No. 19-1409

In the

SUPREME COURT OF THE UNITED STATES

MS. LINDA FROST,

Petitioner,

v.

COMMONWEALTH OF EAST VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI

TO THE SUPREME COURT OF APPEALS OF EAST VIRGINA

BRIEF FOR PETITIONER

Oral Argument Requested

Team Letter K
Counsel of Record for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER AN INDIVIDUAL'S WAIVER OF HER MIRANDA RIGHTS IS KNOWING AND INTELLIGENT WHEN, DUE TO A MENTAL DISEASE, THE ACCUSED DID NOT UNDERSTAND HER RIGHTS EVEN THOUGH SHE APPEARED LUCID TO THE INVESTIGATING OFFICER AT THE TIME OF HER WAIVER.

II. WHETHER ABOLISHING THE INSANITY DEFENSE AND SUBSTITUTING A *MENS REA* APPROACH TO EVIDENCE OF MENTAL IMPAIRMENT VIOLATES THE EIGHTH AMENDMENT RIGHT NOT TO BE SUBJECT TO CRUEL AND UNUSUAL PUNISHMENT AND THE FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WHERE THE ACCUSED FORMULATED THE INTENT TO COMMIT THE CRIME BUT WAS INSANE AT THE TIME OF THE OFFENSE.

PROCEEDINGS BELOW

The Circuit Court of Campton Roads denied Ms. Frost's motion to suppress her confession, and upheld the constitutionality of E. VA. Code § 21-3439. The court found that the investigating officer had no reason to suspect Ms. Frost was mentally unstable until after her waiver and confession. The court also found that E. VA. Code § 21-3439 neither imposed cruel and unusual punishment upon Ms. Frost nor violated her due process rights. Thus, the court convicted Ms. Frost for murder and accepted the jury's recommended life sentence.

On appeal, the Supreme Court of East Virginia affirmed the Circuit Court's decision and upheld Ms. Frost's conviction. The court held that Ms. Frost's confession was admissible because it was voluntary, knowing and intelligent. Further, the court held that East Virginia's abolition of the insanity defense for a *mens rea* approach does not violate Ms. Frost's Eighth or Fourteenth Amendment rights.

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Abraham S. Goldstein, *The Insanity Defense* (Yale Univ. Press, 1967). 16, 18

R. Michael Shoptaw, *M'Naghten is a Fundamental Right: Why Abolishing the Traditional Insanity Defense Violates Due Process*, 84 Miss. L.J. 1101 (2015). 23

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) (2018). This case is an appeal from a judgment ordered by the Supreme Court of East Virginia. R. at 12. The Supreme Court of the United States granted the petition for writ of certiorari on July 31, 2019. R. at 12.

CONSTITITUIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall

any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const. amend. VIII:

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

U.S. Const. amend. XIV § 1:

"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."

STANDARD OF REVIEW

The Supreme Court of the United States has authority to review the decisions of lower courts. Highmark Inc. v. Allocate Health Mgmt. Syst., Inc., 572 U.S. 559, 563–64 (2014). Decisions regarding questions of law are "reviewable *de novo*," decisions regarding "questions of fact" are "reviewable for clear error," and decisions on "matters of judicial discretion" are "reviewable for abuse of discretion." Id. This case poses questions of law, and is therefore reviewed by this Court *de novo*. Id

STATEMENT OF THE CASE AND FACTS

Ms. Frost was a waitress at Thomas's Seafood Restaurant and Grill. R. at 2. On June 16, 2017, Ms. Frost picked up an extra shift by covering a coworker's 2 p.m. to 8 p.m. shift. R. at 2. Given this was a last-minute favor on one of the restaurant's busiest nights, Ms. Frost did not clock in or out. R. at 2. Thus, no one knew the exact time Ms. Frost left the restaurant. R. at 2. Two eyewitnesses alleged that they observed a woman matching Ms. Frost's description leaving the restaurant late that night. R. at 2. However, these eyewitnesses could not definitively identify Ms. Frost because both eyewitnesses observed the woman from a distance. R. at 2.

On June 16, 2017, Ms. Frost's ex-boyfriend, Christopher Smith, was murdered between the hours of 9 p.m. and 11 p.m. R. at 2. On June 17, 2017, police discovered Smith's body in his office at the U.S. Department of Agriculture after receiving an anonymous tip. R. at 2.

After Smith's body was found, Officer Barbosa brought Ms. Frost in for questioning. R. at 2. Officer Barbosa read Ms. Frost her *Miranda* rights, and Ms. Frost signed a written waiver. R. at 2. According to Officer Barbosa, Ms. Frost's physical demeanor at the beginning of the interrogation did not cause Officer Barbosa to question her competency. R at 2. Thus, Officer Barbosa proceeded with the interrogation by informing Ms. Frost about the discovery of Smith's body, and asked if she knew who might be responsible. R. at 3. In response, Ms. Frost stated that she stabbed Smith and left the knife in Lorel Park. R. at 3. Importantly, Ms. Frost made several statements about the "voices in her head" telling her to "protect the chickens at all costs." R. at 3. Specifically, Ms. Frost informed Officer Barbosa she did not think that killing Smith was wrong. R. at 3. Ms. Frost believed that after killing Smith, he would reincarnate as a chicken, "the most sacred of all creatures." R. at 3. Thus, Ms. Frost implored Officer Barbosa to join her cause "to

liberate all chickens in Campton Roads." R. at 3. Officer Barbosa ended the interrogation when Ms. Frost requested a court appointed attorney. R. at 3.

Ms. Frost was charged and indicted in federal and state court for Smith's murder. R. at 3. While both trials were pending, Ms. Frost's attorney filed a motion in federal court for a mental evaluation. R. at 3. Dr. Frain, a clinical psychiatrist, conducted Ms. Frost's mental evaluation. R. at 3. During this evaluation, Ms. Frost told Dr. Frain she believed she needed to kill Smith to protect the sacred lives of chickens that Smith endangered through his job. R. at 4. Dr. Frain diagnosed Ms. Frost with paranoid schizophrenia and prescribed the appropriate medication for Ms. Frost. R. at 3. Notably, Ms. Frost had never been diagnosed with schizophrenia, nor had she received medication for any mental condition before this evaluation. R. at 3-4.

During Ms. Frost's federal court proceedings, Dr. Frain testified that it was highly probable that between June 16 and June 17, Ms. Frost was in a psychotic state and suffering from severe delusions and paranoia. R. at 4. Dr. Frain opined that Ms. Frost could not control or fully understand the wrongfulness of her actions during those few days. R. at 4. Based on Dr. Frain's testimony, Ms. Frost was acquitted based on insanity, which is an affirmative defense under federal law. R. at 4.

After Ms. Frost's federal acquittal, the state prosecutor in East Virginia brought an additional murder charge against her. R. at 4. East Virginia recently abolished the affirmative insanity defense for a *mens rea* approach. R. at 4. Under East Virginia Code § 21-3439, lack of ability to know right from wrong is not a defense. R. at 4. Instead, evidence of a mental disease or defect may be introduced to disprove the *mens rea* element of an offense. R. at 4.

At the state court trial, Ms. Frost moved to suppress her confession and asked the court to hold East Virginia's abolishment of the insanity defense unconstitutional under the Eighth and

Fourteenth Amendments to the United States Constitution. R. at 5. The state court judge denied both motions, finding Ms. Frost's initial appearance of lucidity gave the officer no reason to suspect her mental instability, and finding the East Virginia statute facially constitutional. R. at 5. Thus, Ms. Frost was convicted of murder and received a life sentence. R. at 5.

On appeal, the East Virginia Supreme Court affirmed the circuit court's decision and upheld Ms. Frost's conviction. R. at 5. The opinion, delivered by Associate Justice Capra, held that Ms. Frost's waiver of her Miranda rights was valid based on the circumstances surrounding the interrogation and Ms. Frost's initially lucid behavior. R. at 9. Associate Justice Capra also held that the *mens rea* statute did not violate Ms. Frost's Eighth or Fourteenth Amendment rights. R. at 9.

In the dissent, Chief Justice Evans opined that a person in Ms. Frost's psychotic state could not comprehend her rights, regardless of how deceivingly lucid she may have appeared at the inception of the interrogation. R. at 10. Thus, Ms. Frost's waiver was not knowing and intelligent, and her confession should have been excluded. R. at 10. Chief Justice Evans further stated that the *mens rea* statute constitutes a deprival of Due Process and imposes cruel and unusual punishment on persons with mental illness. R. at 10.

Ms. Frost petitioned for writ of certiorari in the United States Supreme Court requesting an appeal on both issues. On July 31, 2019, the United States Supreme Court granted certiorari for both issues. Ms. Frost respectfully requests the United States Supreme Court to reverse the judgment of the lower courts and vacate her conviction.

SUMMARY OF ARGUMENT

This Court should reverse the decision of the Supreme Court of East Virginia. This case is about protecting the insane from criminal interrogation and prosecution for actions committed while in a delusional state. Insanity is defined as any mental disorder severe enough to inhibit an individual's capacity. When an individual is suffering from a psychotic state, she is considered insane.

The Fifth Amendment to the United States Constitution protects individuals against self-incrimination. A defendant can waive his or her constitutional right against self-incrimination only when the waiver is voluntary, knowing and intelligent. The inquiry to determine whether a waiver is proper has two dimensions. First, the waiver must be made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Second, the right must be voluntarily relinquished, given it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. An individual cannot satisfy either dimension if, due to a mental disease that causes insanity, the accused did not understand her rights even though she appeared lucid at the time of her waiver.

Whether or not Ms. Frost's delusional confession is suppressed, East Virginia's decision to abolish the insanity defense for a *mens rea* approach violates Ms. Frost's Eighth Amendment right to be free from cruel and unusual punishment and the Fourteenth Amendment right to Due Process.

The Supreme Court has laid out a two-part test for determining what constitutes cruel and unusual punishment under the Eighth Amendment. The first step asks whether there is a national consensus against the practice. Several state supreme courts have held that abolishing the insanity defense is cruel and unusual punishment because such action permits criminal

punishment of persons whose mental illness prevents them from rationally understanding the difference between good and evil. Further, society has recognized the insanity defense to criminal liability for hundreds of years, and nearly every state continues to provide an affirmative insanity defense where a defendant lacks culpability.

The second step of Eighth Amendment analysis requires the Court to consider Ms. Frost's culpability in light her crime and characteristics, along with the severity of this punishment, to determine whether the sentencing practice is proportional to the offense. Here, Dr. Frain testified that Ms. Frost could not control or understand the wrongfulness of her actions on the day she stabbed Mr. Smith. Imposing a life sentence on a blameless offender is categorically disproportionate.

Further, abolishing the insanity defense also violates the Fourteenth Amendment because the concept of legal insanity is fundamental to the American criminal justice system, and the insanity defense warrants due process protection. Culpability for criminal action is a fundamental aspect of American law. Thus, a defense for mentally ill individuals who lack culpability is inherently fundamental. East Virginia replaced the affirmative insanity defense with a *mens rea* model which ultimately eliminates the concept of wrongfulness from all crimes. The *mens rea* model means the weight given to Ms. Frost's mental illness is left entirely to a jury to decide. This permits severe punishment of mentally blameless offenders and violates due process.

For these reasons, Petitioner respectfully requests this Court reverse the decision of the Supreme Court of East Virginia holding that a defendant who appears lucid while suffering from mental illness can knowingly and intelligently waive her Miranda rights. Petitioner further requests this Court reverse the Supreme Court of East Virginia's finding that abolishing the affirmative insanity defense does not violate the Eighth or Fourteenth Amendment.

ARGUMENT

Petitioner respectfully requests this Court reverse the decision of the East Virginia Supreme Court finding that Ms. Frost's *Miranda* waiver was knowingly and intelligently made. On appeal, Petitioner seeks reversal of this holding because an individual cannot knowingly and intelligently waive her Fifth Amendment rights when she is in a psychotic state during her interaction with police. This is because that individual cannot fully know both the nature of the right being abandoned and the consequences of the decision to abandon it. Further, the individual cannot provide a waiver freely and deliberately if she is suffering from a psychotic state. Ms. Frost was not aware and sane at the time of her waiver, so her conviction should be vacated.

Additionally, Petitioner requests this Court reverse the East Virginia Supreme Court's decision on the constitutionality of East Virginia's abolition of the affirmative insanity defense. This Court should find that abolishing the insanity defense imposes cruel and unusual punishment on individuals who lack culpability for their actions. Further, this Court should find that the insanity defense is a fundamental right protected by the due process clause of the United States Constitution. Based on these findings, Ms. Frost's conviction should be vacated because it was premised on violations of her Eighth and Fourteenth Amendment rights.

I. MS. FROST'S WAIVER OF HER MIRANDA RIGHTS WAS NOT KNOWING AND INTELLIGENT WHEN, DUE TO A MENTAL DISEASE, MS. FROST DID NOT UNDERSTAND HER RIGHTS EVEN THOUGH SHE APPEARED LUCID TO THE INVESTIGATING OFFICER AT THE TIME OF HER WAIVER.

The district court erred when it determined that Ms. Frost knowingly and intelligently waived her *Miranda* rights. The Fifth Amendment protects against self-incrimination, particularly to maintain citizens' dignity and integrity and to safeguard the government-individual balance that the United States was founded on. Miranda v. Arizona, 384 U.S. 436, 460

(1996). This Court has determined that a defendant can waive their constitutional right against self-incrimination only when the waiver is voluntary, knowing and intelligent. Id. at 444.

The inquiry to determine whether a waiver is proper has two dimensions. Edwards v. Arizona, 451 U.S. 477, 482; Brewer v. Williams, 430 U.S. 387, 404 (1977). First, the waiver must be made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Moran v. Burbine, 475 U.S. 412, 421 (1986). Second, the right must be voluntarily relinquished, given it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Id. An individual cannot satisfy either dimension if, due to a mental disease, that individual did not understand her rights despite appearing lucid at the time of her waiver.

A. Ms. Frost's waiver of her Fifth Amendment rights was not made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

The Fifth Amendment guarantees individuals their due process rights in criminal proceedings, including the right against self-incrimination. U.S. Const. amend. V. This Court interpreted this right to be fulfilled only when an individual is "guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." Miranda, 384 U.S. at 460 (internal quotations omitted). A *Miranda* waiver must be made knowingly and intelligently. Id. at 444. Whether a *Miranda* waiver was knowing and intelligent has traditionally embraced concerns besides police activity, including whether the defendant was too mentally ill to understand the warnings. See, e.g., United States v. Gaddy, 894 F.2d 1307, 1312 (11th Cir. 1990). This Court employs a totality of the circumstances approach to evaluate whether a waiver was made knowingly and intelligently. Fare v. Michael C., 442 U.S. 707, 725 (1979). The circumstances to be considered include "age, experience, education, background, and intelligence, and [an evaluation] into whether he has the capacity to understand the warnings

given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." Id. at 725.

An individual makes a knowing waiver when the waiver is made with full awareness of the nature of the right being abandoned and the consequences of abandoning it. Moran, 475 U.S. at 421. There is a difference between suppressing a confession "as the product of a non-knowing waiver . . . unless there is evidence of police coercion" and as the result of an accused not having the capacity to understand their rights. U.S. v. Bradshaw, 935 F.2d 295, 298 (D.C. Cir. 1991). Again, police misconduct ties to the voluntariness of the waiver and is distinct from whether a *Miranda* waiver was made knowingly and intelligently. Id.

An individual's mental capacity is relevant and critical to finding whether that individual understood and knowingly waived her *Miranda* rights. Id. at 300. In Bradshaw, the defendant was accused and convicted of bank robberies. Id. at 297. Bradshaw was diagnosed with acute schizophrenia. Id. After his arrest, Bradshaw confessed to the robberies, but he moved to suppress the confession, claiming he did not knowingly and intelligently waive his *Miranda* rights. Id.

The D.C. Circuit Court of Appeals decided that Colorado v. Connelly could not control in determining whether Bradshaw knowingly and intelligently waived his rights. Id. at 298. The question that the court focused on was not whether Bradshaw's mental illness impaired his volitional abilities, but whether it "significantly impair[ed] his cognitive functions." Id. at 298–99. The Bradshaw court read Connelly as only addressing the volitional aspect, and as such declined to allow the requisite police coercion standard to apply. Id. It further explained that because *Miranda* focuses on a voluntary, knowing and intelligent waiver, it is improper to consider only volition and not an individual's capacity to understand the rights they are waiving.

Id. Because an individual's mental state during her alleged confession could impair her cognitive functions, an inquiry into her mental state during the confession is necessary to determine whether the *Miranda* waiver was knowingly and intelligently made.

An officer's perception that an accused knowingly and intelligently understood his or her rights is irrelevant in determining whether a proper waiver of *Miranda* rights was made. One purpose of the *Miranda* waiver is to protect those accused of committing crimes from abusive police practices. Rice v. Cooper, 148 F.3d 747, 750–51 (7th Cir. 1998). However, this inquiry, should apply in part to whether an individual waived their rights voluntarily. The Ninth and D.C. Circuit Courts of Appeals both agree that a *Miranda* waiver does not have to "be caused by police misconduct to be deemed non-knowing." Bradshaw, 935 F.2d at 300; see Derrick v. Peterson, 924 F.2d 813, 820–21 (9th Cir. 1990) (distinguishing Connelly and stating that police misconduct cannot be used to appraise the two distinct questions of whether a *Miranda* waiver was made voluntarily, knowingly and intelligently).

The misunderstanding regarding the role of a police officer's perception and an individual's waiver of her *Miranda* originates from the Seventh Circuit in Rice v. Cooper. In Rice, the Seventh Circuit Court of Appeals outlined that a court can look to whether a police officer reasonably believed a suspect understood the explanation of their *Miranda* rights to protect the accused from police misconduct through further questioning. Rice, 148 F.3d at 750. The court reasoned that "the Constitution doesn't protect [a] suspect against himself . . . if he understands the *Miranda* warnings yet is moved by a crazy impulse to blurt out a confession, the confession is admissible because it is not a product of coercion." Id. However, our issue does not involve police coercion. It concerns whether an individual understood her rights and knowingly and intelligently waived those *Miranda* rights.

Further, the Seventh Circuit is wrong as a principle of public policy. In Rice, the court explains that it is more important to protect the public from police misconduct than from themselves and that it is not the police's fault if a suspect is impulsive. Id. However, a suspect susceptible to impulsive confessions due to mental illness cannot knowingly and intelligently waive their rights. Knowing and intelligent waive "implies rational choice based upon some appreciation of the consequences of the decision." Cooper v. Griffin, 455 F.2d 1142, 1146 (5th Cir. 1972). Mental health experts have questioned whether an individual who is impulsive due to his mental illness can understand the consequences of waiving his Fifth Amendment rights. See Garner v. Mitchell, 557 F.3d 257, 278 (6th Cir. 2009) (Cole, J. dissenting) (explaining when three separate mental health specialists evaluate a defendant and conclude that he is impulsive because of his illness, there are serious doubts as to whether that defendant knowingly and intelligently waived his Fifth Amendment rights). While it is an important concern for courts to protect individuals against police misconduct, it is equally important to protect individuals from themselves. This protection is critical when a mental illness is the root of the danger for an individual.

Here, Ms. Frost did not knowingly and intelligently waive her *Miranda* rights because she could not have a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. The right being abandoned here is the Fifth Amendment protection against self-incrimination. *Miranda* rights specifically aim to protect Ms. Frost's integrity and dignity through the criminal justice system. Miranda v. Arizona, 384 U.S. 436, 460 (1996). The clinical psychiatrist that evaluated Ms. Frost determined that it was highly probable that Ms. Frost was in a psychotic state and suffering from delusions between June 16th and 17th. R. at 4. Given that Ms. Frost was suffering from a psychotic state when she gave her

confession, the court must evaluate whether her mental state "significantly impair[ed her] cognitive functions." Bradshaw, 935 F.2d at 298–99. Because Ms. Frost had not been diagnosed with schizophrenia and because she was suffering from paranoia at the time of her confession, her illness significantly impaired her cognitive functions. Id. ; R. at 3–4. While Ms. Frost did not physically appear to the investigating officer to be suffering from a psychotic state, this inquiry is irrelevant to whether Ms. Frost knowingly and intelligently waived her rights. Based on the first, distinct, element to determine whether Ms. Frost's waiver was knowingly and intelligently made, this court should find that Ms. Frost could not have a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

B. The police officer's perception of Ms. Frost's mental state at the time of questioning is irrelevant to whether she knowingly and intelligently waived her Fifth Amendment rights.

This Court has reasoned that a *Miranda* waiver is involuntary when an individual's "will was overborne or if [her] confession was not the product of a rational intellect and a free will." Townsend v. Sain, 372 U.S. 293, 307 (1963) (internal quotation marks omitted). This Court has also determined that a totality of the circumstances approach should apply to determining whether a waiver was voluntarily made. Frazier v. Cupp, 394 U.S. 731, 739 (1969). While many federal decisions focus the voluntariness test on whether police misconduct is present, it is not the only circumstance that should be evaluated. See Colorado v. Connelly, 479 U.S. 157, 167 (1986) (holding that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'"); but see Blackburn v. State of Ala., 361 U.S. 199, 211 (1960) (finding that a defendant suffering from a mental disease cannot voluntarily waive their *Miranda* rights). An individual cannot voluntarily waive her Fifth Amendment rights when she is insane and incompetent at the time of her alleged confession.

In applying a totality of the circumstances approach to determine voluntariness, "[c]ourts must weigh, rather than simply list, the relevant circumstances, and weigh them not in abstract but against the power of resistance of the person confessing." U.S. v. Preston, 751 F.3d 1008, 1017 (9th Cir. 2014). An important circumstance to consider is the mental state of the accused during the waiver.

An individual deemed insane or incompetent during an interrogation cannot voluntarily waive her Miranda rights. Blackburn, 361 U.S. at 211. The defendant in Blackburn had a history of schizophrenia and was arrested and charged with robbery. Id. at 200–01. After the defendant confessed to the robbery, the Sheriff reported that the defendant showed signs of insanity. Id. at 201. The defense objected to the defendant's confession being entered into evidence because the confession was involuntary. Id. at 202–03. The defense argued that even though the defendant answered questions normally and nothing outwardly suggested his psychosis, two doctors determined that Blackburn was insane at the time of the crime and that one aspect of Blackburn's illness was "complete amnesia concerning his behavior." Id. at 202–04.

This Court determined that because the defendant was in a state of psychosis during the confession, his waiver was involuntary. Id. at 211. This Court reasoned that while it is "important . . . that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence." Id. at 206. The strong "probability that Blackburn was insane and incompetent at the time" of his confession is one such consideration. Id. at 207. Further, this Court reasoned that the government must prove "guilt by means other than inquisition." Id. at 207. This Court also reasoned that "in the present stage of our civilization[,] a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane." Id.

This Court, along with all the circuit courts of appeals have considered and determined that a critical circumstance to consider in the voluntariness question is police misconduct. In Connelly, this Court held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." Connelly, 479 U.S. at 167. While Connelly explains the rule that many courts follow, it is not applicable to this case.

Connelly had chronic schizophrenia and approached a police officer to confess to a murder. Id. at 160-–61. Before trial, the defendant moved to suppress his confession after a psychiatrist testified about the defendant's mental illness and indicated he was in a psychotic state at least the day before he confessed. Id. at 161–62.

The distinction in Connelly and similar cases is that they begin their analysis with a totality of the circumstances approach and stop at police misconduct to determine whether a defendant's due process rights have been violated. These cases stop here because they are analyzing the facts to find a state actor that worked against the defendant's due process rights. Id. at 164. The question before this Court is not whether an accused's due process rights are violated if they are deemed insane and incompetent. The question presented here is whether an accused's right against self-incrimination is violated if **s**he is deemed insane and incompetent, regardless if the police knew at the time or not. Rather than narrowing the entire totality of the circumstance approach to whether police misconduct or coercion was present, other factors must be "weigh[ed], rather than simply list[ed]." Preston, 751 F.3d at 1017.

Here, Ms. Frost's waiver was not made voluntarily. Before both criminal trials, Ms. Frost was evaluated by a clinical psychiatrist that diagnosed Ms. Frost with paranoid schizophrenia. R. at 3. The clinical psychiatrist also determined that it was highly probable that Ms. Frost was in a

psychotic state and suffering from delusions between June 16th and 17th. R. at 4. Ms. Frost gave her confession on June 17th. R. at 2. Because Ms. Frost was probably experiencing delusions during the time of her confession, and because Ms. Frost had never been diagnosed for schizophrenia, the totality of the circumstances would favor the determination that Ms. Frost's waiver was involuntary. R. at 3–4. This Court should weigh these two facts particular heavier compared to the lack of police misconduct to preserve our society's most basic sense of justice. Blackburn, 361 U.S. at 211. Therefore, the district court erred in finding that Ms. Frost's waiver was voluntarily made.

II. ABOLISHING THE AFFIRMATIVE INSANITY DEFENSE VIOLATES THE EIGHT AMENDMENT RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT AND THE FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

East Virginia Code § 21-3439 provides that evidence of a mental disease or defect is admissible to disprove the *mens rea* element of an offense, but the lack of ability to know right from wrong is no longer a defense. However, this Court has stated that disabilities in areas of reasoning, judgment, and impulse control prevent a person with mental illness from acting with the level of moral culpability that characterizes the most serious adult criminal conduct. Atkins v. Virginia, 536 U.S. 304, 306 (2002).

The United States Constitution requires states to provide a mechanism for excusing criminal defendants who lack culpability, and one such mechanism is the affirmative insanity defense. Graham v. Florida, 560 U.S. 48, 48 (2010). Unlike the affirmative insanity defense which excuses insane offenders from all liability for actions they lacked culpability in committing, the penalty-phase *mens rea* process does not require a jury to give any particular effect to evidence about an insane offender's mental state when he committed the offense. Enacting a *mens rea* approach to replace the affirmative insanity defense abolishes the defense

entirely. This amounts to an unconstitutional denial of due process to United States citizens with mental illnesses.

A. Abolishing the insanity defense violates the Eighth Amendment because punishing persons who cannot appreciate the wrongfulness of their action constitutes cruel and unusual punishment.

Petitioner requests this Court hold that the Supreme Court of East Virginia erred when it determined that East Virginia's *mens rea* statute does not violate Ms. Frost's Eighth Amendment right to be free from cruel and unusual punishment. To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to "the evolving standards of decency that mark the progress of a maturing society." Graham v. Florida, 560 U.S. 48, 59 (2010). Cruel and unusual determinations embody moral judgments, so the applicability of the Eighth Amendment "must change as the basic mores of society change." Kennedy v. Louisiana, 544 U.S. 407, 419 (2008) (internal quotation marks omitted).

In Graham, this Court considered whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime. Id. at 52. The concept of proportionality is central to the Eighth Amendment, and "punishment for a crime should be graduated and proportioned to the offense." Id. at 59.

This Court outlined a two-pronged test for determining whether a practice violates the Eighth Amendment . Id. at 62. First, a Court should evaluate whether there is a national consensus against the practice. Id. at 61. A national consensus is shown by objective indications of society's standards, as expressed in legislative enactments and state practices. Id. Next, guided by precedent and the Court's own interpretation of the Eighth Amendment, this Court should determine whether this punishment violates the Constitution. Id.

In Graham, this Court found the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full

legislative consideration. Graham, 560 U.S. at 67. While some states permit life sentences without parole for juvenile, nonhomicide offenders, it is incorrect to find those states have expressed the view that the sentence is appropriate. Id. This Court also noted that "the fact that transfer and direct charging laws make life without parole possible for some juvenile, nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences." Id.

In analyzing the second prong of the test, this Court emphasized that community consensus, while "entitled to great weight," is not itself determinative of whether a punishment is cruel and unusual. Id. at 67. This Court determined that judicial exercise of independent judgment requires consideration of the culpability of the offenders, given their crimes and characteristics, along with the severity of punishment they face. Id. Adhering to precedent, this Court stated that because juveniles, like people with mental illnesses, have lessened culpability and are less deserving of the most severe punishments. Id. at 68. Thus, imposing life without parole sentences on juvenile offenders was deemed by this Court to be cruel and unusual punishment. Id. at 82.

While the Supreme Court of East Virginia determined the Commonwealth of East Virginia was correct in its analysis of the Eighth Amendment, applying Graham proves that determination to be incorrect. Graham, 560 U.S. 48. Because forty-five states and other United States jurisdictions continue to provide an affirmative insanity defense, this Court should find a clear national consensus exists against abolishing the insanity defense. State v. Korell, 690 P.2d 992, 999 (Mont. 1984) (Analyzing the history of the American insanity defense and stating its policy against convicting a person who lacks the requisite criminal state of mind); See generally Abraham S. Goldstein, *The Insanity Defense* (Yale Univ. Press, 1967) (Demonstrating the

conventional view that the insanity defense is fundamental to American criminal law and examining the defense's underlying processes of proof).

In considering the first prong of the Graham test, several leading cases from other jurisdictions are analogous to this case. These cases find that the decision to abolish the insanity defense to incriminate persons with mental illness is a form of cruel and unusual punishment. Atkins v. Virginia, 536 U.S. 304, 306 (2002) (recognizing that a mentally ill person who commits a harmful act with no rational appreciation it is wrong lacks the essential prerequisite for criminal punishment); Robinson v. California, 370 U.S. 660, 667 (1962) (holding that individuals lacking culpability because of mental illness are protected from criminal punishment under the Eighth Amendment because punishing blameless individuals is categorically excessive); Ford v. Wainwright, 477 U.S. 399, 406 (1986) (finding that criminally punishing the insane violates the Eighth Amendment because the practice was condemned by the common law and because a modern proportionality analysis confirms history's judgment).

The consistent consideration in all these cases is that abolishing the insanity defense permits criminal punishment of a person whose mental illnesses precludes culpability or an appreciation of the wrongfulness of the offense. In considering the first prong of the Graham test, there is a clear national consensus among at least forty-five states that abolishing the insanity defense is a form of cruel and unusual punishment.

The findings in the previous cases are based on two considerations. First, the four widely accepted penological goals of the American criminal justice system are not served by punishing individuals who lack moral culpability. Graham, 560 U.S. at 71. Where a criminal sentence lacks any legitimate penological justification, this Court has consistently found the sentence to be categorically disproportionate to the offense. Id.

First, retribution is not supported by sentencing mentally ill offenders because "the heart of 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). Second, the same characteristics which render persons with mental illness less culpable than other persons suggest that persons with mental illness will be less susceptible to deterrence. Johnson v. Texas, 509 U.S. 350, 367 (1993). Third, incapacitation does not justify punishing mentally ill offenders because public safety concerns could be more efficiently addressed through civil commitment. Id. Finally, rehabilitation is not served by criminal sentencing of mentally ill offenders because civil treatment centers are better equipped than prisons to care for persons with mental illness. Jones v. United States, 463 U.S. 354, 373 (1983). Criminally sentencing mentally ill offenders constitutes disproportionate punishment because such action lacks penological justification.

The second consideration focuses on the presence of an insanity defense in American law from the founding to the present. State v. Strasburg, 110 P. 1020, 1022 (Wash. 1910). Society has acknowledged the insanity defense to criminal liability for hundreds of years, and many states have recognized the insanity defense as a fundamental principle of American law. See generally Finger v. State, 27 P.3d 66, 71-75 (Nev. 2001). Currently, forty-five states, the federal criminal-justice system, the military justice system, and the District of Columbia all provide an affirmative insanity defense where a defendant lacks moral culpability. State v. Korell, 690 P.2d 992, 999 (Mont. 1984); See generally Abraham S. Goldstein, *The Insanity Defense* (Yale Univ. Press, 1967). The overwhelming majority of jurisdictions employing an insanity defense reflects the "universal and persistent . . . belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." Morissette v. United States, 342 U.S. 246, 250 (1952). Jurists have consistently considered acquittal to be the appropriate result of

insanity, and the affirmative insanity defense is the appropriate way to effectuate this result. People v. Skinner, 704 P.2d 752, 758 (Cal. 1985). A clear legislative consensus has been enacted through state practices to reflect the societal belief that persons with mental illness are entitled to a defense which represents their lack of moral culpability.

Here, the Commonwealth of East Virginia has failed to show that abolishing the insanity defense has been endorsed through deliberate, express, and full legislative consideration. Graham, 560 U.S. at 67. East Virginia's *mens rea* statute directly contradicts the national consensus that the insanity defense is fundamental to American criminal and ignores the principle that an insane person may not be held criminally responsible for her conduct. Id.

The new statute would permit Ms. Frost to be sentenced to life in prison for an act she committed under the schizophrenic delusion that she was protecting chickens. R. at 3. On the evening of June 16, 2017, Ms. Frost had no understanding that her actions were wrong, and believed she was doing the world a "great favor" by liberating all chickens in Campton Roads. R. at 3. The standards accepted by society require that because Ms. Frost lacked culpability because of her mental illness, she is protected from criminal punishment under the Eighth Amendment. Robinson, 370 U.S. at 667. Applying the first prong of the Graham standard, the national consensus that mentally ill offenders should receive statutory protection precludes Ms. Frost's criminalization for a crime she lacked culpability in committing.

Graham also requires the Court to exercise its own independent discretion regarding the proportionality of this sentencing practice. This analysis should be guided by Dr. Frain's medical testimony stating Ms. Frost could not control or understand the wrongfulness of her actions on June 16th. R. at 4. The punishment Ms. Frost faces for her delusional actions is a lifetime of imprisonment, which is categorically disproportionate to Ms. Frost's complete lack of

culpability. R. at 5. The national consensus that an insanity defense is a constitutional guarantee, combined with the lack of penological justifications for criminally punishing the insane, should guide the Court's application of the Eighth Amendment to this case. Graham, 560 U.S. at 61. Imposing a life sentence on Ms. Frost because an insanity defense is no longer permitted under East Virginia law constitutes cruel and unusual punishment in violation of the United States Constitution. Id.

B. Abolishing the insanity defense violates the Fourteenth Amendment because the concept of legal insanity is a fundamental principle protected by due process.

The Supreme Court of East Virginia erred when it determined that East Virginia's *mens rea* statute does not violate Ms. Frost's due process protections under the Fourteenth Amendment. Ohio v. Curry, 543 N.E.2d 1228, 1230 (Ohio 1989). Three cases Washington v. Glucksberg, 521 U.S. 702, (1997) , Finger v. State, 27 P.3d 66 (Nev. 2001), and Morissette v. United States, 342 U.S. 246 (1952) support this conclusion. This Court should hold that abolishing the insanity defense for a *mens rea* approach is unconstitutional because it impedes with a right honored by longstanding American traditions and the fundamental notion of culpability to the American criminal justice system.

In Glucksberg, this Court described the substantive due process methodology as a two-part analysis. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997). The asserted fundamental right must be carefully described, and the liberty interest must be deeply rooted in the history and tradition of the United States. Id. In Glucksberg, this Court took a narrow view on substantive due process by refusing to recognize a fundamental right to assisted suicide. Id. at 728. This Court reasoned that no longstanding tradition supported the argument that a fundamental right to physician-assisted suicide exists in the United States. Id. To reach its conclusion, this Court underwent an exhaustive history-focused investigation into a tradition

regarding the asserted fundamental right. Id. at 708–19. Here, East Virginia's Supreme Court's' failure to apply this two-part analysis led to the erroneous conclusion that the affirmative insanity defense is not a fundamental right. This error should be reconciled with existing precedent and a proper application of the findings from Glucksberg.

In Finger, the Nevada Supreme Court considered whether abolishing insanity as an affirmative defense violates the Fourteenth Amendment to the United States Constitution. Finger v. State, 27 P.3d 66, 68 (Nev. 2001). The court analyzed Finger's claim that the ability of an accused to pursue a legal insanity defense is a fundamental right under the due process clause of the United States Constitution. Id. at 70. The court further reviewed whether a *mens rea* model provides an adequate alternative to an affirmative insanity defense. Id. at 81. As a baseline, the court held that legal insanity is a fundamental principle under the due process clause. Id. at 80.

Specifically, "because legal insanity is a corollary of *mens rea*, the mental state that imposes criminal responsibility upon an individual, legal insanity is a fundamental aspect of criminal law." Finger, 27 P.3d at 80. Here, the Court of Appeals relied on principles of state discretion to claim that legal insanity is not a fundamental right which warrants due process scrutiny under the Fourteenth Amendment. R. at 7. The East Virginia Supreme Court erred in this reliance.

The Nevada Supreme Court noted that the term "legal insanity" means a person has a complete defense to a criminal act based upon the person's inability to form the requisite criminal intent. Finger, 27 P.3d at 80. The court emphasized that recognition of insanity as a defense is a core principle recognized for centuries by every civilized system of law. Id. An individual who lacks the mental capacity to form the requisite intent or *mens rea* of a criminal offense cannot be convicted for that offense without violating the due process provisions of the

United States Constitution. Id. at 86. Persuaded by precedent in Washington and Mississippi, the Nevada Supreme Court found the *mens rea* model eliminates the concept of wrongfulness from all crimes, which negates the purpose of including a criminal intent requirement in the definition of an offense. Id. at 81. Because legal insanity is protected by due process, the court stated that legislature may not abolish insanity as a complete defense to a criminal offense. Id. at 84. Thus, imposing a *mens rea* model in place of the affirmative insanity defense is unconstitutional and unenforceable. Id.

In Morissette, this Court established that a person whose mental illness deprives him of the ability to control his actions can form intent, yet lacks the ability of the normal individual to choose between good and evil. Morissette v. United States, 342 U.S. 246, 251 (1952). The issue in Morissette was whether criminal intent to convert government property could be presumed from a defendant's act of removing spent bomb casings from a property which appeared abandoned. Id. at 247. While the removal of property was a conscious and intentional act, the Court held that isolated fact was not an adequate basis for the jury to find criminal intent to steal or knowingly convert. Id. at 276. Thus, this Court differentiated between intent to commit a crime, and the rational ability to choose between whether such commission would be a good or evil action. Id. at 251.

The East Virginia Supreme Court erred in ruling there is no fundamental right to an affirmative insanity defense. Finger v. State, 27 P.3d 66, 68 (Nev. 2001). The test for determining if a fundamental right exists requires a careful description of a right deeply rooted in American history and traditions. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997). Examining the insanity defense through the narrow lens of the Glucksberg approach, the

traditional insanity defense meets the standard for a fundamental right. Abolishing the insanity defense therefore violates Fourteenth Amendment due process.

Here, the fundamental right to an insanity defense can be carefully described as the right to an affirmative defense demonstrating an inability to distinguish right from wrong. R. at 4. Further, the right of a criminal defendant to raise a traditional insanity defense is deeply rooted in our nation's history, legal traditions, and practices. Finger, 27 P.3d at 80. All but five states have an insanity defense incorporating principles of moral culpability. R. Michael Shoptaw, *M'Naghten is a Fundamental Right: Why Abolishing the Traditional Insanity Defense Violates Due Process*, 84 Miss. L.J. 1101. There is an extensive historical and modern practice of providing an affirmative insanity defense or an equally protective alternative to excuse defendants who lack culpability. The East Virginia Supreme Court erred when it dismissed the overwhelming foundation for recognizing the right to raise an insanity defense as constitutionally guaranteed and fundamental to the American criminal justice system. R. at 11.

A fundamental right to a traditional insanity defense exists premised on a defendant's inability to distinguish right from wrong. East Virginia's *mens rea* statute abolishes the right-from-wrong test constitutionally guaranteed to protect the fundamental interest society has in precluding individuals lacking culpability from criminal prosecution. The affirmative insanity defense embraces the principles of moral culpability well established in criminal justice systems around the world. While the traditional insanity defense excuses insane offenders from all liability for actions they lacked culpability in committing, the *mens rea* process merely focuses on whether the offender intended to commit the offense, and endows the jury with full discretion over how much weight to give evidence of an offender's mental state when he committed the offense. Thus, mentally ill offenders may be differentiated based on the content of their obscured

delusions, which are erratic products of illness beyond their control. Historical practice, the near universal acceptance of the need for a defense of legal insanity, and the fundamental unfairness of punishing blameless offenders provide strong reasons for concluding that abolishing the affirmative insanity defense violates constitutionally guaranteed rights.

Ms. Frost had no rational appreciation for the wrongfulness of her actions on the evening of June 16, 2017. Ms. Frost's actions were spurred by "voices in her head" telling her to protect "the most sacred of all creatures." R. at 3. Ms. Frost's *mens rea* was based on a delusion or hallucination that was the irrational product of a disordered mind. While Ms. Frost may have intended to commit this act, she lacked an understanding that such action was morally wrong. Under the East Virginia statute, Ms. Frost can be, and has been, convicted without the prosecution ever having to demonstrate that she is morally accountable for her actions. By imposing a life sentence on a psychotic, paranoid schizophrenic offender, the Court of Appeals failed to protect Ms. Frost Frost's Fourteenth Amendment due process guarantees.

CONCLUSION

This Court should conclude that, because Ms. Frost's waiver of her Miranda rights was not knowingly and intelligently made, and because abolishing the insanity defense violates the Eighth and Fourteenth Amendments to the United States Constitution, Ms. Frost's conviction should not be upheld. On de novo review, this Court should reverse the Judgment of the lower court and vacate Ms. Frost's conviction.