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 RESPONDENT

TEAM E
Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether an individual knowingly and intelligently waives her *Miranda* rights when, based on the totality of circumstances surrounding a custodial interrogation, police perceive no indication that defendant was anything but lucid and cognitively aware?

II. Whether a State's abolishment of an affirmative insanity defense through the recognized legislative power to choose its own methods of criminal procedure violates the Due Process Clause of the Fourteenth Amendment or the Cruel and Unusual Punishment Clause of the Eighth Amendment.

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CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves questions relating to the Fifth Amendment right not to be compelled to incriminate oneself, the Eighth Amendment right not to be subject to cruel and unusual punishment, and the Fourteenth Amendment right to Due Process. This case also concerns E. Va. Code § 21-3439, which abolishes an affirmative insanity defense and substitutes a *mens rea* approach to evidence of mental impairment in a criminal trial.

STATEMENT OF JURISDICTION

The Supreme Court of East Virginia entered a judgment on December 31, 2018. This Court granted the petition for a Writ of Certiorari on July 31, 2019. This Court has jurisdiction under 28 U.S.C. § 1257 because a right is claimed under the Constitution and the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution.

STATEMENT OF THE CASE

I. Statement of Facts

The Victim

Christopher Smith worked as a federal poultry inspector for a U.S. Department of Agriculture office in rural Campton Roads, East Virginia. R. at 2. On June 10, 2017, Smith and his girlfriend, Linda Frost, argued on the phone. R. at 2. Smith's sister, Christa, observed that the call upset Smith but did not hear the conversation. R. at 2. A week later, on June 17, 2017, a co-worker found Smith dead in his office. R. at 2.

June 16, 2017

The night of Smith's murder, Frost worked a shift from 2 p.m. to 8 p.m. at Thomas's Seafood Restaurant and Grill. R. at 2. The Friday-night dinner crowd kept the restaurant so busy that no one observed the exact time that Frost left. R. at. 2. Frost did not clock in or out because she was filling in for a co-worker last minute. R. at 2. Two eyewitnesses saw a woman matching Frost's description near the entrance of Lorel Park very late on June 16, 2017. R. at 2. However, the eyewitnesses were too far away to identify Frost definitively. R. at 2.

The Interrogation

The Campton Roads Police Department brought Frost in for questioning based on an anonymous tip. R. at 2. Officer Nathan Barbosa read Frost her *Miranda* rights and Frost then signed a written waiver of said rights. R. at 2. Officer Barbosa asked Frost if she wanted to talk about Smith, and she nodded. R. at 2. According to Officer Barbosa's testimony, Frost's demeanor raised no concerns or suspicions about her competency. R. at 2. Officer Barbosa then informed Frost that someone found Smith's body. R. at 3. When Officer Barbosa asked Frost if she knew who might have killed Smith, Frost blurted out, "I did it. I killed Chris." R. at 3. Officer Barbosa asked Frost to elaborate, to which she replied, "I stabbed him, and I left the knife in the park." R. at 3.

After Frost confessed to killing Smith, she began showing signs of a possible mental disease. Frost stated that "voices in her head" told her to "protect the chickens at all costs." R. at 3. After listening to Frost make a few more unusual statements, Officer Barbosa asked Frost if she wanted a court appointed attorney. R. at 3. When Frost responded affirmatively, Officer Barbosa promptly ended the interrogation. R. at 3.

The Investigation

After Frost's confession, the police searched every park in Campton Roads. R. at 3. In Lorel Park, police found a bloody steak knife hidden under a bush. R. at 3. The knife contained no fingerprints, but DNA tests confirmed that Smith's blood covered the knife. R. at 3. Police also matched the knife to a set from Frost's house. R. at 3. The coroner concluded that Smith died between 9 p.m. and 11 p.m. on June 16, 2017 as a result of multiple stab wounds from a knife like the one found in the park. R. at 3.

The Diagnosis

While Frost awaited trial in prison, Dr. Desiree Frain, a clinical psychiatrist, diagnosed Frost with paranoid schizophrenia. R. at 3. Dr. Frain prescribed medications as part of Frost's treatment. R. at 3. Before meeting with Dr. Frain, Frost had never been diagnosed with any mental disorder, nor had she received any mental health treatment or taken any medication for a mental condition. R. at 3–4.

East Virginia Law

In 2016, the East Virginia legislature adopted E. Va. Code § 21-3439, which abolished the traditional *M'Naghten* rule for the insanity defense in favor of a *mens rea* approach. R. at 4. The East Virginia legislature modeled E. Va. Code § 21-3439 after similar statutes in other states. R. at 4. Under the new East Virginia statute, the inability to distinguish right from wrong is no longer a defense. R. at 4. However, the new statute allows admission of evidence of a mental disease or defect to disprove competency to stand trial or to disprove the *mens rea* element of an offense. R. at 4. In other words, under East Virginia law, evidence of an accused's mental defect is inadmissible to establish an insanity defense. R. at 4.

II. Procedural History

Federal Court

Frost was indicted in federal court for Smith's murder and tried in the United States District Court for the Southern District of East Virginia under 18 U.S.C. § 1114 (2019). R. at 4. The District Court found Frost competent to stand trial. R. at 4. Dr. Frain testified to Frost's mental state on the dates of June 16 and June 17, stating that it was highly probable that Frost was in a psychotic state and having severe delusions and paranoia. R. at 4. According to Dr. Frain, Frost could not control or fully understand the wrongfulness of her actions while in her psychotic state. R. at 4. Frost was acquitted on the basis of insanity, which is a federal defense allowed under 18 U.S.C. § 17(a) (2019). R. at 4.

State Court

Frost was then indicted and tried for murder in the State of East Virginia. R. at 4. Frost's attorney filed a motion to suppress Frost's confession and a motion challenging the constitutionality of the abolition of the insanity defense under E. Va. Code § 21-3439. R. at 5. Circuit Court Judge Joshua Hernandez found Dr. Frain's testimony to be inadmissible and denied both motions. R. at 5. The jury convicted Frost of murder and Judge Hernandez sentenced her to life in prison. R. at 5. On appeal, the Supreme Court of East Virginia affirmed the Circuit Court decision that Frost's confession was admissible because she voluntarily, knowingly and intelligently waived her *Miranda* rights. R. at 5. The Supreme Court of East Virginia also affirmed the Circuit Court's holding that E. Va. Code § 21-3439 does not violate the Eighth or Fourteenth Amendments. R. at 7.

SUMMARY OF THE ARGUMENT

First, The Supreme Court of East Virginia correctly held that police abuse is a prerequisite for finding a *Miranda* waiver to be unknowing and unintelligent. While this Court has only explicitly held police abuse is required for the voluntary inquiry of *Miranda* waivers, it can be inferred that this rule also applies to the knowing and intelligent prong of *Miranda*. This Court has held that "the Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege" to make a knowing and intelligent waiver. *Colorado v. Spring*, 479 U.S. 564, 573 (1987). In analyzing whether police abuse occurred, courts must focus on the totality of the circumstances. If a reasonable police officer, given the totality of the circumstances, would believe the defendant appeared to understand her rights, then the accused's waiver can be said to be knowing and intelligent. Not only the aforementioned precedent, but also strong policy concerns regarding the safety of the American public and the purpose of *Miranda*, demonstrate that police abuse should be a prerequisite to find a waiver unknowing and unintelligent. Because no police abuse occurred in Frost's case, this Court should affirm the decision of the Supreme Court of East Virginia and hold that Frost knowingly and intelligently waived her *Miranda* rights.

Second, The Supreme Court of East Virginia correctly held that East Virginia's *mens rea* approach does not violate the Due Process Clause of the Fourteenth Amendment. No insanity defense is so rooted in the traditions and conscience of the American people as to be ranked as fundamental. Because no definitive version of the insanity defense currently exists or has existed at any point in American history, East Virginia's decision to abolish the insanity defense and substitute a *mens rea* approach does not offend a fundamental principle. Nor does the Constitution mandate the States provide an affirmative insanity defense. States enjoy wide

latitude concerning the manner in criminals are convicted. This Court should not intrude on state power by constitutionalizing a rigid affirmative insanity defense. This matter is better left to state legislatures. This Court should affirm the decision of the Supreme Court of East Virginia and hold that E. Va. Code § 21-3439 does not violate the Due Process Clause of the Fourteenth Amendment.

Third, the Supreme Court of East Virginia correctly held that East Virginia's *men rea* approach does not violate the Eighth Amendment. The Cruel and Unusual Punishment Clause of the Eighth Amendment prohibits certain punishments. However, E. Va. Code § 21-3439 does not impose a punishment. Rather, the statute addresses only the guilt stage of a criminal prosecution. Even if the Court finds that the statute falls under the Cruel and Unusual Punishment Clause, East Virginia's *mens rea* approach is not cruel and unusual. Under East Virginia's *mens rea* approach, a criminal defendant is still provided the opportunity to put on a complete case, showing he did not possess the requisite *mens rea*. In sum, East Virginia's decision to channel evidence of mental illness into the element of *mens rea* does not eliminate the prosecution's burden to prove *mens rea* beyond a reasonable doubt, nor does it convict or punish a criminal defendant simply because they are mentally ill. This Court should affirm the decision of the Supreme Court of East Virginia and hold that E. Va. Code § 21-3439 does not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment.

ARGUMENT

I. A defendant's subjective lack of understanding of her *Miranda* rights due to mental illness does not preclude her from knowingly and intelligently waiving those rights.

The United States Constitution protects individuals from compulsory self-incrimination. U.S. Const. amend. V. When police subject individuals to custodial interrogation, this Court has interpreted the Constitution as requiring additional "procedural safeguards" to ensure the free exercise of Fifth Amendment rights. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Police must advise an individual of her "*Miranda*" rights before questioning. *Id.* A defendant may then choose to waive her rights and submit to questioning. *Id*. That said, courts will only admit statements given after a defendant voluntarily, knowingly and intelligently waives her rights. *Id*. This Court later clarified that the *Miranda* rule breaks down into two separate requirements: (1) the waiver must be made voluntarily and (2) the waiver must be made knowingly and intelligently. *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

While this Court has unequivocally stated the analysis required for the voluntariness inquiry, the knowing and intelligent inquiry remains a source of debate. In *Connelly*, the Supreme Court held "that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'…." *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Today, this Court must determine whether *Connelly* also applies to the knowing and intelligent inquiry.

This Court should affirm the judgment of the Supreme Court of East Virginia and hold that Frost knowingly and intelligently waived her Fifth Amendment rights for two reasons. First, an unknowing or unintelligent *Miranda* waiver requires a finding of police coercion under *Connelly*. Second, there is no evidence of police coercion surrounding Frost's waiver.

A. Police coercion is a prerequisite to finding that an individual's waiver of *Miranda* rights was not knowing and intelligent.

Courts disagree as to the correct analysis of the knowing and intelligent inquiry. In *Colorado v. Spring*, this Court held that "the Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege" to make a knowing and intelligent waiver. *Spring*, 479 U.S. at 573. Since *Spring*, courts have debated the full extent of *Connelly's* application to this prong of the waiver analysis. *Woodley v. Bradshaw*, 451 F. App'x. 529, 540 (6th Cir. 2011) ("We note that a circuit split has developed on whether the holding of *Connelly* applies to the knowing and intelligent inquiry as well as to the voluntariness one."). Some courts focus on the subjective understanding and mental capacity of the defendant, regardless of police conduct. *Id*. Others, like the Supreme Court of East Virginia, read *Connelly* and *Spring* as requiring evidence of police abuse to show that a waiver was made unknowingly and unintelligently. *Id*.

Courts that require a finding of police abuse rely on the *Spring* holding as the constitutional backbone of the waiver analysis. Because "the Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege" to make a knowing and intelligent waiver, courts need not attempt to discern a defendant's subjective mindset at the time of waiver. *Spring*, 479 U.S. at 573. Instead, courts can focus on police conduct to determine if coercion or abuse occurred. This analysis adheres to both the stated purpose of the *Miranda* requirement—deterring abusive police conduct—and prior decisions made by this Court. For instance, when this Court explained the two requirements of a *Miranda* waiver in *Moran v. Burbine*, "[a]t no point did the … Court say that one of the two dimensions is to be examined from the perspective of the police while the other is to be examined from the perspective of later scientific inquiry." *Garner v. Mitchell*, 557 F.3d

257, 263 (6th Cir. 2009). The Sixth Circuit in *Garner* explained that "[t]he underlying police-regulatory purpose of *Miranda* compels that these circumstances be examined, in their totality, primarily from the perspective of the police." *Id*.

In sum, because the police coercion requirement is consistent with jurisprudence and the underlying goal of the *Miranda* requirement, this Court should agree with the Circuit Courts that apply *Connelly* to the knowing and intelligent inquiry as well as the voluntariness inquiry. In *Woodley*, the Sixth Circuit applied *Connelly* in holding "evidence of police abuse – such as disregarding signs that a defendant is incapable of making a rational waiver in light of his age, experience, and background" is a prerequisite to concluding a *Miranda* waiver was not knowing and intelligent. *Woodley*, 451 F. App'x at 540.

The Seventh Circuit has also agreed with this approach, placing the emphasis on police abuse. *Rice v. Cooper*, 148 F.3d 747, 751 (7th Cir. 1998). The Seventh Circuit reasoned that "[t]he relevant constitutional principles are aimed not at protecting people from themselves but at curbing abusive practices by public officers." *Id*. at 750. Thus, "the knowledge of the police is vital." *Id*. If a defendant's mental illness is not readily apparent to a questioning officer, then the officer has no reason to suspect that the defendant does not understand their *Miranda* warnings. Where police do not suspect a lack of understanding, no abusive police behavior occurs. *Id*. The Seventh Circuit in *Rice* concluded that the question posed should be whether the questioning officers believed the defendant understood their *Miranda* rights—not whether if the defendant were more intelligent, informed, balanced, and so on, he would not have waived said rights. *Id*. at 750–51.

1. Courts analyze the totality of circumstances surrounding a custodial interrogation to determine if police coercion occurred.

This Court has established that courts must analyze "the totality of circumstances surrounding the interrogation" when determining whether a *Miranda* waiver is voluntary, knowing and intelligent. *Fare v. Michael C.*, 442 U.S. 707, 724–25, (1979); *see Garner*, 557 F.3d at 263. This Court has further clarified the weight that should be given to each circumstance, stating that evidence of diminished mental capacity alone is insufficient to find a *Miranda* waiver invalid. *Connelly*, 479 U.S. at 164. Courts consider medical evidence of the individual's mental illness or ability as *one* of the relevant circumstances surrounding an interrogation and a waiver. *Garner*, 557 F.3d at 264.

Other factors include the defendant's "age, experience, education, background, and intelligence. . . ." *Fare*, 442 U.S. at 725. Courts also consider "evidence of the defendant's conduct during, and leading up to, the interrogation." *Garner*, 557 F.3d at 265. Further, one's familiarity with the criminal justice system and the proximity of the waiver to the giving of the *Miranda* rights are factors that courts have at times considered relevant. *Poyner v. Murray*, 964 F.2d 1404, 1413 (4th Cir. 1992); *see McFadden v. Garraghty,* 820 F.2d 654, 661 (4th Cir.1987); *United States v. Cruz Jimenez,* 894 F.2d 1, 8 (1st Cir.1990); *U.S. ex rel. Patton v. Thieret*, 791 F.2d 543, 548 (7th Cir. 1986). Only when the totality of all relevant circumstances support not only that the waiver was made knowingly and intelligently, but also voluntarily, may a court find that a *Miranda* waiver is valid. *Moran*, 475 U.S. at 421.

a. Courts should examine the totality of circumstances from the perspective of the police officers involved.

To identify police coercion, courts should evaluate the totality of circumstances perceptible to the officers at the time of interrogation. In other words, the relevant inquiry is what an officer could have concluded at the time of interrogation based of the circumstances. *Garner*, 557 F.3d at 263. When an officer reasonably believes, based on the information available, that an individual understands her *Miranda* rights, there is no police coercion. *Rice*, 148 F.3d at 750. On the other hand, where a government agent makes a credible threat of physical violence to the individual being interrogated, resulting in the individual's will being overborne, police coercion has occurred. *Arizona v. Fulminante*, 499 U.S. 279, 288 (1991).

When police act reasonably and have no reason to suspect that an individual has misunderstood her *Miranda* rights, police behavior is not coercive. In *Rice*, the Seventh Circuit held that Rice, an illiterate, mildly retarded defendant, made a knowing and intelligent waiver because there was no evidence of police coercion. *Rice*, 148 F.3d at 752. Despite the testimony of multiple psychiatrists that Rice was "mentally incompetent to waive his rights under *Miranda*. . ." at the time of his arrest, the Seventh Circuit found that the police had no indication of Rice's incompetence. *Id* at 749. Officers testified that Rice "did not appear to be incapable of understanding. . ." before and during interrogation. *Id*. at 751. Although Rice expressed some confusion when policed informed him of his rights, the police explained his rights in simple terms and clarified that Rice understood before continuing. *Id*. The court held that the officers' reasonable inability to perceive Rice's incapacity precluded a finding of police coercion. *Id*.

b. Later-developed evidence of a mental disease is a relevant factor in evaluating police conduct for signs of coercion.

Later-developed evidence of mental incapacity may be relevant in assessing police conduct. A defendant's mental condition at the time of interrogation is one factor among the totality of circumstances surrounding a *Miranda* waiver. *Garner*, 557 F.3d at 264. Medical evidence of a mental condition may indicate that a defendant's mental disease was so apparent or obvious that police should have perceived the defendant's mental incapacity. Police failure to acknowledge mental incapacity where a reasonable officer would perceive the incapacity amounts to police coercion. *Id*. at 263. The Sixth Circuit explained this reasoning in *Garner*:

> Of course, while our primary focus must remain on what the interrogating officers could have concluded about Garner's ability to understand the warnings, we may consider later-developed evidence of a defendant's actual mental ability to understand the warnings at the time of the interrogation. This is because, if it turns out by subsequent inquiry that a defendant in his mind could not actually understand the warnings, the finder of fact may be more inclined to determine in a close case that the police should have known that the defendant could not understand.

Garner, 557 F.3d at 263.

In short, focusing the *Miranda* waiver analysis on police conduct does not make an individual's mental disease or capability irrelevant. Rather, courts should indeed consider later developed evidence of one's alleged mental defect to evaluate police conduct. In other words, courts should consider this evidence to confirm that interrogating officers did not commit abuse or coercion by ignoring apparent signs of mental illness.

2. The interests of American society support requiring a finding of police coercion prior to finding a waiver unknowing and unintelligent.

As demonstrated above, the precedent from this Court and lower courts throughout the country support the police coercion prerequisite. This precedent illustrates the constitutionality of holding police coercion as a prerequisite to finding a *Miranda* waiver unknowing and

unintelligent. The police coercion prerequisite is not only constitutionally permissible, but also supported by policy considerations and societal interests.

The scope of this decision extends beyond the fate of any one defendant. *Miranda* transformed criminal procedure in the United States by placing a duty of care on custodial interrogators. The decision in this case will similarly influence the behavior of defendants and police in conducting custodial interrogations. Public policy concerns encourage courts to focus on the conduct of police rather than the defendant's subjective mindset for three reasons. First, a subjective standard reduces the intended deterrent effect of the Fifth Amendment. Second, a subjective standard creates a proof issue that would increase the prevalence of false Fifth Amendment claims. Third, a subjective standard threatens public safety.

a. A subjective standard would contravene the deterrent purpose of the Fifth Amendment.

The Fifth Amendment acts as a deterrent for government abuses of power. "The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion." *Connelly*, 479 U.S. at 170. The Constitution mandates that courts exclude evidence acquired by police misconduct. *Miranda*, 384 U.S. at 444. By eliminating the incentive to abuse power, courts deter unacceptable police practices. This Court has also stated that "the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion'. . .," as police overreaching has always been the sole concern. *Connelly*, 479 U.S. at 170. (citing *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)). As this Court so eloquently stated in the context of the suppression evidence due to an allegedly involuntary waiver:

> [S]uppressing respondent's statements would serve absolutely no purpose in enforcing constitutional guarantees. The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the

> Constitution. See *United States v. Leon,* 468 U.S. 897, 906–913, 104 S.Ct. 3405, 3411–3415, 82 L.Ed.2d 677 (1984). Only if we were to establish a brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated—could respondent's present claim be sustained.

Connelly, 479 U.S. at 166.

In other words, the subjective standard directly counteracts the effectiveness of the stated purpose of the Fifth Amendment—deterrence—by incorrectly disregarding police conduct. An analysis that focuses solely on the defendant's subjective understanding does nothing to promote appropriate police conduct or to deter inappropriate police conduct. Rather, a subjective standard ignores the actions of the interrogating officers. Under the subjective approach, courts could exclude statements in circumstances where police act completely lawfully. An officer could perform his job in total compliance with the Constitution and yet still lose relevant evidence. This outcome contradicts the stated purpose of the Fifth Amendment, and thus looking only to a defendant's subjective mindset without regard to police abuse is an unacceptable rule. *Connelly*, 479 U.S. at 170.

b. A lesser, subjective standard would increase the prevalence of false Fifth Amendment claims.

A subjective analysis that focuses on a defendant's mental capacity and understanding presents a proof problem. No one can conclusively rebut a defendant's claim of a subjective lack of understanding. While courts would require evidence from medical records or experts to support a claim that the defendant could not knowingly and intelligently waive her *Miranda* rights, this evidence is highly subjective and often ambiguous.

The inexact nature of the subjective standard would encourage more defendants to make Fifth Amendment claims in an effort to bar the admission of statements made to police. While some defendants would certainly have legitimate claims, others would make fraudulent or

unsubstantiated claims in an attempt to avoid conviction. These added cries of "wolf" would weigh on the criminal justice system and deplete limited resources. The subjective standard cannot adequately differentiate the legitimate claims from the superficial claims.

c. The subjective standard threatens public safety.

"[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). The practice of confining or punishing individuals who threaten society began long before the United States Constitution. Criminal laws not only enforce a civilization's important values, but also protect innocent people from the individuals who disregard those values. The criminal justice system removes these individuals from society to maintain public safety and the status quo.

A subjective standard poses a great risk to public safety. As analyzed above, the subjective standard is ambiguous and imprecise. By focusing solely on a defendant's subjective understanding, courts would risk excluding invaluable confessions from individuals who have committed violent crimes with full understanding of their actions. The individuals could then be let free, creating a dangerous safety threat to the American public.

B. Frost made a knowing and intelligent *Miranda* waiver because police coercion did not influence her waiver.

Applying the aforementioned analysis to the facts of the current case, it becomes evident that no police abuse occurred. Thus, Frost made a knowing and intelligent *Miranda* waiver. The interrogating officer acted as any reasonable police officer would act. The totality of circumstances surrounding the interrogation provide no evidence of police abuse or coercion. Therefore, a reasonable police officer could not have concluded that Frost was incapable of understanding her rights.

During all the interactions with police before and during Frost's confession, Frost exhibited no outward signs of her mental condition that would raise any concerns or suspicions. R. at 2. In fact, Frost appeared to be objectively lucid and capable of waiving her rights when she signed the written waiver. R. at 5. Further, Frost had never before received a diagnosis of or treatment for any mental disorder. R. at 3–4. Although Dr. Frain later diagnosed Frost with delusions and paranoia that impeded her understanding, nothing in Frost's interaction with Officer Barbosa gave police any indication of Frost's condition—meaning Officer Barbosa was not attempting to take advantage of Frost's alleged mental disease. R. at 3–6. As the Supreme Court of East Virginia stated, "Officer Barbosa exercised due diligence in performing the interrogation lawfully." R. at 6.

In sum, Officer Barbosa's conduct does not suggest coercion of any kind. Before Frost's answers became muddled and illogical, Officer Barbosa had no reason to believe Frost to be anything less than competent. Upon his first suspicion of Frost's mental condition, Officer Barbosa asked Frost if she wanted a court appointed attorney. R. at 3. At her affirmative response, Officer Barbosa stopped the interrogation. R. at 3. There is no evidence that Officer Barbosa attempted to take advantage of or disregard Frost's diminished mental capacity. R. at 5. In conclusion, based on the totality of the circumstances discussed above, no police abuse occurred. Frost thus made a knowing and intelligent waiver of her *Miranda* rights.

II. East Virginia law does not violate the Fourteenth Amendment.

The Constitution guarantees every citizen's right to due process. U.S. Const. amend. XIV. A state's insanity rule violates the Due Process Clause only if the rule offends a "principle of justice so rooted in the traditions and conscience of [the] people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 201–02 (1977) (internal quotation marks

omitted) (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958) (holding that a state's authority to "regulate procedures under which its laws are carried out" will not be questioned under the Due Process Clause unless state action offends a "fundamental" principle that is rooted within the traditions of the American people)). Due process does not mandate an affirmative insanity defense for two reasons. First, the insanity defense is not "so rooted" within the traditions of the American people as to be fundamental. Second, determining an insanity defense is a policy matter best left to the States.

A. An affirmative insanity defense is not a fundamental principle of justice.

The traditional test for insanity developed from English caselaw. *M'Naghten's Case*, 8 Eng. Rep. 718 (1843). Under this *M'Naghten* rule, a defendant can establish an insanity defense if he can show that at the time of the act he did not know "the nature and quality" of her actions or that she did not know her actions were wrong. *Id*. at 722. Over time, states have developed numerous, diverse variations of the insanity rule. *Clark v. Arizona*, 548 U.S. 735, 749 (2006). "This varied background makes clear that no particular formulation [of the insanity defense] has evolved into a baseline for due process. . . ." *Id.* at 737. Because no definitive, singular insanity defense exists within the United States, an affirmative insanity defense is not a "principle of justice so rooted in the traditions and conscience of [the] people as to be ranked as fundamental." *Patterson*, 432 U.S. at 201–02. Justice Rehnquist affirmed this view in his dissenting opinion in *Ake v. Oklahoma*, in which he wrote: "[I]t is highly doubtful that due process requires a state to make available an insanity defense to a criminal defendant . . . ." *Ake v. Oklahoma*, 470 U.S. 68, 91 (1985).

East Virginia, along with four other states, eliminated the affirmative insanity defense in favor of a *mens rea* approach. State Supreme Courts in Idaho, Kansas, Montana, and Utah have

concluded that the *mens rea* approach does not deprive a criminal defendant of due process rights. *State v. Bethel*, 66 P.3d 840, 851 (Kan. 2003); *State v. Herrera*, 895 P.2d 359, 367 (Utah 1995); *State v. Searcy*, 798 P.2d 914, 919 (Idaho 1990); *State v. Korell*, 690 P.2d 992, 1002 (Mont. 1984). For example, in *Herrera*, the Supreme Court of Utah focused on the dissenting and concurring opinions in *Foucha v. Louisiana*:

> On an uncontested point, Justice Kennedy acknowledged, 'States are free to recognize and define the insanity defense as they see fit.' 504 U.S. at 96 . . . (Kennedy, J., dissenting). In a concurring opinion, Justice O'Connor emphasized that the Court's holding placed no new restriction on the 'States' freedom to determine whether and to what extent mental illness should excuse criminal behavior. The Court does not indicate that States must make the insanity defense available.' 504 U.S. at 88–89 . . . (O'Connor, J., concurring).

Herrera, 895 P.2d at 365. All four State Supreme Courts conclude this Court's prior opinions yield one result: the Constitution does not mandate that a state provide an affirmative insanity defense to criminal defendants. Accordingly, a statute that abolishes the affirmative insanity defense does not violate due process.

B. The Court should not interfere with the States' power to legislate criminal conviction procedures.

The Court has noted the significance of the insanity defense is properly left to the States. *Powell v. Texas*, 392 U.S. 514, 535–36 (1968). Criminal law, by its inherent nature, depends on the ever-evolving trends and characteristics of society as a whole. *Id*. As a result, it would be foolish to attempt to make a Constitutional mandate that will forever bind the States, regardless of societal changes. Constitutionalizing a singular insanity defense would require substituting this Court's policy judgment for the more appropriate judgment of state legislatures. *See Clark*, 548 U.S. at 753 ("[T]he insanity rule…is substantially open to state choice.").

The Constitution does not define the elements of criminal offenses and affirmative defenses. Thus, individual states may exercise discretion in defining their state criminal laws.

Montana v. Egelhoff, 518 U.S. 37, 58 (1996) (Ginsburg, J., Concurring) ("States enjoy wide latitude in defining the elements of criminal offenses."). The definition of insanity is too subjective to impose a uniform insanity rule on the States. *Clark*, 548 U.S. at 753. "[F]ormulating a constitutional rule would … freeze the developing productive dialogue between law and psychiatry into a rigid constitutional right." *Powell*, 392 U.S. at 536–37.

Following this Court's precedent, it is clear that the decision whether to abolish or guarantee an insanity defense is best left to the States. The Court should not burden itself with narrowing the many available insanity defenses into a singular constitutional mandate. This task is best left to state legislatures as they continue to adjust and experiment with criminal procedure. As such, this Court should hold that E. Va. Code § 21-3439 does not violate the Due Process Clause of the Fourteenth Amendment.

III. The abolition of the insanity defense and substitution of a *mens rea* approach to evidence of mental impairment does not violate the Eighth Amendment right not to be subject to cruel and unusual punishment.

The Eighth Amendment protects individuals from "cruel and unusual punishment." U.S. Const. amend. VIII. The Supreme Court defined "cruel and unusual punishment" as criminal punishment that violates "fundamental human dignity" as reflected in "evolving standards of decency that mark the progress of a maturing society." *Ford v. Wainwright*, 477 U.S. 399, 405–06 (1986). The abolition of an affirmative insanity defense does not violate the Eighth Amendment for two reasons. First, the assessment of *mens rea* affects the prosecution, not punishment, of criminal defendants. Second, even if the Court finds that the conviction of mentally diseased criminal defendants constitutes punishment, it is not cruel and unusual.

A. The *mens rea* approach does not constitute punishment.

E. Va. Code § 21-3439 does not implicate the Eighth Amendment because the statute addresses the conviction, not punishment, of criminal defendants. The primary purpose of the Eighth Amendment "has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes. . . ." *Powell*, 392 U.S. at 531–32. In other words, the focus of the *mens rea* approach is the prosecution of criminals, not how they are to be punished. The East Virginia statute only addresses the admissibility of evidence relating to mental illness. R. at 4. Frost's Eighth Amendment right is not violated by a statute that does not address punishment.

Further, convicting an alleged paranoid schizophrenic of murder does not equate to punishment. Determining guilt or innocence is separate and distinct from assessing punishment. While East Virginia may be among the minority of states which apply this approach, the "Eighth Amendment is not violated every time a state reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." *Harris v. Alabama*, 513 U.S. 504, 510 (1995) (quoting *Spaziano v. Florida*, 468 U.S. 447, 464 (1984)).

B. Punishing criminals who do not understand the difference between right and wrong is not cruel and unusual.

Eliminating an affirmative insanity defense does not make mental disease a crime. States have enacted proper sentencing procedures to effectively and fairly punish mentally ill criminal defendants. These procedures mitigate some of the harsher consequences of eliminating an affirmative insanity defense. Further, criminals who do not feel moral responsibility—such as psychopaths, and terrorists who feel justified by religion—should not escape their due punishment solely because they do not appreciate right from wrong.

1. Sentencing procedures mitigate punishment for the mentally ill.

An offender's mental condition also continues to be relevant at sentencing. Many of the states that eliminate the affirmative insanity defense have enacted sentencing procedures specifically to address mental illness. One such state, Kansas, specifically distinguishes defendants with mental illnesses in the state sentencing guidelines. *See* Kan. Stat. Ann. § 21-6815(c)(1)(C). Kansas statutes promulgate certain mitigating factors for courts to consider at sentencing, including "[t]he capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired." Kan. Stat. Ann. § 21-6625(a)(6). Kansas law also authorizes a judge to commit a defendant convicted of a felony to a mental health facility instead of prison in some cases. *See* Kan. Stat. Ann. § 22-3430.

Similarly, Montana waives minimum sentences when the sentencing court finds the defendant was suffering from mental disease or defect which rendered him unable to appreciate the criminality of her conduct or to conform her conduct to the requirements of law. *See* Mont. Code Ann. § 46-14-312(2). The defendant is committed to the custody of the director of institutions and placed in an appropriate institution for custody, care and treatment not to exceed the maximum possible sentence. *Id*. The institutionalized defendant may later petition the District Court for release from the hospital upon a showing that the individual has been cured of the mental disease or defect. If the petition is granted, the court must transfer the defendant to the state prison or place the defendant under alternative confinement or supervision. *Id*. The length of this confinement or supervision must equal the original sentence. *See* Mont. Code Ann § 46-14-312(3).

Furthermore, in Utah, if a defendant is found guilty and mentally ill, the sentencing court may commit the defendant to the state hospital in lieu of sending her to prison. *See* Utah Code Ann. § 77-16a-104(3). If a defendant is committed to the state hospital for confinement and treatment, she remains there for eighteen months or until she reaches "maximum benefit." Utah Code Ann. § 77-16a-202(1)(b).

These sentencing procedures allow states to effectively punish the mentally ill. Prior to sentencing, the *mens rea* approach treats mentally ill individuals as equal to other human beings to insure the safety of the American public. When an individual knowingly or intentionally commits a crime, she is duly liable to society and must face punishment. However, the states which have adopted the *mens rea* approach recognize the status of mentally ill criminal defendants, and accordingly adjust sentencing to avoid cruel and unusual punishment. East Virginia's *mens rea* approach does not throw away the appropriate sentencing guidelines used to effectively punish criminals who are mentally ill. Rather, the statute bolsters said guidelines to hold criminals liable in a fair way. As such, the East Virginia statute does not violate "fundamental human dignity" as reflected in "evolving standards of decency that mark the progress of a maturing society." *Ford*, 477 U.S. at 405–06.

2. Criminals who do not feel moral responsibility should not escape punishment.

The fact that an individual does not understand that what she is doing is morally wrong does not render her blameless. For example, terrorists who kill in the name of religion may sincerely believe that their conduct is morally right. However, no American would consider someone like Osama bin Laden morally blameless. Many individuals commit crimes while believing their actions are morally justified. These individuals remain culpable and should not escape punishment. Exempting psychopaths—malignant, personality-disordered offenders—

from criminal liability, will hobble the States' and Congress's ability to punish the worst crimes. *See*, *e.g.*, Federal Bureau of Investigation, *Killed in the Line of Duty. A Study of Selected Felonious Killings of Law Enforcement Officers* (1992) (concluding that half of officers killed in line of duty were killed by people closely matching psychopath profile); *United States v. Antone*, 742 F.3d 151 (4th Cir. 2014) (citing studies showing up to 70 percent of prisoners suffer from antisocial personality disorder). As such, the Court should hold that the East Virginia Statute does not violate the Eighth Amendment.

CONCLUSION

For the reasons stated in this brief, the respondent respectfully requests that this Court affirm the decision of the Supreme Court of East Virginia.

Respectfully submitted,

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