IN THE SUPREME COURT OF THE UNITED STATES

Linda Frost,
Petitioner,

v.

The Commonwealth
of East Virginia,
Respondent.

BRIEF OF THE PETITIONER

Team U

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Under *Miranda* does an individual make a knowing and intelligent waiver when the accused did not understand her rights or the consequences of the waiver?

2. Under the Eighth and Fourteenth Amendments does the abolition of the insanity defense and substitution of a *mens rea* approach to determine mental impairment violate the right not to be subject to cruel and unusual punishment and right to Due Process when the individual does not have cognitive understanding of the wrongfulness of their actions.

STATEMENT OF THE CASE

1. Factual Background

Ms. Frost suffers from paranoid schizophrenia. While awaiting trial Dr. Desiree Frain, a clinical psychiatrist, diagnosed Ms. Frost and prescribed her the appropriate medication to begin her treatment. R. at 3. Paranoid Schizophrenia manifests itself in an array of symptoms, of the most prominent are hallucinations and delusions. These hallucinations can be both audible and visual and, the delusions can lead the affected to believe that everyone is out to cause the sufferer harm. During a schizophrenic episode, the sufferer is unable to tell what is real from what is imagined.

On June 16, 2017, Ms. Frost had a schizophrenic episode. R at 2-3. During the episode, delusional voices in her head told her that chickens are sacred. Thus, the chickens needed protection and liberation at all costs. R. at 3. Ms. Frost's boyfriend, Mr. Smith, worked as a poultry inspector, thus part of the threat to chickens. Ms. Frost believed that killing him would not only protect the chickens, but also that Mr. Smith would reincarnate as a chicken. Ms. Frost considered this as a high honor, due to the sacred nature of chickens. With this at the forefront of her mind, Ms. Frost killed Mr. Smith.

After finding Mr. Smith's body, the Campton Roads Police Department brought in Ms. Frost for questioning on June 17, 2017. While in the interrogation room, Ms. Frost was read her Miranda rights and subsequently signed a waiver. During the examination, Ms. Frost was undoubtedly still in a psychotic break due to her mental illness. Ms. Frost immediately admitted to the crime upon questioning and began to explain why she killed Christopher. After requesting an attorney, the interrogation ended.

2. Procedural History

The Court appointed a psychiatrist, Dr. Frain, to evaluate Ms. Frost. The psychiatrist diagnosed her with paranoid schizophrenia. R. at 3. Ms. Frost was then tried for murder in East Virginia District Court. R. at 4. During the trial, Dr. Frain testified that it was highly probable that Ms. Frost was in a psychotic state and suffering from severe delusions and paranoia on June 16 and June 17. R. at 4. Dr. Frain stated that Ms. Frost was unable to control or fully understand the wrongfulness of her actions over those few days. R. at 4. Ms. Frost was acquitted on the basis of insanity, which is still a defense under federal law, pursuant to 18 U.S.C. § 17(a).

Subsequently, Ms. Frost was tried for murder in the East Virginia Commonwealth. R. at 4. Previously East Virginia applied the *M'Naughten* test for the insanity defense, but now the East Virginia Code Section 21-3439 replaced the *M'Naughten* test for insanity to a *mens rea* approach.

Ms. Frost's attorney filed a motion to suppress the confession because the alleged waiver was not made knowingly and intelligently. Then, the attorney asked the trial court to find that the abolition of the insanity defense and substitution of a *mens rea* approach was a violation of the Eighth and Fourteenth Amendments. The motions were denied, and Ms. Frost was convicted of murder and given a life sentence.

STATEMENT OF JURISDICTION

The petition for the writ of certiorari was granted by this Court on July 31, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

SUMMARY OF THE ARGUMENT

All United States Citizens are guaranteed certain constitutional rights. The judiciary protects these rights by enforcing fundamental principles of the law. The risk of a Constitutional violation increases when a person has a mental illness. Thus, this Court must strictly apply fundamental principles of law to protect their rights adequately.

The Fifth Amendment protects an individual's right to not self-incriminate. An individual may only waive those rights voluntarily and knowingly. Traditionally, the Supreme Court considers each element of the waiver as two distinct inquiries. First, the waiver must be voluntary and free of police coercion. Second, the waiver must have been made with an understanding of the right waived and at least some consequences of waiving the right. The knowing inquiry requires the Court to consider the subjective understanding of the defendant.

However, the Court below conflated the inquiries. Despite finding that Ms. Frost did not understand her Fifth Amendment rights or the consequences of her waiver, the Court found her waiver valid. The Court explained a reasonable officer would not suspect she could not understand her rights, so the waiver was valid. Under this reasoning, the Fifth Amendment rights of individuals with severe mental illnesses are in danger. For individuals suffering from discrete disabilities, like Ms. Frost, the Supreme Court test for a valid waiver is reduced to a one step inquiry. So long as the State proved the officer acted reasonably, the Fifth Amendment rights of Ms. Frost were free game. Only the proper two step inquiry will adequately protect her right to not self-incriminate.

A principle as old as our nation, the insanity defense is a fundamental part of criminal proceedings. The substitution of the insanity defense with a *mens rea* approach does not adequately protect the rights guaranteed to citizens under the Constitution. Abolishing the

insanity defense violates the Due Process Clause and the Eighth Amendment. The State depriving Ms. Frost of the insanity defense in criminal proceedings violates her rights as a U.S. citizen.

History enshrines the insanity defense as a fundamentally ranked principle; thus, the Due Process Clause protects it. This Court ranks fundamental principles by asking two primary questions. First, what is the historical background and opinion of the principle? Second, how does society today view the principle? Courts have recognized the insanity defense since the 14th century and it remains in effect in forty-eight U.S. jurisdictions. Both history and modern society establish the insanity defense as a fundamentally ranked principle.

Historically, the judiciary has condemned the punishment of people with mental illnesses. This Court determines whether punishment violates the Eighth Amendment by looking at how society at the founding would deem punishment cruel and unusual. At the founding, society viewed punishment of the insane as cruel and unusual. Thus, punishment of people with mental illnesses violates the Eighth Amendment.

Additionally, at the core of the Eighth Amendment, this Court has held that the punishment must be proportional to the crime and must serve penological purposes for serving justice. Punishing the insane does not meet the proportionality standard of this Court. No penological justifications for punishment are served by punishing the insane. Thus, the substitution of the insanity defense with a *mens rea* approach does not adequately substitute the insanity defense in a way that comports with the Constitution.

ARGUMENT

I. MS. FROST DID NOT KNOWINGLY WAIVE HER RIGHT TO NOT SELF-INCRIMINATE AND SO THIS COURT MUST REVERSE AND REMAND.

"No person… shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. *Miranda* attempts to protect a person's right against self-incrimination from modern police interrogation tactics. *Miranda v. Arizona*, 384 U.S. 436, 477 (1966). This right is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

This Court should reverse and remand the decision of the Circuit Court. To make a valid waiver, the defendant must make either an involuntary waiver or a knowing and intelligent waiver. *Colorado v. Spring*, 479 U.S. 564, 573 (1987). A knowing waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)). Ms. Frost did not understand her *Miranda* rights or the consequences of waiving her rights. R. at 5. Thus, her waiver was invalid and the Court must order the Circuit Court to exclude the confession.

Individuals with severe mental disorders are more susceptible to contemporary police interrogation. *See* Cloud et al., 69 U. Chi. L.Rev.. at 511–12 (describing how people with mental disabilities are "unusually susceptible to the perceived wishes of authority figures."). Individuals with paranoid schizophrenia are particularly susceptible to modern police interrogation and more likely to waive their rights without understanding them. Specifically, an individual in the midst of a psychotic break due to paranoid schizophrenia that makes a knowing waiver of their rights nearly impossible. When a defendant fails to understand the basic rights guaranteed by the Fifth Amendment and fails to understand the consequences of that waiver, the waiver is invalid.

Spring, 479 U.S. at 575. Thus, applying the correct legal test to determine whether Ms. Frost waived her right to remain silent is critical to protect those rights.

A. Miranda requires a knowing and intelligent waiver of an individual's right to remain silent.

The inquiry to determine whether a waiver is compelled has two distinct dimensions. *Id*. at 573. The Court must first consider whether police coercion rendered the confession involuntary. *Id.* Then, the Court must determine whether the defendant made the waiver knowingly and intelligently. Specifically, whether the defendant has a "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2012) (quoting *Burbine*, 475 U.S. at 421.). The Court may find a waiver valid only after the State proves both distinct dimensions. *See Id.* at 384 (Citing case law to support the proposition that a voluntary waiver is insufficient to demonstrate a valid waiver). Instead, the Circuit Court and Supreme Court of Appeals conflated the distinct dimensions and applied an incorrect test. Because the lower courts applied the incorrect legal standard, this Court must reverse and remand with instructions to exclude the confession.

i. The right to not self-incriminate remains a fundamental right.

The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. *See Malloy*, 378 U.S. at 84. The privilege embodies principles of humanity and civil liberty, secured only after years of struggle. *Bram v. United States*, 168 U.S. 532, 544 (1897). The right to remain silent reflects fundamental values and noble aspirations; including a sense of fair play which dictates a fair state-individual balance by requiring the government to shoulder the entire burden to prove guilt and a respect for the inviolability of the human personality. *Withrow v. Williams*, 507 U.S. 680, 692 (1993) (citations

omitted). Further, the right requires the government to respect the dignity and integrity of its citizens. *Miranda*, 384 U.S. at 460.

However, today, modern custodial techniques exploit psychological vulnerabilities by isolating suspects and questioning them alone, depriving them of outside support. *See Id.* at 448–55 (discussing police strategy during custodial interrogations). The government's ability to secure self-incriminating statements began to erode a fundamental right. *Withrow*, 507 U.S. at 691. Thus, to protect a fundamental trial right, this Court established the *Miranda* test.

Miranda attempts to protect a person's right against self-incrimination from modern police interrogation tactics. This Court reiterated well-established principles behind this right that require the government to respect the dignity and integrity of its citizens. *Miranda*, 384 U.S. at 460. The right to remain silent protects the defendant from unreliable evidence being used against her at trial. *Withrow*, 507 U.S. at 692. Thus, if *Miranda* and the right to remain silent are violated, the accused's statement is inadmissible at trial. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

ii. A valid waiver requires the State to prove the defendant understood the right abandoned and the consequences of waiving that right.

In limited circumstances, a person can waive their right to remain silent. *Miranda*, 384 U.S. at 444. However, the person must voluntarily, knowingly, and intelligently waive their rights. *Id*. To determine whether a waiver is valid, the Court must examine the particular facts and circumstances surrounding each case, including the background, experience, and conduct of the accused. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). If the defendant did not understand their right to remain silent and the consequences of waiving that right, the waiver was invalid and the court must exclude the confession. *See Miranda*, 384 U.S. at 492 (Excluding confession

and holding a signed statement with a clause stating he had full knowledge of his legal rights was an invalid waiver).

As an initial matter, the Court must determine the validity of the waiver. The waiver inquiry "has two distinct dimensions," first, whether the waiver was made voluntarily, and second, whether the defendant knowingly and intelligently waived their rights. *Moran,* 475 U.S. at 421. This two-dimensional test reflects the *Miranda* decision requiring a waiver to be knowing, voluntary, and intelligent. *Miranda*, 384 U.S at 479. Courts must consider both requirements separately. *See Edwards*, 451 U.S. 477, at 483–84 (criticizing the Arizona Supreme Court for not separately focusing on whether Edwards had knowingly and intelligently waiving his Fifth Amendment rights).

The first dimension requires a waiver that is "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran*, 475 U.S. at 421. This dimension of the test has its origin in the common law, as the courts of England and the United States recognized that coerced confessions are inherently untrustworthy. *Dickerson v. United States*, 530 U.S. 428, 433 (2000). This Court first excluded an involuntary confession under the Fifth Amendment in *Bram*. 168 U.S. at 542. Thus, the voluntary dimension of the waiver test originates in part from Courts trying to protect defendant's Fifth amendment rights.

However, before *Miranda*, most confessions were excluded on notions of due process. *Dickerson*, 530 U.S. at 433–32. In those cases, this Court refined the test of a voluntary waiver into an inquiry that examines "whether a defendant's will was overborne" by the circumstances surrounding the giving of a confession. *Id.* (quoting *Schneckloth v. Bustamonte,* 412 U.S. 218, 226 (1973)). However, the Court recognized that this test alone failed to adequately protect

citizens from modern interrogation techniques. *Id.* at 434–35. Therefore, the Court created the second dimension of the *Miranda* test.

The second dimension requires the person to have "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Berghuis*, 560 U.S. at 382. When the State fails to prove that the defendant knowingly and intelligently waived their Miranda rights before making incriminating statements to the police, the waiver is invalid. *See Tague v. Louisiana*, 444 U.S. 469, 471 (1980) (Excluding a confession when the State offered no evidence to prove the defendant waived his rights knowingly and intelligently). When a defendant fails to understand the basic privilege guaranteed by the Fifth Amendment, the waiver is invalid. *Spring*, 479 U.S. at 575.

Under current Supreme Court precedent, the State failed to prove Ms. Frost understood her rights. If the defendant failed to understand their rights, then that results in an invalid waiver. *Miranda*, 384 U.S at 491–92; *See Spring*, 479 U.S. at 573–575; *Moran*, 475 U.S., at 421–422. Here, the State failed to provide any evidence that Ms. Frost understood her waiver, which alone mandates the exclusion of a confession. *Tague*, 444 U.S. at 471. Further, the Circuit Court explicitly found that Ms. Frost did not understand her rights and waiver, therefore the waiver was invalid. R. at 5.

iii. The Supreme Court of Appeals applied the incorrect legal test.

A waiver is invalid if the prosecution fails to prove the defendant understood their rights. *Berghuis*, 560 U.S. at 384. The correct test evaluates whether the defendant subjectively knew he could "stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction." *Moran*, 475 U.S. at 422–23. The knowing and intelligent dimension does not require a court to probe what the police reasonably believed regarding the

defendant's understanding. *See Berghuis*, 560 U.S. at 384 (explaining the burden to establish a valid waiver as "showing that the accused understood these rights"); *See also Tague*, 444 U.S. at 471 *(*holding a confession inadmissible because the State gave no evidence that accused understood his Miranda rights*)*. Instead, the knowing and intelligent dimension focuses on whether the defendant understood her basic rights and the consequences of waiving those rights.

Police coercion is not a prerequisite to finding an invalid waiver. *United States v. Bradshaw*, 935 F.2d 295, 299 (D.C. Cir. 1991). *Connelly* held that coercive police activity is a necessary predicate to finding a confession involuntary. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).[1] However, the Court did not address the knowing and understanding inquiry, because the defendant understood his right to remain silent. *Id.* at 162. *Connelly* bears no weight on the distinct, separate question of whether the waiver was knowing and intelligent. *U.S. v. Taylor*, 157 F.3d 552, 555 (1998).

Thus, Circuit Courts have explicitly refuted the proposition that *Connelly* requires police coercion to find an invalid waiver. *United States v. Cristobal*, 293 F.3d 134, 142 (4th Cir. 2002); *United States v. Turner*, 157 F.3d 552, 555 (8th Cir. 1998); *Bradshaw*, 935 F.2d at 299. Further, Courts still find invalid waivers in the absence of police coercion. *United States v. Breton-Rodriguez*, 232 Fed. App'x. 725, 725–26 (9th Cir. 2009). Finally, Courts apply *Connelly* to the voluntary inquiry, but not to the knowing and intelligent inquiry. *United States v. Minard*, 208 Fed. App'x. 657, 661–62 (10th Cir. 2006); *United States v. Cardenas*, 410 F.3d 287, 293 (5th Cir. 2005); *Miller v. Dugger*, 838 F.2d 1530, 1539 (11th Cir. 1988). For example, in *Bradshaw*, a

[1]Notably, the voluntary dimension of the *Miranda* test has its origin in both due process and Fifth Amendment jurisprudence. *Dickerson*, 530 U.S. At 433–34; *See Jackson v. Denno*, 378 U.S. 368 (1964). It was not until *Miranda* that the Supreme Court articulated a test for waiving the right to remain silent.

bank robber diagnosed with schizophrenia confessed without police coercion and argued he did not understand his waiver. 935 F.2d at 297–98. The Court interpreted *Connelly* as holding that police coercion is a prerequisite to a determination that a waiver was involuntary, but not whether the waiver was knowing and intelligent. *Id.* at 2

A minority of courts interpret *Connelly* to require the inquiry from the officer's perspective. *See Garner v. Mitchell*, 557 F.3d 257 (6th Cir. 2009). However, an emphasis on the absence of police abuse is in tension with the conventional approach to waivers of the Miranda rights—that of asking simply whether the defendant was subjectively able to make a knowing waiver of his rights. *e.g.*, *Spring*, 479 U.S. at 573–74; *Fare*, 442 U.S. at 725–26; *United States v. Male Juvenile (95-CR-1074)*, 121 F.3d 34, 40–41 (2d Cir. 1997). The Supreme Court reiterated the deficiency in this approach, explaining that an absence of police coercion is insufficient to demonstrate "a valid waiver" of Fifth Amendment rights. *Berghuis*, 560 U.S. at 384.

The Supreme Court of Appeals conflated their analysis of the two-dimensional *Miranda* test. Here, Ms. Frost did not understand her Miranda rights or the consequences of her waiver. R. at 5. Ms. Frost did not make her decision with "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Spring*, 479 U.S. at 573–74. The State failed to prove Ms. Frost made her waiver knowingly and intelligently. R. at 5. Because her waiver was not knowing and intelligent, her confession should have been excluded.

B. The proper application of the Two-Dimensional Miranda Inquiry protects individuals with mental disorders right to not self-incriminate.

Traditionally, the knowing and intelligent dimension has embraced the concern of whether a mentally ill person is able to understand the warnings. *Bradshaw*, 935 F.2d at 298; *see, e.g.*, *United States v. Gaddy*, 894 F.2d 1307, 1312 (11th Cir. 1990). The right to remain silent preserves our respect for the inviolability of the human personality. *Miranda*, 384 U.S at 460

*(*citing *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964)). *Miranda* protects individuals from the inherently compelling pressures which work to undermine their will to resist and to compel him to speak where he would not otherwise do so freely. *Id.*

Individuals with severe mental illness are particularly susceptible to contemporary police interrogation. Cloud, at 511–12. Seemingly harmless interrogation techniques employed by inevitably exploit personal vulnerabilities of an individual with a severe mental illness. Richard Rogers et al., *Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants*, 31 Law & Hum. Behav. 4 (2007). Approximately one-fourth of mentally ill defendants could not generate a single reason for why they should exercise their Miranda right to remain silent. *Id*. Thus, the danger of compelled testimony and a violation of the right to not self-incriminate is heightened when police interrogate individuals with mental illness.

Individuals with mental illness encounter the police frequently. Estimates suggest that 695,000 defendants annually were suffering from severe mental disorders at the time of their arrests and subsequent Miranda warnings. *Id.* In forty-four states, a jail or prison holds more mentally ill individuals than the largest remaining state psychiatric hospital. Fuller, *The Treatment of Persons With Mental Illness in Prisons and Jails: A State Survey*, Treatment Advoc. Ctr (2014). For individuals with mental illness, frequent encounters with the police coupled with susceptibility to exploitation creates a uniquely high risk of Fifth Amendment violations.

Only application of the correct legal test will adequately protect individuals with mental illnesses from Fifth Amendment violations. To protect the countless individuals with mental disorders who encounter custodial interrogation, this Court must uphold the longstanding application of *Miranda* and determine whether the defendant waived their right knowingly and

intelligently. Otherwise, for individuals with hidden handicaps, the *Miranda* waiver inquiry amounts to a one step test. *Garner*, 557 F.3d at 275 (Moore, J., dissenting).

Ms. Frost's right to not self-incriminate was violated. Ms. Frost has paranoid schizophrenia. R. at 3. While schizophrenia has several subtypes, the paranoid type is characterized by delusions or auditory hallucinations despite otherwise normal cognitive and emotional functioning. Mohandie & Duffy, *Understanding Subjects with Paranoid Schizophrenia*, 68 FBI L. Enforcement Bull. 8 (1999). This explains Ms. Frost's calm and unsuspecting demeanor at the beginning of the interrogation. R. at 2. Despite her outward appearance, Ms. Frost lacked the requisite awareness of her rights and the consequences of her waiver. R. at 5. Simply because her disability was not obvious to a reasonable police officer, should not preclude her from exercising her Fifth Amendment Rights.

If *Miranda* does not require a knowing and intelligent waiver absent police coercion, the rights of individuals with mental illness are at risk. Individuals with severe Axis I mental disorders struggle to comprehend the basic right to remain silent. Rogers, *supra*. Below, the East Virginia Circuit Court found Ms. Frost did not understand her Miranda rights or the consequences of signing the waiver. R. at 5. Because she did not make her waiver knowingly or intelligently, the waiver was invalid and the confession in violation of *Miranda*. Therefore, this Court must reverse and remand to the East Virginia Circuit Court with instructions to exclude Ms. Frost's confession.

II. THE *MENS REA* APPROACH AS SUBSTITUTED FOR AN AFFIRMATIVE INSANITY DEFENSE IS UNCONSTITUTIONAL

The insanity defense is a reflection of the very core values and history of criminal law in the United States. This Court must not allow abolition of the insanity defense. An approach to insanity in criminal law such as the *mens rea* approach deprives a person of their constitutional

right to due process and the right to not be subject to cruel and unusual punishment. Abolishing the historic insanity defense will allow the state to subject people with mental illness to unwarranted punishment. History has shown that the insanity defense is a fundamental right. The *mens rea* approach does not sufficiently fill the hole left by the abolition of this right. The abolition of the insanity defense subjects a person with the inability to appreciate right from wrong to unwarranted punishment. The result is a violation of person's right not to be subject to cruel and unusual punishment.

A. Abolition of the insanity defense and the substitution of a mens rea approach violates Due Process.

i. The insanity defense is a principle of justice deeply rooted in the traditions and conscience of our people ranking it as a fundamental principle.

The insanity defense is a principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental. Unless the procedures of the state offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental, Courts should not interfere. *Patterson v. New York*, 432 U.S. 197, 201–202 (1977). To determine what is deemed fundamental, this Court has found that the burden of the party wanting to establish the right as fundamental must show that the principle "was so deeply rooted at the time of the Fourteenth Amendment (or perhaps has become so deeply rooted since) as to be a fundamental principle which that Amendment enshrined." *Montana v. Egelhoff*, 518 U.S. 37, 48 (1996).

There has been no hard and fast rule laid out to determine what is a fundamentally ranked principle. However, courts have grappled with what constitutes a fundamental principle by looking at what society has historically viewed as uniformly necessary to justice. *Montana*, 518 U.S. at 48. The Court's primary guide "in determining whether the principle in question is

fundamental is, of course, historical practice." *Id*. at 43. In *Montana v. Egelhoff*, this Court found that the respondent had not met the burden of showing that presenting evidence of voluntary intoxication in the determination of *mens rea* was a fundamental principle of the Due Process Clause. *Id.* In making this decision the Court considered several factors, amongst which was the fact that one-fifth of the states never adopted the rule in question. *Id* at 49. Additionally, the Court noted that the principle was "of too recent vintage, and has not received sufficiently uniform and permanent allegiance, to qualify as fundamental." *Id.* at 51.

Additionally, this Court has recognized that while not conclusive, "the fact that a practice is followed by a large number of states is…plainly worth considering in determining whether," the principle is ranked as fundamental." *Leland v. State of Or.*, 343 U.S. 790, 798 (1952). Currently, forty-eight U.S. jurisdictions, the federal criminal system, and other jurisdictions provide an affirmative defense that takes into consideration the moral culpability of the defendant, like the insanity defense. Up until 1979, every U.S. jurisdiction had some type of affirmative insanity defense. If there has ever been a principle so uniformly adopted by the states that has received sufficient uniformity and permanent allegiance to be ranked as fundamental, it is the insanity defense. History confirms that society views a defendant's ability to raise a legal insanity defense as a fundamentally ranked right.

In early studies of the effects of mental illness on the criminal justice system, doctors began distinguishing between two different groups: the mentally insufficient and the mentally perverse. Homer D. Crotty, *History of Insanity as a Defense to Crime in English Criminal Law*, 12 Calif. L. Rev. 105, 106 (1924). While researchers are continuing to learn more about mental illness, we now have a much fuller understanding of mental illnesses than we did in the 14th century. Even before we had as full of a grasp on mental illnesses and the effects of mental

illness on a person's action as we do today, courts recognized the need for some type of insanity defense. In early times, courts referred to the difference between people who were mentally ill, and those who chose to disregard reason as the "distinction between idiots and lunatics." *Id*. While no longer acceptable terminology, these groups encompass a basic understanding of the difference between those who suffer from a mental infliction caused by an actual insufficiency in their brain, and those who make decisions without using reason.

Insanity has been used as a defense to criminal punishment and liability for thousands of years, dating back to the fourteenth century. *Crotty*, at 105. The insanity defense allows the jury to determine based on psychiatric advice, evidence, and testimony whether the defendant has chosen to disregard reason, or whether the defendant is incapable of reason due to mental illness. *United States v. Mikulich*, 732 F.3d 692, 700–702. Since the inception of the insanity defense, it has been available only to those who are totally deprived of their understanding as not to know right from wrong. *Hopps v. People*, 31 Ill. 385, 391 (1863). Now, the insanity defense, under the *M'Naughten* test followed by most jurisdictions, is still difficult to prove. *Mikulich*, 732 F.3d at 700–702. The insanity defense is not a freebie for people to claim and avoid criminal responsibility, but a needed safety for those who can attribute their actions to mental illnesses.

Several states have recognized that legal insanity is a principle so important to society that it should be ranked as fundamental. See *Finger* v. *State*, 27 P.3d 66, 84 (Nev. 2001); see also *People* v. *Skinner*, 704 P.2d 752, 758–59 (Cal. 1985); *State ex rel. Causey*, 363 So. 2d 472, 474 (La. 1978); *People* v. *Hill*, 934 P.2d 821, 825 (Colo. 1997); *Sinclair* v. *State*, 132 So. 581, 582 (Miss. 1931) (per curiam); *State* v. *Lange*, 123 So. 639, 642 (La. 1929); *State* v. *Strasburg*, 110 P. 1020, 1021 (Wash. 1910). These decisions properly understand that abolition of the insanity defense and substitution of a *mens rea* approach is a violation of due process. This Court should

decide in line with these decisions and find that a defendant is deprived of their right to Due Process if deprived of an insanity defense.

ii. The Substitution of a *Mens Rea* Approach Denies a Defendant of Due Process by Ignoring that Moral Culpability is a Prerequisite to Criminal Punishment.

For thousands of years, lawmakers and society at large have recognized that moral culpability, or an understanding of the wrongdoing committed, is a prerequisite to criminal punishment. The *mens rea* approach to insanity ignores moral culpability as part of the process of punishing a person for a crime. The Due Process Clause protects the rights of citizens by preventing the government from infringing on the life, liberty, or property of its citizens without due process of law. U.S. Const. amend. XIV 1. Court has found that Due Process protects those principles ranked as fundamental. The judicial system has the responsibility to correct the criminal laws of a jurisdiction that contradict fundamentally ranked principles. The fundamentally ranked principle of the insanity defense needs its prerequisite moral culpability to adequately protect the due process rights of individuals with mental illness. A test, such as the *mens rea* substitution for the insanity defense, that ignores moral culpability, is a violation of the Due Process Clause.

In *M'Naghten* it was cemented that a person who is deemed to be insane should not be held criminally responsible for their actions because they lack moral culpability to understand the ethical repercussions of their actions. *Clark v. Arizona*, 548 U.S. 735, 748–54. The defendant in *M'Naghten* suffered from paranoid schizophrenia. His psychotic delusions and hallucinations caused him to attempt to kill the Prime Minister. *M'Naghten's Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843). The judges in the case established that in order to establish insanity it must be shown that, "the party accused was laboring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing." *Id*. Most states have adopted an

approach to the affirmative defense of insanity that incorporates a version of the *M'Naghten* test. *Clark*, 548 U.S. at 748–54. The *M'Naghten* test correctly takes into consideration the element of moral culpability before convicting a person of a crime.

Punishment of a person who is not morally culpable for his crime is a violation of the Due Process Clause. The insanity defense ensures Due Process for individuals who are mentally insane. The defense allows those with mental illnesses to show a jury that they are not capable of having the ability to be morally culpable for their actions. A *mens rea* approach to the insanity defense virtually eliminates the right to Due Process for an individual who reaches the standard of being legally insane. As noted in *Delling v. Idaho*, the *mens rea* approach protects the defendant in a niche of select cases while punishing in a nearly parallel set of facts. *Delling v Idaho*, 568 U.S. 1038, 1039–40 (2012). As illustrated in *Delling*:

> "[the *mens rea* approach] would distinguish between the following two cases. *Case one:* the defendant, due to insanity, believes that the victim is a world. He shoots and kills the victim. *Case Two*: the defendant, due to insanity, believes that a world, a supernatural figure, has ordered him to kill the victim. In *Case One*: the defendant does not know he has killed a human being, and his insanity negates a mental element necessary to commit the crime. In *Case Two*, the defendant has intentionally killed a victim whom he knows is a human being; he possesses the necessary *mens rea*. In both cases the defendant is unable, due to insanity, to appreciate the true quality of his act, and therefore unable to perceive that is wrong." *Delling*, 568 U.S. at 1040.

This example reveals the resulting offense of the *mens rea* approach to Due Process, an arbitrary distinction between two individuals with slightly different psychotic episodes. In one scenario, the court exonerates the defendant due to mental health reasons; in the other, the court condemns the defendant for the same reasons. The *mens rea* approach is not constitutional and does not adequately substitute the rightful protections protected under the insanity defense.

B. Abolition of the insanity defense and substitution of a *mens rea* approach violates the Eighth Amendment.

The Eighth Amendment stands to protect those who are morally inculpable against cruel and unusual punishment. No purpose for punishment is served by punishing those who cannot distinguish right from wrong. Punishing the mentally ill serves no purpose and contradicts societal and Constitutional values. The *mens rea* approach to insanity in a criminal proceeding does not adequately protect them from cruel and unusual punishment.

i. Punishing the insane would have been considered cruel and unusual at the time of the founding of the United States.

The Eighth Amendment prohibits at the very least any act that would have been prohibited at common law in 1789, or at the founding of the United States. *Ford v. Wainwright*, 477 U.S. 399, 406 (1986). Criminally punishing the insane for what they cannot reasonably form an appreciation of was considered cruel and unusual punishment in 1789. In 1789, at common law, punishing those who were considered at the time 'lunatics' was considered wrong. Blackstone on common law explains in commentary:

> "Idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities…if a man in his sound memory commits a capital offense, and before arraignment for it, he becomes mad, he ought not to be arraigned for it… And if after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defense?"
> Blackstone, *Commentaries*, 24-25.

In 1789, the law saw no logic or purpose of punishing someone who does not understand that what they have done is wrong due to the infliction of a mental illness. This Court established that the fact that punishing the mentally insane was considered cruel and unusual in 1789 is enough to be in violation of the Eighth Amendment.

ii. No penological justification for criminal punishment is served by punishing the insane.

Common Law has long established that punishment for criminal behavior must hold a purpose. Deterrence and retribution have been established to be the reasoning behind justifying punishment for criminal behavior. *Ford*, 477 U.S. at 406.

"The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 481 U.S. 137, 149 (1987). The legal definition of retribution is primarily based upon distinguishing between revenge and the extent that punishment is supposed to fit the crime. *People v. Hickman*, 988 P.2d 628, 644–45 (Colo. 1999). In *Ford v. Wainwright*, this Court emphasizes that retribution is punishment for conduct that is equal to the moral quality of the act committed. 477 U.S. at 408. This Court has emphasized that culpability is required for retribution to serve it's penological purpose. *See, e.g.*, *Tison*, 481 U.S. at 149, 156; *Graham v. Fla.*, 560 U.S. 48, 71 (2010); *Ford*, 477 U.S. at 399. A person unable to understand the moral consequences of their actions, has no moral culpability, which creates a system of punishment based on revenge rather than retribution.

This Court predicates the function of deterrence upon the notion that the punishment will keep criminal actors from committing criminal conduct. *Atkins v. Virginia*, 536 U.S. 304, 319–20 (2002). Additionally, *Ford* provides that the purposes of punishment are to deter the defendant or to provide an example to others of what that type of criminal conduct will result in. 477 U.S. at 407. The general public, or even a general criminal, likely cannot relate to a person who proves legal insanity in a criminal proceeding. Only those who have experienced a psychotic episode can understand what happens in the mind to convince a person that another human is an animal or that demons are in their head. The purpose of deterrence is to make an example of the criminal actor. However, a legally insane person cannot be an example to the general public because the

general public cannot relate to a person with a severe mental illness. Additionally, a person who does not understand the wrongness of their actions because of their mental illness cannot be deterred from committing their wrongful actions.

"The Eighth Amendment contains a narrow proportionality principle..." *United States v. Williams*, 264 F. App'x. 795, 798 (11th Cir. 2008) (internal citations omitted). This Court has held that at the center of the Eighth Amendment is a consideration of whether the crime is proportionate to the offense committed. *Graham*, 560 U.S. at 59. The Court in upholding this standard looks to what society views as important to their closest values. *Id*. at 61. All but four jurisdictions uphold the insanity defense. *Clark*, 548 U.S. at 767–69. Clearly, society still values a justice system that protects the morally inculpable from unwarranted punishment. It is cruel and unusual to punish a person who cannot reasonably comprehend the wrongfulness of their actions.

The clearest indicator of society's values can be found by looking at how citizens speak through the laws enacted by their legislatures. Again, forty-eight U.S. jurisdictions have maintained an affirmative insanity defense that holds moral culpability at the center of the test. This reflects the values of society as being that an insane person is not criminally culpable for their acts if they are uncapable of being morally culpable for their acts. Thus, protecting people incapable of moral culpability from unjust criminal punishment remains a fundamental value of American society.

CONCLUSION

For the foregoing reasons, we respectfully ask that the Court reverse and remand.