CAUSE NO. [19-1409]

IN THE

Supreme Court of the United States

LINDA FROST
Petitioner,

—v.—

COMMONWEALTH OF EAST VIRGINIA,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF
EAST VIRGINIA

BRIEF FOR PETITONER

ORAL ARGUMENT REQUESTED

TEAM G

QUESTIONS PRESENTED

I. Whether the State, in denying a motion to suppress Ms. Frost's confession, after an unknowing and unintelligent waiver of Miranda rights, is violating the Fifth Amendment.

II. Whether the abolition of the insanity defense for mentally ill defendants who could not understand the wrongfulness of their actions is in violation of the Eighth Amendment against cruel and unusual punishment and the Fourteenth Amendment right to due process.

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STATEMENT OF JURISDICTION

The Supreme Court of East Virginia entered its judgement. The petition for the writ of certiorari was granted by this Court on July 31, 2019. This Court's jurisdiction invoked pursuant to 28 U.S.C. § 1257 (2012).

STANDARD OF REVIEW

In evaluating the denial of a motion to suppress evidence, "we review the district court's factual findings for clear error and its conclusions of law de novo." United States v. Awadallah, 349 F.3d 42, 71 (2d Cir.2003) (quotation marks omitted). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. When, as here, credibility determinations are at issue, we give particularly strong deference to a district court finding." United States v. Iodice, 525 F.3d 179, 185 (2d Cir. 2008).

The validity of a defendant's waiver of his or her Fifth Amendment rights is reviewed de novo with the underlying facts reviewed under the clearly erroneous standard. See United States v. Bautista, 145 F.3d 1140, 1149 (10th Cir. 1998); United States v. Robertson, 19 F.3d 1318, 1321 (10th Cir. 1994). The Court reviews a trial court's decision regarding the affirmative defense of insanity for clear error. United States v. Turner, 7 F.3d 228 (4th Cir. 1993); United States v. Freeman, 804 F.2d 1574 (11th Cir. 1986). In order to uphold the Appellant's criminal convictions, the reviewing court must find "when viewing the evidence in the light most favorable to the prosecution, [that] any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307 (1979). The prosecution must

prove each and every individual element of a crime beyond a reasonable doubt. Estelle v. Maguire, 502 U.S. 62, 69 (1991)..

STATEMENT OF FACTS

A. Events of June 16, 2017 and June 17, 2017

On Friday, June 16, 2017, Ms. Frost picked up a shift to cover for her co-worker from 2 p.m. to 8 p.m. at Thomas's Seafood Restaurant and Grill. R. at 2. Friday nights are the busiest nights of the week at Thomas's. R. at 2. Mr. Smith, Ms. Frost's boyfriend, was found dead on the same evening. R. at 2.

An unsubstantiated anonymous tip lead to Ms. Frost being called in for questioning at the Campton Roads Police Department. R. at 2. Upon arrival, Ms. Frost was led to an interrogation room where the investigating officer read Ms. Frost her *Miranda* rights and had her sign a waiver. R. at 2.

At the beginning of the interrogation, the investigating officer asked Ms. Frost if she wanted to talk about Mr. Smith and Ms. Frost nodded. R. at 2. Only a few minutes later, the investigating officer spoke about Mr. Smith's body and asked Ms. Frost if she knew who might be responsible. R. at 3. Ms. Frost then said "I did it. I killed Chris." She further stated that she stabbed him and left the knife in the park. R. at 3. As the investigating officer attempted to elicit more information, Ms. Frost started making irrational statements. R. at 3. Ms. Frost spoke of the "voices in her head" telling her to "protect the chickens at all costs." She stated she did not believe killing Mr. Smith was wrong. R. at 3. She believed she was doing him a "great favor" because Mr. Smith would be reincarnated as a chicken and "chickens are the most sacred of all creatures." R. at 3. Ms. Frost's delusional statements worsened as she spoke to the investigating officer and asked him to join her "to liberate all the chickens on Campton Roads." R. at 3. At that time, the investigating officer asked Ms. Frost if she needed a court appointed attorney, which she answered affirmatively, and the interrogation was over. R. at 3.

Ms. Frost's confession did not provide any details of the crime in question, but the police searched all parks in Campton Roads and eventually found a bloody steak knife under a bush in Lorel Park. R. at 3. There were no identifiable fingerprints on the knife. R. at 3.

B. Procedural History

Ms. Frost's attorney filed a motion in federal court for a mental evaluation. R. at 3. She was evaluated by Dr. Desiree Frain, a clinical psychiatrist. R. at 3. Ms. Frost was diagnosed with paranoid schizophrenia and prescribed appropriate medication while she was incarcerated pending both her state and federal charges. R. at 3. Dr. Frain further concluded that Ms. Frost was unable to control or fully understand the wrongfulness of her actions because she was in a psychotic state and was suffering from severe delusions and paranoia at the time of the killing. R. at 4. Due to this compelling testimony, Ms. Frost was acquitted on the basis of insanity pursuant to 18 U.S.C. § 17(a) (2019). R. at 4.

The State's attorney waited until the federal proceedings against Ms. Frost were over to proceed in state court. R. at 4. The evidence that was gathered and used to acquit Ms. Frost of her federal charges was ruled inadmissible by the Circuit Court Judge in light of E. Va. Code § 21-3439, which abolishes the insanity defense and attempts to replace it with the *mens rea* approach. R. at 5. Ms. Frost's attorney also filed a motion asking the court to evaluate whether the abolition of the insanity defense, the only defense available to those who are mentally insane, is a constitutional violation. R. At 5. The second motion was also denied. R. at 5.

Ultimately, because the jury was not able to hear any of the evidence about her mental illness, Ms. Frost was convicted of murder and was sentenced to life in prison. R. at 5.

SUMMARY OF THE ARGUMENT

I.

Ms. Frost did not make a knowing and intelligent waiver of her *Miranda* rights resulting in the motion to suppress her confession being erroneously denied and upheld by the Supreme Court of East Virginia. Police Coercion is not a prerequisite for a defendant to bring forth a Fifth Amendment claim and to have an illegally obtained confession thrown out. The Supreme Court of East Virginia did not apply the correct *Miranda* analysis. The *Miranda* analysis that the court should have applied consists of two prongs. The first prong looks at whether there was a free and deliberate ("voluntary") waiver. This is the appropriate prong to evaluate whether there was police coercion. However, Ms. Frost is not claiming there was any type of police coercion. The claim before this Court today regards the second prong of the *Miranda* analysis. The second step of the *Miranda* analysis requires the determination, through the totality of the circumstances, of whether there was a knowing and intelligent waiver of a constitutional right. Ms. Frost's schizophrenia prevents her from being able to make a knowing and intelligent waiver of her *Miranda* rights. Because Ms. Frost is incapable of making a knowing and intelligent *Miranda* waiver, her confession should be inadmissible. If her confession is deemed inadmissible, her conviction should be overturned as there is no other evidence directly linking this crime to Ms. Frost.

II.

The State of East Virginia's new statute E. Va. Code § 21-3439, which abolishes the insanity defense, is in violation of the Eighth and Fourteenth Amendment. Negating the *mens rea* element of an offense and asserting an affirmative insanity defense are fundamentally different. The *mens rea* approach is not an adequate substitute for the insanity defense.

The Eighth Amendment protects those who suffer from a severe mental defect from criminal punishment. Our Eighth Amendment jurisprudence has always looked to the evolving standards of human decency that mark the progress of a maturing society in order to determine if a practice is cruel and usual. Recognizing advances in science, this Court should look to mental health professionals and scientific literature to determine that severe mental illness impairs one's ability to understand the wrongfulness of conduct. If this Court were to allow mentally insane defendants to be treated the same as the sane defendants, this Court would essentially be allowing the State to punish defendants for being mentally ill. In addition, incarcerating the insane does not accomplish retribution, deterrence, rehabilitation or incapacitation.

The abolition of the insanity defense does not just violate the Eighth Amendment, but it also violates the Fourteenth Amendment rights to Due Process and Equal Protection. The affirmative defense is longstanding and to abolish it would be offending a principle that is grounded in our fundamental principles of law and justice. When applying the *mens rea* approach to a hypothetical, it is clear that it unconstitutionally differentiates a common class by the content of their delusions. Similarly situated people are not being treated equally. Finally, the *mens rea* approach makes the opportunity for a defendant to present any type of mental illness evidence impossible in strict liability offenses because evidence of *mens rea* is not an element of the crime that must be proven to the jury beyond a reasonable doubt.

ARGUMENT

I. THE STATE COURT ERRED IN DENYING APPELLANTS MOTION TO SUPPRESS BECAUSE MS. FROST DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER OF HER FIFTH AMENDMENT RIGHTS.

The Fifth Amendment Privilege Against Self-Incrimination provides specific protections for suspects subjected to custodial interrogations. U.S. CONST. amend. V. The motion to suppress Ms. Frost's confession was improperly denied because Ms. Frost did not knowingly and intelligently waive her *Miranda* Rights. R. at 3; *see Miranda v. Arizona*, 384 U.S. 436, 444 (1996) (stating Fifth Amendment rights are only waived when done voluntarily, knowingly, and intelligently). This Court must look to its own decision in *Miranda v. Arizona* and *Colorado v. Spring* and apply the Constitutional analysis used in those cases to determine whether Mr. Frost's Fifth Amendment rights were violated. *Miranda*, 384 U.S. 436; *Colorado v. Spring*, 479 U.S. 564 (1986).

A. *Colorado v. Connelly* Does Not Apply to The Case Before This Court Today Because It Involved a Strict Due Process Violation, Not A Fifth Amendment Violation.

The Supreme Court of East Virginia relied on this Court's decision in *Colorado v. Connelly*, 479 U.S. 157 (1986), in holding that coercive police activity is necessary to find that a confession is not voluntary and that the focus of the validity inquiry is on whether a reasonable officer would believe Ms. Frost appeared to understand her rights. The *Connelly* analysis does not apply to the case before this Court today because here we have a Fifth Amendment challenge, not a Due Process challenge. *Compare Connelly*, 479 U.S. 157 (challenging the defendant's waiver under the Due Process Clause), *with* R. at 1 (challenging the denial of the motion to suppress a confession under the Fifth Amendment). *Connelly* dealt with a Due Process Clause violation, not a Fifth Amendment violation. *Connelly*, 479 U.S. at 157. To establish a Due Process violation,

the defendant must show misconduct on the part of the state. *Id.* In *Connelly*, the defendant alleged a due process violation; accordingly, this Court held that the defendant must show misconduct by the state, i.e. police coercion. *Id.*

Presently, Ms. Frost is alleging a Fifth Amendment, rather than a Due Process, violation. R. at 1. Thus, Connelly is not controlling as it does not consider a Fifth Amendment challenge. Ms. Frost is presenting a claim that the motion to suppress her confession was improperly denied because she was incapable knowingly and intelligently waive her *Miranda* Rights. R. at 12. Police coercion is not the controlling factor in determining whether a *Miranda* waiver is constitutional as this is not a Due Process claim.

B. The Supreme Court of East Virginia's Majority Opinion Misarticulates the *Miranda* Analysis to Determine an Invalid Waiver: Police Coercion Is Just One Factor to Consider Under the Voluntariness Prong of the *Miranda* Analysis.

This Court's decision in *Colorado v. Connelly* was misapplied by the lower court in holding that coercive police activity is the only required element in finding a waiver involuntary. R. at 5. Waiving one's *Miranda* rights must be voluntary, but it must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege. *Moran v. Burbine*, 475 U.S. 412, 421(1986). Thus, the question of Ms. Frost's knowing and intelligent waiver is distinct from voluntariness. *See also Wilson v. Murray*, 806 F.2d 1232, 1235 (4th Cir. 1986) (recognizing the absence of coercion as a distinct issue from an understanding and intelligent waiver). While police coercion must be considered under the voluntariness prong of *Miranda*, its presence is not outcome determinative. A confession can be voluntary but not knowing and intelligent. In other words, both prongs are not necessary in determining a *Miranda* violation. This Court must look to the totality of the circumstances surrounding this case to determine whether a constitutional waiver occurred. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (determining a waiver through

evaluating the totality of the facts); *cf. Faretta v. California*, 422 U.S. 806, 835 (1975) (holding voluntary and intelligent waivers are decided through considering all the facts); *North Carolina v. Butler*, 441 U.S. 369, 374–75 (1979) (holding silence is not enough to prove a knowing and intelligent waiver); *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (emphasizing the high burden the state has in order to show there was an intentional relinquishment of a right or privilege); *Fare v. Michael C.*, 442 U.S. 707, 724–25, (1979) (holding a totality of the circumstances analysis is required to determine an adequate waiver).

Here, the Supreme Court of East Virginia erred in asking only whether there was coercive police activity. R. at 5. The totality of the circumstances was not considered for Ms. Frost; rather, the court's focus was only on whether a reasonable police officer would believe Ms. Frost understood the gravity of the rights she was waiving. R. at 6. The lower court's inquiry stopped here. *Id.* The Supreme Court of East Virginia's failure to inquire into whether the waiver was knowing and intelligent deprived Ms. Frost of her Fifth Amendment protections against self-incrimination. R. at 9. The court allowed the government to condense their distinct burdens of proof into one vague inquiry. This oversight was an abuse of the court's discretion and a prejudicial mistake that resulted in a violation of Ms. Frost's constitutional guarantees.

C. The Court Must Consider the Totality of the Circumstances in Determining Whether Ms. Frost's Waiver Was Voluntary, Knowing, And Intelligent.

In *Miranda v. Arizona*, this Court created a guiding principal concerning the admissibility of statements obtained during a custodial interrogation to assure an individual's Fifth Amendment rights are protected. *Miranda*, 384 U.S. at 436. "Without proper safeguard the process of custodial interrogation of persons suspected or accused of crime contains *inherently compelling pressures* which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467 (emphasis added). This Court held that prior to questioning,

a suspect must be advised "he has the right to remain silent, any statement he does make may be used in evidence against him, and he has the right to the presence of an attorney, either retained or appointed. *Id.* at 444. Notably, any waiver of these rights must be knowing, intelligent, *and* voluntary. A knowing and intelligent waiver means that it must be made with an understanding of the consequences of the waiver. *Id.* at 444 (emphasis added). "It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege." *Id.* at 469.

The validity of a suspect's waiver of *Miranda* rights must be evaluated by totality of circumstances surrounding the interrogation. . ." *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) citing *Miranda*, 384 U.S. at 475–77; *North Carolina v. Butler*, 441 U.S. 369, 374–75 (1979). *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). The totality of the circumstances inquiry is comprised of two dimensions. Brief for Colorado Criminal Defense Bar, Inc. as Amicus Curiae Supporting Respondent at 5, Colorado v. Spring, 479 U.S. 564 (1986) (No. 85-1517). First, the relinquishment of the right must be voluntary, meaning it must be a product of a free and deliberate choice rather than intimidation, coercion, or deception. *Id.* This is the appropriate prong under which to determine whether there was any indication of police coercion. *Spring*, 479 U.S. at 157. Second, the waiver must have been knowing and intelligent, meaning it was made with full awareness of the right being relinquished and the consequences associated with that decision. *Moran*, 475 U.S. at 412. This is the proper analysis that should be applied to Ms. Frost's case in determining whether her confession should have been suppressed.

D. Ms. Frost's Waiver Was Not Valid Because She Could Not Have Been Fully Aware of the Nature of Her Right or the Consequences of Abandoning It.

Applying the *Miranda* analysis correctly will show this Court that Ms. Frost's waiver was not knowing or intelligent, and that the motion to suppress was improperly denied. R. at 5. To

determine if there was a violation of Ms. Frost's Fifth Amendment rights, this Court must follow the three-step *Miranda* inquiry. First, it must be established that this was a custodial interrogation. *Miranda*, 384 U.S. at 444. Next, this Court must ask whether the relinquishment of the right was voluntary in the sense that it was a product of free and deliberate choice rather than intimidation, coercion, or deception. Finally, the waiver must have been knowing and intelligent in the sense that it was made will full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Brief for Colorado Criminal Defense Bar, Inc. as Amicus Curiae at 5, Spring, 479 U.S. 564 (No. 85-1517).

1. *Ms. Frost was subjected to a custodial interrogation.*

In order to challenge a *Miranda* violation, the suspect must have been subject to a custodial interrogation. *Miranda*, 384 U.S. at 444. A custodial interrogation occurs when one is subjected to questioning initiated by law enforcement after being taken into custody or otherwise deprived of his freedom of action in any significant way. *Id.* Here, the Campton Road Police Department initiated a formal investigation, brought Ms. Frost in for questioning, placed Ms. Frost in an interrogation room with an officer, read her *Miranda* rights, and asked Ms. Frost to sign a waiver. R. at 2. This shows that Ms. Frost was subject to a custodial interrogation and can therefore challenge a *Miranda* violation.

2. *Petitioner concedes that Ms. Frost's relinquishment of her right did not involve police coercion.*

The next step of the *Miranda* analysis is to determine whether there was a free and deliberate waiver, without police coercion. Brief for Colorado Criminal Defense Bar, Inc. as Amicus Curiae at 5, Spring, 479 U.S. 564 (No. 85-1517). The State burden is heavy in determining whether a valid waiver exists, and the courts should "indulge every reasonable presumption against waiver." *Johnson v. Zerbst*, 304 U.S. 458, 464 (quoting *Aetna Insurance Co. v. Kennedy*, 301 U.S.

389, 393 (1937)). The courts will not "presume acquiescence in the loss of fundamental rights, and the state is responsible for establishing the isolated circumstances under which the interrogation takes place . . . the burden is rightly on its shoulders." *Zerbst*, 304 U.S. at 464 (quoting *Ohio Bell Telephone Co. v. Public Utilities Comm'n.*, 301 U.S. 292, 307).

Here, Mr. Frost does not claim police coercion. *See* R. at 2–3. Rather, Ms. Frost was brought in for questioning, read her *Miranda* rights, and asked to sign a written waiver. R. at 2. When the investigator asked Ms. Frost if she wanted to talk about Mr. Smith, she nodded. R. at 2. There is nothing in the record to show the investigating officer coerced Ms. Frost into confessing to the crime in question; however, this is not the issue before the Court today. While Petitioner concedes that no evidence shows Ms. Frost's waiver to be involuntary, there is evidence illustrating that Ms. Frost's waiver was not knowing or intelligent.

This Court should find Ms. Frost's waiver to be invalid because evidence shows that it was not knowing or intelligent. The proper remedy for an invalid waiver is suppression of the resulting confession. Therefore, after determining Ms. Frost's waiver of her *Miranda* rights was invalid, this Court should hold that the trial court erred in not suppressing Ms. Frost's unconstitutionally elicited confession.

3. *Ms. Frost's Mental Illness Prevents Her from Being Able to Make A Knowing and Intelligent Waiver of Her Miranda Rights.*

Ms. Frost was incapable of making a "knowing and intelligent" waiver of her *Miranda* rights. This Court must ask whether the "waiver was made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *U.S. v. Bradshaw*, 935 F.2d 295, 298 (D.C. Cir. 1991) (quoting *Moran v. Burbine*, 475 U.S. 412 (1986)). This is a matter which depends in each case "upon the particular facts and circumstances

surrounding that case, including the background, experience, and conduct of the accused." *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). A totality of the circumstances analysis would include both the characteristics of the accused and the details of the interrogation. *See Dickerson*, 530 U.S. at 434 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). The statements given must be "the product of a rational intellect and a free will." *Mincey v. Arizona*, 437 U.S. 385, 398 (1978). Additionally, there is a heavy burden that rests on the government to demonstrate the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda*, 384 U.S. at 475. Here, the State has presented no evidence that affirmatively proves Ms. Frost was fully aware of her rights and the consequences of waiving those rights at the time she signed the written waiver. The record is also silent as to any indications of her understanding.

Both state and federal courts recognize the important role mental illness plays in determining whether an individual's waiver was voluntary, and whether it was knowing and intelligent.[1] In *Connelly*, for example, the defendant claimed his mental illness rendered his unwarned confession to murder involuntary. *Connelly*, 479 U.S. at 157. Although this Court held the facts did not permit a finding that the confession was involuntary, this Court nevertheless was careful to recognize an individual's mental illness was an important factor to be considered. *Id*.

Courts have articulated special constitutional rules based on the diminished capacity of a class of individuals in other contexts. Brief for Oregon Justice Resource Center as Amicus Curiae

[1] *See e.g*., *Yeboah-Stefa v. Ficco*, 556 F.3d 53 (1st Cir. 2009); *United States v. Nichols*, 56 F.3d 403 (2nd Cir. 1995); *United States v. Purden*, 398 F.3d 241 (3rd Cir. 2005); *United States v. Cristobal*, 293 F.3d 134 (4th Cir. 2002); *United States v. McClure*, 786 F.2d 1286 (5th Cir. 1986); *Garner v. Mitchell*, 557 F.3d 257 (6th Cir. 2009); *Rice v. Cooper*, 148 F.3d 747 (7th Cir. 1998); *Forster v. State*, 236 P.3d 1157 (Alaska, 2010); *Commonwealth v. Cephas*, 522 A.2d 63 (Pa. 1987); *Commonwealth v. Hilton*, 823 N.E.2d 383 (2005); *State v. Caenen*, 270 Kan. 776 (2001); *State v. Ives*, 162 Vt. 131 (1994); *Williams v. State*, 115 So. 3d 774 (2013).

Supporting Appellant at 10, Oregon v. Norgren, 401 P.3d 1275 (2016) (No. C142869CR). For example, this Court has long recognized that admissions and confessions of juveniles require special attention. Courts must take the greatest care to assure juvenile admissions are voluntary, not only in the sense that they are not coerced, but also in the sense that they are not the product of "ignorance of rights or of adolescent fantasy, fright, or despaired." *Application of Gault*, 387 U.S. 1, 55 (1967). Furthermore, this Court also considers a suspect's age as a factor when determining if a *Miranda* waiver was knowing and intelligent. *J.D.B. v. North Carolina*, 564 U.S. 261 (2011). This Court looked to recent sociological and scientific studies and noted that the likelihood of false confessions is particularly high for juveniles. *Id.* at 269. Just as this Court's jurisprudence considers the diminished capacity of juveniles, it follows that this Court should consider the diminished capacity of the mentally ill. It is hard to imagine a situation less conductive to the exercise of "a rational intellect and a free will" than a defendant who suffers from a mental illness. *See Connelly*, 479 U.S. 157, 164–165 (1986).

In the case before us, only a few minutes into the interrogation, Ms. Frost started to blurt out statements about the "voices in her head" telling her to "protect the chickens at all costs." R. at 3. Ms. Frost continued to make irrational statements about liberating all chickens on Campton Roads, and about how Mr. Smith would be reincarnated as a chicken because they are the most sacred of creatures. R. at 3.

Furthermore, in her federal court indictment, Ms. Frost was ordered by the court to undergo a mental evaluation. R. at 3. A clinical psychiatrist, Dr. Desiree Frain, diagnosed Ms. Frost with paranoid schizophrenia and further determined that during the time the crime was committed, Ms. Frost was in a psychotic state and suffering from severe delusions and paranoia. R. at 3–4. Dr. Frain also opined that Ms. Frost was unable to control or fully understand the wrongfulness of her

actions over the days that she was suffering from these severe delusions and paranoia. R. at 4. The federal court deemed Ms. Frost incapable of understanding the wrongfulness of her actions and acquitted her of the charges. R. at 4. The statements should not have been admitted into evidence, and the East Virginia Supreme Court erred in upholding the trial court decision denying the motion to suppress.

As a note, the typical *Miranda* warning used by police officers says, "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me?" *What Are Your Miranda Rights?*, MIRANDA WARNING.ORG, http://www.mirandawarning.org/whatareyourmirandarights.html. Imagine hearing those words from a police officer while you are under arrest and sitting in an interrogation room waiting to be questioned about the murder of your significant other. In that overwhelming context, and especially depending on how the warning is delivered, the meaning and implications of those words could be hard to grasp as an ordinary person. Now imagine trying to understand those words, in that context, with the additional hardship of a mental illness such as schizophrenia. It is not difficult to infer how confused Ms. Frost could have been at the time she was initially read her *Miranda* Rights. This inference is further supported by the fact that, after she had already confessed, the interrogator simply asked if Ms. Frost would like to speak to an attorney and Ms. Frost nodded in response. When the question was put simply, Ms. Frost was able to understand her need for representation. This chain of events shows that Ms. Frost did not understand her rights when she was first warned and asked to sign them away.

E. Because Ms. Frost's Wavier Was Invalid, Her Confession Should be Suppressed, and Her Conviction Overturned.

Ms. Frost's waiver was not knowing and intelligent; therefore, the motion to suppress was improperly denied. R. at 5. Without this confession, every element of the offense cannot be proven beyond a reasonable doubt. The proper remedy for an improperly obtained confession is to exclude the confession from evidence. *United States v. Patane*, 542 U.S. 630, 643 (2004); R. at 11, n.6. Petitioner does not dispute this statement of law.[2] R. at 11, n.6.

Ms. Frost was charged with murder in the State Courts. R. at 4. The State holds the burden of proving, beyond a reasonable doubt, every element of the offense. *Id*. The only evidence the State leveraged throughout the case was the confession. R. at 2. This record shows that there was no evidence directly linking Ms. Frost to the crime, absent the confession. *See generally* R. 2–3.

There is evidence alluding to Ms. Frost being upset with Mr. Smith a week prior to the murder. R. at 6. However, the only person that can testify to this is Christa, Mr. Smith's sister, who was out of earshot of the conversation. *Id.* Additionally, a disagreement does not prove that Ms. Frost murdered Mr. Smith. The timing of Mr. Smith's murder was determined to have been the evening of June 16, 2017, between the hours of 9 and 11 p.m. R. at 2. During that time, Ms. Frost was working an extra shift at work because it was the restaurant's busiest night of the week. *Id.* In recognizing it was the restaurant's busiest night of the week, it would be reasonable to infer that Ms. Frost left the restaurant late that night. This inference is further supported by the fact that there is no one who can definitively place Ms. Frost at Mr. Smith's offices or at Lorel Park on the night of the murder. R. at 3. Furthermore, the knife that was found had no fingerprints. *Id.* Ms. Frost's confession occurred solely because she suffers from paranoid schizophrenia, producing

[2] Petitioner recognizes that the Fifth Amendment does not prescribe to the "fruit of the poisonous tree" rationale. The only evidence that can be suppressed after proving the *Miranda* waiver is unconstitutional is the confession.

severe delusions and paranoia, and faces the same pressure and likelihood of false confession that this Court recognized in *Application of Gault*. R. at 4; *See generally Application of Gault*, 387 U.S. at 55. None of the facts directly implicate Ms. Frost as the culprit behind Smith's murder.

F. Mental Illness Renders Suspects Uniquely Vulnerable to Subtle Coercion and Frequently Prevents Them from Fully Understanding Their *Miranda* Rights.

Persons with mental illness are at heightened risk of making false confessions, which ultimately leads to devastating consequences. Lauren Rogal, *Protecting Persons with Mental Disabilities from Making False Confessions: The Americans with Disabilities Act as a Safeguard*, 47 N.M.L. REV. 64, 66 (2017). First, persons with mental impairments are more susceptible to the methods and pressures of investigation. *Id.* Second, mental illness impairs their ability to understand and invoke their Constitutional rights. *Id.* Finally, the criminal justice system is ill equipped to identify false confessions and prevent their use as evidence against the mentally impaired. *Id.*

Mentally ill persons are susceptible to interrogation tactics because interrogations are intended to mislead, impair thought processes, and relentlessly push a suspect, against his or her best interests, in the direction of a confession. Willian C. Follette et al., *Mental Health Status and Vulnerability to Police Interrogation Tactics*, 22 CRIM. JUST. 42, 45–46 (2007); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1095 (2010). Research shows that the probability of arrest is 67 times greater for persons demonstrating symptoms of mental illness than those whom do not. Linda A. Teplin, *Keeping the Peace: Police Discretion and Mentally Ill Persons*, 244 NAT'L INST. JUST. J. 8–15 (2000). Compared to the general population, persons with mental impairments have a greater suggestibility, tendency towards acquiescence, and inattentiveness to long-term consequences, which make them especially

vulnerable to investigative tactics. *See* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 4 (2010).

Distinct from developmental disabilities, individuals with certain psychological disorders also suffer greater vulnerability in *Miranda* waiver situations. *See*, *e.g*., Virginia G. Cooper & Patricia A. Zapf, *Psychiatric Patients' Comprehension of Miranda Rights*, 32 LAW & HUM. BEHAV. 390, 392 (2008); William C. Follette et al., *Mental Health Status and Vulnerability to Police Interrogation Tactics*, 22 CRIM. JUST. 42, 44–45 (2007); Solomon M. Fulero & Caroline Everington, *Assessing the Capacity of Persons with Mental Retardation to Waive Miranda Rights: A Jurisprudent Therapy Perspective*, 28 LAW & PSYCHOL. REV. 53, 55 (2004). This may manifest in impaired understanding and as certain forms of anxiety or other phobias which distort the decision-making process. *Id.* Some estimates have concluded that each year approximately 695,000 persons with mental disorders enter the criminal justice system, involving hundreds of thousands of *Miranda* situations. *Id.*

One study compares the lowest and highest functioning mentally ill defendants' ability to paraphrase *Miranda* warnings immediately after hearing them. Richard Rogers et. al., *Miranda Rights . . . and Wrongs: Myths, Methods, and Model Solutions*, 22 A.B.A. CRIM. JUST. 4, 4, 6 (2008). The study showed that the participants could not properly paraphrase the *Miranda* warnings they just heard. *Id.* Mental impairments, particularly of those who suffer from a psychotic disorder, render individuals vulnerable to false confessions because they are more compliant with police requests, more suggestable to police-generated narratives, and are less able to communicate information. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 4 (2010). That study demonstrates that those

suspects who suffer from mental illness are more vulnerable to making an unknowing or unintelligent waiver. *Id*.

G. If This Court Looks Only to Police Coercion, It Would Create Precedent Approving *Miranda* Violations Against Those Who Cannot Fully Comprehend Their Constitutional Rights.

If this Court strictly follows the majority opinion from the Supreme Court of East Virginia, the standard would deem sufficient a suspect's awareness that they can consult an attorney even if said suspect is incapable of understanding what an attorney is or the role one might play. *See* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 12 (2010). The need for this Court to distinguish and clarify the appropriate analysis for determining validity of a waiver is exemplified by the case before us. Although Petitioner concedes there was no explicit police coercion, the fact is that Ms. Frost's mental illness prohibited her from understanding her Fifth Amendment rights and the gravity of signing a written waiver of those rights. Allowing a mentally ill defendant to validly waive rights she does not understand goes against the purpose of the Fifth Amendment Privilege Against Self-Incrimination and this Court's jurisprudence. Therefore, Petitioner believes this Court should hold that the trial court erred in denying the motion to suppress Ms. Frost's unconstitutionally elicited confession and overturn her conviction.

II. THE EIGHTH AND FOURTEENTH AMENDMENTS REQUIRE AN AFFIRMATIVE INSANITY DEFENSE.

The Constitution requires some mechanism to excuse a defendant who, because of mental disease or defect, is not morally culpable. The ability of an accused to pursue a legal insanity defense is a fundamental right under the Eighth and Fourteenth Amendments of the United States Constitution. *See generally* U.S. CONST. amend. VIII.; U.S. CONST. amend. XIV. Many State

Supreme Courts have recognized the constitutional importance of the insanity defense.[3] The lower court's holding perverts the criminal justice system by affirming a system in which those suffering from mentally illness—such as Ms. Frost—are held culpable even though they cannot understand the wrongfulness of their actions. The court below erred when affirming that evidence of Ms. Frost's severe mental illness was inadmissible under E. Va. Code § 21-3439. R. at 4

A. A Defendant is Capable of Being Insane and Having Requisite Intent—The Two are Not Mutually Exclusive.

There is a significant difference, substantively and procedurally, between the *mens rea* approach and the insanity defense. *See generally State v. Jorrick*, 269 Kan. 72 (Kan. 2000) (highlighting situations where a mental disorder destroys the capacity to form any criminal intent at all); *see also* Raymond L. Spring, *Farewell to Insanity: A Return to Mens Rea*, 66 J. KAN. B. ASS'N 38, 39 (1997) (highlighting the difference between the *mens rea* approach and the insanity defense). The insanity defense is much broader than merely negating the *mens rea* element of an offense. *State v. Curry*, 543 N.E.2d 1228, 1230–31 (Ohio 1989). The *mens rea* model is concerned only with the mental state required as an element of an offense. In contrast, the question of insanity is a sperate inquiry which is centered around legal capacity and extrinsic to the elements of a crime.

[3] *See, e.g.*, *Finger v. State*, 117 Nev. 548 (Nev. 2001) (holding Nevada's abolishment of insanity as an affirmative defense violated the Eighth and Fourteenth Amendments); *People v. Skinner*, 39 Cal. 3d 765 (1985) (holding the defendant proved by a preponderance of the evidence that he was incapable of knowing or understanding the nature and quality of his actions and reaffirming the importance of the insanity defense); *State in Interest of Causey*, 363 So. 2d 472 (La. 1978) (holding that the right to plead guilty by reason of insanity was an element of fundamental fairness); *State v. Strasburg*, 60 Wash. 106 (1910) (holding that an accused has the right to present to the jury whether he was insane at the time he committed the assault); *Sinclair v. State*, 161 Miss. 142 (1931) (holding that the due process clause protects those who are insane at the time of the commission of the offense); *Ingles v. People*, 92 Colo. 518 (1933) (holding one who is insane when he commits an act prohibited by law cannot be held guilty of a crime); *People v. Hill*, 934 P.2d 821 (Colo. 1997) (reversing lower court's refusal to recognize settled insanity as a valid insanity defense; *State v. Hoffman*, 328 N.W.2d 709 (Minn. 1982) (holding defendants have a right to assert the defense of mental illness under both state and federal constitution due process clause); *State v. Bouwman*, 354 N.W.2d 1 (Minn. 1984) (holding the defendant did not prove insanity but reaffirming the concept of the affirmative defense of insanity).

Jean K. Gilles Phillips & Rebecca E. Woodman, *The Insanity of the Mens Rea Model: Due Process and the Abolition of the Insanity Defense*, 28 PACE L. REV. 455, 460 (2008).

These principles are fundamentally different. The insanity defense relates to a person's legal capacity for criminal responsibility, meaning the accused is unable to appreciate the wrongfulness of his conduct and is not criminally responsible, regardless of whether the *mens rea* element of the crime is proven beyond a reasonable doubt. *Id.* at 487. Insanity excuses a person from criminal responsibility, not because he did not commit the act, but because his mental disease or defect robbed him of his capacity to make a free, meaningful choice. *See Davis v. United States*, 160 U.S. 469, 485 (1895) ("If [a person's] reason and mental powers are either so deficient that he has no will, no conscious, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent and is not punishable for his criminal acts." (quoting *Commonwealth v. Rogers*, 48 Mass. 500, 501 (1844)))*; see also Morissette v. United States*, 342 U.S. 246, 250 (1952) (*mens rea* looks to the freedom of the human will). The state can prove beyond a reasonable doubt that a defendant has the requisite *mens rea* element yet does not understand the wrongfulness of his action or lacks criminal culpability. An insanity defense limited to the *mens rea* approach is no insanity defense at all. Petition for Writ of Certiorari at 25, Kahler v. Kansas, 307 Kan. 374 (2018) (No. 18-6135).

There is a common example that is helpful to illustrate the difference between the *mens rea* model and the insanity defense. *State v. Herrera*, 895 P.2d 359, 362 (Utah 1995). If A kills B, under the delusion that he is merely squeezing a grapefruit, A does not have the requisite *mens rea* for murder and would be acquitted under the *mens rea* approach and the insanity defense. *Id*. However, if A kills B, under the delusion that B is an enemy solider and that the killing is justified as self-defense, then A has the requisite *mens rea* for murder and could be convicted under the

mens rea approach but not the insanity defense. *Id*. Both situations consist of the same parties, same crime, same mental illness and same outcome, yet under the *mens rea* approach, the first situation would result in an acquittal whereas the second situation would result in a conviction. *See generally id.* (differentiating the two approaches and possible outcomes). In short, the same evidence that would lead to an acquittal under the affirmative insanity defense in almost every other state will lead to a conviction in East Virginia under the *mens rea* model.

Procedurally, the two differ because an affirmative defense is not a mere denial or contradiction of the prosecution's evidentiary burden; rather, it is an opportunity for the defendant to prove an independent matter which could exempt him from criminal liability even if the prosecution fulfills their evidentiary burden. Brief for the Idaho Association of Criminal Defense Lawyers, the Kansas Association of Criminal Defense Lawyers, the Utah Association of Criminal Defense Lawyers, and the Montana Association of Criminal Defense Lawyers as Amici Curiae Supporting Petitioners, Delling v. Idaho, 568 U.S. 1038 (2012) (No.11-1515). Simply put, the applicability of the affirmative defense becomes an issue only after all the elements of a crime have been satisfied. If an element is missing, the defendant is simply not guilty. *Id*.

It would be prudent for Respondents to cite to cases such as *State v. Searcy*, *State v. Korell*, and *State v. Byers* to show that the *mens rea* approach and the insanity defense function identically. The State would attempt to assert that the *mens rea* approach also allows defendants to present evidence of mental illness to rebut the state's evidence proving criminal intent or *mens rea*. That is just not the case. Comparing the two concepts is comparing apples and oranges. Those cases are not analogous to the one before this Court today because presently, no evidence of Ms. Frost's mental illness was admitted at the trial level. R. at 5.

1. All evidence relating to Ms. Frost's mental illness was ruled inadmissible. R. at 5. The *Individuals lacking culpability on account of personal characteristics,*

such as a severe mental defect, are protected from criminal punishment under the Eighth Amendment

jury in Ms. Frost's case was not presented with any evidence that she was diagnosed and medicated for paranoid schizophrenia. R. at 3. Nor was the jury exposed to any evidence that she was in a psychotic state and suffering from severe delusions and paranoia. R. at 4. Ms. Frost's case, with evidence of her mental illness, exposes the *mens rea* approach as an inadequate substitute for the insanity defense.

In abolishing the insanity defense, the State of East Virginia is eliminating the fundamental inquiry concerned with criminal responsibility. Under E. Va. Code § 21-3439, the state holds that an insane person who commits an act prohibited by the criminal law is as guilty as a sane person and may be imprisoned, and even executed, as if he were a fully culpable sane person. R. at 4. Ms. Frost has been sentenced to life for this crime. R. at 1. This is precisely why this Court is tasked with the first question presented for review: determining whether abolishing the insanity defense is a violation of the Constitution. R. at 12.

If this Court were to condone the abolition of the insanity defense, it would be effectively punishing individuals for being ill. *See Sinclair v. State*, 132 So. 581 (Miss. 1931) (holding insanity is a disease and the *mens rea* statute makes it a crime for a person to be afflicted with the disease of insanity). Abolishing the insanity defense means taking away the one defense available to those who, because of a mental illness, did not comprehend their actions during the commission of a crime. *See id.* at 177 (recognizing an insanity defense is one step further from the prerequisite of proving the elements of an offense beyond a reasonable doubt). While this Court has never addressed the issue of a state's prohibition of an insanity defense specifically, this Court has decided cases in which the defendants were not capable of comprehending the nature and quality of their acts. *See generally Penry v. Lynaugh*, 492 U.S. 302 (1989); *Robinson v. California*, 370

U.S. 660 (1962); *Roper v. Simmons*. 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002). This Court should look to its own jurisprudence for guidance in determining this case.

An intellectual disability (formerly termed mental retardation) has long been regarded as a critical factor that may diminish an individual's culpability for a criminal act. *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Atkins v. Virginia*, 536 U.S. 304 (2002).

In the past this Court has looked to the national consensus to support its holding against executing the intellectually disabled. *Id.* at 329. We see an overwhelming national consensus in favor of an affirmative insanity defense. Following this Court's line of reasoning, the national consensus supports this Court in holding that the abolition of an affirmative insanity defense is unconstitutional. Current practice confirms the insanity defense's fundamental nature. *Id.* at 329–330. Forty-eight U.S. jurisdictions—45 states, the federal criminal-justice system, the military justice system, and the District of Columbia—provide an affirmative insanity defense that encompasses the defendant's lack of moral culpability. Petition for Writ of Certiorari at 25, *Kahler*, 307 Kan. 374 (No. 18-6135). Until 1979, every U.S. jurisdiction had some form of affirmative insanity defense. Congress recognized when it adopted the current federal rule, "the insanity defense should not be abolished" because it reflects "that fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment." H.R. Rep. No. 98-577, at 3, 7–8 (1983).

Further, this Court held that it is well settled at common law that "idiots," together with "lunatics," were not subject to punishment for criminal acts committed under those incapacities. *Id.* at 331. While there is no single definition of idiocy, the term "idiot" was generally used to describe persons who had a total lack of reason or understanding, or an inability to distinguish between good and evil. *Id.* at 332–333. The common law prohibition against punishing "idiots"

and "lunatics" for criminal acts was the precursor of the insanity defense, which today generally includes "mental defect" as well as "mental disease" as part of the legal definition of insanity. *See, e. g.*, MODEL PENAL CODE § 4.01 (AM. LAW INST. 1985) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law"); 18 U.S.C. § 17 (Supp. V 1982) (stating it is an affirmative defense to federal prosecution if "the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts" at the time the offense was committed); *see generally* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 432–444 (1985).

In *Robinson v. California*, 370 U.S. 660 (1962), this Court held that drug addiction is "an illness which may be contracted innocently or involuntarily," and therefore, any imprisonment would be cruel and unusual. *Id.* at 667. In the words of this Court, "[e]ven one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." *Id.* Furthermore, this Court held if we allowed sickness to be made a crime and permitted sick people to be punished for being sick, the courts would be forgetting the teachings of the Eighth Amendment and that this age of enlightenment cannot tolerate such barbarous action." *Robinson v. California*, 370 U.S. 660, 678 (1962) (Douglas, W., concurring). The *Robinson* Court viewed the Eighth Amendment as prohibiting punishment for morally blameless offenders. *Id.* at 669–670. This rationale suggests that other individuals lacking culpability, because of personal characteristics such as a severe mental defect, are similarly protected from criminal punishment under the Eighth Amendment. *Id.* at 672.

Here, Ms. Frost is clearly exhibiting signs of mental illness as early as during the interrogation with the Officer. R. at 3. She discussed the "voices in her head" telling her to "protect the chickens at all costs." *Id.* She continued by stating that she believed her boyfriend would be reincarnated as a chicken. *Id.* Upon psychiatric evaluation, Ms. Frost was diagnosed with paranoid schizophrenia. The evaluating psychiatrist determined that Ms. Frost was in a psychotic state and suffering from severe delusions and paranoia at the time of the alleged offense. R. at 3–4. The Federal Court acquitted Ms. Frost because, even though she intended to kill Mr. Smith and knew she was doing so, she was unable to control or fully understand the wrongfulness of her actions. R. at 4. This Court has consistently held that those who suffer from a mental illness are not treated the same as those who do not under the Eighth Amendment and Fourteenth Amendment. *See generally* U.S. CONST. amend. XIII.

; U.S. CONST. amend. XIV. This Court should not allow the State of East Virginia to punish Ms. Frost for her figurative common cold.

2. *Abolition of the Insanity Defense Goes Against the Eighth Amendment's "Evolving Standards of Human Decency that Mark the Progress of a Maturing Society.*

Our Eighth Amendment jurisprudence demonstrates that the Amendment must draw its meaning from the evolving standards of human decency that mark the progress of a maturing society. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This Court should look to mental health professionals and scientific literature to conclude that severe mental illness can impair an individual's ability to appreciate the wrongfulness of their conduct. Brief for Petitioner at 22, *Kahler*, 307 Kan. 374 (No.18-6135). Over the past several decades, scientific and medical advances have allowed for a deeper understanding of the manifestations and effects of mental illnesses, such as schizophrenia. This matured understanding of mental illness and the effects it

has on a criminal defendants' understanding of right or wrong should guide this Court to determine that abolition of the insanity defense is a constitutional violation. Schizophrenia and other psychotic disorders have been proven to produce delusions and erroneous perceptions of the external world, which are held with strong conviction. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 87–90 (5th ed. 2013). For example, persecutory delusions can lead a person with mental illness to believe, incorrectly, that another person threatens harm. *See e.g.* R. at 2-3 (During her evaluation, Ms. Frost explained that she believed Mr. Smith needed to be killed to protect the chickens).*see also* DONALD W. BLACK & NANCY C. ANDREASEN, INTRODUCTORY TEXTBOOK OF PSYCHIATRY 136–37 (6th ed. 2014). Individuals experiencing delusions and hallucinations often lack the ability to perceive the wrongfulness of their actions. *See Madison v. Alabama*, 139 S. Ct. 718, 728 (2019) (focusing on the ability to distinguish right from wrong, not the symptoms that a defendant exhibits).

The ban on cruel and unusual punishment, in curbing punishments lacking in penological justification, serves to uphold the "standards of decency" that define the "progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). "Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance," Justice Marshall wrote for a majority of this Court, the Eighth Amendment bars executing someone lacking "capacity" and "understanding," regardless of whether the deficiency is due to delusion, like Ms. Frost. *Ford*, 477 U.S. at 410. Punishment without penological justification, "risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." *Cf. Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008).

It is clear from the facts of this case that Ms. Frost was and is suffering from a severe mental illness. R. at 3–4. This is exemplified by Ms. Frost's statements about the "voices in her head" telling her to "protect the chickens at all costs" and "liberate the chickens in Campton Roads." R. at 3–4. Additionally, after her attorney filed a motion in federal court for mental evaluation, she was diagnosed a paranoid schizophrenic. *Id.* During her evaluation, Ms. Frost explained that she believed Mr. Smith needed to be killed to protect the chickens. *Id.* The evaluating psychiatrist determined that Ms. Frost was in a psychotic state and suffering from severe delusions and paranoia during the commission of this crime. *Id.* Ms. Frost was unable to control or fully understand the wrongfulness of her actions over the course of the time she was experiencing the severe delusions. R. at 4. This scenario is the perfect vessel for this Court to apply the Eighth Amendment principles it has already established with the modern understanding of mental illness and the effect it has on people. The result of this application would be holding the abolition of the insanity defense unconstitutional. Absent the insanity defense, defendants who suffer from a mental illness will not have an extrinsic defense to affirm their lack of culpability for a crime. *See generally People v. Skinner*, 704 P.2d 752 (Cal. 1985) (holding the defendant could not appreciate the wrongfulness of his action was not convicted).

3. *Incarcerating the Insane Accomplishes None of the Recognized Rationales of Criminal Punishment.*

There are four rationales recognized by this Court for criminal punishment: retribution, deterrence, rehabilitation and incapacitation. *See Rosales-Mireles v. Unites States*, 138 S. Ct. 1897 (2018); *see also* 18 U.S.C. § 3553(a)(2). A State accomplishes none of these rationales when punishing those who cannot distinguish right from wrong. *United States v. Freeman*, 357 F.2d 606, 615 (2d Cir. 1966).

i. There is no retributive value in punishing a person who has no comprehension of the wrongfulness of their actions.

Those subscribing to the retribution rationale believe that incarceration accomplishes justice in the form of payback for committing the crime—an eye for an eye. The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender. Tison v. Arizona, 481 U.S. 137, 149 (1987); cf Ford v. Wainwright, 477 U.S. 399, 409 (1986) ("[W]e may question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life."). The abolition of the insanity defense will result in the mentally insane being punished for crimes in which they lacked the capacity to understand and thus will not serve a retributive purpose. When a state punishes a defendant, who is not morally culpable, it does not achieve retribution.

Our Eighth Amendment cases provide parallel reasoning regarding criminal punishment of the insane being justified by retribution. This Court should look to its decision in Roper v. Simmons. 543 U.S. 551 (2005). The Roper Court observed, "whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." Id. at 571. There are three general differences between juveniles and adults which contribute to the retributive justification not being sufficient. First, the lack of maturity and an underdeveloped sense of responsibility result in ill-considered actions and decisions. Roper, 543 U.S. 551, 569. Second, juveniles are more susceptible to negative influences and outside pressures. Id. Finally, juveniles are vulnerable and have a lack of control. Id. at 570.

This Court's rejection of retribution as a rationale for punishing minors can be analogized to punishment of the mentally insane. All three of the Roper Court's reasons to differentiate between juveniles and adults apply to the mentally ill. Roper, 543 U.S. at 570. Mentally ill persons

do not understand the wrongfulness of their actions, also stemming from an underdeveloped sense of responsibility. See Clark v. Arizona, 548 U.S. 735, 748 (2006). Studies have found that mentally ill defendants are more susceptible to influences and pressures. William C. Follette et al., Mental Health Status and Vulnerability to Police Interrogation Tactics, 22 CRIM. JUST. 42, 44–45 (2007); see Virginia G. Cooper & Patricia A. Zapf, Psychiatric Patients' Comprehension of Miranda Rights, 32 LAW & HUM. BEHAV. 390, 392 (2008). Finally, those who suffer from a mental illness are also unable to control their actions. Morissette, 342 U.S. at 250.

Next, this Court should look to its decision in Atkins v. Virginia, 536 U.S. 304 (2002), holding the defendant could not be sentenced to death because his intellectual disability diminished his personal culpability. Unless the imposition of the death penalty on an intellectually disabled person measurably contributes to retribution or deterrence, it is nothing more than the purposeless imposition of pain and suffering, and hence an unconstitutional punishment. Atkins, 536 U.S. at 319. The Atkins Court places a substantive restriction on the state's power to take the life of an intellectually disabled offender but left it to the state to determine ways of enforcing the constitutional restriction. Id. at 317. Ultimately, the deficiencies of persons who are intellectually disabled with respect to their information processing, communication, logical reasoning, and understanding of the situation, are deficiencies that diminish the culpability behind their crimes. See id. (drawing attention to the fact that intellectual disability individuals have diminished culpability and cannot be treated the same as capable members of society).

The belief that a person must have moral culpability is further reflected in death penalty jurisprudence. In 1986, this Court held that it is a violation of the Eighth Amendment to execute an insane prisoner. *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986). Justice Marshall reasoned that:

> We may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.

Id. (internal citations omitted). These lines of reasoning are analogous to the mentally insane. Recent studies have noted the similarities between intellectual disabilities and psychotic disorders. Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1095 (2010). Psychotic disorders, including schizophrenia, impair the ability of sufferers to ascertain reality and distinguish it from delusions and hallucinations. Lauren Rogal, *Protecting Persons with Mental Disabilities from Making False Confessions: The Americans with Disabilities Act as a Safeguard*, 47 N.M.L. REV. 64, 70 (2017). Mental disabilities, particularly intellectual impairments and psychotic disorders render individuals especially vulnerable because they result in a lack of understanding of the situation and consequences. *See id.* at 69. This reasoning is directly applicable to the case at issue. Ms. Frost's acts were prompted by the "voices in her head" compelling her to "liberate all the chickens." R. at 3. Her psychosis resulted in the complete inability for her to comprehend the reality of the circumstances she faced. Unlike a juvenile, Ms. Frost didn't have an underdeveloped sense of responsibility; rather, she was incapable of responsibility as she was a passenger in her own mind due to her delusions. Abolishing the affirmative defense would subject the mentally ill to a purposeless imposition of pain and suffering. *Cf. Atkins*, 536 U.S. 304.

ii. Deterrence is not accomplished because punishing the insane does not provide an example to others.

Deterrence stems from the rationale that crime can be controlled by assigning criminal punishments to deter a thinking individual from committing a crime—one man's fault is another's lesson. *See* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003). There is no deterrent value in punishing the insane because such punishment "provides no example to others." *Ford v. Wainwright*, 477 U.S. at 407; *see Jones v. United States*, 463 U.S. 354, 373 (1983) (Brennan,J., dissenting) ("The insanity defense has traditionally been viewed as premised on the notion that society has no interest in punishing insanity acquittees, because they are neither blameworthy nor the appropriate objects of deterrence.").

iii. Prisons are not adequate to meet the rationale behind rehabilitation and incapacitation

Rehabilitation calls for the improvement of the criminal for his own benefit and to reduce the probability that he will offend again. Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1313 (2000). However, a convicted insane person is unable to appreciate the wrongfulness of their actions at any time, so prison is not going to serve a rehabilitative purpose. *Id.* As long as they are suffering from a mental illness, they will not be able to understand that their actions were wrong. If they cannot understand right from wrong, there is no way for them to be rehabilitated, unless prison can magically cure a mental illness. An insane person is unable to appreciate the wrong he committed initially; thus, he will be unable to improve and reduce the probability of repeat offences. The goal of incapacitation is to physically restrain an offender from committing additional crimes against society. Hannah T. S. Long, *The "Inequability" of Incarceration*, 31 Colum. J.L. & Soc. Probs. 321 (1998). Many studies have shown that ordinary prison facilities

are not equipped to rehabilitate people suffering from severe mental disorders. Linda A. Teplin, *Psychiatric and Substance Abuse Disorders Among Male Urban Jail Detainees*, 84 AM. J. PUB. HEALTH 290, 292 (1994); Human Rights Watch, *Ill-equipped: U.S. Prisons and Offenders with Mental Illness* 1–5 (2003), https://goo.gl/wDAsmW. The lack of adequate mental health resources worsens existing serious mental conditions for inmates, resulting in destruction in mental and physical health, inmate suicides, and related complications in inmate management for correctional officials. *Id.*

B. The Inanity Defense is a Long-Staning In Our Fundamental Principles of Law and Justice and Protects Similarly Situated Individuals from Being Treated Differently.

The Constitution provides that states cannot deprive an individual of life, liberty, and the pursuit of happiness without due process of law. U.S. CONST. amend. XIV. A legislative enactment violates the Due Process Clause if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Clark v. Arizona*, at 2719. In addition, the Equal Protection clause under Due Process ensures that "persons similarly situated must be treated alike," unless there is a sufficient justification for not doing.

1. Affirmative Insanity Defense Is So Grounded in Our Legal System That Its Abolishment Offends Our Fundamental Principles of Law and Justice and Therefore Violates Due Process.

This Court has consistently looked to history and common law when assessing fundamental rights. *See Ford v. Wainwright*, 477 U.S. 399, 415 (1986) (relying on common law rule that executing a mentally inside person violates the Eighth Amendment). The insanity defense is so grounded in our legal system that its abolition offends this country's fundamental principles of law

and justice, thereby violating due process.[4] *State v. Herrera*, 895 P.2d 359, 365 (Utah 1995); *State v. Searcy*, 798 P.2d 914 (Idaho 1990) ("insanity defense has had a long and varied history during its development in the common law.").

For example, in 1796, Blackstone explained that lunatics suffered a deficiency in will "that rendered them unable to tell right from wrong." William Blackstone, 4 Commentaries on the Laws of England 24 (1769); *Atkins v. Virginia*, 536 U.S. 304, 340 (2002) (Scalia J., dissenting). It is that lack of free will that prevents a finding of criminal liability. *Id.* According to Blackstone, it is a person's free will and ability to choose to act that renders their conduct "praiseworthy or culpable." *Id.* at 20–21. Another case that this Court should look to is the 1843 *M'Naughten* Case. There, an English Court determined that an accused is not responsible for his conduct if, as a result of a mental illness, the accused did not know the nature and quality of his actions, or what he was doing, was wrong. *M'Naughten's Case*, 8 Eng. Rep. 718, 722 (1843). For hundreds of years, the common law has required that a defendant be morally culpable before he can be punished for a *malum in se* crime.[5] *State v. Strasburg*, 60 Wash. 106, 110 (1910).

Justice Felix Frankfurter wrote in *United States v. Baldi*, 344 U.S. 561 (1953), "Ever since our ancestral common law emerged out of the darkness of its early barbaric days, it has been a

[4] Petitioner does recognize that the history of the insanity defense has not been uniform, and the implications of a criminal defendant's insanity have changed. While the insanity defense has not been uniform, every jurisdiction throughout the common law and in the history of this country has recognized the insanity as an extrinsic defense and has used some form of an insanity test or standard that recognizes the concept. Daniel J. Nusbaum, *The Craziest Reform Of Them All: A Critical Analysis Of The Constitutional Implications Of "Abolishing" The Insanity Defense*, 87 CORNELL L. REV. 1509, 1542 (2002). In addition, if this Court held that there was a prerequisite that the principle in question would be uniform and have continuing acceptance in order to enjoy fundamental principle status, it is likely that very few, if any, principles would be considered fundamental. *Id.* at 1538.

[5] Malum in se crime is defined by Black's Law Dictionary as an act that is evil within itself. A crime or an act that is inherently immoral, such as murder, arson, or rape. Black's Law Dictionary (11th ed. 2019).

postulate of Western civilization that the taking of life by the hand of an insane person is not murder." *Id.* at 570.

More recently, we see the same principles affirmed by this Court in *Morisette v. United States*, 342 U.S. 246 (1952), where Justice Jackson held that some mental element and punishment for a harmful act is almost as instinctive as the child's exculpatory "but I didn't mean to." Unqualified acceptance of this doctrine by English common law was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.' *Id.* at 250–51.

2. It Is Capricious and Arbitrary to Make Criminal Culpability Depend on The Content of The Delusion and Therefore Is in Violation of Equal Protection.

The State of East Virginia's *mens rea* approach violates the Constitution by not treating similarly situated individuals alike. *State v. Herrera*, 895 P.2d 359, 368 (Utah 1995). The *mens rea* approach unconstitutionally differentiates between mentally ill defendants solely on the content of their delusions. *Herrera*, 895 P.2d at 386. The Equal Protection Clause ensures that "persons similarly situated must be treated alike," unless there is a sufficient justification for not doing so. Daniel J. Nusbaum, *The Craziest Reform of Them All: A Critical Analysis of The Constitutional Implications Of "Abolishing" The Insanity Defense*, 87 CORNELL L. REV. 1509, 1542 (2002). The Equal Protection Clause is only implicated when a state action creates a classification distinguishing between persons similarly situated and does not stand constitutional muster under the appropriate standard of review.

i. Similarly situated insane persons are being treated differently without a reasonable basis.

The *mens rea* approach fails constitutional muster on two grounds. First, it only allows a small fraction of all insane persons to successfully raise an insanity defense. Second, the *mens rea* approach treats insane people differently. Referring to the hypothetical stated earlier:

Suppose in the following situations that A is suffering from the same mental illness, committed the same crime the and only difference between the two is the content of A's delusions. In situation one: A kills B, under the delusion that he is merely squeezing a grapefruit. In situation two: A kills B, under the delusion that B is an enemy and that the killing is justified as self-defense. If the insanity defense is available in situation one and two, A would have the chance of being acquitted of the crime. However, under the *mens rea* approach, A would only have the chance of being acquitted in situation one. That is because in situation two, A possessed the required "intent" or "*mens rea*" to kill. In situation one, A did not have the intent to kill because A believed he was squeezing a grape fruit.

This hypothetical proves that the *mens rea* approach creates two subgroups within the class of insane people—one group who suffer from 'grapefruit' delusions, and the other who suffer from 'enemy combatant' delusions. Alternatively, one group who has the requisite *mens rea*, and one group who does not. The *mens rea* approach unconstitutionally differentiates between mentally ill defendants solely on the content of their delusions. In addition, because the *mens rea* approach narrows the type of delusions that will negate the *mens rea* element of a crime, only a small fraction of insane persons will be able to successfully raise an insanity defense. Differentiating between insane people on the content of their delusions is arbitrary and capricious, and therefore is a constitutional violation of the Equal Protection Clause.

ii. There is no rational relationship to a legitimate state purpose.

The *mens rea* approach does not stand constitutional muster even under the most difficult standard for the Petitioner to overcome—rational basis. Rational basis is the appropriate standard under which a court should evaluate the *mens rea* approach because altering the insanity defense does not burden all insane persons, although it burdens most. Daniel J. Nusbaum, *The Craziest*

Reform of Them All: A Critical Analysis of the Constitutional Implications of "Abolishing" the Insanity Defense, 87 CORNELL L. REV. 1509, 1542 (2002). The formulation of a rational basis test requires the challenged law to have some rational relationship to a legitimate state purpose. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 438 (1985). There are five conceivable purposes for the *mens rea* approach that will likely be argued by the Respondent as a legitimate state purpose, although each one of those purposes falls short. Daniel J. Nusbaum, *The Craziest Reform of Them All: A Critical Analysis of The Constitutional Implications Of "Abolishing" The Insanity Defense*, 87 CORNELL L. REV. 1509, 1542 (2002). Those five purported purposes are: abuse of the extrinsic insanity defense, preventing the insane from being hastily released, providing treatment of the insane, holding individuals personally accountable for their actions, and eliminating confusion and inconsistency resulting from considering mental illness in the guilt phase of the trial. *Id*.

First, the insanity defense is not abused. All empirical analysis has been consistent: the public at large and the legal profession grossly overstate both the frequency and success rate of the insanity plea. The most recent research shows that the insanity defense is used only in one percent of all felony cases and is successful just about one-quarter of that time. Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 613 (1989–90). Second, it will likely be alleged that those who are found not guilty by reason of insanity are spending less time in custody compared to those who are sentenced to prison. That too, is untrue. Studies have shown that insane acquittees spend almost double the time that defendants of similar charges spend in prison settings. *Id*. at 110–11. Third, the notion that treatment would be provided to the insane is also a fallacy. The inevitable result is that more defendants will be convicted and sent to prison. Mentally ill individuals are not more likely to

receive treatment in state prison than they would in a state mental health institution. Linda A. Teplin, *Psychiatric and Substance Abuse Disorders Among Male Urban Jail Detainees*, 84 AM. J. PUB. HEALTH 290, 292 (1994); Human Rights Watch, *Ill-equipped: U.S. Prisons and Offenders with Mental Illness* 1–5 (2003), https://goo.gl/wDAsmW. Next, "accountability is synonymous with responsibility, and one simply cannot say that individuals who could not appreciate the consequences of their actions or understand that what they were doing was wrong even if they possessed the requisite intent would feel in some sense 'responsible' for their acts, or would understand why they were being punished." Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 613 (1989–90). Finally, the state enacting the *mens rea* approach to avoid confusion is a reason that is difficult to conceive. *Id.* The *mens rea* approach is more difficult and confusing for a juror than applying the insanity test. *Id.* As stated above, the *mens rea* approach differentiates on the basis of the type of delusion, making it even more difficult for jurors to apply the appropriate standard. Every conceivable reason for the abolition of the insanity defense can be rebutted and does not have rationale relationship to a legitimate state interest. Therefore, the *mens rea* statute—or E. Va. Code § 21-3439—does not stand constitutional muster under rational basis. The *mens rea* approach is a clear violation of the Equal Protection Clause under the Due Process Clause of the U.S. Constitution.

3. Under the *Mens Rea* Theory, Criminal Intent is Transformed into Strict Liability

    i. The Means Rea Approach Leaves Mentally Ill Defendants Defenseless Against Strict Liability Offenses.

Under strict liability, no insane defendant could successfully raise an insanity defense. *Cf. State v, Herrera*, 895 P.2d 359, 374–75 (Utah 1995) (Stewart, J., dissenting) ("as to nonintentional

crimes . . . an insane defendant is held strictly liable for doing the act because he cannot, by definition, show that he acted as a reasonable person would have acted."). Strict liability offenses are infractions, violations or crimes that can be committed without any intent to break the law, any knowledge of what the law is, or what the law prohibits. Paul J. Larkin Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL'Y 1065, 1072–1075 (2014). There is no requisite *mens rea* element that the State must prove for strict liability offenses. However, the insanity defense is an affirmative defense that has been available to those who are charged with a strict liability offense.

For example, driving under the influence of intoxicants and driving while license is suspended are strict liability offenses. The state is not required to prove a *mens rea* element, which subsequently means the evidence of mental illness is inadmissible if this Court upholds abolition of the insanity defense for the *means rea* approach.

CONCLUSION AND PRAYER

For the forgoing reasons, Petitioner respectfully request this Court reverse the judgment of the Supreme Court of East Virginia on both issues.

Respectfully submitted this 13th day of September 2019.

/s/ *Team G*

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