No. 19-1409

IN THE
SUPREME COURT OF THE UNITED STATES

LINDA FROST,
Petitioner,
v.

THE COMMONWEALTH OF EAST VIRGINIA,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF EAST VIRGINIA

BRIEF FOR RESPONDENT

COUNSEL FOR RESPONDENT

TEAM Q

DATED SEPTEMBER 13, 2019

QUESTIONS PRESENTED

I. Whether an individual's waiver of her *Miranda* rights is knowing and intelligent when, due to a mental disease, the accused claims to not have understood her rights, even though she appeared lucid to the investigating officer at the time of her waiver.

II. Whether the abolition of the insanity defense and substitution of a *mens rea* approach to evidence of mental impairment violates the Fourteenth Amendment right to Due Process and the Eighth Amendment right not to be subject to cruel and unusual punishment where the accused formulated the intent to commit the crime but was mentally ill at the time of the offense.

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At the time of filing this Brief, the decisions of the Circuit Court of East Virginia and the Supreme Court of East Virginia have not been reported in an official or unofficial reporter.

STATEMENT OF JURISDICTION

This court has jurisdiction because the issues concern the constitutionality of a defendant's *Miranda* waiver and the constitutionality of a state statute. The decision of the Supreme Court of East Virginia was entered on December 31, 2018. This Court granted certiorari on July 31, 2019.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth, Fourteenth, and Eighth Amendments to the United States Constitution are reproduced verbatim in Appendices A, B, and C, respectively.

STATEMENT OF THE CASE

On June 16, 2017, Christopher Smith ("Christopher") tragically lost his life at the hands of his girlfriend, Petitioner, Linda Frost. R. at 2. Christopher's co-worker discovered his dead body with multiple puncture wounds after entering Christopher's office. R. at 2, 3. The Petitioner intentionally stabbed Christopher with a steak knife—robbing an innocent man of his life. R. at 3. The facts leading up to Christopher's murder are as follows.

A week before the murder, the Petitioner and Christopher argued on the phone. R. at 2. The nature of the argument is unknown, though Christopher's sister observed his distressed demeanor after the phone call. R. at 2. On the day of the murder, the Petitioner worked at her

usual place of employment[1] from 2pm-8pm. R. at 2. Although her exact time of departure from work is unknown, two eyewitnesses observed a woman matching the Petitioner's description at a local park later that evening. R. at 2.

Following an anonymous tip, the Campton Roads Police Department ("Police Department") brought in the Petitioner for questioning. R. at 3. Officer Nathan Barbosa ("Officer Barbosa") brought the Petitioner into an interrogation room. R. at 3. Officer Barbosa read the Petitioner her *Miranda* rights. R. at 3. The Petitioner signed a written waiver. R. at 3. After some initial questioning, Officer Barbosa informed the Petitioner that the Police Department found Christopher's body. R. at 3. Officer Barbosa asked the Petitioner if she knew who might be responsible for Christopher's murder. R. at 3. The Petitioner proclaimed, "I did it. I killed Chris." R. at 3. The Petitioner described the murder by stating, "I stabbed him, and I left the knife in the park." R. at 3. Following this clear declaration, the Petitioner began exclaiming some unusual statements such as, "she did not think that killing [Christopher] was wrong because she believed that he would be reincarnated as a chicken." R. at 3. After several statements relating to the sacristy of chickens, Officer Barbosa did not ask the Petitioner further questions relating to the murder. R. at 3. Officer Barbosa did however ask the Petitioner if she wanted a court appointed attorney. R. at 3. The Petitioner responded in the affirmative. R. at 3. Officer Barbosa ended the interrogation. R. at 3.

Subsequently, a search of all local parks led to the discovery of a bloody steak knife. R. at 3. Despite the knife having no identifiable fingerprints, other circumstantial evidence supported the Petitioner's confession. R. at 3. First, DNA tests of the blood on the knife confirmed that the

[1] The Petitioner worked at Thomas's Seafood Restaurant and Grill. R. at 2. The exact nature of her employment is unknown, including her job responsibilities.

blood matched Christopher's. R. at 3. Second, the knife matched a knife set found in the Petitioner's home. R. at 3. Third, the coroner confirmed that Christopher died from multiple puncture wounds from a knife similar, if not the exact, to the one found at the local park. R. at 3.

The Petitioner faced both federal and state indictment for Christopher's murder. R. at 3. While awaiting trial, the Petitioner filed a motion for a mental evaluation. R. at 3. Dr. Desiree Frain, a clinical psychiatrist, performed the evaluation. R. at 3. During the evaluation, the Petitioner reiterated her belief that she murdered Christopher "to protect the sacred lives of chickens." R. at 4. Dr. Frain diagnosed the Petitioner with paranoid schizophrenia. R. at 3. Importantly, the Petitioner has no history of any mental disorder, any mental health treatment, or any medication for a mental health condition. R. at 4.

After Dr. Frain evaluated the Petitioner's current mental state and provided the Petitioner with medication, the Petitioner was deemed competent to stand for trial. R. at 4. At the Petitioner's federal trial, Dr. Frain's testimony suggested that the Petitioner was in a psychotic state and suffering from severe delusions and paranoia on the date of the murder and the date of the interrogation. R. at 4.

Procedural History

As it pertains to the Petitioner's federal trial, the Petitioner set forth an insanity defense. R. at 4. Because insanity remains a defense under federal law,[2] the Petitioner was acquitted. R. at 4.

In 2016, the Commonwealth of East Virginia enacted E. Va. Code § 21-3439, which established that evidence of an accused's mental defect is inadmissible to establish an insanity defense. R. at 4. Following the Petitioner's federal acquittal, the Commonwealth of East Virginia prosecuted the Petitioner for Christopher's murder. R. at 4. The Petitioner was similarly found

[2] *See* 18 U.S.C. § 17(a) 2019.

competent to stand trial. R. at 4. The Petitioner filed a motion to suppress her confession and a motion asking the trial court to hold that abolishing the insanity defense violated the Petitioner's Eight Amendment rights and the Fourteenth Amendment Due Process clause. R. at 5. The trial court denied both motions. R. at 5. The trial court found that although the Petitioner did not understand her *Miranda* rights or the consequences of signing the waiver form, the Petitioner's conduct during the interrogation did not suggest her lack of understanding. R. at 5. Additionally, the trial court found that E. Va. Code § 21-3439 was not cruel and unusual punishment under the Eighth Amendment nor did it violate the Petitioner's Due Process rights under the Fourteenth Amendment. R. at 5. Thereafter, the jury convicted the Petitioner of murder. R. at 5. Subsequently, the Petitioner appealed to the Supreme Court of East Virginia. R. at 1. The Supreme Court of East Virginia affirmed the court below on December 31, 2018. R. at 5-9. The Petitioner filed a Writ of Certiorari to the Supreme Court of the United States and this Court granted that Certiorari on July 31, 2019. R. at 12.

SUMMARY OF THE ARGUMENT

This Court should affirm the Circuit Court's holding and ensure that the Petitioner receives the necessary punishment for her heinous crime. First, the Petitioner's confession obtained during custodial interrogation is admissible. The Petitioner knowingly and intelligently waived her *Miranda* rights. A knowing and intelligent waiver occurs when the Petitioner understands the nature of the rights being relinquished and the consequences of relinquishing those rights. The totality of the circumstances surrounding the interrogation is the driving force behind this inquiry. Under an objective inquiry, the totality of the circumstances indicates that the Petitioner knowingly and intelligently waived. Officer Barbosa had no reason to suspect that the Petitioner's confession was anything other than sane and lucid. Officer Barbosa and the

Petitioner participated in an exchange of dialogue both before and after the confession. The exchange of communication illustrates that the Petitioner understood her rights and the consequences of abandoning them. Under a subjective inquiry, the totality of the circumstances illustrates that the Petitioner knowingly and intelligently waived. The Petitioner had a basic understanding of the nature of the interrogation, including the distinction between Officer Barbosa and a court appointed attorney. Thus, this Court should find that the Petitioner knowingly and intelligently waived.

Second, East Virginia's choice to enact a *mens rea* approach to insanity does not offend the Fourteenth Amendment Due Process clause or the Eighth Amendment. An individual is afforded Due Process protection when a principle of justice is so deeply rooted in the traditions and conscience of the people as to order it fundamental. The affirmative insanity test is not so deeply rooted in society so as to render it a fundamental right. In fact, the affirmative insanity defense did not develop until the nineteenth century. For centuries prior, insane defendants were only entitled to introduce evidence to negate the requisite mental state. Further, East Virginia's *mens rea* approach is not cruel or unusual punishment under the Eighth Amendment. A punishment is only cruel and unusual if it was condemned by the common law in 1789, or if "evolving standards of decency" suggest that it is cruel and unusual punishment today. Objective evidence, including states legislative evidence, is the most persuasive factor for whether society today considers the punishment cruel and unusual. Conversely, the affirmative insanity defense was not a mandated defense in 1789. Further, objective evidence does not suggest that evolving standards require that East Virginia provide mentally ill defendants with an affirmative insanity defense. Only sixteen states mandate that a defendant receives an affirmative insanity defense. Sixteen states are not enough to indicate that society today considers a *mens rea* approach cruel

and unusual punishment. Lastly, creating a constitutional requirement for a specific insanity test is premature when analyzing both the medical and legal communities lack of agreement on the proper insanity defense. Thus, this Court should find that a state legislature retains the absolute right to enact a *mens rea* approach to the insanity defense.

ARGUMENT

I. THE SUPREME COURT OF EAST VIRGINIA CORRECTLY HELD THAT THE PETITIONER'S CONFESSION WAS ADMISSIBLE BECAUSE THE PETITIONER KNOWINGLY AND INTELLIGENTLY WAIVED HER *MIRANDA* RIGHTS.

In *Miranda v. Arizona*, the Supreme Court determined that statements from custodial interrogation may be used at trial so long as effective procedural safeguards provided the accused with the privilege against self-incrimination. 384 U.S. 436, 444 (1966). The Court concluded that procedural safeguards required the accused to be warned "that [s]he has a right to remain silent . . . and that [s]he has a right to the presence of an attorney . . ." *Id.* Additionally, the Court noted that a defendant may waive her rights when the waiver is made voluntarily, knowingly, and intelligently. *Id.* The *Miranda* Court's primary concern was protecting defendants from inherent governmental coercion. *Id.* at 466; *Colorado v. Connelly*, 479 U.S. 157, 170.

Since the *Miranda* holding, courts continue to grapple with the proper analysis for deciding whether a waiver was made knowingly and intelligently. *See Woodley v. Bradshaw*, 451 F. App'x 529, 540 (6th Cir. 2011). A number of courts require evidence that the interrogating officer knew that a waiver was made unknowingly and unintelligently. *Garner v. Mitchell*, 557 F.3d 257, 263 (6th Cir. 2009). Under this approach, courts will consider the police officer's perspective—an objective inquiry—and determine whether a defendant knowingly and intelligently waived. *Id.* Other courts understand the proper analysis requires a subjective inquiry from the perspective of the defendant's state of mind during the interrogation. *See Smith v.*

Mullin, 379 F.3d 919, 933 (10th Cir. 2004); *United States v. Zerbo*, 1999 U.S. Dist. LEXIS 15696, *29 (S.D.N.Y. Oct. 8, 1999).

The facts of this case do not suggest that the Petitioner suffered from any inherent governmental coercion[3] during custodial interrogation. To the contrary, Officer Nathan Barbosa performed a textbook custodial interrogation, including providing the Petitioner with adequate *Miranda* warnings and stopping the interrogation once the Petitioner invoked her rights. Under the objective inquiry, Officer Barbosa had no reason to believe that the Petitioner did not understand the nature of the interrogation. Under the subjective inquiry, the Petitioner had a basic understanding of the nature of the interrogation. Regardless of the analysis that this Court chooses to employ, the Petitioner's confession[4] was admissible. The Petitioner received adequate procedural safeguards, which she knowingly and intelligently waived.

A. Pursuant to either the subjective or objective inquiry, the Petitioner knowingly and intelligently waived her *Miranda* rights because the totality of the circumstances indicates that the Petitioner understood the nature of the rights being abandoned and the consequences of her decision to abandon those rights.

This Court should affirm the Circuit Court's holding because the Petitioner knowingly and intelligently waived her *Miranda* rights. A defendant's *Miranda* waiver must be effectuated "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 472 (1986). However, an effective waiver does not require that a defendant understand all possible consequences of a waiver. *Colorado v. Spring*, 479 U.S. 564, 574 (1987). An effective waiver only requires that the

[3] The Petitioner does not contend that she involuntarily waived her *Miranda* rights.
[4] The standard of review for a motion to suppress a confession is a "bifurcated standard." *See* United States v. Hampton, 572 F. Appx. 430, 432 (6th Cir. 2014) (reviewing whether the defendants statement was knowing and intelligent de novo and reviewing "subsidiary" findings of fact for clear error).

defendant knew that she had a choice not to talk with the interrogating officer, to speak with counsel, or to stop the interrogation at any point. *Id.*

Although it is the government's burden to establish a valid waiver by a preponderance of the evidence, a court should view the evidence in the light most likely to support the district court's decision. *See United States v. Nichols*, 512 F.3d 789, 798 (6th Cir. 2008); *see United States v. Adams*, 583 F.3d 457, 463 (6th Cir. 2009) (noting that a reviewing court should review the evidence in the light most likely to support the district court's decision when the district court denied a motion to suppress). Thus, the proper inquiry requires that a reviewing court determine the validity of a waiver by the totality of the circumstances surrounding the interrogation. *Moran*, 475 U.S. at 421; *see Garner v. Mitchell*, 557 F.3d 257, 263 (6th Cir. 2003) (noting that the "'police-regulatory purpose of *Miranda*'" requires that the totality of the circumstances be considered from the perspective of the police officer); *cf. United States v. Zerbo*, 1999 U.S. Dist. LEXIS 15696, *29 (S.D.N.Y. Oct. 8, 1999) (holding that the totality of the circumstances considered from the defendant's perspective illustrated an invalid waiver). The totality of the circumstances includes considering the defendant's "age, experience, education, background, and intelligence . . ." *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

Under either the objective or subjective inquiry, courts agree that some circumstances indicate a defendant knowingly and intelligently waived her *Miranda* rights. *See People v. Daoud*, 462 Mich. 621, 643 (2000) (noting that a very basic understanding is all that is necessary for a valid waiver); *see United States v. Bernal-Benitez*, 594 F.3d 1303, 1319 (11th Cir. 2010) (noting that a "signed waiver is [] strong evidence that the defendant waived [her] rights"); *see, Smith v. Mullin*, 379 F.3d 919, 933-34 (10th Cir. 2004) (finding that a mentally disabled

defendant intelligently waived his Miranda rights because among other things, the defendant understood the role of the police officers).

1. Under the objective inquiry, the Petitioner knowingly and intelligently waived her *Miranda* rights because Officer Nathan Barbosa testified that the Petitioner appeared competent.

The Circuit Court correctly concluded that the Petitioner knowingly and intelligently waived her *Miranda* rights because Officer Nathan Barbosa had no reason to question the Petitioner's mental capacity at the time she waived. The Circuit Court's approval of the objective inquiry aligns with the primary purpose for protecting a defendant's privilege against self-incrimination. The *Miranda* Court did not create procedural safeguards to protect a defendant against herself. *See New York v. Quarles*, 467 U.S. 649, 656 (1984). To the contrary, the *Miranda* Court sought to "reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation." *Id.* It follows then that the question of a valid waiver is whether the interrogating officer believed that the defendant understood the rights she waived. *See Rice v. Cooper*, 148 F.3d 747, 750-51 (7th Cir. 1998).

A defendant's ability to answer a police officer's questions indicate a knowing and intelligent waiver. *See Garrett v. Beard*, 2014 U.S. Dist. LEXIS 183515, *44 (S.D. Cal. Dec, 29, 2014). In *Garrett*, an accused underwent custodial interrogation while in a hospital room. *Id.* at *6. The accused was on morphine during the interrogation. *Id.* The accused made comments about wanting to die, but he also answered responsively to all the detective's questions. *Id.* at *42. The accused filed a motion to suppress his damaging statements. *Id.* at 40. The accused argued that the detective was aware of the accused's history of mental illness and that the influence of morphine rendered his *Miranda* waiver unknowing and unintelligent. *Id.* at *39. The court held that based on the officer's perspective, the waiver was knowing and intelligent. *Id.* at

44. The court reasoned that the accused's mental illness, pain, and use of controlled substances during the interrogation did not alone compel the conclusion that he was unable to waive. *Id.* at *43. While the aforementioned are relevant factors, the exchange of communication between the accused and the detective suggested that the accused understood what the detective said to him. *Id.* at *44-45. This understanding included the reading of his *Miranda* warnings. *Id.*; *see also Garner*, 557 F.3d at 271 (indicating that a defendant's rational conduct preceding the interrogation provides evidence that the defendant executed a valid waiver at the start of the interrogation); *cf. id.* at 263 (noting that "later-developed evidence" of a defendant's mental illness may encourage a court to consider a defendant's perspective at the time of the waiver).

A defendant's questionable remarks during an interrogation will not automatically render a waiver invalid. *See United States v. Page*, 2019 U.S. Dist. LEXIS 37047, *5 (N.D. Ohio Mar. 7, 2019). Additionally, a defendant's bizarre behavior after a confession will not render the confession inadmissible. *See United States v. Turner*, 157 F.3d 552, 556 (8th Cir. 1998). In *Page*, a defendant claimed that he unknowingly waived his *Miranda* warnings. *Page*, 2019 U.S. Dist. LEXIS 37047 at *2. The defendant argued that his behavior during the interrogation was questionable so as to raise doubt in the interrogating officer's mind regarding the defendant's understanding. *Id.* at *4. Further, the defendant suggested that the interrogating officer's knowledge of the defendant's mental illness history should have warranted the waiver invalid. *Id.* at *5. During the interrogation, the defendant made questionable statements regarding the Social Security Administration lying to him and "talk[ing] sexy" to him during a previous phone call. *Id.* The court held that despite the questionable comments raising some doubt about the defendant's capacity to understand his rights, the defendant knowingly waived his *Miranda* rights. *Id.* The court reasoned that throughout the interrogation, the defendant seemed competent

and engaged. *Id.* Further, the defendant seemed to understand the nature of the questions being asked as evidenced by the defendant's refusal to allow the interrogating officer to search his room. *Id.*; *see also United States v. Clarke*, 2012 U.S. Dist. LEXIS 118958, *14-*15 (N.D. Iowa Aug. 20, 2012) (holding that the totality of the circumstances indicated that even a defendant with "somewhat slurred speech" is capable of knowingly and intelligently waiving his *Miranda* rights when the defendant answered the questions responsively and the interrogating officer did not have to repeat any questions).

Similarly, in *Turner*, a defendant with a mental illness claimed that he unknowingly and unintelligently waived his *Miranda* rights. *Turner*, 157 F.3d at 554. The defendant signed a waiver form after being advised both orally and in writing of his *Miranda* rights. *Id.* Following the waiver, the defendant admitted to the suspected charges against him. *Id.* The defendant acted cooperatively both prior to the interrogation and during the interrogation. *Id.* at 555. Subsequently, while in jail, the defendant exhibited "bizarre" behavior. *Id.* at 554. A psychiatrist diagnosed the defendant with a psychotic disorder. *Id.* The court held that the defendant knowingly and intelligently waived his *Miranda* rights. *Id.* at 556. The court reasoned that the defendant's bizarre behavior did not render his confession inadmissible because the bizarre behavior did not occur until after he confessed. *Id.*; *see also United States v. Al-Cholan*, 610 F.3d 945, 954 (6th Cir. 2010) (noting that a defendant knowingly and intelligently waived his *Miranda* rights because any issues with the defendant's ability to understand his surroundings occurred after the defendant made damaging statements).

In the present case, the Petitioner knowingly and intelligently waived her *Miranda* rights. First, the Petitioner answered Officer Barbosa's questions responsively. R. at 3. Second, Officer Barbosa testified that the Petitioner's demeanor at the start of the interrogation did not suggest

that she had any competency issues. R. at 2. Third, the Petitioner did not exhibit bizarre behavior until after the Petitioner confessed to the murder. R. at 3. Therefore, this Court should affirm the Circuit Court's holding and apply an objective inquiry when determining that the Petitioner knowingly and intelligently waived her *Miranda* warnings.

To begin, the record indicates that the Petitioner responded to Officer Barbosa's questions. Similar to *Garrett*, 2014 U.S. Dist. LEXIS 183515 at *44, this Court should consider Officer Barbosa's perspective of the Petitioner during the interrogation. Officer Barbosa testified that the Petitioner's demeanor did not suggest a lack of competency. R. at 2. In fact, nothing prior to the Petitioner's confession illustrates that the Petitioner lacked competency. Officer Barbosa asked the Petitioner if she wanted to talk about Christopher. R. at 2. The Petitioner nodded her head, indicating that she understood his questioning. R. at 2. The Petitioner's understanding of the nature of the interrogation is further illustrated by her response to Officer Barbosa's subsequent questions. For example, Officer Barbosa asked the Petitioner if she knew who might be responsible for Christopher's murder. R. at 3. Without hesitation, the Petitioner blurted out that she killed Christopher. R. at 3. An individual incapable of understanding her surroundings would not have proscribed to the question and answer dialogue that ensued between the Petitioner and Officer Barbosa. Thus, the exchange of communication illustrates that the Petitioner knowingly and intelligently waived her *Miranda* rights.

Additionally, the Petitioner appeared entirely rational prior to the proceeding. Like *Garner*, 557 F.3d at 271, there is no record evidence to suggest that the Petitioner exhibited erratic behavior leading up to the interrogation. Importantly, prior to committing a murder, the Petitioner went to work. R. at 2. The record is devoid of any evidence that either the Petitioner's co-workers or customers complained of "bizarre" behavior just prior to committing a murder.

Moreover, even though the Petitioner made strange comments regarding the necessity to murder Christopher for the well-being of chickens, that alone is not sufficient to render her waiver unknowing and unintelligent. In *Page*, the court held that a defendant's bizarre comments regarding the Social Security Administration did not render his waiver invalid without more evidence. *Page*, 2019 U.S. Dist. LEXIS 37047 at *5. The facts in *Page* are even more analogous to the present case when analyzing the dialogue between the Petitioner and Officer Barbosa. In *Page*, the defendant answered the interrogating officer's initial questions responsively and then went on a tangent about the Social Security Administration. *Page*, 2019 U.S. Dist. LEXIS 37047 at *5. However, following the tangent, the interrogating officer asked the defendant if he could search the defendant's room. *Id.* The defendant declined the search. *Id.* In this case, the Petitioner answered Officer Barbosa's initial questions responsively. R. at 2. After going on a tangent about the sacristy of chickens and the necessity to murder Christopher, Officer Barbosa asked the Petitioner if she wanted a court appointed attorney. R. at 3. The Petitioner responded in the affirmative. R. at 3. The final exchange of communication between the Petitioner and Officer Barbosa is telling. It suggests that the Petitioner had a basic understanding of the custodial interrogation as evidenced by the Petitioner invoking her right to counsel. R. at 3. Like the *Page* court, this Court should find that although the Petitioner exhibited signs of mental illness, her other conduct suggested an understanding of her abandonment of her right to counsel and her right to remain silent.

Lastly, similar to the defendants in both *Turner* and *Al-Cholan*, *Turner*, 157 F.3d at 554; *Al-Cholan*, 610 F.3d at 954, the Petitioner did not exhibit bizarre behavior until after she confessed to Christopher's murder. R. at 3. Officer Barbosa did not perceive any questionable behavior by the Petitioner prior to her confession. R. at 2. Once hearing Petitioner's bizarre

statements, Officer Barbosa asked Petitioner if she wanted to invoke her right to counsel. R. at 3. Thus, Petitioner's confession should not be rendered inadmissible because Petitioner appeared entirely lucid while making damaging statements.

The idea that this Court should consider anything other than Officer Barbosa's perspective, runs contrary to this Court's jurisprudence regarding a defendant's right to procedural safeguards during custodial interrogation. Further, an analysis that focuses on the interrogating officer's perspective ensures that "law enforcement officers are not mind readers or psychiatric soothsayers." R. at 6. Prior to her confession, Officer Barbosa only had reason to believe that the Petitioner understood her rights and those that she abandoned. Thus, this Court should affirm the Circuit Court's holding that the Petitioner knowingly and voluntarily waived her *Miranda* rights.

2. Even if this Court chooses to adhere to a subjective inquiry, the Petitioner knowingly and intelligently waived her *Miranda* rights because she had a basic understanding of the nature of the interrogation.

The Circuit Court did not address whether the Petitioner waived her *Miranda* warnings under a subjective inquiry. R. at 7. However, this Court should determine that even under a subjective inquiry, the Petitioner knowingly and intelligently waived her *Miranda* warnings because she was aware of her circumstances. Under the subjective approach, a defendant's waiver is only invalid if the totality of the circumstances surrounding the interrogation suggest that the defendant lacked a basic comprehension. *See United States v. Rojas-Tapi,* 446 F.3d *1, *4 (1st Cir. 2006); *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Therefore, the waiver inquiry will not turn upon any single factor. *See Arizona v Fulminate*, 499 U.S. 279, 285 (1991); *see Bone v. Polk,* 2010 U.S. Dist. LEXIS 69233, *59 (M.D.N.C. July 9, 2010) (noting that "the proper inquiry focuses on the suspect's conduct at the time of the interrogation and whether the police officers

had any indication that the suspect's 'age, experience, education, background, and intelligence' may have prevented [her] from understanding the *Miranda* warnings).

Moreover, the *Miranda* Court highlighted potential problems arising with a valid waiver. *See Miranda v. Arizona*, 348 U.S. 436, 476 (1966) (noting that "the fact of lengthy interrogation or incommunicado incarceration . . . is strong evidence that the [defendant] did not validly waive [her] rights"). While it is true that the Court could not have predicted all potential waiver problems, the Court's choice of words is significant. *See Garner*, 557 F.3d at 262. Nevertheless, lower courts tend to apply a low standard for a valid waiver. *See United States v. Frank*, 956 F.2d 872, 877-78 (9th Cir. 1991) (holding that a defendant with zero knowledge about the American legal system knowingly and intelligently waived his *Miranda* rights because the defendant understood the difference between his lawyer and the prosecutor). Thus, the Respondent need only show that the totality of the circumstances indicate that the Petitioner retained a "coherence of an understanding of what [was] happening." *See United States v. Smith*, 608 F.2d 1011, 1012 (4th Cir. 1979); *United States v. Alacron*, 95 F. App'x. 954, 955-57 (10th Cir. 2004).

A defendant knowingly and intelligently waives her *Miranda* rights when the evidence illustrates that she understood the most basic concepts underlying the *Miranda* warnings. *See Smith v. Mullin*, 379 F.3d 919, 933 (10th Cir. 2004). In *Smith*, police officers discovered the defendant's wife and the wife's four children dead in the marital home. *Id.* at 924. The defendant was placed under arrest and a custodial interrogation ensued. *Id.* The defendant described his wife's murder in detail by indicating the reasoning for the murder and the weapon used. *Id.* As it pertains to the other murders, the defendant could not recall any details. *Id.*

Among other things, the defendant argued that his waiver was unknowing and unintelligent because of his mental retardation and mental illness. *Id.* at 933. Several experts testified that the

defendant suffered from cognitive difficulties. *Id.* Further, a psychiatrist administered a Grisso test, which indicated that the defendant could not understand the implications of making a *Miranda* waiver. *Id.* Nevertheless, the court concluded that the defendant knowingly and intelligently waived his *Miranda* rights. *Id.* at 933-34. The court reasoned that the defendant understood the questions during the interrogation and that the defendant provided the officers with a precise explanation of the crime and the crime scene. *Id.* at 934; *see also Collins v. Gaetz*, 612 F.3d 574, 580-89 (7th Cir. 2010) (holding that despite ample expert testimony regarding the defendant's limited mental capacity, the defendant was still capable of understanding the nature of his *Miranda* rights and the abandonment of those rights); *cf United States v. Zerbo*, 1999 U.S. Dist. LEXIS 15696, *34-6 (S.D.N.Y. Oct. 8. 1999) (holding that a mentally ill defendant unknowingly and unintelligently waived his *Miranda* rights because the defendant testified that he did not understand the rights he relinquished).

Courts frequently refute an expert's testimony regarding a defendant's understanding of her *Miranda* rights. *See Bone*, 2010 U.S. Dist. LEXIS 69233 at *77. In *Bone*, the defendant filed a motion to suppress his incriminating statements made during custodial interrogation. *Id.* *11. The defendant argued that he lacked the mental capacity to knowingly and intelligently waive his *Miranda* rights. *Id.* at *37. In support of his contention, the defendant submitted affidavits from two expert witnesses. *Id.* at *71. The first expert opined that after conducting various tests on the defendant, including the Grisso test, the defendant did not have the ability to understand his *Miranda* rights. *Id.* at *72. The second expert similarly concluded that the defendant did not understand his *Miranda* rights or the consequences of abandoning them. *Id.* However, despite the expert testimony, the court held that the defendant knowingly and intelligently waived his *Miranda* rights. *Id.* at *77. The court reasoned that even when considering the defendant's subjective

understanding of the *Miranda* rights and the waiver, the totality of the circumstances indicated a valid waiver. *Id.* at 77-78. First, the court rejected the expert testimony and the testing used to support the expert testimony. *Id.* at 77. Second, the court's opinion turned on the defendant's competent interactions with law enforcement during the custodial interrogation. *Id.* at *78; *see also United States v. Glover*, 596 F.2d 857, 865 (9th Cir. 1979) (noting that a court is not obligated to follow an expert's medical testimony if other probative evidence points to a different result).

In the present case, an analysis from the Petitioner's perspective indicates that the Petitioner knowingly and intelligently waived her *Miranda* rights. The totality of the circumstances illustrate that the Petitioner understood the nature of her *Miranda* rights and the consequences of abandoning those rights. First, the Petitioner acknowledged that she wanted a court appointed attorney. R. at 3. Second, the Petitioner accurately described the nature of the murder and the weapon used in executing the murder. R. at 3. Third, Dr. Desiree Frain's mental evaluation of the Petitioner lacks any supportive reasoning for her diagnosis. R. at 4. Thus, this Court should affirm the Circuit Court's holding that the Petitioner knowingly and intelligently waived her *Miranda* warnings because the Petitioner had a basic understanding of her *Miranda* rights.

Like *Smith*, 379 F.3d at 934, the Petitioner's psychotic delusions did not impair her ability to provide accurate and coherent statements to Officer Barbosa about Christopher's murder. R. at 3. In *Smith*, the defendant's accurate portrayal of the nature of the crime and the crime scene indicated a valid waiver. *Id.* Here, the Petitioner similarly described the murder and the execution of the murder accurately. R. at 3. The Petitioner detailed the murder by explaining that "[she] stabbed him, and [] left the knife in the park." R. at 3. The record indicates that the Petitioner's confession later led to the discovery of a bloody steak knife at a local park. R. at 3. Thus, the Petitioner's statements provided in custodial interrogation illustrated her competency in communicating during

the interrogation. Furthermore, the Petitioner did not abruptly provide Officer Barbosa with this information. R. at 3. The Petitioner only made these statements after Officer Barbosa asked the Petitioner specific questions about the nature of the murder. R. at 3. Thus, the totality of the circumstances indicate that the Petitioner understood the nature of the interrogation.

Further, the Petitioner argues that Dr. Frain's testimony establishes that she could not have knowingly and intelligently waived her *Miranda* rights. However, this Court should blindly following Dr. Frain's testimony when other probative evidence suggests that the Petitioner knowingly and intelligently waived. *See Glover*, 596 F.2d at 865 (noting that unsubstantiated expert testimony need not be followed). First, the record does not indicate that Dr. Frain performed any testing on the Petitioner in order to support the expert's ultimate conclusion. However, even if she had, the Grisso test is not a reliable tool in determining the Petitioner's understanding of her *Miranda* rights. *Bone v. Polk*, 2010 U.S. Dist. LEXIS 69233, *77 (M.D.N.C. July 9, 2010); *see Garner*, 557 F.3d at 268-69. Although Dr. Frain attributes the Petitioner's invalid waiver to her schizophrenia diagnosis, Dr. Frain does not explain how or why she diagnosed the Petitioner. Conveniently, Dr. Frain did not testify whether the Petitioner had any moments of lucidity prior to Christopher's murder, during Christopher's murder, during the interrogation, or at any points thereafter. Fortunately, the record does illustrate that the Petitioner did have moments of lucidity. The Petitioner successfully attended a full work shift just prior to committing a murder. R. at 2. Further, the Petitioner understood the distinction between Officer Barbosa and a court appointed attorney. *See Smith*, 379 F.3d at 933-34 (finding that a defendant's ability to distinguish between a police officer and an attorney is evidence of a valid waiver). This is illustrated by the fact that the Petitioner did not make any questionable or bizarre comments after Officer Barbosa asked if she wanted a court appointed attorney. R. at 3. Therefore, although Dr. Frain's testimony suggests

that the Petitioner could not appreciate the nature of her actions or the abandonment of her *Miranda* rights, this Court should refrain from relying on such testimony because other probative evidence suggests otherwise.

There is no dispute that the Petitioner suffers from a mental illness. However, the Respondent urges this Court to consider the actual effect of the Petitioner's mental illness on her ability to knowingly and intelligently waive her *Miranda* rights. The Petitioner's conduct leading up to the murder and during the interrogation suggest that Dr. Frain's testimony is unsupported by the facts of this case. Therefore, this Court should affirm the Circuit Court's holding and find that the Petitioner knowingly and intelligently waived her *Miranda* rights.

II. THE COMMONWEALTH OF EAST VIRGINIA'S STATUTORY ENACTMENT TO ABOLISH THE AFFIRMATIVE INSANITY DEFENSE AND ADOPT A *MENS REA* APPROACH TO EVIDENCE OF MENTAL IMPAIRMENT IS CONSTITUTIONAL BECAUSE IT DOES NOT VIOLATE THE EIGHTH AMENDMENT OR THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE.

In 2016, the Commonwealth of East Virginia enacted a statute that endorsed a *mens rea* approach to an insanity defense. R. at 5. Prior to this enactment, the *M'Naghten* rule was the test for the defense of insanity in East Virginia. R. at 4. The *M'Naghten* rule voided criminal liability where the defendant did not know the nature and quality of his act or where the defendant did not know right from wrong. *State v. Kahler*, 307 Kan. 374, 400 (2018).

The Commonwealth of East Virginia was not the first state to amend its criminal liability statutes. *See e.g. State v. Bethel*, 275 Kan. 456, 458 (2003); *State v. Herrera*, 895 P.2d 359, 361 (Utah 1995); *State v. Searcy*, 118 Idaho 632, 633 (1990). Under the *mens rea* approach, the defendant is entitled to introduce evidence that negates the intent element of a crime. *Bethel*, 275 Kan. at 462-63. However, the evidence is only admissible if it specifically speaks to the *mens rea*

of the offense. *Id.* As such, a defendant cannot simply introduce evidence of her mental illness unless it corroborates her intent to commit the crime. *Id.*

The Petitioner suggests that a *mens rea* approach to criminal liability for the mentally insane violates the Due Process clause and the Eighth Amendment of the United States Constitution. In order to prevail, the Petitioner carries the burden of overcoming a statute's strong presumption of constitutionality. *State v. Delling*, 152 Idaho 122, 125 (2011); *see State v. Engles*, 270 Kan. 530, 531 (2001) (noting that a court should only invalidate a statute if "there is no reasonable way to construe it as constitutionally valid"). Although this Court owes no deference to the Circuit Court's decision, this Court's precedent cited in the Circuit Court's decision is tantamount to the issues in this case. This Court continuously declined to attach a constitutional definition for insanity. *See Powell v. Texas*, 392 U.S. 514, 536 (1968); *Clark v. Arizona*, 548 U.S. 735 (2006). Moreover, this Court is vocal in its belief that state legislatures should be afforded deference on matters of criminal punishment. *See Leland v. Oregon,* 343 U.S. 790, 801 (1952).

A successful Due Process claim requires the Petitioner prove that a state's insanity rule "offends a principle of justice so deeply rooted in the traditions and conscience of [the] people as to be ranked as fundamental." *Patterson v. New York,* 432 U.S. 197, 201-02 (1977). Further, this Court may only infringe on a state's regulative powers if the state action offends a fundamental principle. *Speiser v. Randall*, 357 U.S. 513, 523 (1958). As it pertains to the Petitioner's Eighth Amendment claim, the Petitioner argues that a *mens rea* approach is cruel and unusual punishment. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). A punishment is cruel and unusual if it was condemned by the common law in 1789, or if "evolving standards of decency" suggest that it is cruel and unusual punishment today. *Id.*

A *mens rea* approach is not repugnant to either the Due Process clause or the Eighth Amendment. First, the affirmative insanity defense is not so deeply rooted in Anglo-American society, which renders it fundamental. Second, neither the founders nor today's society consider a *mens rea* approach to the insanity defense cruel and unusual punishment. Therefore, this Court should affirm the Circuit Court's holding and allow the Commonwealth of East Virginia to regulate those that are criminally liable by mandating a *mens rea* approach to insanity. After all, ". . . the release of the insane is the punishment of society." *Montana v. Korell,* 690 P.2d 992, 1002 (Mont. 1984) (quoting *Tennessee v. Stacy*, 601 S.W. 2d 696, 704 (Tenn. 1980) (Henry J., dissenting)).

A. East Virginia's statute does not violate the Due Process clause because the affirmative insanity defense is not so deeply rooted in American jurisprudence so as to warrant at a fundamental right.

The Circuit Court correctly held that East Virginia's *mens rea* approach does not violate the Due Process clause. R. at 9. The Due Process clause prohibits states from "depriv[ing] any person of life, liberty or property, without due process of law." U.S. Const., amend. XIV § 1. However, states are only prohibited from depriving individuals of fundamental liberties. *See Duncan v. Louisiana*, 391 U.S. 145, 147 (1968). A fundamental liberty is determined by examining history, legal traditions, and practices. *Wash v. Glucksberg*, 521 U.S.702, 710 (1997); *Montana v. Egelhoff,* 518 U.S. 37, 43 (1996) (noting that the primary inquiry in determining whether the state regulated practice is fundamental is examining historical practice); *cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (noting that although history is a guiding principle, questionable acts from the past should not control the present).

This Court's precedent suggests that the insanity defense is not a constitutionally protected right. *See Ake v. Oklahoma*, 470 U.S. 68, 105 (1985) (noting that "it is highly doubtful" that states

are required to afford a criminal defendant an insanity defense); *see Foucha v. Louisiana*, 504 U.S. 71, 112 (1992) (O'Connor, J., concurring) (observing that the majority decision did not limit a states' ability to "determine whether and to what extent mental illness should excuse criminal behavior"); *see Medina v. California*, 505 U.S. 437, 449 (1992) (indicating that the Court has never required that states afford defendants the insanity defense).

There is a fundamental disagreement among scholars regarding the role of the insanity defense in the history of American jurisprudence. *State v. Korell*, 213 Mont. 316, 328 (1984). At the heart of this disagreement lies the lack of uniformity regarding the insanity defense. *See. Herrera*, 895 P.2d at 365 (noting that the insanity defense evolved over time, creating many different theories). Even courts that decline to adopt the *mens rea* approach recognize that the insanity defense had no clear formulation throughout history. *See Finger v. State*, 117 Nev. 548, 569 (2001) (noting that the insanity defense "has been [historically] formulated differently"). The different insanity defense approaches include, the *M'Naughten* test, the *mens rea* approach, variations of the Model Penal Code, and the irresistible impulse test. *Herrera*, 895 P.2d at 365. Four states follow the *mens rea* approach, six states utilize the irresistible impulse test, a majority of states follow a form of *M'Naughten*, and others identify with the Model Penal Code definition. *See* Kathryn J. Fritz, Proposed Federal Insanity Defense: Should the Quality of Mercy *Suffer for the Sake of Safety?*, 22 Am. Crim. L. Rev. 49, 52-53 (1984) [hereinafter *Proposed Federal Insanity Defense*].

No single approach to the insanity defense has ever been identified as the correct approach. Nor has any approach been deemed better than others. *Herrera*, 895 P.2d at 365; *see Leland*, 343 U.S. at 801 (indicating that states are in the best position to adopt its own legal insanity approach because it involves both technical knowledge, but also questions of "[local

legislative] policy"). However, there is clear agreement amongst scholars and courts that a state's freedom to regulate its criminal code does not go unlimited. *See State v. Korell*, 213 Mont. 316, 329 (1984) (noting that a state cannot abolish the insanity defense without providing the defendant the opportunity to introduce evidence pertaining to the defendant's state of mind). Further, the scientific community is not silent as to its endorsement of the *mens rea* approach. *See Herrera*, 895 P.2d at 366 (noting that the American Medical Association adopted the *mens rea* method as the policy of the Association).

The "majority" approach to the insanity defense did not develop until the 19th century. *Bethel*, 275 Kan. at 473 (2003). Prior to the nineteenth century, the earliest period of the common law recognized that a mentally ill person could only be convicted if he possessed the requisite criminal intent. Morris, *The Criminal Responsibility of the Mentally Ill*, 33 Syracuse L.R. 477, 500 (1982) [hereinafter *The Criminal Responsibility of the Mentally Ill*]. Thus, the *mens rea* approach to insanity developed prior to the affirmative insanity defense that is recognized today. Consider Plato's understanding of criminally punishing an individual for wrongdoing. *See United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 490 (E.D.N.Y. 1993) ("'If a man unintentionally cause[s] the death of a person . . . he shall, on accomplishing such purifications as may be directed by a law for these cases . . , be esteemed clear of pollution.'").

Additionally, states that choose to adopt a *mens rea* approach potentially aid defendants during criminal trials. *See State v. Korell*, 213 Mont. 316, 331 (1984). In *Korell*, the Montana legislature enacted a *mens rea* approach to the insanity defense. *Id.* at 322. The court indicated that the *mens rea* approach potentially lowered a defendant's hurdle in proving insanity. *Id.* at 331. The court reasoned that under the typical affirmative insanity defense the defendant needed to potentially disprove both his requisite mental state **and** his moral culpability. *Id.* (emphasis added).

Under the *mens rea* approach, the court noted that the legislature, whether intentional or not, placed a heavier burden of proof on the prosecution. *Id.*

In the present case, East Virginia's *mens rea* approach to insanity does not offend traditions so deeply rooted in Anglo-American jurisprudence. First, the affirmative insanity defense did not develop until the late nineteenth century. Second, the only "fundamental" aspect of the insanity defense is the defendant's right to introduce evidence to negate the requisite mental state. Third, East Virginia's statute does not abolish the insanity defense. It simply redefines the insanity defense. Thus, this Court should find that East Virginia's *mens rea* approach does not violate the Due Process clause.

East Virginia's state choice in removing the affirmative insanity defense is compliant with the federal Constitution. East Virginia did not abolish the insanity defense. It merely adopted the insanity defense so as to allow the defendant to present evidence of mental illness to negate the required state of mind. R. at 4. Due Process does not mandate that a state consider a defendant's moral culpability for an insanity defense. A state is only limited in eliminating the insanity defense in its entirety, *Korell*, 213 Mont. at 329, which East Virginia has not done. Four other state courts have found a *mens rea* approach constitutional. *See Bethel*, 275 Kan. at 473 (holding that Kansas' mens rea approach did not violate the defendant's right to due process); *see Searcy*, 118 Idaho at 798 (finding that Idaho's *mens rea* approach did not violate due process); *see Korell*, 213 Mont. at 316 (holding that Montana's *mens rea* approach did not violate the defendant's due process rights). Therefore, this Court should similarly conclude that East Virginia's *mens rea* approach does not violate the Due Process clause.

Further, the history surrounding the insanity defense is instructive on this issue. History does not suggest that the affirmative insanity defense is so deeply rooted in American society.

See Bethel, 275 Kan. at 473. While it is true that some type of insanity defense has consistently been afforded to defendants, the scope, nature, and type of the defense constantly shifted throughout history. *See Proposed Federal Insanity Defense.* The only consistent aspect of the insanity defense is that at each point in time, courts considered whether a defendant contained the requisite mental state. *See Korell*, 213 Mont. at 329 (rejecting the defendant's argument that insanity has been recognized as a defense from the earliest period of common law but recognizing that the earliest period of common law acknowledged a defense where one who lacked the requisite criminal state of mind could not be criminally liable). As such, this Court should find that the affirmative insanity defense is not fundamental, and thus does not violate the Due Process clause.

Moreover, the range of insanity tests used over time illustrates that the affirmative insanity defense is not so deeply rooted in our history and tradition so as to label it fundamental. In fact, commentators agree that the *M'Naughten* case in the 19th century was the first time that courts began considering moral culpability. *Bethel*, 275 Kan. at 472. If this Court invalidates East Virginia's statute, it will necessarily be instructing local legislatures on how to criminally punish its citizens. Doing so is contrary to this Court's precedent. *See e.g.*, *Powell v. Texas*, 392 U.S. 514, 535-36 (1968); *Leland v. Oregon*, 343 U.S. 790 (1952). More so, overturning East Virginia's statute suggests that the right to an affirmative insanity defense is fundamental. However, both the common law and historical practices illustrate the exact opposite. From the earliest point in time, the only aspect of the affirmative insanity defense that was recognized was that a defendant must have the requisite state of mind. *See The Criminal Responsibility of the Mentally Ill*. Requiring states to afford mentally insane defendants anything more than the opportunity to introduce evidence negating mental intent, disrupts local legislative powers and

ignores historical practice, which is the guiding principle in this inquiry. *See Montana*, 518 U.S. at 43 (noting that examining historical practice is the primary inquiry for a due process analysis). Thus, this Court should affirm the Circuit Court's holding and find that East Virginia's *mens rea* approach does not violate the Petitioner's Due Process rights.

B. East Virginia's statute does not violate the Eighth Amendment because its *mens rea* approach does not subject a mentally ill person to cruel and unusual punishment.

The Circuit Court properly determined that East Virginia's *mens rea* approach conforms to the Eighth Amendment of the United States Constitution. The Eighth Amendment mandates that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. A court's Eighth Amendment analysis begins by considering whether the common law would have supported the punishment. *Ford v. Wainwright*, 477 U.S. 399, 406-08 (1986). Next, the court considers the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). Determining evolving standards requires courts to examine objective evidence of how society views a particular punishment. *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989). Lastly, a court will consider whether the punishment is proportionate to the offense. *Rummel v. Estelle*, 445 U.S. 263, 288 (1980) (Powell, J., dissenting).

Common law recognized that a court must consider a defendant's requisite mental state before convicting a defendant. *Sanders v. State*, 585 A.2d 117, 136 (Del. 1990). This consideration did not include a defendant's moral culpability. *Id.* Courts did not begin considering a defendant's moral culpability until the nineteenth century. *Clark v. Arizona*, 548 U.S. 735, 749 (2006). Most legal theorists agree that the *M'Naughten* test (the affirmative insanity defense) thus did not develop until the nineteenth century. *Id.*; *see id.* (recognizing that "history shows no deference to [the affirmative insanity defense]"). Prior to the nineteenth century, courts only recognized that a

defendant was entitled to a *mens rea* approach to insanity. *See State v. Korell*, 213 Mont. 316, 329 (1984). This idea is supported by the ancient legal theorist, Henrici Bracton. *Id.* Mr. Bracton noted that "for a crime is not committed unless the will to harm be present." *Id.*

Analyzing contemporary standards requires considering legislation enacted by state legislatures. *Thompson v. Oklahoma*, 487 U.S. 815, 831 (1988). Legislation enacted by state legislatures suggests that society is not in agreement with the scope of the insanity defense. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (noting that forty seven percent of states acting in a particular manner is not enough to indicate a majority trend and to label punishment cruel and unusual); *see also State v. Kleypas*, 305 Kan. 224, 335 (2016) (holding that policy statements of national health organizations are unpersuasive when legislative consensus does not support the same findings). Only seventeen states and the federal government utilize the standard *M'Naughten* test. *Clark*, 548 U.S. at 851. One state adopted *M'Naughten's* cognitive incapacity test. *Id.* at 751. Ten states utilize the moral incapacity test alone. *Id.* Fourteen states drew from the Model Penal Code's insanity defense and implemented a volitional incapacity test and some form of the moral incapacity test. *Id.* Three states combine the *M'Naughten* test with the volitional incapacity formula. *Id.* One state utilizes the product-of-mental-illness test. *Id.* Four states adopted a *mens rea* approach, allowing evidence of a defendant's mental illness if it speaks to the defendant's requisite mental state. *Id*. Additionally, as it pertains to insanity generally, only one state has ever passed legislation expressly prohibiting the death penalty for individuals whom were mentally ill when they committed the crime. *See Kleypas*, 305 Kan. at 332-31; Conn. Stat. § 53a-46a[h][3] (2009).

Powell suggests that the Eighth Amendment does not require an offender to commit a voluntary act before a punishment may be imposed. *Powell v. Texas*, 392 U.S. 514 (1968). In

Powell, a chronic alcoholic was convicted for public intoxication. *Id.* at 517. The chronic alcoholic argued that his disease—chronic alcoholism—caused his non-volitional acts. *Id.* Ultimately, the chronic alcoholic urged that his conviction be overruled in light of the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* The chronic alcoholic suggested that *Robinson* should be extended to the facts of his case. *Id.* at 521. The Court held that the punishment did not violate the Eighth Amendment because the state did not attempt to punish the man simply for being a chronic alcoholic. *Id.* at 532. Additionally, the Court cautioned itself from constitutionally limiting a state's right to criminalize chronic alcoholics for exhibiting criminal behavior. *Id.* at 536. The Court reasoned that overturning the statue would open a can of worms urging future courts to redefine insanity in constitutional terms. *Id.* The Court noted that such an action "would reduce, if not eliminate [] fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold." *Id.* at 536-37; *see also id.* (noting that it was not the proper time to constitutionally define the insanity defense because neither doctors nor lawyers underst[oo]d the relevance or importance of any of the insanity tests).

In the present case, the "punishment" at issue is the removal of the affirmative insanity defense, a right the founding fathers did not recognize. The Petitioner alleges that removing her right to an affirmative insanity defense is cruel and unusual punishment because it punishes an individual regardless of her moral culpability. This argument is flawed. First, the *mens rea* approach was not condemned by the common law in 1789. Second, there is no objective evidence that illustrates a national consensus on providing the affirmative insanity defense. Third, this Court's precedent suggests that moral culpability is not a factor in non-death penalty cases. Indeed, "nothing could be less fruitful" than for this Court to impose a constitutional mold for the insanity

defense. *Id.* at 536. Thus, the Circuit Court correctly determined that East Virginia's *mens rea* approach is not cruel and unusual punishment under the Eighth Amendment.

East Virginia's *mens rea* approach does not offend the Constitution's ban against cruel and unusual punishment. As mentioned above, the *mens rea* approach was not condemned in 1789. *See Clark*, 548 U.S. at 749. To the contrary, the common law approach for determining criminal liability for insane defendants stemmed from assessing the defendant's requisite mental state. *Sanders*, 585 A.2d at 136. Therefore, it is not cruel or unusual in the context of the past. The remainder of Petitioner's argument rests on analyzing the state legislatures and concluding that 48 states enable the defendant to present an insanity defense. What the Petitioner's argument fails to consider is the discrepancies among those 48 states in regard to their insanity defenses. The discrepancies suggest that only 16/50 states utilize a standard affirmative insanity defense. *Clark*, 548 U.S. at 750-52. Thus, there is only a thirty-two percent consensus among state legislatures regarding the affirmative insanity defense. *Id.* As this Court previously noted, such a percentage is inadequate to label a punishment cruel and unusual. *See Atkins*, 536 U.S. at 304 (noting that 47% is not sufficient evidence to indicate evolving standards of decency). More so, only one state prohibits executing a defendant who committed a crime while mentally insane. *See* Conn. Stat. § 53a-46a[h][3] (2009). This legislative action suggests that the current trend resides with states maintaining control in protecting their citizens from the escape of the criminally insane. Thus, objective evidence indicates that societal trends do not mandate greater protection for the mentally insane. Therefore, the *mens rea* approach is not repugnant to the Eighth Amendment.

East Virginia's statute does not purport to punish the Petitioner simply for the status of being mentally insane. Rather, the statute seeks to punish the Petitioner for her intentional

murder. R. at 5. The Court's fear in *Powell* remains a real possibility today. *See Powell*, 392 U.S. at 537. (noting the uncertainty surrounding the different insanity tests and that imposing constitutional standards would "freeze" development). There is still not a clear consensus on the "correct" insanity test to employ on mentally ill defendants. For instance, in 1983 the American Medical Association adopted the *mens rea* approach as the policy of the American Medical Association. *State v. Herrera*, 895 P.2d 359, 365 (Utah 1995). However, in *Sanders v. State*, the court noted that the legal and medical community criticize the volitional test. 585 A.2d 117, 125 (Del. 1990). Other scholars argue that the insanity defense is "overbroad" and leads to the acquittal of more people than deserved. *See* Morris B. Hoffman & Stephen J. Morse, *The Uneasy Entente Between Insanity and Mens Rea: Beyond Clark v. Arizona*, 97 J. CRIM. L. & CRIMINOLOGY 1123 (2007). As such, society has still not found a precise legal insanity test that has sufficient support throughout the legal and medical community. Therefore, this Court should wait for "productive dialogue" to occur before creating a "rigid constitutional mold" for the insanity defense. *See Powell*, 392 U.S. at 537.

The Petitioner's intentional and premeditated murder of Christopher requires penal punishment, regardless of her moral culpability at the time of the offense. The Petitioner's cruel and unusual punishment argument falls short for what this Court mandates under the Eighth Amendment analysis. First, East Virginia's *mens rea* approach was not condemned by the common law. Second, there is no objective evidence that suggests a trend with the insanity defense, which would require East Virginia to provide an affirmative insanity defense. Third, this Court's precedent recognizes that affording the affirmative insanity defense constitutional protection creates more chaos than control. *Id.* at 536. Therefore, this Court should affirm the

Circuit Court's holding and find that a *mens rea* approach is not cruel or unusual punishment under the Eighth Amendment.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court affirm the Circuit Court's decision. First, the Circuit Court correctly utilized an objective inquiry when determining whether the Petitioner knowingly and intelligently waived her *Miranda* rights. Under such an inquiry, Officer Barbosa had no reason to suspect that the Petitioner's confession was anything other than sane and lucid. Second, even if this Court chooses to employ a subjective inquiry, the Petitioner's conduct leading up to the interrogation and during the interrogation suggest that she was aware of her surroundings at a basic level.

Further, East Virginia's *mens rea* approach to an insanity defense is constitutional under the Due Process clause and the Eighth Amendment. First, the affirmative insanity defense is not so deeply rooted in Anglo-American jurisprudence so as to warrant it a fundamental right. Second, removing the affirmative insanity defense is not cruel or unusual under the Eighth Amendment. The affirmative insanity defense was not a mandated defense in 1789. Further, objective evidence does not suggest that evolving standards require that East Virginia provide mentally ill defendants with an affirmative insanity defense. Thus, this Court should affirm the Circuit Court's holding and ensure that the Petitioner is sufficiently punished for her senseless murder of an innocent man.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September 2019, I served a copy of the Respondent Brief to Petitioner.

/s./_____
Counsel for Respondent
Team Q

CERTIFICATE OF COMPLIANCE

Counsel for Respondent certifies that the foregoing brief complies with the Rules of the United States Supreme Court, and with the most recent edition of *The Bluebook: A Uniform System of Citation*. This brief has been prepared in accordance with all Leroy R. Hassell, Sr. National Constitutional Law Moot Court Competition Rules.

/s./_____
Counsel for Respondent
Team Q

APPENDIX A

U.S. CONST., amend. V

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 offense 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.

APPENDIX B

U.S. CONST., amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX C

U.S. CONST., amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.