No. 19-1409

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2019

LINDA FROST,

Petitioner,

v.

THE COMMONWEALTH OF EAST VIRGINIA,

Respondent.

On Writ of Certiorari to the Supreme Court of East Virginia

BRIEF FOR PETITIONER

Team D

ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

I. Whether a *Miranda* waiver is knowing and intelligent where the accused, because of mental illness, did not understand her rights or the consequences of waiving them?

II. Whether the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense, allowing criminal punishment of defendants whose mental disorders render them morally blameless?

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The Circuit Court of Campton Roads opinion below was unreported. The Supreme Court of East Virginia issued its opinion on December 31, 2018. R. at 1–11. This opinion was unreported.

STATEMENT OF JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment, which, in relevant part, provides: "[N]or shall any person . . . be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

The Eighth Amendment is also involved in this case, which provides that: "[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

In addition, the Fourteenth Amendment is involved in this case, which 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.

This case also involves provisions of E. Va. Code § 21-3439, which abolished the traditional *M'Naghten* rule for a *mens rea* approach. R. at 4.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

This case involves a confession given by an individual in a psychotic mental state during the confession. Before the confession was made, Ms. Frost waived her *Miranda* rights and the officer did not realize she was suffering from mental illness. The court below ruled that the confession was voluntary, knowing and intelligent. The court also held that East Virginia's *mens rea* statute did not violate Ms. Frost's Eighth or Fourteenth Amendment rights, although it deprived her of the ability to plead an affirmative insanity defense.

Background. Christopher Smith, a federal poultry inspector at a U.S. Department of Agriculture office in Campton Roads, East Virginia, was found dead in his office on the morning of June 17, 2017. R. at 2. The coroner determined that Mr. Smith died between 9 p.m. and 11 p.m. the night before from multiple puncture wounds from a knife. R. at 3.

A week before his death, Smith's sister, Christa, observed him having a fiery argument over the phone with Ms. Frost. R. at 2. Christa could tell that Smith was visibly upset, but she did not hear the contents of the phone conversation because Smith was out of earshot. R. at 2.

On June 16, 2017, the night of Smith's death, Ms. Frost covered a shift for a co-worker from 2 p.m. to 8 p.m. at Thomas's Seafood Restaurant and Grill, where Frost worked. R. at 2. It was a Friday night, the busiest night of the week, and no one saw Ms. Frost leave work at the end of her shift. R. at 2. Ms. Frost did not clock in or out because the extra shift was a last-minute favor for her co-worker. R. at 2. Later that evening, two eyewitnesses saw a woman near the entrance of Lorel Park who fit Ms. Frost's description. R. at 2. However, neither witness could positively identify the woman as Ms. Frost because it was late at night and the witnesses observed from quite a distance. R. at 2.

The Campton Roads Police Department investigated. R. at 2. After receiving an anonymous tip, the Department brought in Ms. Frost for questioning. R. at 2.

The Interrogation. Officers brought Ms. Frost in for questioning and placed her in an interrogation room at the Campton Roads Police Department. R. at 2. Officer Nathan Barbosa read Ms. Frost her *Miranda* rights and Ms. Frost signed a written waiver. R. at 2. According to Officer Barbosa, Ms. Frost's demeanor raised no concerns or suspicions about her competency at the beginning of the interrogation. R. at 2. He asked Ms. Frost if she wanted to talk about Mr. Smith and Ms. Frost nodded that she did. R. at 2. After a few minutes, Officer Barbosa told Ms. Frost about Mr. Smith's body. R. at 3. He asked Ms. Frost if she knew who was responsible and she blurted out, "I did it. I killed Chris." R. at 3. Officer Barbosa asked her for more details and she replied, "I stabbed him, and I left the knife in the park." R. at 3.

When Officer Barbosa tried to ask her more questions, Ms. Frost talked about the "voices in her head" and how these voices told her to "protect the chickens at all costs." R. at 3. Ms. Frost stated that killing Mr. Smith was not wrong because she believed that Smith would be reincarnated as a chicken. R. at 3. According to Ms. Frost, because "chickens are the most sacred of all creatures," she did Mr. Smith a "great favor." R. at 3. Ms. Frost attempted to recruit Officer Barbosa to join her cause "to liberate all chickens in Campton Roads." R. at 3. Subsequently, Officer Barbosa asked if she wanted a court appointed attorney to which she answered yes. R. at 3. Officer Barbosa then terminated the interrogation. R. at 3.

After the interrogation, the police found a bloody steak knife under a bush in Lorel Park. R. at 3. The knife matched a set found in Ms. Frost's home, but the knife had no identifiable fingerprints on it. R. at 3. The DNA tests on the knife confirmed the blood belonged to Mr. Smith. R. at 3.

Mental Evaluation. Ms. Frost was charged and indicted in federal and state court for the murder of Mr. Smith. R. at 3. Her attorney, Noah Kane, filed a motion in federal court for a mental evaluation. R. at 3. A clinical psychiatrist, Dr. Desiree Frain, diagnosed that Ms. Frost suffered from paranoid schizophrenia and prescribed her with medication. R. at 3. During the mental evaluation, Ms. Frost told Dr. Frain that Mr. Smith needed to be killed because he endangered the sacred lives of chickens through his job and they needed protection. R. at 4. Ms. Frost was prosecuted in the United States District Court for the Southern District of East Virginia and was deemed competent to stand trial helped by Dr. Frain's prescribed medication. R. at 4. During the trial, Dr. Frain testified that it was highly probable that Ms. Frost was suffering from severe delusions and paranoia and in a psychotic state between June 16 and June 17, 2017. R. at 4. It was Dr. Frain's testimony that although Ms. Frost knew she killed Mr. Smith and intended to do so, she could not fully understand her wrongful actions and unable to control her actions during her psychotic state. R. at 4. Ms. Frost was acquitted on the basis of insanity. R. at 4.

II. NATURE OF THE PROCEEDINGS

The Circuit Court. Ms. Frost was deemed competent to stand trial in state court.[1] However, unlike in federal court, East Virginia enacted E. Va. Code § 21-3439 in 2016, which abolished the insanity defense. R. at 4. The statute provides that evidence of a mental disease or defect is admissible to disprove competency or to disprove the *mens rea* element of the offense, but the inability to know right from wrong is no longer a defense. R. at 4. Ms. Frost's attorney moved to

[1] Ms. Frost unsuccessfully argued that her subsequent state court prosecution violated the Fifth Amendment's Double Jeopardy Clause because of her acquittal in federal court for the same offense. However, this Court's opinion in *Gamble v. United States*, 139 S. Ct. 1960, 1962 (2019), upheld the "dual-sovereign doctrine" meaning that two offenses are not the same offense for double jeopardy purposes if prosecuted by separate sovereigns. Thus, Ms. Frost's subsequent state court prosecution did not violate Double Jeopardy.

suppress her confession. R. at 5. He also filed a motion asking the trial court to find that E. Va. Code § 21-3439 was unconstitutional. R. at 5. Ms. Frost's attorney argued that abolishing the insanity defense violated Ms. Frost's Eighth Amendment right not to be subject to cruel and unusual punishment as well as her Fourteenth Amendment Due Process rights. R. at 5.

The court denied both motions and ruled that because of E. Va. Code § 21-3439, Dr. Frain's testimony was inadmissible. R. at 5. Despite its determination that the evidence was undisputed that Ms. Frost did not understand her *Miranda* rights or the consequences of signing the waiver form, the court denied the motion for suppression. R. at 5. Ms. Frost initially appeared objectively lucid and capable of waiving her rights to the interrogating officer. R. at 5. The interrogating officer did not suspect or know that Ms. Frost was mentally unstable until after she signed the waiver and gave her confession. R. at 5. The court held that E. Va. Code § 21-3439 did not impose cruel and unusual punishment and did not violate Ms. Frost's Due Process rights. R. at 5. The jury found Ms. Frost guilty of murder and the Circuit Court accepted the jury's life sentence recommendation. R. at 5.

The Supreme Court of East Virginia. Ms. Frost appealed the decision to the Supreme Court of East Virginia. R. at 5. The court affirmed the circuit court's decision and held that Ms. Frost's waiver was valid, and her confession was admissible based on the objective circumstances surrounding the interrogation, including the lack of police coercion and her initial lucidity when the interrogation began. R. at 7. The court also held that E. Va. Code § 21-3439 does not violate the Eighth or Fourteenth Amendment. R. at 9. Ms. Frost now appeals. R. at 12.

SUMMARY OF THE ARGUMENT

In this case, the East Virginia Supreme Court committed two fatal errors that require reversal.

I.

The East Virginia Supreme Court first erred in holding that Ms. Frost's confession was admissible at trial because she validly waived her *Miranda* rights. Criminal confessions in response to police interrogation are excluded from evidence unless the accused voluntarily, knowingly, and intelligently waived *Miranda* rights. The government has a "heavy burden" to prove that a defendant voluntarily, knowingly, and intelligently waives *Miranda* rights.

In *Moran v. Burbine*, the Court established the appropriate standard to determine whether a *Miranda* waiver is valid. The inquiry has two distinct dimensions: First, the relinquishment of rights must have been voluntary, meaning that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, a defendant must perform a *Miranda* waiver with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. If the totality of the circumstances surrounding the investigation reflects both an uncoerced choice and the requisite level of comprehension, then a *Miranda* waiver is valid.

To satisfy the "voluntary" prong, this Court requires police coercion as a necessary prerequisite to invalidate a *Miranda* waiver. The Supreme Court of East Virginia incorrectly interpreted *Colorado v. Connelly* to suggest that police coercion is all that is required to invalidate a *Miranda* waiver. Notably, only voluntariness was at issue in *Connelly* because the facts, particularly the evaluating psychiatrist's testimony, showed that Connelly understood his rights and the consequences of waiving them, despite his mental illness. Thus, Connelly's waiver was "knowing and intelligent."

The "knowing and intelligent" prong focuses on whether the defendant understood the rights being waived and the consequences of waiving those rights. Police coercion is irrelevant to

this inquiry, and the East Virginia Supreme Court incorrectly found that Ms. Frost's waiver was "knowing and intelligent" because there was no police coercion in her case.

The facts indicate Ms. Frost was in a psychotic state at the time of her confession. Even the trial court determined Ms. Frost did not understand the rights she was waiving or the consequences of waiving those rights. Under this Court's precedent, the trial court's factual determination is sufficient to prove that Ms. Frost did not knowingly and intelligently waive her *Miranda* rights. This Court should reverse, remand, and order the exclusion of Ms. Frost's confession.

II.

The second error concerns the constitutionality of East Virginia's *mens rea* statute. East Virginia's *mens rea* approach restricts admitting evidence of mental illness to disprove competency to stand trial or to disprove the *mens rea* element of an offense. The ability to know right from wrong is no longer an acceptable defense. Under the Eighth and Fourteenth Amendments, a state must maintain an insanity defense to protect defendants from criminal punishment who, because of a mental disorder, cannot discern right from wrong.

First, the Fourteenth Amendment's Due Process Clause demands some mechanism to excuse those whose mental disorders render them incapable of appreciating the wrongfulness of their conduct. It is a fundamental principal that insane defendants, who lack the ability of the normal individual to choose between good and evil, are not criminally culpable. The insanity defense is deeply ingrained in our legal system; therefore, its abolition violates Due Process under the Fourteenth Amendment.

Second, this Court's holding and dicta in *Clark v. Arizona* support requiring an insanity defense that includes a moral culpability component. *Clark* did hold that the insanity rule is

substantially open to state choice, but this does not imply that the insanity rule is *absolutely* open to abolition. This Court requires that, at minimum, a state consider moral culpability as a factor in an affirmative insanity defense because *Clark* upheld Arizona's requirement that the accused know the act was wrong. Therefore, East Virginia's abolition of the insanity defense contradicts *Clark*.

Third, the Eighth Amendment prohibits criminally punishing the insane because it is cruel and unusual. This Court has held that the Eighth Amendment prohibits, at minimum, those practices that the common law in 1789 condemned, as well as practices that qualified as cruel and unusual at the time of the Eighth Amendment's adoption. Notably, the common law at the Founding condemned criminal punishment of the insane because of its cruel and unusual nature. Additionally, modern proportionality analysis confirms that punishing the insane is cruel and unusual. A criminal sentence must be directly related to the personal culpability of the offender. Insane defendants lack personal culpability because they are morally blameless; therefore, criminal punishment of the insane is cruel and unusual. Accordingly, E. Va. Code § 21-3439 violates the Eighth and Fourteenth Amendments by abolishing the insanity defense.

ARGUMENT AND AUTHORITIES

This appeal concerns constitutional challenges to Ms. Frost's murder conviction under the Fifth, Eighth, and Fourteenth Amendments. One issue involves a challenge to the district court's denial of Petitioner's motion to suppress. When considering whether the denial of a motion to suppress was proper, the reviewing court uses a bifurcated standard, reviewing findings of fact for clear error and conclusions of law de novo. *United States v. Rodriguez*, 564 F.3d 735, 740 (5th Cir. 2009); *United States v. King*, 509 F.3d 1338, 1341 (11th Cir. 2007). In this case, the

facts are not at issue. All issues before this Court are legal in nature; therefore, the standard of review is de novo. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

I. A *MIRANDA* WAIVER IS INVALID WHERE, BECAUSE OF MENTAL DISEASE, THE ACCUSED DID NOT UNDERSTAND HER RIGHTS OR THE CONSEQUENCES OF SIGNING THE WAIVER.

Criminal confessions in response to police interrogation are excluded from evidence unless the accused voluntarily, knowingly, and intelligently waived *Miranda* rights. *Moran v. Burbine*, 475 U.S. 412, 421 (1986); *see Miranda v. Arizona*, 384 U.S. 436, 475 (1966). *Miranda v. Arizona* held that a suspect taken into police custody must be informed of the Fifth Amendment right to remain silent and to have either retained or appointed counsel before an admissible confession can arise from police interrogation. 384 U.S. at 467–73. Further, *Miranda* provided that the government has a "heavy burden" to prove that the defendant "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."

This Court did not establish the appropriate test for valid *Miranda* waivers until *Moran v. Burbine*, 475 U.S. 412. *Moran*'s two-part totality of the circumstances approach reads as follows:

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

Id. at 421 (emphasis added) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)); *see Colorado v. Spring*, 479 U.S. 564, 573 (1987) (applying *Moran* standard). If the prosecution

does not establish both of *Moran*'s requirements under the totality of the circumstances, then a *Miranda* waiver is invalid.

Whether Ms. Frost's *Miranda* waiver was voluntary is not in dispute. Instead, the waiver was neither knowing nor intelligent because Ms. Frost's mental illness prevented her from appreciating the rights she waived as well as the consequences of waiving them. Accordingly, her confession should have been excluded from evidence.

A. Police Coercion Is Irrelevant When Considering Whether a *Miranda* Waiver Was "Knowing and Intelligent."

To begin, the first part of the inquiry relates to voluntariness. Coercive police conduct is a necessary prerequisite to a determination that a confession is not voluntary. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Wrongful police conduct pertaining to the confession determines voluntariness, but that is a half-full analysis for assessing a *Miranda* waiver's validity. *See id.* at 176 (Brennan, J., dissenting) (reasoning that "[t]he absence of police wrongdoing should not, by itself, determine" a *Miranda* waiver's validity). Circuit courts that have construed *Connelly* as only requiring police coercion as an "all-or-nothing" test are incorrect. *See, e.g.*, *Woodley v. Bradshaw*, 451 F. App'x 529, 540 (6th Cir. 2011); *Garner v. Mitchell*, 557 F.3d 257, 262 (6th Cir. 2009); *Rice v. Cooper*, 148 F.3d 747, 750–51 (7th Cir. 1998) (finding defendant made a knowing and intelligent waiver because there was no police misconduct).

1. The "knowing and intelligent" requirement was not at issue in *Connelly*.

In *Connelly*, only voluntariness was at issue and the case does not modify *Moran*'s knowing and intelligent inquiry to demand police misconduct. In fact, several circuits correctly interpret *Connelly* "as holding only that police coercion is a necessary prerequisite to a

determination that a waiver was involuntary and not as bearing on the separate question whether the waiver was knowing and intelligent." *United States v. Bradshaw*, 935 F.2d 295, 299 (D.C. Cir. 1991); *United States v. Turner*, 157 F.3d 552, 555 (8th Cir. 1998); *see United States v. Cristobal*, 293 F.3d 134, 142 (4th Cir. 2002) ("Unlike the issue of voluntariness, police overreaching (coercion) is not a prerequisite for finding that a waiver was not knowing and intelligently made."); *Miller v. Dugger*, 838 F.2d 1530, 1538–39 (11th Cir. 1988) ("We do not read the *Connelly* decision as demonstrating an intent by the Supreme Court to eliminate this distinction between voluntariness and knowing waivers."); *United States v. Robles-Ramirez*, 93 F. Supp. 2d 762, 765 (W.D. Tex. 2000) ("[A] distinction must be made between a waiver not knowingly and intelligently effected, which is invalid even if not the result of any police misconduct.").

In *Connelly*, the evaluating psychiatrist determined that Connelly's mental "illness did not significantly impair his cognitive abilities" and he understood his rights that he waived before confessing. 479 U.S. at 161–62. The psychiatrist testified as an expert witness that Connelly's mental condition only affected "his ability to make free and rational choices." *Id.* at 161. Because the concept of a free and deliberate choice applies only to the voluntariness prong, *Moran*'s second requirement—knowing and intelligent—was not at issue. *See Bradshaw*, 935 F.2d at 299 ("Connelly's claims . . . were clearly directed only towards the voluntariness of his actions; the knowledge test was not involved in the case."). This explains why voluntariness was the center point of *Connelly*'s opinion. Although Connelly suffered from mental illness at the time of confession, he fully understood his rights as well as the consequences of waiving them, which satisfied *Moran*'s second requirement.

Moreover, this Court concluded with a subtle disclaimer suggesting the possibility that Connelly's waiver may have actually been invalid under the "knowing and intelligent" prong:

> It is possible to read the opinion of the Supreme Court of Colorado as finding respondent's *Miranda* waiver invalid *on other grounds*. Even if that is the case, however, we nonetheless reverse the judgment in its entirety because of our belief that the Supreme Court of Colorado's analysis was influenced by its mistaken view of "voluntariness" . . . . *Reconsideration of other issues*, not inconsistent with our opinion, is of course open to the Supreme Court of Colorado on remand.

Connelly, 479 U.S. at 171 n.4 (emphasis added). Although vague, the "other grounds" could only refer to a ruling that the *Miranda* waiver was not "knowing and intelligent" because that is the only other consideration for a challenged waiver. This Court was not free to determine an issue not in dispute, but its disclaimer provided a window of opportunity for the Colorado Supreme Court to invalidate the *Miranda* waiver on remand through reconsidering Connelly's mental illness as a determinant factor.

2. The "knowing and intelligent" requirement analyzes the defendant's mental state and does not focus on the perspective of a questioning officer.

The lower court incorrectly relied on *Colorado v. Connelly* in deeming Ms. Frost's mental state irrelevant to her *Miranda* waiver's validity. The Supreme Court of East Virginia adopted an unprecedented "all-or-nothing" standard that controverts this Court's *Miranda* waiver cases. As *Moran* provided, the *Miranda* waiver inquiry has two distinct dimensions; thus, a valid *Miranda* waiver must be voluntary *as well as* knowing and intelligent. *Moran*, 475 U.S. at 421. If one prong is lacking, then a *Miranda* waiver is invalid. Police coercion relates only to the voluntariness of the waiver, but that merely accomplishes half the analysis. Ms. Frost's mental capability at the time of her confession relates directly to the "knowing and intelligent" prong and is unaffected by the existence or nonexistence of police coercion.

One month after *Connelly*, this Court resolved any doubt as to the importance of the "knowing and intelligent" requirement in *Colorado v. Spring*, 479 U.S. 564. *Spring* adopted the *Moran* two-prong standard, reaffirming the inquiry's "two distinct dimensions." *Id.* at 573. *Spring* "dispels any notion that a *Miranda* waiver must be caused by police misconduct to be deemed non-knowing." *Bradshaw*, 935 F.2d at 300. "Only if the 'totality of the circumstances surrounding the interrogation' reveals *both* an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Spring*, 479 U.S. at 573 (emphasis added) (quoting *Moran*, 475 U.S. at 421).

Spring's language does not support the lower court's reasoning that the second prong's "focus is on whether a reasonable officer would believe Ms. Frost appeared to understand her rights and thus proceed to interrogate her based on that objective understanding." R. at 6 (citing *Garner*, 557 F.3d at 262). In *Spring*'s analysis, the question presented for the "knowing and intelligent" requirement was whether "Spring understood that he had the right to remain silent and that anything he said could be used as evidence against him," and the Court found that he did. 479 U.S. at 574–75. Also, the Court reasoned that Spring's waiver was knowing and intelligent because there was "no allegation that Spring failed to understand the basic privilege guaranteed by the Fifth Amendment" or that "he misunderstood the consequences of speaking freely to the law enforcement officials." *Id.* at 575. Thus, the focus of the analysis, in contrast to the lower court's opinion, centers on the subjective awareness and understanding of the defendant instead of the perspective of the police.

B. Ms. Frost's *Miranda* Waiver Was Not "Knowing and Intelligent" Because, as the Trial Court Found, She Did Not Understand Her *Miranda* Rights or the Consequences of Signing the Waiver Form.

A court should "indulge every reasonable presumption against waiver of fundamental constitutional rights" and shall "not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). To preserve this principle, it is imperative to restore the government's "heavy burden" to prove that a defendant voluntarily, knowingly, and intelligently waives the privilege against self-incrimination. *See Miranda*, 384 U.S. at 475. A defendant who does not understand the rights a *Miranda* waiver forfeits does not knowingly or intelligently waive them. Similarly, a defendant who does not understand the *consequences* of waiving those rights also does not waive them knowingly or intelligently. Ms. Frost understood neither her rights nor the consequences of waiving them. Therefore, her waiver was invalid because it was not "knowing and intelligent."

To satisfy the "knowing and intelligent" prong, a waiver of *Miranda* rights must be "made with a *full awareness* both of the *nature of the right* being abandoned and the *consequences* of the decision to abandon it." *Spring*, 479 U.S. at 573 (emphasis added). If the totality of the circumstances reflects an uncoerced choice along with the requisite level of comprehension, then a court may conclude that the defendant waived *Miranda* rights. *Id.* It is true that "[t]he Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege." *Id.* at 574. Still, there is a difference between a defendant who does not know every possible consequence of a *Miranda* waiver and one who, because of mental illness, does not have any clue what waiving *Miranda* rights entails.

In the present case, the trial court weighed the totality of the circumstances and determined that Ms. Frost did not understand either her *Miranda* rights or the consequences of signing the

waiver form. Under this Court's precedent, that should have been sufficient reason to grant suppression. *See Connelly*, 479 U.S. at 188 (Stevens, J., dissenting) (reasoning that because the lower court found that the defendant "was 'clearly' unable to make an 'intelligent' decision," the waiver was neither knowing nor intelligent). The trial judge even made this factual determination without the expert testimony of Dr. Frain, who described Ms. Frost's hindered mental state during the events in the prior federal prosecution. R. at 4–5. Curiously, both lower courts disregarded this factual finding because, according to the lower opinions, lack of police coercion is the dispositive factor to validate a *Miranda* waiver. This erroneous "all-or-nothing" approach fails to preserve this Court's two-prong "totality of the circumstances" test.

Under this Court's *Miranda* waiver precedent, a defendant who, because of mental illness, does not understand what rights a *Miranda* waiver entails or the consequences of waiving them cannot knowingly and voluntarily waive those rights. Without the capacity to understand one's rights or the consequences of waiving them, a Defendant's *Miranda* waiver is invalid. East Virginia has not met its "heavy burden" to prove a *Miranda* waiver and this Court should not presume acquiescence in the loss of fundamental rights. Ms. Frost's mental condition during her confession prevented her from satisfying this requirement; therefore, her waiver was not knowing and intelligent.

C. The Criminal Justice System Embodies Accurate and Reliable Evidence and Admitting the Statements of a Mentally Ill Defendant Accomplishes Neither Principle.

The consequences of the lower court's decision, if affirmed, will have drastic effects on prosecutions and police investigations in this nation. Redefining the constitutionally protected right against self-incrimination to allow confessions from the legally insane will cause an increase in wrongful convictions. Undoubtedly, obtaining confessions from criminal defendants

is an important tool for law enforcement. However, the criminal justice system operates on a preference for evidence that is both accurate and reliable. Police obtain accurate and reliable evidence through skillful investigation skills, as this Court has noted:

> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.

Escobedo v. Illinois, 378 U.S. 478, 488–89 (1964).

Accuracy and reliability are not served by admitting confessions from those who do not understand the nature or consequences of their acts. *See Connelly*, 479 U.S. at 181 (Brennan, J., dissenting). While in this case, Ms. Frost committed the act she was accused of, other mentally ill defendants in her situation may not have. It is more destructive than helpful to admit insane defendants' statements into evidence that do not embody accuracy and reliability that the criminal justice system embodies.

Accordingly, this Court should reverse and remand the judgment of the lower court, and order the exclusion of Ms. Frost's confession.

II. THE CONSTITUTION REQUIRES AN INSANITY DEFENSE FOR THOSE WHO, BECAUSE OF A MENTAL DISORDER, DID NOT KNOW THE CHARGED CONDUCT WAS WRONG.

This appeal presents the Court with the opportunity to determine whether all states must provide some form of an insanity defense to excuse a criminal defendant who, because of a mental disorder, is morally blameless. The Colonies at the Founding followed the English common law in adopting an affirmative insanity defense. Even before the Colonies adapted the affirmative insanity defense from the English common law, the principle that criminal punishment of the mentally ill is wrong dates back to teachings of ancient civilizations. *See infra* Part II.A.1. Therefore, it is a fundamental ideology of criminal justice that there must be a

mechanism in place to prevent criminal punishment of those who do not appreciate right from wrong.

East Virginia became the fifth state to abolish the affirmative insanity defense in favor of a *mens rea* approach, which admits evidence of a defendant's mental capacity only to the extent that it negates the *mens rea* element of the accused offense.[2] The *mens rea* approach permits a state to criminally punish mentally ill persons who cannot appreciate right from wrong, so long as they formed the intent to commit the accused crime. Under both the Eighth and Fourteenth Amendments, the Constitution prohibits a state from abolishing the insanity defense.

A. The Fourteenth Amendment's Due Process Clause Obligates States to Provide Some Mechanism to Excuse Those Whose Mental Disorders Render Them Incapable of Appreciating the Wrongfulness of Their Conduct.

Criminal law aims to punish individuals who possess a certain capacity for moral culpability enabling them to recognize right from wrong. *See Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (reasoning that mentally retarded criminals have diminished culpability). The existence of mental state elements of a crime—the *mens rea*—is necessary for criminal responsibility, but not sufficient standing alone. Rollin M. Perkins, *A Rationale of Mens Rea*, 52

[2] East Virginia's legislature "followed the lead of other states" in abolishing the insanity defense in favor of a *mens rea* approach. R. at 4. These states include Kansas, Idaho, Montana, and Utah. *See* Kan. Stat. Ann. § 22-3220 (2009) ("It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense."); Idaho Code § 19-2523 (2019) ("Evidence of mental condition shall be received, if offered, at the time of sentencing of any person convicted of a crime."); Mont. Code Ann. § 46-14-102 (2019) ("Evidence that the defendant suffered from a mental disease or disorder or developmental disability is admissible to prove that the defendant did or did not have a state of mind that is an element of the offense."); Utah Code Ann. § 76-2-305 (2019) ("It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged.").

Harv. L. Rev. 905, 908 (1939). Still, *mens rea* encompasses "a morally blameworthy state of mind." Joshua Dressler, *Understanding Criminal Law* 116 (3d ed. 2001).

It is a fundamental principle that certain individuals such as "lunatics or infant[s] . . . are incapable of committing any crime; unless in such cases where they show a consciousness of doing wrong." 4 William Blackstone, *Commentaries* *25, *195–96. The mentally ill are unfit for criminal conviction and punishment because they lack the "ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250 (1952).

States are empowered to define and determine their criminal laws as they see fit, *see Clark v. Arizona*, 548 U.S. 735, 752 (2006), but they must not violate the Fourteenth Amendment in doing so. The Fourteenth Amendment's Due Process Clause protects "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 202 (1977) (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)). This Court analyzes historical practice as its "primary guide" to determine whether a questioned principle is fundamental. *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (plurality op.). The existence of moral culpability as a prerequisite for criminal punishment is a fundamental tradition of our legal system. Through abolishing the insanity defense, East Virginia disregards moral culpability in criminal prosecutions and therefore violates the Fourteenth Amendment.

1. The principle that criminal punishment is reserved for those who can distinguish right from wrong is deeply ingrained in our legal system.

Insanity as an excuse to criminal liability has historically been a foundational principle of law for over one thousand years; it has roots in ancient Hebrew, Roman, and Greek legal doctrines, and was further developed in English common law in the 13th century to pardon those lacking moral responsibility for their conduct. *See* R. Michael Shoptaw, M'Naghten *Is a*

Fundamental Right: Why Abolishing the Traditional Insanity Defense Violates Due Process, 84 Miss. L. J. 1101, 1106 (2015). English courts cemented the significance of moral culpability in 1843 by establishing the *M'Naghten* test.[3] *See M'Naghten's Case* (1843) 8 Eng. Rep. 718.

History reflects that the insanity defense "is an integral . . . part of Anglo-American criminal law." H.R. Rep. No. 98-577, at 2 (1983). Early American courts, much like their English predecessors, factored whether the defendant was morally culpable. *See United States v. Drew*, 25 F. Cas. 913, 913 (C.C.D. Mass. 1828) (No. 14,993) ("[I]nsanity is an excuse for the commission of every crime, because the party has not the possession of that reason, which includes responsibility."). In fact, the early American view was that "punish[ing] an insane man, would be to rebuke Providence." *Roberts v. State*, 3 Ga. 310, 328 (1847).

The *M'Naghten* test became the rule of insanity in many U.S. jurisdictions. *See, e.g., Davis v. United States*, 160 U.S. 469, 479–80, 484–85 (1895) (discussing *M'Naghten* and emphasizing the common law principle that a person cannot be guilty of murder "unless at the time he had sufficient mind to comprehend the criminality or the right and wrong of such an act . . . ."). In *Davis*, this Court noted:

> [T]o constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of *mental disease*, his intellectual power is for the time obliterated, *he is not a responsible moral agent, and is not punishable for criminal acts*.

[3] The judges in *M'Naghten's Case* established the *M'Naghten* test as follows: "To establish a defence on the ground of insanity it must be clearly proved, that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong." 8 Eng. Rep. 718, 722. Thus, the two prongs of the *M'Naghten* test are: 1) the cognitive capacity test, and 2) the moral culpability component.

Id. at 485 (quoting *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 501 (1844)) (emphasis added).

More recently, courts have recognized that "legal insanity is a well-established and fundamental principle of the law of the United States" that is "protected by the Due Process Clause . . . ." *Finger v. State*, 27 P.3d 66, 84 (Nev. 2001) ("[L]egal insanity is a well-established and fundamental principle of the law of the United States."); *see also State v. Curry*, 543 N.E.2d 1228, 1231 (Ohio 1989) (holding that "insanity may be a defense to any crime regardless of" the *mens rea* required); *People v. Skinner*, 704 P.2d 752, 758–59 (Cal. 1985); *Sinclair v. State*, 132 So. 581, 582 (Miss. 1931) (per curiam) ("So closely has the idea of insanity as a defense to crime been woven into the criminal jurisprudence of English-speaking countries that it has become a part of the fundamental laws thereof."); *State v. Strasburg*, 110 P. 1020, 1021 (Wash. 1910) (rejecting a law prohibiting "evidence tending to prove" insanity).

Forty-eight United States jurisdictions—including forty-five states, the federal government, the U.S. military, and the District of Columbia—all incorporate an insanity defense that considers moral culpability. Until 1979, every American jurisdiction had an affirmative insanity defense. *State v. Korell*, 690 P.2d 992, 996 (Mont. 1984). Indeed, states may formulate their criminal laws as they see fit and many states have adopted different formulations of the insanity defense; however, "[t]he fact that a practice is followed by a large number of states . . . is plainly worth considering . . . ." *Leland v. Oregon*, 343 U.S. 790, 798 (1952).

"Ever since our ancestral common law emerged out of the darkness of its early barbaric days, it has been a postulate of Western civilization that the taking of life by the hand of an insane person is not murder." *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 570 (1953) (Frankfurter, J., dissenting). Notably, when adopting the current federal insanity defense,

Congress acknowledged that "the insanity defense should not be abolished" because it embodies a "fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment." H.R. Rep. No. 98-577, at 3, 7–8 (1983). Moral culpability as a prerequisite for punishment is a bedrock principle of our legal system and a state abolishing the insanity defense violates due process.

2. The holding and dicta in *Clark* support requiring an insanity defense that includes a moral culpability component.

This Court's decision in *Clark v. Arizona*, 548 U.S. at 752, does not support the argument that states are free to completely abolish the insanity defense. The lower decision erroneously construes *Clark*'s holding and dicta to suggest that Due Process does not require a state to recognize either component of the *M'Naghten* test. R. at 7. Instead, *Clark* solidifies Ms. Frost's position that Due Process requires states to provide an insanity defense that includes a moral culpability component.

First, *Clark* requires a state, at minimum, to consider moral culpability as a factor in an insanity defense. *Clark* upheld Arizona's insanity defense although its statutory requirements leave absent the cognitive capacity component of the *M'Naghten* test. 548 U.S. at 736. The Arizona scheme in *Clark* preserved "the requirement that the accused know his act was wrong," and thus did not "change the meaning of the insanity standard." *Id.* at 754, 755 n.24. This Court justified that "cognitive incapacity is itself enough to demonstrate moral incapacity," therefore, it "is a sufficient condition for establishing a defense of insanity, albeit not a necessary one." *Id.* at 753. In other words, a defendant cannot possess moral culpability—the capability to understand right from wrong—without first employing the cognitive capacity to understand the nature and quality of the defendant's act. Above all, moral culpability is a foundational requirement under *Clark*.

Second, the question presented is a novel issue for the Court and the lower opinion incorrectly applied *Clark*'s language to justify its decision. In *Clark*, this Court clarified that it has never determined whether the Constitution mandates an insanity defense. 548 U.S. at 752 n.20. Further, the majority opinion refused to "decide the matter." *Id.* Had the Court intended that states could abolish the insanity defense outright, its analysis supporting moral culpability as a foundational requirement of an insanity defense would have been pointless. Specifically, there is no purpose in providing pages of legal reasoning to establish precedent for an insanity defense that, actually, need not exist.

Third, *Clark* did not state or imply that a state may abolish the insanity defense. *Clark* did note that "the insanity rule . . . is *substantially* open to state choice," but not that it is *absolutely* open. *Id.* (emphasis added). Although "due process imposes no single canonical formulation of legal insanity," *id.* at 753, *Clark*'s deference to state freedom does not suggest that a state can outright abolish the insanity defense. Rather, a state can simply choose its own adaptation of the insanity defense. Stricter states can even place a heavy burden upon the defendant to prove insanity beyond a reasonable doubt. *See Leland v. Oregon*, 343 U.S. at 798–99 (upholding an Oregon statute requiring criminal defendants to establish insanity beyond a reasonable doubt); *Clark*, 548 U.S. at 769. Ms. Frost does not advocate this Court to mandate a uniform insanity defense. A state such as East Virginia may implement whichever variation of an insanity defense it so chooses, as long as moral culpability remains a requirement.

3. Admitting mental disorder evidence to negate *mens rea* or to mitigate the sentence are inadequate substitutes to the insanity defense.

This Court's precedent does not permit replacing the historical insanity defense with a *mens rea* approach. East Virginia's *mens rea* approach differs from any other scheme this Court has considered because East Virginia does not preserve the moral culpability requirement present in

Clark. East Virginia only allows evidence of mental disease or defect "to disprove competency to stand trial or to disprove the *mens rea* element of an offense." R. at 4. The *mens rea* approach does not work because "the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." *Clark*, 548 U.S. at 796 (Kennedy, J., dissenting). Consolidating the historical legal insanity concept as a mitigating factor for *mens rea* is therefore inadequate and unconstitutional.

East Virginia allows for criminal punishment of any act without regard for moral blameworthiness. For instance, under the East Virginia statute, defendants who "act with a proven criminal state of mind" will be held accountable for their acts, "regardless of [their] motivation or mental condition." *Korell*, 690 P.2d at 1002. Under this rationale, other common law defenses such as infancy, duress, or self-defense might anticipate abolishment. For example, infancy has historically excused a child lacking "sufficient capacity to understand the wrongfulness of his act." *State v. Nickleson*, 14 So. 134, 135 (La. 1893). If states are free to no longer consider moral culpability for criminal offenses, then East Virginia could also criminally punish children like adult felons. The same justification applicable to keeping an infancy defense applies to keeping an insanity defense. The only substantial difference is society cares more about protecting children than the mentally ill.

The consequences of East Virginia's scheme are substantial. This Court has observed that "the cognitively incapacitated," who do not know the nature and quality of their acts, "are a subset of the morally incapacitated." *Clark*, 548 U.S. at 754. East Virginia's *mens rea* approach protects only the smaller subclass of the cognitively incapacitated while making vulnerable the larger population of morally incapacitated defendants. The practical effect is that East Virginia is

shrinking the class of defendants otherwise acquitted by reason of insanity while increasing the number of severely mentally ill prisoners.

Furthermore, East Virginia's *mens rea* approach is inconsistent in its application. The *mens rea* approach would find a morally blameless defendant guilty where, alternatively, an insanity defense would "excuse [the] defendant from customary criminal responsibility." *Id.* at 768. A legally insane defendant will rarely lack the requisite *mens rea* because of mental illness or defect. *United States v. Pohlot*, 827 F.2d 889, 900 (3d Cir. 1987); *see also* Daniel J. Nusbaum, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of Abolishing the Insanity Defense*, 87 Cornell L. Rev. 1509, 1522 (2002) (explaining that "even the most debilitating mental illness rarely negates the appropriate mental state").

To illustrate this inconsistency, a defendant who murders another "because he feels compelled by demons," *Pohlot*, 827 F.2d at 900, or because "a wolf . . . has ordered him to kill the victim," *Delling v. Idaho*, 568 U.S. 1038, 1039 (2012) (Breyer, J., dissenting), lacks moral culpability for criminal conviction under the insanity defense because the defendant lacked the capacity to choose right from wrong. Under East Virginia law, the defendant in both situations could form the prerequisite *mens rea* because the defendant intentionally killed a human being. *See Delling*, 568 U.S. at 1039 (Breyer, J., dissenting from denial of cert.). In contrast, had the defendant believed instead that the victim was a wolf, that would negate the *mens rea* because the defendant did not intend to kill a human being. *Id.* In both cases, the defendant's mental illness caused the defendant to kill, but East Virginia's *mens rea* approach produces two conflicting results.

In addition, admitting evidence of mental condition at the sentencing stage rather than the guilt stage is an inadequate substitute for the insanity defense. Defendants under this system may

survive incarceration by the sentencing judge but will never escape the stigma of a guilty verdict which alone constitutes criminal punishment. *In re Winship*, 397 U.S. 358, 363 (1970) ("The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.").

Defendants also have lesser constitutional protections during the sentencing phase than the guilt phase. For example, in cases where capital punishment is not involved, a defendant does not have a guaranteed Eighth Amendment right to introduce evidence of mental capacity during the sentencing stage. *See* Lynette S. Cobun, Note, *The Insanity Defense: Effects of Abolition Unsupported by a Moral Consensus*, 9 Am. J.L. & Med. 471, 494–95 (1984) (arguing that "[r]eliance on sentencing to incorporate society's moral impulse embodied in the insanity defense is inadequate").

Last, when considering mental illness during the sentencing phase, there may be two outcomes: it might support a lesser sentence, or it might recommend special treatment. *Id.* at 495. The problem with the latter—post-conviction imposition of special treatment—is that it limits the state's options. Any special treatment can only take place within the criminal justice system at that point; the alternative of civil commitment is no longer available. Criminal penitentiaries are incapable of necessarily treating those suffering from mental illness; therefore, admitting evidence of mental illness at the sentencing phase is an insufficient remedy. Further, minimum prison requirements or determinate sentencing statutes may constrict or stipulate the sentencer's ultimate determination. *Id.*

B. The Eighth Amendment Prohibits Punishing the Insane.

The assignment of guilt to an insane defendant is a critical departure from longstanding punitive practice. Insane persons, before and at the Founding, were not criminally culpable. *See Delling*, 568 U.S. at 1039 (Breyer, J., dissenting from denial of cert.) ("The law has long recognized that criminal punishment is not appropriate for those who, by reason of insanity, cannot tell right from wrong."). "[T]here could be no greater cruelty than trying, convicting, and punishing a person wholly unable to understand the nature and consequence of his act, and . . . such punishment is certainly both cruel and unusual in the constitutional sense." *Sinclair*, 132 So. at 585.

East Virginia's *mens rea* approach eliminates the distinction between ordinary criminals and the mentally ill. This is highly concerning because the Eighth Amendment requires a state to treat a defendant "who has 'lost his sanity'" differently from everyone else. *See Madison v. Alabama*, 139 S. Ct. 718, 722 (2019). An insane person should not "be branded with the stigma of felony when he was wholly unable to comprehend the nature and quality of the act." *Sinclair*, 132 So. at 583. The Eighth Amendment prohibits a state from criminally punishing those who, because of mental illness or defect, lack the capacity to distinguish right from wrong. East Virginia's *mens rea* approach is an inadequate replacement for the traditional insanity defense and constitutes cruel and unusual punishment.

1. Criminally punishing the insane was condemned by the common law in 1789.

At minimum, the Eighth Amendment prohibits "those practices condemned by the common law in 1789," *Ford v. Wainwright*, 477 U.S. 399, 406 (1986), as well as punitive practices that "qualified as 'cruel and unusual,' as a reader at the time of the Eighth Amendment's adoption would have understood those words." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019).

Our laws did not allow criminal punishment of the insane at the Founding in 1789. *See Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated on other grounds by Atkins*, 536 U.S. 304 (2002) ("It was well settled at common law that 'idiots,' together with 'lunatics,' were not subject to punishment for criminal acts committed under those incapacities."); *Sinclair*, 132 So. at 583 ("The common law proceeds upon an idea that before there can be a crime there must be an intelligence capable of comprehending the act prohibited, and the probable consequence of the act, and that the act is wrong."). Therefore, punishing the mentally ill is cruel and unusual, and the Eighth Amendment demands an insanity defense.

At the Founding, punishing the insane would have been "cruel," meaning "[p]leased with hurting others; inhuman; hard-hearted; void of pity; wanting compassion; savage; barbarous; unrelenting." *Bucklew*, 139 S. Ct. at 1123 (quoting 1 Samuel Johnson, *A Dictionary of the English Language* (4th ed. 1773)). English common law found it cruel to punish "idiots, lunatics, and the insane." Michael Clemente, *A Reassessment of the Common Law Protections for "Idiots,"* 124 Yale L.J. 2746, 2756 (2015).

Similarly, punishing the insane would have been "unusual" at the Founding because both the Colonies and the English common law recognized the insanity defense. The Colonies adopted the English common law view banning punishment of the insane. *Id.* at 2757–58. Therefore, in 1789, it would have been unusual to not be able to plead an insanity defense.

East Virginia's law authorizes practices that the common law condemned as cruel and unusual at the Founding; therefore, its law violates the Eighth Amendment.

2. Modern proportionality analysis confirms that criminally punishing the insane is cruel and unusual.

Categorical-proportionality—a key principle of the Eighth Amendment—embraces the "precept of justice that punishment for crime should be graduated and proportioned to [the]

offense." *Graham v. Florida*, 560 U.S. 48, 59 (2010). Under this approach, this Court's first step is to consider "objective indicia of society's standards, as expressed in legislative enactments and state practice," *id.* at 61, which are "the 'clearest and most reliable objective evidence of contemporary values,'" *Atkins*, 536 U.S. at 312. Society has spoken through legislative enactments. Forty-five of fifty states incorporate an insanity defense. Accordingly, society's demonstrated values agree with the values of the English common law and the Colonies: An insane person should not be subject to criminal punishment.

Next, the Court determines proportionality through its own independent judgment, considering "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose." *Graham*, 560 U.S. at 61. These textual and historical standards surrounding the Eighth Amendment all support requiring an insanity defense.

In addition, the Court contemplates the "culpability of the offenders at issue," "the severity of the punishment in question," and "whether the challenged sentencing practice serves legitimate penological goals." *Id.* at 67. All of these factors weigh against punishing the mentally ill because they cannot reasonably appreciate the nature and consequences of their actions and punishment of the insane serves no legitimate penological goals.

This Court has recognized four rationales for criminal punishment: retribution, deterrence, incapacitation, and rehabilitation. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903 (2018); *Graham*, 560 U.S. at 71. A state serves none of these four penological goals by convicting and punishing persons who are not blameworthy, are incapable of being deterred, and have special incapacitation and rehabilitation needs that penal institutions do not provide.

First, East Virginia serves no retributive value in punishing someone unable to understand an action's wrongfulness. "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). Personal culpability includes a question of moral responsibility. *See Ford*, 477 U.S. at 408 (reasoning that retribution entails "the need to offset a criminal act by a punishment of equivalent 'moral quality'"). Because they do not understand the consequences of their actions, the insane lack moral culpability, meaning they also lack personal culpability. To adequately proportion retribution, there should be no criminal sentence for an insane defendant just as there is no personal culpability for one.

Second, East Virginia does not deter the insane from committing similar crimes because the insane cannot reasonably understand or control their actions. Punishing an insane person does not provide an example to others. *Id.* at 407. Further, a "deranged person . . . is plainly beyond the deterrent influence of the law." Model Penal Code § 4.01 cmt. at 166 (Am. Law Inst. 1985). Similarly, punishing the insane will not deter sane persons from committing similar crimes. *See* 1 Wayne R. LaFave, *Substantive Criminal Law* § 7.1(c)(4) (3d ed. 2018) ("It is unlikely that the sane person (or even the insane person who believes himself to be sane) will identify with the insane defendant, and thus the insane cannot be effectively used as a deterrent example to others.").

Third, civil commitment should be the method of incapacitating the insane instead of criminal punishment. The criminal system has determinate sentences in place, which does not comport with the indeterminate nature of mental illness. Indeterminate civil commitment sentences better serve the mentally ill. A mentally ill prisoner may remain that way well past a criminal sentence. In contrast to the uninformed perception of some, a defendant acquitted on

insanity grounds is not released to the street but is instead civilly committed until determined no longer dangerous or mentally ill. *Jones v. United States*, 463 U.S. 354, 370 (1983). Thus, there is no relation between duration of incapacitation to mental illness and dangerousness in the criminal justice system.

Fourth, prisons do not offer the special treatment required to rehabilitate the insane. Civil commitment facilities have the staff and specialized treatment that criminal penitentiaries lack. A mentally ill inmate does not receive adequate treatment in a penal institution. Therefore, civil commitment is the appropriate method for incapacitating the insane, not criminal punishment.

Because none of the four rationales for criminal punishment applies to defendants lacking the capacity to discern right from wrong, society receives no benefit from punishing them. Criminal punishment of the mentally ill infringes upon fundamental notions of justice and due process. In contrast, the civil commitment of the insane serves legitimate purposes that criminal punishment lacks. Most U.S. jurisdictions civilly commit an insane defendant "until such time as [the defendant] has regained his sanity or is no longer a danger to himself or society." *Id.* This best serves the interests of society and the mentally ill.

CONCLUSION

This Court should REVERSE the judgment of the Supreme Court of East Virginia.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER