Docket No. 19-1409

In the

Supreme Court of the United States of America

LINDA FROST,

Petitioner,

v.

COMMONWEALTH OF EAST VIRGINIA,

Respondent.

On Writ of Certiorari to the
Supreme Court of the United States

BRIEF FOR THE PETITIONER

Team J.
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. Whether a severe mental disorder constitutionally prevents an individual from knowingly and intelligently waiving her *Miranda* rights.

II. Whether the abrogation of the insanity defense unconstitutionally imposes criminal punishment on a non-culpable individual in violation of the Due Process Clause and the Eighth Amendment.

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OPINIONS BELOW

The opinion of the East Virginia Circuit Court is unpublished. R. at 4-5. The opinion of the East Virginia Supreme Court is unpublished. R. at 5-9.

JURISDICTION

The East Virginia Supreme Court 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)(2012).

CONSTITUTIONAL PROVISIONS[1]

The Fifth Amendment to the United States Constitution provides: "No person shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

STATEMENT OF THE CASE

Statement of the Facts

On September 17, 2017, the Campton Roads Police Department brought Linda Frost ("Petitioner") in for questioning pursuant to an investigation into the murder of her boyfriend, Christopher Smith ("Mr. Smith"), a federal poultry inspector for the U.S. Department of Agriculture. R. at 2. Unbeknownst to Petitioner, she was suffering from what would later be

[1] The East Virginia statute was not provided in the record and is not included here.

diagnosed as paranoid schizophrenia. R. at 3-4.

Officer Nathan Barbosa ("Officer Barbosa") brought Petitioner into an interrogation room for questioning. R. at 2. At that time, he simply read Petitioner her *Miranda* rights and had her sign a written waiver. R. at 2. He proceeded to ask Petitioner if she wanted to answer his questions and received a mere nod in response. R. at 2. Shortly after, she "blurted" out a confession, informed the officer of where to find the weapon, and proceeded to describe the "voices in her head" that told her to "protect the chickens at all costs." R. at 3. She explained to Officer Barbosa that she did not think killing Mr. Smith was wrong and "implored [the officer] to join her cause to liberate all the chickens in Campton Roads." R. at 3. She further described how she did Mr. Smith a "great favor" because she believed he would be reincarnated as a chicken—"the most sacred of all creatures." R. at 3.

While the officer claimed that nothing about Petitioner's demeanor raised questions about her competency or lucidity, following these absurd and illogical statements, he asked if she wanted a lawyer and ended the interrogation. R. at 2-3. Nobody disputes that Petitioner "did not understand either her *Miranda* rights or the consequences of signing the waiver form." R. at 5.

Petitioner was not previously diagnosed with schizophrenia or any other mental disorder, and as a result had never sought treatment until, following her indictment, Dr. Desiree Frain ("Dr. Frain"), a clinical psychologist, evaluated her. R. at 3. During the evaluation, Petitioner told Dr. Frain that she believed Mr. Smith had endangered the chickens and thus needed to be killed to protect their sacred lives. R. at 4. Dr. Frain diagnosed Petitioner with paranoid schizophrenia and prescribed her the appropriate medication. R. at 3. Petitioner was charged and indicted in both state and federal court. R. at 3.

Procedural History

Petitioner was first charged and indicted in federal court for murder and tried in the United States District Court for the Southern District of East Virginia under 18 U.S.C. § 1114 (2012). R. at 4. As a result of her treatment and the medication prescribed by Dr. Frain, Petitioner was deemed competent to stand trial. R. at 4.

At the federal trial, Dr. Frain testified that between June sixteenth and seventeenth, when the murder occurred, Petitioner was "in a psychotic state suffering from delusions and paranoia." R. at 4. Though Petitioner may have intended to kill Mr. Smith and known what she was doing, "she was unable to control or fully understand the consequences of her actions" due to her paranoid schizophrenia. R. at 4. The District Court acquitted Petitioner based on the federal insanity defense, 18 U.S.C. § 17(a) (2012). R. at 4. After the federal trial, the state prosecuted Petitioner for murder. R. at 4. Petitioner was again deemed competent to stand trial. R. at 4.

East Virginia law prevented Petitioner from presenting an insanity defense. R. at 4. In 2016, the legislature adopted E. Va. Code § 21-3439, which abolished the traditional *M'Naghten* rule and replaced it with the mens rea approach. R. at 4. Under the mens rea approach, evidence of a mental defect is admissible only to refute the mens rea element of the crime. R. at 4.

Petitioner's attorney filed a motion to suppress her confession and a motion asking the trial court to hold that East Virginia's statute violated both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. R. at 5. Circuit Court Judge Hernandez excluded Dr. Frain's testimony and denied both motions. R. at 5. Despite the undisputed evidence that Petitioner neither understood her *Miranda* rights nor the consequences of waiving those rights, the Judge denied the suppression motion because Officer Barbosa could not initially recognize Petitioner's mental instability. R. at 5. Moreover, Judge Hernandez, without any reasoning on the

record, rejected the argument that East Virginia's statute violated Due Process and imposed cruel and unusual punishment on Petitioner. R. at 5.

Consequently, the jury convicted Petitioner of murder and sentenced her to life in prison. R. at 5. Petitioner appealed and the Supreme Court of East Virginia affirmed the Circuit Court's decision. R. at 1. This Court granted certiorari. R. at 13.

SUMMARY OF THE ARGUMENT

Permitting states to erode the constitutional protections established for criminal defendants converts our system from one of justice to one of convenience. This country was founded on a need to balance the interests of the state in enforcing the law with the interests of the individual in retaining her liberty. The only way to strike this balance is by preserving the spirit of these safeguards. Yet that spirit is not upheld when vulnerable individuals, such as the mentally ill, so often fall through the cracks of a one-size-fits-all criminal justice system and end up in our nation's prisons. East Virginia undermined fundamental notions of fairness by diluting and depriving its most vulnerable citizens of rights secured under the Fifth, Eighth, and Fourteenth Amendments to the Constitution.

First, the Supreme Court of East Virginia impeded Petitioner's Fifth Amendment right to be free from self-incrimination by failing to inquire as to whether Petitioner knowingly and intelligently waived her *Miranda* rights. This Court acknowledges the gravity of a Fifth Amendment waiver and, therefore, imposes a heavy burden on the prosecution to prove that the individual *both* voluntarily *and* knowingly and intelligently waived her rights. However, the Supreme Court of East Virginia erroneously conflated the two prongs and, in doing so, diminished the constitutional protections of *Miranda*.

While the Circuit Court in this case recognized that Petitioner could not understand her

rights nor the consequences of waiving those rights, it inappropriately concluded that the waiver was valid, and the Supreme Court of East Virginia affirmed. Their incorrect analysis of waiver stems from an improper focus on the officer. However, police coercion is not a prerequisite for invalidating a waiver, and the officer's perception is irrelevant to determining whether an individual has the requisite capacity to knowingly and intelligently waive her rights.

To uphold the spirit of *Miranda* and ensure that a waiver was given knowingly and intelligently, the court must weigh capacity more heavily than any other factor in the analysis. Even when warnings are adequately provided, it is well-documented that those, like Petitioner, who suffer from schizophrenia have cognitive deficits that stunt their ability to process and understand information. Failing to conform the waiver analysis to afford greater weight to an individual's capacity to understand deprives Petitioner, and those like her, of *Miranda's* constitutional safeguard and, ultimately, of the Fifth Amendment right itself.

Second, E. Va. Code § 21-3439 violates Due Process and the Eighth Amendment by depriving Petitioner of the affirmative defense of insanity, resulting in punishment without culpability. A fundamental principle in our criminal justice system is to punish the bad. A moral principle in our society is that we do not stigmatize the sick. The insanity defense is a necessary mechanism to guard against criminal conviction and punishment of non-culpable defendants.

The affirmative defense of insanity—which recognizes moral incapacity—is a fundamental legal principle under Due Process that is necessary for a fair trial. Society has long understood that the law may excuse a non-culpable actor for committing an otherwise wrongful act. The mens rea approach strips Petitioner of the ability to present a complete defense by prohibiting the exculpating evidence of her severe mental illness. Further, East Virginia fails to provide any sufficient justification for barring access to the defense. The states historically

utilized insanity, along with other criminal law doctrines, to adjust criminal laws to meet the evolving moral aims of society. While states have discretion to use these doctrines to adjust the laws, they cannot abrogate the insanity doctrine altogether without offending Due Process.

Additionally, rejecting the insanity defense imposes cruel and unusual punishment under the Eighth Amendment. The Eighth Amendment circumscribes the government's power to define crime and inflict punishment. East Virginia's statute violates this Amendment because it effectively criminalizes Petitioner's mental illness and imposes a disproportionate punishment.

Under these circumstances, where Petitioner's acts were inseparable from her illness, denying access to the insanity defense amounts to criminalizing the illness itself. Further, punishment of a non-culpable defendant will always amount to cruel and unusual punishment when it is disproportionate to the offender and the offense. Common law condemned the punishment of the insane, and the evolving standards of decency require institutionalization, not imprisonment. However, East Virginia conveniently absolves itself of any moral responsibility by creating a system that labels the insane as criminals and purposefully withholds treatment in violation of the Eighth Amendment.

ARGUMENT

"The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law." Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 26 (1956). The Constitution was intended to establish justice and fair treatment, ensure domestic tranquility, promote the general welfare of society, and secure future generation's welfare. Whether a statute is constitutional raises a question of law. *See State v. Reed*, 399 P.3d 865, 869 (Kan. 2017). This Court reviews questions of law de novo. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

Petitioner is a paranoid schizophrenic. Due to this mental illness, she was incapable of waiving her Fifth Amendment rights, and she was entitled to the insanity defense under the Eighth and Fourteenth Amendments. Thus, East Virginia's interpretation of the *Miranda* waiver analysis and abrogation of the insanity defense violates the Constitution.

I. A SCHIZOPHRENIC SUFFERING FROM DELUSIONS IS INCAPABLE OF WAIVING HER FIFTH AMENDMENT RIGHTS.

The state's interest in law enforcement cannot come at the cost of an individual's constitutional rights. The broad privilege against self-incrimination, preserved under the Fifth and Fourteenth Amendments, guarantees a fundamental trial right. *See Malloy v. Hogan*, 378 U.S. 1, 6 (1964). To preserve this fundamental right and the integrity of the judicial system, the Supreme Court requires that an interrogating officer notify the accused of her rights prior to questioning. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966). However, mere notification is insufficient. *See id.* at 468. Rather, the individual must have "clearly understood the warnings given." *Moran v. Burbine*, 475 U.S. 412, 426 (1986). Statements obtained during custodial interrogation[2] are only admissible at trial if the prosecutor can show that the individual validly waived her privilege against self-incrimination. *See Miranda*, 384 U.S. at 475. To prove waiver, the prosecutor must show not just that *Miranda* warnings were given[3] but that the individual both (1) voluntarily[4] and (2) knowingly and intelligently waived her rights. *See id.* at 444, 475-79.

Due to her paranoid schizophrenia, Petitioner was incapable of waiving her rights. The trial court erroneously found Petitioner's waiver valid when it conflated the concept of

[2] The parties do not dispute that Petitioner was subjected to custodial interrogation.
[3] Petitioner is not arguing that the *Miranda* warnings were not read to her.
[4] Petitioner is not disputing the voluntariness of her waiver.

voluntariness with knowledge and intelligence. First, the two distinct elements of waiver deserve equal weight. Second, the individual, not the officer, must have a basic level of understanding to knowingly and intelligently waive her rights.

A. Voluntariness Alone Is Insufficient To Establish A Valid Waiver.

Because the privilege against self-incrimination is "indispensable to a fair trial," courts must afford more than mere lip-service to the knowing and intelligent inquiry. *Schneckloth v. Bustamonte*, 412 U.S. 218, 242 (1973). The law must protect the Fifth Amendment just as zealously as all fundamental trial rights. *See id.* at 237; *see also Barker v. Wingo,* 407 U.S. 514 (1972) (speedy trial); *United States v. Wade*, 388 U.S. 218 (1967) (waiver of counsel); *Adams v. United States ex. rel. McCann*, 317 U.S. 269 (1942) (jury trial). Where an individual intentionally relinquishes a known right, the Court requires a high standard of proof because it can lead to the loss of liberty. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (applying a totality of the circumstances test to determine whether the individual possessed the requisite comprehension level for a valid waiver). The *Miranda* Court purposefully applied the knowing and intelligent waiver standard, set out in *Johnson*, to the Fifth Amendment privilege. *See Miranda*, 384 U.S. at 475.

The two requirements of waiver—voluntariness *and* knowledge and intelligence—must be independently analyzed and equally weighted. *See Colorado v. Connelly*, 479 U.S. 157, 188 (1986) (Harlan, J. dissenting). Voluntariness alone is not enough. *See United States v. Bradshaw*, 935 F.2d 295, 298 (D.C. Cir. 1991); *see also Edwards v. Arizona*, 451 U.S. 477, 487 (1981) (remanding the case to the lower court for a determination of whether the waiver was knowing and intelligent); *Schneckloth*, 412 U.S. at 224 (emphasizing that voluntariness does not equate to a "knowing" choice). Some courts, like the East Virginia Supreme Court, fail to differentiate

between the two distinct prongs of waiver and instead analyze both together.

While coercion is relevant to the voluntariness inquiry, it has no place in the analysis of whether a waiver was given knowingly and intelligently. *See Bradshaw*, 935 F.2d at 298. In its majority opinion, the East Virginia Supreme Court relied on a faulty interpretation of *Connelly*. R. at 5-6. In *Connelly*, this Court held that coercive police activity is necessary to find a confession involuntary. 479 U.S. at 167. The East Virginia court incorrectly inferred that coercion is a prerequisite for invalidating a waiver. R. at 6. However, *Connelly* focused only on the voluntariness of a confession. *See Bradshaw*, 935 F.2d at 299.

Contrary to the lower court's interpretation, this Court did not render the knowing and intelligent prong of the waiver inquiry moot. Rather, the *Connelly* Court remanded the case for consideration of the waiver "on other grounds." 479 U.S. at 171 n. 4. The only "other ground" the Court could have been referring to is the knowing and intelligent prong. *See Bradshaw*, 935 F.2d at 299. The D.C. Circuit Court, in *Bradshaw*, followed this precedent and remanded the case for a finding on knowledge and intelligence even after affirming that the waiver was given voluntarily. *See id.* at 303. On remand, the court invalidated the waiver. *See United States v. Bradshaw*, No. 89-0038, 1992 WL 13207, at *5 (D.D.C. Jan. 8, 1992). Thus, under the knowing and intelligent prong of the analysis, police coercion is immaterial. East Virginia stopped its analysis short at voluntariness. Merely establishing that the accused made an uncoerced statement is insufficient to demonstrate a valid waiver. *See Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010). At a minimum, this Court must remand this case for a determination on whether Petitioner knowingly and intelligently waived her rights.

B. Petitioner Did Not Knowingly Or Intelligently Waive Her Rights.

The use of a mentally ill person's unknowing and unintelligent confession is antithetical

to the spirit of *Miranda* and an affront to the most basic sense of justice. *See id.* at 383 ("The main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel."). While courts may use the words "knowing" and "intelligent" interchangeably, this Court did not intend either word to be superfluous. *See Miranda*, 384 U.S. at 467-69. First, the "knowing" aspect requires the government to show that the warnings were adequately provided to safeguard the individual's rights. *See id.* Second, the "intelligent" aspect requires that an individual actually understand her rights and the consequences of giving up those rights. *See id.* at 469. Here, neither requirement was met.

1. The government failed to adequately inform Petitioner of her rights.

Conforming to *Miranda's* requirements in form only but not in spirit is wholly insufficient to prove a waiver was given knowingly. Mere recitation of the *Miranda* language does not establish that warnings were adequate to facilitate a knowing waiver. *See Berghuis*, 560 U.S. at 384. The interrogating officer must deliver the warnings in a way that is conducive to establishing a basic understanding of the rights and the consequences of waiving them. *See Miranda*, 384 U.S. at 469. Otherwise awareness is presumed absent, and the waiver is invalid because it was not made knowingly. *See id.*; *Doody v. Schriro*, 548 F.3d 847, 862 (9th Cir. 2008). The validity of a waiver cannot be based on "the fact that a confession was . . . eventually obtained." *Miranda*, 384 U.S. at 475. While a written or oral statement of waiver is usually strong proof of its validity, it is ultimately not dispositive. *See North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

Merely asking whether the accused understands her rights does not satisfy an interrogating officer's burden. *See United States v. Porter*, 764 F.2d 1, 7 (1st Cir. 1985). While the officer need not advise an individual of every possible consequence, *Moran*, 475 U.S. at 422,

Miranda requires that an individual be able to adequately foresee the consequences of her waiver, 384 U.S. at 469. When a defendant does not allege a failure to understand the consequences of speaking freely to law enforcement, warnings are deemed adequate. *See Colorado v. Spring*, 479 U.S. 564, 575 (1987). However, absent communication of any charges or resulting consequences, a waiver cannot be given knowingly. *See Kurilik v. Wolfenbarger*, No. 05-74317, 2008 WL 2115248, at *15-16 (E.D. Mich. May 19, 2008).

In most cases that have found a waiver valid, law enforcement showed an abundance of caution to ensure warnings were actually understood. In *Berghuis*, the record clearly established that the defendant understood his rights where the detective gave him a written copy of his rights, determined he could read and understand English, gave him time to read the warnings, and had him read one of the warnings aloud. 560 U.S. at 385-86. Similarly, in *Fare v. Michael C.*, 442 U.S. 707, 726 (1979), a juvenile's waiver was valid because the officers advised him of his rights twice, fully explained the reason for questioning, and he "clearly expressed" his willingness to waive his rights. On the other hand, in *United States v. Gonzalez*, 719 F. Supp. 2d 167, 169-70 (D. Mass. 2010), the court held that the defendant did not understand his rights, despite hearing them multiple times, when he was "dazed and bleeding" and "not thinking clearly." *Id.* at 176, 181. He did not sign a waiver, read the warnings, or state that he understood his rights. *See id.* at 177.

When an individual has a lowered capacity for understanding, such as a language barrier, courts recognize a higher burden on the interrogating officer to ensure understanding. *See United States v. Short*, 790 F.2d 464, 469 (6th Cir. 1986) (finding a defendant's waiver invalid when the officer read him his rights in English because he needed a German translator at trial); *United States v. Hoang*, 238 F. Supp. 3d 775, 785-86 (E.D. Va. 2017) (finding a waiver valid, despite

the defendant's low proficiency in English, because he was mirandized in his native language and a translator checked for understanding by thoroughly reviewing each right). Language disability is one of the most notable impairments in patients with schizophrenia. *See* Sung-Jin Kim et. al., *The Relationship Between Language Ability and Cognitive Function in Patients with Schizophrenia*, 13 Clin. Psychopharmacol. Neurosci. 288, 288 (2015). Science has shown that schizophrenics don't interpret language in the same way as the average individual. *See id.* They have difficulty understanding figurative and ambiguous language and grammatically complex sentences. *See id.* The World Health Organization determined that mentally ill defendants "had widespread difficulties in understanding all but the simplest warnings . . . despite their past experiences with the criminal justice system." *See* Richard Rogers et al., *Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants*, 31 Law & Hum. Behav. 401, 414 (2007).

Requiring police to confirm that an individual understands the rights she is giving up is a low burden. Conversely, validating unknowing or unintelligent waivers comes at a high cost to society. While requiring police to ensure understanding may decrease their ability to obtain a confession in some cases, this cost is "necessary to preserve the character of our free society." *Moran*, 475 U.S. at 457-58 (Stevens, J. dissenting). "[T]here is something very wrong with a system" that fears "the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement." *See Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

Here, the interrogating officer complied with the language of *Miranda* but contravened its spirit by failing to take any steps to ensure Petitioner recognized what she was giving up. He merely read the warnings and had her sign a waiver. R. at 2. A mental barrier due to paranoid schizophrenia is not easily overcome even with a careful review of each right. *See* Rogers et al.,

supra, at 414. But even such careful review was absent from this interrogation. There is no evidence that the interrogating officer went through each of the rights slowly and checked for understanding. There is no evidence that Petitioner read the rights herself or stated that she understood them. There is no evidence that she actually understood her rights and even less evidence that she understood the consequences of giving up those constitutional rights. Accordingly, the state has failed to prove that Petitioner knowingly waived her rights.

2. Petitioner lacked the capacity to understand her rights and the consequences of her waiver.

A waiver is invalid, even with an adequate warning, if the individual does not have the capacity to understand her rights or the consequences of waiving them. Rogers et al., *supra*, at 402. The prosecutor bears the burden of showing that, under the totality of the circumstances, the accused had the requisite level of comprehension to intelligently waive her rights. *See Johnson*, 304 U.S. at 464. Courts look to various factors such as the person's background, experience, age, education, intelligence, and conduct. *See Fare*, 442 U.S. at 725. Additional factors focus on individual characteristics including the defendant's emotional state at the time of confession and her capacity to understand. *See id.*; *United States v. Brown*, 557 F.2d 541, 548 (6th Cir. 1977).

In considering the totality of the circumstances, "the state of mind of the police is irrelevant to the question of [] intelligence." *Moran*, 475 U.S. at 423. The Supreme Court of East Virginia relied on *Garner v. Mitchell*, 557 F.3d 257 (6th Cir. 2009), in asserting that the intelligence inquiry should focus on whether a reasonable officer would believe that the suspect understood her rights. R. at 6. The Sixth Circuit mischaracterized *Miranda* as only addressing police coercion and, therefore, erroneously made the officer's belief the sole inquiry. *See Garner*, 557 F.3d at 262-63. However, police coercion was just one factor in the *Miranda* decision. *See* 384 U.S. at 462-77. If coercion was the only consideration, voluntariness alone

would have sufficed. Instead, the Court also requires "the record [to] show . . . that an accused was offered counsel but intelligently and understandingly rejected the offer." *Id.* at 475.

Analyzing intelligence based on what the officer is able to discern about a suspect is dangerous because this leads to "find[ing] waiver in almost every case." George C. Thomas III, *Separated at Birth But Siblings Nonetheless: Miranda and the Due Process Notice Cases,* 99 Mich. L. Rev. 1081, 1083 (2001). Narrowing the analysis is contrary to the high standard of proof historically set for waiving constitutional rights, including the Fifth Amendment privilege against self-incrimination. *See Miranda* 384 U.S. at 462, 465. Basing the analysis on the officer is not only incompatible with this Court's precedent, it is an unreliable test for intelligent waiver when some mental disorders are exceedingly difficult to identify. James W. Ellis & Ruth A. Luckasson, *Symposium on the ABA Criminal Justice Mental Health Standards: Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 429 (1985). Requiring the mentally ill to have noticeable symptoms is akin to finding that handicapped individuals only warrant protection under the Americans with Disabilities Act if they manifest visible symptoms. Focusing on police perception, therefore, undermines the importance of an intelligent waiver.

To truly safeguard the Fifth Amendment privilege, a prophylactic rule—that a schizophrenic in a delusional state at the time *Miranda* warnings are given can never waive her rights—is mandated. Schizophrenia greatly diminishes an individual's comprehension. *See* Anthony Walsh & Ilhong Yun, *Schizophrenia: Causes, Crime and Implications for Criminology and Criminal Justice*, 41 Int'l J.L., Crime & Just. 188, 189 (2013). This severe chronic mental disorder is characterized by abnormal thinking, perceptual disturbances, paranoia, delusions, suicidal tendencies, significantly impaired cognitive abilities, and diminished decisional capacities. *See id.* As a result, these individuals struggle to filter information and focus their

attention. *See id.*

Courts recognize schizophrenia as drastically affecting an individual's capacity to understand and, thus, to intelligently waive *Miranda* rights. *See Moore v. Ballone*, 658 F.2d 218, 229 (4th Cir.1981) (emphasis added) (holding that evidence of schizophrenia *alone* suffices to find that a waiver was not given intelligently); *Bradshaw*, 1992 WL 13207, at *5 (invalidating a waiver after considering the defendant's schizophrenia); *see also Connelly*, 479 U.S. at 188 (Brennan, J. dissenting) (refuting that the defendant, a paranoid schizophrenic, was able to make an "intelligent" decision). Finding the waiver invalid, the *Bradshaw* court reasoned that while the defendant, an unmedicated schizophrenic, "may well have had a cognitive awareness of the meaning of the words," he did not have "a full appreciation of the consequences of abandoning his rights." *See Bradshaw*, 1992 WL 13207, at *5.

The idea that schizophrenics can understand their rights or the consequences of waiving them is unreasonable. Applying a one-size-fits-all standard to these individuals is illogical and violates a schizophrenic's fundamental right against self-incrimination. Like the schizophrenics in *Connelly*, *Bradshaw*, and *Moore*, who were unable to intelligently waive their rights, Petitioner could not intelligently waive her rights while suffering from delusions. Therefore, a prophylactic rule is necessary to ensure *Miranda* has equal force for individuals like Petitioner.

Even if this Court is not prepared to go that far, an individual's mental condition is particularly relevant to her capacity to understand. *Miller v. Dugger*, 838 F.2d 1530, 1539 (11th Cir. 1988) ("There is little doubt that mental illness can interfere with a defendant's ability to make a knowing and intelligent waiver."). Many suspects already struggle to comprehend their *Miranda* rights, and this is only further exacerbated when a suspect is juvenile, mentally impaired, or mentally disordered. *See* Thomas Grisso, *Juveniles' Capacities to Waive Miranda*

Rights: An Empirical Analysis, 68 Cal. L. Rev. 1134, 1153 (1980) (in one study, only twenty-one percent of juveniles and forty-two percent of adults fully understood the *Miranda* warnings). When analyzing a waiver, courts must weigh an insane individual's mental impairment, just as heavily as it would a juvenile's age. Otherwise the government deprives the insane of the same constitutional protections. *See Cooper v. Griffin*, 455 F.2d 1142, 1146 (5th Cir. 1972) (finding two mentally retarded teenage boys were not capable of meaningfully comprehending the *Miranda* warning and thus their waivers were invalid). Therefore, capacity should be the most important factor in the intelligence inquiry.

Petitioner lacked the capacity to intelligently waive her rights. Her confession was rife with illogical statements. R. at 3. Immediately after blurting out her confession, she made "several statements about the 'voices in her head' telling her to 'protect the chickens at all costs.'" R. at 3. These were clearly not statements made by an individual with all the mental faculties necessary to have any kind of understanding of her rights or the consequences of waiving them. Thus, this Court should invalidate Petitioner's waiver or at the very least remand for a determination as to whether the waiver was given knowing and intelligently.

II. THE CONSTITUTION DOES NOT PERMIT A STATE TO ABOLISH THE INSANITY DEFENSE.

A state cannot abolish the insanity defense without offending the Constitution. Because our laws are intended to punish only those who are blameworthy, individuals with no meaningful ability to make moral judgments, such as Petitioner, cannot be held criminally liable. *See Morissette v. United States*, 342 U.S. 246, 252 (1952). The affirmative defense of insanity is a necessary mechanism that has been historically preserved to protect this fundamental principle.

The mens rea approach is a radical departure from our common law traditions and an

insufficient substitute for the insanity defense. It dramatically changes "the weights and balances in the scales of justice." *Id.* at 263. East Virginia's mens rea statute abandons "lack of ability to know right from wrong" as a defense. R. at 4. The few jurisdictions that have adopted this approach narrow the definition of mens rea to the mere intent to commit the act rather than the intent to act with a wrongful purpose. *See* Joshua Dressler, *Understanding Criminal Law* 125 (4th ed. 2006). Under this approach, evidence of a mental disorder is only admissible to dispute the intent to act, but "[m]ental disease or defect is not otherwise a defense." *State v. Kahler*, 410 P.3d 105, 124 (Kan. 2018) (quoting Kans. Stat. Ann. § 22-3220 (repealed 2011)).

In contrast, the *M'Naghten* rule, which East Virginia previously applied, excused a defendant from criminal liability, even when all elements of the crime were met, where either (1) she did not know the nature of her act or (2) she did not "know right from wrong with respect to that act." *State v. Baker*, 819 P.2d 1173, 1187 (Kan. 1991); *see M'Naghten's Case* (1843) 8 Eng. Rep. 718. To establish the latter, the moral capacity prong, an individual had to prove that she did not understand the act was contrary to law. *See Baker*, 819 P.2d at 1187. The mens rea approach cuts the *M'Naghten* rule off at its knees by narrowing legal insanity to exclude moral incapacity. In adopting the mens rea approach, states abandon an expressly preserved historical requirement of culpability for a finding of guilt. *See Morissette*, 342 U.S. at 252.

While deciding who should be subject to blame and punishment is a legal and moral issue, it is appropriate to consider a scientific understanding of mental illness. Though some mental illnesses are hard to define, schizophrenia is "a well-documented mental illness, and no one seriously disputes either its definition or its most prominent clinical manifestations." *Clark v. Arizona*, 548 U.S. 735, 794 (2006) (Kennedy, J. dissenting). Schizophrenia clearly affects culpability because it causes delusions that seriously impair an individual's ability to perceive

reality and appreciate the wrongfulness of her conduct. *See* Abolfazl Ghoreishi et al., *Prevalance and Attributes of Criminality in Patients with Schizophrenia*, 7 J. Inj. Violence Res. 7, 7 (2015).

It is axiomatic to principles of fairness and justice that our criminal laws aim to punish the bad rather than stigmatize the sick. *See State v. Guido*, 191 A.2d 45, 52 (N.J. 1963). East Virginia has chosen to stigmatize the mentally ill and label them as criminals. East Virginia replaced the insanity defense with an inadequate substitute and, in doing so, violated Due Process and the Eight Amendment's ban against cruel and unusual punishment.

A. Denial of the Insanity Defense Violates Due Process.

Abrogation of the insanity defense violates a fundamental sense of fair play and equity in punishment. Defendants are entitled to certain affirmative defenses that exculpate them from liability as a fundamental legal principle protected under Due Process. *See Montana v. Egelhoff*, 518 U.S. 37, 63 (1996) (O'Connor, J. dissenting). Due Process requires not just looking objectively at whether the elements of a crime are met, but whether there is a justification. *See id.* Substantive criminal law is premised on punishing the "vicious will." *Brief of American Psychiatric Association* et al. as *Amici Curiae* In Support of Petitioner at 22, *Kahler v. Kansas*, No. 18-6135 (U.S. Jun. 7, 2019) (quoting Roscoe Pound, *Introduction* to Frances B. Sayre, *Cases on Criminal Law*, at 1 (1927)). Therefore, states abandon the moral foundation of criminal law by withholding necessary justifications and, thereby, punishing those who are not culpable. East Virginia's statute infringes upon a fundamental legal principle with no valid reason by replacing the insanity defense with the mens rea approach—an insufficient substitute.

1. The affirmative defense of insanity is a fundamental legal principle.

The insanity defense has been preserved as a fundamental principle under the law. *See Finger v. State*, 27 P.3d 66, 84 (Nev. 2001). For a principle to be guaranteed under Due Process,

it must be one that is deeply rooted in our nation's traditions and "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968). Historical practice is the primary factor in determining whether a principle is fundamental. *See Egelhoff*, 518 U.S. at 43.

There are few defenses more rooted in Anglo-American jurisprudence than the affirmative defense of insanity. *See* Brief of *Amici Curiae* Legal Historians & Sociologists in Support of Petitioner at 3, *Kahler v. Kansas*, No. 18-6135 (U.S. Jun. 7, 2019). For hundreds of years the insanity defense has provided defendants with a necessary mechanism for excusing themselves from criminal liability. *See Finger*, 27 P.3d at 71. Under this defense, a person's inability to form criminal intent due to serious mental illness completely absolves her of blameworthiness. *See id.* at 80. While it first received formal legal status in 1843, the court in *M'Naghten* was not creating a new principle of law but merely recognizing a long-held moral consensus—the insane are not suitable for punishment. *See M'Naghten's Case*. Many states, including East Virginia, quickly adopted the *M'Naghten* Rules. *See Finger*, 27 P.3d at 72-73.

Although states have modified the defense from its original model, every American jurisdiction retained some form of it until 1979. *See generally State v. Korell*, 690 P.2d 992 (Mont. 1984). Despite minor differences in its implementation, nearly all iterations of the insanity defense encompass moral incapacity. *See* Anthony Platt & Bernard L. Diamond, *The Origins of the Right and Wrong Test of Criminal Responsibility and its Subsequent Development in the United States: An Historical Survey*, 54 Cal. L. Rev. 1227, 1256-57 (1966).

Only five states[5], including East Virginia, have departed from this long-held tradition of exculpating the medically insane. *See id.* Insanity, like other traditionally preserved affirmative

[5] The other states are Idaho, Montana, Utah, and Kansas.

defenses, upholds the longstanding principle of conviction and punishment tied to culpability. Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to be*, 78 St. John's L. Rev. 725, 800-02, 854 (2004). Without this mechanism, we upend the only method for exculpating the insane.

States deny that the insanity defense is fundamental under Due Process by erroneously clinging to its non-uniform application. *See State v. Herrera*, 895 P.2d 359, 365 (Utah 1995); *Korell*, 690 P.2d at 999; *State v. Bethel*, 66 P.3d 840, 846-47 (Kan. 2003); *State v. Searcy*, 798 P.2d 914, 917-19 (Idaho 1990). This non-uniform application among the states advances a policy that states act as laboratories for the rest of the country. While the Court has been reluctant to set a specific test, granting permission to experiment with the insanity defense's application differs from sacrificing this legal principle altogether. *See Leland v. Oregon,* 343 U.S. 790, 800-01 (1952). However, legal principles are often recognized as fundamental even if states vary in their application. *See e.g. Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to learn foreign languages though states freely regulate education); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marriage). For example, trial by jury in a criminal case is a fundamental legal principle, but states are free to choose the number of citizens that sit on a jury. *See Duncan*, 391 U.S. at 149-50, 155. Similarly, the legislature may redefine insanity, but it may not remove the defense altogether—anymore than it could remove the mens rea element from all crimes. *C.f. Commonwealth v. Rumsey*, 454 A.2d 1121, 1122 (Pa. Super. Ct. 1983) (redefining mens rea within constitutionally permissible limits).

Although no definitive test is required, *see Clark*, 548 U.S. at 752, without some minimum requirement, states are free to distort the insanity defense to such an extent that it no longer resembles the traditionally-recognized protection against punishment without culpability.

C.f. Lord v. State, 262 P.3d 855, 861-62 (Alaska Ct. App. 2011). Alaska has limited the insanity defense, thereby, excluding a large group of individuals who would otherwise be considered legally insane. *See id.* at 861. By rejecting the moral incapacity prong of the *M'Naghten* rule, Alaska found a woman guilty even though the Court agreed that she lacked the capacity to appreciate the wrongfulness of her conduct. *See id.* This Court should uphold the essence of the defense which, "however formulated, has been that a defendant must have the mental capacity to know the nature of [her] act *and* that it was wrong." *Herrera*, 895 P.2d at 372 (Stewart, J. dissenting) (emphasis added).

While this Court need not impede the experimentation of the States, it must set a minimum standard that: (1) there must be some form of an affirmative insanity defense, and (2) it must include moral incapacity.

2. The mens rea approach is an insufficient substitute for the insanity defense.

The mens rea approach is a wholly inadequate substitute for the insanity defense. First, it ignores several recognized serious illnesses that do not impair cognition but affect the ability to tell right from wrong. Second, it defies the underlying purpose of the insanity defense—society's recognition that, even where all the elements of a crime are technically met, an individual should not be marked a "criminal." Without the capacity to form "criminal intent, there can be no moral blameworthiness, crime or punishment." *Korell*, 690 P.2d at 999.

Even if this Court finds that the affirmative defense of insanity is not fundamental, that which it seeks to safeguard—culpability linked to criminality—is. *See* Ralph Reisner & Herbert Semmel, *Abolishing the Insanity Defense: A Look at the Proposed Federal Criminal Code Reform Act in Light of the Swedish Experience*, 62 Cal. L. Rev. 753, 754 n.9 (1974). Under Due

Process, criminal defendants are guaranteed "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). Insane defendants that commit wrongful acts as a result of their condition need a mechanism to present evidence of their illness.

Under the mens rea approach, these individuals are denied the right to a fair trial. Evidence of mental illness is relevant to negate culpability, an essential part of the offense charged. *See Korell*, 690 P.2d at 1007 (Sheehy, J. dissenting). Denying Petitioner the opportunity to negate criminal intent through evidence of her schizophrenia "deprives [her] of a trial by jury for each element of the crime for which [she was] charged." *Id.* at 1006 (Sheehy, J. dissenting).

The mens rea approach, as it stands now, prohibits evidence of a serious mental illness from being used to negate moral capacity. *See Finger*, 27 P.3d at 81. In doing so, it effectively eliminates the concept of wrongfulness from criminality, in essence making all crimes strict liability. *See id.* Strict liability, or a crime without intent, has generally been accepted in two contexts: (1) where the offense is a petty crime with a relatively low punishment, *see Morissette*, 342 U.S. at 257, and (2) where the victim is part of a special class, such as children, *see Kennedy v. Louisiana*, 554 U.S. 407, 423 (2008) (statutory rape crimes). However, abandoning the requirement of a guilty intent on the most basic of common-law offenses, such as murder, creates a deformed criminal justice system, aimed solely at vengeance and retribution rather than deterrence and rehabilitation. *See Morissette*, 342 U.S. at 250-51. Furthermore, the mens rea approach effectively "ease[s] the prosecution's path to conviction." *Id.* at 263. Reducing the prosecution's burden in this way is unconstitutional if "the rule . . . itself violates a fundamental principle of fairness." *Egelhoff*, 518 U.S. at 55. Abrogating the insanity defense clearly does.

Even Congress has recognized that "the existence of moral culpability as a prerequisite for punishment" is a "fundamental basis of Anglo-American criminal law." H.R. Rep. No. 98-

577, at 3, 7–8 (1983). The continuing acceptance of the common law rule—that the insane are not suitable to bear criminal responsibility—is what this Court would expect from a fundamental principle. *See* Paul H. Robinson & Tyler Scot Williams, *Mapping American Criminal Law Variations Across the 50 States: Ch. 14 Insanity Defense*, U. Pa. L. Sch. Penn Law: Legal Scholarship Repository, Jan. 2017, at 2-4. The survival of the defense in so many states is a testament to "[t]he underlying premise of our political and legal institutions . . . that men and women are moral agents, free to choose between right and wrong." *Herrera*, 895 P.2d at 376. Society cannot impose punishment without blame. *See Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945). Accordingly, the mens rea approach is a significant departure from the traditional aims of our criminal law and an inadequate substitute for the insanity defense.

3. East Virginia has failed to provide a valid justification for the abolition of this fundamental principle.

East Virginia fails to present a valid reason for abandoning a fundamental defense that is necessary for a fair trial. Where both historic and modern state practice indicate that the affirmative defense of insanity is a fundamental principle under Due Process, states cannot abrogate the defense without sufficient justification. *See Speiser v. Randall*, 357 U.S. 513, 529 (1958) (no justification for suppressing protected speech). The Court closely examines the state's interest said to justify the infringement. *See Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

This Court, while deferring to state policies on criminal punishment, has an inescapable duty to enforce the Constitution. *See Leland*, 343 U.S.at 807 (Frankfurter, J. dissenting). The states retain discretion to define crime and shape the criminal process, but this Court weighs in to set the constitutional bounds of that discretion. *See Morissette*, 342 U.S. at 263 (refuting the contention that theft crimes didn't include an intent element)*; Patterson v. New York*, 432 U.S. 197, 201-02 (1977) (prohibiting a state from implementing procedures which offend a

fundamental principle); *Robinson v. California*, 370 U.S. 660, 666-68 (1962) (finding limits on what a state may criminalize); *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86 (1916) (forbidding states from declaring individuals "guilty or presumptively guilty of a crime"). Therefore, the mere fact that the states retain discretion is an insufficient justification for impeding a fundamental legal principle, such as the right to an insanity defense.

Additional state justifications for adopting the mens rea approach are clouded by misconceptions. *See* Michael L. Perlin, *The Insanity Defense: Nine Myths That Will Not Go Away in* The Insanity Defense: Multidisciplinary Views on Its History, Trends, and Controversies (Mark D. White ed. 2016); *see generally Clark*, 548 U.S. at 775-78 (jury confusion); *Herrera*, 895 P.2d at 362, 368 (potential for misuse); *Korell*, 690 P.2d at 1002 (future dangerousness). These include jury confusion, future dangerousness, and overuse of the defense. None of these could be described as compelling.

First, we trust juries to be the arbiters of justice and to frequently weigh-in on complicated matters. *See* Elizabeth Aileen Smith, *Did They Forget to Zero the Scales?: To Ease Jury Deliberations, the Supreme Court Cuts Protection for the Mentally Ill in Clark v. Arizona*, 26 Law & Ineq. 203, 223 (2008). Recognizing an insanity defense will no more confuse a jury than the commonly-used defenses of heat of passion, duress, or coercion, nor is it even as complicated as some issues raised in complex litigation. *See Clark*, 548 U.S. at 794-95 (Kennedy, J. dissenting). Even if jury confusion was enough of a risk to justify excluding evidence, it would still be insufficient to justify a complete prohibition on the insanity defense. *See id.* at 793 (Kennedy, J. dissenting).

Second, future dangerousness cannot even provide a rational basis for stripping the mentally ill of the insanity defense. *See Leland*, 343 U.S. at 798. This fundamental mechanism of

exculpation guards against punishment of the innocent. *Korell*, 690 P.2d at 1002. History and statistics do not support the myth that acquitting the insane bears punishment upon society. *See* Perlin, *supra*, at 5-6. While not criminally liable, defendants who establish the insanity defense do not get off scot-free. *See Jones v. United States*, 463 U.S. 354, 370 (1983). Rather, civil commitment proceedings adequately ensure that those who present a danger to themselves or others receive necessary treatment without unfairly labeling them as criminals. *See id.*; *Leland*, 343 U.S. at 798.

Third, the defense is not commonly raised, and when raised, it is rarely in murder cases. *See* Joseph H. Rodriguez et al., *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 Rutgers L.J. 397, 402 (1983) (in jurisdictions where this is closely studied, it appears that less than one-third of the cases involve murder). Additionally, juries tend to be skeptical of defendants who raise this defense. *See* Perlin, *supra*, at 5. Therefore, feared abuse of the defense is an insufficient justification.

Petitioner acknowledges that our justice system is imperfect and an insanity defense, if raised, may not always be successful. In those cases, when a criminal defendant has been afforded an opportunity to present their case along with exculpating evidence, conviction and punishment of the mentally ill will not run afoul of Due Process. However, East Virginia has offended Due Process through its blanket denial of the affirmative defense of insanity, without any rational justification.

B. Blanket Denial of the Insanity Defense Results in Criminal Punishment of the Insane in Violation of the Eighth Amendment.

East Virginia has not only offended Due Process, but it has violated the Eighth Amendment by imposing punishment on non-culpable defendants without restraint. The Eighth

Amendment, incorporated to the states through the Fourteenth Amendment, categorically bans the infliction of "cruel and unusual punishment." U.S. Const. amend. VIII; *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). States must respect the human attributes of even those who have committed serious crimes. *See Graham v. Florida*, 560 U.S. 48, 59 (2010). Through the Eighth Amendment, the Constitution recognizes the need to safeguard human dignity. *See Trop v. Dulles*, 356 U.S. 86, 100 (1958). While the Amendment does not define "cruel and unusual," this Court has held that its meaning is derived from the maturing values of a civilized society. *See Roper v. Simmons*, 543 U.S. 551, 560 (2005). The right to be free from excessive sanctions flows from the basic principle of justice, "that punishment for crime should be graduated and proportioned to [the] offense" and the offender. *Id.*

A centralized feature of Eighth Amendment jurisprudence is punishment linked to culpability. *See Miller v. Alabama*, 567 U.S. 460, 470 (2012); *Atkins v. Virginia*, 536 U.S. 304, 306-07, 312-13 (2003). With a keen eye on proportionality, the Amendment circumscribes the states' power to define crime and impose punishment in two significant ways. *See Ingraham v. Wright*, 430 U.S. 651, 667 (1977). It substantively limits what the government may criminalize and restricts the modes of punishment and manner in which they can be imposed. *See id.*

East Virginia's scheme runs afoul of both restrictions. First, penalizing an individual for actions that are a direct and involuntary result of her illness amounts to a criminalization of status. Second, placing criminal responsibility upon a defendant who lacks the ability to form blameworthiness as a result of a serious mental illness is a disproportionate type of punishment. Ultimately, "there could be no greater cruelty than trying, convicting, and punishing a person wholly unable to understand the nature and consequence of [her] act, and . . . such punishment is certainly both cruel and unusual." *Sinclair v. State*, 132 So. 581, 585 (Miss. 1931) (Ethridge, J.

separate opinion). Therefore, denial of the insanity defense effectuates an impermissible result under the Eighth Amendment.

1. Abrogation of the insanity defense results in the criminalization of status.

The Eighth Amendment prohibits a state from criminalizing a status or condition that one inherits. *See Robinson*, 370 U.S. at 667. It follows that a state cannot punish an involuntary act that is an unavoidable consequence of one's status. *See id.* East Virginia cannot withhold the insanity defense from Petitioner and others whose actions are entirely inseparable from their condition without criminalizing the disorder itself.

A law that turns a disease into a criminal offense is universally recognized as inflicting cruel and unusual punishment. *See id.* at 666. The *Robinson* Court struck down a statute criminalizing the status of being a drug addict, relying on the idea that it would be just as cruel to punish an addict for his addiction, as it would be to punish the insane for their insanity. *See id.* at 667. Similar to addiction, which is linked to genetics, evidence suggests that schizophrenia is hereditary and attributed to an imbalance in brain chemistry. L. Bevilacqua & D. Goldman, *Genes and Addictions*, 85 Clin. Pharmacol. Ther. 359, 360 (2009).

"[C]riminal penalties may not be inflicted upon a person for being in a condition [she] is powerless to change." *Powell v. Texas*, 392 U.S. 514, 567 (1968) (Fortas, J. dissenting). The plurality in *Powell* narrowly interpreted the *Robinson* decision as precluding only laws criminalizing status, not those criminalizing acts closely related to that status. *See id.* at 532. However, if the conduct is inseparable from the condition, penalizing the conduct violates the Eighth Amendment. *See id.* at 551 (White, J. concurrence) (noting that a statute prohibiting public drunkenness would be cruel and unusual if the conduct was an unavoidable consequence

of a homeless individual's alcoholism). This Court, in *Robinson* and *Powell*, interpreted the Cruel and Unusual Punishment Clause to allow criminal penalties to attach when the accused committed some act or engaged in some behavior that society has an interest in preventing. *See Robinson*, 370 U.S. at 664-66; *Powell*, 392 U.S. at 530-31. Yet neither case addressed the unconstitutionality of punishing involuntary conduct that is inseparable from status.

The Ninth Circuit addressed this inseparable quality in *Martin v. Boise*, 920 F.3d 584 (9th Cir. amended Apr. 1, 2019). In *Martin*, the court struck down an ordinance criminalizing sleeping outside under the Eighth Amendment because it imposed criminal sanctions on homeless individuals without available shelter beds as an alternative. *See id.* at 617-18. The status of being insane and the resulting delusional act are just as directly linked as the status of being homeless and the act of sleeping outside. Accordingly, the state cannot criminalize conduct that is an unavoidable consequence of a schizophrenic's delusion without criminalizing the disease of schizophrenia. That is not to say that East Virginia cannot criminalize murder. However, in circumstances such as these, defendants must have access to an insanity defense to excuse them from punishment for acts that directly result from their status as schizophrenics.

2. Barring access to the defense results in disproportionate punishment.

A historic and modern consensus indicates that those who suffer from serious mental illness are simply not culpable and are, therefore, unfit to bear criminal responsibility. *See Atkins*, 536 U.S. at 317-19. The Eighth Amendment limits the legislature's power to punish. *See Furman vs. Georgia*, 408 U.S. 238, 259 (1972) (Brennan, J. concurring). Punishment is cruel and unusual if it was condemned at common law in 1789 or it violates fundamental human dignity as reflected in the evolving standards of decency. *See Ford v. Wainwright*, 477 U.S. 399, 405-06 (1986). Although its scope lacks precision, society has long understood that the Eighth

Amendment prevents punishments that are disproportionate to the offense and the offender due to their excessive length or severity. *See Roper*, 543 U.S. at 560-61.

i. Punishment of the insane was condemned at common law

Originally, the drafters of the Bill of Rights barred punishment that resulted in unnecessary cruelty. *See Wilkerson v. Utah*, 99 U.S. 130, 136 (1879). A historical look at the insanity defense is not limited to its formal legal status; rather, this Court should consider how the punishment was perceived under common law in 1789. *See Ford*, 477 U.S. at 406.

Historically, society perceived inflicting punishment on those that suffer from serious illness as "a miserable spectacle, both against law, and" humanity. *Id.* at 407 (quoting E. Coke, 3 Institutes 6 (6th ed. 1680)). At common law, "lunatics" were not punished for acts committed due to their incapacities. *See* Homer D. Crotty, *History of Insanity as a Defence to Crime in English Criminal Law*, 12 Cal. L. Rev. 105, 114 (1924). Scholars wrote that society should deal with those that commit crime as a result of their madness *outside* of the penal system and provide treatment. *See id.* at 109-114 (citing to the writings of Edward Coke, William Blackstone, and Sir Matthew Hale). These writings were "read in the American Colonies by virtually every student of law," *see Klopfer v. North Carolina*, 386 U.S. 213, 225 (1967), and even Justice Scalia cited the writings to interpret the original meaning of constitutional amendments. *See e.g. Kerry v. Din*, 135 S.Ct. 2128, 2132-33 (2015).

Even though the insanity defense has had different formulations, for centuries every civilized system of law has preserved the defense—recognizing that "the taking of a life by the hand of an insane person is not murder." *United States v. Baldi,* 344 U.S. 561, 570 (1953). Although this Court has yet to define an exact test for insanity, this postulate has always encompassed the idea that punishment is not appropriate for those who, by reason of insanity,

cannot tell right from wrong. *See Delling v. Idaho*, 568 U.S. 1038, 1039 (2012) (Breyer, J. dissenting) (citing W. Blackstone, *Commentaries on the Laws of England* 24-25 (1769) and *M'Naghten's Case*). In fact, out of eleven insanity cases between 1816 and 1838, all but one instructed on "right and wrong," "good and evil," or a similar test focused on knowledge of "moral turpitude." Platt et al., *supra*, at 1256-57.

Schizophrenics, like Petitioner, have historically belonged to this class of "lunatics" who cannot tell right from wrong. *See* Siddhartha Mukherjee, *Runs in the Family: New Findings About Schizophrenia Rekindle Old Questions About Genes and Identity*, The New Yorker, Mar. 28, 2016 (Annals of Science). Therefore, denying them the insanity defense and purposefully punishing them would have been condemned as cruel at common-law.

ii. Punishment of the insane offends evolving standards of decency

The Eighth Amendment's scope is not static, and, therefore, must also reflect a modern understanding of human dignity. *See Trop*, 356 U.S. at 101. Punishing the insane is not only historically recognized as cruel, it is also contrary to evolving standards of decency. Under the evolving standards framework, courts must consider objective evidence of society's values, including this Court's precedent and medical advancement. *See Atkins*, 536 U.S. at 313-21. However, the most reliable objective evidence is legislation enacted nationwide. *See id.* at 304.

The objective evidence is overwhelming. The federal legislature, forty-five states, and the military all recognize an affirmative defense of insanity that gives legal recognition to those whose moral capacity is entirely diminished as a result of their illness. *See* Robinson et al., *supra*, at 2-4. East Virginia and the four other states are anomalies. By abrogating or narrowing the insanity defense, these states have chosen to promote punishment of the insane. In doing so, they conveniently absolve themselves of a moral responsibility and dispense with a constitutional

obligation by imposing punishment untethered to culpability. *See Herrera*, 895 P.2d at 386-87 (Stewart, J. dissenting). Yet punishment without any consideration of culpability "shocks the sense of justice of every one." *Felton v. United States*, 96 U.S. 699, 703 (1877).

In addition to the objective evidence of state legislation, this Court's judgment has already come to bear on the suitability of punishment without culpability. *See Roper*, 543 U.S. at 575-76. Over a century of precedent, especially within the last fifty years, makes this Court's judgment clear—punishment in the absence of culpability is disproportionate. *See e.g. Miller*, 567 U.S. at 489 (holding that life without parole is cruel and unusual punishment for juveniles because of their diminished culpability and potential for change); *Atkins*, 536 U.S. at 317 (reasoning that the national consensus reflects "widespread judgment" about the culpability of the mentally retarded, and prohibits sentencing these offenders to death); *Ford*, 477 U.S. at 406-10 (prohibiting the death penalty for the insane); *Morissette*, 342 U.S. at 263 (holding that omitting intent from a statute does not eliminate it as an element of the crime); *Weems v. United States*, 217 U.S. 349, 382 (1910) (finding that severe punishment could not be imposed for a small infraction); *Felton*, 96 U.S. at 703-04 (finding, even where the defendants knowingly violated a statute, they could not be punished because necessity justified the act).

Although this discussion more recently centers around imposing the death penalty or trying juveniles as adults, this Court's reasoning extends to the case at hand. For example, Justice Stevens' majority opinion in *Atkins* begins with the premise that criminal punishment can be imposed on "[t]hose mentally retarded persons who meet the law's requirements for criminal responsibility." 536 U.S. at 306. However, he went on to say that "because of their disabilities . . . [the mentally retarded] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* In finding that the death penalty could not be imposed on this

class, the Court's analysis intuitively began by recognizing that punishment could *only* justly follow where criminal responsibility could be imposed. *See id.*

Atkins laid the foundation for this Court's precedent surrounding punishment of juveniles. This Court found that the increasing rate of change among state legislatures and advancing medical science all indicated that the severest forms of punishment are unfit for juveniles because of their diminished culpability, maturity, and impulse control. *See generally Miller*, 567 U.S. 460 (2012); *Graham*, 560 U.S. 48 (2010); *Roper*, 543 U.S. 551 (2005). However, unlike juvenile or mentally handicapped offenders that still retain some capacity to understand wrongfulness, Petitioner and others like her suffer from illnesses that make it impossible to recognize right from wrong.

Those that suffer from mental illnesses are non-culpable defendants better suited for institutionalization and treatment than for imprisonment. Of the more than 11.2 million people suffering from severe mental illness, almost thirty percent are schizophrenic. *See* National Institute of Mental Health, *Mental Illness*, NIH, https://www.nimh.nih.gov/health/statistics/mental-illness.shtml#part_154788 (last updated Feb. 2019); *Schizophrenia Symptoms, Patterns and Statistics and Patterns*, MentalHelp.Net, https://www.mentalhelp.net/schizophrenia/statistics/ (last visited Sept. 10, 2019). Schizophrenia is just one of the mental illnesses that affects moral capacity. National Institute of Mental Health, *supra*. Therefore, states that deny the insanity defense have definitively chosen to withhold treatment from a large class of people.

Purposefully denying treatment to inmates has already been held to be cruel and unusual. *See generally Estelle v. Gamble*, 429 U.S. 97 (1976). The government's failure to provide treatment at the very least results in pain and suffering, and at worst may actually produce torture. *See id.* at 103. "Such unnecessary suffering is inconsistent with contemporary standards

of decency." *Id.*

Prisons are unable to provide adequate mental health treatment. *See* National Alliance on Mental Illness, *Jailing People with Mental Illness*, NAMI.org, https://www.nami. org/learn-more/public-policy/jailing-people-with-mental-illness (last visited Sep. 11, 2019) (eighty-three percent of inmates that suffer from serious mental illness are denied access to treatment). Further, withholding mental health treatment from those that suffer from serious mental illness not only results in mental anguish but has the potential to produce physical pain as well. *See* Jouce Gabriela de Almeida et al., *Chronic Pain and Quality of Life in Schizophrenic Patients*, 35 Brazilian J. Psychiatry 1, 1 (2013). By stripping a large class of insane offenders[6] of their ability to obtain institutionalization over imprisonment, states, like East Virginia, undermine this Court's proscription in *Estelle*.

At the intersection of *Estelle*, *Roper*, *Graham*, *and Miller v. Alabama* lies the proposition that contemporary standards of decency require a state to institutionalize and treat rather than imprison those that commit wrongful acts due to their serious mental illness. However, cruel and unusual punishment results not just from imprisoning the insane and denying treatment, but from convicting them and labeling them as "criminals." *See Robinson*, 370 U.S. at 676 (Douglas, J. concurring). The stigma associated with this label does irreparable damage to the good name of the accused and is not justified where a civil commitment would do as well. *See id.* at 677 (Douglas, J. concurring). Labels, such as "mad," "loony," "disturbed," or "deranged," already stigmatize the mentally ill. *See* Diana Rose et al., *250 Labels Used to Stigmatise People with Mental Illness*, 2007 BMC Health Serv. Res. 1, 3 tbl.1, 5 tbl.3. Subjecting them to the additional undeserved label of "criminal" is cruel in and of itself. Labeling and punishing these offenders is

[6] Two million detained annually. *See* National Alliance of Mental Illness, *supra*

contrary to the spirit of the Eighth Amendment and lacks any penological justification. *See Graham*, 560 U.S. at 71 (retribution, deterrence, incapacitation, or rehabilitation).

The core of the retribution rationale is culpability, which requires an awareness of some wrongdoing. *See Miller*, 567 U.S. at 471-72. Retribution is not served when the actor lacks awareness as to what makes her conduct criminal. *See* Herbert L. Packer, *Mens Rea and the Supreme Court,* 1962 Sup. Ct. Rev. 107, 109. Schizophrenics, specifically, are plagued by abnormal thinking, paranoia, and delusions, which do not allow them to develop the requisite wrongful intent. *See* Ghoreishi, *supra*, at 7. Thus, punishment of these individuals does not serve a retributive purpose.

Deterrence is equally futile in the absence of blameworthiness and personal responsibility. *See Sinclair*, 132 So. at 584. It is illogical to suggest that punishing the insane will deter others, sane or insane, from doing the same thing. *See Robinson*, 370 U.S. at 668 (Douglas, J. concurring). Even in adopting the mens rea approach, the Montana Supreme Court acknowledged that its "policy does not further criminal justice goals of deterrence . . . where an accused suffers from a mental disease that renders him incapable of appreciating the criminality of his conduct." *Korell*, 690 P.2d at 1002.

Additionally, stigmatizing and imprisoning those that suffer from serious mental illness does not advance the goal of rehabilitation. A prison sentence can have permanent, detrimental effects on a mentally ill inmate's mental and physical health, especially where a vast majority are denied access to vital treatment. *See* National Alliance of Mental Illness, *supra*. Alternatively, a successful insanity defense can lead to commitment in a mental health facility in lieu of prison time, which is clearly the more rehabilitative option. *See Jones*, 463 U.S. at 356.

Incapacitation is thus the sole and inadequate justification. The underlying assumption of

incapacitation is that an offender is beyond redemption and must be kept away from the rest of the population for the safety of others. *See Graham*, 560 U.S. at 72-73. However, conduct without understanding of its wrongfulness does not single out the actor "as a socially dangerous individual who needs to be incapacitated or reformed." Packer, *supra*, at 109. While the mentally ill do not have the capacity that juveniles have to evolve and mature, there is the potential for treatment. *See id.* Here, the Eighth Amendment requires treatment rather than punishment.

East Virginia has unconstitutionally decided that moral blameworthiness is irrelevant for purposes of rendering a guilty verdict and thus irrelevant for punishment. This is a stark departure from a historic and contemporary understanding of decency and a denial of what the Eighth Amendment requires. If this Court agrees that punishment no longer needs to be tailored to "personal responsibility and moral guilt," *Enmund v. Florida*, 458 U.S. 782, 801 (1982), it places itself in the unsettling position of overturning the last century of Eighth Amendment jurisprudence. Therefore, abrogating the insanity defense results in the infliction of cruel and unusual punishment.

CONCLUSION

The force of the constitutional rights protected under the Fifth, Eighth, and Fourteenth Amendments must apply equally to all citizens. Accordingly, to uphold notions of fundamental fairness, this Court must find Petitioner's waiver invalid and allow her the affirmative defense of insanity. Otherwise this Court allows East Virginia to dilute her rights.

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Respectfully submitted,

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