No. 19-1409

IN THE

SUPREME COURT OF THE UNITED STATES

LINDA FROST,

Petitioner,

v.

COMMONWEALTH OF EAST VIRGINIA,

Respondent.

On Writ of Certiorari
To the Supreme Court of Appeals of East Virginia

BRIEF OF RESPONDENT LINDA FROST

TEAM Y

QUESTIONS PRESENTED

1. Whether an individual's waiver of her Miranda rights is knowing and intelligent when, due to severe mental disease, the accused did not understand her rights even though she appeared lucid to the investigating officer at the time of her waiver.

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

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JURISDICTION

The East Virginia issued its opinion on December 31, 2018. R. at 9. This Court granted certiorari on July 31, 2019. R. at 12. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, as relevant: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . without due process of law . . . ." U.S. CONST. amend. V.

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

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

E. Va. Code § 21-2439 "abolished the [insanity defense] in favor of a *mens rea* approach." R. at 4.

STATEMENT OF THE CASE

When Linda Frost entered the Compton Roads police station on June 17, 2017, she was in the midst of a psychotic break. R. at 4. She had been called to submit to interrogation concerning the killing of Christopher Smith the prior day. *Id*. According to a clinical psychiatrist, because of her mental illness Frost suffered "severe delusions and paranoia" that left her "unable to control or fully understand" her actions both in the police station and over the previous 24 hours. *Id.* Upon commencement of her interrogation, Frost signed a written form waiving her *Miranda* rights before confessing to killing Smith and leaving the murder weapon in a nearby park. R. at 3. Yet immediately after her confession, she began exhibiting extremely bizarre behavior: describing "'voices in her head' telling her to 'protect the chickens at all costs,'" arguing that killing Smith "was [not] wrong because [Smith] would be reincarnated as a chicken" and imploring the interrogating officer "'to liberate all chickens in Campton Roads.'" R. at 3.

Upon commencement of litigation, the circuit court found that Ms. Frost "did not understand either her *Miranda* rights or the consequences of signing the waiver form" – a proposition that no party to this litigation contests. R. at 5. That court, as well as the East Virginia Supreme Court, nonetheless upheld Frost's *Miranda* waiver and subsequent confession because her deteriorated mental state was not evident to the interrogating officer during Frost's questioning. R. at 5, 7. These courts held that absent unusual police coercion, a suspect's *Miranda* waiver was per se valid and her confession need not be suppressed – even where, as in Ms. Frost's case, the defendant has untreated "paranoid schizophrenia" leaving her unaware of the "wrongfulness of her actions." R. at 3-5.

Typically, the consequences of permitting the confession of a defendant in Ms. Frost's mental condition would be minimal: after all, under federal law and the law of the vast majority

of states, Frost would be entitled to pursue an insanity defense. R. at 4; *see Clark v. Arizona*, 548 U.S. 735, 752 (2006). This is precisely what happened at Frost's initial trial in federal court – after the testimony of the clinical physician demonstrated Frost's lack of mental capacity, she was acquitted on the basis of insanity under federal law. R. at 4; *see* 18 U.S.C. § 17(a) (2012).

But Frost had a unique misfortune: the East Virginia legislature had recently abolished the insanity defense in favor of a *mens rea* approach, an extraordinarily rare decision. R. at 4. Under this legislation, evidence of mental disease may be introduced to disprove the *mens rea* element of a defense or to disprove competency to stand trial but could not be used to establish an insanity defense. *Id.*, *see* E. Va. Code § 21-3439. The circuit court upheld this legislation, finding that it did not violate either the Fourteenth or the Eighth Amendments. R. at 5. Then, based on § 21-3439, that court precluded Frost from introducing testimony from her clinical physician. *Id.* The jury subsequently convicted Frost of murder, a sentence accepted by the circuit court judge. *Id.* The East Virginia Supreme Court upheld the circuit court's judgment on both the *Miranda* waiver and insanity defense issues. R. at 5-9. This Court granted certiorari to resolve whether Frost's *Miranda* waiver and subsequent confession were proper despite her mental insanity, and whether East Virginia's abolition of the insanity defense violated either the Fourteenth or Eighth Amendments to the Constitution. R. at 12.

SUMMARY OF THE ARGUMENT

Every year, the world community learns more and more about just how impactful mental disease can be on human behavior. As society continues to experiment with the best policies to treat mental disease, American legal standards must account for the deficits that plague so many of its citizens. Recognizing that the severely mentally ill are among the most vulnerable

members of society, the law often considers their capacity to abide by the same rules as those who are not afflicted with such debilitating illnesses.

Perhaps the area of greatest vulnerability to the mentally ill is the criminal law, where their liberty is at stake. The Fifth Amendment affords all people the privilege against self-incrimination, and a waiver of that privilege that is not truly knowing and intelligent renders the amendment's protections toothless. Ms. Frost's severe mental delusions make it absolutely clear that she was not capable of knowingly and intelligently waiving her Fifth Amendment right, and this Court should so hold.

Under a recently enacted statute, East Virginia denies Ms. Frost the opportunity to demonstrate that her actions were motivated by mental insanity, and thus denies her due process of law. Furthermore, because Ms. Frost lacks moral culpability for her actions, subjecting her to a criminal conviction amounts to a Cruel and Unusual Punishment, in violation of the Eighth Amendment.

ARGUMENT

I. Ms. Frost Did Not Knowingly and Intelligently Waive Her Fifth Amendment *Miranda* Rights

Warnings advising individuals of their rights while under law enforcement questioning – commonly known as *Miranda* warnings – may only be waived voluntarily, knowingly, and intelligently. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Unusual police coercion is a prerequisite to finding a *Miranda* waiver involuntary. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). We concede on the facts presented that Ms. Frost's *Miranda* rights were waived voluntarily under this Court's decision in *Connelly*. *See* R. at 2-3 (showing no unusual coercion when Frost signed a written *Miranda* waiver and then confessed to murder).

Despite this, Ms. Frost's *Miranda* waiver was not knowing and intelligent, which must be determined based on the totality of the circumstances even post-*Connelly*. *See Miranda*, 384 U.S. at 444; *Moran v. Burbine*, 475 U.S. 412, 421 (1986); *United States v. Bradshaw*, 935 F.2d 295, 299-300 (D.C. Cir. 1991). However, if this Court views *Connelly* as allowing the severely mentally ill to waive *Miranda* rights without knowledge and intelligence of the meaning of such a waiver, *Connelly* should be overruled to restore the protections guaranteed by *Miranda* and the Fifth Amendment. *See Miranda*, 384 U.S. at 444; U.S. CONST. amend. V.

A. Ms. Frost's *Miranda* Waiver Was Not "Knowing and Intelligent" and Was Therefore Improperly Given

Although police coercion is a prerequisite to a finding of involuntary waiver, no such prerequisite exists to find a waiver unknowing and unintelligent, which is determined under a "totality of the circumstances" analysis. *United States v. Bradshaw*, 935 F.2d at 299-300. Under this analysis, Ms. Frost's *Miranda* waiver was not knowing and intelligent and her testimony is therefore inadmissible. *See United States v. Price*, 921 F.3d 777, 791-92 (9th Cir. 2019).

i. Knowing and Intelligent Miranda *Waiver is Determined Under a Totality of the Circumstances Analysis*

In order for a *Miranda* waiver to be effective, it must be given knowingly and intelligently as well as voluntarily. *See Moran*, 475 U.S. at 421 (articulating that *Miranda* waiver must be both "voluntary" and made with "awareness" of its consequences). While circuit courts split on the issue, a totality of the circumstances analysis finding a waiver not knowingly and intelligently given does not and should not require police coercion beyond that always present in citizen-police encounters. *Compare United States v. Bradshaw*, 935 F.2d at 299-300 (finding

knowing and intelligent waiver of *Miranda* to be part of a totality of the circumstances analysis), *with Woodley v. Bradshaw*, 451 F. App'x 529, 540 (2011) (finding additional police coercion to always be a prerequisite to invalid waiver). *See also Miranda*, 384 U.S. at 455 ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.").

Connelly's holding on police coercion is limited to voluntariness because this Court does not overrule itself by implication. *See Connelly*, 497 U.S. at 167 ("We hold that coercive police activity is a necessary predicate to the finding that a confession is not '*voluntary*' . . . .") (emphasis added); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (holding that this Court reserves "the prerogative of overruling its own decisions"). Accordingly, this Court should interpret *Connelly's* instructions as changing *Miranda*'s voluntariness dictates but not the longstanding totality of the circumstances test for knowing and intelligent waiver. *See United States v. Bradshaw*, 935 F.2d at 299 ("We read *Connelly* . . . not as bearing on the question of whether the waiver was knowing and intelligent."); *see also, e.g.*, *Moran*, 475 U.S. at 421 (articulating the historical background of the totality of the circumstances test to be applied to the defendant's waiver).

Maintaining this framework also properly recognizes the logical distinctions between voluntariness and "knowing and intelligent" waivers. While "voluntariness" inquiries focus on interactions between coercion and a defendant's free will, "knowing and intelligent" analysis is driven by the defendant's objective understanding of her waiver. *See Moran*, 475 U.S. at 421; *compare Voluntary*, Merriam-Webster Online (2019) ("from one's own choice or consent"), *with Knowing*, Merriam-Webster Online (2019) ("Having or reflecting knowledge, information, or intelligence.").

Moran explains the "two distinct dimensions" of *Miranda*'s dictates for a waiver: first, that it be "voluntary in the sense that it was a product of free and deliberate choice," and second, that it be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran*, 475 U.S. at 421. *Connelly* prohibited a fully open-ended analysis of a defendant's "free will" from dictating whether a waiver is voluntary and imposed a predicate of police coercion, thereby altering the requirement for voluntariness from *Moran* and *Miranda*. *See Connelly*, 479 U.S. at 167, 169-70. But these restrictions do not speak to the separate question of whether a defendant understood her *Miranda* rights and the consequences of waiving such rights. *See United States v. Bradshaw*, 935 F.2d at 300 (holding that a Court must analyze the defendant's understanding of his rights in the waiver analysis); *United States v. Frank*, 956 F.2d 872, 876 (9th Cir. 1991) ("A voluntary confession is inadmissible if the accused lacks the mental capacity to make a knowing and intelligent waiver . . . ."). If a defendant does not waive her *Miranda* rights knowingly and intelligently, her waiver does not satisfy *Miranda*'s instructions regardless of the waiver's voluntariness.

ii. Ms. Frost's Waiver was Not Knowing and Intelligent

Under a totality of the circumstance analysis, Ms. Frost's waiver was involuntary given her addled mind, unreliable testimony provided, and lack of experience with the criminal justice system. *See Price*, 921 F.3d at 791-92; *United States v. Moses*, 137 F.3d 894, 902 (6th Cir. 1998). A knowing and intelligent waiver may only be given when a defendant understands some of the consequences of giving up her *Miranda* rights as based upon the "totality of the circumstances surrounding the interrogation" and waiver. *See Colorado v. Spring*, 479 U.S. 564,

573 (1987) (quoting *Moran*, 475 U.S. at 421). Factors to be considered in determining whether a waiver was knowing or intelligent include:

> (i) the defendant's mental capacity; (ii) whether the defendant signed a written waiver; (iii) whether the defendant was advised in his native tongue or had a translator; (iv) whether the defendant appeared to understand his rights; (v) whether the defendant's rights were individually and repeatedly explained to him; and (vi) whether the defendant had prior experience with the criminal justice system.

Price, 921 F.3d at 792. In addition, some courts consider reliability of a confession at the time it was given as a factor in the effectiveness of waiver. *See Moses*, 137 F.3d at 902; *see also Dassey v. Dittman*, 877 F.3d 297, 317-18 (7th Cir. 2017) (noting the scholarly and judicial debate over reliability as a factor in analyzing *Miranda* waiver and testimony). These factors, taken together, instruct courts to analyze police coercion present in an encounter with a suspect without making such coercion a predicate to a finding of unknowing and unintelligent waiver.

To be sure, several of these factors cut against Ms. Frost: she waived her *Miranda* rights via written waiver, spoke English fluently, appeared to understand her rights, and had those rights explained. R. at 2-3.

But the other factors effectively demonstrate a total lack of knowledge and intelligence in Ms. Frost's *Miranda* waiver. Most critically, Ms. Frost's mental state was alarmingly compromised when she waived her *Miranda* rights. Severity of mental illness is a crucial factor in the waiver analysis, as defendants judged to have validly waived their Miranda rights are often described as merely "borderline" mentally challenged or otherwise not mentally "debilitat[ed]." *See, e.g.*, *Bell v. Lynaugh*, 828 F.2d 1085, 1089 (5th Cir. 1987); *United States v. Rojas-Tapia*, 446 F.3d 1, 7 (1st Cir. 2006). Not so here: Ms. Frost's statements concerning "'voices in her head' telling her to 'protect the chickens at all costs'" and belief that the deceased would be "reincarnated as a chicken" indicate a complete mental separation from reality. R. at 3. This

mental instability also implicated the reliability of her testimony when it was given – a person in her mental state could not give any reliable statements. *See Moses*, 137 F.3d at 902 (questioning the reliability of a confession provided by a defendant with, among other mental issues, low intelligence and alcoholism). Finally, there is no indication that Ms. Frost had prior experience with the criminal justice system. Taken together, the totality of the circumstances indicate that Ms. Frost did not and could not have knowingly and intelligently waived her *Miranda* rights – making her waiver improper for the purposes of her prosecution.

B. If Necessary, This Court Should Overrule *Connelly* and Clarify the Proper Requirements of *Miranda* and the Fifth Amendment

If this Court disagrees that *Connelly* can be squared with prior precedent on *Miranda* waiver, *Connelly* should be overruled to re-establish clarity on the requirements for a voluntary, knowing, and intelligent waiver. This Court's caselaw outside of *Connelly* properly effectuates the meaning of the Fifth Amendment for all people. *See Miranda*, 384 U.S. at 444; U.S. CONST. amend. V; *see also, e.g.*, *Moran*, 475 U.S. at 421 (articulating a defendant-based analysis for voluntary, knowing, and intelligent waiver); *Spring*, 479 U.S. at 575 (finding whether a defendant understood his Fifth Amendment privilege dispositive).

Connelly focused on *Miranda* as a police-regulatory regime, but *Miranda*'s warning and waiver system exists fundamentally to protect individuals' right against self-incrimination provided by the Fifth Amendment. *Compare Connelly*, 479 U.S. at 163 (finding *Miranda* analysis driven by "the crucial element of police overreaching"), *with Moran*, 475 U.S. at 425 (finding *Miranda* warnings and waivers "'measures to insure that the [suspect's] right against compulsory self-incrimination [is] protected'" (quoting *New York v. Quarles*, 467 U.S. 649, 654, (1984)) (alterations in original)); *see also Miranda*, 384 U.S. at 436 ("The cases before us

[interrogate] . . . the restraints society must observe *consistent with the Federal Constitution* in prosecuting individuals for crime.") (emphasis added). *Miranda*'s focus on a waiver being voluntary, knowing, and intelligent requires a case-by-case analysis tailored to each individual. *See Miranda*, 384 U.S. at 479 (holding that the prosecution must demonstrate the individual defendant's voluntary, knowing, and intelligent waiver at trial); *Miller v. Fenton*, 474 U.S. 104, 116 (1985) ([T]he admissibility of a confession turns . . . on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence . . . .").

In reading *Connelly* as requiring extraordinary police coercion to find an invalid waiver, the circuit court below puts the full protections of *Miranda* and the Fifth Amendment out of reach for the severely mentally ill. Some individuals' minds are so out of touch with reality that they cannot make a knowing or intelligent waiver such that they may provide valid testimonial information to law enforcement officers. *See, e.g.*, R. at 3 ("…[Ms. Frost] began making several statements about the 'voices in her head' telling her to 'protect the chickens at all costs.' . . . [S]he did not think killing [the victim] was wrong because she believed that he would be reincarnated as a chicken . . . ."). Of course, the severely mentally ill may still be investigated and prosecuted using many of the "traditional function[s] of police officers in investigating crime," such as seeking additional evidence in the field and asking questions of those "not under restraint." *Miranda*, 384 U.S. at 477. But allowing the severely mentally ill to validly waive their *Miranda* rights despite being fully unaware of the consequences of such waiver would deny these individuals full protection of the Constitution. If overturning *Connelly* is necessary to rejecting this unconstitutional and unjust result, this Court should not hesitate to do so.

II. East Virginia's *Mens Rea* Approach Violates Both the Fourteenth and Eighth Amendments

East Virginia's *mens rea* approach violates the Due Process Clause of the Fourteenth Amendment because it allows punishment of a defendant lacking moral culpability and violates the Eighth Amendment because it fails to meet evolving societal standards of decency. *See* U.S. CONST. amend. XIV; U.S. CONST. amend. VIII; *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

A. East Virginia's *Mens Rea* Approach Violates Due Process

States are generally free to regulate the procedures of their courts without proscription under the Due Process Clause, unless doing so "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." *Patterson v. New York*, 432 U.S. 197 (1977). The principle that offenders who lack moral culpability cannot be criminally convicted is deeply rooted in the traditions of this nation, such that a departure from it violates the Due Process Clause. The East Virginia law abolishing the insanity defense in favor of a *mens rea* approach would permit the criminal conviction of those who lack moral culpability. *See* E. VA. CODE § 21-3439 (2016). Despite this Court's acceptance of various formulations of the insanity defense, the Court's precedents have long recognized that the moral culpability principle protected by the insanity defense is constitutionally required. *See, e.g.*, *Clark v. Arizona*, 548 U.S. 735, 742 (2006).

i. The Principle Against Convicting Offenders Who Lack Moral Culpability is Deeply Rooted in the Traditions of This Country

While the traditional formulation of the insanity defense was famously articulated in the 1843 *M'Naghten* case, the principle against convicting offenders who lack moral culpability has

been deeply rooted in the traditions of society for centuries. Since as early as 1321, "English law acknowledged that an individual who does not know what he is doing or that what he is doing is wrong cannot be held criminally liable." *Finger v. State*, 27 P.3d. 66, 80 (Nev. 2001); *see also State v. Herrera*, 895 P.2d 359, 374 (Utah 1995) ("History demonstrates that… 'it is fundamental to our system of jurisprudence that a person cannot be convicted for acts performed while insane.'" (Stewart, J., dissenting) (quoting *People v. Skinner*, 704 P.2d 752, 755 (Cal. 1985)). The moral culpability principle can be traced back throughout English common law and is even reflected in two American law cases that predated *M'Naghten*, both of which required acquittal if the offender was incapable of distinguishing between good and evil. *See State v. Searcy*, 798 P.2d 914, 928-31 (Idaho 1990) (McDevitt, J., dissenting). Even discounting this rich history, the insanity defense has been deeply rooted in the legal tradition since at least 1843 when *M'Naghten* was decided. Although the number of years a tradition must exist to become 'deeply rooted' is subject to debate, surely the persistence of the insanity defense in nearly every state without much variation for more than a century is sufficient.

Although the existence of numerous state versions of the insanity defense indicate that the *M'Naghten formulation* may not be deeply rooted in society, "the essence of the defense, however formulated, has been that a defendant must have the mental capacity to know the nature of his act and that it was wrong." *State v. Herrera*, 895 P.2d 359, 372 (Utah 1995) (Stewart, J., dissenting). The *mens rea* approach adopted by Utah, Idaho, Montana, Kansas, and East Virginia thus represents the first significant departure from this principle.

ii. The Mens Rea Approach Would Permit the Conviction of Offenders Lacking Moral Culpability

The traditional formulation of the insanity defense comes from the standard articulated in *M'Naghten.* Under that standard, a defendant could establish an insanity defense if she was unable to appreciate the quality or nature of her act ("cognitive incapacity") or if she did not know that what she was doing was wrong ("moral incapacity"). *See* 21 AM. JUR. 2D CRIMINAL LAW § 50 (2019). In passing § 21-3439, the East Virginia legislature abolished the traditional insanity defense and replaced it with a standard known as the "*mens rea* approach." § 21-3439 provides that evidence of a defendant's mental illness is admissible to disprove the *mens rea* element of an offense, but may not be used to establish an affirmative defense to the crime. E. VA. CODE § 21-3439 (2019). Under the *mens rea* approach, a defendant's conduct is excused where her mental condition prevents her from forming the requisite *mens rea*, or intent, but is not excused where her mental condition prevents her from understanding the nature of the act or that it is wrong. *See Finger*, 27 P.3d at 75. In other words, § 21-3439 permits the conviction of an individual who knew what she was doing but had no capacity to understand that it was wrong. Such offenders have long been considered to lack moral culpability for their crimes. *See Herrera*, 895 P.2d at 374 ("[F]or centuries, the law has recognized that insanity absolved a human being of criminal responsibility for his acts, just as infancy and self-defense do.") (Stewart, J., dissenting).

Ms. Frost's case is illustrative of the difference between the two standards. Under the traditional insanity defense, Ms. Frost would have been able to introduce evidence about the mental delusions that motivated her to kill Smith. *See* R. at 3. If believed, a jury could have found her to be not criminally responsible because she did not have the capacity to understand that her actions were wrong. Under the *mens rea* approach, however, evidence of her mental condition could only be introduced to disprove that she had the requisite intent to commit the

crime. Because Ms. Frost intended to kill Smith, albeit due to her delusions, she was convicted of murder. R. at 5. Thus, the *mens rea* approach departs from the common law tradition against convicting those lacking moral culpability. The adoption of the *mens rea* approach reflects the legislatures "conscious decision to hold individuals who act with a proven criminal state of mind accountable for their acts, regardless of motivation or mental condition." *State v. Korell*, 690 P.2d 992, 1002 (Mont. 1984). By permitting evidence of mental illness only to disprove the defendant had the requisite *mens rea,* § 21-3439 violates the deeply rooted tradition against convicting the mentally insane and thus violates Ms. Frost's due process rights.

iii. This Court's Precedents Demonstrate That the Insanity Defense is Constitutionally Required

Although this Court has never addressed the question directly, the Court's precedents strongly favor the insanity defense as a due process right. In *Clark v. Arizona,* the Court upheld an Arizona law that narrowed the insanity defense by removing the "cognitive incapacity" prong of *M'Naghten*. 548 U.S. 735, 742 (2006). Although the Court upheld a different formulation of the insanity defense, the majority expressly justified their decision by explaining that cognitive incapacity would still be relevant under the "narrowed" formulation. *See id.* at 753. The Court's ruling depended on its understanding that "if a defendant did not know what he was doing when he acted, he could not have known that he was performing the wrongful act charged as a crime." *Id.* Therefore, although the Court did uphold the "narrowing" of how the defense is established, it did so with the understanding that the defense was substantively unchanged. *Id.; see also State v. Chavez,* 693 P.2d 893, 894 (Ariz. 1984) (explaining that the cognitive incapacity factor is treated as "adding nothing to the requirement that the accused know his act was wrong.").

Even if *Clark* could be read to affirm a substantively different formulation of the insanity defense, nothing in the opinion suggests that a state could eliminate it altogether. To be sure, the *Clark* opinion makes various references to there being no constitutionally required formulation of the insanity defense. *Clark*, 548 U.S. at 752-53 ("This varied background makes clear that no particular formulation has evolved into a baseline for due process") ("Due process imposes no single canonical formulation of legal insanity.") But these statements do not indicate that the insanity defense itself is not constitutionally required. As the Court's language suggests, *Clark* simply stands for the proposition that no particular *formation* of the insanity defense is required by due process.

This view is confirmed by the Court's holding in *Powell v. Texas*, 392 U.S. 514 (1968). In *Powell*, the Court upheld a public drunkenness conviction of a man who was, to some degree, compelled to drink due to chronic alcoholism. *Id.* at 537. The state courts which have addressed the question cite the *Powell* majority's warning that "[n]othing could be less fruitful than for this court to be impelled into defining some sort of insanity test in constitutional terms" for the proposition that the insanity defense is not constitutionally required. *See, e.g., State v. Searcy*, 798 P.2d 914, 917 (Idaho 1990) (quoting *Powell*, 394 U.S. at 536). Consistent with the Court's ruling in *Clark* however, this statement means nothing more than that it would be unwise to dictate a particular *formation* of the insanity defense. The *Powell* Court in fact expressly affirmed this understanding, explaining that it "is simply not *yet* the time to write the Constitutional formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers." *Powell*, 392 U.S. at 537 (emphasis added). *Powell*, therefore, provides no support for the contention that the insanity defense is not constitutionally required.

Both *Powell* and *Clark* properly note that the precise contours of the insanity defense are left to the discretion of the states. *See Powell*, 392 U.S. at 536 ("This process of adjustment has always been thought to be the province of the states"); *Clark*, 548 U.S. at 752 ("[T]he insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice."). Indeed, there are persuasive reasons why states should create their own standards. As the Court in *Powell* noted, setting a particular constitutional standard would "freeze the developing productive dialogue between law and psychiatry into a constitutional mold." *Powell*, 392 U.S. at 537. Accordingly, states have formulated the insanity defense in many different ways. *See Clark*, 548 U.S. at 749 (describing the numerous state variations of the defense). Despite the various formulations of the defense, however, "it has always had at its core the proposition that those who are so mentally deranged as to lack the mental capacity to comply with the law are not subject to punishment under the criminal law for acts performed as a result of the derangement." *Herrera*, 895 P.2d at 372 (Stewart, J., dissenting). The Court need not, and perhaps should not, formulate the insanity defense in constitutional terms, as "science has not reached finality of judgment" with respect to mental disease. *Clark*, 548 U.S. at 774. However, by abandoning the defense altogether in favor of the *mens rea* approach, East Virginia has defied this long recognized constitutional minimum.

B. The *Mens Rea* Approach Violates the Eight Amendment

The Eighth Amendment to the United States Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. East Virginia's *mens rea* approach constitutes cruel and unusual punishment because it fails to meet modern standards of decency, it results in punishments that

are disproportionate to the offense, and it furthers no legitimate penological goal. *See Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *Roper v. Simmons*, 543 U.S. 551, 560 (2005); *Graham v. Florida*, 560 U.S. 48 (2010).

i. Lack of Insanity Defense Contradicts This Nation's "Evolving Standards of Decency"

What constitutes cruel and unusual punishment under the Eighth Amendment is determined by reference to the "evolving standards of decency that mark the progress of a maturing society." *Atkins*, 536 U.S. at 312; *Graham*, 560 U.S. at 62. To "prevent this Court from becoming, under the aegis of the Cruel and Unusual punishment Clause, the ultimate arbiter of the standards of criminal responsibility," *Powell*, 392 U.S. at 533, the Court looks to objective factors to determine societal standards of decency. *Atkins*, 536 U.S. at 312. This Court has determined that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Id.*

Accordingly, the Court regularly looks to the number of states to adopt a particular law to determine whether a practice is within societal standards of decency. *See Atkins*, 314-15; *Roper*, 543 U.S. at 564. In *Atkins* and *Roper*, the Court found that a consensus of 30 states with respect to executing mentally ill and juvenile defendants, was sufficient to establish that such executions violated societal standards of decency. *Atkins*, 536 U.S. at 314-15; *Roper*, 543 U.S. at 551. In *Graham*, the court found a national consensus against sentencing juveniles to life without parole for non-homicide crimes despite only 13 states having prohibited it. *Graham*, 560 U.S. at 62-63 ("Thirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances."). By contrast, all but four other states recognize some formulation of the insanity defense. *See Clark*, 548 U.S. at 752. If 30

states in *Atkins* and *Roper* and merely 13 states in *Graham* were sufficient to establish a national consensus, certainly the consensus of 46 states and the federal government with respect to the insanity defense is sufficient to establish that convicting the criminally insane violates societal standards of decency. *See* 18 U.S.C. § 17 (2012).

ii. Criminal Conviction of a Mentally Insane Offender is Disproportionate to the Offense

This Court has repeatedly held that "punishment for crime should be graduated and proportioned to the offense." *See e.g.*, *Roper*, 543 U.S. at 560. This Court's precedents further suggest that an offender's moral culpability is relevant to the proportionality analysis. *See e.g.*, *Atkins*, 536 U.S. at 316. Because the mentally insane lack moral culpability for their crimes, the criminal conviction of a mentally insane person is not proportional to the offense, and thus violates their Eighth Amendment right to be free from cruel and unusual punishment.

In *Atkins*, *Roper*, and *Graham*, this Court held certain punishments against minors and the mentally ill to be unconstitutional due to the defendants' diminished moral culpability. *Atkins*, 536 U.S. at 321; *Roper*, 543 U.S. at 578; *Graham*, 560 U.S. at 82. In *Atkins*, for example, the Court held the death penalty to be unconstitutional as applied to mentally ill offenders. *Atkins*, 536 U.S. at 321. Because "society views mentally retarded offenders as categorically less culpable than the average criminal," the Court found a death sentence against such an offender to violate the Eighth Amendment. *Id.* at 316. The Court in *Roper* similarly held that death sentences for juvenile offenders violated the Eighth Amendment, because their "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. Thus, the Court has already acknowledged that an offender's diminished moral culpability can make an otherwise constitutional punishment disproportionate to the

offense, in violation of the Eighth Amendment. In contrast to juvenile and mentally ill offenders whose deficits diminish their moral culpability, mentally insane offenders suffer from disease so extreme that they lack any moral culpability for their crimes. *See, e.g.*, *United States v. Marble*, 940 F.2d 1543 (D.C. Cir. 1991) ("[I]f a man is insane in the eyes of the law, he is blameless in the eyes of society") (alterations in original) (quoting *Whalem v. United States*, 346 F.2d 812, 818 (D.C. Cir. 1965)). If the nature of a punishment is to be proportioned against an offender's moral culpability, any criminal punishment against an offender who is devoid of moral culpability is disproportionate to the offense, and thus violates the Eighth Amendment.

To be sure, the punishment at issue in *Atkins* and *Roper* was "unique in its severity and irrevocability." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). However, neither *Atkins* nor *Roper* expressly limit their application to death sentences, and the court has already extended the rationale to punishments beyond the death penalty. *See Graham*, 560 U.S. at 48. In *Graham*, this Court held categorically that sentencing a juvenile to life without parole for any offense other than homicide would be unconstitutional. *Id* at 82. Because juveniles have "diminished moral culpability" for their crimes, the court found such sentences to be disproportionate to the offense, in violation of the Eighth Amendment. *Id.* at 69. In doing so, the Court eliminated any distinction based on the uniqueness of the death penalty. *See id.* at 103 ("Death is different no longer.") (Thomas, J., dissenting).

iii. Convicting the Mentally Insane Furthers no Penological Goal

In *Graham*, the Court explained that "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Graham*, 560 U.S. at 48. This alone would be sufficient to find the *mens rea* approach unconstitutional, because no penological goal

is furthered by imposing any sentence on a mentally insane offender. That is not to say that mentally insane offenders are free to reenter society; when an offender establishes an insanity defense, it is proper for the government "to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society." *Jones v. United States*, 463 U.S. 354, 370 (1983). No legitimate penological justifications, however, are furthered by criminally convicting a mentally insane individual.

Both *Roper* and *Graham* relied on the fact that juveniles are not likely to be deterred by punishment. The court in *Roper* stated that "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Roper*, 543 U.S. at 571. *Atkins* applies the same reasoning to the mentally ill, explaining that their cognitive deficits "make it less likely that they can process the information of the possibility of execution as a penalty, and, as a result, control their conduct based upon that information." *Atkins*, 536 U.S. at 320. Perhaps even more so than juveniles and the mentally ill, mentally insane offenders suffer from deficits so severe that they are unable to control their conduct based on the threat of punishment. *See Sinclair v. State*, 132 So. 581, 584 (Miss. 1931) ("[I]t is manifest that the punishment of the insane will not prohibit or deter another insane person from doing another similar act."). Convicting a mentally insane offender under the *mens rea* approach, therefore, has no deterrent value.

Incapacitation and rehabilitation similarly both fail to justify convicting the mentally insane. The availability of civil commitment serves both of these goals equally well. In the case of rehabilitation, an offender is arguably even better served by civil commitment than criminal punishment, as the criminal justice system is notoriously inadequate for treating offenders with mental health issues. *See e.g.*, Jennifer M. Reingle Gonzalez & Nadine M. Connell, *Mental*

Health of Prisoners: Identifying Barriers to Mental Health Treatment and Medication Continuity 104 Am. J. Pub. Health (2014) ("A substantial portion of the prison population is not receiving treatment for mental health conditions.").

Although convicting a mentally insane person may well seem to further the goal of retribution, the court in *Graham* explicitly tied retribution to moral culpability. The court explained that "the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender," and thus determined that minors' diminished culpability makes retribution an inappropriate justification for punishment. *Graham*, 560 U.S. at 71. Since mentally insane individuals lack moral culpability, the retributive goal of punishment cannot justify a criminal conviction.

As none of the legitimate penological goals justifies abolishing the insanity defense, any criminal conviction of a mentally insane defendant is disproportionate to the offense and is thus cruel and unusual under the Eighth Amendment. *See id.*

CONCLUSION

For the reasons listed herein, the Court should reverse the decision below and remand for a new trial.