation indicated Ms. Frost's misunderstanding of her rights or the consequences of signing the waiver. *Id.* at 2. Officer Barbosa told Ms. Frost about the discovery of Smith's body and asked her if she knew who might be responsible. *Id.* at 3. In response, Ms. Frost exclaimed that she was responsible just before going on a tangential string of irrational delusions. *Id.*

Ms. Frost did not believe that killing Smith was wrong. *Id.* Ms. Frost spoke about the "voices in her head" telling her to "protect the chickens at all costs." *Id.* She believed she did Smith

a "great favor" because he would be reincarnated as a chicken, "the most sacred of all creatures." *Id.* Further, she implored Officer Barbosa to join her cause "to liberate all chickens in Campton Roads." *Id.* This barrage of irrational statements prompted Officer Barbosa to ask Ms. Frost if she wanted an attorney. *Id.* She indicated she did, and Officer Barbosa terminated the interrogation. *Id.*

II. Procedural History

Ms. Frost was indicted in both federal and state court. *Id.* at 4. Ms. Frost's attorney filed a motion for a mental evaluation. *Id.* Dr. Frain diagnosed Ms. Frost with paranoid schizophrenia and prescribed her medication. *Id.* During the evaluation, Ms. Frost told Dr. Frain that she believed Smith needed to be killed "to protect the sacred lives of chickens" that he endangered through his job as a poultry inspector. *Id.* at 4.

In her federal murder trial, the court deemed Ms. Frost competent to stand trial. *Id.* Dr. Frain testified as an expert on behalf of Ms. Frost at trial. *Id.* Dr. Frain indicated that, at the time of Ms. Frost's interrogation, it was "highly probable" that she "was in a psychotic state suffering from severe delusions and paranoia." *Id.* This evaluation was the first time that Ms. Frost was diagnosed with paranoid schizophrenia. *Id.* at 3. Ms. Frost was acquitted on the basis of the *M'Naghten* defense, which remains the approach under federal law. *Id.* Dr. Frain testified that even though Ms. Frost intended to kill Smith, "she was unable to control or fully understand the wrongfulness of her actions over the course of those few days." *Id.*

After her acquittal in federal court, the Commonwealth prosecuted Ms. Frost for murder. *Id.* The state court deemed Ms. Frost competent to stand trial. *Id.* Ms. Frost's attorney filed a motion to suppress her confession. *Id.* at 5. The trial judge denied that motion because Officer Barbosa believed Ms. Frost was lucid and capable of waiving her *Miranda* rights. *Id.* Additionally,

the trial court held Officer Barbosa had no reason to know or expect she was mentally unstable after her waiver and confession. *Id.* However, the trial court determined the evidence was undisputed that Ms. Frost did not understand her *Miranda* rights or the consequences of waiving them. *Id.*

Ms. Frost's attorney filed a motion asking the trial court to hold that E. Va. Code § 21-3439 was unconstitutional because it subjected her to cruel and unusual punishment under the Eighth and Fourteenth Amendments. *Id.* at 5. The trial judge denied that motion and a jury convicted Ms. Frost of murder. *Id.* The trial judge sentenced her to life in prison. *Id.* This Court granted certiorari on July 31, 2019. *Id.* at 12.

SUMMARY OF THE ARGUMENT

The East Virginia Supreme Court erred in holding Ms. Frost waived her *Miranda* rights knowingly and intelligently. She was unable to understand her *Miranda* warnings or the consequences of waiving them as a result of her psychosis, severe delusions, and paranoia. The totality of the circumstances surrounding Ms. Frost's interrogation demonstrate her waiver was not knowing and intelligent. The East Virginia Supreme Court failed to consider the crucial factor of Ms. Frost's inability to understand her rights or the consequences of waiving them under the totality test. Additionally, the court misread *Colorado v. Connelly* as requiring police coercion for a waiver of *Miranda* to be unknowing and unintelligent. *Connelly* only applies to the voluntariness prong of *Miranda* waiver. Finally, the lower court improperly focused on exclusively on Officer Barbosa's perception of Ms. Frost during her interrogation. This Court should reverse the East Virginia Supreme Court and hold that, as a matter of law, Ms. Frost's waiver was not knowing and intelligent.

This Court should hold E. Va. Code § 21-3439 unconstitutional because a *mens rea* approach violates Ms. Frost's right to Due Process under the Fourteenth Amendment. The traditional insanity defense found its roots in early common law and is accepted by a vast majority of states in 2019. This Court has implied that a constitutional minimum exists and that a moral culpability prong does not shortchange it. A *mens rea* approach re-defines criminal intent to fit its agenda to create an unnecessary distinction between the type of delusions defendants may suffer from. This approach cannot be seen to serve a compelling state interest or be narrowly tailored given its complete abolishment of a fundamental right—the affirmative insanity defense.

Abolishing the traditional insanity defense for a *mens rea* approach subjects Ms. Frost to cruel and unusual punishment under the Eighth Amendment. This Court has vindicated the utility of evaluating the insanity of a defendant because a tenet of this country is that punishment is not meant for those who lack necessary moral culpability. Substituting a *mens rea* approach violates contemporary standards of decency and fundamental human dignity that have evolved with society. A consensus of support among forty-five state legislatures exemplifies this canon in modern American society. A *mens rea* approach does not serve penological goals and therefore does not ultimately serve society's long-term interest in keeping communities safer. Moreover, punishing Ms. Frost when she does not have the capacity of blameworthiness imposes an excessive punishment in violation of the Eighth Amendment. This Court should reverse Ms. Frost's conviction and hold there is a fundament right to an insanity defense under the Eighth and Fourteenth Amendments.

STANDARD OF REVIEW

The issue of whether or not the *Miranda* waiver was knowing and intelligent is a mixed question of law and fact. When determining questions of law and fact on appeal, this Court's standard of review is de novo unless the mixed question is primarily factual. *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002). There are no issues of fact preserved on the record for appeal, thus, this Court's standard of review is *de novo*.

The constitutionality of a state statute is a question of law, and this Court's standard of review is de novo with regard to the second issue. *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir. 1993).

ARGUMENT

I. MS. FROST DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HER *MIRANDA* RIGHTS BECAUSE SHE DID NOT UNDERSTAND THE NATURE OF HER RIGHTS OR THE CONSEQUENCES OF WAIVING THEM.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. The Fifth Amendment's privilege against self-incrimination applies to the states through the Due Process Clause of the Fourteenth Amendment. *See* U.S. Const. amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). The privilege is premised upon the fact that "the American system of criminal prosecution is accusatorial, not inquisitorial[.]" *Malloy*, 378 U.S. at 7 (citing *Rogers v. Richmond*, 365 U.S. 534, 541 (1961)). Thus, the Government, federal or State, must prove guilt by evidence independent of coerced confessions from the defendant. *Id.* at 8.

The Fifth Amendment's privilege against self-incrimination applies to the inherently coercive atmosphere of custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 461 (1966). To protect this privilege, *Miranda* imposes certain obligations and procedures on law enforcement

prior to custodial interrogation: the accused must be informed (1) of her right to remain silent; (2) anything she says may be used against her in court; (3) she has the right to counsel during interrogation; and (4) if she is indigent, counsel will be appointed to represent her. *Id.* at 467-73. The purpose of *Miranda* is to safeguard against violations of defendants' Fifth Amendment rights. *See Moran v. Burbine*, 475 U.S. 412, 425 (1986) (stating *Miranda's* objective); *Miranda*, 384 U.S. at 469 ("Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process."). *Miranda* warnings serve to two distinct purposes. The first is to dispel the compulsion intrinsic to custodial interrogation. *Moran*, 475 U.S. at 427. Second, *Miranda* warnings function "to ensure the accused is advised of and *understands* the right to remain silent and the right to counsel." *Berghuis v. Thompson*, 560 U.S. 370, 383 (2010) (emphasis added) (citing *Davis v. United States*, 512 U.S. 452, 460 (1994) (additional citations omitted)).

Defendants may waive the right to remain silent and right to counsel "provided the waiver is made voluntarily, knowingly and intelligently." *Miranda*, 382 U.S. at 444. Valid waiver of *Miranda* is a two-pronged test. *See Moran*, 475 U.S. at 421 (citing *Fare v. Michael C.*, 442 U.S. 707, 725 (1979); *North Carolina v. Butler*, 441 U.S. 369, 374-75 (1979)). First, waiver must be voluntary in the sense that it is free from police coercion, intimidation, or deception. *See Colorado v. Connelly*, 479 U.S. 157, 169-70 (1986). Second, "the waiver must have been made with a *full awareness* of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran*, 475 U.S. at 421 (emphasis added) (citing *Michael C.*, 442 U.S. at 725*)*; *Butler*, 441 U.S. at 374-75. A waiver is valid only if both prongs are met. *U.S. v. Bradshaw*, 935 F.2d 295, 298 (D.C. Cir. 1991) (citing *Moran*, 475 U.S. at 421). Here, Ms. Frost does not contend her confession was involuntary; rather, her confession was not knowing and intelligent in violation

of the second prong under *Moran*. This Court has repeatedly held that "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived [her] privilege against self-incrimination and his right to retained or appointed counsel." *Miranda*, 382 U.S. at 475 (citing *Escobedo v. Illinois*, 378 U.S. 478, 490, n. 14 (1964)); *but see Connelly*, 479 U.S. at 168 (holding the prosecution need only prove waiver of *Miranda* by a preponderance of the evidence).

There exists, among the federal circuits, confusion as to the meaning of knowing and intelligent waiver of *Miranda*. The East Virginia Supreme Court, following the Sixth Circuit, focused on the interrogating officer's conduct and his perception of a defendant's understanding of her rights. R. at 6; *see also Garner v. Mitchell*, 557 F.3d 257, 262 (6th Cir. 2009). Most circuits, however, focus on the defendant's actual ability to comprehend the *Miranda* warnings and the consequences of waiving them. *See Collins v. Gaetz*, 612 F.3d 574, 587 (7th Cir. 2010); *United States v. Bezanson-Perkins*, 390 F.3d 34, 41 (1st Cir. 2004); *U.S. v. Cristobal*, 293 F.3d 134, 142 (4th Cir. 2002); *U.S. v. Bradshaw*, 935 F.2d 295, 300 (D.C. Cir. 1991); *U.S. v. Frank*, 956 F.2d 872, 878 (10th Cir. 1991).

A. *The Proper Focus Is on The Totality of The Circumstances, Including Ms. Frost's Capability to Actually Understand And Waive Her* Miranda *Rights.*

Whether a waiver of *Miranda* is voluntary, knowing and intelligent depends upon "the particular facts and circumstances surrounding [each] case[.]" *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *see also Berghuis*, 560 U.S. at 387; *Michael C.*, 442 U.S. at 725. Importantly, this analysis includes an inquiry into whether the accused "has the capacity to understand the warnings given [to] [her], the nature of [her] Fifth Amendment rights, and the consequences of waiving those rights." *Michael C.*, 442 U.S. at 725; *see also Collins*, 612 F.3d at 587; *Bradshaw*, 935 F.2d at 300 (holding a defendant's mental

capability is relevant to the validity of his waiver). Other relevant factors considered under this totality of the circumstances approach are the accused's age, education, background, experience with law enforcement, and intelligence. *Michael C.*, 442 U.S. at 725. Further, courts examine the conduct of the accused before and during custodial interrogation and whether the accused has diminished capacity. *Garner*, 557 F.3d at 264-65. Some courts have considered the interrogating officer's perception of the suspect's ability to understand the *Miranda* warnings. *Id.* at 263. Because the East Virginia Supreme Court focused solely on the officer's perception, it erred as a matter of law when it failed to analyze the totality of the circumstances surrounding Ms. Frost's alleged waiver of her *Miranda* rights.

1. The totality of the circumstances surrounding Ms. Frost's interrogation demonstrate she did not knowingly and intelligently waive her *Miranda* rights.

The trial court found sufficient evidence—without objection by the Respondent—that Ms. Frost did not understand the nature of her Fifth Amendment rights or the consequences of waiving them. R. at 5-6. The record is silent as to Ms. Frost's age, education, experience with law enforcement, and intelligence and indicates only minimal background information as well as her conduct before and during the interrogation. *Id.* at 2-3. The only background information contained in the record is her experience working at a restaurant, which does not indicate whether she waived her rights knowingly and intelligently. *Id.* at 2. Regarding Ms. Frost's conduct during the interrogation, she initially appeared competent to Officer Barbosa; however, after confessing to murdering Mr. Smith, she made several statements about "voices in her head," and the need to "protect chickens at all costs." *Id.* at 3. Ms. Frost implored Officer Barbosa to join her cause "to liberate all chickens in Campton Roads." *Id.* Further, Ms. Frost stated to Officer Barbosa she believed Mr. Smith would reincarnate as a chicken and that chickens were sacred creatures. *Id.*

Concerned by this barrage of irrational statements, Officer Barbosa asked Ms. Frost if she wanted a court appointed attorney. *Id.* The defense expert, Dr. Frain, testified that it was highly probable that, at the time of the interrogation, Ms. Frost was suffering from paranoia and delusions while in a psychotic state. *Id.* at 4. The Commonwealth did not challenge Dr. Frain's conclusions. *Id.* at 5. Consequently, the evidence is undisputed that Ms. Frost did not understand either her *Miranda* rights or the consequences of waiving them. *Id.* at 5-6.

The totality of the circumstances indicate Ms. Frost did not knowingly and intelligently waive her *Miranda* rights. While her initial conduct appeared lucid, it drastically changed throughout the course of the interview to the point where Officer Barbosa found it necessary to ask her if she wanted a court appointed attorney. *Id.* at 3. Further, the evidence is undisputed that Ms. Frost did not actually understand either her *Miranda* rights or the consequences of waiving them. The East Virginia Supreme Court erred as a matter of law when it failed to consider the totality of the circumstances surrounding Ms. Frost's interrogation.

2. Ms. Frost's lack of actual understanding of her rights is a crucial factor in determining whether she waived *Miranda* knowingly and intelligently.

The East Virginia Supreme Court erred when it failed to consider Ms. Frost's inability to understand her *Miranda* rights or the consequences of waiving them. The lower court's disregard of this factor was error because the primary "question is not one of form, but whether the defendant *in fact* knowingly and voluntarily waived the rights delineated in [*Miranda*]." *Butler*, 441 U.S. at 373 (emphasis added). The knowing and intelligent determination turns on whether the accused "at *all times knew* [s]he could stand mute and request a lawyer, and that *[s]he was aware* of the State's intention to use [her] statements to secure a conviction[.]" *Moran*, 475 U.S. at 422-23 (emphasis added). *Butler* and *Moran* make it clear that the focus is on the accused's subjective knowledge of her rights and the consequences of waiving them. Ms. Frost lacked that essential

subjective knowledge and understanding as a result of her psychosis. R. at 5-6. By ignoring Ms. Frost's failure to understand her *Miranda* rights and the consequences of waiving them, the East Virginia Supreme Court vitiated a fundamental purpose of *Miranda*: to ensure the accused understands the right to remain silent and the right to counsel. *Berghuis*, 560 U.S. at 383.

The purpose of the totality of the circumstances test is "to ascertain whether the accused *in fact* knowingly and voluntarily decided to forgo [her] rights to remain silent and to have the assistance of counsel." *Michael C.*, 442 U.S. at 725 (emphasis added) (citing *Miranda*, 384 U.S. at 475-77). In most cases, there is no clear evidence as to whether or not the accused understood her *Miranda* rights or the consequences of waving them. *See, e.g., Collins*, 612 F.3d at 580-84 (holding that, looking at the totality of the circumstances, defendant did not understand his *Miranda* warnings despite conflicting evidence in the record). In that scenario, it is necessary to turn to the totality of the circumstances to determine if she understood them or not. *Moran*, 475 U.S. at 421. Here, the most significant circumstance surrounding Ms. Frost's interrogation is the fact that she did not understand her *Miranda* rights or the consequences of waiving them. R. at 5. The Commonwealth did not dispute that conclusion. *See Id.* Ms. Frost's failure to actually understand her rights or the consequences of waiving them precluded the possibility that she could waive *Miranda* knowingly and intelligently. *See Collins*, 612 F.3d at 587 (reasoning that, even in the absence of coercion, the defendant could not waive his rights if he had insufficient mental capacity to understand them).

The East Virginia Supreme Court's reliance on *Colorado v. Spring* is misplaced. The majority cited *Spring* for the proposition that a suspect need not understand "every possible consequence of a waiver of a Fifth Amendment privilege" for the waiver to be knowing and intelligent. *Colorado v. Spring*, 479 U.S. 564, 574 (1986); R. at 6. *Spring*, however, was concerned

with whether the defendant waived *Miranda* knowingly and intelligently when he did not know all the possible subjects of the interrogation. *Spring*, 479 U.S. at 571. In *Spring*, ATF agents initially questioned defendant about his involvement in transportation of stolen firearms. *Id.* at 566. The agents advised defendant of his *Miranda* rights twice, and defendant signed a written waiver stating he understood and waived his rights, and that he was willing to make a statement. *Id.* at 567. The agents gave defendant his *Miranda* warnings a third time, which defendant again waived in writing. *Id.* The officers then questioned defendant about his involvement in a murder separate from the firearms offenses. *Id.* Defendant confessed to the murder and signed a written statement detailing the events. *Id.* at 567-68.

Defendant argued his waiver of *Miranda* was invalid because he was not informed that he would be questioned about the murder. *Id.* at 569. This Court, however, found defendant voluntarily, knowingly and intelligently waived his *Miranda* rights. *Id.* at 575. Focusing on the knowing and intelligent prong, this Court stressed that there was no doubt defendant understood his right to remain silent and that anything he said could be used against him as evidence. *Id.* at 574. It reasoned there was no evidence that defendant could not understand the basic privileges guaranteed by the Fifth Amendment. *Id.* at 575. Additionally, defendant did not contend he misunderstood the consequences of speaking freely to law enforcement. *Id.*

Spring is distinguishable from Ms. Frost's case. Where *Spring* sought an extension of *Miranda* to encapsulate information concerning the subject matter of a custodial interrogation, Ms. Frost simply seeks a straightforward application of knowing and intelligent waiver under *Moran*. In *Spring*, this Court stressed that defendant understood his rights under *Miranda*. However, in Ms. Frost's case, the lower courts found the evidence undisputed that she did not understand the nature of her rights under *Miranda*. R. 5-6. In *Spring*, defendant did not contend he misunderstood

the consequences of speaking to law enforcement. Again, in Ms. Frost's case, the evidence is undisputed that she did not understand the consequences of waiving her *Miranda* rights as a result of her psychosis. *Id.* While a defendant does not need to be informed of all information "useful" in making a decision to waive *Miranda*, at a minimum, the defendant must know and understand her basic rights and the consequences of foregoing them. *Moran*, 475 U.S. at 421-22. Because the Government could not satisfy that minimum requirement, Ms. Frost's waiver was not knowing and intelligent.

The East Virginia Supreme Court erred when it failed to consider the totality of the circumstances surrounding Ms. Frost's interrogation. Specifically, the court disregarded the most significant factor of all—the fact that Ms. Frost did not understand her basic Fifth Amendment rights or the consequences of waiving them. The court's reliance on *Spring* was misplaced, as that case is materially distinguishable from Ms. Frost's. A primary purpose of *Miranda* is to ensure that defendants are aware of, understand, and are secure in their right against self-incrimination. *Berghuis*, 560 U.S. at 383. Because Ms. Frost did not understand her *Miranda* rights or the consequences of waiving them, the admission of her confession is unconstitutional under the Fifth and Fourteenth Amendments.

B. *The East Virginia Supreme Court Improperly Focused Solely on Officer Barbosa's Conduct, And His Misplaced Belief That Ms. Frost Knowingly And Intelligently Waived Her* Miranda *Rights.*

The lower court, in affirming Ms. Frost's conviction, improperly applied Supreme Court precedent. The East Virginia Supreme Court misread *Colorado v. Connelly* as requiring police coercion to make a waiver of *Miranda* unknowing and unintelligent. The court held that, in the absence of police coercion, any waiver of *Miranda* is knowing and intelligent. *See* R. at 6. This reading of *Connelly* is mistaken on several grounds.

Additionally, the court erred in focusing on Officer Barbosa's subjective perception of Ms. Frost's understanding of her *Miranda* rights and the consequences of waiving them. While the officer's perception may be one factor in the totality of circumstances, it is not the sole, deciding factor in the analysis. Looking only to the mental state of the officer fails to realize the objectives of *Miranda* which seeks to ensure that defendants are aware of and understand their rights within the context of custodial interrogation. *See Berghuis,* 560 U.S. at 383.

1. *Connelly* does not apply to the knowing and intelligent prong of *Miranda* waiver.

Connelly held that coercive police activity is a necessary predicate for a confession or a waiver of *Miranda* to be involuntary, but it did not address the knowing and intelligent prong of *Miranda* waiver. *Connelly,* 479 U.S. at 157-58. In *Connelly,* defendant approached an officer and claimed he murdered someone. *Id.* at 160. The officer gave defendant his *Miranda* warnings, and defendant stated he understood them. *Id.* Officers advised defendant of his rights two more times before defendant confessed to the murder and took the officers to the body. *Id.* at 160-61. Later, defendant relayed to a public defender that he confessed because "voices" told him to. *Id.* at 161. The voices told defendant he had to confess to the murder or commit suicide. *Id.* A mental examination revealed defendant suffered from chronic schizophrenia and was in a state of psychosis while he confessed. *Id.* Defendant's examining doctor testified that defendant's illness affected his volitional capabilities, but not his cognitive abilities. *Id.* As a result, defendant's illness motivated him to confess, but he still understood his *Miranda* rights when advised of them. *Id.* at 161-62.

This Court held defendant's confession and waiver of *Miranda* was voluntary. *Id.* at 157-58. Absent any police overreaching, "there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Id.* at 164. Nor is there any basis for

concluding a *Miranda* waiver is involuntary absent some police overreaching. *Id.* at 169-70. This is so because state action is a necessary predicate for a Due Process violation, and that reasoning logically extended to the voluntariness of a waiver. *Id.* at 165, 169-70. Suppression of the confession would not serve one of *Miranda*'s or Due Process's purposes: protecting and enforcing constitutional guarantees by deterring future violations of the Constitution. *Id.* at 166 (citing *United States v. Leon*, 468 U.S. 897, 906-13 (1984)).

Connelly's holding, however, does not apply to the knowing and intelligent prong of a *Miranda* waiver. Unlike Ms. Frost, Connelly's sole challenge was to the voluntariness of his confession and the waiver of his *Miranda* rights. Ms. Frost's solitary challenge is that her waiver of *Miranda* was not knowing and intelligent. This Court, in *Connelly*, accepted the conclusion that defendant understood his rights. *Connelly*, 479 U.S. at 161-62. That acceptance was based on the doctor's testimony that defendant's mental illness affected his volitional abilities, but it had no effect on his cognitive abilities. *Id.* Ms. Frost, by contrast, was in a state of psychosis and suffered from severe delusions and paranoia, which made her incapable of understanding her rights or the consequences of waiving them. R. at 4-5.

Connelly implied that police overreaching is not necessary for a determination of whether a waiver is knowing and intelligent. *Connelly*, 479 U.S. at 171, n.4. This Court provided the limited disclaimer:

> It is possible to read the opinion of the Supreme Court of Colorado as finding respondent's *Miranda* waiver invalid *on other grounds*. Even if that is the case, however, we nonetheless reverse the judgment in its entirety because of our belief that the Supreme Court of Colorado's analysis was influenced by its mistaken view of "voluntariness". . . *Reconsideration of other issues*, not inconsistent with our opinion, is of course open to the Supreme Court of Colorado on remand.

Id. (emphasis added). "[T]here is no other way to explain [this] disclaimer: aside from the knowledge inquiry, there are no 'other grounds' on which the lower court's ruling could [be] based,

and if police coercion were the focus of that inquiry as well, the lower court would be unable to 'reconsider' anything." *Bradshaw*, 935 F.2d at 300. This Court, by ordering a remand in *Connelly*, implicitly held that a lack of police coercion, while fatal to the defense of involuntariness, is not a necessary predicate to finding that a waiver was knowing and intelligent.

The East Virginia Supreme Court misapplied *Connelly*. *Connelly*'s holding requires police coercion to find a confession and waiver of *Miranda* to be involuntary, but it did not hold police coercion as a necessary predicate to finding a *Miranda* waiver unknowing and unintelligent. Where the defendant in *Connelly* understood his rights, Ms. Frost did not understand her rights or the consequences of waiving them. *Connelly*'s holding serves one of the purposes of *Miranda*: securing defendants' constitutional rights by deterring police overreach. By misapplying *Connelly* to the knowing and intelligent prong, the lower court vitiated *Miranda*'s other purpose: ensuring defendants are aware of and understand their constitutional rights.

2. The East Virginia Supreme Court erred when it focused its analysis on Officer Barbosa's perception of Ms. Frost's understanding of her *Miranda* rights.

The lower court improperly focused on Officer Barbosa's perception of Ms. Frost's understanding of her rights, rather than focusing on Ms. Frost's actual understanding. R. at 9-10 (Evans, C.J., dissenting). It held Officer Barbosa's perception to be of "primary significance." *Id.* at 6. While Officer Barbosa's perception may be a factor to consider, it is not the sole or even primary factor to consider. *See Michael C.*, 442 U.S. at 725 (listing different factors to consider under the totality of the circumstances analysis). The purpose of the totality of the circumstances analysis is to determine whether the accused understood her rights and the consequences of waiving them. *See Moran*, 475 U.S. at 421. When the evidence is undisputed that Ms. Frost did not understand her rights or the consequences of waiving them, there is no need to look to the officer's perception. R. at 5-6; *see Moran*, 475 U.S. 423-24 (holding that a police officer's

perception is "*irrelevant*" to the intelligence . . . of a defendant's election to abandon his rights) (emphasis added).

Shifting the focus to the interrogating officer's perception will have negative consequences. First, officers will be less inclined to conduct an inquiry into a suspect's background, education level, and prior experience with law enforcement. If the focus is on the officer's perception, he or she will have little incentive to determine the mental capacity of a suspect. This would vitiate both a fundamental purpose of *Miranda*—suspect's actual understanding—and the totality-of-the-circumstances analysis mandated by this Court. *See Edwards*, 451 U.S. at 482. Next, because officers are "engaged in the often competitive enterprise of ferreting out crime," *Riley v. California*, 573 U.S. 373, 382 (2014) (additional citation omitted), they may downplay indications of a suspect's incompetence. Shannon McDonald, *Miranda Protections for Mentally Challenged Defendants at Risk: The Sixth Circuit Distorts Supreme Court Precedent in Garner v. Mitchell*, 8 Seton Hall Circuit Rev. 413, 427 (2012). Officer's exert a great deal of effort in investigation, pursuit, and apprehension of suspects, and they do not want those efforts to go in vain, especially if they know the validity of a waiver depends on *their* perception. *Id.* Finally, nefarious motivations, like pressure from superior officers, may motivate an interrogating officer to downplay signs of impairment. *Id.* Interrogating officers with minimal to no training in the mental health field are not better suited than medical experts to make on-the-spot assessments of a suspect's capacity to understand her rights or the consequences of waiving them. *Id.*at 426.

Finally, the East Virginia Supreme Court's reliance on *Garner v. Mitchell* is misplaced. While *Garner* noted an officer's perception of the suspect's understanding of her rights was of "primary significance," it did so only because there was no direct evidence in the record that

defendant, in fact, could not understand his rights or the consequences of waiving them. *Garner*, 557 F.3d at 262. In *Garner*, the record indicated defendant was "perfectly normal" and "very coherent" during his interrogation. *Id.* at 261. Further, in *Garner*, the "officers took care to ensure that [defendant] understood the warnings and waiver before he signed them." *Garner*, 557 F.3d at 261. After reading each provision of the warnings to defendant, the officers asked defendant if he understood the provision's meaning, and defendant responded affirmatively each time. *Id.*

The record in the present case is distinguishable and led the lower court to determine that Ms. Frost "didn't understand either her *Miranda* rights" or the "consequences of waiving them." R. 5-6. Further, there is evidence in the record to suggest that Officer Barbosa perceived Ms. Frost's mental incapacity. Unlike the defendant in *Garner*, Ms. Frost was relayed a salvo of irrational statements to Officer Barbosa. R. at 3. These statements were enough for Officer Barbosa to ask Ms. Frost if she wanted a court appointed attorney, indicating he perceived something was wrong with Ms. Frost's mental capacity. *Id.* Further, unlike in *Garner*, Officer Barbosa did not take this same level of care in ensuring Ms. Frost understood her rights and the consequences of waiving them. In *Garner*, a competency report prepared by a clinical psychologist concluded defendant could understand all questions and material presented to him. *Garner*, 557 at 262. For Ms. Frost, the evidence is undisputed that she could not understand her rights or the consequences of waiving them. R. at 5-6.

In *Garner*, the totality of the circumstances revealed the officers had no reason to discern any understanding in defendant's mind; the exact opposite is true in Ms. Frost's case. *Garner*, 557 F.3d at 262; R. at 5-6. Crucially, the Sixth Circuit noted that "later-developed evidence of a defendant's actual mental ability to understand the warnings at the time of the interrogation" was relevant to the validity of any waiver. *Garner*, 557 at 263. The evidence is undisputed that Ms.

Frost could not understand her rights or the consequences of waiving them. R. 5-6. This fact alone undermines the East Virginia Supreme Court's argument that the only focus is on the officer's perception.

In conclusion, this Court should reverse the East Virginia Supreme Court's holding and find Ms. Frost did not knowingly and intelligently waive her *Miranda* rights. The East Virginia Supreme Court erred as a matter of law when it failed to consider the totality of the circumstances surrounding Ms. Frost's interrogation. Instead, it focused its inquiry into Officer Barbosa's conduct and misguided perception that Ms. Frost understood her rights and the consequences of waiving them, rather than Ms. Frost's actual misunderstanding of her rights and the consequences of waiving them. Further, *Connelly*'s holding only applies to the voluntariness prong, and the lower court erred in extending it to the knowing and intelligent prong. This Court, as Chief Justice Roberts put it, is ". . . careful not to uncritically extend existing precedents[.]" *Carpenter v. U.S.*, 138 S.Ct. 2206, 2222 (2018). Ms. Frost's case is one of those where this Court should not uncritically extend existing precedent, and it should find Ms. Frost did not knowingly and intelligently waive her *Miranda* rights.

II. THE TRADITIONAL INSANITY DEFENSE IS CONSTITUTIONALLY REQUIRED UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND ITS ABOLITION VIOLATES THE EIGHTH AMENDMENT'S PROSCRIPTION OF CRUEL AND UNUSUAL PUNISHMENT.

The abolition of the affirmative insanity defense subjects Ms. Frost to cruel and unusual punishment under the Eighth Amendment and violates her right to Due Process under the Fourteenth Amendment. An insanity test—which analyzes a defendant's ability to differentiate right from wrong—has been recognized for its importance since common law making it rooted in American tradition and a fundamental right. This Court's holding in *Clark v. Arizona* implies that a constitutional minimum exists and providing a prong of moral culpability does not "shortchange"

it. 548 U.S. 735, 750-51 (2006). There is a substantial consensus by the states that an affirmative insanity defense is a necessity as abolishing it does not advance penal goals. Instead, the abolishment promotes the excessive punishment of morally inculpable offenders which violates contemporary standards of decency.

A. *The Traditional Insanity Defense Is Constitutionally Required under The Due Process Clause of The Fourteenth Amendment.*

The Fourteenth Amendment's Due Process Clause should entitle a defendant to an affirmative insanity defense that analyzes moral culpability. In relevant part, the Fourteenth Amendment states, "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. A traditional insanity defense is defined by the defendant's ability to judge right from wrong, and if proven, provides a complete defense to the offense charged. *Delling v. Idaho*, 133 S.Ct. 504, 504 (2012) (Breyer, J., dissenting from a denial of certiorari); Michael R. Shoptaw, *M'Naghten is a Fundamental Right: Why Abolishing the Traditional Insanity Defense Violates Due Process*, 84 Miss. L.J. 1101, 1118-19 (2015). States have the power to construct their own insanity defense statutes. A state's statutory test for insanity violates the Due Process Clause if the state rule offends a "principle of justice so rooted in the traditions and conscience of [the] people as to be ranked as fundamental." *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (quoting *Patterson v. New York*, 432 U.S. 197, 201–202 (1977)).

1. <u>The affirmative insanity defense is deeply rooted in American tradition.</u>

The insanity defense has been recognized for its necessity since common law. *Sinclair v. Mississippi*, 132 So. 581, 583 (Miss. 1931). The traditional insanity defense cemented itself into American law one-hundred and seventy-six years ago when Daniel M'Naghten attempted to assassinate the prime minister of Britain. *Finger v. Nevada*, 27 P.3d 66, 72 (Nev. 2001). Following

the incident, the House of Lords and Queen Victoria deemed it important that the insane not be punished. *Id.* The American people, too, deemed this prohibition important and adopted the test into state law. *Id.* The original M'Naghten test was two-pronged: the first prong deals with whether or not the defendant knew what she was doing, and the second prong analyzes whether a defendant knew that what she is doing is wrongful. *Id.* State legislatures modified the M'Naghten test in varying forms but not varying function. *Clark*, 548 U.S. at 750-51. Each test still includes the evaluation of moral culpability, with a small exception of five states who have adopted a *mens rea* approach. *Id.* State courts ratified, and this Court vindicated the traditional insanity defense since the adoption of the *M'Naghten* rule. *Robinson v. California*, 370 U.S. 660, 666-67 (1962); *Finger*, 27 P.3d at 84; *Louisiana v. Lange*, 123 So. 639, 641-42 (1929); *Sinclair*, 132 So. at 584; *Washington v. Strasburg*, 110 P. 1020, 1027 (Wash. 1910). These cases are not remote; they are well settled law and tradition. The affirmative insanity defense first found its American validity in common law, and the support for the defense has continued into modern era.

The traditional insanity defense was recognized over a century ago but is still utilized in present day. *Clark*, 548 U.S. at 750-52. This Court in *Montana v. Egelhoff*, held that a principle, which had only been adopted by one-fifth of the states, could not be considered fundamental under the Fourteenth Amendment. *Egelhoff*, 518 U.S. at 48. Currently, nearly every state has adopted a version of the traditional insanity defense, exemplifying its place as a fundamental right among the American people. *Clark*, 548 U.S. at 750-52. The *Egelhoff* Court went on to say that a defense of voluntary intoxication cannot be validated under the Constitution because it "displaces a lengthy common-law tradition which remains supported by valid justifications." *Egelhoff*, 518 U.S. at 51. A state's adoption of a *mens rea* approach to the insanity defense "displaces a lengthy common-law tradition" a value held by the American people since 1843. *Id.*

2. An insanity defense that analyzes the defendant's ability to distinguish right from wrong is the constitutional minimum.

A state's statutory insanity defense must, at minimum, require analysis of the defendant's moral culpability. Arizona instituted an insanity test that evaluated only the defendant's ability to tell right from wrong; defendant challenged the constitutionality of the statute. *Clark,* 548 U.S. at 735. In *Clark*, this Court noted that it had neither recognized nor repudiated a defendant's right to an affirmative insanity defense. *Id.* at 752. This Court stated, however, that Arizona's statutory scheme did not offend a "constitutional minimum." *Id.* at 753. This language indicates that the Supreme Court believes that a constitutional minimum exists regarding the affirmative insanity defense; a test that focuses on the defendant's ability to know right from wrong satisfies that minimum prong. Thus, this Court should hold that the Fourteenth Amendment mandates an insanity defense. States may fashion their own insanity defense, but in so doing, must include an inquiry into a defendant's ability to differentiate between right and wrong. *Id.*

This Court should decide the issue of whether an affirmative insanity defense is constitutionally required. States that have abolished the insanity defense on the basis that this Court has not explicitly stated that the affirmative insanity defense is a fundamental right. This Court implicitly ruled that there are constitutionally required minimums to an insanity defense, and it now has the opportunity to define that minimum consistent with the values of the Fourteenth Amendment. *Id.* at 752. Congress had the opportunity to remove an evaluation of a defendant's ability to tell right from wrong following the John Hinckley acquittal, but explicitly chose not to. *Finger*, 27 P.3d at 80 (citing H.R. Rep. No. 98–577 at 7–8 (1983)). This Court noted that there is a constitutional minimum, and it now has the opportunity to define this minimum consistent with its holding in *Clark.*

3. Mens rea in serious crimes must incorporate an element of knowing wrongfulness.

In order for a criminal defendant to possess the requisite criminal intent for conviction, she must have understood the wrongfulness of her actions. *Finger*, 27 P.3d at 79; *Sinclair*, 132 So. at 584. The *Sinclair* court reasoned that intent requires the ability to exercise reasoning power. *Sinclair*, 132 So. at 584. The defendant must have "clearly understood" the result of a criminal act with which she has been charged. *Id.* For a defendant to truly understand the consequences of his or her act, he or she must also understand that their actions are wrong and prohibited by law. *See Id.* at 585.

A commonly used example of how to negate *mens rea* via insanity is when a person murders someone via strangulation, but she thought she was squeezing a lemon. *Utah v. Herrera*, 895 P.2d 359, 362 (Utah 1995) (citations omitted). This scenario would negate the defendant's *mens rea* because the person could not intend to kill someone if they thought they were squeezing a lemon. There is no difference in moral culpability between the fictional, lemon-squeezing defendant and Ms. Frost; neither defendant was aware of the wrongfulness of her actions. The Utah Supreme Court held that if a defendant thought that she was squeezing a lemon there is no *mens rea*, but if a defendant legitimately believed that she was acting in self-defense, she would still be acting with criminal intent. *Id.* "The distinction is irrational and has no theoretical legitimacy. It cannot be justified on any of the underlying bases of our criminal jurisprudence." *Id.* at 388 (Durham, J., dissenting) (referring to a defendant believing they are only squeezing a fruit is able to negate criminal culpability). Therefore, neither could have formed a criminal intent, but a *mens rea* approach will still subject one of them to prison, that person being Ms. Frost.

Criminal intent encompasses a defendant's ability to differentiate right from wrong. *Finger*, 27 P.3d at 79. Intent requires that the defendant both intended to a certain act and had

knowledge that the act is illegal because it is wrong. *Id.* An offense of murder generally requires a defendant to have the intent to kill with malice aforethought or a similar analysis. *Id.* Given this, the affirmative insanity defense and proving *mens rea* are laced together. To abolish the insanity defense or define it so narrowly would require states to re-write the intent element of many of their criminal statutes but most importantly their murder statutes. *Sinclair*, 132 So. at 584 (holding that malice is a crucial element of murder).

Due Process proscribes the punishment of defendants who do not possess the necessary criminal intent and requisite "guilty mind." *Finger*, 27 P.3d at 79; *Herrera*, 895 P.2d at 387 (Durham, J., dissenting) (quoting Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 Utah L.Rev. 635, 636). Ms. Frost did not have guilty mind because she was unable understand the consequences of her act. R. 5-6. Ms. Frost believed that she had done the decedent a "great favor" and hoped that Smith would be reincarnated as a chicken. R. at 3.

Courts who have adopted a *mens rea* approach have stressed that having the intent to kill is enough, even when acting under a delusion. *Herrera*, 895 P.2d at 366. In *Lord v. Alaska*, the court held the method of murder employed by the defendant inferred her criminal intent because she shot the victims in the back of the head and was consciously aware their lives were being taken. *Lord v. Alaska*, 262 P.3d 855, 857, 859 (Alaska Ct. App. 2011). In contrast, Ms. Frost did not understand the wrongfulness of her actions thus could not have the requisite intent to kill. R. at 3. Adopting a *mens rea* approach treats mental defects as a one-size fits all sweater, yet every defendant pleading insanity suffers from something different. The insanity defense protects those acting under a delusion because their intent is fatally flawed. *Finger*, 27 P.3d at 75. To prohibit defendants from using an affirmative insanity defense when they were acting under a psychotic

delusion "treats all criminal intent more like an aspect of strict liability." *Id.* East Virginia's E. Va. Code § 21-3439 violates Due Process because it subjects a person who lacks criminal intent to punitive punishment.

4. A *mens rea* approach unconstitutionally shifts the burden of proof to the defendant for the element of intent.

Due Process requires prosecution prove beyond a reasonable doubt every element of the crime charged. *In re Winship*, 397 U.S. 358, 364 (1970). In *Utah v. Herrera*, the court stated that if a defendant was forced to disprove *mens rea* it would shift the burden of proof and would be unconstitutional under the Fourteenth Amendment. 895 P.2d at 368. East Virginia Code § 21-3439 provides that "evidence of a mental disease or defect is admissible to disprove competency to stand trial or to disprove a *mens rea* element of an offense." R. at 4. The legislature of East Virginia has openly embraced letting the defendant disprove an element of the crime charge in order to abolish the traditional insanity defense. This burden shifting is unconstitutional; it ignores and violates foundational elements of American jurisprudence that require the government to prove every element of an offense beyond and to the exclusion of any reasonable doubt.

5. The traditional insanity defense better serves a compelling state interest, and a mens rea approach is not narrowly tailored to meet the requirements of strict scrutiny.

An affirmative insanity defense is a fundamental right under the Fourteenth Amendment and there are only limited situations where a state may limit that right. *See Clark*, 584 U.S. at 753 (holding that a statutory insanity defense has constitutionally required minimums). An abridgement of a constitutionally guaranteed right is only permitted when necessary to further a compelling state interest and must be narrowly tailored to achieve its goal. *Roe v. Wade*, 410 U.S. 113, 155 (1973). While states do have a compelling state interest in protecting citizens from criminal offenders, there is a greater state interest in rehabilitating offenders suffering from mental

defects instead of imprisoning them. *See Ewing v. California*, 538 U.S. 11, 25 (2003) (holding that one of the four hallmarks of penal goals is rehabilitation of the offender). Putting someone with a mental disease behind bars with minimal psychiatric treatment will not rehabilitate them, and they will pose the same risks to the community upon release. Stephen M. LeBlanc, *Comment: Cruelty to the Mentally Ill: An Eighth Amendment Challenge to the Abolition of the Insanity Defense*, 56 Am. U.L. Rev. 1281, 1319-21 (2007). The traditional insanity defense is complete and allows for the justice system to place the offender under the supervision of a mental health facility until they no longer pose a threat to the community. *Jones v. United States*, 463 U.S. 354, 370 (1983). The traditional insanity defense better serves a compelling state interest because members of the public remain protected, and the state's interest in rehabilitating the mentally ill can still be served.

An abolishment of the insanity defense is not narrowly tailored since it represents complete destruction of the right to an insanity defense. A *mens rea* approach only allows a defendant to present evidence negating their intent and does away with the longstanding tradition of proving insanity via moral culpability. This approach would subject a veteran suffering from post-traumatic stress disorder to imprisonment if he was hallucinating that he was on the battlefield and shot someone due to the delusion. The veteran would know that he was killing someone, but he would not understand the wrongfulness of his actions; in fact, he may believe that what he is doing will result in an overall good. This is similar to Ms. Frost who was unable to understand that her actions were wrong due to her mental defect. Adopting a *mens* rea approach subjects both the hypothetical veteran and Ms. Frost to prison instead of giving them the psychiatric help they need. Protecting the public has been successfully achieved for nearly two centuries by allowing defendants the traditional insanity defense, thus legislative abolishment of the defense is not a narrowly tailored means of achieving any state interest.

B. *Ms. Frost's Imprisonment Violates Her Eighth Amendment Right and Subjects Her To Cruel And Unusual Punishment.*

The traditional insanity defense that evaluates a defendant's ability to tell right from wrong during the commission of a crime is constitutionally required under the Eighth Amendment. The Eighth Amendment states "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Cruel and unusual punishment that violates the Eighth Amendment is defined by criminal punishment that was either "condemned by the common law in 1789" or that violates "fundamental human dignity" as observed in "evolving standards of decency that mark the progress of a maturing society." *Ford v. Wainwright*, 477 U.S. 399, 405-06 (1986).

1. The common law condemned the subjection of a morally inculpable defendant to punitive punishment, and the validity of an insanity evaluation has been recognized by the Supreme Court.

An affirmative insanity defense based on moral culpability has been recognized by common law and is still a frequent fixture in the American justice system. *See* Shoptaw, *supra* at 1106 (finding that the insanity defense has roots in ancient Greek and Roman doctrines and has been used as a "tool for pardon" since early English common law); *see also Finger*, 27 P.3d at 72. The Supreme Court of the United States has recognized the utility of an insanity evaluation when an offender lacks moral culpability to understand his present situation. *See Ford*, 477 U.S. at 417-18. In *Ford v. Wainright,* this Court held that under the Eighth Amendment an insane person cannot be executed because they lack an understanding of the reasons for punishment and its implications. *Ford,* 477 U.S. at 417-18. Similar principles have been adopted concerning the execution of the mentally retarded and juvenile offenders because of a lack of ability to understand an offense or implications of punishment. *Roper v. Simmons*, 543 U.S. 551, 567-68 (2005) (holding that it is

unconstitutional under the Eighth Amendment to execute juveniles due to diminished culpability); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (holding that the death penalty for mentally retarded offenders is cruel and unusual punishment due to a lack of moral culpability). In *Ford*, *Roper*, and *Atkins*, this Court repeatedly established that defendants lacking moral culpability do not deserve the same punishment as a fully functioning defendant.

The Eighth Amendment should ensure that insane defendants be treated differently than sane defendants. This Court already recognizes that defendants who commit capital crimes and are adjudged insane should not be treated in the same manner as a sane defendant who commits the same crime. *Ford*, 477 U.S. at 417-18. This principle should also apply to the manner of confinement that insane defendants face. This ideal is not new to constitutional or criminal law as the Fourth, Fifth, and Sixth Amendments already apply evenly to similarly situated criminal defendants. LeBlanc, *supra* at 1308-09. Ms. Frost is a diagnosed paranoid schizophrenic who was in a psychotic state during the commission of the crime, and she lacked the necessary moral culpability necessary under this Court's previous Eighth Amendment analysis in *Roper* and *Atkins*.

2. Abolishing the insanity defense violates evolving standards of decency.

Punishing Ms. Frost for the actions that her disease induced violates fundamental human dignity and does not comport with evolving standards of decency. In *Robinson v. California*, this Court held that someone addicted to narcotics could not be sent to prison on the sole basis that they were an addict because it punishes a disease. *Robinson*, 370 at 666-67. Requiring those with a mental defect to answer for the offense with punitive punishment instead of rehabilitation penalizes the disease. *Sinclair*, 132 So. at 590. The *Ford* Court held that "[i]t is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications. *Ford*, 477 U.S. at 422.

The lower court's reliance on *Kansas v. Bethel* to negate this proposition is misguided. The *Bethel* court held—without explanation—that because Kansas's statutory insanity defense did not expressly or effectively outlaw mental disease, it did not punish the mental defect. *Kansas v. Bethel*, 66 P.3d 840, 862 (Kan. 2003). Moreover, the defendant in *Bethel* was diagnosed with schizophrenia before the offense occurred, whereas Ms. Frost was unaware she was suffering from a mental disease when the commission of the offense occurred. *Id.* at 843; R. at 3. Ms. Frost was in a psychotic state suffering from delusions at the time of the alleged offense and inflicting a punitive sentence on her effectively punishes her for the chemical makeup of her brain. R. at 4.

The lower court's reliance on *Montana v. Korell* is also misplaced. 690 P. 2d 992 (Mont. 1984). Montana's legislature abolished insanity as an affirmative defense, but if the defendant was adjudged insane, the court was required to place that person in "an appropriate institution for custody, care and treatment," which included appropriate mental institutions. *Korell*, 690 P.2d at 1001. Although defendants in Montana can be convicted of crimes, they will not be punished in the same manner as those defendants who don't suffer mental abnormalities. East Virginia has not provided similar remedial action for Ms. Frost even though she is unquestionably suffering from a mental disease. R. at 4-6.

Allowing the insane to receive rehabilitation treatment accomplishes what the traditional insanity defense provides. The *Ford* Court stated "[i]t is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Ford*, 477 U.S. at 417. The lower court affirmed Ms. Frost's lifetime condemnation because she was unable to comprehend the difference between right and wrong. R. at 1, 3. When a disease instead of the defendant is responsible for an action, it would be cruel and unusual, indeed, to punish the nonculpable host.

3. Legislation and policy in the United States represent a consensus of support for requiring an affirmative insanity defense.

A review of state legislation and policy reflects overwhelming support for the necessity of an affirmative insanity defense. *Clark*, 548 U.S. at 750-51; s*ee also Atkins*, 536 U.S. at 312 (holding that an Eighth Amendment analysis requires evaluating state legislation and policy addressing the punishment); LeBlanc, *supra* at 1312-13. The traditional insanity defense—where moral inculpability provides a complete acquittal with potential to be civilly committed—is represented in the United States in three different forms. *Jones*, 463 at 370; LeBlanc, *supra* at 1287-88. Forty-five states recognize one of these insanity defenses; emphasizing the mass amount of public support for an affirmative insanity defense. *Clark*, 548 U.S. at 750-51. *Atkins* and *Roper* evaluated public support via state policy, and even though there was less state support for halting the executions of the morally inculpable, this Court reasoned there was enough of a consensus established. *Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 321. The majority of states recognize the necessity for an affirmative insanity defense while a minority of five other states have adopted a *mens rea* approach. *Clark*, 548 U.S. at 750-51. An evaluation of current state policy satisfies the Eighth Amendment analysis under *Atkins*.

4. A *mens rea* approach does not advance penal goals and creates an excessive penalty for insane offenders.

A punitive sentence for an offender suffering from a mental defect does not advance the penal goals of retribution, deterrence, rehabilitation, and incapacitation. LeBlanc, *supra* at 1314-22. Retribution establishes a connection between the blameworthiness of the defendant and the imposed punishment. *Atkins*, 536 U.S. at 319. However, a person who cannot differentiate between right and wrong does not possess the same blameworthiness as a sane person because without the disease, the offense would not have occurred. The *Atkins* and *Ford* Court held that for retribution

goals to be served when handling an inculpable offender there needs to be a lesser punishment in order to establish the connection retribution requires. *Atkins,* 536 U.S. at 319; *Ford,* 477 U.S. at 422 (Powell, J., concurring).

Punishing an insane defendant under a *mens rea* approach does not deter others from committing a similar offense because those who lack moral culpability are unable to determine when an action is wrong. LeBlanc, *supra* at 1318-19. A criminal punishment is used to exemplify what is acceptable behavior and to deter society from committing unacceptable behavior. *Id.* at 1317-18. Other potentially insane offenders will not be deterred from committing crimes on the basis that insane offenders in the past received a punitive sentence. *Id.* at 1318; *see also Sinclair*, 132 So. at 584 (holding "the punishment of the insane will not prohibit or deter another insane person from doing another similar act . . . it is certainly shocking and inhuman to punish a person for an act when he does not have the capacity to know the act or to judge of its consequences.") Because there is no elevated level of deterrence when a *mens rea* approach is adopted, the proper rule should be an insanity defense that ensures that only morally culpable defendants are convicted. Ms. Frost is not such a defendant.

Imprisoning insane offenders does not serve society's long-term interest. The goal of incapacitation is to protect other people from dangerous offenders to prevent future crimes. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). Sentencing insane offenders to prison likely means they will not receive the psychiatric help they are in need of so that they can rejoin society as safe, functioning member. *United States v. Freeman*, 357 F.2d 606, 615, 626 n.61 (2d Cir. 1966). The country's long-term interest is to rehabilitate those suffering from a mental defect and the only way to provide that rehabilitation and make society a safe place is to provide them with medical

treatment. *Id.* Ms. Frost and the community are better served if she is given mental rehabilitation; East Virginia's new prohibition on the insanity defense precludes that option.

Criminal punishments are prescribed based on the offense committed and the offender's blameworthiness, and excessive punishments are unconstitutional under the Eighth Amendment. *Coker v. Georgia*, 433 U.S. 584, 598 (1977). "Free will is a necessary attachment of moral blame." LeBlanc, *supra* at 1323. Dr. Desiree Frain testified that Ms. Frost was unable to understand that her conduct was wrong. R. at 4. Blameworthiness is not assigned to Ms. Frost because she lacked necessary free will. When an insane person commits a crime, it is their mental disease that is to blame for their action instead of themselves. *Robinson*, 370 at 666-67. Imprisoning Ms. Frost for life creates a disproportionate punishment to the offense she committed while in a psychotic state. Because subjecting an insane person to the same punishment for an act as a sane person is excessive and offends our notions of fairness, East Virginia's *mens rea* statute violates the Eighth Amendment's prohibition against cruel and unusual punishment.

CONCLUSION

The East Virginia Supreme Court erred as a matter of law. It failed to consider the totality of the circumstances surrounding Ms. Frost's interrogation. It improperly focused solely on Officer Barbosa's conduct and his perception of Ms. Frost, and failed to consider her inability to understand her *Miranda* warnings and the consequences of waiving them. Its misapplication of this Court's precedent was further error. Accordingly, this Court should reverse the East Virginia Supreme Court and hold that Ms. Frost did not waive her *Miranda* rights knowingly and intelligently.

This Court should hold E. Va. Code section 21-3439 unconstitutional under the Eighth and Fourteenth Amendments. The traditional insanity defense is so rooted in American tradition that its abolishment represents a violation of a fundamental human right. The application of a *mens rea*

approach does not meet a prescribed constitutional minimum and violates Ms. Frost's right to Due Process. Incarcerating insane defendants instead of rehabilitating them violates evolving standards of decency. Ms. Frost suffers from a mental disease, and mandating she spend the rest of her life in prison subjects her to cruel and unusual punishment.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS