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 EAST VIRGINIA

BRIEF FOR THE PETITIONER

TEAM L
COUNSEL FOR THE PETITIONER

QUESTIONS PRESENTED

I. Whether an individual who suffers from a mental illness knowingly and intelligently waived her *Miranda* rights when, at the time of her waiver, she was incapable of comprehending the rights to be abandoned or the consequences of the decision to abandon them?

II. Whether abolishing the insanity defense, and consequently criminally punishing the morally inculpable, violates the Fourteenth Amendment's Due Process Clause and the Eighth Amendment's prohibition against cruel and unusual punishment, when the accused is morally inculpable and therefore unable to know the difference between right and wrong?

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

United States Supreme Court Cases:

United States Court of Appeals Cases:

United States District Court Cases:

State Cases:

United States Constitution:

Statutory Provisions:

Legislative Materials:

International Authorities:

Secondary Authorities:

OPINIONS BELOW

The decision of the Circuit Court of Campton Roads has not been reported in any official or unofficial reporter at the time of filing this Brief. The record sets forth the unofficial and unreported opinion of the Supreme Court of East Virginia. *Frost v. Commonwealth.*, No. 18-261 (E. Va. Aug. 1, 2019).

STATEMENT OF JURISDICTION

The Circuit Court of Campton Roads convicted Petitioner, Linda Frost, of murder and sentenced her to life in prison. R. at 1. The Supreme Court of East Virginia affirmed the decision. R. at 1. Petitioner then filed a timely petition for writ of certiorari, which this Court granted. R. at 12. This Court has jurisdiction pursuant to 28 U.S.C.A. § 1257(a) (West 2019).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment

The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

Eighth Amendment

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Fourteenth Amendment

The Fourteenth Amendment provides, as relevant: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV § 1.

E. Va. Code § 21-3439.

This case also concerns the constitutionality of Commonwealth of East Virginia's statute abolishing the insanity defense. E. Va. Code § 21-3439.

STATEMENT OF THE CASE

Linda Frost ("Petitioner"), who has been diagnosed with paranoid schizophrenia, was initially charged with murder in both federal and state courts. R. at 4. Petitioner was acquitted in federal court based on her moral inculpability. R. at 4. Following her acquittal in federal court, Petitioner was convicted of murder and sentenced to life in prison in the Circuit Court of Campton Roads ("Circuit Court"). R. at 1, 3. Subsequently, Petitioner appealed her conviction to the Supreme Court of East Virginia. R. at 1. Petitioner challenged the admissibility of her confession, arguing that the waiver of her *Miranda* rights was not knowing and intelligent, and therefore violated her Fifth Amendment protection against self-incrimination. R. at 5. Additionally, Petitioner challenged the constitutionality of E. Va. Code § 21-3439, arguing that East Virginia's abolition of the insanity defense violated the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's Due Process Clause. R. at 5. In affirming the Circuit Court, the Supreme Court of East Virginia disregarded consequential constitutional standards. Accordingly, this appeal follows. R. at 1.

A. Statement of the Facts

Petitioner is diagnosed with paranoid schizophrenia and suffers from "severe delusions and paranoia." R. at 4. Petitioner worked at Thomas's Seafood Restaurant and Grill in East Virginia. R. at 2. Petitioner was in a romantic relationship with Christopher Smith ("Smith"), who worked as a federal poultry inspector for the United States Department of Agriculture in Campton Roads, East Virginia. R. at 2. On June 10, 2017, the last documented time in which Petitioner and Smith contacted each other, Petitioner and Smith purportedly had a disagreement over the phone. R. at 2.

On June 16 and June 17, 2017, Petitioner was in a "psychotic state and suffering from severe delusions and paranoia." R. at 4. Accordingly, because of her mental illness, Petitioner "was unable to control or fully understand the wrongfulness of her actions[.]" R. at 4. On June 16, 2017, Petitioner covered the 2 p.m. to 8 p.m. shift for a co-worker as a last-minute favor. R. at 2. There is no definitive record of Petitioner's whereabouts after her shift ended on June 16. R. at 2.

On the morning of June 17, 2017, Smith was found dead in his office. R. at 2. It was later determined by a coroner that Smith died at his office on the evening of June 16, 2017 between 9 p.m. and 11 p.m. R. at 3. Shortly after Smith's body was found, Campton Roads Police Department ("Police Department") initiated an investigation. R. at 2. Later that day, based on an anonymous tip, Petitioner was brought in for questioning. R. at 2.

Petitioner was suffering from severe delusions and paranoia when she was brought in for questioning. R. at 4. Petitioner was placed in an interrogation room where Officer Nathan Barbosa ("Officer Barbosa") read Petitioner her *Miranda* rights and she signed a written waiver. R. at 2. Officer Barbosa asked Petitioner if she wanted to talk about Smith. R. at 2. Petitioner did

not audibly respond, however, "she nodded." R. at 2. Officer Barbosa then proceeded to tell Petitioner about Smith's death and asked Petitioner if she knew who might be responsible. R. at 3. Petitioner responded, "'I did it. I killed Chris.'" R. at 3. After Petitioner's response, Officer Barbosa immediately inquired further to see if Petitioner could state more details about Smith's death. R. at 3. Petitioner responded again and stated, "'I stabbed him, and I left the knife in the park.'" R. at 3. After this response, Officer Barbosa pushed even further and continued to question Petitioner. R. at 3.

While answering Officer Barbosa's questions, Petitioner stated that the "'voices in her head'" were telling her to "'protect the chickens at all costs.'" R. at 3. Petitioner continued, "that she did not think that killing Smith was wrong because she believed that he would be reincarnated as a chicken, and so she did Smith a 'great favor' because 'chickens are the most sacred of all creatures.'" R. at 3. Petitioner then beseeched Officer Barbosa to join her cause "'to liberate all chickens in Campton Roads.'" R. at 3. Finally, at the end of the interrogation, Officer Barbosa asked Petitioner if she wanted a court appointed attorney, to which she responded in the affirmative. R. at 3.

After the interrogation, based on Petitioner's delusional ramblings, the Police Department searched all of the parks in Campton Roads for a knife. R. at 3. The Police Department found a knife in Lorel Park that matched the set at Petitioner's home. R. at 3. However, the knife did not contain Petitioner's fingerprints or DNA. R. at 3. Later, the coroner determined that the only DNA on the knife was Smith's. R. at 3.

Subsequently, Petitioner was charged and indicted in both federal and state court for Smith's death. R. at 3. Petitioner filed a motion in federal court for a mental evaluation. R. at 3. Pending both trials, Petitioner underwent a mental evaluation conducted by Dr. Desiree Frain

("Dr. Frain"), a clinical psychiatrist. R. at 3. During the evaluation Petitioner told Dr. Frain "that she believed Smith needed to be killed to protect the sacred lives of chickens that Smith endangered through his job." R. at 4. Dr. Frain diagnosed Petitioner with paranoid schizophrenia and prescribed her the appropriate medication. R. at 3. Petitioner "had not previously been diagnosed with schizophrenia or any other mental disorder, and she had not been given any mental health treatment or medication for any mental condition." R. at 3-4.

Initially, Petitioner was indicted in federal court and tried in the United States District Court for the Southern District of East Virginia under 18 U.S.C.A. § 1114 (West 2019). R. at 4. Petitioner was deemed competent to stand trial upon further evaluation of Dr. Frain. R. at 4. Because the affirmative defense of insanity is available in federal proceedings, pursuant to 18 U.S.C.A. § 17(a) (West 2019), Dr. Frain was permitted to testify on behalf of Petitioner's mental disorder. R. at 4. Dr. Frain testified "that, even though Ms. Frost intended to kill Smith and knew she was doing so, she was unable to control or fully understand the wrongfulness of her actions over the course of those few days." R. at 4. Based on Dr. Frain's testimony, Petitioner was acquitted in federal court on the basis of insanity. R. at 4.

B. Proceedings Below

After Petitioner's acquittal in federal court, the Commonwealth of East Virginia filed state murder charges against Petitioner in the Circuit Court. R. at 4. Because East Virginia abolished the insanity defense through E. Va. Code § 21-3439, evidence of Petitioner's paranoid schizophrenia and lack of moral culpability was inadmissible at trial. R. at 5. Petitioner presented undisputed evidence that she did not understand "either her *Miranda* rights or the consequences of signing the waiver form." R. at 5. Accordingly, Petitioner filed a motion to suppress her confession and a motion asking the trial court to hold that E. Va. Code § 21-3439 was

unconstitutional pursuant to the Eighth and Fourteenth Amendments of the Constitution. R. at 5. The Circuit Court denied both motions and ruled that Dr. Frain's testimony was inadmissible. R. at 5. After the Circuit Court ruled Dr. Frain's testimony inadmissible, the jury convicted Petitioner of murder and recommended a life sentence, which the Circuit Court accepted. R. at 5. Petitioner subsequently filed a timely appeal to the Supreme Court of East Virginia. R. at 5.

The Supreme Court of East Virginia affirmed the Circuit Court's decision, finding that: (1) the objective circumstances surrounding the interrogation were permissible, and consequently Petitioner's "waiver of her *Miranda* rights was valid, and her confession was admissible[,]" and (2) that "E. Va. Code § 21-3439 does not violate the Eighth or the Fourteenth Amendment." R. at 6-7. Petitioner appealed to this Court, which granted certiorari. R. at 12.

SUMMARY OF THE ARGUMENT

This Court should reverse the Supreme Court of East Virginia's holding that Petitioner's waiver of her *Miranda* rights was knowing and intelligent. The Supreme Court of East Virginia erred in two ways. First, the court incorrectly applied this Court's precedent in *Colorado v. Connelly* by holding that police coercion is necessary to find that a *Miranda* waiver is not knowing and intelligent. In doing so, the Supreme Court of East Virginia ignored the principle that the test for a valid *Miranda* waiver has two parts: (1) whether the waiver is voluntary, and (2) whether the waiver is knowing and intelligent. Second, the Supreme Court of East Virginia incorrectly found that Petitioner's waiver was knowing and intelligent despite her mental illness. Under the totality of the circumstances test used to determine whether a waiver is knowing and intelligent, evidence of a mental illness can be a substantial factor showing that a defendant did not comprehend or understand the consequences of waiving her *Miranda* rights. Thus, Petitioner's confession should be inadmissible.

This Court should also reverse the Supreme Court of East Virginia's holding that the abolition of the insanity defense does not violate the Fourteenth Amendment's Due Process Clause and the Eighth Amendment's prohibition against cruel and unusual punishment. The Supreme Court of East Virginia erred in two ways. First, the court disregarded that the insanity defense is deeply rooted in this Nation's history and an indispensable principle of American criminal law. This Nation's history demonstrates that moral culpability is a prerequisite for criminal punishment. Accordingly, the insanity defense is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. Second, in defiance of this Court's Eighth Amendment jurisprudence, the Supreme Court of East Virginia conveniently ignored the national consensus against abolition of the insanity defense and failed to recognize that criminal

punishment for the morally inculpable is categorically excessive. Forty-six states have legislation protecting this defense, establishing a national consensus in favor of the affirmative defense of insanity. Further, criminal punishment for those who do not understand right from wrong is unconstitutionally excessive under the Eighth Amendment. Thus, the abolition of the insanity defense infringes on Petitioner's Eighth Amendment right to be free from cruel and unusual punishment.

ARGUMENT

I. THE SUPREME COURT OF EAST VIRGINIA ERRED IN HOLDING THAT PETITIONER VALIDLY WAIVED HER *MIRANDA* RIGHTS BY MISAPPLYING THE POLICE COERCION TEST TO THE KNOWING AND INTELLIGENT INQUIRY AND FAILING TO TAKE PETITIONER'S MENTAL ILLNESS INTO ACCOUNT.

This Court should reverse the Supreme Court of East Virginia's holding that Petitioner's waiver of her *Miranda* rights was valid and her confession was admissible because the Supreme Court of East Virginia incorrectly applied this Court's holding in *Colorado v. Connelly*, 479 U.S. 157 (1986) to the knowing and intelligent component of the *Miranda* waiver analysis. Furthermore, this Court should reverse the Supreme Court of East Virginia's holding that her waiver was not knowing and intelligent as required by *Miranda* because she was suffering from a mental illness and thus could not knowingly and intelligently waive her *Miranda* rights.

The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. The purpose of the Fifth Amendment is to prevent police from forcing an individual to confess. *Connelly*, 479 U.S. at 170 (1986). The privilege against self-incrimination is deeply enshrined in American jurisprudence, and "[t]hese precious rights were fixed in our Constitution only after centuries of persecution and struggle." *Miranda v. Arizona*, 384 U.S. 436, 442 (1966). These protections were put in place to uphold the constitutional rights of individuals "against overzealous police practices." *Id.* at 444. However, in certain circumstances, defendants may waive these rights if they choose. *Id.*

This Court articulated the requirements for a valid waiver of an individual's Fifth Amendment rights in *Miranda*. *Id.* at 444-45. Under *Miranda*, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444. A "custodial interrogation" is a "questioning

initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* In any custodial interrogation, before questioning, an individual "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* An individual may waive his Fifth Amendment rights "provided the waiver is made voluntarily, knowingly and intelligently." *Id.* Thus, in the context of a custodial interrogation, police must adequately warn an individual and ensure that any waiver, either written or oral, is valid before the statements can be admissible in court. *Id.*

> The waiver requirement in *Miranda* has two components:
>
> > First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Moran v. Burbine, 474 U.S. 412, 421 (1986) (internal citations omitted). This Court has determined that a waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Berghuis v. Thompkins*, 560 U.S. 370, 385 (2010) (applying the *Zerbst* waiver standard to a waiver of *Miranda* rights). The prosecution has the burden of demonstrating at trial that both the warning and waiver are valid, and there is a presumption against waiver. *See Miranda*, 384 U.S. at 479; *North Carolina v. Butler*, 441 U.S. 369, 372-73 (1979) (recognizing that the state bears a heavy burden in proving waiver and that an "express written statement" is not "necessary or sufficient to establish waiver.").

A. The Police Coercion Test Can Only Determine Whether a Waiver was Voluntary, Not Whether it was Knowing and Intelligent.

The Supreme Court of East Virginia incorrectly applied the police coercion test articulated in *Connelly* to the knowing and intelligent inquiry of the test for a valid *Miranda* waiver. In *Connelly*, the defendant approached the police and stated that he had murdered someone. 469 U.S. at 160. After giving the defendant his *Miranda* warnings, a detective began speaking with the defendant and the defendant confessed to murdering a young girl. *Id.* at 161. The defendant moved to suppress his statements after a psychiatrist diagnosed him with paranoid schizophrenia and determined that the defendant was in a psychotic state when he confessed. *Id.* At a preliminary hearing, the defendant successfully argued that his mental state rendered him unable to validly waive his *Miranda* rights, making his statements inadmissible. *Id.* The state trial court suppressed the defendant's statements and the Colorado Supreme Court affirmed. *Id.* at 162.

After granting certiorari, this Court analyzed whether the defendant's confession was voluntary under the Due Process Clause of the Fourteenth Amendment. *Id.* at 163. This Court stated in *Connelly* that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary[.]'" *Id.* at 167. Because the defendant did not present any evidence of police coercion, only his own mental incapability, the Court reversed the Supreme Court of Colorado's judgement and remanded the case. *Id.* at 171. However, the Court did not specifically address the knowing and intelligent component of the test. *Id.* The Court stated that on remand the Supreme Court of Colorado was free to consider whether the defendant's waiver was invalid on grounds other than voluntariness. *Id.* at 171, n.4.

Shortly after its holding in *Connelly*, this Court reiterated that "the inquiry whether a waiver is coerced 'has two distinct dimensions.'" *Colorado v. Spring*, 479 U.S. 564, 573

(quoting *Moran* 475 U.S. at 421). Notably, in *Spring*, this Court applied the police coercion test found in *Connelly* to the voluntariness inquiry, but not the knowing and intelligent inquiry. *Id.* at 573-74. Although "the Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege[,]" this Court recognized that "*Miranda* warnings ensure that a waiver of these rights is knowing and intelligent by requiring that the suspect be fully advised of this constitutional privilege, including the critical advice that whatever he chooses to say may be used as evidence against him." *Id.* at 574.

Further supporting the distinction between whether a waiver is voluntary and whether it is knowing and intelligent, Justice Brennan noted the difference between the Due Process voluntariness analysis and the *Miranda* analysis in his dissent in *Connelly*. 470 U.S. at 187-88 (Brennan, J., dissenting). Justice Brennan argued that the principles articulated by the *Moran* Court should have controlled. *Id.* at 188. Justice Brennan further stated that because the defendant in *Connelly* was "'clearly' unable to make an 'intelligent' decision[,]" that his waiver should have been invalid because it was not knowing and intelligent. *Id.* Justice Brennan also noted that the Court's decision in *Connelly* did not preclude the Supreme Court of Colorado from considering the knowing and intelligent analysis on remand. *Id.*

Currently, there is a circuit split on whether the police coercion test this Court articulated in *Connelly* applies to both the voluntary and knowing and intelligent components of the test of a valid *Miranda* waiver. *Woodley v. Bradshaw*, 451 F. App'x 529, 540 (6th Cir. 2011). Some circuits have applied the *Connelly* police coercion test to the voluntary requirement, and the totality of the circumstances test to the knowing and intelligent requirement, while other circuits have applied the *Connelly* police coercion test to both the voluntary requirement and the

knowing and intelligent requirement. *See, e.g.*, *United States v. Bradshaw*, 935 F.2d 295, 300 (D.C. Cir. 1991) (holding that mental capability is relevant to the knowing and intelligent inquiry); *but see Rice v. Cooper*, 148 F.3d 747, 752 (7th Cir. 1998) (holding that "there was neither police abuse nor compelling evidence of Rice's incapacity to make a knowing waiver of his *Miranda* rights after the police explained in simple terms what those rights were.").

The court in *Rice* claimed that it is too difficult for police to distinguish whether a suspect's confession is due to an irresistible impulse to confess or "an inability . . . to understand [the defendant's] right not to confess" and applied the police coercion test to the knowing and intelligent requirement. *Id.* at 751. However, simply stating that it is too difficult for police to determine whether an individual is mentally incapable of waiving his *Miranda* rights undermines the foundation of constitutional rights that this Court recognized in *Miranda*. Although this Court's holding in *Connelly* applies to the voluntary component of the *Miranda* waiver inquiry, "police overreaching (coercion) is not a prerequisite for finding that a waiver was not knowing and intelligently made." *United States v. Cristobal*, 293 F.3d 134, 142 (4th Cir. 2002). When there is no coercive police activity present, the relevant inquiry is whether any mental impairment renders an individual "incapable of making an informed decision or incapable of thinking rationally." *Id.*

This Court's holding in *Spring* "dispels any notion that a *Miranda* waiver must be caused by police misconduct to be deemed non-knowing." *Bradshaw*, 935 F.2d at 300. Courts have followed *Spring* by using the police coercion test to determine whether a waiver is voluntary and the totality of the circumstances test to determine whether a waiver is knowing and intelligent. *See Bradshaw*, 935 F.2d 295; *Cristobal*, 293 F.3d at 142. Courts interpret this Court's decision in *Connelly* to hold "that police coercion is a necessary prerequisite to a determination that a waiver

was *involuntary* and not as bearing on the separate question whether the waiver was knowing and intelligent." *Bradshaw*, 935 F.2d. at 299. In *Bradshaw*, the defendant claimed that his waiver was not knowing and intelligent because at the time of his waiver he was (1) suffering from mental illness, and (2) extremely intoxicated. *Id.* The court held that the defendant's mental capacity was relevant to the circumstances of the validity of his waiver of *Miranda* rights because it related to whether the waiver was knowing and intelligent. *Id.*

Here, the Supreme Court of East Virginia incorrectly relied on *Connelly* for the purpose of applying the police coercion test to the knowing and intelligent prongs of a *Miranda* waiver. R. at 6. Petitioner was in a psychotic state when she waived her *Miranda* rights, R. at 3, rendering her unable to knowingly and intelligently waive her *Miranda* rights. By focusing on whether there was police coercion that would render Petitioner's *Miranda* wavier invalid, the Supreme Court of East Virginia misconstrued this Court's precedent because Petitioner's waiver could be voluntary without being knowing and intelligent because of her mental illness. Thus, *Connelly* is not controlling in this case.

B. Petitioner's Waiver of Her *Miranda* Rights was Not Knowing and Intelligent Because She Did Not Fully Understand Her Rights.

Because the Supreme Court of East Virginia failed to bifurcate the *Miranda* waiver inquiry as required by this Court's precedent in *Moran* and *Spring*, the court incorrectly determined that Petitioner's waiver was knowing and intelligent. While this Court first articulated the current test for a valid waiver of a defendant's Fifth Amendment rights in *Miranda*, this Court further explained the requirements in *Moran*. 475 U.S. 412. Under *Moran*, for a waiver to be valid, it must satisfy two distinct inquiries. *Id.* at 421. First, the waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id.* (citing *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)).

Second, "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* For the second component of the test for a valid *Miranda* waiver, this Court requires a totality of the circumstances approach to analyze whether an individual's *Miranda* waiver is knowing and intelligent. *Fare*, 422 U.S. at 725. At issue here is the knowing and intelligent component of the test, and East Virginia bears the burden of showing that Petitioner's waiver was knowing and intelligent. *See Miranda*, 384 U.S. at 479; *Butler*, 441 U.S. at 373.

Under the two components of the test for a valid *Miranda* waiver, this Court has indicated that an uncoerced statement alone is not sufficient for demonstrating a valid waiver. *Berghuis*, 560 U.S. at 384. In order to establish a valid waiver, the state must show that the individual understood their rights. *Id.* Thus, even if the prosecution can show that the waiver was voluntary in the sense that it was not the product of police coercion, the prosecution must still show that the waiver was knowing and intelligent. *Tague v. Lousiania*, 444 U.S. 469, 471 (1980) (holding that where the prosecution did not introduce evidence that the petitioner knowingly and intelligently waived his rights, the prosecution had not met its burden of proof and the statement was inadmissible).

The totality of the circumstances test includes an evaluation of the defendant's "age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Fare*, 442 U.S. at 725. While the test in *Fare* specifically related to juvenile defendants, the test and principles contained therein are equally applicable to cases where the defendant has a mental illness. *See Bradshaw*, 935 F.2d 295. When evaluating whether an individual's *Miranda* waiver is valid, courts "may consider later-developed evidence

of a defendant's actual mental ability to understand the warnings at the time of the interrogation." *Garner v. Mitchell*, 557 F.3d 257, 263 (6th Cir. 2009).

When constitutional rights are at issue, courts have "repeatedly emphasized that mental deficiency, age, and lack of familiarity with the criminal process are important factors to be considered in determining whether there has been a waiver of constitutional rights." *Cooper v. Griffin*, 455 F.2d 1142, 1145 (5th Cir. 1972). In *Miranda* cases, "mental illness is certainly a factor that a trial court should consider when deciding the validity of a waiver." *Miller v. Dugger*, 838 F.2d 1530, 1539 (11th Cir. 1988). Specifically, "[t]he requirement of 'knowing and intelligent' waiver implies a rational choice based upon some appreciation of the consequences of the decision." *Cooper*, 455 F.2d at 1146. Furthermore, while voluntariness is evaluated in light of external factors, "the [knowing and intelligent] component depends on mental capacity." *Cox v. Del Papa*, 542 F.3d 669, 675 (9th Cir. 2008).

Courts have consistently considered mental impairments, or other barriers to a defendant's full comprehension of his *Miranda* rights, as evidence that a waiver is not knowing and intelligent. *See Miller*, 838 F.2d 1530; *Cooper*, 455 F.2d 1142. Regardless of the reason that an individual may not be able to understand their *Miranda* rights, courts consider whether an individual fully comprehends their *Miranda* rights at the time of the waiver. *United States v. Short*, 790 F.2d 464 (6th Cir. 1986). For instance, in *Short*, the Court held that the prosecution did not meet its burden of proof to show that the defendant's waiver was knowing and intelligent because it was not clear how much, if at all, the defendant understood about the contents of a *Miranda* warning due to a language barrier. *Id.* at 469.

Because the key inquiry into whether a waiver is valid is whether the defendant understood her rights, mental capacity "is relevant to whether or not a person could have

understood both the nature of the right being abandoned and the consequences of the decision to abandon it." *United States v. Morris*, 287 F.3d 985 (10th Cir. 2002). Accordingly, evidence of mental impairment, such as paranoid schizophrenia, can be used to demonstrate whether a waiver is not knowing and intelligent. *United States v. Rang*, No. 1:15-cr-10037-IT-1, 2017 WL 74278 at *13 (D. Mass. Jan. 6, 2017). Although an individual may appear lucid while suffering from a mental illness, "whether the interrogating officer *perceived* that the defendant understood is immaterial." *Id.* When a defendant's "limited intellectual capacity" casts doubt on his ability to understand, and thus knowingly waive, his *Miranda* rights, such intellectual capacity is a "substantial factor" in the totality of the circumstances test. *United States v. Zerbo*, 98 Cr. 1344 (SAS), 1999 WL 804129 at *34 (S.D.N.Y. Oct. 8, 1999) (citing *Toste v. Lopes*, 701 F. Supp. 306, 314 (D. Conn. 1987)).

Regarding a defendant's capacity to fully comprehend his *Miranda* rights, "[t]here is little doubt that mental illness can interfere with a defendant's ability to make a knowing and intelligent waiver of his *Miranda* rights." *Miller*, 838 F.2d at 1539. Other courts have also recognized that mental impairment due to age, experience, language, and mental disabilities such as paranoid schizophrenia can impact individuals' ability to validly waive their *Miranda* rights. *See Fare* 442 U.S. at 725; *Short*, 790 F.2d at 469; *Moore v. Ballone*, 658 F.2d 218, 229 (4th Cir. 1981); *Cooper*, 455 F.2d at 1145. Additionally, police cannot "disregard signs or even hints" that a defendant does not understand their rights. *Garner*, 557 F.3d at 262 n.1.

When a defendant exhibited a "distorted mental condition" due to suffering from schizophrenia during a custodial interrogation, the court held that the defendant did not knowingly and intelligently waive his *Miranda* rights. *Moore*, 658 F.2d at 228-29. After examining the circumstances surrounding the alleged waiver, the court held that "[g]iven [the

defendant's] mental history, and his lack of any experience with law enforcement procedures . . . the evidence [was] overwhelming that any waiver he gave the officers was invalid." *Id.* Furthermore, mentally ill individuals have "an impaired understanding of *Miranda* warnings" compared to individuals who are not mentally ill. 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, 72 (2017). This impaired understanding can lead mentally disabled individuals to waive their *Miranda* rights without a full understanding of the rights themselves or the reasons why they should invoke those rights. *Id. See also Cooper*, 455 F.2d at 1146 (holding that where two brothers suffered from mental disability and low IQs, their waivers were not knowing and intelligent because they "had no appreciation of the options before them or of the consequences of their choice.").

The Supreme Court of East Virginia inappropriately focused on Officer Barbosa's perception of whether Petitioner understood her rights. Specifically, the Supreme Court of East Virginia determined that Officer Barbosa had no reason to question Petitioner's mental competency at the time of her waiver. R. at 6. In doing so, the Supreme Court of East Virginia failed to recognize that an individual's mental condition at the time of waiver is significant. *See Moore*, 658 F.2d 218. Because Petitioner was suffering from a psychotic episode at the time of her waiver, she could not knowingly and intelligently waive her rights.

Here, when Petitioner was brought in for questioning, Officer Barbosa asked Petitioner if she knew anything about the discovery of Smith's body, to which Petitioner responded in the affirmative. R. at 3. After only one more question, Petitioner began displaying confusion and abnormal behavior, by stating that "the 'voices in her head'" told her "to 'protect the chickens at all costs.'" R. at 3. Petitioner began exhibiting signs that she was suffering from some sort of

mental illness or delusion near the beginning of the interrogation when she began talking about chickens. R. at 4. At this point, it should have been evident to Officer Barbosa that Petitioner was suffering from some sort of mental illness that affected her reasoning and judgment. Furthermore, Dr. Frain testified in the federal trial that Petitioner was "in a psychotic state and suffering from severe delusions and paranoia" at the time of the event. R. at 4. These statements from Dr. Frain, along with Petitioner's conduct during the interrogation, show that at the time of the waiver Petitioner was unable to knowingly and intelligently waive her *Miranda* rights.

Thus, the Supreme Court of East Virginia misconstrued this Court's precedent by holding that police coercion is a necessary prerequisite to finding that Petitioner's *Miranda* waiver was knowing and intelligent. The Supreme Court of East Virginia also incorrectly focused on Officer Barbosa's perception of Petitioner's mental state at the time of her waiver instead of her ability to understand and comprehend her rights. For these reasons, this Court should reverse the Supreme Court of East Virginia's ruling that Petitioner knowingly and intelligently waived her *Miranda* rights and remand for a new trial.

II. EAST VIRGINIA'S ABOLITION OF THE INSANITY DEFENSE CONTRAVENES PETITIONER'S CONSTIUTIONAL PROTECTIONS UNDER THE FOURTEENTH AND EIGHTH AMENDMENTS.

This Court should reverse the holding of the Supreme Court of East Virginia that the abolition of the insanity defense does not infringe on Petitioner's protections under the Fourteenth and Eighth Amendments. The Supreme Court of East Virginia disregarded that the insanity defense is deeply rooted in this Nation's history and an indispensable principle of American criminal law. Moreover, the Supreme Court of East Virginia conveniently ignored the national consensus against abolition of the insanity defense and failed to recognize that criminal punishment for the morally inculpable serves no legitimate penological interest. The Fourteenth

and Eighth Amendments require states to provide an insanity defense in criminal prosecutions. Thus, East Virginia's elimination of the insanity defense is unconstitutional under either the Fourteenth Amendment or the Eighth Amendment.

This Court's jurisprudence has unwaveringly acknowledged "that criminal punishment is not appropriate for those who, by reason of insanity, cannot tell right from wrong." *Delling v. Idaho*, 568 U.S. 1038, 1039 (2012) (Breyer, J., dissenting from denial of certiorari). If insanity is established, the defendant "is not criminally liable, though the government may confine him civilly for as long as he continues to pose a danger to himself or to others by reason of his mental illness." *Id*. *See Jones v. United States*, 463 U.S. 354, 370 (1983). The insanity defense does not result in acquittal or outright release if successfully proven, rather it is "followed by a commitment of the defendant to a mental institution." Wayne R. LaFave, 1 Substantive Crim. L. § 7.1(c) (3d ed. 2018); *see also Insanity Defense*, *Black's Law Dictionary* (11th ed. 2019) (explaining that the affirmative defense of insanity properly leads to commitment to a mental institution). The purpose of the insanity defense is to separate those who are morally culpable, and place them in the criminal justice system, from those who are not morally culpable, and place them within a "medical-custodial disposition." *Id*.

A. The Insanity Defense is a Fundamental Right Protected by the Due Process Clause of the Fourteenth Amendment.

East Virginia's abolition of the insanity defense infringes on Petitioner's Fourteenth Amendment Due Process protections. The Due Process Clause protects against governmental interference with certain fundamental rights, requiring that "[n]o state shall … deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Due Process Clause "bars certain arbitrary, wrongful government actions[.]" *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). It

mandates protection of those principles deemed "fundamental to the American scheme of justice[.]" *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Fundamental rights are those "which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations omitted). Because the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense, the insanity defense is a fundamental right protected by the Due Process Clause. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

While states enjoy some deference when dealing with crime and regulating procedures, states are limited by, and subject to, the protections afforded under the Due Process Clause. *See Patterson v. New York*, 432 U.S. 197, 201-02 (1977); *Irvine v. California*, 347 U.S. 128, 134 (1954). States do not have unfettered authority to implement criminal procedures in furtherance of the administration of justice. Precisely, "there are constitutional limitations on the conduct that a State may criminalize." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). State regulations are unconstitutional under the Due Process Clause if the regulation "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202 (internal citations omitted). Under this test, Petitioner bears the burden to demonstrate that the insanity defense is a fundamental right under the Due Process Clause, such that E. Va. Code § 21-3439 violates constitutional protections.

1. The insanity defense, and moral blameworthiness, is deeply rooted in this Nation's history and is an indispensable principle of American criminal law.

American jurisprudence has consistently demonstrated that culpability, or lack thereof, is a fundamental aspect of criminal law and justice. *See Morissette v. United States*, 342 U.S. 246

(1952). Notably, "[r]ecognition of insanity as a defense is a core principle that has been recognized for centuries by every civilized system of law in one form or another." *Finger v. State*, 27 P.3d 66, 80 (Nev. 2001). Our Nation's criminal law has consistently exhibited the principle of "punishing the vicious will." *Morissette*, 342 U.S. at 250 n.4 (quoting Roscoe Pound, *Introduction* to *Cases on Criminal Law* (Francis Bowes Sayre ed., 1927)). Our history "postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." *Id*. Anglo-American jurisprudence reflects the comprehensive notion that to "constitute any crime there must first be a 'vicious will[,]'" *Id*. at 251 (citing 4 William Blackstone, Commentaries 24 (1769)), as well as the notion that "[t]hose who are under a natural Disability of distinguishing between Good and Evil, as Infants under the Age of Discretion, Ideots and Lunaticks, are not punishable by any criminal Prosecution whatsoever." 1 William Hawkins, *A Treatise of the Pleas of the Crown*, 2 (1739).

In *Morissette*, this Court articulated the core notions of the insanity defense, and its broad acceptance throughout the United States. This Court explained:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Morissette, 342 U.S. at 250-51.

This Court has recognized that the core justification of criminal punishment is moral culpability. *See Tison v. Arizona*, 481 U.S. 137, 149 (1987) (explaining "that a criminal sentence must be directly related to the personal culpability of the criminal offender"). Additionally, the insanity defense has been an indispensable principle in the criminal justice system since this

Nation's founding. *See United States v. Drew*, 25 F. Cas. 913 (C.C.D. Mass. 1828) (holding that insanity is an excuse for every crime because a mentally incapable defendant lacks reason); *In re McElroy*, 1843 WL 5177 (Pa. Sept. 1, 1843) (reasoning that a mentally incapable defendant is an "irresponsible being" unfit for punishment).

Consequently, this Court has recognized four different approaches to the insanity defense throughout this Nation's history. *Clark v. Arizona*, 548 U.S. 735, 749 (2006). Moral culpability is at the core of the "four traditional strains" of the insanity defense, which have been adopted in forty-six states and the federal government. *Id.* (explaining that the four strains of the insanity defense are cognitive incapacity, moral incapacity, volitional incapacity, and product-of-mental-illness). The first two strains are "cognitive incapacity" and "moral incapacity" which were set forth in 1843 in *M'Naghten's Case*, 8 Eng. Rep. 718 (1843). The *M'Naghten* Rule requires the defendant to show that at the time of the act "the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." *Id.* at 722.

The third strain, "volitional incapacity," began in England in 1840, and was applied in the United States in 1887. *See Queen v. Oxford*, 173 Eng. Rep. 941 (1840); *Parsons v. State*, 2 So. 854 (Ala. 1887). This strain inquires "whether a person was so lacking in volition due to a mental defect or illness that he could not have controlled his actions." *Clark*, 548 U.S. at 749. The fourth strain, "product-of-mental-illness," was applied in 1870 and questions "whether a person's action was a product of a mental disease or defect." *Id.* at 749-50 (citing *State v. Jones*, 50 N.H. 369 (1871)).

States have recognized that the insanity defense is a fundamental right under the Fourteenth Amendment. *See generally*, *Finger*, 27 P.3d at 84 (recognizing the insanity defense

as a fundamental right); *People v. Skinner*, 704 P.2d 752, 757 (Cal. 1985) (acknowledging that the insanity defense is and has been a fundamental legal principle in the United States); *State ex rel. Causey*, 363 So.2d 472, 474 (La. 1978) (holding that the principle that the accused must understand the nature of his acts to be criminally responsible is "deeply rooted in our legal tradition and philosophy"); *Sinclair v. State*, 132 So. 581, 581-82 (Miss. 1931) (holding a Mississippi statute that prevented the insanity defense unconstitutional); *State v. Strasburg*, 110 P. 1020 (Wash. 1910) (holding that the legislature cannot remove the defense of insanity).

Abolition of the insanity defense alters the "fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment." *United States v. Pohlot*, 827 F.2d 889, 900 (3d Cir. 1987) (quoting 130 Cong. Rec. H. 9674, 7 (daily ed. Sept. 18, 1984) (statement of Sen. Orrin Hatch) (recognizing that the insanity defense is deeply rooted in this Nation's history)). Moral culpability is a basic tenet "unaffected by advances in medicine or psychology." *United States. v. Denny-Shaffer*, 2 F.3d 999, 1012 (10th Cir. 1993) (recognizing that the criminal justice system has always rejected criminal punishment for those who do not understand right from wrong); *see also* Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 Case W. Res. L. Rev. 599, 658–66 (1990).

The insanity defense is rooted in our Nation's history as well as in our contemporary values. *See Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (noting that contemporary values are demonstrated through legislative enactments). State practices are "worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Leland v. Oregon*, 343 U.S. 790, 798 (1952) (internal citation omitted). Currently, only five states, including the Commonwealth of

East Virginia, have abolished the insanity defense.[1] This statistic alone is sufficient, pursuant to this Court's precedent, to deem the insanity defense a fundamental right protected by the Due Process Clause. *See Atkins* 536 U.S. 304.

The Supreme Court of East Virginia disregarded the history of the insanity defense in the United States. While there are different variations of the insanity defense, there has always been an insanity defense - to protect those who are morally, cognitively, or volitionally inculpable for their actions. *See Clark*, 548 U.S. at 749. Accordingly, East Virginia, by abolishing the insanity defense, has erased Petitioner's ability to present a complete defense in accordance with constitutional guarantees. *See Crane* 476 U.S. at 690. Denying Petitioner, who lacked the capacity to comprehend reality, the defense of insanity "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." *Patterson*, 432 U.S. at 202 (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)). The Due Process Clause requires East Virginia to afford Petitioner the opportunity to present an affirmative defense of insanity based on her mental illness.

2. East Virginia's statutory scheme is unconstitutional.

The Supreme Court of East Virginia mischaracterized the function of the *mens rea* approach adopted in E. Va. Code § 21-3439. The Supreme Court of East Virginia also misconstrued the application of *Clark* by equating the *mens rea* approach to an insanity defense. The abolition of the insanity defense, and the *mens rea* substitute, infringes on Petitioner's constitutional protections.

[1] Idaho, Idaho Code Ann. § 18- 207 (West 2019); Kansas, Kan. Stat. Ann. § 21- 5209 (West 2019); Montana, Mont. Code Ann. § 46-14-102 (West 2019); Utah, Utah Code Ann. § 76-2- 305 (West 2019).

The insanity defense represents a fundamental principle of this Nation's criminal law – that "certain wrong-doers [are] improper subjects for punishment" – and the *mens rea* approach systematically eradicates this principle. *United States v. Freeman*, 357 F.2d 606, 615 (2d Cir. 1966). The *mens rea* approach eliminates the legal mechanism that separates those who know right from wrong from those who do not. *Id*. at 625. Traditionally, morally culpable defendants face criminal punishment while defendants who are morally inculpable due to mental illness face medical treatment through civil commitment. *Id*. Conversely, under the *mens rea* approach, such morally inculpable defendants are criminally punished, and their medical conditions go untreated. *See id*.

The *mens rea* substitute mischaracterizes how mental disorders affect human behavior. Stephen J. Morse & Richard J. Bonnie, *Abolition of the Insanity Defense Violates Due Process*, 41 J. Am. Acad. Psychiatry & L. 488, 491 (2013). Mental disorders, including paranoid schizophrenia, involving hallucinations and delusions do not negate the *mens rea* for the crime charged. *Id*. A mental disorder "affects a person's *reasons* for action." *Id*. (emphasis added). Specifically, a mentally ill defendant's irrational beliefs "give him the motivation to form the *mens rea* required by the charged offense." *Id*. A mentally ill person may have the *mens rea* to complete an act that is criminal, although not understand that the act itself is wrong. *Id*. Even "a man who commits murder because he feels compelled by demons still possesses the [*mens rea*] required for murder." *Pohlot*, 827 F.2d at 900.

The Supreme Court of East Virginia also misconstrued the application of *Clark*. Petitioner's challenge is distinguishable from *Clark*. In *Clark*, Arizona narrowed the definition of insanity and removed the portion of the *M'Naghten* test that asked whether a mental defect left the defendant unable to understand what he was doing. *Clark*, 548 U.S. at 749. However, the

Arizona statute permitted the question of whether a mental disease or defect left the defendant unable to understand that his action was wrong, and explicitly provided for the affirmative defense of insanity. *Id*. *See also* Ariz. Rev. Stat. Ann. § 13–502(A) (West 2019) ("A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong"). In *Clark*, the defendant argued that Arizona violated his Due Process rights by enacting legislation that was inconsistent with the *M'Naghten* test. *Clark*, 548 U.S. at 748. This Court held that the Arizona legislation was permissible because no constitutional minimum had been "shortchanged." *Id*. at 753.

Here, unlike the Arizona legislation at issue in *Clark*, the statutory scheme in E. Va. Code § 21-3439 abolishes the insanity defense altogether. R. at 4. East Virginia's statutory scheme does not serve as an alternative to the insanity defense and is incompatible with fundamental principles of justice because it ignores Petitioner's absence of moral culpability. While East Virginia has an interest in regulating the administration of justice within the state, it may implement restrictive interpretations of the insanity defense consistent with constitutional protections, but it cannot abolish the insanity defense all together. *See Leland*, 343 U.S. at 796 (holding that legislation requiring defendants to prove insanity beyond a reasonable doubt was permissible).

Abolishing the insanity defense erroneously deprives criminal defendants of constitutionally guaranteed rights. When a state deprives a mentally ill defendant the insanity defense it affronts fundamental principles of "justice so rooted in the traditions and conscience of our people[.]" *Clark*, 548 U.S. at 748 (internal quotation omitted). Further, abolishing the insanity defense permits mentally ill defendants who are not morally culpable to be convicted of

a crime for which they are not responsible. Here, Petitioner has been diagnosed with paranoid schizophrenia, rendering her unable to be morally culpable for her actions. R. at 3. She believed that the victim "needed to be killed to protect the sacred lives of chickens that Smith endangered through his job." R. at. 4. Because of her illness, Petitioner "was unable to control or fully understand the wrongfulness of her actions[.]" R. at 4. E. Va. Code § 21-3439 prohibited Petitioner from introducing evidence to show cognitive incapacity, moral incapacity, volitional incapacity, or product-of-mental-illness. Accordingly, E. Va. Code § 21-3439 denied Petitioner "a meaningful opportunity to present a complete defense." *Crane*, 476 U.S. at 690 (internal quotation omitted). Therefore, E. Va. Code § 21-3439 is unconstitutional.

The insanity defense is a fundamental right under the Due Process Clause of the Fourteenth Amendment, thus, abolishing the insanity defense is unconstitutional. However, if this Court were to find that the abolition of the insanity defense is permissible under the Fourteenth Amendment, it is nevertheless unconstitutional under the cruel and unusual punishments clause of the Eighth Amendment.

B. The Abolition of the Insanity Defense Infringes on Petitioner's Eighth Amendment Right to be Free from Cruel and Unusual Punishment.

The Eighth Amendment of the United States Constitution prohibits the imposition of "cruel and unusual punishment[.]" U.S. Const. amend. VIII. This prohibition is "applicable to the states through the Fourteenth Amendment." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008). A criminal punishment must conform with "'the dignity of man,' which is 'the basic concept underlying the Eighth Amendment.'" *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)). The Eighth Amendment is not static; it derives "meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356

U.S. at 101. In accordance with the Eighth Amendment, a criminal punishment must not be "excessive." *Gregg*, 428 U.S. at 173*; see also Solem v. Helm*, 463 U.S. 277 (1983).

In determining what the Eighth Amendment requires under the evolving standards of decency, this Court has conducted a two-part analysis. *See generally Atkins* 536 U.S. at 312; *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991); *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980). First, this Court reviews the proportionality of a punishment informed by the evolving standards of decency. *Atkins*, 536 U.S. at 312. Second, this Court determines whether there is justification to implement the principles derived from evolving standards of decency. *Id*. at 313 ("in cases involving a consensus, our own judgment is 'brought to bear' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators." (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

1. The national consensus precludes abolishing the insanity defense.

This Court has reiterated that the evolving standards of decency analysis must be determined through "objective factors to the maximum possible extent." *Rummel*, 445 U.S. at 274-75 (internal citation omitted). The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins*, 536 U.S. at 312 (internal citation omitted). A national consensus, through federal and state legislative enactments, reflects the proposition that punishing morally inculpable defendants constitutes cruel and unusual punishment under the Eighth Amendment.

Currently, forty-six states recognize an insanity defense that incorporates criminal defendants' lack of moral culpability. *See* Appendix A. Only five states, including East Virginia, have abolished the insanity defense altogether. *See* Appendix A. Along with a national consensus, this Court also looks to the "consistency of the direction of change" when analyzing

the evolving standards of decency. *Atkins*, 536 U.S. at 315. There is no such consistency here, as only five states have eliminated the insanity defense since 1979. *See Clark*, 548 U.S. at 752. In applying this Court's precedent under the evolving standards of decency analysis, five states' legislation, developed over the span of forty years, would be insufficient to constitute a prevailing standard. *See Roper v. Simmons*, 543 U.S. 551 (2004) (reasoning that thirty states banning the death penalty for juveniles constituted a national consensus); *Atkins*, 536 U.S. 304 (reasoning that thirty states forbidding capital punishment for the mentally disabled constituted a national consensus).

The inconsistency of passing legislation to abolish the insanity defense as well as the national consensus for the insanity defense demonstrates "powerful evidence that today our society views mentally [ill] offenders as categorically less culpable than the average criminal." *Id*. at 316. Thus, "[t]his consensus unquestionably reflects widespread judgment about the relative culpability of mentally" ill defendants. *Atkins*, 536 U.S. at 317. Accordingly, the "objective indicia of consensus," through state policy and legislative enactments, demonstrates that the insanity defense is necessary under the Eighth Amendment to protect morally inculpable defendants from criminal punishment. *Roper*, 543 U.S. at 552; *see also Atkins*, 536 U.S. at 316.

2. Criminal punishment for the morally inculpable is categorically and unequivocally excessive.

East Virginia's abolition of the insanity defense serves no legitimate penological purpose, and disproportionately punishes morally inculpable defendants in violation of the Eighth Amendment. Without an insanity defense, mentally ill and inculpable offenders, such as the Petitioner, will be inexcusably punished. Punishment is deemed "excessive" under the Eighth Amendment if it involves the "unnecessary and wanton infliction of pain" or if it is grossly "disproportionate" to the severity of the crime. *Gregg*, 428 U.S. at 173. This Court has

consistently recognized that "a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison*, 481 U.S. at 149. Abolition of the insanity defense will cause mentally incapable, and therefore morally inculpable, defendants to be inexcusably convicted and criminally punished.

Abolishing the insanity defense involves the "unnecessary and wanton infliction of pain" because it does not further a legitimate penological interest. *Gregg*, 428 U.S. at 173. This Court has noted four legitimate penological justifications for punishment: retribution, deterrence, rehabilitation, and incapacitation. *See Graham v. Florida*, 560 U.S. 48, 71 (2010) (citing *Ewing v. California*, 538 U.S. 11, 25 (2003)). Unless the imposition of criminal punishment for the mentally ill and morally inculpable serves one of these penological justifications, "it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (citing *Coker*, 433 U.S. at 592).

The retribution theory allows society to impose sanctions to "to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense." *Graham*, 560 U.S. at 71. However, "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison*, 481 U.S. at 149. This Court has recognized that mentally ill offenders possess a diminished culpability, unable to understand right from wrong. *See Atkins*, 536 U.S. at 319 (reasoning that punishment must correspond with the diminished culpability of an offender). Because mentally ill offenders, like the Petitioner, are unable to know right from wrong, the retributive justification does not vindicate abolishing the insanity defense. *Id*.

The deterrence theory is society's interest of preventing future crimes by a prospective offender. *Atkins,* 536 U.S. at 319. Deterrence reinforces the law-abiding tendencies of the general public through the example of punishing those who have broken the law. LaFave, *supra*, at § 7.1(c)(4). The same cognitive impairments that make mentally incapable offenders morally inculpable "also make it less likely that they can process the information of the possibility" of a criminal punishment and "control their conduct based on that information." *Atkins*, 536 U.S. at 320. Accordingly, the deterrence justification does not vindicate abolishing the insanity defense.

The rehabilitation theory reasons that punishments are "imposed upon the convicted defendant for the purpose of altering his behavior pattern and making him a more useful citizen in the community." LaFave, *supra*, at § 7.1(c)(3). Rehabilitation of a mentally ill person cannot be accomplished in prison. *Freeman*, 357 F.2d at 615 n.61 (reasoning that "[t]he important thing is to render the dangerous person harmless. And it is best to do this by correction rather than simply by incarceration"). Importantly, the insanity defense permits treatment of mentally ill individuals through civil commitment rather than criminal punishment through prison. LaFave, *supra*, at § 7.1(c)(3); *see Freeman*, 357 F.2d at n.61 (recognizing that sending individuals with mental disease to prison instead of a mental hospital could result in aggravation of the mental disease for the individual, and "haunted" outcomes for society upon release). Thus, the rehabilitation justification does not vindicate abolishing the insanity defense.

The incapacitation theory of punishment promotes the "protection of society from dangerous persons[.]" LaFave, *supra*, at § 7.1(c)(2). The incapacitation justification imprudently mischaracterizes mental illness because there is no correlation between an individual's mental illness and the dangerousness to society. *Id*. The application of the insanity defense promotes the notion that "the defendant is not merely incarcerated for a fixed period of time but is instead

committed until such time as he no longer is dangerous." *Id*. Notably, prison is likely to worsen the mental illness of the offender. The insanity defense prevents the imposition of life in prison for the mentally inculpable because the defendant is committed, not imprisoned. LaFave, *supra*, at § 7.1(c)(2). Accordingly, the incapacitation justification does not vindicate abolishing the insanity defense.

Criminally punishing mentally ill defendants, who are unable to know right from wrong, fails to serve any of the penological justifications for punishment recognized by this Court. *See Freeman*, 357 F.2d at 615. Rather, these justifications are better served through the insanity defense by committing a mentally ill offender "until such time as he has regained his sanity or is no longer a danger to himself or society." *Jones*, 463 U.S. at 370. Hence, abolishing the insanity defense contributes to the "purposeless and needless imposition of pain and suffering." *Coker*, 433 U.S. at 592.

Criminal punishment for mentally ill offenders is incompatible with their moral blameworthiness for any crime and therefore excessive under the Eighth Amendment. *See Freeman*, 357 F.2d at 615 (reasoning that mentally disabled offenders, "those who lack substantial capacity to control their actions" are "truly irresponsible"). This Nation's criminal law is founded on the principle that in order to punish a "vicious will" there must be "a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." *Morissette*, 342 U.S. at 251 n.4 (quoting Roscoe Pound, *Introduction* to *Cases on Criminal Law* (Francis Bowes Sayre ed., 1927)). This fundamental principle is abandoned if the insanity defense is abolished.

The purpose of the insanity defense is to prohibit an individual from being punished for acts which they are not morally culpable. *Leland*, 343 U.S. at 796. This Court has recognized

that those with a diminished capacity are not subject to the same punishments as those who are mentally competent. *See Miller v. Alabama*, 567 U.S. 460 (2012) (holding that life without parole for juvenile offenders is unconstitutional under the Eighth Amendment because juveniles do not possess the mental capacity to appreciate their actions); *Atkins*, 536 U.S. at 321 (holding that the death penalty is unconstitutional under the Eighth Amendment because of the reduced capacity of mentally disabled offenders).

A prison sentence for an individual with paranoid schizophrenia is cruel and unusual punishment under the Eighth Amendment. *State v. Cowan*, 861 P.2d 884, 889 (Mont. 1993) (sentencing a defendant with paranoid schizophrenia to prison after he was not permitted to assert an insanity defense was unconstitutional under the Eighth Amendment). Here, Petitioner was unable to comprehend the moral culpability necessary to be responsible for a crime. East Virginia's abolition of the insanity defense "constitutes an excessive sanction for the entire category of mentally [ill] offenders[.]" *Roper*, 543 U.S. at 563. It is impossible for Petitioner's criminal punishment of life in prison to be "directly related to [her] personal culpability." *Tison*, 481 U.S. at 149. Accordingly, the overwhelming national consensus, and the disproportionality of criminal punishment of the mentally ill, precludes abolishing the insanity defense. Therefore, East Virginia's abolition of the insanity defense constitutes cruel and unusual punishment under the Eighth Amendment.

As such, because the Supreme Court of East Virginia incorrectly concluded that East Virginia's statutory scheme was an acceptable substitute to the constitutional requirement of an insanity defense, this Court should reverse the Supreme Court of East Virginia's holding that East Virginia's abolition of the insanity defense does not violate the Fourteenth Amendment's Due Process Clause or the Eighth Amendment's prohibition against cruel and unusual

punishment. A finding of unconstitutionality under either the Fourteenth or Eighth Amendments would be sufficient for this Court to remand the case.

CONCLUSION

For the foregoing reasons, Petitioner Linda Frost respectfully requests that this Court reverse the decision of the Supreme Court of East Virginia, and remand the case for a new trial on the merits excluding her confession and permitting her to present the affirmative defense of insanity.

Dated: September 13, 2019

Respectfully Submitted,

TEAM L
COUNSEL FOR THE PETITIONER

APPENDIX A

This is a jurisdictional survey that reflects the predominant practice of the insanity defense throughout the United States. In short, forty-six states recognize an insanity defense, while five states have abolished the insanity defense.

States that have abolished the insanity defense.

Jurisdiction	*Authority*	*Law*
East Virginia	E. Va. Code § 21-3439.	"[E]vidence of a mental disease or defect is admissible to disprove competency to stand trial or to disprove the *mens rea* element of an offense, but the lack of ability to know right from wrong is no longer a defense."
Idaho	Idaho Code § 18-207(1).	"Mental condition shall not be a defense to any charge of criminal conduct."
Kansas	Kan. Stat. Ann. § 21-5209.	"It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged. Mental disease or defect is not otherwise a defense."
Montana	Mont. Code Ann. § 46-14-102.	"Evidence that the defendant suffered from a mental disease or disorder or developmental disability is admissible to prove that the defendant did or did not have a state of mind that is an element of the offense."
Utah	Utah Code Ann. § 76-2-305(1)(a).	"It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged."

States that have an insanity defense.

Jurisdiction	*Authority*	*Law*
Alabama	Ala. Code § 13A-3-1(a).	"It is an affirmative defense to a prosecution for any crime that, at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense."
Alaska	Alaska Stat. § 12.47.010(a).	"In a prosecution for a crime, it is an affirmative defense that when the defendant engaged in the criminal conduct, the defendant was unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct."
Arizona	Ariz. Rev. Stat. Ann. § 13-502(A).	"A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the

		criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense."
Arkansas	Ark. Code Ann. § 5-2-301(6).	" 'Lack of criminal responsibility' means that due to a mental disease or defect a defendant lacked the capacity at the time of the alleged offense to either: (A) Appreciate the criminality of his or her conduct; or (B) Conform his or her conduct to the requirements of the law."
California	Cal. Penal Code § 25(b).	"In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense."
Colorado	Colo. Rev. Stat. § 16-8-101.5(1).	"The applicable test of insanity shall be: (a) A person who is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act is not accountable; except that care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions, for, when the act is induced by any of these causes, the person is accountable to the law; or (b) A person who suffered from a condition of mind caused by mental disease or defect that prevented the person from forming a culpable mental state that is an essential element of a crime charged, but care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions because, when the act is induced by any of these causes, the person is accountable to the law."
Connecticut	Conn. Gen. Stat. § 53a-13(a).	"In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his

		conduct or to control his conduct within the requirements of the law."
Delaware	Del. Code Ann. tit. 11, § 401(a).	"In any prosecution for an offense, it is an affirmative defense that, at the time of the conduct charged, as a result of mental illness or serious mental disorder, the accused lacked substantial capacity to appreciate the wrongfulness of the accused's conduct."
Florida	Fla. Stat. § 775.027(1).	"It is an affirmative defense to a criminal prosecution that, at the time of the commission of the acts constituting the offense, the defendant was insane. Insanity is established when: (a) The defendant had a mental infirmity, disease, or defect; and (b) Because of this condition, the defendant: 1. Did not know what he or she was doing or its consequences; or 2. Although the defendant knew what he or she was doing and its consequences, the defendant did not know that what he or she was doing was wrong."
Georgia	Ga. Code Ann. § 16-3-3.	"A person shall not be found guilty of a crime if, at the time of the act, omission, or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence." Ga. Code Ann. § 16-3-2. "A person shall not be found guilty of a crime when, at the time of the act, omission, or negligence constituting the crime, the person, because of mental disease, injury, or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime."
Hawaii	Haw. Rev. Stat. § 704-400(1).	"A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect the person lacks substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirements of law."
Illinois	720 Ill. Comp. Stat. 5/6-2(a).	"A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity to appreciate the criminality of his conduct."
Indiana	Ind. Code § 35-41-3-6(a).	"A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease

		or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense."
Iowa	Iowa Code § 701.4.	"A person shall not be convicted of a crime if at the time the crime is committed the person suffers from such a diseased or deranged condition of the mind as to render the person incapable of knowing the nature and quality of the act the person is committing or incapable of distinguishing between right and wrong in relation to that act."
Kentucky	Ky. Rev. Stat. Ann. § 504.020(1).	"A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental illness or intellectual disability, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."
Louisiana	La. Stat. Ann. § 14:14.	"If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility."
Maine	Me. Stat. tit. 17-A, § 39(1).	"A defendant is not criminally responsible by reason of insanity if, at the time of the criminal conduct, as a result of mental disease or defect, the defendant lacked substantial capacity to appreciate the wrongfulness of the criminal conduct."
Maryland	Md. Code Ann., Crim. Proc. § 3-109(a).	"A defendant is not criminally responsible for criminal conduct if, at the time of that conduct, the defendant, because of a mental disorder or mental retardation, lacks substantial capacity to: (1) appreciate the criminality of that conduct; or (2) conform that conduct to the requirements of law."
Massachusetts	*Commonwealth v. Lawson*, 62 N.E.3d 22, 28 (Mass. 2016) (recognizing the Model Penal Code standard for the insanity defense).	"Where a defendant asserts a defense of lack of criminal responsibility and there is evidence at trial that, viewed in the light most favorable to the defendant, would permit a reasonable finder of fact to have a reasonable doubt whether the defendant was criminally responsible at the time of the offense, the Commonwealth bears the burden of proving beyond a reasonable doubt that the defendant was criminally responsible. 'In this process, we require the Commonwealth to prove negatives beyond a reasonable doubt: that the defendant did not have a mental disease or defect at the time of the crime and, if that is not disproved

		beyond a reasonable doubt, that no mental disease or defect caused the defendant to lack substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.' "
Michigan	Mich. Comp. Laws Ann. § 768.21a(1).	"It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness as defined in section 400 of the mental health code … or as a result of having an intellectual disability as defined in section 100b of the mental health code … that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or having an intellectual disability does not otherwise constitute a defense of legal insanity."
Minnesota	Minn. Stat. § 611.026.	"No person having a mental illness or cognitive impairment so as to be incapable of understanding the proceedings or making a defense shall be tried, sentenced, or punished for any crime; but the person shall not be excused from criminal liability except upon proof that at the time of committing the alleged criminal act the person was laboring under such a defect of reason, from one of these causes, as not to know the nature of the act, or that it was wrong."
Mississippi	Miss. Stat. § 41-21-61.	"'Person with mental illness' includes a person who, based on treatment history and other applicable psychiatric indicia, is in need of treatment in order to prevent further disability or deterioration which would predictably result in dangerousness to himself or others when his current mental illness limits or negates his ability to make an informed decision to seek or comply with recommended treatment."
Missouri	Mo. Rev. Stat. § 562.086(1).	"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he was incapable of knowing and appreciating the nature, quality or wrongfulness of his or her conduct."
Nebraska	*State v. Hotz*, 795 N.W.2d 645, 653	"Under our current common-law definition, the two requirements for the insanity defense are that

	(Neb. 2011) (recognizing *M'Naghten* test for insanity).	(1) the defendant had a mental disease or defect at the time of the crime and (2) the defendant did not know or understand the nature and consequences of his or her actions or that he or she did not know the difference between right and wrong."
Nevada	*Finger v. State*, *27* P.3d 66, 84-85 (Nev. 2001) (recognizing *M'Naghten* test for insanity).	"To qualify as being legally insane, a defendant must be in a delusional state such that he cannot know or understand the nature and capacity of his act, or his delusion must be such that he cannot appreciate the wrongfulness of his act, that is, that the act is not authorized by law."
New Hampshire	*State v.* Fichera, 903 A.2d 1030, 1034 (N.H. 2006) (recognizing an insanity defense).	"A defendant asserting an insanity defense must prove two elements: first, that at the time he acted, he was suffering from a mental disease or defect; and, second, that a mental disease or defect caused his actions."
New Jersey	N.J. Stat. Ann. § 2C:4-1.	"A person is not criminally responsible for conduct if at the time of such conduct he was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong. Insanity is an affirmative defense which must be proved by a preponderance of the evidence."
New Mexico	*State v. Hartley*, 565 P.2d 658, 660 (N.M. 1977) (recognizing *M'Naghten* test plus an additional requirement for the insanity defense).	"In order to support a verdict of insanity under the *M'Naghten* test, the jury must be satisfied that the defendant (1) did not know the nature and quality of the act or (2) did not know that it was wrong, [¶] This rule prevailed in New Mexico until 1954 when this court in *State v. White*,58 N.M. 324, 270 P.2d 727 (1954) made a careful analysis of the authorities and made a limited extension of the *M'Naghten* rule, adding a third ingredient. The court held that if the accused, (3) as a result of disease of the mind 'was incapable of preventing himself from committing' the crime, he could be adjudged insane and thereby relieved of legal responsibility for what would otherwise be a criminal act."
New York	N.Y. Penal Law § 40.15.	"In any prosecution for an offense, it is an affirmative defense that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the time of such conduct, as a result of mental disease or defect, he lacked substantial

		capacity to know or appreciate either: 1. The nature and consequences of such conduct; or 2. That such conduct was wrong."
North Carolina	*State v. Thompson*, 402 S.E.2d 386, 390 (N.C. 1991) (recognizing *M'Naghten* test for insanity defense).	"[A]n accused is legally insane and exempt from criminal responsibility by reason thereof if he commits an act which would otherwise be punishable as a crime, and at the time of so doing is laboring under such a defect of reason, from disease of the mind, as to be incapable of knowing the nature and quality of the act he is doing, or, if he does know this, incapable of distinguishing between right and wrong in relation to such act."
North Dakota	N.D. Cent. Code 12.1-04.1-01(1).	"An individual is not criminally responsible for criminal conduct if, as a result of mental disease or defect existing at the time the conduct occurs: a. The individual lacks substantial capacity to comprehend the harmful nature or consequences of the conduct, or the conduct is the result of a loss or serious distortion of the individual's capacity to recognize reality; and b. It is an essential element of the crime charged that the individual act willfully."
Ohio	Ohio Rev. Code Ann. § 2901.01(A)(14).	"A person is 'not guilty by reason of insanity' relative to a charge of an offense only if the person proves … that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts."
Oklahoma	Okla. Stat. tit. 21, § 152.	"All persons are capable of committing crimes, except those belonging to the following classes: … 4. Mentally ill persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness …."
Oregon	Or. Rev. Stat. § 161.295(1).	"A person is guilty except for insanity if, as a result of a qualifying mental disorder at the time of engaging in criminal conduct, the person lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of law."
Pennsylvania	18 Pa. Cons. Stat. § 314(d).	"Common law M'Naghten's Rule preserved. - Nothing in this section shall be deemed to repeal or otherwise abrogate the common law defense of insanity (M'Naghten's Rule) in effect in this

		Commonwealth on the effective date of this section."
Rhode Island	*State v. Carpio*, 43 A.3d 1, 12 n.10 (R.I. 2012) (recognizing the Model Penal Code standard for the insanity defense).	"A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, his capacity either to appreciate the wrongfulness or his conduct or to conform his conduct to the requirements of the law were so substantially impaired that he cannot justly be held responsible."
South Carolina	S.C. Code Ann. § 17-24-10(A).	"It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong."
South Dakota	S.D. Codified Laws § 22-1-2(20).	"'Insanity,' the condition of a person temporarily or partially deprived of reason, upon proof that at the time of committing the act, the person was incapable of knowing its wrongfulness, but not including an abnormality manifested only by repeated unlawful or antisocial behavior."
Tennessee	Tenn. Code Ann. § 39-11-501(a).	"It is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of the defendant's acts. Mental disease or defect does not otherwise constitute a defense. The defendant has the burden of proving the defense of insanity by clear and convincing evidence."
Texas	Tex. Penal Code Ann. § 8.01(a).	"It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong."
Vermont	Vt. Stat. Ann. tit. 13, § 4801(a)(1).	"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he or she lacks adequate capacity either to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law."
Virginia	*Orndorff v. Commonwealth*, 691 S.E.2d 177, 179 n.5 (Va. 2010) (recognizing	"As applied in Virginia, the defense of insanity provides that a 'defendant may prove that at the time of the commission of the act, he was suffering from a mental disease or defect such that he did not know the nature and quality of the act he was

	M'Naghten test plus an additional requirement for the insanity defense).	doing, or, if he did know it, he did not know what he was doing was wrong.' … In addition, we have approved in appropriate cases the granting of an instruction defining an 'irresistible impulse' as a form of legal insanity. 'The irresistible impulse doctrine is applicable only to that class of cases where the accused is able to understand the nature and consequences of his act and knows it is wrong, but his mind has become so impaired by disease that he is totally deprived of the mental power to control or restrain his act.' "
Washington	Wash. Rev. Code § 9A. 12.010.	"To establish the defense of insanity, it must be shown that: (1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that: (a) He or she was unable to perceive the nature and quality of the act with which he or she is charged; or (b) He or she was unable to tell right from wrong with reference to the particular act charged."
West Virginia	*State v. Fleming*, 784 S.E.2d 743, 751-52 (W. Va. 2016) (recognizing the Model Penal Code standard for the insanity defense).	"When a defendant in a criminal case raises the issue of insanity, the test of his responsibility for his act is whether, at the time of the commission of the act, it was the result of a mental disease or defect causing the accused to lack the capacity either to appreciate the wrongfulness of his act or to conform his act to the requirements of the law, and it is error for the trial court to give an instruction on the issue of insanity which imposes a different test or which is not governed by the evidence presented in the case."
Wisconsin	Wis. Stat. § 971.15(1).	"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law."
Wyoming	Wyo. Stat. Ann. § 7-11-304(a).	"A person is not responsible for criminal conduct if at the time of the criminal conduct, as a result of mental illness or deficiency, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

Additional jurisdictions.

Jurisdiction	*Authority*	*Law*
Federal	18 U.S.C.A. § 17(a).	"It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense."
District of Colombia	*Bethea v. United States*, 365 A.2d 64, 79 (D.C. 1976).	"A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of law."